

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

UNITED STATES OF AMERICA,

Plaintiff, : Case No. 3:03-po-002  
also Case No. 3:09-cv-017

-vs-

Magistrate Judge Michael R. Merz

:

THEODORE SOMERSET,

Defendant.

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**ORDER DENYING FURTHER STAY OF EXECUTION OF SENTENCE**

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This case is before the Court on Defendant's Motion for Stay of Execution of Sentence pending appeal of the denial of his Motion to Vacate under 28 U.S.C. § 2255 (Doc. No. 89). As grounds for a stay, Defendant cites only his previous compliance with the previously-imposed terms of his release.

A district court has authority to enlarge a state prisoner pending determination of his or her petition for writ of habeas corpus under 28 U.S.C. §2254. *Aronson v. May*, (1964, US), 85 S. Ct. 3, 13 L. Ed. 2d 6. However, it is appropriate to exercise that authority only upon a showing that a petitioner's claim is both substantial and clear on the merits. *Glynn v. Donnelly*, 470 F.2d 95 (1st Cir. 1972); *Calley v. Callaway*, 496 F.2d 701 (5th Cir. 1974).

In order to receive bail pending a decision on the merits, prisoners must be able to show not only a substantial claim of law based on the facts surrounding the petition but also the existence of "some circumstance making [the motion for bail] exceptional and deserving of special treatment in the interests of justice." *Aronson v. May*, 85 S.Ct. 3, 5, 13 L.Ed.2d 6, 9 (1964) (Douglas, J., in chambers); see *Martin v. Solem*, 801 F.2d at 329-330; *Iuteri v. Nardoza*, 662 F.2d at 161. There will be few occasions where a prisoner will meet this

standard.

*Dotson v. Clark*, 900 F.2d 77, 79 (6<sup>th</sup> Cir. 1990).

In *Cherek v. United States*, 767 F.2d 335 (7th Cir., 1985), Judge Posner recognized this power applies as well to federal prisoners seeking §2255 release, but also wrote:

The reasons for parsimonious exercise of the power should be obvious. A defendant whose conviction has been affirmed on appeal . . . is unlikely to have been convicted unjustly; hence the case for bail pending resolution of his postconviction proceeding is even weaker than the case for bail pending appeal.

767 F.2d at 337.

In considering whether to exercise their discretion to grant a stay pending appeal generally, courts are to consider the following factors

- 1) Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;
- 2) Whether the plaintiffs have shown irreparable injury;
- 3) Whether the issuance of a preliminary injunction would cause substantial harm to others;
- 4) Whether the public interest would be served by issuing a preliminary injunction.

*Ohio, ex rel. Celebrezze, v. Nuclear Regulatory Comm'n.*, 812 F.2d 288 (6th Cir. 1987).

Considering these factors, the Defendant has as of yet shown no likelihood of success on appeal. While his suffering of punishment pending appeal is irrevocable, that is always true when a stay of execution pending appeal is denied, and Defendant has already had delays of execution of sentence for almost four years pending appeal.

Regarding the third and fourth factors, the Court notes that the crimes of which Defendant stands convicted occurred in January, 2003, more than six years ago. The conviction occurred in August, 2004, more than five years ago. Defendant's conviction was then reviewed on direct appeal by both the District Court and the Court of Appeals, the latter affirming summarily (Doc. Nos. 67,

80). Defendant's Motion to Vacate was denied with a full explanation of the Court's reasons; in part, the claims made had previously been ruled on in the appeals or were procedurally defaulted by failing to present them on appeal. Defendant has now appealed again and seeks a stay without yet having sought the required certificate of appealability which would explain why he believes he has good grounds for appeal. Moreover, this pattern of avoiding just punishment for his offenses repeats his identical pattern in his prior case in this Court, M-3-94-074, where he avoided actual execution of sentence for more than eight years, until October, 2002.

The crimes in this case were committed less than ninety days after execution of sentence in the prior case and the same person was victimized. The Court therefore concludes that a further delay of sentence would unconscionably further delay justice to the victim and completely disserve the public interest in the speedy conclusion of criminal cases.

The Motion for Stay Pending Appeal is denied. The prior stay pending decision of the § 2255 Motion (Doc. No. 85) has ended by its own terms and is dissolved. Accordingly, Defendant's sentence shall commence forthwith. His supervision is transferred from the Pretrial Services Office to the United States Probation Department. Those two Departments shall arrange among themselves his first date to appear for probation supervision and notify him accordingly.

February 6, 2009.

s/ **Michael R. Merz**  
United States Magistrate Judge