IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KIMBERLY GRAHAM, Petitioner,	)	
-vs-	)	Case No. 23-CV-0164-CVE-SH
TAMIKA WHITE, Warden, Respondent.	)	Relates to Docs. 17-18

PETITIONER'S RESPONSE IN OPPOSITION TO THE RESPONDENT'S *MOTION FOR STAY*

The Petitioner, Kimberly Graham objects to a stay of this Court's order because it is unwarranted.

The Respondent's Request for a Stay is Moot Because The Respondent Already Released the Petitioner.

Rule 23 of the Federal Rules of Appellate Procedure mandates that "[w]hile a decision ordering the release of a prisoner is under review, the prisoner **must** [unless otherwise ordered the rendering judge or an appellate judge] **be released** on personal recognizance, with or without surety. (Emphases added). The factors regulating the issuance of a stay are generally: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776-779 (1987) (citations omitted).

There is presumption in favor of enlargement of the petitioner with or without surety, but it may be overcome if the traditional stay factors tip the balance against it. A

reviewing court must accord a presumption of correctness to the initial custody determination whether that order directs release or continues custody, but that presumption "may be overcome if the traditional stay factors so indicate". *Id.*

The traditional stay factors contemplate "individualized judgments in each case." *Id* (explaining that the formula cannot be reduced to a set of rigid rules and agreeing factors to be considered include the possibility of flight; a risk that the prisoner will pose a danger to the public if released; the State's interest in continuing custody and rehabilitation pending a final determination of the case on appeal; and the length of the remaining portion of the sentence to be served). *Id.* at 777.

The Court noted that the "interest of the habeas petitioner in release pending appeal, always substantial, will be strongest where the factors mentioned in the preceding paragraph are weakest." *Id*. at 778. Further, the Court explained the balance may depend to a large extent upon determination of the State's prospects of success in its appeal. "Where the State establishes that it has a strong likelihood of success on appeal, or where, failing that, it can nonetheless demonstrate a substantial case on the merits, **continued** custody is permissible if the second and fourth factors in the traditional stay analysis militate against release. *Id.* (emphasis added) (citations omitted). Importantly, the Court directed that "where the State's showing on the merits falls below this level, the preference for release should control." *Id.*

In addition, a stay temporarily suspends "judicial alteration of the status quo." *Turner Broad. Sys. v. FCC*, 507 U.S. 1301, 1302-1303 (1993). A stay does not alter the legal status quo. *Id.* (rejecting a party's request that the Court issue an order

"altering the legal status quo and noting that "[n]ot surprisingly, they do not cite any case in which such extraordinary relief has been granted, either by a single Justice or by the whole Court"). *Id.*

Moreover, an applicant for a stay bears a heavy burden of persuasion. *Graddick v. Newman*, 453 U.S. 928, 933, 102 S. Ct. 4 (1981). In *Graddick*, the Court ordered release of 400 inmates due to unconstitutional conditions at the state prison. After releasing 200 inmates, the Attorney General applied for a stay pending appeal for the return of the 200 inmates. The Court denied the application noting the applicant's "unexplained tardiness" and the failure to show actual or threatened irreparable injury to the "individualized" applicant. *Id.* at 934, 936.

Justice Powell explained that "an order, once executed, cannot be 'stayed.' Affirmative action then becomes necessary to restore the status quo" which is governed under "different standards. *Id*. at 936-37 (citing *Barthuli v. Board of Trustees*, 434 U.S. 1337, 1338-1339 (1977) (Renquist, J., in chambers) ("stay" of state-court decision would not reinstate a discharged employee" and "should be used sparingly and only in the most critical and exigent circumstances").

Here, as in *Graddick*, the applicant's request for a stay is inexplicably tardy and would require unwarranted affirmative action. Ms. Graham has been released. The applicant can show no actual or threatened individualized harm; the only effect Ms. Graham's freedom has on the applicant is a spare bed to fill at *Mable Basset*.

Furthermore, in the present case, the Respondent is not asking this Court to issue a stay to maintain the *status quo*; rather, she requests this Court to issue a stay

to **alter** the *status quo*. As in *Turner*, such a request does not exist in the law.

The Respondent chose to comply with this Court's Judgment and released Ms. Graham from custody. The Respondent's compliance undermines any suggestion that she has a strong case on the merits because she herself determined otherwise. The Respondent was represented by the Attorney General with all the legal background and experience that implies. Several hours after this Court's Judgment was published, the Attorney General contacted Ms. Graham's attorney and notified him that Ms. Graham was being released. Ms. Graham was home by that evening. If the Respondent had concerns about Ms. Graham' flight, or dangerousness or any of the other factors it asks this Court to consider, these were discounted and dismissed as not valid by the Respondent herself.

Furthermore, the Respondent cannot show she has a substantial case on the merits and that **continued** custody is warranted because custody cannot be **continued**. The Respondent decided that custody should not be continued when she released Ms. Graham **before** she asked for a stay. The factors became irrelevant. Here, there is no continued custody because the Respondent chose release. There is no action in the law for "reaquiring" custody.

The Respondent freed Ms. Graham. By her own deliberation, contemplation, decision-making and actions, the Respondent restored Ms. Graham's liberty. If this Court is to maintain the *status quo* as the Respondent asks, this Court maintains Ms. Graham's freedom. If Respondent has now changed her mind and wants a do-over, that is not the purpose of a request for a stay. This Court cannot alter the status quo to

satisfy the whims of the Respondent who released first, then asked for alteration and "reaquirement" second. Ms. Graham is free because the Respondent chose to comply and free her. No action exists to "alter the *status quo*" and "reaquire" Ms. Graham. She is free. That is the *status quo*. The request for a stay and "reaquirement" should be denied.

Arguendo, Ms. Graham is not a flight risk or a danger to others. After the State's *Motion to Vacate Order Granting Post Conviction Relief, Reinstate Conviction and Sentences, and Remand to Custody* the Petitioner has awoken every morning beneath a Sword of Damocles which has made her constantly fearful. The best predictor of future behavior is past behavior. Ms. Graham, a former court reporter in Osage County, surrendered the day after the accident and she again timely surrendered in April, 2023, after the OCCA order was issued. Further, she is on a Fifty-Two Thousand Dollar ($52,000.00) cash bond for this same event in the *Muscogee (Creek) Nation*. *See Nation v. Graham*, CF-21-391. The record indicates she never obtained a driver's license and that fact was recently confirmed by the undersigned.[1] Also, she has not taken a drink since the accident. The State, once again, thinks that the Tribal Court is incapable of handling its own affairs and prays additional conditions are required.

Moreover, the State's machinations with its now-your-free, now-your-not can be aptly characterized as cruel. When the Petitioner was re-incarcerated after surrendering in April of this year, she was placed on twenty-three (23) hour a day lock

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[1] "In addition thereto, I would inform the court that Ms. Graham has always been available to me. She doesn't have a driver's license as a matter of choice and she lives in Broken Arrow on an acreage with her family." Dkt. 1-2, pg.155

down as a matter of course for more than six (6) weeks at Lexington A&R, and that was after a stint in the Tulsa County Jail. The Petitioner has no reason to believe that the Respondent will not again impose this initial condition.

These conditions may not reach the level of irreparable, but they are significant and will have lasting effect. Importantly, the record establishes these conditions are unnecessary and, now, unlawful.

The Respondent's Likelihood of Success on Appeal?

The Respondent's pleading does not establish a strong showing she is likely to succeed. Quite the opposite.

It is highly unlikely that any court will ever again see a *Motion to Vacate Order Granting Post Conviction Relief, Reinstate Conviction and Sentences, and Remand to Custody*, apropos nothing, being filed in a district court three (3) months after the lawful, un-appealed PCR order granting the Petitioner's release had become final and then said district court springs forth an order depriving the Petitioner of her liberty.

This case was not about application of the post-conviction relief statute as argued by the State. By every measure, the PCR action was final and over and the Petitioner's original judgements and sentences were vacated and dismissed by the TCDC. Nor was this case about the so-called unauthorized order which has now been exposed as a fiction. Rather, this case was about a citizen being snatched off the street and re-convicted without authority of law in an unprecedented hearing no one could even name. In sum, this case was about the State's violation of the Petitioner's **substantive** due process rights contrary to the 14th Amendment which occurred a few

weeks before this writ was filed. Hence, the State's complaint about retroactive application via *Teague* is inapplicable as is its query about whether the issue was substantive or procedural. Additionally, the State's *su sponte* complaint referenced in dicta in other cases is likewise unpersuasive. Reviewing courts have the "discretion to affirm on any ground adequately supported by the record." *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004).

What is more, the Petitioner had raised her 14th Amendment claim before the OCCA and neither that court nor the State, in its specially authorized brief by OCCA, deigned to address the Petitioner's argument in any form or fashion. The *Hicks* claim was raised by the Petitioner throughout the proceedings. It was first raised in Ms. Graham's special appearance as the real-party-in-interest in the States' vain attempt for a writ of prohibition. That response was then submitted to the TCDC. Finally, it was presented to the OCCA in Ms. Graham's writ of prohibition. Dkt. 2, pgs. 27, 33 and Dkt. 1, pg. 53. The Petitioner's *Hicks* argument was detailed, contained analysis and was intended to provoke a response from the OCCA.[2] The OCCA ignored these

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[2]"It has been axiomatic for generations of lawyers going back to before statehood that an un-appealed district court order, whether civil or criminal, is final. Similarly, this Court has been ruthlessly efficient for scores of decades in applying procedural default to cause waiver of an issue when it is against the Citizen. In *Hicks v. Oklahoma,* 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed.2d 175 (1980) state law provided a specific method for determining whether a specific sentence should be imposed. This created "substantial and legitimate expectation that [the Petitioner would] be deprived of his liberty", if this method was not used and that a "liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Id.* at 346.

Likewise, the Petitioner has a liberty interest protected by a clear, specific and **exclusive** method under Oklahoma law for the State to seek relief from the district court's order freeing her. It chose not to do so and it will be a substantive due process violation for this Court to allow the State an unlawful remedy now. (Emphasis original).

The Respondent ignores numerous statutory and procedural bars to rectify a problem of the State's own making. The Petitioner has a substantial and legitimate expectation this Court

inconvenient facts.

This Court noted the Petitioner's arguments and further noted the circumstances of the State weighing in on its special brief. Dkt. 1-1, pg. 66(wherein the OCCA established a one size fits all approach to similarly situated citizens none of whom included the Petitioner's constitutional claim). This Court likewise noted the brevity and language of the majority opinion. Then, addressing all of the facts and circumstances, this Court concluded, "[a]ll told, no part of the majority opinion suggest that the majority considered that [TCDC's actions] might deprive Ms. Graham of a liberty interest without due process." Accordingly, this Court rightfully did not apply § 2254(d)'s framework citing valid precedent. Dkt. 14, pgs. 33-35. Rather, this Court reasoned that OCCA had arbitrarily disregarded its own rules and capriciously concluded that the TCDC had "mistakenly" released the Petitioner-a conclusion the Court mandated was "demonstrably false." Dkt. 14, pgs. 37-39.

As the Petitioner summarized to the TCDC at the initial hearing:

> If you don't appeal a District Court's final order, it is final. And the State didn't appeal it. And they (sic) had notice. And to come in four, five months later and say, we want -- we want the District Court to simply unilaterally reach out and say, just fooling, to Ms. Graham is not only unfair, Judge, it is audacious beyond reason.

Dkt. 1-2, pgs. 133-134.

The State misses the mark both in its timing and its authority. This Court's ruling is founded in both fact and law. The Respondent does not even have a modest right to

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will follow its own rules and laws. Upending an un-appealed final order, an order deemed to be the same as verdict of not guilty, months after the Petitioner's unfettered release will make a mockery of this Court playing by its own rules." Dkt. 1-1, pg. 53.

"reacquire" custody in its prayer for a stay and has not overcome the presumption of release.

Its motion should be denied.

Respectfully submitted to the Court and delivered to:

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As of June 28, 2023, by

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