

OCT 11 2012

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

GARRY THOMAS ALLEN,)	
)	
Appellant,)	NOT FOR PUBLICATION
)	
v.)	Case No. DC-1988-37
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

ORDER SETTING EXECUTION DATE

Garry Thomas Allen is incarcerated at the Oklahoma State Penitentiary pursuant to a guilty plea to first degree murder and sentence of death in Oklahoma County District Court case number CRF-1986-6295. *See Allen v. State*, 1996 OK CR 9, 923 P.2d 613. The State of Oklahoma now seeks a date for the execution of sentence, by its filing dated September 27, 2012. Allen, through counsel, has filed an objection to the setting of the execution date. Both parties agree that a previous issued stay of execution was lifted on September 26, 2012.

The State asks that a date be set pursuant to 22 O.S.2011, § 1001.1, either under paragraphs "E" or "F," and the execution should be set thirty (30) days after the dissolution or vacation of the stay of execution. Allen argues that he is pursuing his original habeas petition ("renewed"), thus the provisions of Section 1001.1(A) apply, and this Court should not act until he has pursued an appeal of the denial of the federal habeas petition.

A history of the latest litigation in this case is necessary to our decision and order in this case. The first execution date set pursuant to § 1001.1 was set for May 19, 2005, when Allen exhausted all of his appeals, both at the state and federal level. The District Court of Pittsburg County, Oklahoma issued a stay of execution prior to that date due to a question regarding Allen's sanity to be executed. See 22 O.S.2001, § 1005. A subsequent jury trial resulted in a verdict finding Petitioner sane and competent to be executed. Allen attempted to appeal that verdict, and this Court dismissed his appeal on December 8, 2011. See *Allen v. State*, 2011 OK CR 31, 265 P.3d 754. Subsequently, the District Court of Pittsburg County vacated its stay of execution, and the sentence of death was ultimately set to be carried out on April 12, 2012, by order of the Governor pursuant to 22 O.S.2011, § 1001.1(G).

Allen then filed a writ of mandamus, stating that his level of sanity had diminished from the date the Pittsburg County jury found that he was sane. This Court denied the writ prior to the April 12 execution date.¹ Allen further sought relief by filing a writ of habeas corpus with the Federal District Court for the Western District of Oklahoma, which issued a stay of execution pending review of Allen's case. The Federal District Court, Honorable David L. Russell, United States District Judge, presiding, issued its Memorandum Opinion and

¹ See *Allen v. Workman*, Oklahoma Court of Criminal Appeals case number MA-2012-307 ("Order Denying Writ of Mandamus and Application for Stay of Execution," April 11, 2012).

Order on September 26, 2012, denying relief.² Judge Russell also issued an order denying a certificate of appealability and an order lifting the stay of execution. As a result of the lifting of the stay of execution, the State has filed its current application for an execution date.

We find that an execution date should be set pursuant to § 1001.1(F). All of the subsequent execution dates set after the original death warrant issued by District Court of Oklahoma County pursuant to 22 O.S.2001, § 1001, have been set pursuant to § 1001.1. Thus Allen's argument that paragraphs E and F do not apply, because his latest execution date was not set pursuant to "this section" is not well taken, as we find that the "this section" language found in those paragraphs refer to executions set pursuant to § 1001.1.

Allen's latest appeal attempting to block his execution was his habeas petition filed in federal court. Allen entitled this habeas petition as "renewed petition for writ of habeas corpus." He claims it is a renewal of his original habeas petition filed after his original sentence of death, allowing him to litigate his *Ford v. Wainwright*³ claim, or sanity to be executed claim, in federal court. Thus, Allen argues that as a renewal of his original habeas petition, the execution date should not be set unless he fails to file an appeal in the United States Court of Appeals for the Tenth Circuit from a denial of his federal writ of habeas corpus within seventy (70) days. See 22 O.S.2011, § 1001.1(B)(5).

² Western District case number CIV-12-140-R.

³ 106 SCt 2595, 477 U.S. 399, 91 L.Ed.2d 335 (1986).

Despite Allen's claim that the federal process has not concluded, and he should be given the time allotted to file an appeal, the federal district court lifted its stay of execution, indicating otherwise.

Allen's habeas corpus proceeding was brought due to a proceeding collateral to his judgment and sentence of death. The proceeding, which was brought in the Pittsburg County District Court pursuant to 22 O.S.2001, § 1005, was a proceeding seeking an indefinite stay of the ability of the State to carry out the execution of the sentence of death against Allen, due to his alleged insanity. The § 1005 proceeding, while *sui generis* and does not become relevant until the execution is imminent, is more akin to a collateral proceeding attacking the validity of a judgment and sentence, in a capital case. As such, when a State collateral appeal is initiated, a stay of execution may be issued, if necessary during the review of the appeal only pursuant to 22 O.S.2011, § 1001.1(C), and when that stay is vacated, a new execution date is set pursuant to 22 O.S.2011, § 1001.1, paragraphs E or F.

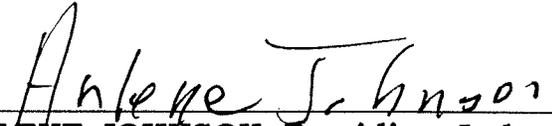
As always, the federal courts maintain the authority to issue a stay of execution in any case should further review of the United States District Court's decisions be warranted. Further, § 1001.1(B) provides that an appeal of a decision does not prevent this Court from setting an execution date. This Court, therefore, finds that Oklahoma Statutes require us set an execution date pursuant to § 1001.1(F).

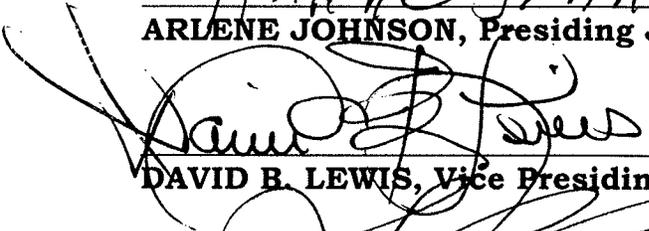
Therefore, we hereby order the execution of the judgment and sentence of

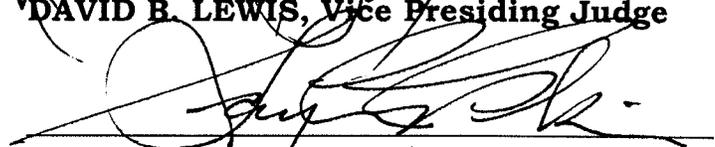
death be carried out. The execution date of Garry Thomas Allen shall be set for Tuesday, November 6, 2012.

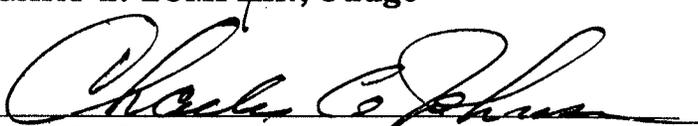
IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 11th day of October, 2012.


ARLENE JOHNSON, Presiding Judge

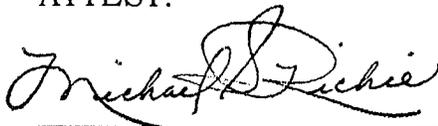

DAVID B. LEWIS, Vice Presiding Judge


GARY L. LUMPKIN, Judge


CHARLES A. JOHNSON, Judge


CLANCY SMITH, Judge

ATTEST:


Clerk