

Werner Wolfgang Kunkel,

Petitioner,

vs.

State of North Dakota,

Respondent.

Case No. 36-2025-CV-61

ORDER DENYING MOTION TO STAY

[¶1] This matter comes before the Court on the State of North Dakota’s (“State”) Motion to Stay filed on March 13, 2026. Doc. No. 138. Petitioner Werner Kunkel (“Kunkel”) filed a Response in Opposition on March 17, 2026. Doc. No. 145. For the reasons stated below, the Motion is **DENIED**.

I. BACKGROUND

[¶2] Kunkel filed a Post-Conviction Relief Application on January 15, 2025. Doc. No. 1. The Court held evidentiary hearings on January 7th and 8th of 2026. On February 27, 2026, the Court vacated Kunkel’s criminal conviction and ordered a new trial. Doc. No. 132. Judgment was entered on March 18, 2026. Doc. No. 148. The State appealed on March 23, 2026. Doc. No. 150. The State requests the Court to stay the Judgment pending conclusion of its appeal to the North Dakota Supreme Court.

II. LAW AND ANALYSIS

[¶3] The State first requested the Court not enter an order to otherwise disturb an automatic stay under N.D. R. Civ. P. 62(a), which states “execution on a judgment and proceedings to enforce it are stayed for 30 days after filing notice of entry of judgment or entry of default judgment unless the court orders otherwise.” However, that request is now moot, as more than thirty days have

passed since Judgment was entered. The State also requests a stay pursuant to N.D. R. App. P. 8(a)(1), which states:

(a) Motion for Stay.

(1) *Initial Motion in the District Court.* A party must ordinarily move first in the district court for the following relief:

- (A) a stay of the judgment or order of a district court pending appeal.
- (B) approval of a supersedeas bond.
- (C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

[¶4] When analyzing a motion to stay, the Court looks to four factors, including “1) a strong showing that the appellant is likely to succeed on appeal; 2) that unless the stay is granted, the appellant will suffer irreparable injury; 3) that no substantial harm will come to any party by reason of the issuance of the stay; and 4) that granting the stay will do no harm to the public interest.” Access Indep. Health Servs., Inc. v. Wrigley, 2025 ND 26, ¶ 14, 16 N.W.3d 902, 910, as amended (Apr. 17, 2025).

[¶5] The State contends it is likely to succeed on appeal because it maintains Kunkel’s claims were time-barred and he cannot meet any exception to the statute of limitations. Specifically, the State contends on appeal that Kunkel’s Brady claim will fail because it asserts it has shown Kunkel either possessed the Brady material or could have obtained it with reasonable diligence. The State further asserts that on appeal it will prevail because it maintains Kunkel failed to show the Brady material establishes he “did not engage in the criminal conduct for which he was convicted.” Bridges v. State, 2022 ND 147, ¶ 13, 977 N.W.2d 718. The State maintains “[t]he kind and type of evidence that the Petitioner alleges is Brady material is substantially similar to the prior matter and should similarly fall short of establishing that the Petitioner did not commit the murder of Gilbert Fassett.” Doc. No. 139, p. 5.

[¶6] The Court finds the State has not made a strong showing that it will prevail on appeal. As noted by Kunkel, this Court made a number of factual determinations after hearing and carefully weighing the evidence in light of the record as a whole. The Court spent considerable time discussing the evidence presented in this matter as it relates to all Brady factors and the statute of limitations exceptions. The Court will not repeat that discussion here. While the State contends this Court did not make appropriate findings on the diligence element for both the Brady analysis and the statute of limitations exception analysis, the Court disagrees. A review of the Court's Order, the evidence presented, and the entire record supports the Court's finding that Kunkel's Brady claim not only has merit, but also survives the statute of limitations. The State has not made a strong showing that on appeal it will prevail.

[¶7] The State contends it will be harmed if Kunkel is released because he would "go directly into ICE custody[.]" Doc. No. 139, p. 7. The State maintains no one, including Kunkel, may know where he ends up housed in ICE custody or for how long. It contends Kunkel may not be available for the results of the appeal. The Court finds the State will not be irreparably harmed in this matter by the denial of a stay. Even if the Court denies the stay, Kunkel will remain in state custody, where he may motion the Court in the underlying criminal matter for pretrial release. The State has the right and ability to raise any concerns in that proceeding regarding the possible location of Kunkel's physical presence during and after the appeal.

[¶8] The State asserts Kunkel will not face substantial harm because he "has been in DOCR custody since 1995, and if released from that custody, will continue to remain incarcerated by ICE." Doc. No. 139, p. 7. Kunkel responds that the State "offers no proof for this assertion, nor does it provide any legal support for such an abjectly cruel proposition." Doc. No. 145, p. 18. The Court agrees that Kunkel, whose conviction was overturned by this Court and granted a new trial,

will suffer substantial harm if a stay is granted, because his ability to seek pretrial release will be wholly frustrated during the pendency of an appeal that could take several months to resolve.

[¶9] The State maintains the public interest will be protected by the stay because it would maintain the status quo, and it points out that Kunkel “is still charged with the Murder of Gilbert Fassett.” While this Court has overturned Kunkel’s conviction and ordered a new trial, the Court does recognize the case is on appeal and finality is not present yet, either in Kunkel or the State’s favor. However, again, even if the Court denies the stay, Kunkel will still be required to file a motion for pretrial release with the Court in his underlying matter. Any potential concerns about the public interest can be adequately heard and appropriately addressed at that time.

III. CONCLUSION

[¶10] The Motion to Stay is **DENIED**.

[¶11] Dated this 15th day of May, 2026.

BY THE COURT:



Honorable Daniel Narum
District Court Judge
Southeast Judicial District