

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	
v.	)	ID No.: 0009007758
	)	IN-00-09-1542-R2, 1525-R2,
EDMUND F. BAILEY,	)	1526-R2, 1527-R2, 1528-R2,
Defendant.	)	1529-R2, IN-00-10-0309-R2,
	)	0310-R2, 0311-R2, 0312-R2,
	)	0313-R2

**ORDER**

**Upon Defendant’s Rule 35 Motion for Correction of Illegal Sentence -  
GRANTED**

**Upon Defendant’s Fourth Motion for Postconviction Relief -  
STAYED**

1. On November 7, 2012, after receiving Department of Correction’s recommendation under 11 *Del. C.* § 4217, the court reduced Defendant’s prison sentence from approximately 14 mandatory years to “time served.” The reduction, however, was consistent with Department of Correction’s recommendation that before his release from Level 5, Defendant must complete Key. Then he must complete Level 4 CREST, followed by work release. Thus, the order substituted the Key/CREST continuum.

2. Consistent with the above, the modified sentence order specifically provided that the Level 5 sentence was suspended “upon completion of the Key Program followed by Level 4 CREST plus an additional six months of Level 3 work release [. . . .]” Again, that was consistent with the § 4217 recommendation.

3. In short, but for the Board of Parole’s act of grace, Defendant would have been eligible for release from Level 5 no earlier than January 3, 2014.

4. As the modified order reflects, the court contemplated that as soon as Defendant completed Level 5 substance abuse treatment, he would be moved to Level 4. For one reason or another, Defendant was not timely placed in Key. Accordingly, were he to enter Key now, his release from Level 5 would be delayed, not moved forward, as the Board recommended.

5. Defendant filed his Rule 35 motion on December 11, 2012, arguing insufficient time to complete the November 7, 2012 modified sentence. The Rule 35 briefing completed on March 11, 2013. Shortly after that, on March 20, 2013, Defendant filed his fourth motion for postconviction relief, making a *Martinez v. Ryan*<sup>1</sup> claim. But, Defendant has an active appeal in the Delaware Supreme Court,

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<sup>1</sup> 566 U.S. at —, 132 S.Ct. at 1320 (“Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal *habeas* court from hearing a substantial claim of ineffective

precipitated by this court's June 26, 2012 order summarily dismissing Defendant's third postconviction relief motion.<sup>2</sup> Therefore, Defendant's fourth postconviction relief motion is **STAYED**.

6. As to the Rule 35, while Defendant is correct that he would not be at Level 5 now had he been placed immediately in Key once his sentence was modified, his contention "that he would be home now" is incorrect. As explained above, the modified sentence order not only called for him to complete Key, it also called for CREST followed by work release. Adding-up all the time it would have taken to complete those programs, it is likely that Defendant would not have finished work release before his original, early release date. In other words, it appears that the "benefit" the modified sentence conferred was that Defendant would complete the Level 5 portion of his sentence in Key, then the Level 4 programs.

7. The court now understands that Defendant will be placed at Level 4 CREST on June 3, 2013. If that happens, Defendant is likely to still be in CREST when his pre-modification early release date arrives. Beyond that, the modified sentence calls for Defendant to complete work release, which was not part of his original sentence. In summary, even if the court waives the modified sentence's Key

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assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.").

<sup>2</sup> *Bailey v. State*, Supreme Court No. 407, 2012.

portion, the remaining conditions – CREST and work release – paradoxically mean that Defendant will be at a disadvantage because he received a sentence reduction.

8. At this point, the best the court can do is balance the competing circumstances fairly and waive the Key and CREST portions of the sentence modification, thus allowing Defendant to begin work release as soon possible.

For the foregoing reasons, effective immediately, the now disadvantageous modified sentence order is **VACATED** and the unserved portion of the Level 5 sentence that Defendant was required to serve under the original sentence order is **SUSPENDED**. Effective immediately, Defendant is being held at Level 5 waiting for work release, which will end on the sentence's original, early release date. Then, the Level 3 portion of sentence will begin, as called for by the original sentence order. A modified sentence order will be issued forthwith. If Defendant is not promptly transferred to work release, Defendant has leave to further address the court.

**IT IS SO ORDERED.**

Date: May 24, 2013

/s/ Fred S. Silverman  
Judge

oc: Prothonotary (Criminal)  
cc: Sarita R. Wright, Deputy Attorney General  
Edmund F. Bailey, Defendant