



1 petitioner filed a motion for release, which has not been fully  
2 briefed.

3 In reply to the motion for stay, respondent represents that  
4 prosecutors have determined that petitioner will be retried if  
5 the appeal is unsuccessful and that they are ready to begin the  
6 retrial if necessary.<sup>1</sup> Thus, two separate questions are  
7 presented by respondent's motion: first, whether petitioner's  
8 retrial should take place during the pendency of his appeal; and  
9 second, whether petitioner should be released from custody while  
10 the appeal is pending.<sup>2</sup> The latter issue is also tendered by  
11 petitioner's motion for release.

12 It is presumed that a successful habeas petitioner will be  
13 released from custody pending appeal. See Hilton v. Braunskill,  
14 481 U.S. 770, 774 (1987); see also Fed. R. Civ. P. 23(c). The  
15 presumption "'may be overcome if the traditional stay factors tip  
16 the balance against it.'" Haggard v. Curry, 631 F.3d 931, 934

17 <sup>1</sup> On August 21, 2014, petitioner filed a memorandum in which he suggest that  
18 an evidentiary hearing may be required on this motion to stay because a  
19 factual dispute has arisen over whether the prosecution has in fact located  
20 witnesses and evidence necessary to try the case, or whether most of the  
21 witnesses are "'either almost all gone or dead.'" Mem. Re: Factual Dispute  
22 (ECF No. 128) at 2. Respondent has filed an opposition to this memorandum  
23 (ECF No. 130) accompanied by a declaration from the deputy district attorney  
24 in which he represents that if a retrial occurs the testimony of any necessary  
25 witness who is unavailable will be presented through their prior testimony  
26 pursuant to California Evidence Code § 1291. This factual dispute is  
27 irrelevant to the matters at bar, as any risks to retrial raised by the  
28 contentions in petitioner's memorandum fall on respondent, the party seeking  
to delay the start of the retrial.

24 <sup>2</sup> The grant of habeas corpus relief is a "declar[ation] in essence that the  
25 petitioner is being held in custody in violation of his constitutional . . .  
26 rights." Harvest v. Castro, 531 F.3d 737, 741 (9<sup>th</sup> Cir. 2008). Unless this  
27 court's order is reversed on appeal or petitioner is retried and convicted in  
28 constitutionally sound proceedings, petitioner is in custody in violation of  
his federal constitutional rights. For this reason, respondent's  
representation that prosecutors will retry petitioner if the appeal is  
unsuccessful does not end the inquiry about whether this court's order should  
be stayed. Respondent is seeking to delay the retrial and petitioner's  
release until the appeal is concluded.

1 (9<sup>th</sup> Cir. 2010) (quoting Hilton, 481 U.S. at 777). The court  
2 considers the following factors:

3 (1) whether the stay applicant has made a  
4 strong showing that he is likely to succeed  
5 on the merits; (2) whether the applicant will  
6 be irreparably injured absent a stay; (3)  
7 whether issuance of the stay will  
8 substantially injure the other parties  
9 interested in the proceeding; and (4) where  
10 the public interest lies.

11 Hilton, 481 U.S. at 776. "The most important factor is the first,  
12 that is, whether the state has made a strong showing of likely  
13 success on the merits of its appeal of the district court's  
14 decision." Haggard, 631 F.3d at 934-45 (citing Hilton, 481 U.S.  
15 at 778).

16 Respondent advances both legal and factual arguments in  
17 support of her motion for stay. The court finds that respondent  
18 has not made a strong showing that she is likely to succeed on  
19 the merits of her legal argument that petitioner's Batson claim  
20 should be governed by the deferential standard of review under  
21 the Antiterrorism and Effective Death Penalty Act (AEDPA), rather  
22 than the de novo review required by the United States Court of  
23 Appeals for the Ninth Circuit and applied by this court. The  
24 factual questions on appeal are vigorously contested by the  
25 parties, and this court cannot find that respondent has made a  
26 "strong showing" that she is likely to prevail on the merits of  
27 her factual arguments on appeal.

28 Petitioner, who filed his opposition apparently before  
respondent decided that petitioner would be retried if the appeal  
was unsuccessful, has not argued that a delay of the retrial will

1 cause him substantial harm. It appears to this court that the  
2 interest of the parties and the public interest are all served by  
3 delaying any retrial until the conclusion of respondent's appeal.  
4 Accordingly, respondent's motion to stay will be granted as to  
5 the requirement that retrial proceedings be commenced within  
6 sixty days.

7 The question of whether petitioner should be released  
8 pending appeal is a closer question. In addition to the  
9 traditional factors outlined above, the court should consider  
10 whether petitioner poses a possible flight risk or danger to the  
11 public. Hilton, 481 U.S. at 777. In addition, "[t]he State's  
12 interest in continuing custody and rehabilitation pending a final  
13 determination of the case on appeal is also a factor to be  
14 considered; it will be strongest where the remaining portion of  
15 the sentence to be served is long, and weakest where there is  
16 little of the sentence remaining to be served." Id.

17 Petitioner, who is now thirty-six years old, has been in  
18 prison on the commitment offenses for eighteen years. He was,  
19 however, sentenced to life in prison without the possibility of  
20 parole for a special circumstance murder and life with the  
21 possibility of parole on two counts of attempted murder. While  
22 this factor, without more, might weigh in favor of staying  
23 petitioner's release, with his opposition to the motion for stay<sup>3</sup>  
24 petitioner has presented substantial evidence that might favor  
25 supervised release pending appeal.

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27 <sup>3</sup> Except to note that it has been filed, the court has not reviewed  
28 petitioner's August 27, 2014 motion for release, which will remain pending  
while the matter is reviewed by Pretrial Services.

1 After review of the record, and good cause appearing, this  
2 matter will be referred to the Pretrial Services Department of  
3 this court for a report and recommendation on whether petitioner  
4 is an appropriate candidate for supervised release pending appeal  
5 and conditions of such release, if appropriate. Petitioner's  
6 release will be stayed pending the filing of that report.

7 In accordance with the above, IT IS HEREBY ORDERED that:


8 1. Respondent's July 21, 2014 motion for a stay is granted  
9 in part;

10 2. Retrial of petitioner is stayed during the pendency of  
11 respondent's appeal from the judgment entered in this action. If  
12 the appeal is unsuccessful, the State of California shall have  
13 thirty (30) days from the date the appellate decision is final to  
14 institute trial proceedings in State court;

15 3. This matter is referred to Pretrial Services for a  
16 report and recommendation on whether petitioner is an appropriate  
17 candidate for supervised release pending appeal, and conditions  
18 of such release, if appropriate; and

19 4. Respondent's obligation to release petitioner from  
20 custody is stayed pending further order of the court.

21 DATED: August 27, 2014.

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24   
25 LAWRENCE K. KARLTON  
26 SENIOR JUDGE  
27 UNITED STATES DISTRICT COURT  
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