UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RICHARD ALEX WILLIAMS, Petitioner, v. CHERYL PLILER, Warden, Respondent.	No. 2:03-cv-0721-KJM-AC ORDER

On June 26, 2014, the previously assigned district judge granted petitioner's application for a writ of habeas corpus. (ECF No. 114.) The motions currently pending before the court are petitioner's motion for release (ECF No. 129) and respondent's cross-motion to deny petitioner's release while respondent pursues an appeal (ECF No. 134). Respondent requests that the court deny petitioner's motion, arguing petitioner is "a serious flight risk and a danger to the community . . . ." (*Id.* at 2.) Alternatively, respondent asks the court to set "bail at $1,000,000 as a condition of [petitioner's] release." (*Id.*) The court held a hearing on the matter on October 10, 2014, at which Victor S. Haltom appeared for petitioner and Carlos Martinez appeared for respondent. As explained below, the court DENIES petitioner's motion.

I. BACKGROUND

In 1998, petitioner Richard Alex Williams was convicted in California state court of one count of murder, in violation of California Penal Code section 187(a), with the special

circumstance that the murder was committed "by means of discharging a firearm from a motor vehicle, intentionally at another person outside the vehicle with the intent to inflict death," *id.* § 190.2(a)(21); and two counts of attempted murder, in violation of Penal Code sections 664 and 187(a). (ECF No. 105 at 1.) He received a sentence of life imprisonment without the possibility of parole for the murder conviction and an aggregate determinate term of ten years and eight months for the attempted murder charges. (*Id.*)

Petitioner first filed a petition for writ of habeas corpus in 2003 (ECF No. 1), arguing, *inter alia*, that the state trial prosecutor exercised a peremptory challenge to exclude an African-American prospective juror based on her race in violation of the Equal Protection Clause of the Fourteenth Amendment (*see generally* ECF No. 63). The court denied petitioner's first application in 2008. (*See* ECF No. 40.) Petitioner appealed that order (ECF No. 42), and in 2011, the Ninth Circuit reversed the district court's denial of the petition, concluding that the district court had erred in two ways. (ECF No. 50 at 1–2.) First, the Ninth Circuit held that the district court had erred in according deference to the trial court's credibility determination because the state trial court never reached the step-three inquiry under *Batson v. Kentucky*, 476 U.S. 79 (1986). (ECF No. 50 at 3.) Second, it was error to conduct a limited comparative juror analysis by comparing the stricken juror to one other stricken juror, as opposed to the empaneled jurors. (*Id.*) The Ninth Circuit ordered as follows:

> On remand, the district court should conduct a full step-three inquiry that includes a proper comparative juror analysis. In conducting that comparative juror analysis, the district court should consider all of the juror questionnaires from Williams's trial. Those juror questionnaires were properly presented to the state courts, but were not presented to the district court.

(*Id.* at 4.)

Subsequently, the previously assigned magistrate judge ordered petitioner to file an amended petition (ECF No. 61 at 1), which petitioner did (ECF No. 63). In 2012, the same magistrate judge recommended that petitioner's amended petition for a writ of habeas corpus be granted. (ECF No. 73 at 32.) Thereafter, in objecting to the recommendation, respondent moved for an evidentiary hearing to examine the demeanor and credibility of Robert Gold, the district

attorney who tried petitioner's case and who allegedly exercised his peremptory strikes in violation of the Constitution. (ECF No. 78 at 4.) The magistrate judge granted the request and presided over an evidentiary hearing on February 14, 2013. (ECF No. 101.) Subsequently, yet another newly assigned magistrate judge vacated the original findings and recommendations and filed new ones (ECF No. 105), which the previously assigned district judge adopted in full (ECF No. 114). Hence, petitioner's amended application for a writ of habeas corpus was granted on June 27, 2014 (*id.*), and judgment was entered on the same day (ECF No. 115). On July 21, 2014, respondent filed a notice of appeal (ECF No. 117) and a motion to stay pending appeal (ECF No. 116). The court granted the motion to stay, staying retrial of petitioner during the pendency of respondent's appeal. (ECF No. 132 at 5.) As to petitioner's release, however, the court referred the case "to the Probation Office for a report and recommendation on whether petitioner is an appropriate candidate for supervised release pending appeal . . . ." (ECF No. 135.) The Probation Office provided a report on October 8, 2014. At hearing on the instant motions, petitioner objected to certain factual findings in the report. This court directed petitioner to file his objections with the Probation Office and directed the Probation Office to respond to those objections. The court has now received the Probation Office's final report and response to petitioner's objections.

The Probation Office report confirms its initial recommendation that petitioner remain in custody. (Prob. Rep. at 9.) Specifically, while the report finds petitioner's flight risk to be low to moderate, it recommends denying release because of a motive to flee, as petitioner is still facing a possible life imprisonment following retrial or reversal on appeal, and because petitioner will be a danger to the community, as he has a history of violence and substance abuse. (*Id.*)

II. LEGAL STANDARD

A district court retains jurisdiction to issue orders concerning the custody or enlargement of a habeas petitioner even after an appeal of the grant or denial of habeas relief has been processed. *Stein v. Wood*, 127 F.3d 1187, 1190 (9th Cir. 1997).

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There is a presumption of release where a prisoner has been granted habeas relief. *See Hilton v. Braunskill*, 481 U.S. 770, 774 (1987); Fed. R. App. P. 23(c). This presumption, however, "may be overcome if the traditional stay factors tip the balance against it." *Hilton*, 481 U.S. at 777. These factors are: (1) whether the stay applicant has made a strong showing of likelihood of success on the merits, which, here, means it is reasonably likely that the Ninth Circuit will conclude the district court's decision was erroneous; (2) whether the applicant will be irreparably injured without a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies. *Id.* at 776. "The most important factor is the first, that is, whether the state has made a strong showing of likely success on the merits of its appeal of the district court's decision." *Haggard v. Curry*, 631 F.3d 931, 935 (9th Cir. 2010). The stay factors, however, contemplate individualized judgments in each case and "the formula cannot be reduced to a set of rigid rules." *Hilton*, 481 U.S. at 777.

The Supreme Court has observed that how the factors play out "may depend to a large extent upon determination of the State's prospects of success in its appeal." *Hilton*, 481 U.S. at 778. For example, "[w]here 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.* On the other hand, as a general matter, "[w]here the State's showing on the merits falls below this level, the preference for release should control." *Id.*

At the same time, the Supreme Court in *Hilton* further observed that in determining whether to release a successful habeas petitioner from custody, a court can also take into account (a) petitioner's possibility of flight; (b) the potential danger to the public; and (c) the state's interest in continuing custody and rehabilitation.[1] *Id.* "[A] district court has broad discretion in conditioning a judgment granting habeas relief, including whether or not to release a prisoner pending appeal." *Stein*, 127 F.3d at 1190.

[1] "Although the *Hilton* Court does not specify, it appears that danger to the public, risk of flight, and the state's interest in continuing custody and rehabilitation are appropriately considered as part of the second and fourth equitable factors." *Franklin v. Duncan*, 891 F. Supp. 516, 519 (N.D. Cal. 1995).

III. ANALYSIS

A. Likelihood of Success

In its motion to stay,[2] previously granted, respondent made two main arguments. (ECF No. 116 at 1–2.) First, respondent contends it is likely to succeed on its argument before the Ninth Circuit that the district court had erred in not applying the deferential standard of review under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d). (*Id.* at 7–10.) Second, in the alternative, assuming AEDPA does not apply, respondent contended it made out a substantial case it was likely to succeed on the underlying merits of the *Batson* issue. (*Id.* at 10–52.)

As to respondent's first argument, petitioner countered it was implausible the Ninth Circuit would apply AEDPA. (ECF No. 123 at 28–29.) As to respondent's second argument, petitioner countered respondent did not demonstrate a fair prospect of likelihood of success on the merits. (*Id.* at 29–32.)

In adopting the magistrate judge's findings and recommendations on the merits of the petition, the court rejected respondent's argument that the AEDPA deferential standard of review should apply in this case. (ECF No. 114 at 2–4.) The court rejected the argument for two reasons:

> First, . . . [a]cceptance of respondent's argument would run contrary to the spirit of the Ninth Circuit's decision in this case. Moreover, the finding required at step three of *Batson* is whether the peremptory strike at issue was motivated in substantial part by race. The state Court of Appeal did not resolve this question.

(*Id.* at 4 n.3.)

In addition, the court in its order granting the stay found respondent did not establish a strong likelihood of success on its second argument. Specifically, the court found that

> respondent has not made a strong showing that she is likely to succeed on the merits of her legal argument that petitioner's *Batson* claim should be governed by the deferential standard of review under [AEDPA], rather than the *de novo* review required by the United States Court of Appeals for the Ninth Circuit and applied by

[2] The court references respondent's motion to stay because respondent did not separately address the likelihood of success factor in its motion to deny release.

> this court. The factual questions on appeal are vigorously contested by the parties, and this court cannot find that respondent has made a "strong showing" that she is likely to prevail on the merits of her factual arguments on appeal.

(ECF No. 132 at 3.)

The court finds respondent's AEDPA argument unavailing under the law of the case doctrine, whereby "a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005) (internal quotation marks omitted). The purpose of the doctrine is "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Id.* (internal quotation marks omitted). A district court's decision to apply the doctrine is reviewed for an abuse of discretion. *Id.* "A district court abuses its discretion in applying the law of the case doctrine only if (1) the first decision was clearly erroneous; (2) an intervening change in the law occurred; (3) the evidence on remand was substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result." *Id.*

Here, the Ninth Circuit held that AEDPA deference did not apply "because the state trial court applied the wrong legal standard in determining whether [petitioner] made out a prima facie violation at *Batson* step one." (ECF No. 52 at 2.) Respondent has not shown that decision was clearly erroneous, the law or the record has changed, other circumstances have changed, or a manifest injustice would otherwise result. *Id.* at 594. Respondent is unlikely to succeed on its argument before the Ninth Circuit that the district court erred in not applying the AEDPA deferential standard of review.

As to respondent's second argument, that it "has at the very least presented a substantial case on the merits warranting a stay" (ECF No. 116 at 13), the court finds it unpersuasive as well. The court granted habeas relief on the basis of discriminatory use of peremptory strikes. (ECF No. 105.) The magistrate judge's thorough analysis, supported by the factual record and the applicable law, demonstrated "petitioner [had] carried his burden of proving . . . the prosecutor was motivated in substantial part by race." (*Id.* at 42.) The court

adopted the magistrate judge's findings in full. (ECF No. 114.) The court cannot say respondent has presented a substantial case on the merits.

Because respondent has shown neither a strong showing that it is likely to succeed on its appeal nor a substantial case on the merits of its appeal, this factor weighs in favor of release.

B. Irreparable Injury

In analyzing the irreparable injury element, courts consider "the [s]tate's interest in continuing custody and rehabilitation pending a final determination of the case on appeal . . . ." *Hilton*, 481 U.S. at 777. A state's interest "will be strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served." *Id.*

Here, petitioner was sentenced to life with no possibility of parole for murder. (ECF No. 105 at 1.) Petitioner has served eighteen years of imprisonment, but at thirty-six is still relatively young. (ECF No. 132 at 4.) This factor weighs in favor of staying petitioner's release because "the remaining portion of the sentence to be served is long. . . ." *Hilton*, 481 U.S. at 777; *Franklin*, 891 F. Supp. at 521 ("Where . . . [the] petitioner has a life sentence and the remaining portion of the sentence to be served is long, this factor weighs against release."). In addition, it is undisputed that under California law, petitioner would be presumptively ineligible for bail. (Super. Ct. of Cal., Cnty. of Sacramento, Felony & Misdemeanor Bail Schedules at 6; ECF No. 134 at 6–8.)

The state's interest is attenuated because of the court's conclusion that the prosecutor exercised his peremptory strikes in violation of the Constitution and because the state has made neither a strong showing of likelihood of success nor a substantial case on the merits of the appeal. *See Hilton*, 481 U.S. at 778; *see also Douglas v. Singh*, No. C-11-5370, 2013 WL 2645175, at *5 (N.D. Cal. June 12, 2013).

On balance, however, this factor weighs against release.

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C. The Interests of Other Parties

As to other parties' interests, the record does not reflect that release will substantially injure any other party interested in the proceeding. *See Haggard*, 631 F.3d at 939.

D. Public Interest

As noted, the *Hilton* Court teaches that flight risk and danger to the community are relevant factors for a district court to consider in analyzing the public interest factor. *See* 481 U.S. at 777.

Respondent claims petitioner poses a flight risk. (ECF No. 116 at 50–51.) Yet, the probation report states petitioner "presents as a low-moderate risk of non-appearance" and that petitioner "has a tremendous amount of familial support and a release plan in place that has been verified . . . ." (Prob. Rep. at 9.) While pointing to murder and attempted murder as serious charges, which by their nature may give petitioner a strong motive to flee, respondent has not presented evidence showing petitioner poses a particularized flight risk. *See Franklin*, 891 F. Supp. at 521. For example, respondent provides no evidence that petitioner has access to significant financial or travel resources. Rather, petitioner's financial resources appear modest. *See Walker v. Martel*, No. 94-1997, 2011 WL 2837406, at *3 (N.D. Cal. July 13, 2011) ("Respondent has made no particularized showing that petitioner poses a flight risk."); *Cowans v. Marshall*, No. 05-6276, 2009 WL 4929406, at *5 (C.D. Cal. Dec. 10, 2009) (finding respondent provides no evidence that the petitioner "with strong family ties and viable parole plans, is a significant flight risk if released without supervision pending [r]espondent's appeal to the Ninth Circuit").

Respondent also claims petitioner poses a danger to the community. (ECF No. 34 at 6–8.) In that regard, the evidence before the court is mixed. The conviction offenses occurred eighteen years ago when petitioner was only eighteen. (Prob. Rep. at 1.) Prior to those offenses, petitioner had no "adult arrests or convictions." (*Id.* at 3.) No evidence was presented at trial indicating petitioner was a member of a gang, which is consistent with petitioner's statements and "is supported by state prison records . . . [indicating] 'No documentation of affiliation with a STG' (Security Threat Group)." (*Id.*) In addition, the Probation Report notes petitioner's mental

health is sound. (*Id.* at 6.) Petitioner's "thinking has changed since his arrest"; he is now "'into tutoring others, coaching others, helping others along the way,'" and petitioner "has grown through education." (*Id.* at 7.) Both petitioner's mother and the mother of petitioner's son confirm petitioner's "'large network of support'" and that petitioner "is a much different person than he was [eighteen] years ago." (*Id.* at 8.)

On the other hand, there is evidence that petitioner poses a threat to the community. Although there is no documented evidence of gang membership, "he does have a history of criminal associations . . . and continued violence and behavioral issues while in prison." (*Id.* at 9.) In 1993, petitioner was arrested for burglary at the age of fifteen, but the matter was dismissed at intake. (*Id.* at 2–3.) In 1994, petitioner was arrested for attempted burglary and trespassing. (*Id.* at 3.) When petitioner did not appear for that matter, he was arrested and two other charges were added, possession of a controlled substance, 0.3 grams of cocaine base, and providing false information to a peace officer. (*Id.*) Except for the drug possession charge, the remaining charges were dismissed, and petitioner was placed on informal probation. (*Id.*) In 1996, petitioner was again arrested for providing false identification to a peace officer; that matter was dismissed as well. (*Id.*)

Moreover, while in custody, petitioner has had "some disciplinary problems." (Resp. to Objections at 3.) Specifically, in 2006, prison administration found petitioner guilty of spitting on a correctional officer; the Imperial County District Attorney's Office declined to prosecute the matter. (*Id.*) In 2008, petitioner was found guilty of participating in a prison riot; the Sacramento County District Attorney's Office declined to prosecute the matter. (*Id.*) In 2010, petitioner was found guilty of battery on another inmate. (*Id.*) Finally, in 2011, petitioner was found guilty of possessing individually packaged marijuana with the intent to distribute. The matter was referred to the Sacramento County District Attorney's Office who declined prosecution . . . . Petitioner appealed the matter which was partially granted, and he was found guilty of a 'lesser Division B offense' and sanctioned accordingly."[3] (*Id.*) While "[t]here have

[3] In 2011, petitioner was found guilty of possession of a controlled substance with intent to distribute, a Division "A-2" offense. (ECF No. 134-4 at 22.) While the record is unclear to

been no documented disciplinary issues since 2011" (*id.*), the relative recency of petitioner's last two disciplinary issues give the court pause.

The Probation Report, in utilizing a pretrial risk assessment tool, calculates a 10 percent chance petitioner may commit a new offense if released. On balance, petitioner poses some risk of danger to the public. (*See* Prob. Rep. at 8.)

While the court has carefully considered whether conditions can mitigate danger, and weighed the offer of the mother of petitioner's child to provide "a safe and healthy environment" for petitioner in Sacramento (*id.* at 8), this offer would locate petitioner in the Strawberry Manor area in Sacramento, where his former friends and codefendants may remain. (*Id.* at 9.) Although petitioner's mother has offered her home in Los Angeles, where petitioner's son also resides, the court is not prepared to approve petitioner's residency in another district at some distance from the court where he is likely to be retried if the state does not prevail on appeal. (*Id.* at 7–9.)

IV. CONCLUSION

For the foregoing reasons, because petitioner is not an appropriate candidate for supervised release, the court DENIES petitioner's motion for release and GRANTS respondent's cross-motion to deny petitioner's motion for release.

IT IS SO ORDERED.

DATED: February 11, 2015.

UNITED STATES DISTRICT JUDGE

what Division "B" offense the charge was downgraded after petitioner's appeal, the most related Division "B" offense is the "[u]nauthorized possession of any controlled substance . . . including marijuana . . . ." Cal. Code Regs. tit. 15, § 3323(d)(7).