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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Barry Floyd Braeske,)	
)	2:05-cv-00279-GEB-CMK
Petitioner,)	
)	
v.)	<u>ORDER DENYING RESPONDENT'S</u>
)	<u>MOTION FOR RECONSIDERATION</u>
Michael Martel,)	<u>AND ALTERNATIVE REQUEST FOR</u>
)	<u>STAY*</u>
Respondent.)	
_____)	

On January 3, 2011, Respondent filed a "Motion for Reconsideration; [or in the Alternative an] Application for a Stay of the Court's December 27, 2010 Order," which granted Petitioner Braeske ("Petitioner")'s petition for writ of habeas corpus. (ECF No. 48.)

Respondent argues:

The Board . . . conducted a parole consideration hearing for [Petitioner] on May 25, 2010 . . . [which] complies with In re Lawrence, 44 Cal. 4th 1181 (2008), upon which Hayward and Pearson are based. Thus, [Petitioner] has already received the remedy ordered by this Court . . . and his Petition should be dismissed as moot."

(Resp't Mot. ("Mot.") 2:5-9, 3:19-20.) Respondent argues in the alternative, should the Court find "that dismissal is not warranted," a stay "pending resolution of Respondent's appeal" or "a temporary stay to

* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 give him the opportunity to seek a stay in the Ninth Circuit" is
2 "necessary and appropriate to preserve the status quo." Id. at 2:10-19.

3 Respondent requested an "expedited ruling by January 10,
4 201[1] because the Court's December 27, 2010 order requires the Board to
5 hold a new hearing for [Petitioner] within thirty days[, and Petitioner]
6 has been scheduled for a court-ordered hearing on January 20, 201[1]."
7 Id. at 2:20-22.

8 An order was filed on January 4, 2011, which requested
9 Petitioner to file a written response to Respondent's motion no later
10 than January 7, 2011. (ECF No. 49.) Petitioner filed an opposition to
11 Respondent's motion on January 7, 2011. (ECF No. 50.)

12 **I. BACKGROUND**

13 This action involves Petitioner's application for a writ of
14 habeas corpus under 28 U.S.C. § 2254, in which he challenges a 2003
15 denial of parole. The matter was referred to a United States Magistrate
16 Judge under 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

17 The magistrate judge filed findings and recommendations on
18 September 30, 2010, which recommended the Petitioner's application be
19 granted since "[o]ther than the circumstances of his commitment offense,
20 there is no evidence in the record to establish petitioner is a danger
21 to others." (ECF No. 39 at 10:7-8.) Therefore, the magistrate judge
22 found the "decision that there was sufficient evidence of dangerousness
23 to deny petitioner parole [was] an unreasonable application of the 'some
24 evidence' standard and an unreasonable interpretation of the facts." Id.
25 at 10:8-11.

26 The findings and recommendations provided notice to all
27 parties that any objections to the findings and recommendations were to
28 be filed within twenty-one days. Respondent filed timely objections.

1 (ECF No. 41.) After conducting a de novo review of the action, the
2 district judge filed an Order on December 27, 2010 adopting the
3 magistrate judge's findings and recommendations "in full as to the
4 recommendation that Petitioner's application for writ of habeas corpus
5 be granted." (ECF No. 46.) The December 27, 2010 Order directed
6 Respondent, *inter alia*, "to release petitioner within thirty days unless
7 a new parole suitability hearing is held in accordance with the
8 provisions required by the Fourteenth Amendment of the United States
9 Constitution and identified in the September 30, 2010 findings and
10 recommendations." Id. at 2:6-9.

11 **II. MOTION FOR RECONSIDERATION**

12 Respondent requests the Court "reconsider its [December 27,
13 2010 Order] and dismiss [Petitioner's] Petition," arguing Petitioner
14 "already received the remedy ordered by this Court" when the Board
15 conducted a "parole consideration hearing for [Petitioner] on May 25,
16 2010." (Mot. 2:5-9.) Petitioner counters that Respondent did not make
17 the required showing that he is entitled to reconsideration, and "even
18 if [the] Court considers Respondent's tardy proffer of further evidence,
19 it should deny the motion" because "Respondent has not provided [the]
20 Court with a record to determine the fairness of the Board's 2010
21 decision." (Pet'r Opp'n ("Opp'n") 2:22-24, 3:11-16, 3:21-22, 3:28-4:4.)

22 "Absent 'highly unusual circumstances,' reconsideration of a
23 final judgment is appropriate only where (1) the court is presented with
24 newly-discovered evidence, (2) the court committed 'clear error or the
25 initial decision was manifestly unjust,' or (3) there is an intervening
26 change in the controlling law." Calif. Dump Truck Owners Ass'n v. Davis,
27 302 F. Supp. 2d 1139, 1141 (E.D. Cal. 2002) (quoting School Dist. No.
28

1 1J, Multnomah County, Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir.
2 1993).

3 Respondent does not address this standard in his moving
4 papers; nor has he made any showing under its criteria. However, even
5 assuming that the May 25, 2010 parole consideration hearing is "newly-
6 discovered evidence," Respondent has not shown that reconsideration is
7 appropriate in this case because he has not provided a sufficient record
8 to determine if the 2010 hearing complied with the Court's December 27,
9 2010 Order.¹ See Sass v. Calif. Board of Prison Terms, 376 F. Supp. 2d
10 975, 978-79 (E.D. Cal. 2005) (stating that respondent's assertion that
11 subsequent parole hearings mooted Petitioner's application for writ of
12 habeas corpus incorrectly "assumes that all of the subsequent hearings
13 were conducted in accordance with federal law"); see also Jackson v.
14 Carey, No. 2:02-cv-0946 FCD KJN P, 2010 WL 27772656, at *2 (E.D. Cal.
15 July 13, 2010) ("Subsequent parole denials do not render this claim
16 moot. . . . [P]etitioner's claim challenging the denial of parole
17 fall[s] within the 'capable of repetition yet evading review' exception
18 to mootness.") (citation omitted). Therefore, Respondent's Motion for
19 Reconsideration is denied.

20 **III. MOTION FOR STAY**

21 Respondent states he intends to file a notice of appeal
22 "[s]hould [his] Motion for Reconsideration be denied," and argues "a
23 stay pending appeal is appropriate" since "the Respondent has a high
24 likelihood of success on the merits," and "the Board will be irreparably
25 injured if it is forced to hold a new hearing under the parameters
26

27 ¹ The only evidence filed in support of Respondent's Motion for
28 Reconsideration is a transcript of the California Board of Parole
Hearings' Decision from the May 25, 2010 hearing. (Mot., Ex. 1.)

1 provided by the Court." (Mot. 3:25-26, 4:13-16.) Petitioner rejoins that
2 Respondent "has failed to demonstrate that the relevant factors support
3 a stay of this Court's order granting the writ, or even a temporary
4 stay." (Opp'n 11:17-19.)

5 Rule 62(c) prescribes: "[w]hile an appeal is pending from an
6 interlocutory order or final judgment that grants, dissolves or denies
7 an injunction, the court may suspend, modify, restore, or grant an
8 injunction" However, a stay pending appeal "is not a matter of
9 right, even if irreparable injury might otherwise result." Nken v.
10 Holder, 129 S. Ct. 1749, 1760 (2009). "It is instead an exercise of
11 judicial discretion, and the propriety of its issue is dependent upon
12 the circumstances of the particular case. The party requesting a stay
13 bears the burden of showing that the circumstances justify an exercise
14 of that discretion." Id. at 1761 (quotation, citations and internal
15 brackets omitted).

16 The following factors should be considered in deciding whether
17 to issue a stay pending appeal:

18 "(1) [W]hether the stay applicant has made a strong
19 showing that he is likely to succeed on the merits;
20 (2) whether the applicant will be irreparably
21 injured absent a stay; (3) whether issuance of the
stay will substantially injure the other parties
interested in the proceeding; and (4) where the
public interest lies."

22 Golden Gate Restaurant Ass'n v. City and County of San Francisco, 512
23 F.3d 1112, 1115 (9th Cir. 2008) (quoting Hilton v. Braunskill, 481 U.S.
24 770, 776 (1987)). The Ninth Circuit applies these factors by
25 "employ[ing] two interrelated legal tests that represent the outer
26 reaches of a single continuum." Id. at 1115 (quotation omitted).

1 At one end of the continuum, the moving party is
2 required to show both a probability of success on
3 the merits and the possibility of irreparable
4 injury. . . . At the other end of the continuum,
5 the moving party must demonstrate that serious
6 legal questions are raised and that the balance of
7 hardships tips sharply in its favor. These two
8 formulations represent two points on a sliding
9 scale in which the required degree of irreparable
10 harm increases as the probability of success
11 decreases.

12 Id. at 1115-16 (quotations omitted).

13 **A. Likelihood of Success on the Merits**

14 Respondent's stay motion is premised upon four arguments: 1)
15 "the Court did not apply the . . . standard of federal habeas review
16 appropriately" by impermissibly relying upon "the Ninth Circuit's
17 decision in Hayward[, which based] its holding on [In re] Lawrence,
18 which the California Supreme Court issued three and half years after it
19 denied [Petitioner's] petition[;]" 2) even if federal law permits the
20 application of [In re] Lawrence to this case, "the Court . . . erred in
21 its application[;]" 3) Petitioner's lack of parole plans in California
22 was a proper basis to deny his parole; and 4) "the state court decisions
23 [denying Petitioner's applications for writs of habeas corpus] complied
24 with the Supreme Court's holding [in Greenholtz] that federal due
25 process is satisfied by an opportunity to be heard and a statement of
26 reasons why the inmate was not found suitable for parole." (Mot. 4:23-
27 25, 5:15-22, 5:25-28, 6:2-4, 6:14-16 (citations omitted).)

28 **1) Standard of Federal Habeas Review**

The Ninth Circuit has rejected Respondent's first and fourth
arguments, which concern the scope of a federal court's habeas corpus
review under 28 U.S.C. § 2254(d). See Haggard v. Curry, --- F.3d ---,
2010 WL 4978842, at * 5 (9th Cir. 2010) (rejecting the state's argument
that "the 'some evidence' requirement is a state-created procedure that

1 . . . is not a procedural protection required under Greenholtz as a
2 matter of federal due process.”) (citation omitted); Pearson v. Muntz,
3 606 F.3d 606, 610 (9th Cir. 2010) (holding California right to parole
4 absent some evidence of current dangerousness is protected by federal
5 due process); McCullough v. Kane, --- F.3d ----, 2010 WL 5263140 (9th
6 Cir. 2010) (applying the California Supreme Court’s decision In re
7 Lawrence retroactively). Therefore, Respondent has not shown a
8 likelihood of success, nor raised serious questions, on the merits of
9 these two arguments.

10 **2) Application of In re Lawrence**

11 Respondent also argues that even if federal law permitted the
12 Court to apply In re Lawrence to the Board’s 2003 parole decision, the
13 Court “erred in its application” by not “address[ing] the severity of
14 [Petitioner’s] crime.” (Mot. 5:25-28.)

15 “For federal habeas review, parole decisions in California are
16 analyzed under the ‘some evidence’ standard set forth by the California
17 Supreme Court in Lawrence and Shaputis.” Lewis v. Schwarzenegger, No.
18 07-02465 CW, 2010 WL 3448570, at *6 (N.D. Cal. Aug. 31, 2010) (citing
19 Hayward v. Marshall, 603 F.3d 546, 562 (9th Cir. 2008).

20 “[W]hen a court reviews a decision of the Board or
21 the Governor, the relevant inquiry is whether some
22 evidence supports the decision of the Board or the
23 Governor that the inmate constitutes a current
threat to public safety, and not merely whether
some evidence confirms the existence of certain
factual findings.”

24 In re Lawrence, 44 Cal. 4th 1181, 1212 (2008). The aggravated
25 circumstances of the prisoner’s commitment offense may be relied upon as
26 a basis for denying parole. Id. at 1214. However,

27 [T]he aggravated nature of the crime does not in
28 and of itself provide some evidence of current
dangerousness to the public unless the record also
establishes that something in the prisoner’s . . .

1 history, or his or her current demeanor and mental
2 state, indicates that the implications regarding
3 the prisoner's dangerousness that derive from his
4 or her commission of the commitment offense remain
5 probative of the statutory determination of a
6 continuing threat to public safety.

7 Id. at 1214. Therefore, "the relevant inquiry is whether the
8 circumstances of the commitment offense, when considered in light of
9 other facts in the record, are such that they continue to be predictive
10 of current dangerousness many years after commission of the offense."
11 Id. at 1221. "This inquiry is . . . an individualized one, and cannot be
12 undertaken simply by examining the circumstances of the crime in
13 isolation, without consideration of the passage of time or the attendant
14 changes in the inmate's psychological or mental attitude." Id.

15 The Court conducted the individualized inquiry described in In
16 re Lawrence in this case when it concluded "there is no evidence in the
17 record to establish petitioner is a danger to others," other than "the
18 circumstances of his commitment offense." (ECF No. 39, 7:7-8, 8:7-23,
19 8:26-9:7, 9:8-15, 9:16-25, 10:7-8 (discussing Petitioner's only past
20 criminal offense for shoplifting as a minor, parole plans in New Mexico,
21 "marketable employment skills," disciplinary event in 1994, significant
22 self-help efforts, and positive psychological report).) Therefore,
23 Respondent has not shown a likelihood of success, nor raised serious
24 questions, on the merits of its argument that the Court incorrectly
25 applied In re Lawrence.

26 **3) Petitioner's Lack of Parole Plans in California**

27 Respondent also argues Petitioner's "absence of parole plans
28 [in California] is a factor of unsuitability that supports the Board's
decision to deny parole." (Mot. 6:10-13.)

1 In denying Petitioner parole in 2003, the Board relied in part
2 on Petitioner's parole plans, stating:

3 The prisoner's parole plans does [sic] lack some
4 work. Well, the prisoner's parole plans need to be
5 worked on. He doesn't have any parole plans in the
6 State of California and he have [sic] not been
7 accepted for an Interstate Transfer to [New]
8 Mexico. And based on that, we would say that the
9 prisoner's parole plans are inadequate

10 (Resp't Answer, Ex. 2, at 36:1-7.)

11 In determining whether a life prisoner is suitable for parole,
12 the Board of Parole Hearings ("Board") must consider all "relevant,
13 reliable information available," including:

14 [T]he circumstances of the prisoner's social
15 history; past and present mental state; past
16 criminal history . . . ; the base and other
17 commitment offenses, including behavior before,
18 during and after the crime; past and present
19 attitude toward the crime; any conditions of
20 treatment or control . . . ; and any other
21 information which bears on the prisoner's
22 suitability for release.

23 15 Cal. Code Regs. § 2402(b).

24 Section 2402 sets forth a non-exhaustive list of factors that
25 the Board is to consider in evaluating parole suitability. 15 Cal. Code
26 Regs. § 2402(c), (d). Factors tending "to indicate suitability" for
27 parole include: "(8) Understanding and Plans for Future. The prisoner
28 has made realistic plans for release or has developed marketable skills
that can be put to use upon release." 15 Cal. Code Regs. § 2402(d)(8).
"Lack of parole plans is not listed as a factor tending to show
unsuitability" for parole. Nicholson v. Salazar, No. CV 06-5911-
JVS(AJW), 2010 WL 2757132, at *12, n.14 (C.D. Cal. April 15, 2010).
"Indeed, the [relevant factor indicating suitability for parole] simply
requires 'realistic plans for release' or 'marketable skills' . . ." In
re Powell, 188 Cal. App. 4th 1530, 1543 (2010).

1 The Board discussed Petitioner's work history during his 2003
2 parole hearing. Petitioner indicated that he has obtained his GED and
3 completed some college courses while incarcerated. ((Resp't Answer, Ex.
4 2, at 14:10-14, 17:20-23.) Prior to his incarceration, Petition worked
5 for Pacific Telephone in operator services, for PriMark Marketing
6 Company manufacturing label guns, and at a gas station. Id. at 14:19-25.
7 At the time of the parole hearing, Petitioner worked in the
8 institution's "maintenance repair crew," and he had completed a number
9 of vocational programs, including "Electronic Technician . . . EEG
10 Technician, a record clerk, a canteen clerk . . . courses in [Complete
11 Business Oriented Language]" and "Mobile Air Conditioning Repair." Id.
12 at 17:6-11, 17:24-18:18. Two recent supervisors submitted positive work
13 "chronos," which indicated Petitioner would be able to find work upon
14 his release. Id. at 20:16-22:7. The Board commended Petitioner for his
15 work history at the hearing, stating, "the panel is aware for a number
16 of years that you've been a very excellent worker. You've done just
17 about the same, just about anything you could to try to improve
18 yourself." Id. at 22:9-14.

19 Petitioner also discussed his release plans with the Board
20 during the hearing. Petitioner had plans to live with Thomas and Agnes
21 Gibson on their cattle ranch in New Mexico. Id. at 24:25-25:27.
22 Petitioner met Mr. Gibson while incarcerated at San Quentin as a "M2
23 program" sponsor. Id. at 28:15-27. Petitioner planned on helping the
24 Gibsons on their ranch, while looking for work in town. Id. Mr. Gibson
25 submitted a letter to the Board documenting his support for Petitioner.
26 Id. at 27:4-28:13.

1 At the time of the hearing, Petitioner made efforts to have
2 his parole transferred to New Mexico upon his release, but was informed
3 he could not do so until he had a set parole date. Id. at 26:1-27. The
4 Board is unopposed to Petitioner being transferred out-of-state. Id. at
5 39:13-19.

6 Based upon the above record, Respondent has not shown a
7 likelihood of success on the merits, or raised a serious question, that
8 Petitioner's lack of parole plans in California constituted "some
9 evidence" that Petitioner is a current threat to public safety.
10 Petitioner had both marketable skills and a "realistic" plan for
11 release. See In re Powell, 188 Cal. App. 4th at 1543 ("[T]o qualify as
12 'realistic' a [release] plan need not be ironclad.") (citation omitted).

13 Further, the relevant inquiry for the Board is "an
14 individualized assessment of the continuing danger and risk to the
15 public safety posed by the inmate." In re Lawrence, 44 Cal. 4th at 1227.
16 Application of the "some evidence" standard "requires more than rote
17 recitation of the relevant factors with no reasoning establishing a
18 rational nexus between those factors and . . . [a] determination of
19 current dangerousness." Nestle v. Davison, No. CV 07-4331-CAS(OP), 2009
20 WL 2997225, at *8 (C.D. Cal. Sept. 11, 2009) (citing In re Shaputis, 44
21 Cal. 4th 1241, 1254 (2008).) Even if Petitioner's lack of release plans
22 in California was a factor for the Board to consider, it "failed to
23 create [the required] nexus between [that factor] and whether Petitioner
24 is currently a danger to society." Id. at *13.

25 **B. Irreparable Injury / Comparison of Hardships / Public Interest**

26 Since Respondent has failed to show a likelihood of success,
27 or raise a serious question, on the merits of any of his arguments, the
28

1 Court need not address the remaining factors. See Mount Graham Coalition
2 v. Thomas, 89 F.3d 554, 558 (9th Cir. 1996).

3 **IV. CONCLUSION**

4 For the stated reasons, Respondent's Motion for
5 Reconsideration and alternative Motion for Stay are DENIED.

6 Dated: January 12, 2011

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9 _____
GARLAND E. BURRELL, JR.
United States District Judge