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

REYES Y. RIOS,

Petitioner,

No. CIV S-05-1711 MCE DAD P

vs.

K. MENDOZA-POWERS, et al.

Respondent.

ORDER

_____ /

Petitioner is a former state prisoner proceeding pro se with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In 1988 petitioner was convicted of second degree murder and sentenced to 15 years-to-life in state prison. (Pet. at 1; Answer, Ex. 1.) Petitioner challenges Governor Schwarzenegger’s reversal of the 2004 decision by the Board of Parole Terms (hereinafter the “Board”)¹ granting petitioner parole. In addition, petitioner claims the Governor exceeded his authority when he denied parole utilizing a law not in effect at the time of petitioner’s conviction, in violation of the Ex Post Facto Clause.

When he commenced this action on August 24, 2005, petitioner was in prison. (Pet. at 1; Answer at 1-2.) However, petitioner filed a notice of change of address on May 7,

_____ ¹ California has since replaced the Board of Prison Terms with the Board of Parole Hearings. See California Penal Code § 5075(a).

1 2007, indicating that he had been released on parole. (Doc. No. 14.) Petitioner’s release from
2 custody raises a question as to whether this habeas action has been rendered moot. See Cantrell
3 v. City of Long Beach, 241 F.3d 674, 678 (9th Cir. 2001) (a case loses its quality as a “present,
4 live controversy” and becomes moot when there can be no effective relief).

5 PROCEDURAL BACKGROUND

6 After filing the instant petition with this court, petitioner filed another application
7 for writ of habeas corpus on May 12, 2006. See CIV S-06-1047 MCE GGH P. In that
8 application, petitioner challenged the 2005 decision by the Board finding him not suitable for
9 parole. The Board’s 2005 decision was allegedly based on the same facts that were relied upon
10 one year earlier in 2004 when the Board found petitioner suitable for parole. (Id.)

11 On May 7, 2007, petitioner filed notices of change of address in both pending
12 cases indicating that he had been released from prison on parole. On May 18, 2007, Magistrate
13 Judge Gregory Hollows ordered petitioner to show cause why CIV S-06-1047 MCE GGH P
14 should not be dismissed as moot. On June 7, 2007, in response to that order, petitioner requested
15 that:

16 this court not dismiss his petition for Habeas Corpus because the
17 issue addressed in Petitioners [sic] Petition and response to answer
is still a valid issue.

18 Petitioner has been released from prison but still remains on parole.
19 In the petition, Petitioner asked the court for an immediate release
20 with no parole because Petitioner has exceeded his parole date
(with good time credits applied) and his parole time (Five years).

21 Therefore, this Court can still determine whether Petitioner is
entitled to have the excess time spent in prison applied to his
22 parole. (See In RE ERNEST SMITH 2007 DJAR 6217).
23 Petitioner further ask [sic] that Respondents be ordered to supply
the court with the relevant documents to determine the actual term,
time spent in custody, good time credits and length of parole.

24 Petitioner request [sic] the court maintain jurisdiction over this
25 case and determine that Petitioner is entitled to an immediate
discharge from parole.

26 (CIV S-06-1047 MCE GGH P, Doc. No. 14.)

1 parole term pursuant to the reasoning of the state appellate court in In re Smith. For this reason,
2 the court finds that this action is not moot.” (CIV S-06-1047 MCE GGH P, Doc. No. 15 at 2-3.)

3 Here, petitioner was convicted of second degree murder in 1988 and sentenced to
4 15 year-to-life in state prison. One state appellate court has recently interpreted California Penal
5 Code § 3000.1 to provide that “a person convicted of a second degree murder that occurred after
6 January 1, 1983 is subject to lifetime parole and becomes eligible for discharge from parole
7 ‘when [such] a person...has been released on parole from the state prison, and has been on parole
8 continuously for five years[.]’” In re Chaudhary, 172 Cal. App. 4th 32, ___, 90 Cal. Rptr. 3d
9 678, 679 (2009). That court also determined that the five-year parole discharge eligibility
10 requirement cannot be satisfied by time spent in prison prior to release from confinement on
11 parole. 90 Cal. Rptr. 3d at 681.

12 In light of the decision cited above, the court will direct respondent to address the
13 impact of petitioner’s release from prison on his habeas petition in this federal habeas action.
14 Accordingly, it is ORDERED that:

15 1. Respondent shall file a brief with the court within 14 days of the filing of this
16 order addressing whether habeas relief is still available to petitioner in the event that the
17 Governor’s reversal of the 2004 Board decision violated his right to due process;

18 2. Respondent shall also file within 14 days of the filing of this order the
19 transcript and all related materials pertaining to petitioner’s 2004 parole hearing before the Board
20 in order to allow the court to properly evaluate the Governor’s reversal of the Board’s 2004
21 decision; and

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