

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LARRY HARDWICK,
Petitioner,
v.
KEN CLARKE, et al.,
Respondents.

NO. CIV. S-06-672 LKK DAD P

O R D E R

_____/

Petitioner Hardwick was released from custody on September 20, 2010, pursuant to two orders of this court granting his habeas relief. Respondents have filed a renewed request for a stay of the court's orders pending appeal of this matter in the Ninth Circuit.

I. Background

On July 13, 2010 order, this court issued an order adopting the findings by the magistrate that there was not "some evidence" of petitioner's current dangerousness. Order, July 13, 2010, ECF No. 23 (adopting the Findings and Recommendations of the Magistrate, April 12, 2010, ECF No. 16). Pursuant to that finding,

1 the order granted petitioner's habeas application, and ordered the
2 California Board of Parole Hearings to calculate a term for the
3 petitioner in accordance with California Penal Code § 3041. On July
4 30, 2010, respondents filed a notice of appeal to the Ninth
5 Circuit, and in this court moved for a stay of the July 13 order
6 pending appeal. The court granted a fourteen-day stay to allow the
7 respondent to seek a further stay from the Ninth Circuit. ECF No.
8 29. The Ninth Circuit denied respondents' motion for a stay.

9 Meanwhile, the California Board of Parole Hearings conducted
10 a term-setting hearing on August 2, 2010 in which it calculated
11 petitioner's total term for custody at 12 years and 9 months.
12 Petitioner had already served over 30 years in prison, but was not
13 released following the Board's hearing. Instead of releasing
14 petitioner, the Board treated the term-setting hearing as a normal
15 parole suitability hearing subject to Board and gubernatorial
16 review. Such review can take up to 150 days. On September 10, 2010,
17 petitioner filed a request for immediate release, and this court
18 granted that request on September 28, 2010. ECF No. 41. The court
19 ordered respondents to release petitioner within five days of the
20 order. That order was executed when respondents released petitioner
21 on September 30, 2010.

22 Respondents have now filed a renewed motion for a stay of the
23 court's July 13, 2010 order granting the habeas petition, and the
24 September 28, 2010 order for immediate release. In requesting a
25 stay, respondents seek to have petitioner re-incarcerated pending
26 appeal of this court's orders.

1 decision and the state court's decisions remaining undisturbed
2 until Respondent has had an opportunity to pursue meaningful
3 appeal of the Court's decision," while re-incarcerating the
4 petitioner will not substantially injure him. Resp't's Renewed
5 Appl. for Stay 5, ECF No. 44.

6 Haggard held "that where the Board's parole denial decision
7 is not based on 'some evidence' of current dangerousness, the
8 California-created, but federally enforceable, liberty interest
9 in parole gives the prisoner only the right to a redetermination
10 by the Board consistent with the state's 'some evidence'
11 requirement, not the right to release on parole." Haggard, No.
12 10-16819 at *5. The Ninth Circuit based that holding on the
13 California Supreme Court's In re Prather, 234 P.3d 541 (Cal.
14 2010), decision, which determined "that prisoners whose parole
15 denials were not based on 'some evidence' of current
16 dangerousness are entitled under state law only to a new parole
17 suitability decision by the state executive, and not to release
18 from custody or a judicial parole determination", see Haggard v.
19 Curry, No. 10-16819, 2010 WL 4015006, at *4 (citing In re
20 Prather, 234 P.3d at 552.). Respondents here argue that the
21 Ninth Circuit's holding in Haggard demonstrates that
22 respondent's have a high likelihood of success on appeal of the
23 issue of whether the remedy of release that this court granted
24 was proper.

25 This court acknowledges now, as it did in the prior order
26 granting a limited stay (ECF No. 29), that respondents have

1 shown an appreciable likelihood of success on the merits of
2 their appeal of the issue of whether ordering release of a
3 prisoner is within the range of remedies available when a
4 federal court grants habeas based on lack of evidence supporting
5 an unsuitability determination by the Board of Parole Hearings.
6 However, the court finds that the other Hilton factors do not
7 support granting a stay in this matter. The court disagrees with
8 the respondent's proposition that re-incarceration of petitioner
9 will not substantially injure him, and that the public interest
10 in having the Board's and Governor's decisions undisturbed
11 outweighs petitioner's interest in being free from custody.

12 Although the court finds that the Hilton factors weigh
13 against granting a stay, the court DENIES the motion to stay on
14 the alternate ground that the motion is moot. Petitioner argues
15 that the motion to stay is moot because the orders have already
16 been fully executed and there is nothing left to stay. In a case
17 similar to this one, Valdivia v. Brown, Civ. S-05-0416 FCD DAD
18 (E.D. Cal. 2010), the court denied a stay as moot. "Because the
19 Board of Parole Hearings calculated a term for Petitioner . . .
20 and set a date for release, and because petitioner has been
21 released, the court's . . . order has been fully executed. As
22 such, there is nothing for the court to stay." Id. *3. See also
23 Ramsey v. Shinseki, 364 Fed. Appx 432 * 2 (10th Cir.
24 2010) (affirming the district court's denial of a motion to stay
25 as moot after the all claims had been dismissed. The Tenth
26 Circuit affirmed, noting that the judgment dismissing the case


1 was executed, "there was nothing that the Secretary sought to
2 execute and therefore nothing to be stayed.")

3 In this case, the court's orders have been fully executed.
4 Petitioner is not seeking to have the orders executed in any
5 other way, and there is nothing to stay. Accordingly, the court
6 DENIES respondent's motion to stay, ECF No. 44 as moot.¹

7 IT IS SO ORDERED.

8 DATED: December 23, 2010.

9
10
11
12
13
14
15


LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

16 ¹ The court notes additionally that issuing a stay in the
17 matter would have no effect. A stay pending appeal should preserve
18 the status quo. However, a stay generally does not apply
19 retroactively to undo any execution of an order that has occurred
20 before the stay is granted. Stays issued under Fed. R. Civ. P.
21 62(d) clearly do not have retroactive effect. See, e.g. Ribbens
22 Intern., S.A. de C.V.v. Transport Intern. Pool, Inc., 40 F.Supp.2d
23 1141, 1144 (C.D.Cal., 1999) ("The absence of any reference to
24 retroactive extinguishment of pre-existing execution efforts in
25 Rule 62(d), in the context of this relatively detailed procedural
26 scheme, further supports the conclusion that no such effect was
intended."); Johns v. Rozet, 826 F. Supp. 565, 568 (D.D.C. 1993)
("any stay granted at this time would not have retroactive effect
upon garnishment proceedings commenced prior to the stay.");
Moore's Federal Practice § 62.03 (in the context of a stay issued
under Fed. Rule Civ. P 62(d), "any execution had on the judgment
before the stay becomes effective is not automatically set aside
or rendered void even after the stay becomes effective."). The same
principal, applied here, would render a stay completely without
effect, since release has already been executed, and that release
is not automatically rendered void even after a stay is granted.