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

WILLIAM CUNNINGHAM,

Petitioner,

No. CIV S-06-2238 FCD DAD P

vs.

CLAUDE FINN, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a former state prisoner proceeding pro se with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging Governor Schwarzenegger’s 2005 reversal of the Board of Parole Hearings’ decision to grant him parole. On January 15, 2009, respondent filed an answer to the petition. On January 26, 2009, petitioner filed a traverse. This matter was then submitted for decision. However, on February 20, 2009, petitioner was released from prison after being again found suitable for parole by the Board of Parole Hearings. Pending before the court is respondent’s motion to dismiss this action as moot. Petitioner has not opposed the motion.¹

_____ ¹ On August 18, 2009, the court required petitioner to file an opposition to respondent’s motion, explaining why this action has not been rendered moot. In the alternative, the court instructed petitioner that he could file a request to voluntarily dismiss this case. Petitioner has neither filed an opposition to respondent’s motion, nor otherwise responded to the court’s order.

1 **BACKGROUND**

2 On December 7, 1981, a San Francisco County Superior Court jury convicted
3 petitioner of, inter alia, first-degree murder with use of a firearm. The trial court sentenced
4 petitioner to twenty-five years to life in state prison with the possibility of parole. On April 13,
5 2005, the Board of Parole Hearings found petitioner suitable for parole. On September 9, 2005,
6 Governor Schwarzenegger reversed the Board’s decision. (Pet. at 2 & Attachs.)

7 **RESPONDENT’S MOTION TO DISMISS**

8 Respondent has filed a motion to dismiss arguing that this action has been
9 rendered moot because petitioner has been released on parole, and the Office of the Governor of
10 the State of California has declined review of the Board’s decision. Respondent contends that
11 petitioner has now achieved everything he sought to gain through the filing of his petition.
12 Accordingly, respondent concludes that the court should dismiss this action as moot. (Resp’t’s
13 Mot. to Dismiss at 2 & Ex. A.)

14 **ANALYSIS**

15 The court is unconvinced that petitioner’s release on parole renders this action
16 moot. See, e.g., McQuillon v. Duncan, 342 F.3d 1012, 1015 (9th Cir. 2003) (“McQuillon II”)
17 (noting that the appropriate remedy was immediate release without parole supervision where
18 petitioner’s parole supervision period would have lapsed but for the constitutional violation);
19 Thomas v. Yates, No. CIV F-05-1198 LJO JMD HC, 2009 WL 1743628 at *2-3 (E.D. Cal. June
20 17, 2009) (concluding that a habeas petition challenging the denial of parole was not rendered
21 moot despite petitioner’s release to a determinate term of parole because the court could afford
22 petitioner a remedy with respect to the length of that parole term); Thompson v. Carey, No. CIV
23 S-05-1708 GEB EFB P, 2009 WL 453053 at *4 (E.D. Cal. Feb. 23, 2009) (concluding that
24 “petitioner is entitled to be placed in a position he would have been in had he been released [on

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1 parole] on time.”²; Basque v. Schwartz, No. CIV S-07-0258 GEB KJM P, 2009 WL 187920 at
2 *2-3 (E.D. Cal. Jan. 20, 2009) (denying motion to dismiss petition as moot where, if he
3 prevailed, petitioner could obtain a reduction of the mandatory parole term by the amount of
4 excess time spent in prison); Carlin v. Wong, No. C 06-4145 SI, 2008 WL 3183163 at *3 (N.D.
5 Cal. Aug. 4, 2008) (“Here, petitioner is entitled to credit against his parole period for his time in
6 confinement that was in violation of his due process rights.”).

7 Nonetheless, the court will recommend dismissal of this action due to petitioner’s
8 failure to prosecute this case. As the United States Court of Appeals for the Ninth Circuit has
9 explained:

10 In determining whether to dismiss a case for failure to comply with
11 a court order the district court must weigh five factors including:
12 “(1) the public’s interest in expeditious resolution of litigation; (2)
13 the court’s need to manage its docket; (3) the risk of prejudice to
14 the defendants; (4) the public policy favoring disposition of cases
15 on their merits; and (5) the availability of less drastic alternatives.”

16 Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992). See also, e.g., Clark v. Barnes, No.
17 CV 08-03848 DOC (SS), 2009 WL 393775 at *3-4 (C.D. Cal. Feb. 13, 2009) (dismissing
18 petitioner’s application for writ of habeas corpus for failure to prosecute when the petitioner
19 failed to oppose respondent’s motion to dismiss).

20 In this case, the first two factors as well as the fifth factor cited by the court in
21 Ferdik strongly support dismissal of this action. As noted above, on August 18, 2009, the court
22 issued an order requiring petitioner to file an opposition to respondent’s motion to dismiss

23 ² In Thompson v. Carey, after habeas relief was initially granted, respondent filed a
24 motion for relief from judgment informing the court that the petitioner was not subject to a five-
25 year parole period but rather was subject to lifetime parole pursuant to California Penal Code §
26 3000.1. Further findings and recommendations were then issued, which the assigned district
judge adopted, vacating the original judgment, again granting the habeas application, and this
time directing that respondent discharge petitioner from parole within thirty days unless the
Board of Parole Hearings determined that there was good cause to retain petitioner on parole.
The district court reasoned that petitioner was entitled to such a determination even under the
lifetime parole provision of California Penal Code § 3000.1 now in effect. Thompson v. Carey,
No. CIV S-05-1708 GEB EFB P, 2009 WL 1212202 at *4-5 (E.D. Cal. May 5, 2009).

1 days after being served with these findings and recommendations, any party may file written
2 objections with the court and serve a copy on all parties. Such a document should be captioned
3 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
4 shall be served and filed within ten days after service of the objections. The parties are advised
5 that failure to file objections within the specified time may waive the right to appeal the District
6 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

7 DATED: November 2, 2009.

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11 DALE A. DROZD
12 UNITED STATES MAGISTRATE JUDGE

11 DAD:9
12 cunn2238.157