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

IAN McFARLAND,

Petitioner,

No. CIV S-08-01165 JAM CHS P

vs.

D.K. SISTO, et al,

Respondents.

ORDER

_____ /

Petitioner Ian McFarland is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. McFarland challenges the December 19, 2006, decision by the Board of Parole Hearings finding him unsuitable for parole. McFarland argues, in part, that the Board’s decision was based on the continued reliance on an unchanging factor, specifically the circumstances of his commitment offense.

On May 16, 2008, the Ninth Circuit ordered that Hayward v. Marshall be reheard en banc. Hayward v. Marshall, 512 F.3d 536 (9th Cir. 2008), reh’g en banc granted, 527 F. 3d 797 (9th Cir. 2008). Squarely before the en banc panel in Hayward is whether the continued reliance on an unchanging factor such as the circumstances of the commitment offense could result in a due process violation. Because the en banc panel’s opinion in Hayward may significantly impact the resolution of McFarland’s petition a stay may be appropriate.

1 In determining whether a stay is appropriate pending the resolution of another
2 case, a district court must consider various competing interests, including: (1) the possible
3 damage which may result from the granting of a stay; (2) the hardship to the parties if the suit is
4 allowed to go forward; and (3) the orderly course of justice measured in terms of the simplifying
5 or complicating of issues, proof, and questions of law which could be expected to result from a
6 stay. Lockyer v. Mirant Corp., 398 F.3d 1098, 1110-09 (9th Cir. 2005), citing CMAX, Inc. v.
7 Hall, 300 F.2d 265, 268 (9th Cir. 1962).

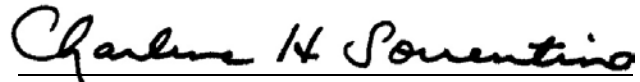
8 The only potential damage resulting from a stay is to McFarland, who may have
9 to wait longer for the resolution of his petition. However, because the Hayward opinion may
10 significantly alter the resolution of his petition, a determination prior to the Hayward opinion
11 may necessitate reconsideration once that opinion is issued. That reconsideration would also
12 result in delay.

13 The hardship to both parties if this matter is allowed to go forward is considerable
14 as any resolution prior to the pending opinion would likely require reconsideration and thus more
15 briefing once the opinion is issued. Further, it is in the interest of the orderly course of justice to
16 await the en banc decision so that McFarland's petition can be considered under the most current
17 precedent, thereby avoiding the need for reconsideration.

18 Because Hayward is being reheard en banc, the pending decision may depart from
19 the original panel decision. Moreover the en banc court may eschew reliance on previous
20 opinions entirely and take a different approach in resolving the questions presented. The
21 “[s]pecial solicitude” that attends this case would be thwarted, and petitioner prejudiced, by an
22 incorrect guess about the reasoning and decision of the en banc panel in Hayward, resulting only
23 in another round of briefing once that decision is announced. Yong v. I.N.S., 208 F.3d 1116,
24 1120 (9th Cir. 2000) (stating that in habeas cases “[s]pecial solicitude is required because the
25 writ is intended to be a ‘swift and imperative remedy in all cases of illegal restraint or
26 confinement’ ”).

1 Accordingly, IT IS ORDERED that this action is administratively stayed pending
2 the Ninth Circuit's en banc decision in Hayward v. Marshall.

3 DATED: October 14, 2009

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5 CHARLENE H. SORRENTINO
6 UNITED STATES MAGISTRATE JUDGE
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