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

FRANK STEPHENSON,

Petitioner,

No. CIV S-08-1730 MCE DAD P

vs.

M. MARTELL,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner is a former state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the 2007 decision by the Board of Parole Hearings denying him parole. Before the court is respondent’s motion to dismiss the petition (Doc. No. 12) as moot in light of the fact that petitioner has since been granted parole.

Petitioner was convicted in 1976 of first degree murder with use of a firearm. He was sentenced to life imprisonment with the possibility of parole. (Answer at 1.) In his habeas petition before this court, petitioner contends that the Board’s 2007 decision violated his due process rights because there was no evidence before the Board of his then-current dangerousness to the public. Petitioner argues that continuing to deny him parole based on immutable factors, such as his commitment offense and prior criminal history, violates the Due Process Clause.

1 Respondent filed an answer to the petition on November 21, 2008. Petitioner
2 filed his traverse on December 4, 2008. On January 30, 2009, respondent filed the pending
3 motion to dismiss after the Governor declined to review the Board's decision to grant petitioner
4 parole and petitioner was released from prison on January 29, 2009. Following his release from
5 confinement, petitioner remains on parole supervision for three years until January 29, 2012.

6 I. Parties' Arguments

7 Respondent moves to dismiss solely on the basis that petitioner has now been
8 granted his release on parole. Respondent has provided the court a copy of a letter dated January
9 23, 2009, from the Office of the Governor, indicating that the Governor has declined to review
10 the Board's decision to grant petitioner parole.

11 Petitioner eventually filed his opposition to the pending motion on July 15, 2009,
12 after being granted two extensions of time to do so. Therein, petitioner argues that his petition
13 has not been rendered moot because he remains in the "constructive custody of the Department
14 of Corrections which still dictates where he lives, works, travels" and the persons petitioner may
15 not associate with while on supervised release. (Opp'n at 4-5.)

16 Petitioner also asserts that he was sentenced under the Indeterminate Sentencing
17 Law which was repealed effective July 1, 1977. According to petitioner, under the Board's rules
18 in effect prior to July 1, 1977, the base term for a first degree murder conviction was 15-19 years.
19 Although petitioner does not contest his base term or net term after applying time credits, he
20 argues that the disparity between his base term (19 years) and the actual time he was required to
21 serve in prison (32 years), entitles him to discharge from parole supervision at this time. (Opp'n
22 at 5.)

23 Finally, petitioner points out that while the statutory provisions now governing
24 parole mandate a life term of parole for those convicted of murder, in 1976 when he was
25 sentenced he was subject to a determinate parole term of three years or less. (Id.)

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1 II. Analysis

2 “Article III, Section 2 of the United States Constitution establishes the scope of
3 federal court jurisdiction, which includes ‘all Cases . . . arising under this Constitution . . . [and]
4 Controversies to which the United States shall be a Party’ Burnett v. Lampert, 432 F.3d
5 996, 999 (9th Cir. 2005). Mootness is jurisdictional. Id.; Foster v. Carson, 347 F.3d 742, 745
6 (9th Cir. 2003) ([F]ederal courts “have no jurisdiction to hear a case that is moot, that is, where
7 no actual or live controversy exists.”). To avoid dismissal on mootness grounds, the court must
8 determine that the habeas petitioner continues to have a “personal stake in the outcome of the
9 lawsuit.” United States v. Verdin, 243 F.3d 1174, 1177 (9th Cir.), cert. denied, 534 U.S. 878
10 (2001). In this regard, “throughout the litigation, the plaintiff must have suffered, or be
11 threatened with, an actual injury traceable to the defendant and likely to be redressed by a
12 favorable decision.” Spencer v. Kemna, 523 U.S. 1, 7 (1998) (internal quotation marks and
13 citations omitted). However, the “party moving for dismissal on mootness grounds bears a heavy
14 burden.” Hunt v. Imperial Merchant Services, Inc., 560 F.3d 1137, 1141 (9th Cir. 2009) (quoting
15 Demery v. Arpaio, 378 F.3d 1020, 1025 (9th Cir. 2004)).

16 A habeas petition is moot where a petitioner’s claim for relief cannot be redressed
17 by a favorable decision of the court issuing a writ of habeas corpus. Spencer, 523 U.S. at 7;
18 Burnett, 432 F.3d at 1000-01. The question of when a collateral attack on a parole denial is
19 rendered moot by a subsequent grant of parole is one that has recently been addressed by several
20 district courts in California.¹ In those cases where the petitioner has been relieved of any and all
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22 ¹ Under California law, “an inmate-turned-parolee remains in the legal custody of the
23 California Department of Corrections through the remainder of his term, and must comply with
24 all of the terms and conditions of parole, including mandatory drug tests, restrictions on
25 association with felons or gang members, and mandatory meetings with parole officers.”
26 Samson v. California, 547 U.S. 843, 851 (2006) The restrictions imposed on a parolee constitute
a concrete injury for purposes of a mootness analysis. See, e.g., Spencer, 523 U.S. at 7-8
(restrictions imposed by the terms of the parole constitute a concrete injury); Jones v.
Cunningham, 371 U.S. 236, 243 (1963) (same). Therefore, release on parole does not moot a
habeas challenge to a prior parole denial in all instances.

1 parole outright, the habeas petition has been found moot. See Hamilton v. Schwartz, No. CV 08-
2 04551-JVS (VBK), 2009 WL 2380093, *2-3 (C. D. Cal. July 30, 2009). Likewise, it has been
3 suggested that if a petitioner is subsequently released on parole for a term of life, there may be no
4 further remedy that the court can fashion even if he prevailed on his challenge to an earlier parole
5 denial. See Thomas v. Yates, ___ F. Supp. 2d ___, No. 1:05-cv-01198-LJO-JMD-HC, 2009 WL
6 1743628, *2 (E.D. Cal. June 17, 2009). But see Thompson v. Carey, No. CIV S-05-1708 GEB
7 EFB P, 2009 WL 1212202, *4-5 (E.D. Cal. May 5, 2009).

8 However, where a petitioner has subsequently been released to a determinate
9 period of parole supervision, federal courts have concluded that the petitioner, should he prevail,
10 may still obtain an order directing California authorities to credit him with the time served in
11 prison in violation of his constitutional rights towards his determinate period of parole
12 supervision. See McQuillion v. Duncan, 342 F.3d 1012, 1015 (9th Cir. 2003) (“McQuillion II”)
13 (noting that the appropriate remedy was immediate release without parole supervision where
14 petitioner’s parole supervision period would have lapsed but for the constitutional violation);
15 Thomas v. Yates, 2009 WL 1743628, at *2-3 (concluding that the habeas petition challenging the
16 denial of parole was not rendered moot despite petitioner’s release to a determinate term of
17 parole because the court could afford petitioner a remedy with respect to the length of that parole
18 term); Thompson v. Carey, No. CIV S-05-1708 GEB EFB P, 2009 WL 453053, at *4 (E.D. Cal.
19 Feb. 23, 2009) (concluding that “petitioner is entitled to be placed in a position he would have
20 been in had he been released [on parole] on time.”)²; Basque v. Schwartz, No. CIV S-07-0258

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22 ² In Thompson v. Carey, after habeas relief was initially granted, respondent filed a
23 motion for relief from judgment informing the court that the petitioner was not subject to a five-
24 year parole period but to lifetime parole pursuant to California Penal Code § 3000.1. Further
25 findings and recommendations were then issued, which the assigned district judge adopted,
26 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 since 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, *4-5 (E.D. Cal. May 5, 2009).

1 GEB KJM P, 2009 WL 187920, at *2-3 (E.D. Cal. Jan. 20, 2009) (denying motion to dismiss
2 petition as moot where, if he prevailed, petitioner could obtain a reduction of the mandatory
3 parole term by the amount of excess time spent in prison); Carlin v. Wong, No. C 06-4145 SI,
4 2008 WL 3183163 (N.D. Cal. Aug. 4, 2008) (“Here, petitioner is entitled to credit against his
5 parole period for his time in confinement that was in violation of his due process rights.”). In
6 such instances, courts have uniformly found that a petition for writ of habeas corpus challenging
7 an earlier parole denial on constitutional grounds has not been rendered moot. Id.

8 Such is the case here. As noted above, petitioner contends that when he was
9 sentenced in 1976, he was subject to a determinate term of parole on release. California Penal
10 Code § 3000.1, which imposes a lifetime parole term for “any inmate sentenced . . . for any
11 offense of first or second degree murder with a maximum term of life imprisonment,” does not
12 apply here since petitioner’s crime was committed prior to January 1, 1983. See Thomas v.
13 Yates, 2009 WL 1743628, at *2 (citing In re Chaudhary, 172 Cal. App. 4th 32, 34 (2009)).
14 Petitioner contends that should he prevail on the pending petition he would be entitled to
15 discharge from parole supervision because of the additional years he served in confinement in
16 violation of his constitutional rights. Specifically, if this court were to determine that petitioner’s
17 due process rights were violated when he was denied parole in 2007, his mandated 3-year period
18 of parole would have begun to run in 2007 and would expire in 2010. Under these circumstances
19 respondent has not met his heavy burden of establishing that dismissal is appropriate on
20 mootness grounds. See Hunt, 560 F.3d at 1141; Demery, 378 F.3d at 1025.

21 Accordingly, respondent’s motion to dismiss the petition as moot should be
22 denied.

23 CONCLUSION

24 In accordance with the above, IT IS HEREBY RECOMMENDED that
25 respondent’s January 30, 2009 motion to dismiss the petition as moot (Doc. No. 12) be denied.

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1 These findings and recommendations are submitted to the United States District
2 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fifteen
3 days after being served with these findings and recommendations, either party may file and serve
4 written objections. Such a document should be captioned “Objections to Magistrate Judge’s
5 Findings and Recommendations.” Any reply to the objections shall be served and filed within
6 five days after service of the objections. The parties are advised that failure to file objections
7 within the specified time may waive the right to appeal the District Court’s order. Martinez v.
8 Ylst, 951 F.2d 1153 (9th Cir. 1991).

9 DATED: August 31, 2009.

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12 _____
13 DALE A. DROZD
14 UNITED STATES MAGISTRATE JUDGE

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