

1 IN THE UNITED STATES DISTRICT COURT
2
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA

4 PAUL TASH,

No. C 05-2417 CW (PR)

5 Petitioner,

ORDER DENYING IN PART
RESPONDENT'S
APPLICATION FOR STAY

6 v.

7 BEN CURRY, Warden,

8 Respondent.

9
10 Respondent requests an expedited ruling on his application for
11 a stay, pursuant to Federal Rule of Civil Procedure 62(c), of the
12 Court's August 27, 2008 Order Granting Habeas Petition. Petitioner
13 opposes the application.

14 Respondent also filed the same application for a stay in the
15 Ninth Circuit Court of Appeals. The Ninth Circuit has granted a
16 temporary stay of the August 27, 2008 Order pending this Court's
17 ruling on the motion to stay. See Tash v. Kane, No. 08-17150, slip
18 op. at 1 (9th Cir. Oct. 28, 2008).

19 Having considered all the papers filed by the parties, the
20 Court DENIES IN PART Respondent's application for a stay.

21 BACKGROUND

22 On June 15, 2005, Petitioner filed a petition for a writ of
23 habeas corpus pursuant to 28 U.S.C. § 2254 based upon Governor
24 Arnold Schwarzenegger's reversal of the decision by the Board of
25 Parole Hearings (Board)¹ finding Petitioner suitable for parole.

26
27 ¹ The Board of Prison Terms was abolished effective July 1,
28 2005, and replaced with the Board of Parole Hearings. Cal. Penal
Code § 5075(a).

1 The Court granted the petition and remanded this case to the
2 Governor to vacate his reversal and to re-evaluate Petitioner's
3 suitability for parole. In its analysis, the Court relied upon a
4 number of Ninth Circuit cases to conclude, "In light of the
5 extensive evidence of Petitioner's in-prison rehabilitation and
6 exemplary behavior, the reliance on the unchanging facts of the
7 murder to deny Petitioner parole for the tenth time -- twenty-two
8 years into his minimum seventeen year sentence -- violated his
9 right to due process." (Aug. 27, 2008 Order at 23.)

10 Respondent requests an expedited ruling on his application for
11 a stay pending his appeal of the August 27, 2008 Order.

12 LEGAL STANDARD

13 Rule 62(c) of the Federal Rules of Civil Procedure provides
14 that "[w]hen an appeal is taken from an interlocutory or final
15 judgment granting, dissolving, or denying an injunction, the court
16 in its discretion may suspend, modify, restore, or grant an
17 injunction during the pendency of the appeal." The standard for
18 granting a stay pending appeal is similar to that for a preliminary
19 injunction. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983).
20 Thus, a party seeking a stay must show either (1) a likelihood of
21 success on the merits of its appeal and the possibility of
22 irreparable harm, or (2) that serious questions regarding the
23 merits exist and the balance of hardships tips sharply in its
24 favor. Lands Council v. McNair, 494 F.3d 771, 775 (9th Cir. 2007).
25 "These two alternatives are extremes of a single continuum in which
26 the greater the relative hardship to the party seeking the [stay],
27 the less probability of success must be shown." Id. (internal
28 quotation marks omitted). In cases such as this one, the court

1 should also consider the effect on the public interest of granting
2 the stay. Lopez, 713 F.2d at 1435.

3 DISCUSSION

4 Respondent argues that a stay should be granted because he has
5 a high likelihood of success on the merits "based on the Court's
6 failure to appropriately apply the deferential standard of federal
7 habeas review, and the erroneous application of the some-evidence
8 test." (Mot. to Stay at 3.) As Respondent points out, these
9 issues are before the en banc panel in Hayward v. Marshall, 527
10 F.3d 797 (2008), and resolution of these issues could impact this
11 case. However, in its August 27, 2008 Order, the Court relied upon
12 other Ninth Circuit authority that continuous reliance on an
13 immutable factor such as the commitment offense could violate due
14 process. See Biggs v. Terhune, 334 F.3d 910, 917 (9th Cir. 2003);
15 Sass v. Cal. Bd. of Prison Terms, 461 F.3d 1123, 1129 (9th Cir.
16 2006); Irons v. Carey, 505 F.3d 846, 850 (9th Cir. 2007).
17 Petitioner argues that if the stay is granted, he will suffer
18 irreparable injury and Respondent will suffer none. Petitioner may
19 suffer irreparable injury if the Court's order is stayed. If he is
20 eventually granted parole as a result of this case, the delay in
21 his release caused by a stay would be irreparable. As stated in
22 the August 27, 2008 Order:

23 Petitioner was found not suitable at nine parole
24 consideration hearings prior to 2004. He was finally
25 found suitable for parole at his tenth Board hearing,
26 after he had been in custody for twenty-two years on
27 his seventeen years to life sentence. (He has now been
28 in custody for more than twenty-five years.) The
Governor looked at the same evidence as the Board and
reached the opposite conclusion.

This case . . . is just the sort of case the Ninth
Circuit envisioned in Biggs, Sass and Irons: where the

1 commitment offense is repeatedly relied on to deny
2 parole notwithstanding the prisoner's exemplary
3 behavior and evidence of rehabilitation since the
4 commitment offense.

5 (Aug. 27, 2008 Order at 22-23.) Respondent states that maintaining
6 the status quo is necessary to preserve his right to a meaningful
7 appeal, the safety of the public and principles of comity and
8 federalism. However, Respondent does not explain how he will be
9 denied a meaningful appeal if the stay is granted. He argues, "If
10 this Court's order is not stayed, the appeal may become moot and
11 the Governor will be left without a channel to challenge this
12 Court's decision." (Mot. to Stay at 6.) His argument is
13 unavailing. While the Governor was ordered to vacate his reversal
14 by October 26, 2008, the Court directed him, within thirty days
15 thereafter, to "issue a new decision re-evaluating Petitioner's
16 suitability for parole in accordance with the August 27, 2008
17 Order," or to "allow the Board's decision to stand." (Aug. 27,
18 2008 Order at 26.) Even if the Governor determined that the
19 Board's parole grant should stand, Petitioner would not be released
20 immediately. The Board would have to set a parole date. The Court
21 will not stay its order directed to the Governor, but if the
22 Governor does determine on consideration of this order that the
23 Board's decision should stand, and the Board sets a release date,
24 the Court will stay Petitioner's actual release for two weeks to
25 allow Respondent again to request a stay, from this Court and if
26 necessary from the Court of Appeals, of the release date pending
27 appeal. Thus, the safety of the public and principles of comity
28 and federalism will not be affected.

Because Petitioner may suffer irreparable injury if the August
27, 2008 Order is stayed and Respondent will suffer no injury, and

1 because Respondent's likelihood of success on the merits is
2 uncertain, the Court denies Respondent's application for a stay
3 pending appeal, except as indicated above.

4 CONCLUSION

5 For the foregoing reasons, Respondent's application for a stay
6 pending appeal (docket no. 19) is DENIED IN PART.

7 This Order terminates Docket no. 19.

8 IT IS SO ORDERED.

9 DATED: 10/29/08



10 CLAUDIA WILKEN
11 United States District Judge

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 TASH,

5 Plaintiff,

6 v.

7 KANE et al,

8 Defendant.

Case Number: CV05-02417 CW

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
10 Court, Northern District of California.

11 That on October 29, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
14 located in the Clerk's office.

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24 Dated: October 29, 2008

25 Richard W. Wiekling, Clerk
26 By: Sheilah Cahill, Deputy Clerk
27
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