

Case No. 3:08-CV-2479
Gwin, J.

Here, the first and third factors compel denial of the Respondent's stay motion. The Respondent has not shown that his appeal to the Sixth Circuit is likely to succeed. Nor has it shown "a substantial case on the merits." See [Hilton, 481 U.S. at 778](#). As this Court's order granting habeas relief observed, the state court's unexplained higher sentence after remand was contrary to the Supreme Court's decision in [North Carolina v. Pearce, 395 U.S. 711 \(1969\)](#). [[Doc. 19 at 6-7](#).] That decision is on point with this case and remains good law.

Moreover, a stay is likely to substantially prejudice the Petitioner because the Sixth Circuit is unlikely to decide the Respondent's appeal within the ten months remaining on the Petitioner's original sentence. Thus, a stay would force the Petitioner to serve part of what the Sixth Circuit is likely to conclude is an unconstitutional sentence. See *supra*.

The second and fourth factors do not alter this analysis. The Respondent contends that he will be injured absent a stay because a resentencing will moot his appeal. But that injury would be a result of the Respondent's own decision to resentence the Petitioner—not an inevitable consequence of this Court's denial of a stay. The only injury that the Respondent faces absent a stay is that, if the Sixth Circuit reverses this Court's grant of habeas relief more than ten months from now, the Respondent may have to release the Petitioner in October 2010. But that injury would not be irreparable because, upon the Sixth Circuit's hypothetical reversal, the Respondent could then reincarcerate the Petitioner for the four years remaining on his sentence. The Respondent does not argue that reincarceration is infeasible (by showing, for example, that the Petitioner poses a significant flight risk, *cf.* [Hilton, 481 U.S. at 777](#) (noting that flight risk is relevant in stay analysis)).

Finally, the public interest does not clearly favor a stay. Although the public interest must account for any danger the Petitioner may pose to the public if released before finishing his sentence,

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that danger must be discounted by his likelihood of success on appeal. *See supra*. The public has no constitutionally cognizable interest in forcing individuals—even potentially dangerous ones—to serve unconstitutional prison sentences.

Thus, the Court **DENIES** the Respondent's motion for a stay. The Respondent may, of course, move the Sixth Circuit for a stay of this Court's order pending appeal. *See* [Fed. R. App. P. 8\(a\)\(2\)\(A\)\(ii\)](#).

IT IS SO ORDERED.

Dated: January 20, 2010

s/ James S. Gwin

JAMES S. GWIN
UNITED STATES DISTRICT JUDGE