IN THE SUPREME COURT OF THE UNITED STATES

No._____

Fred McCullough,

Petitioner-Appellee,

v.

Anthony P. Kane, Warden,

Respondent-Appellant.

EMERGENCY MOTION TO STAY DISTRICT COURT'S ORDER GRANTING IMMEDIATE RELEASE

United States Court of Appeal, Ninth Circuit, Case No. 07-16049
The Honorable Marilyn H. Patel

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TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Respondent-Appellant Ben Curry,[1/] Acting Warden of the Correctional Training Facility, moves for a stay of the district court's order to immediately release convicted murderer Fred McCullough on parole. Although the Governor of California exercised his authority under the California Constitution to find McCullough unsuitable for parole release, and the California courts upheld the Governor's decision, the district court overturned the Governor's parole denial and granted habeas relief in violation of the strict limits placed on habeas corpus relief under 28 U.S.C. § 2254(d) as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA). A stay is necessary to preserve the status quo,

1. A petitioner seeking habeas corpus relief under 28 U.S.C. § 2254 must name the state officer having custody of him as the respondent to the petition. Rule 2(a) of the Rules Governing § 2254 Cases; *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996). As the current warden of the Correctional Training Facility, where McCullough is incarcerated, Ben Curry replaces former warden A.P. Kane as the respondent-appellant in this action.

Respondent's[2/] right to a meaningful appeal, the safety of the public, the Governor's authority over parole, and principles of comity and federalism embodied in § 2254(d).

On March 24, 2008, the Ninth Circuit granted Respondent a temporary stay, up to and including March 28, 2008, to seek relief in this Court. Respondent has exhausted all other means of receiving a stay from the district court and Ninth Circuit Court of Appeals.

STATEMENT OF THE CASE

The facts in this case are undisputed. In 1982, McCullough bludgeoned a sleeping man to death in order to rob him of his wallet, which contained fifty dollars. McCullough was convicted of second-degree murder and received an indeterminate life sentence. On March 17, 2004, the California Board of Parole Hearings found McCullough suitable for parole. The Governor, however, invoked his authority under the California Constitution to reverse the parole grant, finding that McCullough's violent criminal history and the egregious nature of his commitment offense indicated that his release would pose an unreasonable risk of danger to the public. The Superior Court of Los Angeles County, the California Court of Appeal, and the California Supreme Court all upheld the Governor's decision and rejected McCullough's claim that the evidence was insufficient under federal due process standards to justify denial of parole.

The district court, however, disagreed with the Governor's analysis. While finding that the Governor based his decision on proper regulatory factors that were supported by the evidence, the district court determined, in light of dicta in Ninth Circuit opinions, that these factors were not sufficient under the Constitution to uphold the Governor's decision. On

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2. The Warden is the Movant in this Court, the Appellant in the Court of Appeals, and the Respondent in the district court. For clarity, the parties are referred to here as Respondent and Petitioner, their district court designations.

June 1, 2007, the district court ordered McCullough's release on parole. (Ex. A, 6/1/07 Order Granting Petition.)

Respondent requested a stay of the district court's order pending appeal to the Ninth Circuit. The district court granted a stay on June 13, 2007. (Ex. B, 6/13/07 Order Granting Stay.) After the appeal was fully briefed and argued, the Ninth Circuit on its own motion vacated submission of the case pending disposition in the California Supreme Court of two cases raising questions about the standards governing judicial review of California parole determinations: *In re Lawrence*, 150 Cal.App.4th 1511 (2007) (petition for review granted), and *In re Shaputis*, 2007 WL 2372405 (Cal. App. 4th Dist. Aug. 21, 2007) (petition for review granted). (Ex. C, 12/4/07 Order Withdrawing Submission.)[3/] McCullough then petitioned the district court to vacate the June 13 stay, arguing that his continued custody resulted in irreparable injury to him. On February 25, 2008, over Respondent's objection, the district court vacated its stay and ordered McCullough's immediate release. (Ex. D, 2/25/08 Order Vacating Stay.)

Respondent filed an emergency stay request in the Ninth Circuit, asking that McCullough remain in custody pending that court's resolution of his appeal. On March 18, 2008, in a divided opinion, the Ninth Circuit panel denied the motion to stay and made the district court's release order effective immediately. (Ex. E, 3/18/07 Order Denying Stay.) The majority held that Rule 23(c) of the Federal Rules of Appellate Procedure and the factors in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), weighed in favor of releasing McCullough because his continued confinement would injure the liberty interest allegedly created when

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3. *In re Lawrence* and *In re Shaputis* are expected to clarify the manner in which California courts apply the some-evidence standard in reviewing executive parole decisions. As state court interpretations of state court law are irrelevant to federal habeas analysis under AEDPA, it is not clear why the decisions in *Lawrence* and *Shaputis* would impact the Ninth Circuit's analysis of McCullough's due process claims.

the Board found him suitable for parole. (Ex. E at 2.) The majority also noted that, in two recent cases challenging gubernatorial parole reversals, the California Supreme Court declined to stay appellate court orders granting release.[4/] The majority further found that McCullough's parole would not irreparably injure the state, and that the public had an interest "in preserving the principle that a successful habeas petitioner will be released pending appeal, and in rewarding a prisoner's rehabilitation." (*Id.*) The dissenting judge concluded that the state would be irreparably injured should McCullough abscond from parole supervision, and that the public had an "even stronger interest in preserving the principle that its laws will be enforced by its elected officials rather than by non-elected federal judges." (Ex. E at 3.)

This Court should stay the order compelling McCullough's release because the Ninth Circuit's balancing of the *Hilton* factors failed to honor the principles of comity and deference to the State, as mandated by AEDPA. Moreover, the presumption of release embodied in Federal Appellate Rule of Procedure 23(c) should not apply to petitions challenging parole denials, and the appropriate remedy for any violation of McCullough's Fourteenth Amendment rights is remand to the Governor for a new evaluation consistent with due process, not immediate release from custody. For these reasons, Respondent respectfully requests an order staying McCullough's release until final resolution of this appeal.

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4. More recently, the California Supreme Court ruled that the State need not release a prisoner ordered to parole by the state appellate court until the prisoner's case has been made final through state Supreme Court review. Order Denying Stay as Unnecessary, *In re Dannenberg*, 156 Cal. App. 4th 1387 (2007) (petition for review granted). The Ninth Circuit did not address this in its order denying a stay.

RELEVANT LEGAL STANDARDS

Where a federal court of appeals has refused to grant a stay of a district court judgment, the Supreme Court or a Justice thereof may grant the stay or injunction in order to maintain the Court's ultimate jurisdiction. 28 U.S.C. § 1651(a); *In re Equitable Office Bldg. Corp.*, 72 S. Ct. 1086, 1087-88 (1946). Absent a stay, the district court's order granting McCullough's release will continue in effect pending review in the court of appeals and in this Court unless the order is modified or an independent order is entered. Sup. Ct. R. 36.4.

Under AEDPA, when a state prisoner's claim has been adjudicated on the merits in state court, a federal court may grant a writ of habeas corpus on the same claim only if the state court's adjudication was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding." 28 U.S.C. § 2254(d)(1-2).

Any presumption that a district court's release order is correct may be overcome by a showing of certain factors, including: (1) whether the stay applicant has made a strong showing of likely success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other interested parties; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 774, 776 (1987). Other factors to be considered include the possibility of flight, the risk of danger to the public, and the state's interest in continuing custody and rehabilitation. *Id.* at 777.

ARGUMENT

I.

A PROPER BALANCING OF THE *HILTON* FACTORS MANDATES A STAY PENDING APPEAL.

Under *Hilton*, a stay is appropriate when the stay applicant has made a strong showing of likely success on the merits, when the applicant will be irreparably injured absent a stay, and when a stay would benefit the public interest. *Hilton*, 481 U.S. at 776-77. Here, a review of the relevant factors indicates that this Court should issue a stay pending appeal. First, there is a high likelihood that Respondent will succeed on the merits, as the district court abused its discretion by using circuit court dicta—rather than "clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)—to overturn the state court decisions upholding the Governor's parole denial. Moreover, McCullough's release will irreparably injure the Governor, the people of California, and AEDPA's underlying principle of "further[ing] comity, finality, and federalism." *Miller-El v. Cockrell*, 573 U.S. 322, 337 (2003). This Court should grant a stay in order to protect these important interests.

A. Because the District Court Failed to Base Its Decision on Clearly Established Federal Law, Respondent Has a High Likelihood of Success on Appeal.

Under the first *Hilton* factor, a stay should be granted because Respondent has a high likelihood of success on the merits. Where the state can establish "that it has a strong likelihood of success on appeal, or where, failing that, it can nonetheless demonstrate a substantial case on the merits, continued custody is permissible if the second [irreparable injury] and fourth [public safety] factors in the traditional stay analysis mitigate against release." *Hilton*, 481 U.S. at 778.

In the current matter, Respondent has a substantial case on the merits because the district court failed to apply the deferential standard of federal habeas review. Under AEDPA, when a state prisoner's claim has been adjudicated on the merits in state court, a federal court may grant a writ of habeas corpus only if the state court's adjudication was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding." 28 U.S.C. §§ 2254(d)(1)-(2). This "highly deferential standard for evaluating state court rulings demands that the state court decisions be given the benefit of the doubt." *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002).

The district court, however, used only Ninth Circuit dicta and state appellate cases to support an independent finding that the length of McCullough's incarceration and his positive in-prison behavior were more determinative of parole suitability than his past criminal behavior, despite California law to the contrary and no Supreme Court holding indicating that federal courts may exercise such discretion over the decision of a state executive. Because the district court overturned a valid state court decision based on law not clearly established by the Supreme Court, Respondent has a high likelihood of success on appeal—or ultimately, certiorari—and a stay pending appeal should be granted.

1. The some-evidence standard is not applicable in the parole consideration context.

For the purposes of AEDPA, "clearly established Federal law" refers only to the holdings, as opposed to dicta, of the United States Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). The district court, however, based its decision on the Ninth Circuit's erroneous holding that under clearly established Supreme Court law, state parole decisions must be reviewed under the some-evidence standard found in *Superintendent v. Hill*, 472

U.S. 445 (1985). *Irons v. Carey*, 505 F.3d 846, 851 (9th Cir. 2007).[5] In *Hill*, this Court held that some evidence must support the decision of a prison disciplinary board to revoke good time credits. *Id.* at 455. Based on *Hill*, the Ninth Circuit held in *Irons* that the some-evidence standard applies not only in the disciplinary context, but the parole context as well. *Irons*, 505 F.3d at 851.

This Court, however, has never rendered any such holding. In fact, in the context of parole determination, the Court has specifically rejected the idea that a parole board must specify particular evidence to support a parole suitability decision. *Greenholtz*, 442 U.S.at 15-16. Instead, the *Irons* court did exactly what this Court warned against in *Carey v. Musladin*, 127 S. Ct. 649 (2006): it took a test from one set of circumstances, applied it in an entirely different set of circumstances, and deemed it this application "clearly established federal law" for the purposes of AEDPA. As recently affirmed in *Wright v. Van Patten*, 128 S. Ct. 743, 745 (2008) (*per curiam*), "clearly established federal law" refers only to the holdings of the nation's highest court on the specific issue presented. The Ninth Circuit's use of its own precedent to determine "clearly established federal law" was therefore improper, and the district court erred in reviewing McCullough's claim under the some-evidence standard.

In *Greenholtz*, this Court held that a parole board's procedures are constitutionally adequate if the prisoner is given an opportunity to be heard and, if parole is denied, a decision informing him of the reasons he did not qualify for release. *Greenholtz*, 442 U.S. at 17. Accordingly, under AEDPA standards, the district court's scope of review was limited

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5. The propriety of the Ninth Circuit's application of the some-evidence test in the context of state parole decisions is currently being challenged in *Hayward v. Marshall*, 512 F.3d 536 (9th Cir. 2008) (petition for en banc review pending).

to whether McCullough received those two protections. Because the district court improperly expanded the due process required under clearly established Supreme Court law, Respondent has a reasonable likelihood of success on appeal, which weighs in favor of a stay.

2. Even if the some-evidence standard is clearly established federal law in the context of the context of parole consideration, the district court misapplied the standard by re-weighing the evidence.

Even if the some-evidence standard were applicable to the federal review of state parole decisions, the district court nonetheless erred by reassessing and re-weighing the evidence of McCullough's parole unsuitability. The some-evidence standard "does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence;" rather, it assures that "the record is not so devoid of evidence that the [Governor's] findings . . . were without support or otherwise arbitrary." *Hill*, 472 U.S. at 455-56. Under this standard, the district court was obliged to uphold the Governor's parole denial so long as "there [was] *any* evidence in the record that could support [his] conclusion." *Id.* (emphasis added).

Here, the district court found that under California's parole regulations, the heinous nature of McCullough's commitment offense and his violent criminal history supported the Governor's conclusion that McCullough was unsuitable for parole release. (Ex. A at 10-11.) However, the district court then determined that the Governor placed undue weight on McCullough's past behavior, and that his lengthy incarceration and positive in-prison behavior were more determinative of parole suitability than his past criminal activities. (*Id.* at 12.) In essence, the court conducted its own parole consideration assessment, rather than determine whether any evidence supported the Governor's decision. *Hill*'s extremely deferential some-evidence standard does not permit this degree of judicial intrusion.

Furthermore, there is no "clearly established Federal law" preventing the Governor from basing a parole denial on an prisoner's past criminal behavior. The district court cited *Biggs v. Terhune*, 334 F.3d 910 (9th Cir. 2003), to support its finding that the Governor's reliance on static factors violated McCullough's due process rights. However, *Biggs*'s statement that reliance on an unchanging factor to deny parole "could result in a due process violation" is merely circuit court dicta, and not "clearly established Federal law, as determind by the Supreme Court" sufficient to overturn a state court decision. Accordingly, the state courts did not violate clearly established Supreme Court law by upholding the Governor's denial of parole.

Because the district court failed to apply clearly established federal law, and instead based its decision on Ninth Circuit dicta and its own evaluation of McCullough's suitability for parole, Respondent has a high likelihood of success on appeal. As such, a stay pending appeal is appropriate.

B. Petitioner's Release Will Result in Irreparable Injury to the Governor, the Public, and the Principles of Comity and Federalism.

When a district court invalidates a "presumptively constitutional" exercise of state power, the Court may grant a stay despite the lack of injury to any party. *See Bowen v. Kendrick*, 483 U.S. 1304 (1987); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977). As the exercise of state police power, and specifically a state's efforts to protect its citizens' safety, is a presumptively constitutional exercise of power, a stay would be appropriate even absent the risk of injury to Respondent. *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 669-70 (1981). This case, however, presents a grave risk of injury to the Governor, the public, and the principles of AEDPA. Accordingly, under the second and third *Hilton* factors, a stay should be granted because Respondent and other interested parties will be irreparably injured absent a stay. Moreover, under the fourth

Hilton factor, consideration of the public interest requires that McCullough remain in custody until this case has been settled on appeal. *Hilton*, 481 U.S. at 778.

First, McCullough's release will result in irreparable harm to the Governor. In 1988, the people of California voted to amend the state constitution and confer upon the Governor the authority to review decisions by the Board of Parole Hearings concerning the parole of murderers serving indeterminate life sentences. Cal. Const. art. V, § 8; Cal. Penal Code § 3041.2; *In re Rosenkrantz*, 29 Cal. 4th 616, 659 (2002). As such, the Governor may reverse a murderer's parole grant if he determines that the prisoner's release would pose an unreasonable risk of danger to the public. *Id.* The lower court's order to release McCullough forthwith undermines the Governor's authority and his duty to protect the public from harm.

Moreover, the discretionary power to grant and revoke parole in California is vested exclusively in the state's executive branch. *Greenholtz*, 442 U.S. at 7 (no constitutional right to parole); *Rosenkrantz*, 29 Cal. 4th at 659. The proper function of the federal courts with respect to parole issues is simply to ensure, under the deferential standard of review under the habeas corpus statute, that the state courts reasonably adjudicated any due process claim raised by the prisoner, not to independently determine whether an prisoner is entitled to release on parole. *See Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). However, by refusing to stay the district court's order, the Ninth Circuit permitted the district court to usurp the Governor's role as the arbiter of parole decisions in California. As pointed out by the dissent, this undermines the Governor's authority and arrogates to the federal courts a power properly confined to the elected state executive. A stay is necessary to avoid this irreparable harm.

The lower court's decision also risks irreparable harm to the public, as it has ordered the release of a convicted murderer who had been found to pose an unreasonable risk of

danger to society. McCullough has a history of violent robberies, and he bludgeoned a sleeping man to death for fifty dollars. It is not unreasonable for the Governor to be concerned with McCullough's lengthy criminal history, particularly given the high rate of recidivism among California parolees. *See, e.g.* Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994* (2002). Further, as pointed out by the dissent, McCullough might abscond from parole supervision rather than face a return to custody, especially since he has a wife living in Texas. (Ex. E at 3); *see Hilton*, 481 U.S. at 777 (risk of flight appropriate consideration in determining whether stay should be granted).

The length of McCullough's remaining sentence also indicates heightened state interest. The *Hilton* court found that the state's interest "in continuing custody and rehabilitation pending a final determination of the case on appeal is also a factor to be considered; it will be strongest where the remaining portion of the sentence to be served is long, and weakest when there is little of the sentence remaining to be served." *Hilton*, 481 U.S. at 777. Given that McCullough is serving a life sentence with the possibility—not the guarantee—of parole, the public's interest in his continuing custody is especially strong. *See In re Dannenberg*, 34 Cal. 4th 1061, 1083 (an indeterminate sentence is one "of imprisonment *for life,* subject to the possibility of *sooner* release on parole"). McCullough's release from prison would also undermine the public interest in criminal deterrence, framed by this Court in *Greenholtz* as "whether, in the light of the nature of the crime, the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice." *Greenholtz*, 442 U.S. at 8.

Morever, as noted by the dissent, the public has a very strong interest in having its laws enforced by elected officials, rather than non-elected federal judges. As this Court has held, "[t]he deference [federal courts] owe to the decisions of the state legislatures under our

federal system . . . is enhanced where the specification of punishments is concerned, for these are peculiarly questions of legislative policy." *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (citations and internal quotation marks omitted). These same considerations apply to the state's executive branch. In 1988, the people of California voted to amend the state constitution in order to give the Governor final say over a murderer's suitability for parole. The district court erred in appropriating this power to itself in the absence of clearly established Supreme Court law stating that such judicial intrusion is appropriate.

Finally, the Ninth Circuit's refusal to issue a stay pending appeal risks irreparable injury to AEDPA's goals of comity, finality, and federalism. Here, three state courts evaluated McCullough's habeas petition under the some-evidence standard and determined that the Governor's parole reversal was proper. (Ex. A, p. 3); *See Rosenkrantz*, 29 Cal. 4th at 658 (state courts must review gubernatorial parole decisions under *Hill*'s some-evidence standard). Based on nothing more than a disagreement with the weight of the facts, the district court overturned these valid state court decisions. Such second-guessing of the state courts is improper under AEDPA, which "placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners." *Miller-El*, 537 U.S. at 337. Moreover, the public interest weighs strongly in favor of upholding state court decisions dealing with state law issues such as criminal punishment and public safety. Accordingly, consideration of public policy mandates that the state court decisions upholding the Governor's parole reversal not be disturbed until this case has been resolved on appeal.

II.

BECAUSE MCCULLOUGH DID NOT CHALLENGE THE VALIDITY OF HIS MURDER CONVICTION OR LIFE-MAXIMUM SENTENCE, IMMEDIATE RELEASE IS NOT A PROPER REMEDY.

Federal Rule of Appellate Procedure 23(c) provides that "[w]hile a decision ordering

the release of a prisoner is under review, the prisoner must—unless the court or judge rendering the decision, or the court of appeals . . . orders otherwise—be released on personal recognizance, with or without surety." However, this Court has not spoken to the question of whether Rule 23(c) applies to an prisoner challenging a parole denial pending appeal. Instead, the cases in which Rule 23(c) has been applied involve the invalidation of an prisoner's conviction. *See, e.g., Workman v. Tate*, 958 F.2d 164 (6th Cir. 1992). Respondent is aware of no case in which Rule 23(c) has been used to secure the release of a prisoner not challenging the validity of his or her conviction.

As a convicted murderer, McCullough has a lesser interest in his liberty pending appeal than a defendant whose guilt is still at issue. *See Greenholtz*, 442 U.S. at 7 ("no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence"); *see also Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (recognizing that criminal defendants have a greater liberty interest than convicted prisoners facing administrative discipline). Unlike those who have had their conviction overturned, McCullough's conviction—and his life-maximum sentence—remain intact and unchallenged. Thus, the presumption of release under Federal Rule of Appellate Procedure 23 is inapplicable to this case.

Moreover, immediate release is not a proper remedy for alleged violation of due process. The function of the federal habeas corpus court with respect to issues of state parole is to ensure, within the limits of review set out in 28 U.S.C. § 2254(d), that the prisoner is accorded due process. *See Morrissey*, 408 U.S. at 480. Thus, even if a due process violation is found, the remedy should be limited to a new parole consideration hearing that comports with due process. *See Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 984-85 (9th Cir. 2002) (due process violation in parole revocation process remedied through new hearing); *contra*

McQuillion v. Duncan, 342 F.3d 1012 (9th Cir. 2003). In other circumstances, courts have recognized that the proper remedy for a due process violation is an order granting the prisoner the process due—not an order granting immediate release from custody. *See Clifton v. Attorney General of the State of Cal.*, 997 F.2d 660, 665 (9th Cir. 1993) (due process violation based on delayed parole hearing); *Garafola v. Benson*, 505 F.2d 1212, 1219 (7th Cir. 1974) (federal prisoners denied meaningful parole consideration entitled to new hearing "so the Board can write on a clean slate"); *Billiteri v. U.S. Bd. of Parole*, 541 F.2d 938, 944 (2nd Cir. 1976) ("The only remedy the court can give is to order the Board to correct the abuses or wrongful conduct within a fixed period of time, after which, in the case of non-compliance, the court can grant the writ of habeas corpus and order the prisoner discharged from custody").

In addition, the release of a prisoner not challenging the validity of his conviction is a remedy reserved for extreme cases. "Unconditional release of the petitioner is a remedy of last resort, which is generally granted only when a state has failed to comply with federal court orders specifying other forms of relief." Regina Chang, Caroline S. Platt, and Ben E. Wallerstein, *Habeas Relief for State Prisoners*, 90 Geo. L. J. 1937, 1975-76 (2002), citing *Gall v. Parker*, 231 F.3d 265, 335-36 (6th Cir. 2000) (habeas court barred state court from retrial because of double jeopardy prohibition); *Foster v. Lockhart*, 9 F.3d 722, 727 (8th Cir. 1993) (district court had authority to prevent state from retrying successful habeas petitioner when retrial would violate petitioner's constitutional rights); *Capps v. Sullivan*, 13 F.3d 350, 352 (10th Cir. 1993) (district court had authority to bar retrial in state court when state failed to retry petitioner within 90 days of federal habeas court's conditional grant of habeas relief).

Thus, even if the district court were correct in its finding that McCullough's due process rights were violated by the Governor's parole reversal, the only appropriate remedy

would be a remand to the Governor to proceed in accordance with due process. Accordingly, the district court erred in ordering McCullough's immediate release, this Court should grant a stay of that order pending appeal.

CONCLUSION

Respondent respectfully requests a stay, pending resolution of Respondent's appeal, of the district court's order releasing McCullough to parole.

Dated: March 27, 2008

Respectfully submitted,

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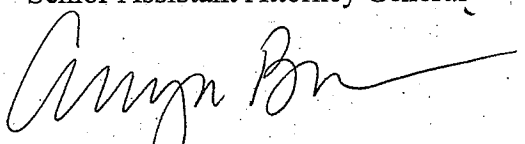

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SF2007200433

EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRED McCULLOUGH,

Petitioner,

v.

ANTHONY P. KANE, warden,

Respondent.

/

No. C 05-2207 MHP (pr)

ORDER GRANTING HABEAS PETITION

INTRODUCTION

Fred McCullough, a prisoner at the Correctional Training Facility in Soledad, filed this pro se action seeking a writ of habeas corpus under 28 U.S.C. § 2254 to challenge the California Governor's 2004 decision that he was not suitable for parole. After 21 years of incarceration on his 15-to-life sentence during which he has exhibited very favorable prison behavior for almost two decades, McCullough's crime and pre-offense criminality do not provide sufficient evidence to support the Governor's decision that he is currently unsuitable for parole. The petition will be granted.

BACKGROUND

Fred McCullough was convicted in 1983 in Los Angeles County Superior Court of second degree murder and was sentenced to a term of 15 years to life in prison. His habeas petition does not concern that conviction directly, but instead focuses on the August 12, 2004 decision by Governor Arnold Schwarzenegger to reverse a March 17, 2004 decision by the Board of Prison Terms (now known as the Board of Parole Hearings

("BPH")) finding him suitable for parole. This was McCullough's second reversal: McCullough also had been found suitable by the BPH in 2002, but that was reversed by Governor Davis.

The specifics regarding the crime and the circumstances regarding parole suitability are described in the Discussion section later in this order and are only mentioned here in brief. In 1982, McCullough used a brick to kill a man by hitting him 2-3 times in the head to facilitate the robbery of that man to obtain money to buy drugs. Before McCullough committed the murder at age 20, he had several juvenile adjudications for crimes and had a significant alcohol and substance abuse problem. As will be shown below, McCullough had an unfavorable start to his imprisonment, but turned his life around in 1985 and has exhibited exemplary behavior since that time.

McCullough sought relief in the California courts.[1] The California Court of Appeal denied McCullough's petition for writ of habeas corpus in a one-sentence order citing In re Rosenkrantz, 29 Cal. 4th 616, 667 (Cal. 2002). Resp. Exh. E. The California Supreme Court summarily denied his petition for review.

McCullough then filed his federal petition for writ of habeas corpus, asserting that his right to due process had been violated. After an unsuccessful motion to dismiss, respondent filed an answer. McCullough filed a traverse. The matter is now ready for a decision on the merits.

JURISDICTION AND VENUE

This court has subject matter jurisdiction over this habeas action for relief under 28 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the challenged action occurred at the Correctional Training Facility in Soledad. Soledad is in Monterey County and within this judicial district. 28 U.S.C. §§ 84, 2241(d).

EXHAUSTION

Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are required first to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the

highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). The parties do not dispute that state court remedies were exhausted for the claims asserted in the petition.

STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); see Williams (Terry) v. Taylor, 529 U.S. 362, 409-13 (2000). Section 2254(d) applies to a habeas petition from a state prisoner challenging the denial of parole. See Sass v. California Board of Prison Terms, 461 F.3d 1123, 1126-27 (9th Cir. 2006).

The application of § 2254(d) in this case is affected by the fact that there is no reasoned explanation by a state court for the rejection of Willis' habeas petitions on the merits. The state courts gave no reasoned explanation of the denial of the petitions. Where, as here, the state court gives no reasoned explanation of its decision, an "independent review of the record" is the only means of deciding whether the state court's decision was objectively reasonable. Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).

DISCUSSION

A. Biased Decision-Maker Claim

McCullough asserted in his petition that Governor Schwarzenegger has an anti-parole policy in violation of due process. See Petition, p. 9. The claim fails for a lack of evidentiary support, as McCullough has presented no evidence to support his allegations. Indeed, his assertion that Governor Schwarzenegger grants parole in a third of cases that

come before him undermines the assertion that he is systematically biased against parole and has an anti-parole policy. The court now turns to McCullough's claim that the decision reached by the Governor violated due process.

B. Sufficiency Of Evidence Claim

1. Due Process Requires That Some Evidence Support A Parole Denial

A California prisoner with a sentence of a term of years to life with the possibility of parole has a protected liberty interest in release on parole and therefore a right to due process in the parole suitability proceedings. See Sass, 461 F.3d at 1127-28; Board of Pardons v. Allen, 482 U.S. 369 (1987); Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1 (1979); Cal. Penal Code § 3041(b).

A parole board's decision satisfies the requirements of due process if "some evidence" supports the decision. Sass, 461 F.3d at 1128-29 (adopting some evidence standard for disciplinary hearings outlined in Superintendent v. Hill, 472 U.S. 445, 454-55 (1985)). California law adds a layer of review by giving the governor the power to review the parole board's decision and to affirm, modify or reverse the decision but only on the basis of the same factors the parole authority is required to consider. See Cal. Penal Code § 3041.2; Cal. Const. art. V, § 8(b). The California Supreme Court has determined, as a matter of state law, that the governor's decision must also satisfy the "some evidence" standard. See In re Rosenkrantz, 29 Cal. 4th 616, 676-77 (Cal. 2002), cert. denied, 538 U.S. 980 (2003). Because the governor's review is an extension of the parole consideration process and the parole decision does not become final until such review has occurred (or the time for it has passed), the governor's decision must be supported by some evidence.

"To determine whether the some evidence standard is met 'does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached'" by the parole board or the governor. Id. at 1128 (quoting Superintendent v. Hill, 472 U.S. at 455-56). The "some evidence standard is minimal, and assures that 'the record is not so devoid of evidence that the findings

of the . . . board were without support or otherwise arbitrary.'" Id. at 1129 (quoting Superintendent v. Hill, 472 U.S. at 457). The some evidence standard of Superintendent v. Hill is clearly established law in the parole context for purposes of § 2254(d). Sass, 461 F.3d at 1129.

Having determined that there is a due process right, and that some evidence is the evidentiary standard for judicial review, the next step is to look to state law because that sets the criteria to which the some evidence standard applies. One must look to state law to answer the question, "'some evidence' of what?"

2. State Law Standards For Parole For Murderers In California

California uses indeterminate sentences for most non-capital murderers, with the term being life imprisonment and parole eligibility after a certain minimum number of years. A first degree murder conviction yields a base term of 25 years to life and a second degree murder conviction yields a base term of 15 years to life imprisonment. See In re Dannenberg, 34 Cal. 4th 1061, 1078 (Cal.), cert. denied, 126 S. Ct. 92 (2005); Cal. Penal Code § 190. The upshot of California's parole scheme described below is that a release date normally must be set unless various factors exist, but the "unless" qualifier is substantial.

A BPH panel meets with an inmate one year before the prisoner's minimum eligible release date "and shall normally set a parole release date. . . . The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates." Cal. Penal Code § 3041(a). Significantly, that statute also provides that the panel "shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting." Cal. Penal Code § 3041(b).

One of the implementing regulations, 15 Cal. Code Regs. § 2401, provides: "A parole date shall be denied if the prisoner is found unsuitable for parole under Section 2402(c). A parole date shall be set if the prisoner is found suitable for parole under Section 2402(d). A parole date set under this article shall be set in a manner that provides uniform terms for offenses of similar gravity and magnitude with respect to the threat to the public."[2] The regulation also provides that "[t]he panel shall first determine whether the life prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." 15 Cal. Code Regs. § 2402(a). The panel may consider all relevant and reliable information available to it. 15 Cal. Code Regs. § 2402(b). As noted earlier, the governor's review must be done on the basis of the same factors the parole authority is required to consider. See Cal. Penal Code § 3041.2; Cal. Const. art. V, § 8(b).

The regulations contain a matrix of suggested base terms for several categories of crimes. See 15 Cal. Code Regs. § 2403. For example, for second degree murders, the matrix of base terms ranges from the low of 15, 16, or 17 years to a high of 19, 20, or 21 years, depending on some of the facts of the crime. Some prisoners estimate their time to serve based only on the matrix. However, going straight to the matrix to calculate the sentence puts the cart before the horse because it ignores critical language in the relevant statute and regulations that requires the prisoner first to be found suitable for parole.

The statutory scheme places individual suitability for parole above a prisoner's expectancy in early setting of a fixed date designed to ensure term uniformity. Dannenberg, 34 Cal. 4th at 1070-71. Under state law, the matrix is not reached unless and until the prisoner is found suitable for parole. Id. at 1070-71; 15 Cal. Code Regs. § 2403(a) ("[t]he panel shall set a base term for each life prisoner who is found suitable for parole"). The California Supreme Court's determination of state law in Dannenberg is binding in this federal habeas action. See Hicks v. Feiock, 485 U.S. 624, 629-30 (1988).

The California Supreme Court also has determined that the facts of the crime can alone support a sentence longer than the statutory minimum even if everything else about the prisoner is laudable. "While the Board must point to factors beyond the minimum elements of the crime for which the inmate was committed, it need engage in no further comparative analysis before concluding that the particular facts of the offense make it unsafe, at that time, to fix a date for the prisoner's release." Dannenberg, 34 Cal. 4th at 1071; see also Rosenkrantz, 29 Cal. 4th at 682-83 ("[t]he nature of the prisoner's offense, alone, can constitute a sufficient basis for denying parole" but might violate due process "where no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for that offense").

3. McCullough As A Parole Candidate

The negative facts about McCullough concern the commitment offense and his pre-offense history. They were described by the Governor:

> On the evening of July 12, 1982, Fred McCullough and friends were drinking alcohol and smoking marijuana and PCP. He, along with two others, walked through a neighborhood searching for a house to burglarize, hoping to get money to buy more drugs. They came across John Kukish, who was asleep in his car, and decided to rob him instead. Some sort of brick was grabbed from a nearby flowerbed–and Mr. McCullough used it to strike Mr. Kukish multiple times on the head before taking his wallet and fleeing. Mr. Kukish died a few hours later.
>
> Mr. McCullough was arrested by police nine days after the murder. He told the arresting officers, "I was going to turn myself in, I just wanted to spend one more night with my lady, I'll do my 10 years for the murder then start over." After a court trial, Mr. McCullough was convicted of first-degree murder. His conviction was subsequently reduced to second-degree murder, and he was sentenced to 15 years to life in prison.
>
> At the time of the murder, Mr. McCullough was 19 years old. He had no previous criminal record as an adult–but as a juvenile, his history includes assaultive and violent conduct. At age 16, Mr. McCullough stole a purse from an elderly woman, for which he was sent to juvenile probation camp. Later that same year, after his release from camp, Mr. McCullough and two crime partners ambushed, beat, and robbed a man in a public restroom. He again was sent to juvenile probation camp. Mr. McCullough also admits that, at age 17, he argued with a park employee, left the park, and then returned with a stolen gun and threatened to shoot all the employees in the park. He further admits to being a gang member from age 14 through age 17 and being expelled from high school at age 19 following a physical altercation with a school security guard. It was just months after this last incident when Mr. McCullough bludgeoned to death Mr. Kukish during the course of an intended robbery.

Petition, Exh. C, p. 1.

Although McCullough's commitment offense and pre-incarceration behavior were undoubtedly negative, positive information about him started developing shortly after his arrival in the CDC system when he decided to change his life.

McCullough went into custody as a high school dropout, but changed that during his imprisonment. Since his arrival in the CDC system, he obtained a G.E.D. in 1986, an A.A. degree and a B.A. degree in social services in 1991. RT 26. One of the BPH commissioners noted that although many prisoners take college courses, this was one of the first times he had seen a prisoner make it all the way through to actually obtain a B.A. degree. RT 26. McCullough attributed his educational achievements to determination, "believing in myself and believing I could turn things around, and hard work." RT 26.

He also developed vocational skills in prison that would make him employable if released from custody. He had been working as a wood finisher in the Prison Industries Authority, where he was the lead man in the spray booth and had been there since about March 2001. RT 27. He had been "receiving exceptional work reports for quite some time across the board with nothing lower than exceptional," according to a commissioner. RT 27-28. His supervisors stated that McCullough also had trained people, and had a good attitude and work ethic. RT 28. McCullough previously had been assigned to culinary and yard maintenance, where he also received favorable reviews. RT 28. He had received a vocational certificate in forklift operation, and had been trained in "vocational upholstery, auto, and furniture." RT 28.

McCullough went into custody with a significant substance and alcohol abuse problem and worked on it in custody. He had started drinking beer at age 12, used PCP fairly often since age 16, used LSD and marijuana numerous times, and "popped pills." RT 18-20, 43. He was using drugs on the day of the murder and his desire to obtain more drugs prompted the robbery of the victim. He saw the connection between drugs and his criminality. See RT 38. After he went to prison, McCullough joined an Alcoholics Anonymous program. He had been participating in A.A. since 1989 or 1990 and had been in

the particular A.A. program at his prison since November or December 2001. RT 29. He was able to demonstrate his familiarity with the A.A. program by discussing a step in that program that was of particular value to him. See RT 30-31. He had been sober and drug-free for 18 years, since 1986. RT 31, 43. Although he used marijuana when he first got to prison, he stopped in about 1986 when he started college: "It got to a point where once I got into college, I decided that I would take this serious. It was a point I was going to succeed or I was going to fail. And this is something I wanted to succeed at." RT 32, 43.

He also had done other self-improvement work. He completed a 2-hour "employability program" in 2003. RT 29. Until a housing transfer ended it, he had worked for 1-1/2 years on the juvenile offender deterrent program, which involved inmates speaking to children to steer them away from criminality. See RT 29-30. He had participated in a 14-week workshop concerning the impact of crime on victims and 10 hours of anger management. See Petition, Exh. D, p. 3. He also had participated in "extracurricular activities such as a music program, a holiday donation drive, and a Christmas Festival." Petition, Exh. C, p. 2.

McCullough's disciplinary history shows that he got off to a rough start, but had behaved himself for the last 18 years before the Governor's decision. He received four CDC-115s (three in 1984 for refusal to exit the yard, evading post count, and failure to report; and one in 1985 for threatening staff). RT 33. He also had received 28 CDC-128 counselling memoranda for lesser rules transgressions, although 19 of those occurred in 1984 and 1985 and the last occurred in 1994. RT 33-35. While the number of disciplinary incidents causes some concern, they were for the most part old: he had not received a CDC-115 for 19 years and had not received a CDC-128 for 10 years before the Governor found him unsuitable. The disciplinary pattern fit with his statement that at some point (in about 1985), he decided to "turn things around." RT 26.

The most recent psychological reports were favorable. The 2002 psychological report stated that there was no change from the 2001 report, which in turn stated there was no change from the 1999 report. See RT 40. The last explained report was from psychologist

Terrini on September 17, 1998. Dr. Terrini said McCullough had an Axis I diagnosis of "polysubstance dependence in institutional remission or at least for the last 18 years" and an Axis II diagnosis of "features of antisocial personality disorder by history, greatly improved." RT 41. Dr. Terrini opined that, if released to the community, McCullough's violence potential would be considered somewhat below average relative to the average citizen in the community. RT 41.

If paroled, McCullough's plan was to reside with his mother in Long Beach. He also had a standing offer to work for a trucking company. See RT 21-23.

4. The Governor's Decision Did Not Comport With Due Process

Governor Schwarzenegger relied on the commitment offense to find McCullough unsuitable for parole. The Governor explained:

> Mr. McCullough committed an especially heinous second-degree murder because he preyed upon and bludgeoned a sleeping, unsuspecting, and unthreatening man repeatedly with a brick–ultimately killing him–for the remarkably trivial motive of stealing his money. And the manner in which Mr. McCullough carried out this crime is vicious. Not only did he not need to beat the sleeping Mr. Kukish to rob him, Mr. McCullough had a clear opportunity in between each blow to Mr. Kukish's head to stop but did not do so. This was a cold-blooded, senseless murder that occurred during a planned robbery and was the culmination of Mr. McCullough's escalating criminality and violence. Significantly, Mr. McCullough was initially convicted of first-degree murder for this crime. Moreover, he told the Board in 2003 that he and his partners returned to the crime scene about an hour later to "see exactly what [they] had done" and saw emergency personnel trying to assist Mr. Kukish. Mr. McCullough and his partners then left the scene to buy drugs with the $50 they had stolen from Mr. Kukish, demonstrating an exceptionally callous disregard for this man's suffering and zero remorse at that time. The nature and gravity of the second-degree murder committed by Mr. McCullough alone is a sufficient basis on which to conclude his release from prison at this time would put society at an unreasonable risk of harm.

Petition, Exh. C, p. 2.

The Governor's consideration of the commitment offense was certainly permissible under the regulation, and his decision that it was "especially heinous" was supported by the undisputed record that McCullough hit the sleeping victim on the head with a brick to kill him. The triviality of the motive also supported a determination that the offense was committed in an especially heinous, atrocious or cruel manner, see 15 Cal. Code Regs. § 2402(c)(1)(E), although killing to facilitate a robbery is, unfortunately, a rather common

motive and it is difficult to imagine a motive that wouldn't be a trivial reason for murdering someone. The Governor also could consider that McCullough had an escalating criminality, including serious assaultive behavior at a young age, as tending to indicate unsuitability for parole. See 15 Cal. Code Regs. § 2402(c)(2).

This case is one of many that turn on the critical question of the BPH's and Governor's use of evidence about the crime that led to the conviction. Three Ninth Circuit cases provide the guideposts for applying the Superintendent v. Hill some evidence standard on this point: Biggs v. Terhune, 334 F.3d 910 (9th Cir. 2003), Sass, 461 F.3d 1123, and Irons v. Carey, 479 F.3d 658 (9th Cir. 2007). Biggs explained that the value of the criminal offense fades over time as a predictor of parole suitability: "The Parole Board's decision is one of 'equity' and requires a careful balancing and assessment of the factors considered. . . . A continued reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation." Biggs, 334 F.3d at 916-17. Biggs upheld the initial denial of a parole release date based solely on the nature of the crime and the prisoner's conduct before incarceration, but cautioned that "[o]ver time . . . , should Biggs continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of Biggs' offense and prior conduct would raise serious questions involving his liberty interest in parole." Id. at 916. Next came Sass, which criticized the Biggs statements as improper and beyond the scope of the dispute before the court: "Under AEDPA it is not our function to speculate about how future parole hearings could proceed." Sass, 461 F.3d at 1129. Sass determined that the parole board is not precluded from relying on unchanging factors such as the circumstances of the commitment offense or the parole applicant's pre-offense behavior in determining parole suitability. See id. at 1129 (commitment offenses in combination with prior offenses provided some evidence to support denial of parole at subsequent parole consideration hearing). Recently, Irons determined that due process was not violated by the use of the commitment offense and pre-offense criminality to deny parole for a prisoner 16 years into

his 17-to-life sentence. Irons emphasized that in all three cases (Irons, Sass and Biggs) in which the court had "held that a parole board's decision to deem a prisoner unsuitable for parole solely on the basis of his commitment offense comports with due process, the decision was made before the inmate had served the minimum number of years required by his sentence." Irons, 479 F.3d at 665; see e.g., id. at 660 (inmate in 16th actual year of his 17-to-life sentence).

The message of these three cases is that the BPH and Governor can look at immutable events, such as the nature of the conviction offense and pre-conviction criminality, to predict that the prisoner is not currently suitable for parole even after the initial denial (Sass), but the weight to be attributed to those immutable events should decrease over time as a predictor of future dangerousness as the years pass and the prisoner demonstrates favorable behavior (Biggs and Irons). Sass did not dispute the principle that, other things being equal, a criminal act committed 50 years ago is less probative of a prisoner's current dangerousness than one committed 10 years ago. Not only does the passage of time in prison count for something, exemplary behavior and rehabilitation in prison count for something according to Biggs and Irons. Superintendent v. Hill's standard might be quite low, but it does require that the decision not be arbitrary.

The murder and pre-offense criminality in this case are the kinds of immutable events that Biggs cautioned against relying on in perpetuity to deny parole for present dangerousness. Although the Governor's decision would have been wholly appropriate 10 or 20 years ago, today it does not comport with due process – not because the standards have changed but because the passage of time plus evidence of significant positive behavior now reduce the predictive value of the circumstances relied upon by the Governor below the point where they provide enough evidence to support the decision that McCullough would pose an unreasonable risk of danger to society if paroled. Although the Governor thought the negative factors discussed above outweighed the positive factors for McCullough, even the Governor noted that McCullough had many factors supportive of parole and "demonstrated considerable progress and increased maturity by remaining discipline-free since 1985."

Petition, Exh. C, p. 1.

McCullough's case also presents the interesting procedural feature that he had twice been found suitable by BPH panels. After the seven denials of parole, the BPH voted 2 to 1 in 2000 to deny parole, thus indicating at least 1 panelist thought he was suitable in 2000. RT 61. At his hearing in 2002, the BPH found him suitable. Former Governor Gray Davis reversed the 2002 decision and determined he was not suitable. At his hearing in 2004, the BPH again found him suitable. Governor Schwarzenegger reversed the 2004 decision and determined he was not suitable. The back-and-forth decisions on whether McCullough was suitable for parole – where no new facts were developed and the only change was the passage of time – indicate that the Governor's reversal of the BPH's decision on the same evidence was an arbitrary decision.

McCullough had surpassed his minimum sentence of 15 years by at least 6 calendar years, thereby making his case stronger than that in Irons, Sass or Biggs. He already had been found suitable for parole by two decision-making bodies, also making his case stronger than Irons, Sass, or Biggs. There also was considerable positive information about McCullough in the record as of 2004, when the Governor considered his case. He had not had a CDC-115 disciplinary offense for 19 years. He had taken advantage of numerous rehabilitation and enrichment programs in prison, obtaining a college degree, participating in volunteer work, taking courses in anger management and understanding the impact of crimes on victims, and participating in Alcoholics Anonymous to address his alcohol and substance abuse problem. He had done vocational training and held a job in the Prison Industries Authority wood finishing department, where he had received exceptional work reports from his supervisors. He had favorable psychological evaluations dating from at least 1998.

This is just the sort of case Biggs envisioned, where the commitment offense is repeatedly relied on to deny parole notwithstanding the prisoner's exemplary behavior and evidence of rehabilitation since the commitment offense. In light of the extensive evidence of McCullough's in-prison rehabilitation and exemplary behavior, the reliance on the unchanging facts of the murder and his juvenile criminality to deny him parole 21 years into

his 15-to-life sentence violated his right to due process. The some evidence standard provides more protection than against fabricated charges or bureaucratic mistakes -- the some evidence standard also protects against arbitrary decisions. See Superintendent v. Hill, 472 U.S. at 454-55, 457. The Governor's decision was arbitrary and therefore did not comport with the some evidence standard. Having conducted an independent review of the record, see Himes, this court concludes that the state court's unexplained rejection of the due process claim was an objectively unreasonable application of Superintendent v. Hill. McCullough is entitled to relief under the standard of 28 U.S.C. § 2254(d).

Having decided that the petition should be granted, the next question concerns the proper remedy. Once the BPH determined that McCullough was suitable for parole, it calculated his term and assessed a total term of confinement of 258 months, less post-conviction credits of 75 months, for a total period of confinement of 183 months (15.25 years). RT 59-60. The significance of this calculation is that, because the Governor's decision was not supported by some evidence, this court need not send the matter back to the BPH to set a term for McCullough because the BPH has already done so. McCullough is entitled to release and he is past his release date.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus is granted. Respondent must release Fred McCullough from custody within **ten days** of the date of this order. Within **twenty days** of the date of this order, respondent must also file a notice with the court confirming the date on which McCullough was released.

IT IS SO ORDERED.

DATED: May 31, 2007

Marilyn Hall Patel
United States District Judge

NOTES

1. McCullough attached to his petition an order by the Los Angeles County Superior Court denying his petition for writ of habeas corpus, but the analysis in that order does not match up with the reasons in the 2004 Governor's decision and leads this court to believe that the Los Angeles court's decision concerns a different decision – perhaps the 2002 Governor's decision. See Petition, Exh. E. For example, the decision stated that the Governor concluded that McCullough was unsuitable "because he has demonstrated a lack of remorse for the offense and minimizes his responsibility, . . . and has insufficiently participated in self-help programming." Id. at 2. Those observations match the discussion in Governor Davis' 2003 decision. see Petition, Exh. D, p. 2.

2. The listed circumstances tending to show unsuitability for parole are the nature of the commitment offense, i.e., whether the prisoner committed the offense in "an especially heinous, atrocious or cruel manner;" the prisoner has a previous record of violence; the prisoner has an unstable social history, the prisoner previously engaged in a sadistic sexual offense, the prisoner has a lengthy history of severe mental problems related to the offense; and negative institutional behavior. 15 Cal. Code Regs. § 2402(c). The listed circumstances tending to show suitability for parole are the absence of a juvenile record, stable social history, signs of remorse, a stressful motivation for the crime, whether the prisoner suffered from battered woman's syndrome, lack of criminal history, the present age reduces the probability of recidivism, the prisoner has made realistic plans for release or developed marketable skills, and positive institutional behavior. 15 Cal. Code Regs. § 2402(d).

EXHIBIT B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRED McCULLOUGH,

Petitioner,

v.

ANTHONY P. KANE, warden,

Respondent.

/

No. C 05-2207 MHP (pr)

ORDER STAYING ORDER THAT PETITIONER BE RELEASED FROM PRISON

Respondent has appealed from this court's order granting the petition for writ of habeas corpus in which the court ordered petitioner's release. In connection with the appeal, respondent filed an "application for stay of June 1, 2007 order and judgment pending appeal." The application is GRANTED. (Docket # 14.) Respondent need not release petitioner from custody unless and until the case is finally resolved in petitioner's favor on appeal or the United States Court of Appeals for the Ninth Circuit otherwise orders petitioner's release from custody.

IT IS SO ORDERED.

DATED: June 12, 2007

Marilyn Hall Patel
United States District Judge

EXHIBIT C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 04 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FRED MCCULLOUGH, Petitioner - Appellee, v. ANTHONY KANE, Respondent - Appellant.	No. 07-16049 D.C. No. CV-05-02207-MHP Northern District of California, San Francisco ORDER

Before: B. FLETCHER, BERZON, and RAWLINSON, Circuit Judges.

This appeal is withdrawn from submission pending decision by the Supreme Court of California in *In re Shaputis*, 2007 WL 2372405 (Cal. App. 4th Dist. Aug. 21, 2007) (petition for review granted); *In re Lawrence*, 150 Cal. App. 4th 1511 (Cal. App. 2d Dist. 2007) (petition for review granted) and further order of the court.

EXHIBIT D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRED MCCULLOUGH,

Petitioner,

v.

ANTHONY P. KANE, Warden,

Respondent.

/

No. C 05-02207 MHP

MEMORANDUM & ORDER
Re: Motion to Vacate June 13, 2007 Order Staying Order That Petitioner Be Released From Prison

Petitioner Fred McCullough, a prisoner at the Correctional Training Facility in Soledad, seeks dissolution of a June 13, 2007 order that stayed his release from prison. McCullough was ordered released from prison on June 1, 2007 when the court granted a writ habeas corpus under 28 U.S.C. section 2254, but release was stayed pending the State's appeal. See Docket No's. 11, 17. Having considered the parties' arguments and submissions and for the reasons set forth below, the court now vacates the stay and orders that petitioner be released from custody immediately.

BACKGROUND

The full recitation of the facts in this action can be found in the decision granting habeas relief. See Docket No. 11. In short, Fred McCullough was convicted of second degree murder in 1983 in the Los Angeles County Superior Court and was sentenced to a term of 15 years to life in prison. His habeas petition did not concern that conviction directly, but instead focused on the August 12, 2004 decision by Governor Arnold Schwarzenegger to reverse a March 17, 2004 decision by the Board of Prison Terms (now known as the Board of Parole Hearings ("BPH"))

finding him suitable for parole. This was McCullough's second reversal: McCullough had also been found suitable for parole by the BPH in 2002, but that was reversed by then-Governor Davis.

McCullough sought relief in the California courts.[1] The California Court of Appeal denied McCullough's petition for writ of habeas corpus in a one-sentence order citing In re Rosenkrantz, 29 Cal. 4th 616, 667 (2002). Response, Exh. E. The California Supreme Court summarily denied his petition for review.

McCullough then filed his federal petition for writ of habeas corpus, asserting that his right to due process had been violated. On June 1, 2007 this court granted McCullough's petition, finding that McCullough's crime and pre-offense criminality did not provide sufficient evidence to support the Governor's decision finding petitioner unsuitable for parole. See Docket No. 11. Shortly thereafter, on June 13, 2007 and prior to receiving McCullough's opposition, the court granted the State's motion to stay McCullough's release pending appeal. Id., No. 17.

On appeal, the parties conducted oral argument in front of the Ninth Circuit on December 3, 2007. The next day, the Ninth Circuit ordered that the appeal be withdrawn from submission pending the California Supreme Court's decisions in In re Shaputis, 2007 WL 2372405 (Cal. App. Aug. 21, 2007), review granted (Oct. 24, 2007), and In re Lawrence, 150 Cal. App. 4th 1511 (2007), review granted, 168 P.3d 869 (Sep. 19, 2007). Noonan Dec., Exh. C (Ninth Circuit Order dated December 4, 2007). In both Shaputis and Lawrence, the California Courts of Appeal granted habeas petitions after finding that the prisoners' offenses themselves were insufficient to demonstrate the dangerousness required to deny parole. Neither action has been fully briefed or scheduled for oral argument before the California Supreme Court. As a result, it is uncertain when they will be resolved and at what point the Ninth Circuit will resume review of the State's appeal in this action.[2]

JURISDICTION

This court has jurisdiction to modify the order staying McCullough's release pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure.

DISCUSSION

Whether a prisoner's release may be stayed pending appeal requires balancing the four factors prescribed by the Supreme Court in Hilton v. Braunskill, 481 U.S. 770 (1987).[3] The four factors considered are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Id. at 776. These four factors presumably suggested that a stay was appropriate last June.[4]

Developments since the June 13, 2007 stay order include both an unforeseen delay on appeal and the issuance of rulings by the California courts of appeals and the Ninth Circuit that favor petitioner. See Shaputis, 2007 WL 2372405; In re Dannenberg, 156 Cal. App. 4th 1387 (2007); Hayward v. Marshall, 512 F.3d 536 (9th Cir. 2008). As a result, the court will review and, as appropriate, re-weigh the four Hilton factors to determine whether a stay of the release order remains appropriate.

A. The State's Likelihood of Success on the Merits

Under Hilton, the State must show that it has a strong or substantial likelihood of success on appeal in order to stay the petitioner's release. 481 U.S. at 778. The State's likelihood of success in overturning this court's grant of the writ of habeas corpus depends on three considerations: (1) whether the court applied the proper standard of review; (2) whether the court correctly applied that standard; and (3) whether recent decisions by the Ninth Circuit and California courts of appeal suggest a favorable outcome for the State upon appeal.

1. The 'Some Evidence' Standard

The State contends it is likely to succeed on the merits on appeal because this court incorrectly adopted the 'some evidence' standard set out in Sass v. California Board of Prison Terms, 461 F.3d 1123, 1126–29 (9th Cir. 2006) (applying the Superintendent v. Hill, 472 U.S. 445, 454–55 (1985), some evidence standard for disciplinary hearings to review parole denials). This

court applied this standard to review whether Governor Schwarzenegger's decision to deny parole was supported by some evidence of parole unsuitability. See Docket No. 11.

The some evidence standard is appropriate in the present action, as the court has previously explained in its order granting the writ. See id. at 4–5. Furthermore, any lingering doubts about the propriety of this standard in this context should have been dispelled by the Ninth Circuit during oral argument in this action. A judge on the panel cut short the State's argument that the some evidence standard was inappropriate. She stated that the Circuit has "held over and over again that the some evidence rule applies in the parole context . . . as far as we're concerned it's settled law and not worth going over again." Ninth Circuit Oral Argument Audio File, available at http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?OpenForm&Seq=2 (Case No. 07-16049 at 1:00–1:20) (last accessed Feb. 20, 2008).

2. Application of the 'Some Evidence' Standard

The State contends that even if the some evidence standard is appropriate, this court misapplied that standard. It argues that after acknowledging factors in support of the Governor's decision—the "especially heinous" nature of the crime, the triviality of the motive and the escalating criminality McCullough once exhibited—the court could not then determine that the some evidence standard was not met.

The State mischaracterizes the nature of the standard by arguing that this court conceded the existence of some evidence by recognizing the factors underlying the Governor's decision. As the Ninth Circuit has explained, "the test is not whether some evidence supports the reasons the Governor cites for denying parole, but whether some evidence indicates a parolee's release unreasonably endangers public safety." Hayward, 512 F.3d at 543 (quoting In re Lee, 143 Cal. App. 4th 1400, 1408 (2006)). The Ninth Circuit has also explained that the weight of evidence that suggests parole unsuitability may change overtime. See Biggs v. Terhune, 334 F.3d 910 (9th Cir. 2003); Sass, 461 F.3d 1123; Irons v. Carey, 479 F.3d 658 (9th Cir. 2007).

In Biggs, the Ninth Circuit upheld a parole denial based on the circumstances of the prisoner's offense, but suggested that the weight of this evidence would decrease over time: "A

continued reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation." 334 F.3d at 916–17. The Ninth Circuit later noted that in Biggs and other subsequent parole denials based on unchanging factors, the petitioners had not completed their minimum sentences at the time their habeas petitions were heard. Irons, 479 F.3d at 665; see also Sass, 461 F.3d 1123; Biggs, 334 F.3d 910. This line of reasoning suggests to this court that the Ninth Circuit is likely to agree with this court's analysis regarding petitioners who have served far beyond their minimum sentences.

By warning that continued reliance on unchanging factors may violate due process, the Ninth Circuit established a standard for district courts to apply in specific actions. Here, analyzing petitioner's commitment offense, the court found that the murder and pre-offense criminality in this action are the kinds of immutable events that Biggs cautioned against relying upon to deny parole in perpetuity. See Docket No. 11 at 11–14; Biggs, 334 F.3d at 916–17. Although the Governor's decision would have been wholly appropriate ten or twenty years ago, it no longer comports with due process because the passage of time, in addition to significant evidence of positive behavior, reduces the current predictive value of the circumstances relied upon by the Governor. In fact, the circumstances relied upon by the Governor are now insufficient to constitute some evidence that petitioner would pose an unreasonable risk of danger to society if paroled.

McCullough has surpassed his minimum sentence of fifteen years by at least six calendar years, thereby making his situation more compelling than Irons, Sass or Biggs. Further, he has been found suitable for parole by two decision-making bodies, again making his situation more compelling than Irons, Sass, or Biggs. There was also considerable positive information about petitioner when Governor Schwarzenegger considered this matter. McCullough had not been issued a disciplinary offense in the past nineteen years. In addition, he had taken advantage of numerous rehabilitation and enrichment programs in prison, such as: 1) obtaining a college degree; 2) participating in volunteer work; 3) taking courses in anger management and understanding the impact of crimes on victims; 4) participating in Alcoholics Anonymous to address his alcohol and

substance abuse problem; 5) completing vocational training; and 6) holding a job in the Prison Industries Authority wood finishing department, where he had received exceptional work reports from his supervisors. Finally, he had favorable psychological evaluations dating from at least 1998.

This is just the sort of scenario Biggs envisioned, where the commitment offense is repeatedly relied upon to deny parole notwithstanding the prisoner's exemplary behavior and evidence of rehabilitation subsequent to the commitment offense. In light of the extensive evidence of McCullough's in-prison rehabilitation and exemplary behavior, blind reliance on the unchanging facts of the murder and his juvenile criminality to deny him parole twenty-one years into his fifteen-to-life sentence violates his right to due process. Having reviewed the record, this court concluded that the state court's unexplained rejection of the due process claim was an objectively unreasonable application of Hill.

Given that this court relied on guidance provided by the Ninth Circuit in Irons, Sass and Biggs when granting the habeas petition, the State's likelihood of success does not appear substantial. However, at the time of the initial stay order, the Ninth Circuit had not yet applied the reasoning of Irons, Sass and Biggs to overturn a denial of parole. As a result, the State's likelihood of success was perhaps favorably adjudged in the initial stay order because the Ninth Circuit's future course remained unknown. This has changed.

3. Recent Holdings and Their Predictive Impact on the State's Appeal

In January 2008, the Ninth Circuit cited the due process concerns expressed in Biggs when granting habeas relief to a prisoner challenging an adverse parole determination. See Hayward, 512 F.3d at 545. In Hayward, the court found that some evidence was not found where the petitioner had already served his minimum sentence and the Governor relied only upon the commitment offense and other factors that have remained unchanged for twenty years. Id. The court held that the weight of these factors as predictive of the petitioner's dangerousness upon release had declined because of: 1) the passage of time; 2) the petitioner's commitment to education; 3) the lack of recent misconduct; and 4) the parole board's repeated decisions that the petitioner was suitable for parole. Id. at 545–47.

The Hayward holding suggests that this court properly interpreted the law when granting McCullough's habeas petition. See id. Many of the pertinent facts in Hayward are also found in the present action, including: 1) time served beyond the minimum sentence; 2) a focus on education; 3) a lack of recent misconduct; and 4) repeated decisions by the parole board that McCullough was suitable for parole. See id. Differences certainly exist, including arguably the severity of the crimes; however, the similarities suggest that the State's likelihood of success on the merits is not strong or even substantial.[5]

Nevertheless, uncertainty still remains due to the Ninth Circuit's order to withhold review pending action by the California Supreme Court. However, uniformity appears to be forming among the California courts of appeal and this may ultimately influence the California Supreme Court. In the two cases noted by the Ninth Circuit in its order postponing review of petitioner's appeal, the Second and Fourth Districts of the California Courts of Appeal overturned parole denials, finding that the commitment offense no longer sufficed to demonstrate the evidence of dangerousness necessary to deny parole. See Shaputis, 2007 WL 2372405, Lawrence, 150 Cal. App. 4th 1511. In addition, the California Supreme Court has also granted review in two other similar cases from the Sixth and First Districts of the California Courts of Appeal. See Dannenberg, 156 Cal. App. 4th at 1400–01 (2007) ("[T]he record that was before the Governor lacks any evidence that now, more than two decades after his offense, the nature of Dannenberg's offense alone *continues* to support a conclusion that he poses an unreasonable risk of danger to society if released"), review granted (Feb. 13, 2008); In re Cooper, 153 Cal. App. 4th 1043 (2007), review granted (Oct. 24, 2007).

Together, these decisions by four different California courts of appeal suggest a growing recognition that due process may be violated by continuing ad infinitum to deny parole based on the underlying commitment offense. These decisions, in conjunction with the Ninth Circuit's decision in Hayward, suggest that the commitment offense may not constitute some evidence of a threat to society when a prisoner has served his underlying sentence, accepted responsibility, devoted time to education and received favorable behavior reports while confined. While the State may yet succeed on the merits here, it has not convinced this court that the likelihood is strong or even substantial.

B. Irreparable Injury to the State

The State contends that a stay is necessary because allowing McCullough's release would undermine the Governor's authority and expose the state to the possibility that McCullough flees its jurisdiction. Neither of these arguments is persuasive.

The Governor's authority is not absolute. The very purpose of the writ of habeas corpus is to provide a failsafe against government action that violates a prisoner's right to due process. Having found such a violation in the present action, the court exercised its constitutional mandate and granted habeas relief. Neither the court's order granting habeas relief nor an order releasing McCullough usurp the Governor's authority any more than is proper under the checks and balances framework instituted by the framers.

The possibility that McCullough will flee is a legitimate State concern. See Hilton, 481 U.S. at 777 (a prisoner's flight risk is an appropriate consideration in granting a stay). However, that concern is largely mitigated by the petitioner's viable housing and employment plans that will keep him within the State's jurisdiction upon release. Noonan Dec., Exh's. H–I. Further, the court is not convinced by the State's efforts to use petitioner's marriage as a factor weighing against release. The stability of marriage should ease McCullough's transition back into society after decades in prison. Indeed, McCullough's wife plans to move from her current residence in Texas to California upon his release, which further suggests that McCullough's marriage creates no added flight risk. Feathers Decl., ¶ 3.

Notably, the California Supreme Court has found that the State is not always irreparably injured by the release of prisoners in similar cases. In both Lawrence and Cooper, the California Supreme Court declined to grant stays that would have prevented release pending appeal. Noonan Dec., Exh's. F–G. However, it appears that petitioners in Shaputis and Dannenberg are still incarcerated. While the California Supreme Court's authority is not binding, the Lawrence and Cooper releases are persuasive in the present case where the facts already suggest that the State will not be irreparably injured by McCullough's release.

C. Substantial Injury to McCullough

To remain in prison after a successful habeas petition injures McCullough and extends the due process violation already recognized by the court. See Docket No. 11.

Unforeseen delay on appeal has increased the injury to McCullough beyond what was recognized at the time of the initial stay order. Although a specific date of resolution has never been known, the expected period of delay increased notably when the Ninth Circuit withdrew McCullough's appeal from submission pending decisions in two cases before the California Supreme Court. Noonan Dec., Exh. C. As a result, there is reason to believe that denying release pending appeal will substantially injure petitioner. See Franklin v. Duncan, 891 F. Supp. 516, 521 (N.D. Cal. 1995) (Jensen, J.) ("A long delay in the appellate process would weigh in favor of release.").

D. The Public Interest

This court has already determined that some evidence does not indicate that McCullough's release unreasonably endangers public safety. This determination was central to its decision to grant habeas relief and has been reiterated here. As a result, the public interest in safety is satisfied. The public interest in general deterrence is also satisfied because McCullough has served his underlying sentence—and more. Furthermore, upon release McCullough will be subject to the terms of parole and parole supervision. Cal. Penal Code § 3000.1(a).

Finally, the public has an interest in rewarding an inmate's rehabilitation and positive conduct. See Biggs, 334 F.3d at 916–917 (giving weight to "the rehabilitative goals espoused by the prison system"). While imprisoned, McCullough earned his college degree, took advantage of numerous rehabilitation and enrichment programs and received favorable behavior reports. To continue to encourage these proactive behaviors, the public must give credit where it is due. Without evidence that McCullough poses a danger to the public, McCullough's commitment to rehabilitation suggests the public has an interest in immediate release, not further incarceration.

CONCLUSION

On balance, the four Hilton factors weigh in favor of petitioner. Petitioner's motion to dissolve the stay is GRANTED. Petitioner is ordered released from custody immediately.

IT IS SO ORDERED.

Dated: February 25, 2008

MARILYN HALL PATEL
United States District Court Judge
Northern District of California

ENDNOTES

1. McCullough attached to his petition an order by the Los Angeles County Superior Court denying his petition for writ of habeas corpus, but the analysis in that order does not match the reasons in Governor Schwarzenegger's 2004 decision. The decision thus likely concerns a different decision—perhaps Governor Davis's 2002 decision. See Petition, Exh. E. For example, the decision states that the Governor concluded McCullough was unsuitable "because he has demonstrated a lack of remorse for the offense and minimizes his responsibility, . . . and has insufficiently participated in self-help programming." Id. at 2. Those observations match the discussion in Governor Davis' 2002 decision. See Petition, Exh. D at 2.

2. Petitioner suggests that based on the California Supreme Court's prior record in habeas actions, it takes the court twenty-seven months to issue a decision after it has accepted a matter for review. If this pattern holds, the court may not issue rulings in Shaputis or Lawrence until December 2009. See Noonan Dec., ¶ 8.

3. Petitioner argues that a presumption in favor of release exists pursuant to Federal Rule of Appellate Procedure 23(c). However, he cites no decisions where Rule 23 was used as the basis for release when a challenge to the underlying conviction was not involved. Thus, the court declines to so extend the law here.

4. The court declines to give strong deference to its initial stay order because that order does not include any discussion on the merits of a stay and was issued prior to the court's receipt of McCullough's motion to oppose the stay.

5. The State suggests that Hayward is unpersuasive because the Ninth Circuit has not previously overturned valid state court decisions denying parole. This argument is unconvincing. Controlling precedent is bolstered, not diminished, by its recency.

EXHIBIT E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED McCULLOUGH, Petitioner - Appellee, v. ANTHONY KANE, Respondent - Appellant.	No. 07-16049 D.C. No. CV-05-02207-MHP Northern District of California, San Francisco ORDER

Before: B. FLETCHER, BERZON, and RAWLINSON, Circuit Judges.

The court denies the State's emergency motion to stay the district court's order granting McCullough's release from prison pending the outcome of the State's appeal and vacates its temporary stay. The district court's release order is effective immediately.

The merits weigh in favor of releasing McCullough under the considerations in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). We note favorable state court actions since the time the district court initially stayed McCullough's release. In circumstances similar to McCullough's, the California Supreme Court refused to stay the release of two prisoners on parole pending the Supreme Court's review of two Court of Appeal decisions finding the same due process violations that the

district court found in McCullough's case. *See* California Supreme Court Orders denying Attorney General's request for stay of release pending appeal in *In re Lawrence*, 150 Cal. App. 4th 1511 (2007), *review granted*; stay of release denied, No. S154018 (Sept. 19, 2007);[1] and *In re Cooper*, 153 Cal. App. 4th 1043 (2007), *review granted*; stay of release denied, No. S155130 (Oct. 24, 2007).

We note further that because McCullough will be returned to custody if the State is successful in its appeal to our court, the State will not be irreparably injured if, in the meantime, McCullough is granted the liberty to which he is presumptively entitled, *see* Fed. R. App. P. 23(c). On the other hand, the continued effect of the stay will substantially injure McCullough's liberty interest because the parole board has determined that he should be released and he has no prison sentence remaining to be served. Finally, the public interest favors McCullough's release. The public has an interest in preserving the principle that a successful habeas petitioner will be released pending appeal, *see*. Fed. R. App. P. 23(c), and in rewarding a prisoner's rehabilitation, *see Biggs v. Tehrune*, 334 F.3d 910, 916-17 (9th Cir. 2003).

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[1] The California Supreme Court's grant of review in one of these cases, *In re Lawrence*, along with its grant of review in *In re Shapitus*, 2007 WL 2372405 (Cal. App. 4 Dist. Aug 21, 2007), *review granted* (Oct. 24, 2007), prompted our December 4, 2007 order withdrawing submission of the appeal in this case.

McCullough v. Kane
No. 07-16049

RAWLINSON, Circuit Judge, dissenting:

I respectfully dissent from the majority's order denying the State's emergency motion to stay the district court's order granting Fred McCullough's release from prison pending the outcome of the State's appeal.

I do not agree with the majority's conclusion that the considerations in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) favor releasing McCullough. Specifically, I disagree with the premise that the State will not be irreparably injured if McCullough is released. That premise is expressly based on the assumption that "McCullough will be returned to custody if the State is successful in its appeal to our court." However, that McCullough will be returned to custody is by no means certain. *See Probation and Parole in the United States, 2006*, U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, pp. 3-6, 10 (December 2007), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus06.pdf> (nine percent, or approximately 381,322, of the 4,237,023 adults on probation, and seven percent, or approximately 55,874, of the total 798,202 adults on parole from both federal and state institutions in the United States, were absconders in 2006; in California, alone, 45,160 parolees exiting parole in 2006 absconded).

In addition, I do not agree that the public interest favors McCullough's release. Although the public "has an interest in preserving the principle that a successful habeas petitioner will be released pending appeal . . . and in rewarding a prisoner's rehabilitation," in my view the public has even stronger interest in preserving the principle that its laws will be enforced by its elected officials rather than by non-elected federal judges. *See In re Lawrence*, 59 Cal. Rptr. 3d 537, 558 (Cal. Ct. App. 2007) (noting the limited review of the governor's parole decision by federal courts deciding a habeas petition).

For the reasons stated, I would grant the State's emergency motion to stay the district court's order pending the outcome of the State's appeal.

EXHIBIT F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED McCULLOUGH, Petitioner - Appellee, v. ANTHONY KANE, Respondent - Appellant.	No. 07-16049 D.C. No. CV-05-02207-MHP Northern District of California, San Francisco ORDER

Before: B. FLETCHER, BERZON, and RAWLINSON, Circuit Judges.

We grant the State of California's motion to stay the district court's order to and through March 28, 2008. The stay is granted to enable the State to seek relief from the Supreme Court. It in no way suggests that our order affirming the district court's order granting release to Mr. McCullough is defective.

The merits weigh in favor of releasing McCullough under the considerations in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The district court found the state proceedings seriously defective in part because the wrong release order was reviewed, so that no AEDPA deference was due. The district court, after a de novo review, found no evidence that McCullough was a current security risk.

We note favorable state court actions since the time the district court initially stayed McCullough's release. In circumstances similar to McCullough's, the California Supreme Court refused to stay the release of two prisoners on parole pending the Supreme Court's review of two Court of Appeal decisions finding the same due process violations that the district court found in McCullough's case. *See* California Supreme Court Orders denying Attorney General's request for stay of release pending appeal in *In re Lawrence*, 150 Cal. App. 4th 1511 (2007), *review granted*; stay of release denied, No. S154018 (Sept. 19, 2007);[1] and *In re Cooper*, 153 Cal. App. 4th 1043 (2007), *review granted*; stay of release denied, No. S155130 (Oct. 24, 2007).

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[1] The California Supreme Court's grant of review in one of these cases, *In re Lawrence*, along with its grant of review in *In re Shapitus*, 2007 WL 2372405 (Cal. App. 4 Dist. Aug 21, 2007), *review granted* (Oct. 24, 2007), prompted our December 4, 2007 order withdrawing submission of the appeal in this case.

sentence remaining to be served. Finally, the public interest favors McCullough's release. The public has an interest in preserving the principle that a successful habeas petitioner will be released pending appeal, *see* Fed. R. App. P. 23(c), and in rewarding a prisoner's rehabilitation, *see Biggs v. Tehrune*, 334 F.3d 910, 916-17 (9th Cir. 2003).

RAWLINSON, Circuit Judge, concurring in part:

I concur only in that portion of the order granting the stay.