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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

11 RAFAEL MADRIGAL, JR.,)
12 Petitioner,)
13 v.)
14 JAMES YATES, Warden)
15 Respondent.)
16 _____)

Case No. CV 07-7251-GAF (MLG)

AMENDED ORDER: (1) GRANTING
RESPONDENT'S MOTION FOR STAY
PENDING APPEAL, AND (2) GRANTING
PETITIONER'S MOTION FOR IMMEDIATE
RELEASE ON BAIL

I. Background

This matter arises from a petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. In this petition, Rafael Madrigal, Jr. challenged the constitutionality of his 2002 conviction in the Los Angeles County Superior Court of the attempted murder of Ricardo Aguilera (Cal. Penal Code §§ 664, 187(a)).¹ On September 3, 2009, United States District Judge Gary A. Feess adopted my July 15,

¹ The jury also found true that Petitioner personally used a handgun (Cal. Penal Code § 12022.53), and that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang. (Cal. Penal Code § 186.22(b)(1)). Petitioner was sentenced to a term of 25-years-to-life with the possibility of parole on the attempted murder charge, plus an additional 28 years on the gang enhancement.

1 2009 Report and Recommendation, and issued an order and judgment
2 conditionally granting the writ of habeas corpus. The Court found
3 that Petitioner's trial counsel was ineffective for failing to
4 present compelling evidence of third-party culpability, failing to
5 call two alibi witnesses, and failing to present Petitioner's
6 testimony after informing the jury in opening statement that such
7 testimony would be presented. It was further found that Petitioner
8 was prejudiced by these errors. The Court ordered that Petitioner be
9 brought to retrial within 60 days of the date of the judgment or be
10 discharged from the adverse consequences of the state conviction and
11 judgment.

12 On August 23, 2009, before the order conditionally granting the
13 petition was entered, Petitioner filed a second motion for bail.²
14 District Judge Feess referred the motion to me for resolution. On
15 August 27, 2009, I filed an order staying Petitioner's motion for
16 bail pending Judge Feess's de novo review of the Report and
17 Recommendation. On September 16, 2009, after entry of Judge Feess's
18 order conditionally granting the petition, the stay of the motion for
19 bail was vacated and a hearing was scheduled for October 1, 2009.

20 Respondent has filed several oppositions to Petitioner's motions
21 for bail. The United States Pretrial Services Agency was directed to
22 investigate the issue of bail and submit a report and recommendation
23 to the Court, which it has done.

24 In addition, on September 30, 2009, Respondent filed a notice of
25 appeal from the judgment conditionally granting the petition for writ
26 of habeas corpus and an ex parte application for stay pending appeal.

27
28 ² Petitioner had filed a motion for bail on June 29, 2009, which
was denied without prejudice on July 16, 2009.

1 Petitioner opposes the motion for stay. Argument on these motions was
2 held on October 1, 2009, and the matters are ready for decision.³
3

4 **II. Analysis**

5 Release on bail of prisoners seeking habeas relief is governed
6 by Federal Rule of Appellate Procedure 23(c), which provides: "While
7 a decision ordering the release of a prisoner is under review, the
8 prisoner must - unless the court or judge rendering the decision, or
9 the court of appeals, or the Supreme Court, or a judge or justice of
10 either court orders otherwise - be released on personal recognizance,
11 with or without surety." Rule 23(c) accords a presumption in favor of
12 release from custody when habeas relief has been granted. This
13 presumption, however, may be overcome if relevant factors governing
14 a stay of proceedings counsel against release. *Hilton v. Braunskill*,
15 481 U.S. 770, 774 (1987).

16 *Hilton* delineates the factors to consider in deciding whether to
17 stay an order conditionally granting habeas corpus relief pending
18 appeal. In evaluating whether to stay habeas corpus proceedings
19 pending appeal, the Court should consider: (1) whether the stay
20 applicant has made a strong showing that he or she is likely to
21 succeed on the merits; (2) whether the applicant will be irreparably
22

23 ³ Although it has not been raised by the parties, it is unclear to
24 this Court whether these motions fall under the provisions of 28 U.S.C.
25 636(b)(1)(A), in which this Court may issue an order subject to review
26 by the District Judge under a clearly erroneous standard, or should be
27 considered matters falling under 28 U.S.C. § 636(b)(1)(B), in which a
28 Report and Recommendation needs to be filed and reviewed under the de
novo review standard. While it appears that the issues involved in
these motions are not dispositive, and therefore subject to treatment
under section 636(b)(1)(A), should this conclusion be deemed incorrect,
this order should be treated as a Report and Recommendation under
section 636(b)(1)(B).

1 injured absent a stay; (3) whether the issuance of a stay will
2 substantially injure the other parties interested in the proceeding;
3 and (4) where the public interest lies. *Id.* at 776.

4 The stay factors and the bail factors obviously overlap.
5 However, "[s]ince the traditional stay factors contemplate
6 individualized judgments in each case, the formula cannot be reduced
7 to a set of rigid rules." *Id.* at 777. With respect to bail, the court
8 must obviously consider the possibility of flight and any risk posed
9 to the public by the prisoner's release. *Id.* The court must also
10 consider the state's interest in continuing custody and
11 rehabilitation pending a final determination. *Id.* Although the *Hilton*
12 Court did not specify, it appears that danger to the public, risk of
13 flight, and the state's interest in continuing custody and
14 rehabilitation are appropriately considered as part of the second and
15 fourth equitable factors. *Franklin v. Duncan*, 891 F.Supp. 516, 519
16 n.4 (N.D. Cal. 1995).

17 The argument in favor of continued custody "will be strongest
18 where the remaining portion of the sentence to be served is long, and
19 weakest where there is little of the sentence remaining to be
20 served." *Hilton*, 481 U.S. at 777. The interest of the habeas
21 petitioner in release pending appeal, always substantial, will be
22 strongest where these three factors - possibility of flight, danger
23 to the public, and continued custody and rehabilitation - are
24 weakest. *Id.* at 777-778. Every day of an unconstitutional
25 incarceration generally constitutes irreparable harm to a person in
26 such custody. *Wauntee v. Ault*, 120 F.Supp.2d 784, 789 (N.D. Iowa
27 2000).

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1 The first *Hilton* factor requires the Court to consider whether
2 Respondent has made a strong showing that he is likely to succeed on
3 the merits. Respondent has presented the same arguments that were
4 submitted in opposition to the petition for writ of habeas corpus and
5 objections to this Court's Report and Recommendation and which have
6 been repeatedly rejected by the Court. The absence of new arguments
7 in light of this Court's evaluation of the state-court record, and
8 the credibility findings at the evidentiary hearing, convinces me
9 that there is not a strong likelihood Respondent will succeed on the
10 merits of his appeal. Conversely, the Court's analysis of this case
11 leads to the inescapable conclusion that Petitioner has established
12 a strong likelihood of prevailing on appeal. This factor clearly
13 weighs in favor of bail and against a stay.

14 "Where the State establishes that it has a strong likelihood of
15 success on appeal, or where, failing that, it can nonetheless
16 demonstrate a substantial case on the merits, continued custody is
17 permissible if the second and fourth factors in the traditional stay
18 analysis militate against release." *Hilton*, 481 U.S. at 778. In
19 considering whether the state has a "substantial case on the merits"
20 for purposes of determining whether to stay a habeas order pending
21 the state's appeal, the "substantial case" is the appeal, as opposed
22 to the prospective retrial or original trial. *Hernandez v. Dugger*,
23 839 F.Supp. 849, 853 (M.D. Fla. 1993).

24 The second *Hilton* factor requires the Court to consider whether
25 Respondent would suffer irreparable injury absent a stay. Respondent
26 argues that by not granting a stay of proceedings, it would be forced
27 to pursue its appeal contemporaneously with a retrial of Petitioner.
28 Respondent also claims that Petitioner is a flight risk because he is

1 a gang member, has no prospects for employment, and has limited ties
2 to the community, consisting of only a few immediate family members.
3 Moreover, Respondent contends that the time left to be served on the
4 sentence warrants denial of bail. The argument regarding duplicative
5 judicial proceedings is obviously compelling, but the remainder of
6 the arguments concerning irreparable harm to Respondent are not.

7 "The state does not have a defensible interest in the continued
8 incarceration of someone whose conviction was obtained in violation
9 of his constitutional right to counsel." *Poindexter v. Booker*, 2007
10 WL 2780556, at *3 (E.D. Mich. 2007). Moreover, contrary to
11 Respondent's claims, I find that Petitioner, who at one time was a
12 gang member, has significant ties to the community, has some prospect
13 for employment, given the current economic conditions, and would not
14 pose a risk of flight or danger to the community. Petitioner has been
15 married for fifteen years. He has three children. His wife and
16 children live with Petitioner's mother in Ontario, California in a
17 home Petitioner's parents have owned for almost 15 years.⁴ The
18 children attend school in Ontario. Petitioner also has numerous
19 aunts, uncles and siblings in the Los Angeles area. Robert Howards,
20 Petitioner's former employer, who testified at the evidentiary
21 hearing, has represented that he will attempt to assist Petitioner in
22 finding employment. This evidence undermines Respondent's contention
23 of a lack of family ties and support in the community. Moreover, at
24 the time of his conviction on this offense in 2002, Petitioner was
25 25-years old and had no felony convictions. Finally, while Petitioner
26 has had two infractions while in prison, one for fighting and another

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28 ⁴ Petitioner's father died in January 2009.

1 for possession of alcohol, these do not give rise to a concern that
2 he would pose a risk of flight or danger to the community should he
3 be released. Finally, while the remaining time to be served on the
4 sentence is lengthy, the remaining factors override that concern and
5 militate in favor of granting bail.

6 I also must note that there is compelling evidence in this case
7 that Petitioner is actually innocent of the crime for which he was
8 convicted. Based upon the alibi evidence that was presented at the
9 evidentiary hearing, it would have been impossible for Petitioner to
10 be at the scene of the crime at the time it was committed. The
11 secretly recorded jailhouse tape of the conversation between
12 Francisco Olivares, Petitioner's co-defendant, and Olivares's
13 girlfriend, demonstrates that Petitioner was not involved in and did
14 not know who committed the offense for which he was charged and
15 convicted. The eyewitness identifications were conflicting and
16 unreliable. Finally, there is evidence of a favorable polygraph
17 examination in 2006, conducted by a 23-year veteran of the F.B.I.

18 The facts described above demonstrate that the granting of a
19 stay of proceedings without granting bond would irreparably harm
20 Petitioner. A notice of appeal was filed yesterday. The *2008 Annual*
21 *Report of the Ninth Circuit* shows that the median interval times from
22 the filing of a notice of appeal to disposition was 19 months. *Id.* at
23 43. In light of the finding by this Court that Petitioner's
24 conviction was constitutionally defective, continued incarceration
25 pending Respondent's appeal would unduly harm Petitioner.

26 The Court must also consider the public interest, and balance
27 the public's interests in the enforcement of state sentences and
28 protection from harm, with the public interest against incarcerating

1 individuals in violation of their constitutional rights. *Poindexter*,
2 at *3-4. In this case, the balancing weighs in favor of granting
3 both the motion for bail and the motion for stay of proceedings.
4 This protects Petitioner from remaining incarcerated on an
5 unconstitutional conviction and the public interest in resolving the
6 appeal of the petition prior to being compelled to retry Petitioner.

7
8 **III. Conclusion**

9 IT IS THEREFORE ORDERED that Respondent's motion for a stay of
10 the order conditionally granting the petition for writ of habeas
11 corpus is GRANTED and the order conditionally granting the petition
12 is stayed pending disposition of the appeal by the United States
13 Court of Appeals for the Ninth Circuit.

14 IT IS FURTHER ORDERED that should the Ninth Circuit affirm the
15 judgment of this Court, the stay shall be automatically lifted and
16 Respondent shall schedule a new trial within 60 days of the
17 disposition of the appeal or Petitioner shall be unconditionally
18 released.

19 IT IS FURTHER ORDERED that Petitioner's request for bail pending
20 appeal is GRANTED. Petitioner shall be released on a \$120,000.00
21 appearance bond consisting of the following: a \$10,000.00 cash
22 deposit and affidavits of surety without justification signed by
23 Petitioner's family members in the amount of \$100,000.00 and Mr. Eric
24 Multhaup in the amount of 10,000.00. The remaining conditions of
25 bond, including reporting requirements and electronic monitoring,
26 shall be set out in a separate order.

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1 IT IS FURTHER ORDERED that the this Order is stayed until Noon
2 on Tuesday, October 6, 2009, so that Respondent may seek review from
3 District Judge Feess should he so elect. The stay shall be
4 automatically vacated at Noon on Tuesday, October 6, 2009.

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6 Dated: October 1, 2009



Marc L. Goldman
United States Magistrate Judge