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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

KIPLAND KINKEL,

Petitioner,

v.

GERALD LONG,

Respondent.

USDC Case No. 11-6244-AA

PETITIONER'S MOTION TO
CERTIFY QUESTIONS OF LAW TO
THE OREGON SUPREME COURT

Request for Oral Argument

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I. CERTIFICATION LOCAL RULE 7-1

Pursuant to Local Rule (hereafter “LR”) 7-1 of the Federal Rules of Civil Procedure (hereafter “FRCP”), counsel of record for Petitioner hereby certifies that the parties made a good faith effort through telephone conferences and e-mail to resolve the issues raised by this motion and have been unable to do so. Respondent opposed the motion.

II. MOTION

Pursuant to Oregon Revised Statute 28.200 and LR 83-15, Petitioner Kipland Kinkel (hereafter “Mr. Kinkel”) respectfully moves to certify the following questions of law to the Oregon Supreme Court:

1. Does the Oregon Board of Parole and Post-Prison Supervision (hereafter “Board”) have the statutory authority under Oregon Revised Statute 163.115 (1999), as amended by Or. Laws 1999, chapter 782, to release onto post-prison supervision a juvenile offender convicted of murder for crimes committed in May of 1998?
2. If so, does the statutory release process in ORS 163.115 (1999) and ORS 144.110 *et.seq.* eliminate any remaining judicially imposed consecutive sentences upon a finding that a prisoner is rehabilitated under ORS 163.115 (1998) and thus require release onto post-prison supervision or parole upon a finding of rehabilitation?

This Motion is supported by the accompanying Memorandum in Support, the Court file, the attachment hereto, and the Declaration of Kipland Kinkel.

Petitioner respectfully requests oral argument on this Motion and to stay this action pending the outcome of this motion.

III. MEMORANDUM OF LAW

A. Introduction

Petitioner brings this 28 U.S.C. § 2254 habeas action challenging his convictions and, separately, his sentence of nearly 112 years for homicide and non-homicide crimes. Petitioner was a 15 year old child when he committed these offenses. Petitioner alleges that his sentence is

unconstitutional in light of *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana* because he is ineligible for parole release. Yet, the Oregon Board of Parole and Post-Prison Supervision is authorized to conduct a rehabilitation hearing after 25 years of Petitioner's sentence by a separate statutory provision enacted after Petitioner's crimes, but made retrospective in application by the time of his sentencing. This state statutory process appears to authorize Petitioner a release opportunity after 25 years of imprisonment.

Petitioner brings this Motion to Certify Questions of Law because it may resolve Grounds 4-7 in the First Amended Petition. That is, if Petitioner is entitled to a rehabilitation hearing after 25 years under State law, his sentence probably does not violate the Eighth Amendment because he has an opportunity for release. This motion will resolve whether Petitioner has a release opportunity after 25 years of imprisonment under State law.

B. Factual and Procedural Background

1. Mr. Kinkel's Sentence

In May 1998, at the age of fifteen, Kipland Kinkel (hereafter: "Mr. Kinkel") was arrested for the crimes of murder and attempted murder. He ultimately plead guilty to 4 counts of murder and 25 counts of attempted murder, and plead no contest to 1 count of attempted murder. (Resp. Ex. 101, Facesheet/Judgment; Resp. Ex. 103 Plea Petition.)

On November 9, 1999, Mr. Kinkel was sentenced to 25 years imprisonment for the 4 counts of murder to be served concurrently with a life term of post-prison supervision. For the 25 counts of attempted murder, the trial court imposed 50 months imprisonment for each count to run consecutive to each other and to the four concurrent 25-year sentences. (Resp. Ex. 101, Facesheet/Judgment). Mr. Kinkel's cumulative sentence totaled 111 years and 8 months. *State v. Kinkel*, 184 Or. App. 277, 56 P.3d 463, *rev. den.*, 335 Or. 142 (2002). Mr. Kinkel's judgment

and sentence require a mandatory minimum term without the possibility of release or parole for nearly 112 years. Mr. Kinkel's sentence expires on January 21, 2110. (Resp. Ex. 101 Facesheet/Judgment).

2. First Amended Petition for Writ of Habeas Corpus

Currently before this Court is Mr. Kinkel's First Amended Petition (hereafter "FAP") for Writ of Habeas Corpus. (Dkt. 90). In the FAP, Mr. Kinkel challenges his convictions for murder and attempted murder, as well as the approximately 112 year sentence imposed on those convictions. He alleges seven grounds for relief, including grounds under the Eighth and Fourteenth Amendments alleging that his aggregate, consecutive sentence violates the proscription against cruel and unusual punishments. (Dkt. 90, pp. 23-24). More specifically, Petitioner alleges his sentence violates the Eighth and Fourteenth Amendments because the sentence affords no possibility of release for a juvenile offender where no finding was made by the sentencing court that Mr. Kinkel's crimes reflected irreparable corruption. (Dkt. 90, pp. 22-24). Absent this finding and without a mechanism for release, Mr. Kinkel's sentence violates the Eighth Amendment.

On May 2, 2019, respondent filed a Response to First Amended Petition for Writ of Habeas Corpus. (Dkt. 103). Mr. Kinkel's response is currently due on April 3, 2020. (Dkt. 116).

C. Argument

1. Standard for Certification Under ORS 28.200 and LR 83-15(a)

Pursuant to Oregon's Uniform Certification of Questions of Law Act, ORS 28.200 – ORS 28.255, this Court may certify a question of law to the Oregon Supreme Court. ORS 28.200 provides:

"The [Oregon] Supreme Court may answer question of law certified to it by * * * a United States District Court * * * when requested by the certifying court if there

are involved in any proceedings before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court and the intermediate appellate courts of this state.”

Further, LR 83-15 adopts the standard set forth in *Western Helicopter Services, Inc. v. Rogerson Aircraft Corp.*, 311 Or. 361, 364, 811 P.2d 627 (1991), which provides five criteria for certification:

“(1) The certification must come from a designated court; (2) the question must be one of law; (3) the applicable law must be Oregon law; (4) the question must be one that ‘may be determinative of the cause;’ and (5) it must appear to the certifying court that there is no controlling precedent in the decisions of this court or the Oregon Court of Appeals.”

The certifying court objectively determines the first four issues, and the fifth issue is a subjective judgment. *Western Helicopter*, 311 Or. at 366. Ultimately, “[u]se of the certification [p]rocedure in any given case rests in the sound discretion of the federal court.” *Micomonaco v. Washington*, 45 F.3d 316, 322 (9th Cir. 1995).¹

2. Certification Is Appropriate Under *Western Helicopter*

a. The request for certification is from a designated court.

The request for certification is from a court designated under ORS 28.200, *viz.*, a “United States District Court.”

b. The question is one of law.

The questions are purely legal, procedural in nature, and are functions of statutory construction. They do not depend upon any particular facts in this case. Simply put, the first question asks whether any person, like Mr. Kinkel, convicted of murder is entitled to a

¹ If all these requirements are met and certification ordered, the Oregon Supreme Court then considers the criteria for its discretion to certify questions. *See Western Helicopter*, 311 Or. at 366-70 (six questions stated).

rehabilitation hearing under the 1999 amendments to ORS 163.115 after completing 25 years of a minimum sentence. The second questions asks whether an offender can be released if found rehabilitated, despite any additional consecutive sentences. The answers to these questions apply equally to any person convicted of murder in Oregon.

c. The applicable law is Oregon law.

The certified questions concern the 1999 amendments to Oregon’s sentencing scheme for the crime of murder, enacted after Mr. Kinkel’s crimes, but effective prior to his sentencing, and made retroactive in application. *See* Att.-1 (Or. Laws 1999, ch. 782).

d. The question may be determinative of the cause.

To be “determinative of the cause,” resolution of the certified question must “have the potential to determine at least one claim in the case.” *Western Helicopter*, 311 Or. at 365. As the following discussion demonstrates, resolution of the certified question would have the potential to determine at least one of Mr. Kinkel’s habeas corpus grounds. Specifically, these certified questions have the potential to resolve Grounds Four and Five: that Petitioner’s sentence violates the Eighth Amendment by condemning the then-child Petitioner to spend his natural life in prison without any possibility of release. The answers to the proposed certified questions will clarify whether or not Mr. Kinkel has any possibility of release. If he does, Grounds Four and Five may very well be resolved against him. Indeed, “[a] state may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.” *Montgomery*, 136 S.Ct at 736. Alternatively, should the Oregon Supreme Court affirm there is no possibility for Mr. Kinkel to be released, Grounds Four and Five may be resolved in his favor.

1) 1999 Legislative Amendments to Murder Penalty Scheme

In February of 1999, the Oregon Court of Appeals held it was unconstitutionally disproportionate, under state law, to sentence an offender convicted of murder to life in prison. *State v. McLain*, 158 Or. App. 419, 974 P.2d 727 (1999). Through a series of statutory and ballot amendment changes, the murder sentencing statute, ORS 163.115 (1998), required a life sentence but did not provide for parole or release mechanism, despite permitting a parole and release mechanism for the greater offense of aggravated murder after 25 years. *Id.* 730-731.

In quick response, the 1999 Oregon legislature explicitly granted the Oregon Board of Parole (“Board”) the authority to release onto post-prison supervision or parole persons convicted of murder “regardless of the date of the crime.” *See* Att.1 Or Laws 1999, ch. 782, §§ 2, 4 (HB 3586);² *State v. Davis*, 216 Or. App 456, 174 P.3d 1022, 1026 (207 (summarizing *McLain* and the legislative response). The main legislative purpose was to remedy the constitutional problem identified in *McLain*. *State v. Ambill*, 282 Or. App. 821, 831, 385 P.3d 1110 (2016). These statutory changes were approved by the governor on July 19, 1999 and made effective October 23, 1999, a month before Mr. Kinkel was sentenced. Or Laws 1999, ch. 782.

The Oregon Court of Appeals held that the retroactive legislative fix to *McLain* does not violate the *ex post facto* provisions under the Oregon and United States constitutions. *State v. Haynes*, 168 Or. App. 565, 568, 7 P.3d 623, *rev. den.*, 331 Or. 283, 18 P.3d 1101 (2000). The court concluded that the 1999 amendments to ORS 163.115 were “[p]lainly . . . ameliorative[.]”

² **SECTION 2.** Section 28, chapter 790 Oregon Laws 1989, is amended to read: **Sec. 28.** The provisions of ORS 144.110, 144.120, 144.122, 144.125, 144.130, 144.135, 144.185, 144.223, 144.245 and 144.270 apply only to offenders convicted of a crime committed prior to November 1 1989 and to offenders convicted of aggravated murder **or murder** regardless of the date of the crime. (Emphasis added).

Id. Thus, the thrust of the 1999 legislative action was to provide a pathway for release for those convicted of murder in order to proscribe a proportionate penalty. *Ambill*, 282 Or. App. at 831 (“the legislature sought to ensure that the sentence for murder was not disproportionate to the sentence for aggravated murder”). By its very terms, the 1999 amendments apply to Mr. Kinkel.

2) The Amended Rehabilitation Hearing Process Under ORS 163.115 (1999) Provides Release to Post-Prison Supervision or Parole.

Parole and post-prison supervision are separate and distinct mechanisms for releasing an offender from prison. *See Fernandez v. Bd. of Parole & Post-Prison Supervision*, 137 Or. App. 247, 904 P.2d 1071, 1073 (1995) (omission of “parole” from statute prohibits Board from adding it to post-prison supervision rule); *Dizick v. Bd. of Parole & Post-Prison Supervision*, 260 Or. App. 229, 232 n 3, 317 P.3d 911, 913 (2013) (“As a general matter, ‘post-prison supervision’ refers to a set term established by a sentencing court when imposing a guidelines sentence, whereas ‘parole’ is a term generally used with the indeterminate sentencing scheme in effect before 1989.”)³

ORS 163.115 (1999) recites that, if found to be rehabilitated, the Board “shall convert the terms of the prisoner’s confinement to life imprisonment with the possibility of parole, release to post-prison supervision, work release ...and may set a release date.” Thus, an offender serving a sentence for murder has the possibility to be released to either post-prison supervision or parole, whichever would be appropriate under the terms of the offender’s sentence. Here, Petitioner was sentenced to a life term of post-prison supervision. (Resp. Ex 101).

3) The Board Has The Authority to Override Judicially Imposed Consecutive Sentences When An Offender is Found Rehabilitated.

³ *See generally* ORS 144.096 to 144.109 (post-prison supervision) and ORS 144.110 to 144.310 (parole).

As noted above, the 1999 amendments to ORS 163.115 operate to correct the unconstitutionally disproportionate penalties for the crimes of murder and aggravated murder in Oregon. *See Ambill*, 282 Or. App. at 831. At the time of Petitioner’s crime in 1998, a person convicted of aggravated murder, a more serious offense, was eligible for a rehabilitation hearing after 25 years from the date of imposition of a 30-year minimum. ORS 163.105(2) (1998). If the prisoner demonstrated a likelihood of rehabilitation, the Board was required override the minimum sentence and provide the possibility of parole or release. *See Janowski/Fleming v. Board of Parole and Post-Prison Supervision*, 349 Or. 432, 245 P.3d 1270 (2010) (explaining process). In the case of a prisoner serving consecutive minimum sentences for multiple aggravated murder convictions, if an offender was found rehabilitated, the Board was required to convert the prohibition on eligibility for parole for all consecutive sentences to the possibility of parole or release. *Severy/Wilson v. Board of Parole and Post-Prison Supervision*, 349 Or. 461, 245 P.3d 119 (2010) (so holding).

The 1999 amendments to ORS 163.115(5) provided, in relevant part, that:

“(c) At any time after completion of a minimum period of confinement pursuant to paragraph (b) of this subsection, the State Board of Parole and Post-Prison Supervision, upon the petition of a prisoner so confined, shall hold a hearing to determine if the prisoner is likely to be rehabilitated within a reasonable period of time. The sole issue shall be whether or not the prisoner is likely to be rehabilitated within a reasonable period of time. The proceeding shall be conducted in the manner prescribed for a contested case hearing under ORS 183.310 to 183.550 except that:

“(A) The prisoner shall have the burden of proving by a preponderance of the evidence the likelihood of rehabilitation within a reasonable period of time; and

“(B) The prisoner shall have the right, if the prisoner is without sufficient funds to employ an attorney, to be represented by legal counsel, appointed by the board, at board expense.

“(d) If, upon hearing all of the evidence, the board, upon a unanimous vote of all of its members, finds that the prisoner is capable of rehabilitation and that the

terms of the prisoner's confinement should be changed to life imprisonment with the possibility of parole, release to post-prison supervision or work release, it shall enter an order to that effect and the order shall convert the terms of the prisoner's confinement to life imprisonment with the possibility of parole, release to post-prison supervision or work release and may set a release date. Otherwise, the board shall deny the relief sought in the petition.

“(e) Not less than two years after the denial of the relief sought in a petition under paragraph (c) of this subsection, the prisoner may petition again for a change in the terms of confinement. Further petitions for a change may be filed at intervals of not less than two years thereafter.”

ORS 163.115 (1999).⁴

The amendments to ORS 163.115 generally mirrored the language of the aggravated murder provisions under ORS 163.105(2) both before and after 1999. Significantly, in addition to authorizing parole eligibility to persons’ serving a sentence for murder, the legislature in 1999 authorized the Board to “convert the terms of the prisoner’s confinement” to allow “release to post-prison supervision.” ORS 163.115(5)(d) (1999).

4) Resolution of the Certified Question Has the Potential of Resolving Grounds Four and Five.

By its terms, the 1999 amendments to ORS 163.115 provide Mr. Kinkel an opportunity to request a hearing before the Board “[a]t any time after completion of a minimum period of confinement” of 25 years. ORS 163.115(5)(c). If he were to demonstrate a likelihood of rehabilitation, the Board is required to convert his sentence so that it provides for release to post-prison supervision or parole. Specifically, even in the context of consecutive minimum sentences, once a person convicted of murder has been found likely to be rehabilitated after the

⁴ Section 4 of Or. Laws 1999, c. 782, § 4. ORS 163.115 has been amended subsequently in ways that are not material to the issue presented here. *See* Or. Laws 2007, c. 717, § 2, eff. June 28, 2007; Or. Laws 2009, c. 660, § 7, eff. July 1, 2009; Or. Laws 2009, c. 785, § 1, eff. Jan. 1, 2010; Or. Laws 2011, c. 291, § 1, eff. June 9, 2011; Or. Laws 2015, c. 820, § 46, eff. Aug. 12, 2015; Or. Laws 2019, c. 634, § 28, eff. Sept. 29, 2019, operative Jan. 1, 2020.

completion of a 25-year minimum sentence, the remainder of their judicially imposed consecutive sentences would become release eligible.⁵ Those are the same rights granted to older juvenile and adult prisoners sentenced to one or more consecutive minimum terms for the greater crime of aggravated murder. *See, e.g., Severy/Wilson*, 349 Or. at 466 (discussing *Severy* and *Wilson*'s crimes). It would be hard to envision a legislative policy that deprives 15 year old juveniles convicted of lesser-crimes of the same release opportunities.

Here, Grounds Four and Five present the question of whether Mr. Kinkel's sentence violates the Eighth and Fourteenth Amendments as set forth in *Graham v. Florida*, 560 US 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). Mr. Kinkel's claim turns on his sentence depriving him of any possibility of parole or release during the nearly 111 years he will be imprisoned for his crimes. Yet, he has never had the opportunity to raise the statutory issue due to the fact he has not served 25 years, the date he becomes entitled to such a hearing before the Board of Parole. Assuming the Oregon Supreme Court interprets the 1999 amendments to ORS 163.115 as providing a release mechanism after 25 years, it would potentially resolve his Eighth and Fourteenth Amendment claims in Ground Four and Five. That is, should the Oregon Supreme Court apply the holdings of *McLain/Haynes* and *Janowski/Fleming* to Petitioner's sentence, he is potentially eligible for release in 2023;

⁵ The phrase "terms of the prisoner's confinement" in the related sentencing statute for aggravated murder, ORS 163.105, has been interpreted by the Oregon Supreme Court to mean:

"any conditions applicable to a period of confinement, including a condition stating that parole or any other form of release was prohibited for a mandatory minimum period and a requirement that certain periods of confinement be served consecutively. It does not refer to the sentence that the trial court imposed for one of multiple convictions for aggravated murder."

Severy/Wilson, 349 Or. at 477.

therefore, his sentence would not violate the Eighth Amendment as alleged in Grounds Four or Five.⁶

e. There is no controlling Oregon precedent

The questions presented have not been resolved by the Oregon Supreme Court nor the Oregon Court of Appeals. While the Oregon Court of Appeals held in *Haynes, supra*, that the 1999 amendments retroactively applied to crimes committed prior to its enactment if the defendant was sentenced to life imprisonment, no state court has addressed the question of how those amendments would apply to a defendant, like Mr. Kinkel, sentenced to a minimum sentence of 25 years for murder with life post-prison supervision and approximately 87 years for attempted murder. Likewise, although the Oregon Supreme Court has held that judicially imposed consecutive mandatory minimum sentences can be overridden by the Board of Parole for offenders convicted of multiple counts of aggravated murder, no court in Oregon has determined whether or not the same principles would apply to an offender convicted of the lesser offense of murder under ORS 163.115. Tellingly, there is no Oregon Administrative rule governing how a juvenile convicted of murder after 1995 is to be treated by the Board of Parole and Post-Prison Supervision. *See* OAR ch. 255, div. 32 (rules governing adults convicted of murder after 1995 but completely silent on juvenile offenders who were automatically treated as adults under ORS 137.700).

⁶ Presuming such a release opportunity would be “meaningful.” *Miller*, 132 S. Ct. at 2475; *see also Cunio v. Brown*, 6:14-CV-01647-MK, 2020 WL 854180 (D Or Feb 20, 2020) (awarding summary judgment in §1983 action to plaintiff alleging Oregon parole mechanism deprived him of an 8th Amendment meaningful opportunity for release).

IV Conclusion

For the foregoing reasons, the Court should approve certification of this legal question to the Oregon Supreme Court.

DATED this 26th day of February, 2020.

Respectfully submitted,

s/ Thaddeus Betz
Thaddeus Betz

s/ Marsha Levick
Marsha Levick
Pro hac vice

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