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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KIPLAND KINKEL,

Petitioner,

v.

GERALD LONG,

Respondent.

Case No. 6:11-cv-06244-AA

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

I. INTRODUCTION

Respondent responds to petitioner's *Motion to Certify Questions of Law to the Oregon Supreme Court* (ECF # 117), filed with this Court on February 26, 2020. In his motion, petitioner asks this Court to certify two specified questions to the Oregon Supreme Court, regarding the Oregon Board of Parole and Post-Prison Supervision's (hereafter the Board) potential authority to release him on to parole after service of a minimum term of incarceration,

and also regarding the consecutive sentences imposed for the 26 attempted murder convictions. (ECF # 117, p. 5).

However, regardless of the answers to those two questions, the Court should deny petitioner's motion. Even under petitioner's theory about the Board's authority over him and his sentences, he will not be entitled to a parole or murder review hearing until after he serves a minimum of 300 months (25 years) of imprisonment. (ECF # 117, p. 6). According to his Oregon Department of Corrections (ODOC) Facesheet, petitioner will have served that minimum period on May 21, 2023, over three years from now. (Resp. Ex. 101, Facesheet/Judgment). Thus, his proposed certified questions are not ripe. In addition, petitioner would essentially be asking the Oregon Supreme Court to issue an advisory opinion, which it is generally prohibited from doing.

Moreover, petitioner's habeas petition involves a challenge to his underlying sentence, not to any Board action, and the Board is not a party to this proceeding. If the questions were certified to the Oregon Supreme Court without the Board being a party, it would not have the opportunity to respond to petitioner's arguments. In addition, if petitioner seeks a parole or murder review hearing after serving 25 years of imprisonment, and he is unsatisfied with the result of that request—either because the Board refuses to hold a hearing or because he does not agree with the outcome of any such hearing—he will have the opportunity to seek judicial review in state court, and, if need be, federal habeas review. *See Hill v. State of Alaska*, 297 F.3d 895, 899 (9th Cir. 2002) (habeas petition challenging calculation of mandatory parole release date not subject to the second or successive petition rule). Under those circumstances, the Court should deny petitioner's motion to certify questions to the Oregon Supreme Court.

II. ARGUMENT

As explained above, petitioner asks this Court to certify two specific questions to the Oregon Supreme Court, regarding a potential Board hearing that cannot occur until after May 21,

2023, and regarding the consecutive sentences for his 26 attempted murder convictions. (ECF # 117, pp. 5-6). Irrespective of the answers to those questions, the Court should deny petitioner's motion.

A. The proposed certified questions are not ripe.

First, the certified questions are not yet ripe. In that regard, Article III of the United States Constitution “limits federal court jurisdiction to ongoing cases and controversies.” *Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010) (internal citations and quotations omitted). In turn, the “ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction”. *Wolfson*, 616 F.3d at 1057 (internal quotations and citations omitted). The “ripeness doctrine is peculiarly a question of timing.” *Id.* (internal quotations and citations omitted). It is “designed to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate” for judicial review. *Id.*; see also *Oklevueha Native American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 835 (9th Cir. 2012) (“The basic rationale of the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements”) (internal citations and quotations omitted).¹

As applied here, asking the Oregon Supreme Court to address petitioner's questions would be asking that court to answer an unripe question. As petitioner acknowledges, if he has a right to a Board hearing at all, that right will not ripen for over three years. The issues of whether he will receive a hearing and whether he will receive the relief he seeks at such a hearing are speculative. This Court should not ask the Oregon Supreme Court to entangle itself in such an abstract disagreement. Given that the certified questions petitioner proposes are unripe, the Court should deny his motion. See *Beck v. City of Portland*, 202 Or. App. 360, 371, 122 P.3d 131 (2005) (“Because the record [did] not reflect that plaintiffs' rights, statuses, or

¹ The ripeness doctrine also applies in Oregon's state courts. See, e.g., *Beck*, 202 Or. App. 360 (so applying).

other legal relations were affected by defendant’s enactments at the time that plaintiffs filed their actions, plaintiffs’ claim for declaratory relief was not ripe”) (alteration added).

B. The proposed questions ask the Oregon Supreme Court to render an impermissible advisory opinion.

In addition, certifying petitioner’s proposed questions would be asking the Oregon Supreme Court to issue an advisory opinion, rather than render a decision on a judicial controversy. A justiciable controversy between parties “must involve present facts as opposed to a dispute which is based on future events of a hypothetical issue.” *Brown v. Oregon State Bar*, 293 Or. 446, 449, 648 P.2d 1289 (1982). A “justiciable controversy results in specific relief through a binding decree as opposed to an advisory opinion which is binding on no one,” and the Oregon Supreme Court “cannot exercise jurisdiction over a nonjusticiable controversy because in the absence of constitutional authority, the court cannot render advisory opinions.” *Brown*, 293 Or. at 449. Again, petitioner’s proposed certified questions concern future events based on hypothetical issues. Asking the Oregon Supreme Court to weigh in on those questions at this point would be asking it to render an advisory opinion, something which it is generally without jurisdiction to do.

C. Petitioner’s petition does not involve any Board action, and the Board is not a party to this proceeding.

Furthermore, and as noted above, petitioner’s habeas petition attacks his underlying judgment of conviction and sentence, not any action by the Board. The Board is not a party to this proceeding, and petitioner has not raised in state court the issues described in his proposed certified questions. Given that the Board is not a party to this action, it, ostensibly, would not be a party before the Oregon Supreme Court in any briefing and argument regarding the proposed certified questions. Neither this Court nor the Oregon Supreme Court should bind the Board—a non-party—by, respectively, certifying and answering unripe, hypothetical questions, much less without giving the Board an opportunity to respond. *Cf. Swanberg v. Tro*, 2016 WL 406342, *3

(D. Or., 2016) (Federal Rules “provide for enforcement of judgment against non-parties in limited circumstances”) (internal citations omitted).

Additionally, if petitioner requests a Board hearing on or after May 21, 2023, after serving 25 years of imprisonment, and if he is unsatisfied with the result of that request, he can seek judicial review in state court, and the Board would be a party to that judicial review proceeding. See Or. Rev. Stat (ORS) § 144.335(1) (providing, as pertinent here, that person under Board’s jurisdiction may seek judicial review of final order of the Board if person is “adversely affected or aggrieved” by final order,” and if person has “exhausted administrative review as provided by Board rule”). After exhausting state-court remedies on any Board order concerning a potential murder review hearing, he would then have the right to habeas review in federal court. See *Hill*, 297 F.3d at 899 (habeas petition challenging calculation of mandatory parole release date not subject to the second or successive petition rule).

III. CONCLUSION

Based on the foregoing, the Court should deny petitioner’s motion to certify questions to the Oregon Supreme Court. (ECF # 117). It should reinstate the briefing schedule, and set a reasonable due date for petitioner’s brief in support.

DATED March 25, 2020.

Respectfully submitted,

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