

No. _____

Application No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO ALEJANDRO CHARLEMAGNE

Petitioner

v.

BRAD CAIN,

Superintendent, Snake River Correctional Institution

and

OREGON BOARD OF PAROLE AND POST PRISON SUPERVISION,

Respondents

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI APPENDIXES

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Pro Se Plaintiff

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Antonio A. Charlemagne
Antonio A. Charlemagne
Pro Se Petitioner

APP 1

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOV 8 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ANTONIO ALEJANDRO
CHARLEMAGNE, AKA Antonio
Gutierrez-Farah, AKA Antonio Alejandro
Gutierrez,

Petitioner - Appellant,

v.

BRAD CAIN, SRCI Superintendent,

Respondent - Appellee.

No. 23-3425

D.C. No. 2:23-cv-00088-SI

District of Oregon,

Pendleton

ORDER

Before: CLIFTON and R. NELSON, Circuit Judges.

Appellant's motion to extend time (Docket Entry No. 15) is granted.

Appellant's motion for reconsideration en banc (Docket Entry No. 16) is deemed

timely filed and is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir.

Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

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APP 2

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUG 26 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ANTONIO ALEJANDRO
CHARLEMAGNE, AKA Antonio
Gutierrez-Farah, AKA Antonio Alejandro
Gutierrez,

Petitioner - Appellant,

v.

BRAD CAIN, SRCI Superintendent,

Respondent - Appellee.

No. 23-3425

D.C. No. 2:23-cv-00088-SI

District of Oregon,

Pendleton

ORDER

Before: SCHROEDER and NGUYEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 13) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Hayward v. Marshall*, 603 F.3d 546, 552-54 (9th Cir. 2010) (en banc) (habeas challenge to parole decision requires a certificate of appealability when underlying conviction and sentence issued from a state court), *overruled on other grounds by Swarthout v. Cooke*, 562 U.S. 216 (2011).

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Any pending motions are denied as moot.

DENIED.

FILED IN COURT

CLERK

U.S. DISTRICT COURT

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APP 3

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ANTONIO A. CHARLEMAGNE,

Petitioner,

v.

BRAD CAIN,

Respondent.

Case No. 2:23-cv-00088-SI

JUDGMENT

SIMON, District Judge.

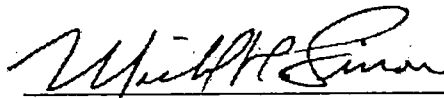
Based on the Record,

IT IS ORDERED AND ADJUDGED that this Action is DISMISSED. The Court declines to issue a Certificate of Appealability on the basis that Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

Pending motions, if any, are DENIED AS MOOT.

October 20, 2023

DATE



Michael H. Simon
United States District Judge

1 - JUDGMENT

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ANTONIO A. CHARLEMAGNE,

Petitioner,

v.

BRAD CAIN,

Respondent.

Case No. 2:23-cv-00088-SI

ORDER TO DISMISS

SIMON, District Judge.

This 28 U.S.C. § 2254 habeas corpus case comes before the Court on Respondent's Motion to Dismiss (#8) the Petition for Writ of Habeas Corpus (#1) as moot. For the reasons that follow, Respondent's Motion to Dismiss (#8) is granted.

BACKGROUND

Following Petitioner's 1985 convictions for Murder and Assault in the Second Degree, the Multnomah County Circuit Court sentenced him to an indeterminate life sentence and a consecutive five-to-ten year prison sentence. The Oregon Board of Parole and Post-Prison Supervision ("Board") established Petitioner's initial release date as December 22, 1998. However, the Board did not release him on that date because it concluded that he suffered from a present severe emotional disturbance that rendered him a danger to the community. It proceeded

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to make that same finding every two years and, in 2011, concluded that it was not reasonable to expect that Petitioner would be granted a firm release date for at least 10 more years. It therefore established November 6, 2021 as his new projected release date. Respondent's Exhibit 103, pp. 80-84.

Even though the Board deferred Petitioner's release date by ten years, Oregon law permitted him to request an interim hearing every two years. *See* ORS 144.280(2). Petitioner availed himself of this opportunity in 2013, 2015, and 2017, but the Board refused to conduct an interim hearing in each of those years. Respondent's Exhibit 103, pp. 89, 94, 125. At issue in this case is the Board's decision denying Petitioner's 2017 request for an interim hearing.

After the Board denied Petitioner's request for an interim hearing in 2017, he filed for administrative review. The Board presided over the administrative review and denied relief. *Id.* at 147-48. Petitioner then filed for judicial review in the Oregon Court of Appeals. While that case was pending, on June 2, 2021, the Board conducted an exit interview in advance of Petitioner's November 6, 2021 projected release date it had established in 2011. The Board once again found that he continued to suffer from a severe emotional disturbance and deferred his release to parole for two more years. Respondent's Exhibit 109, pp. 3-5. Due to the Board's consideration of Petitioner's suitability for parole during the pendency of his judicial appeal, the State moved to dismiss the appeal as moot. The Oregon Court of Appeals granted the motion, and the Oregon Supreme Court denied review. *Gutierrez v. Bd. Of Parole & Post-Prison Supervision*, 317 Or. App. 552, 506 P.3d 1129 (2022), *rev. denied*, 370 Or. 197, 514 P.3d 1113 (2022).

In this federal habeas corpus case, Petitioner continues to challenge the Board's 2017 refusal to conduct an interim parole hearing. He maintains that the Board utilized new standards

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to illegally deny him the interim parole hearing in violation of his rights to due process and to be free from *ex post facto* punishment. Respondent moves to dismiss the case for mootness.

DISCUSSION

A claim which fails to present an active case or controversy is moot under Article III, § 2, of the U.S. Constitution. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). “[A]n actual controversy must exist at all stages of the litigation.” *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002). “The basic question . . . is whether there is a present controversy as to which effective relief can be granted.” *Northwest Environmental Defense Center v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988). “If there is no longer a possibility that [a litigant] can obtain relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction.” *Rubalcaba v. City of L.A.*, 167 F.3d 514, 521 (9th Cir. 1999).

Although Petitioner continues to challenge the Board’s allegedly unlawful refusal to provide him with an interim hearing in 2017, the record clearly establishes that the Board conducted an exit interview for him in 2021 and determined that he still was not suitable for parole. Petitioner nevertheless asserts that his case is not moot because if he prevails, the Board will be required to release him. This assertion is not well taken because if he were to prevail in this case, his remedy would be limited to a parole hearing. Because the Board has already held such a hearing in the form of the previously scheduled 2021 exit interview, there is no longer an active case or controversy.

Petitioner makes an alternative argument wherein he asks the Court to refrain from applying the mootness bar because the Board’s denial of an interim hearing is one that is capable of repetition yet evading review. While there is an exception to mootness for such circumstances,

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the exception only applies where: (1) the challenged action is of too short a duration to be fully litigated prior to its expiration; and (2) the litigant will be subject to the same wrong again. *See, e.g., Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Petitioner's own procedural history belies his contention that this exception applies to his case.

As previously mentioned, Petitioner first unsuccessfully sought an interim hearing from the Board in 2013. He was not only able to challenge the Board's 2013 decision through an administrative appeal, but also mounted judicial challenges to that same decision in the Oregon Court of Appeals, Oregon Supreme Court, the U.S. District Court, and the Ninth Circuit Court of Appeals. *Gutierrez v. Bd. Of Parole & Post-Prison Supervision*, 277 Or. App. 396, *rev. denied*, 360 Or. 235 (2016); *Gutierrez v. Cain*, 2019 WL 5198170 (D. Or. March 7, 2019), *findings and recommendation adopted*, 2019 WL 5197551 (D. Or. Oct. 14, 2019), *certificate of appealability denied*, 2020 WL 2188919 (9th Cir. March 19, 2020). All of those judicial proceedings concluded prior to his exit interview in 2021. "[T]he 'capable of repetition, yet evading review' exception is concerned not with particular lawsuits, but with classes of cases that, absent an exception, would always evade judicial review." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 836 (9th Cir. 2014) (*italics in original*). Petitioner's demonstrated ability to fully litigate the Board's 2013 decision illustrates how a regularly scheduled exit interview does not necessarily moot a challenge to the Board's refusal to conduct an interim hearing. The "capable of repetition, yet evading review" exception is therefore inapplicable to this case, and the Petition for Writ of Habeas Corpus is dismissed as moot.

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CONCLUSION

Respondent's Motion to Dismiss (#8) is granted, and the Petition for Writ of Habeas Corpus (#1) is dismissed on the basis that it is moot. The Court declines to issue a Certificate of Appealability on the basis that Petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

October 20, 2023

DATE



Michael H. Simon
United States District Judge

APP 3

Enrolled
House Bill 2013

By order of the Speaker

CHAPTER

AN ACT

Relating to sentences; creating new provisions; amending ORS 137.079, 137.120, 138.040, 138.050, 144.035 and 144.345; and repealing ORS 144.175, 144.180 and 144.221.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) There is hereby established an Advisory Commission on Prison Terms and Parole Standards consisting of 11 members. Five members of the commission shall be the voting members of the State Board of Parole. Five members of the commission shall be circuit court judges appointed by the Chief Justice of the Supreme Court. The legal counsel to the Governor shall serve as an ex officio member of the commission and shall not vote unless necessary to break a voting deadlock. The Administrator of the Corrections Division shall act as an advisor to the commission.

(2) The term of office of each of the members appointed by the Chief Justice is four years. Before the expiration of the term of any of those members, the Chief Justice shall appoint a successor whose term begins on July 1 next following. A member is eligible for reappointment. If there is a vacancy for any cause, the Chief Justice shall make an appointment to become immediately effective for the unexpired term.

(3) Notwithstanding the term of office specified by subsection (2) of this section, of the members first appointed by the Chief Justice:

- (a) One shall serve for a term ending June 30, 1978.
- (b) One shall serve for a term ending June 30, 1979.
- (c) One shall serve for a term ending June 30, 1980.
- (d) Two shall serve for a term ending June 30, 1981.

(4) A member of the commission shall receive no compensation for his services as a member. However, all members may receive actual and necessary travel and other expenses incurred in the performance of their official duties under ORS 292.495.

(5) The chairman of the State Board of Parole and a judge elected by the judicial members shall serve in alternate years as chairman of the commission. The chairman and a vice chairman shall be elected prior to July 1 of each year to serve for the year following. The commission shall adopt its own bylaws and rules of procedure. Six members shall constitute a quorum for the transaction of business. An affirmative vote of six members shall be required to make proposals to the board under this Act.

(6) The commission shall meet at least annually at a place and time determined by the chairman and at such other times and places as may be specified by the chairman or five members of the commission.

(7) The State Board of Parole shall provide the commission with the necessary clerical and secretarial staff support and shall keep the members of the commission fully informed of the experience of the board in applying the standards derived from those proposed by the commission.

(8) The commission shall propose to the State Board of Parole and the board shall adopt rules establishing ranges of duration of imprisonment and variations from the ranges. In establishing the ranges and variations, factors provided in sections 2 and 3 of this Act shall be considered. The rules adopted and any amendments thereto which may be adopted shall be submitted to the Sixtieth Legislative Assembly. The Sixtieth Legislative Assembly may amend, repeal or supplement any of the rules.

SECTION 2. (1) The commission shall propose to the board and the board shall adopt rules establishing ranges of duration of imprisonment to be served for felony offenses prior to release on parole. The range for any offense shall be within the maximum sentence provided for that offense.

(2) The ranges shall be designed to achieve the following objectives:

(a) Punishment, which is commensurate with the seriousness of the prisoner's criminal conduct; and

(b) To the extent not inconsistent with paragraph (a) of this subsection:

(A) The deterrence of criminal conduct; and

(B) The protection of the public from further crimes by the defendant.

(3) The ranges, in achieving the purposes set forth in subsection (2) of this section, shall give primary weight to the seriousness of the prisoner's present offense and his criminal history.

SECTION 3. (1) The commission shall propose to the board and the board shall adopt rules regulating variations from the ranges, to be applied when aggravating or mitigating circumstances exist. The rules shall define types of circumstances as aggravating or mitigating and shall set the maximum variation permitted.

(2) When a prisoner is sentenced to two or more consecutive terms of imprisonment, the duration of the term of imprisonment shall be the sum of the terms set by the board pursuant to the ranges established for the offenses, subject to variations established pursuant to subsection (1) of this section.

(3) In no event shall the duration of the actual imprisonment under the ranges or variations from the ranges exceed the maximum term of imprisonment fixed for an offense, except in the case of a prisoner who has been sentenced under ORS 161.725 as a dangerous offender, in which case the maximum term shall not exceed 30 years.

SECTION 4. (1) In any felony case, the court may impose a minimum term of imprisonment of up to one-half of the sentence it imposes.

(2) Notwithstanding the provisions of sections 2 and 5 of this Act:

(a) The board shall not release a prisoner on parole who has been sentenced under subsection (1) of this section until the minimum term has been served, except upon affirmative vote of at least four members of the board.

(b) The board shall not release a prisoner on parole who has been convicted of murder defined as aggravated murder under the provisions of section 1, chapter _____, Oregon Laws 1977 (Enrolled House Bill 2011), except as provided in section 2, chapter _____, Oregon Laws 1977 (Enrolled House Bill 2011).

(c) The board shall not release a prisoner on parole who has been sentenced under the provisions of chapter _____, Oregon Laws 1977 (Enrolled House Bill 3041), before the expiration of the minimum term of imprisonment imposed under chapter _____, Oregon Laws 1977 (Enrolled House Bill 3041).

SECTION 5. (1) Within six months of the admission of a prisoner to any state penal or correctional institution, the board shall conduct a parole hearing to interview the prisoner and set the initial date of his release on parole pursuant to subsection (2) of this section. Release shall be contingent upon satisfaction of the requirements of section 6 of this Act.

(2) In setting the initial parole release date for a prisoner pursuant to subsection (1) of this section, the board shall apply the appropriate range established pursuant to section 2 of this Act. Variations from the range shall be in accordance with section 3 of this Act.

(3) In setting the initial parole release date for a prisoner pursuant to subsection (1) of this section, the board shall consider reports, statements and information received under ORS 144.210 from the sentencing judge, the district attorney and the sheriff or arresting agency.

(4) Notwithstanding subsection (1) of this section, in the case of a prisoner whose offense included particularly violent or otherwise dangerous criminal conduct or whose offense was preceded by two or more convictions for a Class A or Class B felony or whose record includes a psychiatric or psychological diagnosis of severe emotional disturbance, the board may choose not to set a parole date.

(5) After the expiration of six months after the admission of the prisoner to any state penal or correctional institution, the board may defer setting the initial parole release date for the prisoner for a period not to exceed 30 additional days pending receipt of psychiatric or psychological reports, criminal records or other information essential to formulating the release decision.

(6) When the board has set the initial parole release date for a prisoner, it shall inform the sentencing court of the date.

SECTION 6. (1) Prior to the scheduled release on parole of any prisoner and prior to release rescheduled under this section, the board shall interview each prisoner to review his parole plan, his psychiatric or psychological report, if any, and the record of his conduct during confinement.

(2) The board shall postpone a prisoner's scheduled release date if it finds, after hearing, that the prisoner engaged in serious misconduct during his confinement. The board shall adopt rules defining serious misconduct and specifying periods of postponement for such misconduct.

(3) If a psychiatric or psychological diagnosis of present severe emotional disturbance has been made with respect to the prisoner, the board may order the postponement of the scheduled parole release until a specified future date.

(4) Each prisoner shall furnish the board with a parole plan prior to his scheduled release on parole. The board shall adopt rules specifying the elements of an adequate parole plan and may defer release of the prisoner for not more than three months if it finds that the parole plan is inadequate. The Corrections Division shall assist prisoners in preparing parole plans.

SECTION 7. The board shall adopt rules consistent with the criteria in section 2 of this Act relating to the rerelease of persons whose parole has been revoked.

SECTION 8. (1) Notwithstanding the provisions of ORS 179.495, prior to a parole hearing or other personal interview, each prisoner shall have access to the written materials which the board shall consider with respect to his release on parole, with the exception of materials exempt from disclosure under paragraph (d) of subsection (2) of ORS 192.500.

(2) The board and the Administrator of the Corrections Division shall jointly adopt procedures for a prisoner's access to written materials pursuant to this section.

SECTION 9. The board shall state in writing the detailed bases of its decisions under sections 4 to 6 of this Act.

**Additional material
from this filing is
available in the
Clerk's Office.**