

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

EDWARD T. HERNANDEZ,

Petitioner,

v.

BOARD OF PAROLE AND
POST-PRISON SUPERVISION,

Respondent.

Case No. 2:15-cv-01176-AA

OPINION AND ORDER

AIKEN, District Judge:

Petitioner brings this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner argues that the Oregon Board of Parole and Post-Prison Supervision (the Board) violated the Ex Post Facto Clause of the United States Constitution when it deferred his parole consideration date pursuant to a statute that was enacted after the commission of his offenses. Petitioner seeks an order either releasing him from custody or requiring the Board to hold a parole consideration hearing. For the reasons explained below, the petition is denied.

I. BACKGROUND

In 1989, petitioner was convicted of several offenses relating to the sexual abuse of an eleven-year-old girl. The sentencing court found petitioner to be a “dangerous offender” based on its finding that petitioner “suffers from a severe personality disorder indicating a propensity towards crimes that seriously endanger the life or safety of another.” Resp’t Ex. 101 at 3; *see also* Or. Rev. Stat. § 161.725(1)(a) (dangerous offender statute). Accordingly, the court imposed consecutive, indeterminate sentences of imprisonment. Resp’t Ex. 101 at 4-5.

The Board’s procedure for determining parole eligibility for dangerous offenders is different than that for other offenders. Instead of calculating an initial parole release date, the Board conducts a parole-consideration hearing to determine whether it should set an initial parole release date. Or. Rev. Stat. § 144.228(1)(a). Before the hearing, a psychiatrist or psychologist examines the offender and submits a written report to the Board. *Id.* § 144.226. The Board must set a parole release date “if the board finds the prisoner no longer dangerous or finds that the prisoner remains dangerous but can be adequately controlled with supervision and mental health treatment.” *Id.* § 144.228(1)(b)(A). “If the board is unable to make such findings, a review will be conducted no less than two years, and no more than 10 years, from the date of the previous review.” *Id.* Further, the Board “may not grant the prisoner a review hearing that is more than two years from the date of the previous hearing unless the board finds that it is not reasonable to expect that the prisoner would be granted a release date before the date of the subsequent hearing.” *Id.* § 144.228(1)(b)(B). In other words, the Board may defer parole consideration hearings for up to ten years if the Board finds that the prisoner 1) remains dangerous and cannot be adequately controlled, and 2) would not reasonably be expected to be granted a release date before the specified deferral period.

In November 2011, the Board conducted a parole-consideration hearing to determine whether an initial parole release date should be set in petitioner's case. Based on the evidence of record, including a report from a psychologist, the Board found that petitioner continued to have a dangerous "mental or emotional disturbance, deficiency, condition, or disorder" rendering him "a danger to the health or safety of others." Resp't Ex. 105 at 176. Invoking § 144.228, the Board further found that petitioner would not reasonably be expected to be granted release during the five years after his February 2012 parole consideration date. *Id.*; *see also* Resp't Ex. 108. Accordingly, the Board did not set an initial release date and scheduled petitioner's next parole consideration date for February 2017. Resp't Ex. 105 at 176. The Board explained that its findings were "based on but not limited to" three factors under Or. Admin. R. 255-062-0016, including "factor number two, which is infractions of institutional rules and discipline; factor number four, inmate's failure to demonstrate understanding of the factors that led to his criminal offense; factor number six, the inmate's demonstrated lack of effort to address criminal risk factors of substance abuse problems." *Id.* at 177. The Board afforded petitioner the right to request an interim hearing after two years to demonstrate that "there is reasonable cause to believe that [petitioner] may be granted a change in terms of confinement." *Id.*

Petitioner sought administrative review with the Board and argued that insufficient evidence supported the Board's deferral of his parole consideration hearing. Resp't Ex. 105 at 184-88. The Board rejected his arguments. *Id.* at 190-91.

Petitioner then sought judicial review with the Oregon Court of Appeals and argued that insufficient evidence supported his continued designation as a dangerous offender and that the Board violated state and federal ex post facto prohibitions by relying on a statute and regulation enacted after petitioner's offenses to defer parole consideration. Resp't Ex. 107. Petitioner

admitted that he did not raise his ex post facto argument before the Board and invited the Court of Appeals to review for plain error; respondent argued that plain error review was not available in those circumstances. Resp't Ex. 109 at 31-32. The Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. Resp't Ex. 112-113.

Petitioner now seeks relief pursuant to 28 U.S.C. § 2254.

II. DISCUSSION

In Ground One, petitioner argues that the Board's decision was not supported by sufficient evidence of a continuing dangerous condition and failed to comply with Oregon statutory requirements. In Ground Two, petitioner claims that the Board's reliance on a 2009 statute and regulation violated the prohibition against ex post facto punishment.¹

¹ Petitioner raises Four "Questions Presented" and two "Assignments of Error" in his petition. Questions 1 through 3 challenge the sufficiency of the evidence supporting the Board's decision, while Question 4 raises an ex post facto claim. Pet. at 3-5 (ECF No. 2). Petitioner's First Assignment of Error asserts that the Board erred by deferring his parole-consideration date on grounds of insufficient evidence and unmet statutory requirements. Petitioner's Second Assignment of Error asserts that the Board erred by deferring the parole-consideration date by five years and violated the prohibition against ex factio punishment in doing so. In other words, Questions 1 through 3 correspond with petitioner's First Assignment of Error, and Question 4 with his Second Assignment of Error. Respondent referred to the First and Second Assignments of Error as Grounds One and Two, respectively. Petitioner was appointed counsel, who likewise referred to petitioner's claims as Ground One and Ground Two.

Petitioner's counsel submitted a brief in support of Ground Two. Subsequently, counsel moved to withdraw at petitioner's request, because petitioner wanted counsel to pursue additional claims concerning his sentence. (ECF Nos. 38-39) The court allowed the motion, and petitioner filed a letter construed as a supplement to his claims. Petitioner seeks review of claims he purportedly raised before the Oregon Court of Appeals, including: 1) violation of the Ex Post Facto Clause; 2) his dangerous offender evaluation is not part of the court record; 3) the trial court failed to follow statutory requirements; 4) his sentence is illegal; 5) consecutive sentences are outside of the sentencing guidelines; and 6) the dangerous offender statute is unconstitutional. (ECF No. 41) The first and second claims he cites were raised before the Oregon Court of Appeals and are included in his habeas petition. However, the remaining claims challenge his original sentence and cannot be raised in this proceeding. In this habeas action, petitioner challenges the action of the Board in deferring his parole-consideration date. The

In support of Ground One, petitioner does not cite a specific federal constitutional or federal law violation. Instead, petitioner relies solely on state law in arguing that the Board's decision was not supported by evidence and failed to comply with Oregon statutory requirements. However, federal habeas relief is not available to remedy alleged violations of state law. Accordingly, relief on Ground One is denied. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (reiterating that "federal habeas corpus relief does not lie for errors of state law").

In Ground Two, petitioner contends that the Board's reliance on § 144.228(1)(b) and Rule 255-062-0016 – both enacted after the commission of his offenses – exposed him to greater punishment by authorizing extended deferrals of parole-consideration hearings based on factors that were not enumerated when petitioner committed his crimes. Respondent maintains that petitioner's claim was not fairly presented to the Oregon courts and is barred by procedural default. Respondent also argues that the claim fails on the merits. Regardless of procedural default, I agree that petitioner's claim fails on the merits. 28 U.S.C. § 2254(b)(2).

To establish an ex post facto claim, petitioner must show that the Board's retroactive application of § 144.228(1)(b) and Rule 255-062-0016 "created a 'sufficient risk' of increasing the punishment attached to [petitioner's] crimes." *Himes v. Thompson*, 336 F.3d 848, 854 (9th Cir. 2003) (citing *Weaver v. Graham*, 450 U.S. 24, 29, (1981) and *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 509 (1995)); *see also Garner v. Jones*, 529 U.S. 244, 251 (2000) (a retroactive procedural change violates the Ex Post Facto Clause when it "creates a significant risk of prolonging [an inmate's] incarceration."). A "speculative" or "attenuated" risk of prolonged incarceration is insufficient to establish a violation of the Ex Post Facto Clause. *Morales*, 514 U.S. at 509.

legality of his underlying sentence is not at issue, and any challenge to his 1989 sentence is likely time-barred. Therefore, the court confines its discussion to the grounds raised in his petition.

At the time of petitioner's offenses, § 144.228(1)(b) generally provided that parole consideration reviews would be conducted "at least once every two years until the condition is absent or in remission, at which time release on parole shall be ordered." The statute afforded the Board no discretion to postpone or defer such hearings. In 2009, the Oregon Legislature amended the statute and authorized the Board to defer parole consideration hearings for up to ten years if the Board finds that the prisoner remains dangerous and that "it is not reasonable to expect that the prisoner would be granted a release date before the subsequent hearing." Or. Rev. Stat. § 144.228(1)(b)(A). Rule 255-062-0016, promulgated in 2009, enumerates a non-exclusive list of factors that the Board may use in determining that "it is not reasonable to expect that the inmate would be granted a firm release date before the end of a specified deferral period."

Petitioner argues that the Board's reliance on amended § 144.228(1)(b) significantly risked increasing his punishment because he now must wait five or even up to ten years for a parole-consideration hearing. Petitioner also emphasizes that the Board cited Rule 255-062-0016(2), (4), and (6) in deferring his parole consideration hearing for five years, and that factors (4) and (6) were not enacted at the time of his offense.² In other words, petitioner argues that these are "new" factors petitioner "could not possible have known about or abided by at the time he committed a punishable offense." Pet.'s Br. at 9.

Petitioner's argument has been rejected by both the Supreme Court and the Ninth Circuit. In *Garner*, the Supreme Court rejected an ex post facto claim based on similar facts, declaring, "it is difficult to see how the Board increased the risk of his serving a longer time when it decided that its parole review should be exercised after an 8-year, not a 3-year, interval." 529

² These factors are the "inmate's failure to demonstrate understanding of the factors that led to his/her criminal offense," and the "inmate's demonstrated lack of effort to address criminal risk factors of substance abuse problems." Or. Admin. R. 255-062-0016(4),(6).

U.S. at 255. The Court emphasized that that the parole board had broad discretion to determine the reconsideration period for parole review and allowed expedited reviews under changed circumstances. *Id.* at 254-55. Likewise, in *Morales*, the Supreme court rejected an ex post facto challenge based on a statutory amendment that changed the frequency of parole reconsideration from every year to up to three years. *Morales*, 514 U.S. at 503. The Court found that the amendment did not increase the applicable sentencing range for an offense, did not change the dates of initial parole hearings, and did not change the standards to determine parole eligibility. *Id.* at 507. Rather, the amendment simply “introduced the possibility that after the initial parole hearing, the Board would not have to hold another hearing the very next year, or the year after that, if it found no reasonable probability that respondent would be deemed suitable for parole in the interim period.” *Id.*

Finally, the Ninth Circuit held that a statutory amendment eliminating biennial reviews of dangerous offender status for certain inmates was not an ex post facto violation. *See Scott v. Baldwin*, 225 F.3d 1020, 1022-23 (9th Cir. 2000). The Ninth Circuit found that while the elimination of biennial review might have disadvantaged the petitioner, “such disadvantage is offset by the provision allowing him to apply for a hearing at any time.” *Id.* at 1022. The court further noted that the risk of increased punishment was “too speculative.” *Id.* at 1023; *see also Guzek v. Felton*, No. 3:11-cv-00749-AA, 2013 WL 1213330, at *4 (D. Or. Mar. 18, 2013) (“the most significant change enacted by the 2009 amendments to ORS 144.228 - the shift from the former two-year maximum review interval to the current ten-year maximum review interval - complies with recent Supreme Court and Ninth Circuit precedent”).

Here, as in *Morales*, application of § 144.228(b) had no effect on the punishment attached to petitioner’s crimes or the standards for determining parole eligibility. Likewise, Rule

255-062-0016 factors do not increase the punishment for an offense or affect eligibility for parole. Instead, they are factors considered by the Board when determining whether and how long to defer parole consideration. Finally, the Board may set a shorter interval between parole consideration hearings and in this case allowed petitioner to request a review after two years. Or. Admin. R. 255-062-0021(1). “This provision, along with the requirement that the Board grant such a hearing if there is a reasonable cause to believe that the prisoner is no longer dangerous, makes the ... amendments merely procedural.” *Scott*, 225 F.3d at 1022. While extended deferment “might create some speculative, attenuated risk of affecting [petitioner]’s actual term of confinement by making it more difficult for him to make a persuasive case for early release, . . . that fact alone cannot end the matter for *ex post facto* purposes.” *Morales*, 514 U.S. at 508-09.


Therefore, the deferral of petitioner’s parole consideration does not pose a significant risk of increasing the punishment for petitioner’s offenses and is not an *ex post facto* violation.

CONCLUSION

The Petition for Writ of Habeas Corpus (ECF No. 2) is DENIED. A Certificate of Appealability is denied 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.

Dated this 25th day of July, 2017.



Ann Aiken
United States District Judge