

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 HUNG VAN NGUYEN,

10 Plaintiff,

11 v.

12 JEFFREY UTTECHT,

13 Defendant.

CASE NO. C16-1711-JCC-JPD

ORDER OVERRULING
PETITIONER'S OBJECTION

14
15 This matter comes before the Court on Petitioner Hung Van Nguyen's objection (Dkt.
16 No. 56) to the order by the Honorable James P. Donohue, United States Magistrate Judge (Dkt.
17 No. 52) denying Nguyen's motion to certify questions to the Washington Supreme Court (Dkt.
18 No. 49). Having thoroughly considered the parties' briefing and the relevant record, the Court
19 finds oral argument unnecessary and hereby OVERRULES the objection (Dkt. No. 56) for the
20 reasons explained herein.

21 **I. BACKGROUND**

22 Petitioner Hung Van Nguyen moved to certify to the Washington Supreme Court two
23 questions regarding Washington law: (1) can a single Chief Judge on the Washington Court of
24 Appeals "address the merits' of a non-frivolous personal restraint petition?" and (2) can the
25 Washington Supreme Court Commissioner "address the merits' of a Motion for Discretionary
26 Review?" (Dkt. No. 49 at 1.) These questions were seemingly motivated by Nguyen's concern

1 that such orders were not adjudications “on the merits” and thus did not direct Judge Donohue’s
2 eventual ruling on the merits of Nguyen’s habeas petition. (*See* Dkt. No. 56 at 1–2) (“The
3 Magistrates of this Court have been improperly relying on the Orders of the Acting Chief Judge
4 of the Washington Court of Appeals.”); *see also* *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th
5 Cir. 2005) (recognizing that a federal court may not grant habeas relief for “any claim that was
6 *adjudicated on the merits* in State court proceedings” (emphasis added)). Nguyen appears to
7 argue that, under Washington law, a lone judge on the Washington Court of Appeals cannot
8 “address the merits” of Nguyen’s claim by issuing a unilateral order. (Dkt. No. 56 at 1.) Thus,
9 Nguyen argues that the Court should not consider the order when reviewing the merits of
10 Nguyen’s habeas petition. (*Id.* at 5–6.) Nguyen requested certification to resolve a perceived
11 conflict with state precedent. (*Id.* at 2.)

12 On review, Judge Donohue declined to certify the questions, ruling that Nguyen failed to
13 meet the requirements for certification under Washington law. (Dkt. No. 52 at 2.) Furthermore,
14 Judge Donohue determined that “[t]his Court is able to address the merits of [Nguyen’s] habeas
15 petition and does not require the assistance of the Washington Supreme Court.” (*Id.*) Nguyen
16 objects to Judge Donohue’s refusal to certify the questions. (*See generally* Dkt. No. 56.) Nguyen
17 argues that Washington law entitles Nguyen to consideration of his questions for review by the
18 Washington Supreme Court. (*Id.* at 4–5.)

19 **II. DISCUSSION**

20 **A. Legal Standard**

21 A district court judge may designate a magistrate judge to hear and determine a non-
22 dispositive pretrial matter. *See* 28 U.S.C. § 636(b)(1)(A). The district court may reconsider a
23 magistrate judge’s decision on a pretrial matter where it has been shown that the decision is
24 clearly erroneous or is contrary to law. *Id.* The Court here considers Judge Donohue’s decision
25 declining to certify questions to the Washington Supreme Court.

26 The standard for certification to the Washington Supreme Court is as follows:

1 When in the opinion of any federal court before whom a proceeding is pending, it
2 is necessary to ascertain the local law of this state in order to dispose of such
3 proceeding and the local law has not been clearly determined, such federal court
4 may certify to the supreme court for answer the question of local law involved and
the supreme court shall render its opinion in answer thereto.

5 Wash. Rev. Code § 2.60.020. Federal courts have broad discretion when determining whether it
6 is “necessary to ascertain the local law” for certification in Washington. *See Thompson v. Paul*,
7 547 F.3d 1055, 1065 (9th Cir. 2008).

8 **B. Washington Law Does Not Require Certification In This Case**

9 Judge Donohue found that neither requirement for certification had been met and it was
10 thus inappropriate to certify Nguyen’s questions to the Washington Supreme Court when “this
11 Court . . . [did] not require the assistance of the Washington Supreme Court.” (Dkt. No. 52 at 2.)
12 However, Nguyen believes that *In re Personal Restraint of Khan*, 363 P.3d 577 (Wash. 2015),
13 entitles him to certification. (Dkt. No. 56 at 2.)

14 In *Khan*, the Washington Supreme Court read the state appellate procedural rules to
15 prohibit a lone appellate judge from dismissing a personal restraint petition without finding
16 frivolity. 363 P.3d at 579. When a lone judge dismissed a non-frivolous petition, the Supreme
17 Court found the appropriate remedy was “consideration of [the petitioner’s] motion for
18 discretionary review.” *Id.* at 581. Nguyen argues that his petition was non-frivolous and thus
19 *Khan* entitles him to certification to the Supreme Court to prevent “Magistrates of this Court
20 [from] improperly relying” on orders by a lone judge. (Dkt. No. 56 at 1–2.)

21 However, *Khan* does not demand this Court certify anything. A motion for discretionary
22 review is fundamentally different from certification. A motion for discretionary review remedied
23 the error in *Khan*, because it gave the Washington Supreme Court an opportunity to *review the*
24 *claim on the merits*. 363 P.3d at 579–81. However, certification addresses *what the law is*,
25 distinct from the merits of a particular petition. *See* Wash. Rev. Code § 2.60.020 (“When . . . it is
26 necessary to ascertain the local law . . . such federal court may certify . . .”).

1 While Nguyen facially asks for a determination of the law, his request amounts to a de
2 facto review of the merits of his personal restraint petition in state court. (See Dkt. No. 56 at 1–
3 2.) Nguyen apparently believes that his petition was dismissed in error by the state appellate
4 court. (See Dkt. No. 56 at 4.) To comply with Nguyen’s request, the Court would first have to
5 assume that his petition was in-fact not frivolous, thereby rendering it “necessary” to “ascertain”
6 the law in accordance with that assumption. See Wash Rev. Code § 2.60.020; (Dkt. No. 56 at 2–
7 3). That is not the Court’s role here. Nguyen has not demonstrated that Judge Donohue’s
8 decision not to certify was “clearly erroneous or contrary to law.” 28 U.S.C. § 636(b)(1)(A). If
9 Nguyen desires review of the merits of his state petition, his remedial vehicle is a motion for
10 discretionary review. *Khan*, 363 P.3d at 581.

11 **III. CONCLUSION**

12 For the foregoing reasons, Nguyen’s objection (Dkt. No. 56) is OVERRULED. The Clerk
13 is DIRECTED to send a copy of this order to Nguyen and to Judge Donohue.

14 DATED this 10th day of April, 2017.

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18 John C. Coughenour
19 UNITED STATES DISTRICT JUDGE
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