

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

April 10, 2018

Elisabeth A. Shumaker
Clerk of Court

GERALD DANIELS,

Petitioner - Appellant,

v.

JANET DOWLING, Warden,

Respondent - Appellee.

No. 18-5006
(D.C. No. 4:17-CV-00174-TCK-FHM)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BRISCOE, HOLMES, and MATHESON**, Circuit Judges.

Gerald Daniels, an Oklahoma state prisoner proceeding pro se,¹ seeks a certificate of appealability (“COA”) to appeal the district court’s denial of his application for federal habeas relief under 28 U.S.C. § 2241. 28 U.S.C. § 2253(c)(1)(A); *see Montez v. McKenna*, 208 F.3d 862, 867 (10th Cir. 2000) (holding “a state prisoner must obtain a COA to appeal the denial of a habeas petition” that “was filed pursuant to . . . § 2241”). Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA. We also deny Mr. Daniels’s request to proceed *in forma pauperis* (“ifp”).

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ Because Mr. Daniels is pro se, we liberally construe his filings but do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

I. BACKGROUND

Mr. Daniels is serving a life sentence for his 1990 first degree murder conviction. In 1994, the Oklahoma Court of Criminal Appeals (“OCCA”) affirmed his conviction and sentence on direct appeal. In 2016, he filed his third state application for post-conviction relief, asking the court to declare that the term of his life sentence is 18-45 years or to modify his sentence to time served. The state court denied relief, and the OCCA affirmed.

In his amended § 2241 application, Mr. Daniels asserted two claims. First, he alleged that in 1997 the state legislature defined a life sentence to be 18-60 years and that he had, with good time credits, served his time. Second, he alleged an equal protection violation, contending that he and a white prisoner, Loyd Kennedy, filed identical state post-conviction relief applications and that Mr. Kennedy received relief and Mr. Daniels, who is black, did not. The federal district court denied both claims.

As to the first claim, the court said the “claim should be denied” “regardless of whether Petitioner failed,” as the State had argued, “to exhaust administrative remedies.” ROA, Vol. 1 at 60 (citing 28 U.S.C. § 2254(b)(2) (stating an unexhausted habeas claim may be denied on the merits)). The court denied the claim because it “alleges an error of state law rather than a cognizable federal habeas claim.” *Id.* at 61. It said “[t]he crux of Petitioner’s claim is that Oklahoma law requires that his life sentence be converted to a term-of-years sentence, and that in denying his request for

post-conviction relief, the state courts either misinterpreted or misapplied Oklahoma law.” *Id.* at 60-61.

As to the second claim, the district court found it was not exhausted but chose to address and deny it under 28 U.S.C. § 2254(b)(2). The court said the state court order in Mr. Kennedy’s case did not address the merits of the post-conviction application that were also alleged in Mr. Daniels’s claim and therefore the order could not support Mr. Daniels’s equal protection claim.

Finally, the district court denied a COA.

II. DISCUSSION

To obtain a COA, Mr. Daniels must make “a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), and “that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

A. *Term of Years Claim*

Federal habeas relief is not available to correct errors of state law. “[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). In his amended § 2241 application, Mr. Daniels did not assert a violation of federal law regarding his sentence. The OCCA explained that the Oklahoma law in question assigned a term of years to a life sentence only for the purpose of calculating parole eligibility, not to convert a life sentence to a “fixed term of years that can be discharged.” ROA, Vol. 1 at 30. We see

no basis to question the district court's denial of Mr. Daniels's claim for failing to assert a federal law violation.

Unlike his § 2241 application, which makes no mention of a federal law violation, Mr. Daniels's brief on appeal argues that the Oklahoma sentencing scheme "gave him a due process right, a liberty interest, to have his earned credits deducted from his life sentence when a court or legislature defined life as a number of years." Aplt. Br. at Additional Page 4(b). He also contends "the OCCA's interpretation of State law should be re-examined, as it frustrate[s] due process." *Id.* The references to due process in Mr. Daniels's appellate brief do not excuse his failure to allege a due process or other federal law violation in his § 2241 application. His forfeiture of that argument in district court and failure to argue plain error in this court constitutes waiver. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128–31 (10th Cir. 2011).²

Because Mr. Daniels's claim rests on state law and any due process arguments he makes now have been waived, we conclude that reasonable jurists could not debate the district court's denial of his challenge to the term of his sentence. We therefore deny a COA on this issue.

² The OCCA, in affirming the denial of his petition for post-conviction review, stated that Mr. Daniels "has not demonstrated how law or regulations assigning a term of years to a life sentence for purposes of calculating parole eligibility have somehow caused his particular life sentence to become illegitimate or a violation of due process." ROA, Vol. 1 at 30. It is not clear whether the OCCA was responding to a due process argument or whether it *sua sponte* said that no due process violation had been shown. It is clear that Mr. Daniels did not allege a due process claim in his § 2241 application.

B. *Equal Protection Claim*

The district court denied the equal protection claim because the state court order granting Mr. Kennedy's sentencing relief was not based on the claim that Mr. Daniels asserted in his third state post-conviction proceedings. The order in Mr. Kennedy's case stated that “[d]ue to health, age and number of years served by Defendant [Kennedy], the Court grants [the Motion] . . . and hereby sentences Defendant to time already served,” ROA, Vol. 1 at 63. Mr. Daniels has not shown that the district court's reading of this order or its conclusion that the order fails to support his equal protection claim is incorrect.

Moreover, although Mr. Daniels may have submitted the same post-conviction relief application in state court that Mr. Kennedy submitted, Mr. Daniels does not show how he and Mr. Kennedy were similarly situated—e.g., similar type of conviction, time served, age, health, prison behavior history, and so on—an essential element of an equal protection claim. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (stating that under the Equal Protection Clause, “all persons similarly situated should be treated alike”); *Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998) (stating a “viable equal protection claim” requires plaintiffs to show “they were treated differently from others who were similarly situated”).

The district court correctly determined that Mr. Daniels had failed to establish an equal protection claim. Because reasonable jurists could not debate this determination, we deny a COA on this issue.

III. CONCLUSION

We deny Mr. Daniels's requests for a COA and to proceed *ipf*, and we dismiss this matter.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GERALD DANIELS,)
Petitioner,)
v.) Case No. 17-CV-174-TCK-FHM
JANET DOWLING, Warden,)
Respondent.)

OPINION AND ORDER

Petitioner, a state prisoner appearing pro se,¹ filed a 28 U.S.C. § 2241 petition for writ of habeas corpus (Doc. 1) on April 3, 2017, and filed an amended petition on April 21, 2017 (Doc. 5).² Before the Court is Respondent's motion to dismiss the amended petition (Doc. 8). For the reasons discussed below, the amended petition for writ of habeas corpus shall be denied, and Respondent's motion to dismiss shall be declared moot.

BACKGROUND

Petitioner is currently serving a life sentence entered in Oklahoma County District Court, Case No. CF-1988-3965 following his conviction of first degree murder.³ Doc 5 at 1-2, 10. The Oklahoma Court of Criminal Appeals (OCCA) affirmed Petitioner's conviction and sentence in a

¹ Because Petitioner appears pro se, the Court must liberally construe his pleadings. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

² The Court notes that the amended petition (Doc. 5) replaces and supersedes the original petition (Doc. 1). For that reason the original petition shall be declared moot.

³ Oklahoma County is in the Western District of Oklahoma. *See* 28 U.S.C. § 116(c). But Petitioner is currently incarcerated in a facility located in Osage County, which is in the Northern District of Oklahoma. *See id.* § 116(a). Thus, the petition is properly before this Court. *See id.* § 2241(d).

decision filed on June 1, 1994. *Id.* at 2, 10-14. On June 16, 2016, Petitioner filed a third application for state post-conviction relief, asking the state district court to “correct[] the judgment and sentencing order to specify that the number of years for the life sentence in his case is between 18 and 45 years or modify the sentence to time served.” *Id.* at 10-11. The state district court denied relief on December 2, 2016, Petitioner filed a post-conviction appeal, and the OCCA affirmed the denial of relief on March 23, 2017.⁴ *Id.* at 2-3, 10-14. In denying relief, the OCCA noted Petitioner’s “multiple references to parole eligibility laws” and reasoned that Petitioner failed to “demonstrate[] how laws or regulations assigning a term of years to a life sentence for purposes of calculating parole eligibility have somehow caused his particular life sentence to become illegitimate or a violation of due process.” *Id.* at 12. The OCCA further stated that “[a]bsent a prisoner receiving a commutation, a life sentence simply cannot be discharged during a prisoner’s lifetime.”

Id.

In his amended petition, Petitioner alleges that his custody is unlawful on two grounds and he provides the following supporting facts:

Ground One: Petitioner’s sentence in CRF-88-3965 exceeds the maximum sentence authorized and has been discharged.

Petitioner’s sentence was defined by the state legislature in 1997 as between 18 and 60 years. Petitioner has served over 60 calendar years with his earned credits deducted. Therefore, the state’s refusal to comply with this, voids

⁴ Petitioner provided a copy of the OCCA’s decision with his amended petition. Doc. 5 at 10-14. But neither party provided a copy of the state district court’s order denying relief. Nonetheless, the Court takes judicial notice of the state district court’s order and the Petitioner’s post-conviction petition in error and supporting brief, all of which are available as public records. *See* The Oklahoma State Courts Network (OSCN), *Daniels v. State*, No. PC-2016-1175, available at <http://www.oscn.net> (last visited January 4, 2018); FED. R. EVID. 201; *see also United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007) (exercising discretion “to take judicial notice of publicly-filed records in [this] court and certain other courts concerning matters that bear directly upon the disposition of the case at hand”).

sentence. In Oklahoma, all life sentences were 45 years, and could be discharged in twenty-two and one-half years before 1997, whereas after 1997 its [sic] discharged in 38 years, minus credits. Since 1997 all Oklahoma courts have set 38 years as 85% of a life sentence for parole purposes, thereby setting 45 years as life to discharge them. Definitions cannot be repealed, and in the 1997 truth in sentencing matrix, 57 O.S. § 332.7(A), it specifically states that the definition of life, is not part of the truth in sentencing act, but is used in the classification, and scheduling of crimes under the act. Under the sentencing scheme Petitioner was sentenced under gave him a right to have his credits deducted from his life sentence, when a court or legislature defined life as a number of years. In 1997 the legislature did define 18 to 60 years as life. It's a non-discretionary legislative mandate, and the state trial court's non-discretionary duty was to specify the number of years for this case's life sentence, based on the facts and circumstance of this case. With credit deductions, Petitioner has discharged his sentence. On May 27, 1994, Oklahoma Governor Walters signed House Bill 1249, into law, creating a non-discretionary duty upon all state courts to retroactively place all prisoners sentenced before 1997, under the 1997 truth in sentencing matrix, and it took immediate emergency effect upon the Governor's 1997 signature. The repeal of a statute shall not revive a statute previously repealed, and accrued, vested rights can in no way be denied after a statute is repealed. Pre-1997 parts of a sentence, even if repealed, must still be applied when it benefits a prisoner. Thus, the state court decision was contrary to clearly established Federal law, as determined by the Supreme Court, because it decided Petitioner's case differently than [the Supreme Court] has done on a set of materially indistinguishable facts. The state court decision was not supported by the record.

Ground Two: The State's denial of post-conviction relief violated Petitioner's rights under the equal protection clause.

Similarly situated inmates have been intentionally treated differently by the State, and there is no rational relation between the dissimilar treatment and any legitimate penal interest. The State granted post-conviction relief to a white prisoner on April 14, 2016, but Petitioner who is black, was denied relief on December 2, 2016. Like the white prisoner, Petitioner's post-conviction relief application alleged the identical claims, i.e., that Petitioner's sentence exceeds the maximum sentence authorized by law and has been discharged. (See Ground One above). In fact, Petitioner simply took the white prisoner's post-conviction relief application and removed his name from it and copied the text word-for-word and sent it to the court with Petitioner's name on it. There was no legitimate penal interest for denying Petitioner post-conviction relief. Although the white prisoner was convicted in 1972 while Petitioner was convicted in 1990, the claim for relief in both cases involved pre-1997 life sentences. Loyd Kennedy, a white prisoner, was

granted post-conviction relief on this claim on April 14, 2016, in Sequoyah County Case No. CRF-72-187, while Petitioner, who is black, was denied post-conviction relief on the identical claim on December 2, 2016. The constitution prohibits the State from discrimination on the basis of a person's race.

Id. at 3-5 (footnote omitted). In response to the amended petition, Respondent filed a motion to dismiss (Doc. 8). Petitioner filed a response to the motion to dismiss (Doc. 10).

ANALYSIS

Respondent moves to dismiss the amended petition for three reasons: (1) Petitioner failed to exhaust administrative remedies as to his claim that he has discharged his sentence; (2) the petition is time barred as to that claim because Petitioner relies on 1997 state legislation to support that claim, and (3) Petitioner has not completed his life sentence. Doc. 8 at 3-7.⁵ As to Petitioner's equal protection claim, Respondent contends that Petitioner misreads the order issued by the Sequoyah County District Court and argues that the order does not support Petitioner's claim. *Id.* at 7-8.

A. Sentencing claim (Ground One).

In Ground One of his amended petition, Petitioner claims that his "sentence in CRF-88-3965 exceeds the maximum sentence authorized and has been discharged." Doc. 5 at 3. Respondent first argues that Petitioner failed to exhaust his administrative remedies as to this claim. Doc. 8 at 3-4. In response, Petitioner asserts that he was not required to exhaust administrative remedies because his petition "does not contain any allegations challenging the manner in which petitioner's sentence is being administered by the Oklahoma Department of Corrections." Doc. 10 at 4. Rather,

⁵ Respondent's arguments regarding exhaustion and untimeliness do not mention Petitioner's equal protection claim and appear to be directed only to his claim that he has discharged his sentence. *See* Doc. 8 at 3-7.

according to Petitioner, his petition “merely raises issues regarding interpretation and application of state law.” *Id.*

Petitioner brings this action under § 2241 which, under Tenth Circuit precedent, is the appropriate procedural vehicle to “attack[] the execution of a sentence rather than its validity.” *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1041 (10th Cir. 2017); *see also McIntosh v. U.S. Parole Comm’n*, 115 F.3d 809, 811 (10th Cir. 1997) (explaining that “[p]etitions under § 2241 are used to attack the execution of a sentence” whereas petitions under § 2254 “are used to collaterally attack the validity of a conviction and sentence”). As Respondent argues, “[a] habeas petitioner is generally required to exhaust state remedies whether his action is brought under § 2241 or § 2254.” *Hamm v. Saffle*, 300 F.3d 1213, 1216 (10th Cir. 2001) (quoting *Montez v. McKinna*, 208 F.3d 862, 866 (10th Cir. 2000)); *see also* 28 U.S.C. § 2254(b)(1)(A) (precluding federal habeas courts from granting relief unless it appears petitioner has exhausted available state remedies). And, in either case, this means that the petitioner must exhaust “both administrative and state court remedies.” *Id.*

But, regardless of whether Petitioner failed to exhaust administrative remedies as to his sentencing claim, the Court finds that Petitioner’s claim should be denied. *See* § 2254(b)(2) (permitting federal habeas courts to deny habeas relief “notwithstanding the failure of the [petitioner] to exhaust” available state remedies). This Court may only grant habeas relief to a state prisoner who is “in custody in violation of the Constitution or laws or treaties of the United States.” *See* 28 U.S.C. § 2241(a), (c)(3); *id.* § 2254(a). As Petitioner admits in his response to the motion to dismiss, his petition—at least as to his claim that he has discharged his sentence—“merely raises issues regarding interpretation and application of state law.” Doc. 10 at 4. The crux of Petitioner’s claim is that Oklahoma law requires that his life sentence be converted to a term-of-years sentence,

and that in denying his request for post-conviction relief, the state courts either misinterpreted or misapplied Oklahoma law. *See* Doc. 5 at 3-4; Doc. 10 at 5-10. But “[a] federal court may not issue the writ on the basis of a perceived error of state law.” *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *see also Eizember v. Trammell*, 803 F.3d 1129, 1145 (10th Cir. 2015) (noting that a federal habeas court’s “role on collateral review isn’t to second-guess state courts about the application of their own laws but to vindicate federal rights”).

Because Petitioner’s sentencing claim alleges an error of state law rather than a cognizable federal habeas claim, the Court shall deny habeas relief as to Ground One.⁶

B. Equal protection claim (Ground Two)

In Ground Two of his amended petition, Petitioner claims that he has been denied post-conviction relief in violation of the equal protection clause of the Constitution. Doc. 5 at 5. Although Respondent does not appear to address whether this claim is exhausted, *see* Doc. 8, nothing in the record before the Court suggests that this claim has been presented to the OCCA.⁷

⁶ Petitioner asserts, at the end of his “supporting facts” for his sentencing claim, that “the state court decision was contrary to clearly established Federal law, as determined by the Supreme Court, because it decided Petitioner’s case differently than [the Supreme Court] has done on a set of materially indistinguishable facts.” Doc. 5 at 3-4. However, Petitioner fails to identify any particular federal law or Supreme Court decision that requires Oklahoma courts to convert a life sentence into a term-of-years sentence. *Id.* Petitioner’s mere assertion that the state court’s decision is contrary to federal law is insufficient to convert his alleged state-law error into a cognizable federal habeas claim. Also, because Petitioner is not entitled to habeas relief on his Ground One claim, the Court declines to address Respondent’s alternative argument that this claim is time barred. *See* Doc. 8 at 4-5.

⁷ The Court acknowledges that Petitioner mentioned the Sequoyah County District Court order in his post-conviction appeal brief in Case No. PC-2016-1175. But there Petitioner referenced the order only to support his claim that his life sentence has been discharged under Oklahoma law. *See* Petitioner’s Brief, *Daniels v. State*, No. PC-2016-1175, at 4, available at <http://www.oscn.net> (last visited January 4, 2018). To exhaust a federal habeas claim, a petitioner must present to the state courts both “the facts on which he bases his

Thus, the Court finds that the claim is unexhausted. Nonetheless, the Court shall also deny habeas relief as to this claim pursuant to § 2254(b)(2).

The Fourteenth Amendment's equal protection guarantee "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Petitioner, who states that he is black, contends that he was treated differently than a white prisoner who was granted post-conviction relief on an allegedly identical claim. *See* Doc. 5 at 5; Doc. 10 at 8-9. To support this contention, Petitioner cites the order, entered April 14, 2016, in Sequoyah County District Court, Case No. CRF-1972-187 (Doc. 8-6), granting post-conviction relief to Loyd Kennedy, identified by Petitioner as a white prisoner. *See* Doc 5 at 5. Petitioner asserts that this order "holds that the 1997 definition of life (18 to 60 years) cannot be repealed, and accrued, vested rights, can in no way be denied after a statute is repealed." Doc. 10 at 5. Thus, he argues, the Sequoyah County District Court ruled in his favor when that court granted Kennedy post-conviction relief because his "application [for post-conviction relief] was identical to the one filed by Kennedy." *Id.* at 8-9. And, he further argues, the state's failure to grant him the same relief therefore violates his right to equal protection. *Id.*

The Court has examined the Sequoyah County District Court order and agrees with Respondent that Petitioner's equal protection claim is premised on an extreme misreading of that order. Significantly, the district judge did not address the merits of claims described by Petitioner as identical to those he raised either in his third application for post-conviction relief or in his post-

claim and the constitutional claim itself." *Wilson v. Workman*, 577 F.3d 1284, 1292 (10th Cir. 2009) (en banc), *overruled on other grounds as recognized in Lott v. Trammell*, 705 F.3d 1167 (10th Cir. 2013). Because the Court finds nothing in Petitioner's post-conviction appeal brief that would have alerted the OCCA that he was relying on the Sequoyah County District Court order to assert an equal protection claim, this claim is unexhausted.

conviction appeal. *See* Doc. 8-6; Doc. 10, 6-8. Instead, the district judge ruled that “[d]ue to health, age and number of years served by Defendant [Kennedy], the Court grants Defendant’s Post Conviction Relief and/or Defendant’s Motion to Modify Sentence and hereby sentences Defendant to time already served in the Oklahoma Department of Corrections.” *See* Doc. 8-6.

Because the Sequoyah County District Court order clearly does not support Petitioner’s assertion of an equal protection violation, the Court shall deny habeas relief on Ground Two.

Certificate of Appealability

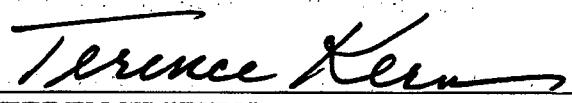
When a district court issues a final order in a habeas proceeding that is adverse to the petitioner, “the district court must issue or deny a certificate of appealability.” Rule 11, *Rules Governing Section 2254 Cases in the United States District Courts*. A district court may issue a certificate of appealability “only if the [petitioner] has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). If the district court denied a constitutional claim on the merits, the petitioner can satisfy that standard by demonstrating “that reasonable jurists would find the district court’s assessment of the constitutional claim[] debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In addition, when the court’s ruling is based on procedural grounds, a petitioner must demonstrate 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.” *Id.*

In this case, the Court concludes that a certificate of appealability should not issue. Nothing suggests that the Court’s rulings are debatable among jurists or that the procedural ruling resulting in the denial of relief is debatable or incorrect. Thus, a certificate of appealability shall be denied.

ACCORDINGLY IT IS HEREBY ORDERED that:

1. The original petition for writ of habeas corpus (Doc. 1) is **declared moot**.
2. The amended petition for writ of habeas corpus (Doc. 5) is **denied**.
3. Respondent's motion to dismiss (Doc. 8) is **declared moot**.
4. A separate judgment shall be entered in this matter.

DATED this 8th day of January, 2018.


TERENCE KERN
United States District Judge

UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

GERALD DANIELS,

Petitioner - Appellant,

v.

No. 18-5006

JANET DOWLING, Warden,

Respondent - Appellee.

ORDER

Before **BRISCOE, HOLMES, and MATHESON**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Appendix C