IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-11445
USDC No. 5:15-CV-109
USDC No. 5:15-CV-110

A True Copy
Certified order issued Jul 07, 2017

Clerk, U.S. Court of Appeals, Fifth Circuit

JOHN PATRICK WALLACE,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Texas, Lubbock

O R D E R:

John Patrick Wallace, Texas prisoner # 1621931, seeks a certificate of appealability (COA) from the denial of a 28 U.S.C. § 2254 petition challenging the loss of good-time credits for a prison disciplinary violation. He contends that he was deprived of procedural due process in the disciplinary proceeding. The district court concluded that Wallace has no constitutionally protected interest in good-time credits because he is serving the first of two consecutive sentences and is thus not eligible for the Texas form of conditional release known as mandatory supervision that is based in part on good-time credits.

Wallace fails to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Reasonable jurists would therefore

not find the district court's ruling debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The motion for a COA is DENIED. Wallace's motion for production of documents is also DENIED.

/s/ Priscilla R. Owen
PRISCILLA R. OWEN
UNITED STATES CIRCUIT JUDGE

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JOHN PATRICK WALLACE,

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Before DAVIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motions for certificate of appealability and for production of documents. The panel has considered appellant's motion for reconsideration of certificate of appealability, only. IT IS ORDERED that the motion is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

JOHN PATRICK WALLACE,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	5:15-CV-109
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	ECF
Respondent.	§	

JUDGMENT

For the reasons stated in the Court's Order of even date,

IT IS ORDERED, ADJUDGED, AND DECREED that the above-styled and -numbered cause is dismissed with prejudice.

Dated August 5, 2016.

SAM R. CUMMINGS
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

JOHN PATRICK WALLACE,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	5:15-CV-109-C
LORIE DAVIS,[1] Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	ECF
Respondent.	§	

ORDER

On this day the Court considered the Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254, filed by Petitioner John Patrick Wallace on April 8, 2015, and Amended Petition filed on April 29, 2015.[2] Respondent filed an Answer with Brief in Support and copies of Petitioner's relevant prison records arguing that the Petition should be dismissed without prejudice because he is not yet eligible for mandatory supervision and thus, fails to state a claim for which federal habeas relief can be granted. Alternatively, Respondent argues that Petitioner's claims lack merit. Petitioner filed a reply.

Respondent has lawful and valid custody of Petitioner pursuant to a judgment and 36-year sentence of the 219th Judicial District Court of Collin County, Texas, in Cause No. 219-82795-07 for burglary of a habitation. Also, in Cause No. 219-80315-08, Petitioner received an 8-year

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[1]Lorie Davis has been named Director of the Texas Department of Criminal Justice, Correctional Institutions Division, and the caption is being changed pursuant to Fed. R. Civ. P. 25(d).

[2]*See Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998) (for purposes of determining applicability of AEDPA, a federal petition is filed on the date it is placed in the prison mail system).

sentence for second conviction for burglary of a habitation, to be served consecutive to the 36-year sentence received for Cause no. 219-82795-07.

Petitioner does not challenge the validity of his original convictions and sentences; rather, he challenges prison disciplinary proceeding number 20140225338, wherein he was charged with threatening to inflict harm on an offender, in violation of offense code 22.0 of the TDCJ Disciplinary Rules and Procedures for Offenders, at the John T. Montford Unit. Petitioner pleaded not guilty; and after a hearing on April 14, 2014, Petitioner was found guilty of the charge. The disciplinary hearing officer assessed his punishment at 15 days' loss of good time credit and 15 days' loss of recreation and commissary privileges. Petitioner appealed from the disciplinary proceeding in step-one and step-two grievances. Both his step-one and step-two grievances were denied.

Petitioner alleges that he was denied due process because the accusing officer, Sgt. Brian Sifford, violated the state's own rules by writing an incident report instead of an "Offender Protection Investigation," and also because the Disicplinary Hearing Officer (DHO) should not have allowed the case to go forward because there was no evidence to support his conviction.

Respondent argues that the Petition should be dismissed with prejudice on the following grounds: (1) Petitioner is not yet eligible for mandatory supervision because of his stacked sentences and thus has failed to state any claim that entitles him to federal habeas relief; and (2) even if he were eligible for mandatory supervision, his claims are without merit because he was not denied due process in the disciplinary hearing process because there was sufficient evidence to find him guilty.

The Court has reviewed Petitioner's Petition, Respondent's Answer, and the prison disciplinary records.

The Supreme Court has determined that "the Due Process Clause does not protect every change in the conditions of confinement having a substantial adverse impact on the prisoner." *Sandin v. Conner,* 515 U.S. 472, 478 (1995) (citing *Meachum v. Fano,* 427 U.S. 215, 224 (1976)). "Admittedly, prisoners do not shed all constitutional rights at the prison gate, . . . but '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" *Id.* at 485 (internal citation omitted and quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (quoting *Price v. Johnston,* 334 U.S. 266, 285 (1948))). Although states "may under certain circumstances create liberty interests which are protected by the Due Process Clause[,]" such interests "will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner,* 515 U.S. at 483-84. "Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law." *Id.* at 485.

Petitioner's losses of commissary and recreation privileges are simply changes in the conditions of his confinement that do not implicate the Due Process Clause and thus do not present grounds for federal habeas corpus review. *Madison v. Parker,* 104 F.3d 765, 768 (5th Cir. 1997). It is well settled that the Due Process Clause does not protect every change in the conditions of confinement having a substantially adverse impact on a prisoner. *Meachum v. Fano,* 427 U.S. 215, 224 (1976). *See Preiser v. Rodriguez*, 411 U.S. at 493 (holding that a federal habeas action is available to challenge the fact or duration of confinement but not the conditions of confinement);

Malchi v. Thaler, 211 F.3d 953, 958 (5th Cir. 2000) (holding that a "30-day loss of commissary privileges and cell restriction do not implicate due process concerns").

In Texas, "[a]s a general rule, only sanctions which result in loss of good conduct time for inmates who are eligible for release on mandatory supervision or which otherwise directly or adversely affect release on mandatory supervision will impose upon a liberty interest." *Spicer v. Collins,* 9 F. Supp. 2d 673, 685 (E.D. Tex. 1998) (citing *Orellana v. Kyle,* 65 F.3d 29, 31-33 (5th Cir. 1995)). *See Malchi v. Thaler,* 211 F.3d at 957 (holding that although Texas law does not create a constitutionally protected interest in parole, the law prior to September 1, 1996, does create a constitutional expectancy of early release on mandatory supervision). Moreover, "an inmate serving consecutive sentences is not eligible for mandatory supervision on any but the last of his consecutive sentences." *See Ex Parte Ruthart,* 980 S.W. 2d 469, 471-73 (Tex. Crim. App. 1998). Although Petitioner lost good-time credit as the result of his disciplinary conviction, records presented by Respondent establish that he is not yet eligible for mandatory supervision as a result of his stacked sentences. In other words, he will not be eligible for mandatory supervision until he has discharged his 36-year sentence and begins serving his 8-year sentence. Because Petitioner is not yet eligible for release to mandatory supervision, he has failed to demonstrate that a constitutional violation has occurred. His claim, therefore, does not provide a basis for federal habeas corpus relief. *See Madison v. Parker,* 104 F.3d at 768-69.

For the reasons stated above and for reasons clearly set forth in Respondent's answer and brief, Petitioner's Petition for Writ of Habeas Corpus is without merit and should be DENIED and dismissed with prejudice.

All relief not expressly granted is denied and any pending motions are hereby denied.

Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability should be denied. For the reasons set forth herein and in Respondent's Original Answer, Petitioner has failed to show that reasonable jurists would find (1) this Court's "assessment of the constitutional claims debatable or wrong," or (2) "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

SO ORDERED.

Judgment shall be entered accordingly.

Dated August 5, 2016.

SAM R. CUMMINGS
Senior United States District Judge