

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 29, 2018

**Elisabeth A. Shumaker
Clerk of Court**

MARIO AKOTHE,

Petitioner - Appellant,

v.

WARDEN BEAR; STATE OF
OKLAHOMA,

Respondents - Appellees.

No. 18-6036
(D.C. No. 5:18-CV-00054-D)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **PHILLIPS, McKAY, and BALDOCK**, Circuit Judges.

Mario Akothe, a state prisoner proceeding pro se,¹ seeks a certificate of appealability (COA) to challenge the district court's dismissal of his 28 U.S.C. § 2241 petition. He also moves to proceed *in forma pauperis* (IFP). We deny Akothe a COA and deny his IFP motion.

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 We construe a pro se appellant's complaint liberally. *Gaines v. Stenseng*, 292 F.3d 1222, 1224 (10th Cir. 2002). But this liberal treatment has limits. Though we can make allowances for "the [pro se] plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements," we can't serve as his advocate. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

BACKGROUND

On January 19, 2018, Akothe, an Oklahoma state prisoner, filed a 28 U.S.C. § 2241 petition. In his petition, he made two claims: (1) that he's "an Indian" being detained for a crime he committed against "an Indian, in Indian Country, on Indian Land, inside an Indian Reservation," so his state charges, conviction and detention by Oklahoma authorities are illegal, R. at 9; and (2) that Oklahoma courts "refuse to enforce U.S. Supreme Court opinions, have suspended habeas-corpus, due process, equal protection of laws, access to courts," and have transgressed the terms of Oklahoma's statehood charter, *id.* at 10.

He also moved to proceed IFP. At the time, Akothe's inmate-savings account balance exceeded the required \$5 filing fee. So the magistrate judge recommended that the district court deny Akothe's IFP motion. Soon after, Akothe paid the \$5 filing fee.

On February 9, 2018, the magistrate judge issued an order recommending dismissal of Akothe's petition. The magistrate judge concluded that Akothe's arguments challenged the fact of his confinement, rather than its nature. And the magistrate judge declined to construe Akothe's claims as a § 2254 petition, warning of unintended consequences if the district court should do so. Akothe objected, reiterating his two claims.

On February 21, 2018, the district court agreed with the magistrate judge and adopted his recommendation. The district court determined that Akothe's claims failed to attack the execution of his sentence as required to state a claim under

§ 2241, and declined to recast his petition as arising under § 2254. Akothe moved to proceed IFP on appeal, but the district court certified that any appeal wouldn't be taken in good faith, so the court denied his motion.

DISCUSSION

Before Akothe's appeal may proceed, he must obtain a COA. *Montez v. McKinna*, 208 F.3d 862, 867 (10th Cir. 2000). To do so, Akothe must make "a substantial showing of the denial of a constitutional right." *Id.* at 869 (quoting 28 U.S.C. § 2253(c)(2)). Such a showing is made where the petitioner demonstrates that the issue "he seeks to raise on appeal [is] deserving of further proceedings, subject to a different resolution on appeal, or reasonably debatable among jurists of reason." *Id.*

Here, the district court dismissed both of Akothe's claims for failure to state a claim because neither claim attacked "the *execution* of his sentence or the nature of his confinement." R. at 20; *see id.* at 31 (adopting magistrate's report and recommendation). Section 2241 petitions are "generally reserved for complaints about the *nature* of a prisoner's confinement, not the *fact* of his confinement." *Prost v. Anderson*, 636 F.3d 578, 581 (10th Cir. 2011). Claims that touch the nature of confinement include "matters that occur at prison, such as deprivation of good-time credits and other prison disciplinary matters . . . affecting the fact or duration of the [prisoner's] custody." *Hale v. Fox*, 829 F.3d 1162, 1165 n.2 (10th Cir. 2016) (alteration in original) (quoting *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811–12 (10th Cir. 1997)). So the question for us is whether Akothe stated claims attacking the nature of his confinement.

We conclude that he didn't. Claims that Oklahoma illegally indicted and detained him in violation of a treaty challenge his confinement but not its nature. *Martin v. Oklahoma*, No. 18-6068, 2018 WL 3854956, at *1 (10th Cir. Aug. 14, 2018). And his claims that the Oklahoma courts "refuse to enforce U.S. Supreme Court opinions, have suspended habeas-corpus, due process, equal protection of laws, access to courts," R. at 10, similarly challenge his confinement but not its nature. *See Hayes v. Bear*, No. 18-6048, 2018 WL 3199231, at *1 (10th Cir. June 28, 2018). So the district court's disposition of Akothe's petition isn't debatable, and we decline to issue Akothe a COA.²

Akothe moves to proceed IFP. To do so he must demonstrate (1) a financial inability to prepay the required appellate filing fee, and (2) that he has forwarded a "reasoned, nonfrivolous argument on the law and facts in support" of his appeal. *McIntosh*, 115 F.3d at 812–13 (quoting *DeBardleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991)). We've reviewed Akothe's financial materials and conclude he lacks the financial ability to prepay the filing fee. But because he simply restates his arguments before the district court and fails to present a reasoned argument as to how the district court erred, we conclude his appeal is frivolous. So we deny his motion to proceed IFP.

² We decline to construe Akothe's claims as a § 2254 petition. *See Davis v. Roberts*, 425 F.3d 830, 834–35 (10th Cir. 2005) (noting the potential prejudicial impacts to petitioner should the court construe a § 2241 petition as a § 2254 petition).

CONCLUSION

We decline to issue Akothe a COA and deny his motion to proceed IFP.

Entered for the Court

Gregory A. Phillips
Circuit Judge

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

MARIO AKOTHE,)	
)	
Petitioner,)	
)	
v.)	Case No. CIV-18-54-D
)	
WARDEN BEAR, <i>et al.</i> ,)	
)	
Respondents.)	

ORDER

This matter is before the Court for review of the Report and Recommendation [Doc. No. 9] issued by United States Magistrate Judge Shon T. Erwin pursuant to 28 U.S.C. § 636(b)(1)(B) and (C). Upon preliminary review of the Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241, Judge Erwin finds that the Petition should be summarily dismissed without prejudice because Petitioner fails to state a claim upon which relief can be granted under § 2241 and his pleading should not be recast as a § 2254 petition.

Petitioner, who appears *pro se*, has filed a timely Objection [Doc. No. 10]. Thus, the Court must make a *de novo* determination of the portions of the Report to which a specific objection is made, and may accept, reject, or modify the recommended decision, in whole or in part. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

Petitioner primarily objects to Judge Erwin's conclusions that the Petition appears to challenge, in Ground One, a state court conviction for which Petitioner is now confined at Joseph Harp Correctional Center and, in Ground Two, Oklahoma procedural rules and laws. Petitioner insists that this action "is a simple matter of [his] detention being in

violation of clearly established federal law, constitution, and treaty (see attached).” *See* Obj. at 1. The attached document appears to be a copy of a paper memorializing “the order given by Major Whittles at Fort Dearborn Sept. 28, 1832” for the protection of “the familys [sic] of the Kickapoo Indians, thirty seven in number.” *See id.* at 3. Beyond that, the Court is hard pressed to determine the nature of Petitioner’s objection, which invokes: 1) principles of res judicata and collateral estoppel; 2) *Murphy v. Royal*, 866 F.3d 1164, 1189-90 (10th Cir. 2017), *modified on denial of reh’g en banc*, 875 F.3d 896 (10th Cir. 2017); and 3) *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 2651 (2016) (Stevens, J., concurring in judgment).

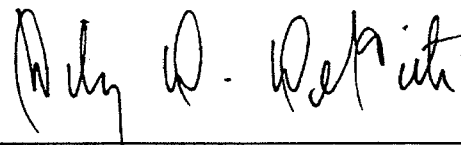
Upon *de novo* consideration of the issues raised by Petitioner’s Objection, the Court finds no viable basis to permit this case to proceed as a habeas action under § 2241. Further, taking judicial notice of pertinent case files and records, the Court notes that Petitioner recently sought habeas relief from his state court conviction and sentence under 28 U.S.C. § 2254, but his petition was denied as untimely. *See Akothe v. Bear*, Case No. CIV-17-693-D, 2017 WL 4512582 (W.D. Okla. Oct. 10, 2017), *COA denied*, 707 F. App’x 568 (10th Cir. 2017). In that case, Petitioner relied on a copy of the same 1832 document submitted in this case. *See Akothe v. Bear*, Case No. CIV-17-693-D, Pet. attach.1 (W.D. Okla. June 23, 2017). Petitioner also claimed, as he appears to claim in this case, that the state court “process denied [him] due process and was inadequate to protect [his] federal rights.” *See id.* Pet. at 9 (ECF pge numbering). Petitioner cannot avoid an unfavorable result in his § 2254 action by seeking relief under § 2241.

For these reasons, the Court fully concurs in Judge Erwin's findings that the Petition fails to state a claim cognizable under § 2241 and his recommendation for the dismissal of the Petition without prejudice to a future filing.

IT IS THEREFORE ORDERED that the Report and Recommendation [Doc. No. 9] is ADOPTED in its entirety. The Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241 is DISMISSED without prejudice. Judgment shall be entered accordingly.

IT IS FURTHER ORDERED that pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a petitioner. A COA may issue only if Petitioner "has made a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, 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). Upon consideration, the Court finds the requisite standard is not met in this case. Therefore, a COA is DENIED.

IT IS SO ORDERED this 21st day of February, 2018.

A handwritten signature in black ink, appearing to read "Timothy D. DeGiusti", is written above a horizontal line.

TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

MARIO AKOTHE,

Petitioner,

v.

WARDEN BEAR, et al.,

Respondent.

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Case No. CIV-18-54-D

REPORT AND RECOMMENDATION

State prisoner Mario Akothe seeks a writ of habeas corpus under 28 U.S.C. § 2241. (ECF No. 1). United States District Judge Timothy D. Degiusti has referred this matter to the undersigned magistrate judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B)-(C). The Court should summarily **DISMISS** the petition without prejudice.

I. SCREENING REQUIREMENT

The Court is required to review habeas petitions promptly and to “summarily dismiss [a] petition without ordering a responsive pleading,” *Mayle v. Felix*, 545 U.S. 644, 656 (2005), “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” *See* R. 4, R. Governing § 2254 Cases in U.S. Dist. Ct.¹

¹ “The district court may apply any or all” of the Rules governing § 2254 cases to a habeas petition brought under § 2241. R. 1(b), R. Governing § 2254 Cases in U.S. Dist. Ct.

II. FACTUAL BACKGROUND AND PETITIONER'S CLAIMS

Petitioner informs the Court that he is confined at the Joseph Harp Correctional Center, but he fails to identify anything else about his sentence(s). That is, the Court does not know when or where Petitioner was sentenced, or for what and for how long. *See* ECF No. 1:1.

In the Petition, Mr. Akothe raises two grounds for relief.² In Ground One, he alleges that the state of Oklahoma is illegally incarcerating him because Petitioner's "tribe" has signed a treaty with the United States President. (ECF No. 1:7). Although the Court presumes that Petitioner is Native American, he does not specify his tribal affiliation. (ECF No. 1:7). In Ground Two, Petitioner claims that Oklahoma state courts: (1) refuse to enforce U.S. Supreme Court opinions and (2) have suspended "habeas corpus, due process, equal protection of laws, access to courts, and terms of statehood charter." (ECF No. 1:7).

III. DISMISSAL

It is "the *nature* of a prisoner's confinement, not the *fact* of his confinement" that is the gravamen of a Section 2241 petition or challenge. *Prost v. Anderson*, 636 F.3d 578, 581 (10th Cir. 2011) (emphasis in original). Here, Mr. Akothe alleges no facts to show that he is challenging the *execution* of his sentence or the nature of his confinement. He

² In the areas of the Petition which allow for explanation of Grounds Three and Four, Mr. Akothe writes that these grounds are "reserved" for the hearing. The Court should not consider these "potential," yet unspecified grounds for relief.

does not, for instance, seek to challenge “certain matters that occur at prison, such as deprivation of good-time credits and other prison disciplinary matters . . . affecting the fact or duration” of his custody. *Hale v. Fox*, 829 F.3d 1162, 1165 n.2 (10th Cir. 2016) (internal quotation omitted). Instead, Petitioner’s Ground One “attempts a frontal assault on his conviction.” *Prost*, 636 F.3d at 581. For example, he apparently believes that his conviction is invalid due to a treaty signed by the President with his tribe. *See* ECF No. 1:7. While an attack on Petitioner’s conviction may be proper in a Section 2254 action, *McIntosh v. U.S. Parole Comm’n*, 115 F.3d 809, 811 (10th Cir. 1997), it fails to establish a basis for habeas relief arising under Section 2241 because it does not attack the execution of his sentence. Therefore, the Court should dismiss Ground One, without prejudice. To the extent Petitioner desires to challenge the validity of his conviction, then he must file an action pursuant to Section 2254 utilizing the proper form. The Court, however, will not construe Ground One as arising under Section 2254.³

In Ground Two, Petitioner asserts that Oklahoma state courts: (1) refuse to enforce U.S. Supreme Court opinions and (2) have suspended “habeas corpus, due process, equal protection of laws, access to courts, and terms of statehood charter.” (ECF No. 1:7). But this challenge is not cognizable on habeas review, as it involves a direct challenge to Oklahoma state procedural rules and laws. *See Estelle v. McGuire*, 502 U.S.

³ The Court lacks sufficient information about Petitioner’s claims to know, for example, whether they have been exhausted in state court or if they are timely. As such, construing the Petition as arising under Section 2254 could have unintended consequences for Petitioner. *See, e.g., Davis v. Roberts*, 425 F.3d 830, 834-35 (10th Cir. 2005) (discussing unintended consequences of construing a petitioner’s habeas petition as arising under § 2254).

62, 67–68 (1991) (“[F]ederal habeas corpus relief does not lie for errors of state law,” and “it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”) (internal quotation marks omitted); *Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000) (“[Petitioner’s] claims of state law violations are not cognizable in a federal habeas action.”) (citing 28 U.S.C. §§ 2241(c)(3), 2254(a)); *Stryker v. Bear*, No. CIV-17-695-W, 2017 WL 4533968, at *3 (W.D. Okla. Sept. 5, 2017) (unpublished report and recommendation) (finding that petitioner’s claim that Oklahoma denied him “access to court, suspended habeas corpus, . . . and denied him equal protection and due process” did “not demonstrate any violation of federal law”), *adopted*, 2017 WL 4533138 (W.D. Okla. Oct. 10, 2017) (unpublished district court order). Therefore, the Court should dismiss Ground Two, without prejudice. *See Rael v. Williams*, 223 F.3d 1153, 1154–55 (10th Cir. 2000).

IV. RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT


Based upon the foregoing analysis, it is recommended that the petition be summarily dismissed, without prejudice.

The parties are advised of their right to file an objection to this Report and Recommendation with the Clerk of this Court by **February 26, 2018**, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The parties are further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

V. STATUS OF REFERRAL

This Report and Recommendation terminates the referral by the District Judge in this matter.

ENTERED on February 9, 2018.

A handwritten signature in black ink, reading "Shon T. Erwin". The signature is written in a cursive style with a horizontal line underneath it.

SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE

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