

Appellate Case: 18-7035 Document: 010110027588 Date Filed: 07/24/2018 Page: 1

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 24, 2018

Elisabeth A. Shumaker
Clerk of Court

WADE LAY,

Petitioner - Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Respondents - Appellees.

No. 18-7035
(D.C. No. 6:18-CV-00139-RAW)
(E.D. Okla.)

ORDER

Before **BACHARACH** and **PHILLIPS**, Circuit Judges.

This matter comes on for consideration upon review of the preliminary record filed in this court on July 23, 2018. The petitioner seeks to appeal the district court's dismissal of his petition for writ of quo warranto. It appears that since the petitioner is in custody under the judgment of the State of Oklahoma, that he may need to obtain a certificate of appealability (COA) in order to proceed with this appeal. *See* 28 U.S.C. § 2253(c)(1)(A); *Montez v. McKinna*, 208 F.3d 862, 867 (10th Cir. 2000).

The district court did not address the issue of whether a COA should issue and the petitioner did not request a COA from the district court.

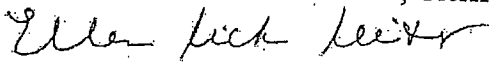
Accordingly, this matter is **partially remanded** to the district court for the limited purpose of deciding whether to grant COA. *See United States v. Higley*, No. 17-1111 (10th Cir. Sept. 29, 2017) (unpublished) (stating that the district court must ordinarily

ATT. - A.Z
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decide in the first instance whether a COA should be granted), It is further ordered that this matter is **abated** pending a decision by the district court.

When the district court enters a decision on COA the district clerk shall file a supplemental preliminary record in this court.

In addition, the petitioner shall file a written report within 30 days of the date of this order advising the court of the status of the remand proceedings if the district court has not ruled by that time.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: Ellen Rich Reiter
Jurisdictional Attorney

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

December 4, 2018

Chris Wolpert
Chief Deputy Clerk

WADE LAY,

Petitioner - Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Respondents - Appellees.

No. 18-7035
(D.C. No. 6:18-CV-00139-RAW)
(E.D. Okla.)

ORDER

This matter is before the court on pro se appellant Wade Lay's failure to either pay the appellate filing fee or to file a compliant Motion for Leave to Proceed on Appeal Without Prepayment of Costs or Fees (an "IFP Motion") despite multiple notices and orders regarding the requirement that he do so. Accordingly, the court dismisses this appeal for failure to prosecute, *see* 10 Cir. R. 3.3(B) and 10th Cir. R. 42.1, and, in light of that dismissal, likewise denies all pending motions.

A copy of this order shall stand as and for the mandate of this court.

Entered for the Court



CHRIS WOLPERT, Chief Deputy Clerk

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

WADE LAY,

Petitioner,

v.

UNITED STATES OF AMERICA,
et al.,

Respondents.

No. CIV 18-139-RAW

OPINION AND ORDER

On May 2, 2018, Petitioner, a death-sentenced state prisoner who is incarcerated at Oklahoma State Penitentiary in McAlester, Oklahoma, filed this petition for writ of quo warranto¹ pursuant to “Fed. R. Civ. P. 9(c), ‘conditions precedent,’ and Fed. R. Civ. P. 81(a)(4), and the prevailing case law precedent and statutory provisions listed [in the petition]” (Dkt. 1 at 1-2).² The respondents are the United States of America; Susan Otto, Federal Public Defender for the Western District of Oklahoma; Phil Lombardi, Clerk of the United States District Court for the Northern District of Oklahoma; Elizabeth A. Shumaker, Clerk of the Tenth Circuit Court of Appeals; and Lisa Nesbitt, Clerk of the United States Supreme Court.

Petitioner alleges that without his assent, Defendants Phil Lombardi and Susan Otto acted in tandem to file a motion pursuant to *McFarland v. Scott*, 512 U.S. 849 (1994),³

¹ According to *Black’s Law Dictionary*, quo warranto is “[a] common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed.”

² Petitioner was convicted and sentenced in Tulsa County District Court Case No. CF-2004-2320.

³ *McFarland* concerns the right to counsel for capital defendants in habeas corpus proceedings and the district court’s jurisdiction to enter a stay of execution.

intended “to supplant the claims presented to the state court by Petitioner on direct appeal.” *Id.* at 6. Defendants Elizabeth Shumaker and Lisa Nesbitt, allegedly “have repeatedly shown a consistent pattern of abuse, violating the rules of the court, that they serve, and refusing to adhere to the prevailing dynamic that concerns the case that is filed in their court.” *Id.* at 7. Petitioner further complains that on January 9, 2017, Defendant Nesbitt, the Clerk of the Supreme Court, altered the caption and the names of the parties in a “next friend” filing by a Tulsa attorney. *Id.* at 8.

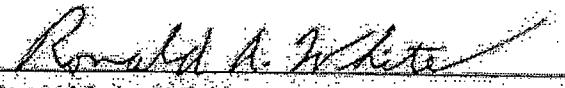
Petitioner “demands a conduit be provided as that anticipated by Congress in the A.E.D.P.A. . . .” *Id.* at 10. He maintains the United States District Court for the Northern District of Oklahoma “has abused its discretion, acting as a blockade to Wade Lay’s claims that were presented to the state court (*i.e.*, the O.C.C.A.), claims ‘adjudicated on the merits,’ under 28 U.S.C. § 2254(d).” *Id.* Petitioner also requests an immediate stay in the proceedings before the U.S. Supreme Court to ascertain the legality of the certiorari petition in *Lay v. Royal*, No. 17-7685 . . . with respect to whether the Northern District Court lacked jurisdiction, in light of *McFarland*; *Barefoot v. Estelle*, 463 U.S. 880 (1983); and *Whitmore v. Arkansas*, 495 U.S. 149 (1980). (Dkt. 1 at 10-11). For these and related reasons, Petitioner maintains he “has a lawful right to motion this court to re-toll the ‘1-year period of limitation’” under 28 U.S.C. § 2244(d)(1)(B) and 28 U.S.C. § 2255(f)(2).⁴ (Dkt. 1 at 12).

According to the U.S. Supreme Court website, Petitioner’s petition for a writ of

⁴ 28 U.S.C. § 2244(d)(1)(B) states that the one-year limitation period for an application for a writ of habeas corpus by a person in state custody runs from the latest of “the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action.” For federal prisoners, 28 U.S.C. § 2255(f)(2) sets forth a parallel limitation period when governmental action in violation of the Constitution or laws of the United States creates an impediment to filing a § 2255 motion.

certiorari in Case No. 17-7685 was denied on April 16, 2018. To the extent Petitioner is presenting issues related to his habeas petition in the Northern District of Oklahoma, or asserting the respondents prevented him from filing a habeas petition, the Court finds such claims should be presented in the Northern District of Oklahoma, because he was convicted and sentenced within the territorial jurisdiction of that district. Therefore, this action is dismissed without prejudice pursuant to 28 U.S.C. § 2241(d).

IT IS SO ORDERED this 13th day of July 2018.



Ronald A. White
United States District Judge
Eastern District of Oklahoma

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