

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 28, 2019

Elisabeth A. Shumaker
Clerk of Court

ALAN DeATLEY TRIBAL MEMBER,

Petitioner - Appellant,

v.

DEAN WILLIAMS, Executive Director
CDOC; WARDEN JAQUEZ; PHIL
WEISER, State of Colorado Attorney
General,

Respondents - Appellees.

No. 19-1322
(D.C. No. 1:19-CV-01326-LTB-GPG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON, McKAY, and BACHARACH**, Circuit Judges.

Alan DeAtley, a Colorado state prisoner serving an 83-year sentence for tax fraud offenses, seeks a certificate of appealability (“COA”) to challenge the district court’s dismissal of his 28 U.S.C. § 2254 application for a writ of habeas corpus.

See 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal “the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court”). He also seeks leave to proceed *in forma pauperis* (“*ifp*”).

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Exercising jurisdiction under 28 U.S.C. § 1291, we deny both requests and dismiss this matter.¹

Mr. DeAtley initiated this proceeding by filing a pro se § 2254 application in the United States District Court for the District of Columbia. That court transferred the application to the District of Colorado, where a magistrate judge ordered Mr. DeAtley to file his application on the proper forms. Mr. DeAtley did so, but the magistrate judge then found that Mr. DeAtley's § 2254 application and its attached 45-page statement failed to comply with Federal Rule of Civil Procedure 8(a), which calls for "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). The magistrate judge ordered Mr. DeAtley to file a compliant § 2254 application. In response, Mr. DeAtley filed an amended application. The magistrate judge, "unable to decipher what federal constitutional violations Applicant is attempting to challenge," ROA at 279, recommended dismissal of the action without prejudice under Federal Rule of Civil Procedure 41(b). Mr. DeAtley objected to the recommendation and filed another amended application. The district court, noting that "neither the Objection nor the Amended Application are intelligible," *id.* at 357, adopted the recommendation, dismissed the action without prejudice for failure to comply with a court order and failure to prosecute, denied *ifp* status on appeal, denied a COA, entered judgment, and denied a motion for reconsideration.

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

We must grant a COA to consider Mr. DeAtley's appeal from the district court's dismissal of his § 2254 application. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). Where, as here, the district court dismissed the application on procedural grounds, we will grant a COA only if the applicant can demonstrate both "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) (emphasis added). We focus here on the district court's procedural ruling.

Mr. DeAtley's challenge to the dismissal of his § 2254 application under Rule 41(b) for failure to comply with Rule 8(a) would be reviewed in a merits appeal for abuse of discretion. *See Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1161 (10th Cir. 2007). We therefore ask if reasonable jurists could debate whether the district court's dismissal of Mr. DeAtley's amended § 2254 application was an abuse of discretion. *See Buck v. Davis*, 137 S. Ct. 759, 777 (2017) (accepting formulation of "the COA question" as "whether a reasonable jurist could conclude that the [d]istrict [c]ourt abused its discretion in declining to reopen the judgment").

We have reviewed Mr. DeAtley's extensive and mostly handwritten filings, including his four applications for habeas relief in the district court and his brief filed in this court. These materials reflect considerable work on his part and are entitled to a liberal construction. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). But pro se litigants must comply with the Federal Rules of Civil Procedure, including

Rule 8. *See United States v. Green*, 886 F.3d 1300, 1307-08 (10th Cir. 2018);

Nielsen v. Price, 17 F.3d 1276, 1277 (10th Cir. 1994). Mr. DeAtley has not.

Mr. DeAtley's fourth (and most recent) § 2254 application alleges the State of Colorado lacks jurisdiction over him as a tribal member who has been granted habeas relief by a tribal court. It also mentions "unconstitutional search and seizure," "unlawful arrest," "unconstitutional failure of the illegal prosecution," "double jeopardy," and "First Amendment right to access." ROA at 282-88. But the only issue he may challenge here is the district court's dismissal based on his failure to comply with its order to satisfy the pleading requirements of the Federal Rules.²

We cannot say the district court abused its discretion in determining that Mr. DeAtley has failed to set forth a short and plain statement of his claims for relief as required

² Although we limit our review to the procedural issue and do not address the merits of Mr. DeAtley's claims, we note that Mr. DeAtley contends that the "Latgawa Indian Tribal Justice Court" has awarded him habeas relief and that the federal court must honor this ruling. ROA at 75, 290-91. The tribal judge who awarded relief and signed the order was *Mr. DeAtley*. For example, attached to his first § 2254 application is an "Order" finding that "*Alan E. De Atley Tribal Special Counsel, Tribal Judge* appointed for life by Chief Judge Newkirk must be released within 1 hours [sic] the same day this has been delivered to any State of Colorado employee." *Id.* at 75 (emphasis added). Then it says, Mr. "De Atley must be released this day within 1 hour of this Tribal Courts Order [sic]." *Id.* The order was signed by "*Alan E. De Atley Tribal Special Counsel, Tribal Judge*." *Id.* at 77 (emphasis added). Similar documents from the "Latgawa Indian Tribal Justice Court" and signed by Mr. DeAtley as the tribal judge were attached to his § 2254 applications in this case. *See, e.g., id.* at 78-94, 121-37, 139-41.

by Rule 8(a) of the Federal Rules of Civil Procedure.³ Nor would reasonable jurists debate whether the district court abused its discretion.

We therefore deny a COA.⁴ We also deny Mr. DeAtley's request to proceed *ifp*.⁵ This matter is dismissed.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

³ "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Rule 12, Rules Governing § 2254 Cases in the United States District Courts; *see* Fed. R. Civ. P. 81(a)(4)(A). To the extent Rule 2 of the Rules Governing § 2254 Cases addresses what a habeas applicant should include in a § 2254 petition, it is "not inconsistent with" Federal Rule of Civil Procedure 8(a)(2)'s requirement of "a short and plain statement" of the applicant's claim.

⁴ The dismissal was without prejudice. A habeas petition dismissed without prejudice has not been decided on the merits and is, therefore, not subject to the limitations governing second or successive petitions. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-44 (1998).

⁵ Mr. DeAtley's brief on appeal alleges improprieties in the district court's handling of this case. These matters may be raised through the judicial conduct process. *See* 28 U.S.C. §§ 351-64; 10th Cir. Rules for Judicial-Conduct and Judicial-Disability Proceedings, <https://www.ca10.uscourts.gov/ce/misconduct>.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK

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Denver, Colorado 80257
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Elisabeth A. Shumaker
Clerk of Court

October 28, 2019

Chris Wolpert
Chief Deputy Clerk

Mr. Alan DeAtley
AVCF - Arkansas Valley Correctional Facility
12750 Highway 96 at Lane 13
Ordway, CO 81034
172066

RE: **19-1322, DeAtley v. Williams, et al**
Dist/Ag docket: 1:19-CV-01326-LTB-GPG

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,



Elisabeth A. Shumaker
Clerk of the Court

EAS/lg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-01326-LTB-GPG

ALAN DeATLEY TRIBAL MEMBER,

Applicant,

v.

DEAN WILLIAMS, Executive Director CDOC,
WARDEN JAQUEZ, and
PHIL WEISER, State of Colorado Attorney General,

Respondents.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge entered on July 22, 2019. See ECF No. 17. Applicant has filed a timely written objection to the Recommendation, see ECF No. 19, and an Amended Application for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, ECF No. 18. The Court has therefore reviewed the Recommendation *de novo* in light of the file and record in this case. On *de novo* review the Court concludes that the Recommendation is correct. Furthermore, neither the Objection nor the Amended Application are intelligible. The pleadings suffer from the same deficiencies as the July 3, 2019, Amended Application, which was the operative pleading at issue in the July 22 Recommendation.

Accordingly, for the foregoing reasons, it is
ORDERED that the Recommendation of United States Magistrate Judge, ECF
No. 17, is accepted and adopted. It is

FURTHER ORDERED that the July 3, 2019 Application, ECF No. 14, is denied
and the action is dismissed without prejudice pursuant to Fed. R. Civ. P. 41(b) for failure
to comply with a Court order and for failure to prosecute. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is
denied without prejudice to the filing of a motion seeking leave to proceed *in forma
pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit. The
Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this dismissal
would not be taken in good faith. It is

FURTHER ORDERED that no certificate of appealability shall issue because
Applicant has not made a substantial showing of the denial of a constitutional right or
that this Court was incorrect in its procedural ruling.

DATED: August 13, 2019

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**
Gordon P. Gallagher, United States Magistrate Judge

Civil Action No. 19-cv-01326-LTB-GPG

ALAN DeATLEY TRIBAL MEMBER,

Applicant,

v.

DEAN WILLIAMS, Executive Director CDOC,
WARDEN JAQUEZ, and
PHIL WEISER, State of Colorado Attorney General

Respondents.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, ECF No. 14.¹ Applicant proceeds *pro se*. The matter has been referred to this Magistrate Judge for recommendation. See ECF No. 16.² The Court has considered the entire case file, the applicable law, and is

¹ "(ECF No. 14)" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Recommendation.

² Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive, or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

sufficiently advised in the premises. This Magistrate Judge respectfully recommends that the action be dismissed without prejudice.

I. Factual and Procedural Background

Applicant Alan DeAtley is in the custody of the Colorado Department of Corrections and currently is incarcerated at the Arkansas Valley Correctional Facility in Ordway, Colorado. Applicant originated this action by filing a pleading titled, "Petition for Writ of Habeas Corpus," ECF No. 1, and a Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 in a Habeas Corpus Action, ECF No. 2, in the United States District Court for the District of Columbia. The action was transferred to this Court on April 17, 2019. The District of Columbia found that it may not entertain a habeas petition involving Applicant's present custody unless the respondent is within its territorial jurisdiction. ECF No. 4 at 1. On May 9, 2019, the Court directed Applicant to submit his habeas petition and his request to proceed pursuant to 28 U.S.C. § 1915 on proper Court-approved forms. See ECF No. 7. Applicant complied with the May 9 Order, and the Court granted Applicant leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, see ECF No. 12. On June 7, 2019, the Court reviewed the 28 U.S.C. § 2254 Application filed on May 28, 2019, found deficiencies with the May 28 Application, and directed Applicant to amend the Application. See ECF No. 13.

Applicant was warned in the June 7 Order that if he failed to file an amended application that complied with the directives in the order the action would be dismissed without further notice. On July 3, 2019, Applicant filed an Amended Application. See ECF No. 14. The Amended Application is operative pleading for the purpose of this Recommendation.

For the following reasons the Court finds the July 3 Amended Application does not comply with the June 7 Order and the action should be dismissed.

II. Legal Standards

The Court must construe the July 3 Amended Application liberally because Applicant is not represented by an attorney. See *Haines v. Kerner*, 404 U.S. 519, 520 21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court will not act as an advocate for a *pro se* litigant. See *Hall*, 935 F.2d at 1110.

III. Analysis

The Court instructed Applicant in the June 7 Order to submit to the Court a clear statement of his claims demonstrating how his federal constitutional rights have been violated. ECF No. 13 at 2. Applicant further was instructed that he must identify the federal constitutional right allegedly violated in each claim and provide the relevant factual allegations from his situation in support of each asserted claim. *Id.* at 3. Finally, Applicant was instructed that prolix, vague, and unintelligible pleadings violate the requirements of Fed. R. Civ. P. 8.

The July 3, 2019 Application is 162 pages long. On Page Five, Applicant states he is challenging the conviction in State of Colorado Criminal Case No. 2010-CR-10309, and that he was convicted on April 12, 2016. See ECF 14 at 5. Rather than provide a clear statement of his claims in the F. Statement of Claims section of the Court-approved form, Applicant refers to "Ex-500," see ECF No. 14 at 67. Ex. 500 is a copy of the petition that Applicant originally filed in the District of Columbia, and to which he refers to in the May 28, 2019 Application rather than completing the § 2254 Court-approved form. Also, Pages Eighty-Four and Eighty-Five of the July 3 Amended

Application are the pages five and six of the § 2254 Court-approved form. On Pages Five and Six, Applicant concedes that he has not fairly presented each claim to the state's highest court and that a direct appeal is underway regarding the illegal state action. ECF No. 14 at 84-85. Otherwise, the Application is unintelligible.

Applicant also has attached what appears to be transcripts, state court orders, tribal court orders, letters, state court filings, and documents that are captioned as state court orders but are signed by Applicant. Overall, the Court is unable to decipher what federal constitutional violations Applicant is attempting to challenge regarding State of Colorado Criminal Case No. 2010-CR-10309.

Because Applicant has been given two opportunities to submit his claims in a format that is intelligible and to comply with Rule 8 and Local Rule 5.1(c) of the United States District Court for the District of Colorado Local Rules of Practice , which requires a *pro se* filer to use a Court-approved form to assert claims, a third attempt to amend is not merited. The instructions in the June 7, 2019 Order to File Amended Application, and in the May 9, 2019 Order to Cure Deficiencies, are clear about what Applicant needs to do to proceed with this action.

The Court further notes that Applicant has submitted proper Court-approved forms both times the Court has directed him to submit his claims on a proper form. He, however, has failed to complete the forms as the form instructs him to do.

The Court, therefore, concludes that because Applicant has failed to comply with the Court order to amend, the Application should be denied, and the action dismissed.

IV. Recommendation

For the reasons set forth herein, this Magistrate Judge respectfully
RECOMMENDS that the July 3, 2019 Application, ECF No. 14, be denied, and
the action be DISMISSED WITHOUT PREJUDICE pursuant to Fed. R. Civ. P. 41(b) for
failure to comply with a Court order and for failure to prosecute.

DATED July 22, 2019 at Grand Junction, Colorado.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Gordon P. Gallagher".

Gordon P. Gallagher
United States Magistrate Judge

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

November 18, 2019

Elisabeth A. Shumaker
Clerk of Court

ALAN DeATLEY TRIBAL MEMBER,

Petitioner - Appellant,

v.

No. 19-1322

DEAN WILLIAMS, Executive Director
CDOC, et al.,

Respondents - Appellees.

ORDER

Before MATHESON, McKAY, and BACHARACH, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

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