

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

December 6, 2019

Elisabeth A. Shumaker
Clerk of Court

WADRESS HUBERT METOYER, JR.,

Plaintiff - Appellant,

v.

DELYNN FUDGE, in her individual capacity and official capacity as Executive Director of the Oklahoma Pardon and Parole Board; TOM GILLERT, in his individual capacity and in his official capacity as Chairman of the Oklahoma Pardon and Parole Board; ROBERT MACY, in his individual capacity and in his official capacity as Member of the Oklahoma Pardon and Parole Board; C. ALLEN MCCALL, in his individual capacity and in his official capacity as Member of the Oklahoma Pardon and Parole Board; MICHAEL KRIS STEELE, in his individual capacity and in his official capacity as Member of the Oklahoma Pardon and Parole Board; ROBERTA ROBBIE FULLERTON, in her individual capacity and in her official capacity as Member of the Oklahoma Pardon and Parole Board,

Defendants - Appellees.

No. 19-6124
(D.C. No. 5:19-CV-00406-SLP)
(W.D. Okla.)

ORDER AND JUDGMENT*

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).* The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may

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

Wadress Hubert Metoyer, Jr., an Oklahoma inmate appearing pro se, appeals the district court's dismissal of his 42 U.S.C. § 1983 action.¹ Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

In 1996, Mr. Metoyer was convicted of a first-degree murder committed in 1982. He began serving his sentence in 2000. He sued members of the Oklahoma Pardon and Parole Board (collectively, "Defendants") for violating his constitutional rights at two parole hearings. A magistrate judge construed Mr. Metoyer's complaint as alleging that Defendants violated his (1) due process rights in denying his liberty interest in parole, (2) Equal Protection rights in applying Oklahoma's Truth in Sentencing Act ("the Act") to his parole proceedings, and (3) Ex Post Facto Clause rights. Mr. Metoyer also alleged claims under the Oklahoma State Constitution.

The magistrate judge issued a Report and Recommendation ("R&R") recommending dismissal of Mr. Metoyer's claims. It held that (1) because parole in Oklahoma is discretionary, Mr. Metoyer had "no constitutionally protected liberty

be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ Because Mr. Metoyer appears pro se, we afford his filings a liberal construction, but we do not craft arguments or otherwise advocate for him. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

interest in parole,” ROA at 65; (2) because inmates similarly situated to Mr. Metoyer are treated alike in consideration for parole, he did not suffer an Equal Protection violation, *id.* at 66; and (3) because he failed to offer “any reasonable argument that he face[d] a significant risk of longer incarceration” based on the Act, he did not state an Ex Post Facto claim, *id.* at 67-68.

Mr. Metoyer objected to the first two holdings in the R&R. The district court rejected Mr. Metoyer’s objections, adopted the R&R, and dismissed the action under 28 U.S.C. § 1915A(b) for failure to state a claim. The court declined to exercise supplemental jurisdiction over the Oklahoma state law claims and dismissed them.

II. DISCUSSION

We review de novo a district court’s § 1915A(b) dismissal for failure to state a claim, *see Young v. Davis*, 554 F.3d 1254, 1256 (10th Cir. 2009), and use the same standard applied under Federal Rule of Civil Procedure 12(b)(6), *see Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007). A complaint must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

We have carefully reviewed Mr. Metoyer’s 15-page brief, which fails to show how the district court erred. *See Nixon v. City & Cty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) (determining an appellant must “explain what was wrong with the reasoning that the district court relied on in reaching its decision”). Instead, he repeats mostly the same arguments that he presented to the district court. His failure to explain why the district court’s order was wrong waives any argument for reversal.

See Utah Envtl. Cong. v. Bosworth, 439 F.3d 1184, 1194 n.2 (10th Cir. 2006) (“An issue mentioned in a brief on appeal, but not addressed, is waived.”); *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (“[T]he inadequacies of Plaintiff’s briefs disentitle him to review by this court.”).²

Even if we reach the sufficiency of his complaint, Mr. Metoyer failed to “nudge[] [his] claims across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570. First, we agree with the district court that parole in Oklahoma is discretionary and not mandatory. As such, Mr. Metoyer was not denied due process because he does not have a liberty interest in parole. *See Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 11 (1979) (“That the state holds out the possibility of parole provides no more than a mere hope[,] . . . a hope which is not protected by due process.”). Second, because Mr. Metoyer was not treated differently from “similarly situated” prisoners, the Act did not violate his Equal Protection rights. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Third, as the R&R points out, because Mr. Metoyer fails to show that applying the Act “in his case would result in a significant risk of a longer period of incarceration,” he does

² Even if Mr. Metoyer had presented an adequate argument about his Ex Post Facto claim on appeal, he waived that issue when he failed to object to the R&R’s recommendation to dismiss that claim. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (“[The] firm waiver rule . . . provides that a litigant’s failure to file timely objections to a magistrate’s R&R waives appellate review” (quotations omitted)). He also waived the argument on appeal by failing to raise it. *See United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006) (“[A] party that has waived [an argument] is not entitled to appellate relief.”).

not allege facts supporting a plausible Ex Post Facto claim. *Henderson v. Scott*, 260 F.3d 1213, 1216-17 (10th Cir. 2001).

III. CONCLUSION

We affirm the district court's judgment. Because Mr. Metoyer has failed to show the "existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised," *Buchheit v. Green*, 705 F.3d 1157, 1161 (10th Cir. 2012), we deny his motion to proceed *in forma pauperis* and remind him of his obligation to pay the remainder of his filing fee forthwith.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 6, 2020

Christopher M. Wolpert
Clerk of Court

WADRESS HUBERT METOYER, JR.,

Plaintiff - Appellant,

v.

No. 19-6124

DELYNN FUDGE, in her individual capacity and official capacity as Executive Director of the Oklahoma Pardon and Parole Board, et al.,

Defendants - Appellees.

ORDER

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

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

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

WADRESS HUBERT METOYER, JR.,)
Plaintiff,)
v.) Case No. CIV-19-406-SLP
DELYNN FUDGE, et al.,)
Defendants.)

ORDER

Before the Court is the Report and Recommendation [Doc. No. 9] issued by United States Magistrate Judge Bernard M. Jones upon referral of this matter. *See* 28 U.S.C. § 636(b)(1)(B) and (C). Judge Jones conducted an initial screening pursuant to 28 U.S.C. § 1915A(a) and (b) and recommends dismissal of Plaintiff's Complaint. Plaintiff has filed an Objection [Doc. No. 12] and has also filed a Motion for Discovery and to Produce Documents [Doc. No. 11]. The Court must now make a de novo determination of the portions of the Report to which 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); *see also* Fed. R. Civ. P. 72(b)(3).

I. Background

Plaintiff, an Oklahoma inmate appearing pro se, brings this action under 42 U.S.C. § 1983 for alleged constitutional violations related to his prior parole hearings. Plaintiff is serving a life sentence for a 1996 first-degree-murder conviction entered in Case No. CF-95-3479, District Court of Tulsa County, State of Oklahoma, for a crime committed in

1982. His conviction was affirmed by the Oklahoma Court of Criminal Appeals on July 8, 1998 in Case No. F-96-1573.¹

Judge Jones noted that “Plaintiff’s Complaint is lengthy” but construed “his repetitive arguments” as raising the following three claims for relief: (1) Plaintiff has a liberty interest in parole and Defendants denied him that interest without due process of law; (2) Oklahoma’s 1997 Truth in Sentencing Act (the Act), which changed the process for considering an inmate’s eligibility for parole, violates Plaintiff’s equal protection rights; and (3) the Act violates the Ex Post Facto Clause of the United States Constitution. R&R at 2.²

Plaintiff objects and contends that Judge Jones has misconstrued the claims raised in his Complaint. Plaintiff argues he is *not* bringing a claim that he has a liberty interest in parole. Instead, Plaintiff argues the Act includes a sentencing matrix “setting a sentencing range as a guide for parole and a definite end to pre-1988 offender’s [sic] incarceration.” Pl.’s Obj. at 3. Plaintiff further argues the Act includes language demonstrating that certain parole hearing procedures are not discretionary, but mandatory, giving rise to a liberty interest. *See id.* at 4, 6-7 (citing Okla. Stat. tit. 57, § 332.7(D) and (G)). For the reasons

¹ The Court takes judicial notice of these facts from the state court record of Plaintiff’s conviction and sentence. *See also* Compl. at 9, 11.

² Because Plaintiff’s crime was committed prior to the Act’s effective date, the only portions of the Act that apply to him are those governing the calculation of his eligibility date for parole. *Seegars v. Ward*, 124 F. App’x 637, 639 (10th Cir. 2005); *see also* R&R at 1-2 (explaining parole consideration under the Act).

set forth, Plaintiff's arguments lack merit and his attempt to establish a liberty interest subject to due process protections is to no avail.

II. Discussion

Plaintiff appears to concede that the Oklahoma statutes governing parole create no liberty interest as the decision whether to grant parole to an inmate "lies firmly within the discretion of the Board, the Department of Corrections, and/or the governor. *Koch v. Daniels*, 296 F. App'x 621, 627 (10th Cir. 2008) (citing *Boutwell v. Keating*, 399 F.3d 1203, 1213-15 (10th Cir. 2005)); *see also Clark v. Fallin*, 654 F. App'x 385, 388 (10th Cir. 2016) (the Tenth Circuit has "repeatedly concluded" that Oklahoma's parole system does not create "a liberty interest that would be protected by the Constitution's guarantee of due process).

In an attempt to end-run this well-established law, Plaintiff argues that the Act requires the Oklahoma Pardon and Parole Board (Board) to implement a procedure to determine what sentence Plaintiff would have received under the applicable matrices of the Act. As the Tenth Circuit has explained the Act "originally included matrices of sentencing ranges for various crimes." *Seegars*, 124 F. App'x at 638. "Although the Oklahoma legislature soon repealed the sentencing matrices, the matrices are still used in calculating parole eligibility dates." *Id.* (citing Okla. Stat. tit. 57, § 332.7(A)(3)).

Plaintiff does not argue his parole eligibility date has been improperly determined and "it is clear that the sole purpose of any recalculation [of Plaintiff's sentence under the Act] is to determine the date upon which the inmate becomes eligible for parole consideration." *Campbell v. Province*, No. CIV-06-382-Raw, 2008 WL 268186 at *3

(E.D. Okla. Jan. 29, 2008) (unpublished op.). Plaintiff's contention that the purpose of the matrix is to set "a sentencing range as a guide for parole and a *definite end to incarceration*," *see* Obj. at 2, is misguided. *See Seegars*, 124 F. App'x at 638-39 (rejecting argument that the Act's language requiring procedures for determining "what sentence the person would have received under the applicable matrix" gave prisoner the right to have his life sentence modified to a determinable number of years; the statute's language "focus[es] exclusively on the calculation of parole eligibility dates").

Plaintiff's argument that he has a due process right to certain procedures being followed during his parole consideration also fails. Plaintiff relies on subsections (D) and (G) of the Act.³ Plaintiff appears to rely on use of language utilizing the word "shall" in

³ The applicable subsections provide:

D. The parole hearings conducted for persons pursuant to paragraph 3 of subsection A of this section or for any person who was convicted of a violent crime as set forth in Section 571 of this title and who is eligible for parole consideration pursuant to paragraph 1 of subsection A of this section, subsection B or paragraph 2 of subsection C of this section *shall* be conducted in two stages, as follows:

1. At the initial hearing, the Pardon and Parole Board *shall* review the completed report submitted by the staff of the Board and *shall* conduct a vote regarding whether, based upon that report, the Board decides to consider the person for parole at a subsequent meeting of the Board; and
2. At the subsequent meeting, the Board *shall* hear from any victim or representatives of the victim that want to contest the granting of parole to that person and *shall* conduct a vote regarding whether parole should be recommended for that person.

* * *

G. The Pardon and Parole Board *shall* promulgate rules for the implementation of subsections A, B and C of this section. The rules *shall* include, but not be limited to, procedures for reconsideration of persons denied parole under this section and procedure for determining what sentence a person eligible for parole consideration

these subsections to argue the Act gives rise to a protected liberty interest. But the Tenth Circuit has rejected similar arguments. *See Clark*, 654 F. App'x at 388 (rejecting Oklahoma prisoner's challenge to the denial of parole "as well as the *process* by which" he was denied parole on grounds no liberty interest in parole exists under Oklahoma law); *Jackson v. Standifird*, 503 F. App'x 623, 625 (10th Cir. 2012) (because Oklahoma prisoner had no liberty interest in parole, he could not make a claim for a denial of procedural or substantive due process); *Koch*, 296 F. App'x at 628 (explaining that where a prisoner has no constitutionally-protected liberty interest in parole, there are no "constitutionally-protected interests in the process at issue"); *Hunter v. Beck*, 244 F. App'x 848, 852 (10th Cir. 2007) (rejecting argument that statutory language mandating processes that might give a prisoner legitimate expectations in receiving a parole hearing did not create a constitutionally-protected liberty interest); *see also Bridenstine v. Farris*, No. CIV-16-498-R, 2017 WL 454210 at *9 (W.D. Okla. Sept. 15, 2017) (addressing Oklahoma prisoner's parole eligibility argument and concluding that even if "Oklahoma law gives Petitioner a legitimate expectation in being considered for parole 'at the earliest date' after he serves some portion of his prison sentence . . . an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause") (internal quotation marks and citations omitted), R&R adopted, 2017 WL 4544611 (W.D. Okla. Oct. 11, 2017).

pursuant to subsection A of this section would have received under the applicable matrix.

Okla. Stat. tit. 57, § 332.7(D) and (G) (emphasis added).

Plaintiff further appears to argue that he has been denied “his invested liberty interest” in his eligibility for clemency pursuant to the Act. But as the Tenth Circuit has held, Oklahoma’s Parole Board “has discretion to decide whether to consider an offender for clemency, so there is no constitutionally protected liberty interest.” *Ward v. Province*, 283 F. App’x 615, 618 (10th Cir. 2008); *see also Parker v. Dowling*, 664 F. App’x 681, 682 (10th Cir. 2016) (under Oklahoma law, the “prospect of commutation is necessarily a speculative event, one in which the prisoner has no liberty interest protected by the Due Process Clause” (internal quotation marks and citations omitted)).

For these reasons, the Court rejects Plaintiff’s argument that, contrary to well-established law, parole should be considered mandatory and not discretionary under the Act.

Plaintiff also objects to the findings in the Report that he has failed to state a claim alleging a violation of his equal protection rights. But Plaintiff bases his claim on the same erroneous assertion that parole in Oklahoma is mandatory, not discretionary. *See Obj.* at 8-9. Plaintiff otherwise does not challenge the Magistrate Judge’s findings with respect to this claim. Accordingly, for the reasons set forth by the Magistrate Judge, the Court finds dismissal of Plaintiff’s equal protection claim is proper.

Plaintiff does not challenge any other findings set forth in the Report, including the recommendation that the Court decline to exercise supplemental jurisdiction over Plaintiff’s claims arising under Oklahoma law. *See R&R* at 6. The Court has addressed the specific issues raised by the Objection and finds review of all other issues waived.

III. Conclusion

In summary, upon de novo consideration of the issues raised by Plaintiff's Objection, the Court finds that the Complaint fails to state any claim upon which § 1983 relief can be granted. For these reasons, and as further ably explained by Judge Jones in his Report, the action is dismissed pursuant to 28 U.S.C. § 1915A(b). The Court declines to exercise supplemental jurisdiction over Plaintiff's claims arising under Oklahoma law and those claims are dismissed without prejudice. *See* 28 U.S.C. § 1367(c)(3).

IT IS THEREFORE ORDERED that the Report and Recommendation [Doc. No. 9] is ADOPTED as set forth herein. This action is DISMISSED. A separate judgment of dismissal shall be entered.

IT IS FURTHER ORDERED that Plaintiff's Motion for Discovery and to Produce Documents [Doc. No. 11] is DENIED as MOOT.

IT IS SO ORDERED this 29th day of July, 2019.



SCOTT L. PALK
UNITED STATES DISTRICT JUDGE

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

WADRESS HUBERT METOYER, JR.,)
Plaintiff,)
v.)
DELYNN FUDGE, et al.,)
Defendants.)
Case No. CIV-19-406-SLP

REPORT AND RECOMMENDATION

Plaintiff, a pro se inmate, filed a Complaint under 42 U.S.C. § 1983 alleging numerous constitutional violations surrounding his two prior parole hearings, (Compl.) [Doc. No. 1]. United States District Judge Scott L. Palk referred the matter for proceedings consistent with 28 U.S.C. § 636(b)(1)(B), (C). For the reasons set forth below, it is recommended that the Court dismiss the Complaint on screening.

I. Background and Plaintiff's Claims

In 1996, Plaintiff was convicted of first degree murder for a crime committed in 1982. Compl. at 9, 11. He began serving his sentence of life with parole in 2000. *Id.* at 9. When Plaintiff was convicted, Oklahoma's Forgotten Man Act obliged the Parole Board to consider "every inmate . . . for parole on or before the expiration of one-third of his maximum sentence." *Shirley v. Chestnut*, 603 F.2d 805, 806 (10th Cir. 1979). The Oklahoma legislature repealed that statute in 1997 and replaced it with the Truth in Sentencing Act. As applied to offenders whose crimes were committed before July 1, 1998, the Truth in Sentencing Act sets initial docket dates for parole consideration at either a percentage of the mid-point of the sentencing matrix for the crime, or at one-third of the actual sentence, whichever is earlier. Okla. Stat. tit. 57, § 332.7(A). Once denied parole, inmates convicted of a violent crime are not eligible for reconsideration for three years. *Id.*

§ 332.7(E)(1); *see Traylor v. Jenks*, 223 F. App'x 789, 790 (10th Cir. 2007) ("Under the Truth in Sentencing Act, a person who committed a violent crime before July 1, 1998, and has been denied parole, is eligible for reconsideration at least once every three years.").¹ Additionally, when the Board considers his application for parole, an inmate generally receives "jacket review" rather than an in-person hearing. *See, e.g., Taylor v. Hargett*, 203 F.3d 836, 2000 WL 135172, at *1 (10th Cir. 2000) (internal quotation marks omitted); *see also, generally, Maynard v. Fallin*, 564 F. App'x 943, 945 (10th Cir. 2014) (detailing the change in parole consideration brought by the Truth in Sentencing Act).

Plaintiff sues Oklahoma Pardon and Parole Board (the Parole Board) members Delynn Fudge, Tom Gillert, Robert Macy, C. Allen McCall, Michael Kris Steele, and Roberta Fullerton for alleged constitutional violations involving his November 2015 and November 2018 parole hearings. Although Plaintiff's Complaint is lengthy, the Court construes his repetitive arguments as raising three claims for relief. In his first claim, Plaintiff argues he has a liberty interest in parole and alleges Defendants denied him that interest without due process of law. Compl. at 6-14, 14-21, 21-33. In his second and third claims, Plaintiff alleges that Oklahoma's 1997 Truth in Sentencing Act, enacting changes in the process for considering an inmate's eligibility for parole, created both an Equal Protection and an Ex Post Facto Clause violation. *Id.* at 14-21.

II Screening Standard

Because Plaintiff is suing government officials, the Court has a duty to screen the Complaint. *See* 28 U.S.C. § 1915A(a). In that analysis, the Court must consider whether the Complaint fails to state a claim upon which relief may be granted. *Id.* § 1915A(b)(1). To survive screening, Plaintiff's Complaint "must contain sufficient factual matter, accepted as true, to state

¹ First degree murder is a violent crime. Okla. Stat. tit. 57, § 571(2)(i).

a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In applying this standard, the Court “accept all the well-pleaded allegations of the [Complaint] as true and must construe them in the light most favorable to . . . [P]laintiff.” *Thomas v. Kaven*, 765 F.3d 1183, 1190 (10th Cir. 2014) (internal quotation marks and citation omitted).

III. Analysis

A. Plaintiff’s Due Process Claims

Plaintiff alleges Defendants violated his constitutional right to due process by failing to properly consider him for parole. Compl. at 6-14, 14-21, 21-33. Plaintiff alleges a myriad of shortcomings by Defendants, including that the Parole Board failed to establish procedures for determining Plaintiff’s eligibility for parole under applicable statutory matrices; provide an in-person parole hearing; provide an annual parole hearing; properly review his application for parole; and properly vote on his application for parole. *Id.* Plaintiff also argues that the Parole Board has failed to comply with recently enacted legislation regarding parole for prisoners who are at least 60 years old. *Id.* at 21-33; *see* Okla. Stat. tit. 57, § 332.21. However, Plaintiff’s claims are rooted in his belief he has a constitutional liberty interest in parole, and he is incorrect. *See, e.g.*, Compl. at 6 (Plaintiff relying on his “state created statutory liberty interest rights”). Because it is discretionary, Plaintiff has no constitutionally protected liberty interest in parole. *See Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 11 (1979) (“That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained . . . a hope which is not protected by due process.” (emphasis in original)); *Griffith v. Bryant*, 625 F. App’x 914, 917-18 (10th Cir. 2015) (“Also, because Oklahoma’s parole scheme is discretionary, [plaintiff] has no constitutionally protected due process liberty interest in parole.” (citing *Shabazz v. Keating*, 977 P.2d 1089, 1093 (Okla. 1999) and *Shirley*, 603 F.2d at 807); *see also Hunter v.*

Beck, 244 F. App'x 848, 852 (10th Cir. 2007) ("[A]n expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." (quoting *Olim v. Wakinekona*, 461 U.S. 238, 251 n.12 (1983))). Therefore, none of the Parole Board's alleged deficiencies violated Plaintiff's constitutional rights. *See Pettigrew v. Zavaras*, 574 F. App'x 801, 809-815 (10th Cir. 2014) (affirming dismissal of plaintiff's claim that the Parole Board violated his procedural and substantive due process rights when they relied on false information in his prison file to deny parole because plaintiff lacked a due process right in parole and thus lacked a constitutional right to "fair parole procedures").

B. Plaintiff's Equal Protection Claim

Plaintiff alleges that the "major changes" in parole consideration enacted by the Truth in Sentencing Act caused him to be discriminated against and denied equal protection of the law. Compl. at 14-21. Plaintiff appears to allege that all inmates who are subject to the Truth in Sentencing Act are treated differently than the "pre-1998 inmates," who were subject to the Forgotten Man Act. *Id.* Plaintiff is correct, but such difference does not implicate the Equal Protection Clause. 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). Here all current inmates (i.e., persons similarly situated) are considered for parole according to the Truth in Sentencing Act and not the Forgotten Man Act and, therefore, are treated alike. *See, e.g., Coggin v. Champion*, 188 F.3d 518, 1999 WL 614700, at *2 (10th Cir. 1999) (affirming the district court's dismissal of plaintiff's equal protection claim – alleging he was treated differently than inmates sentenced under new legislation – because he failed to show that "criminals convicted and sentenced . . . on the same date . . . received a [sentence under the new legislation], as required for an equal protection claim").

C. Plaintiff's Ex Post Facto Claim

Plaintiff also alleges that Okla. Stat. tit. 57, § 332.7 violates the Ex Post Facto Clause. Compl. at 19.² The Ex Post Facto Clause “is aimed at laws that ‘retroactively alter the definition of crimes or increase the punishment for criminal acts.’” *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 504-505 (1995) (citations omitted). Thus, a law violates the Ex Post Facto Clause when it changes an allotted punishment to the offender’s disadvantage. *See Lynce v. Mathis*, 519 U.S. 433, 441 (1997). The Tenth Circuit Court of Appeals has clearly held the relevant change in Oklahoma law – Okla. Stat. tit. 57, § 332.7’s enactment – does not constitute a facial violation of the Ex Post Facto Clause. *See Henderson v. Scott*, 260 F.3d 1213, 1216 (10th Cir. 2001) (“When viewed within the whole context of Oklahoma’s parole regulations, [Okla. Stat. tit. 57 § 332.7] does not facially increase the likelihood of punishment.”); *see also Maynard*, 564 F. App’x at 948.

However, Plaintiff can still succeed on an ex post facto claim if he can show application of Okla. Stat. tit. 57, § 332.7 to him specifically “would result in a significant risk of a longer period of incarceration.” *Henderson*, 260 F.3d at 1217; *see also Koch v. Daniels*, 296 F. App’x 621, 625 (10th Cir. 2008) (“A retroactive law may not violate the Ex Post Facto Clause on its face, yet may still be applied in a way that increases a convict’s punishment and therefore violates the Clause.”). But Plaintiff fails to offer any reasonable argument that he faces a significant risk of longer incarceration and, based on his underlying conviction, the undersigned finds Plaintiff cannot carry his burden on this issue.

Plaintiff was convicted of first degree murder and sentenced to life with parole. Compl. at 9, 11. Based on the crime and the sentence’s gravity, the undersigned finds Plaintiff’s prospects

² Though Plaintiff couched much of his Claim II as an Equal Protection claim, *see* Compl. at 14-21 and discussion *supra*, he appears to have conflated equal protections argument with his ex post facto claim.

for parole are remote and a change in the procedure for considering his parole eligibility appears immaterial. Therefore, Plaintiff's as-applied ex post facto challenge to Okla. Stat. tit. 57, § 332.7 fails. *See Henderson*, 260 F.3d at 1217-18 (rejecting inmate's "as applied" ex post facto violation when inmate had committed a violent crime and was sentence to a lengthy incarceration, finding that the inmate had offered only "remote speculation to suggest that the application of the amended statute . . . [would] increase his punishment"); *accord Clark v. Fallin*, CIV-15-908-C, 2016 WL 1068854, at *2 (W.D. Okla. Feb. 23, 2016) (report and recommendation), *adopted*, 2016 WL 1069706 (W.D. Okla. Mar. 17, 2016), *aff'd*, 654 F. App'x 385 (10th Cir. 2016).

D. Plaintiff's Supplemental State Constitutional Claims

Plaintiff also asserts claims grounded on the Oklahoma State Constitution. *E.g.*, Compl. at 10, 16. Because Plaintiff's federal claims are subject to dismissal for failure to state a plausible claim for relief, the Court should decline to exercise supplemental jurisdiction over any state constitutional claims. *See Brooks v. Gaenzle*, 614 F.3d 1213, 1229 (10th Cir. 2010) (recognizing that when all federal claims are dismissed before trial, a district court should generally decline to exercise pendant jurisdiction over state-law claims).

RECOMMENDATION

On screening, the Court should summarily dismiss Plaintiff's Complaint. Because amendment would be futile, dismissal should be with prejudice. *See Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1189 (10th Cir. 2012) (holding "a dismissal with prejudice is appropriate 'where the complaint fails to state a claim and granting leave to amend would be futile'" (citation, internal brackets, and ellipsis omitted)).

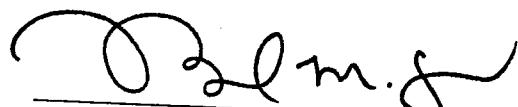
NOTICE OF RIGHT TO OBJECT

Plaintiff is advised of his right to file an objection to this Report and Recommendation. *See* 28 U.S.C. § 636. Any objection must be filed with the Clerk of the District Court by June 21, 2019. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Failure to make a timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal questions contained herein. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

STATUS OF REFERRAL

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

ENTERED this 31st day of May, 2019.



BERNARD M. JONES
UNITED STATES MAGISTRATE JUDGE