

No. 19-8713

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL K. BAILEY — PETITIONER
(Your Name)

VS.
LYNEAL WAINWRIGHT, Warden — RESPONDENT(S)

Supreme Court, U.S.
FILED
JUN 04 2020
OFFICE OF THE CLERK

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

The appointment was made under the following provision of law: _____
18 U.S.C. §3006A(2)(B), or

a copy of the order of appointment is appended.

RECEIVED
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SUPREME COURT, U.S.

Michael K. Bailey
(Signature)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**

Oct 17, 2018

DEBORAH S. HUNT, Clerk

MICHAEL K. BAILEY,
Petitioner-Appellant,
v.
LYNEAL WAINWRIGHT, Warden,
Respondent-Appellee.

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ORDER

Michael K. Bailey, a pro se Ohio prisoner, appeals the district court's judgment dismissing his 28 U.S.C. § 2254 habeas petition. Bailey now seeks a Certificate of Appealability. *See* 28 U.S.C. § 2253(c). He also asks to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(5).

According to Bailey's petition, he was convicted of aggravated murder in 1975 by a jury in Lucas County, Ohio. Bailey was sentenced to life in prison with eligibility for parole after fifteen years. After his trial, he unsuccessfully sought relief both on direct appeal and in an Ohio post-conviction proceeding. Bailey has since been denied parole eight times.

In 2011, Bailey sought to apply to the Governor of Ohio for clemency. To assemble his application, he requested particular documents from the Lucas County Clerk's Office. According to Bailey, the clerk's office notified him that "his entire criminal file was missing." Ultimately, the Clerk's Office was able to piece together his record, which included a written statement sent to the Parole Board in 1992 by the prosecutor who tried Bailey's case. Bailey asserts that this statement contained multiple inaccuracies, so he filed a request to correct the prosecutor's statement. Although Bailey's petition does not state to whom he made this request, the context suggests it was the Parole Board, which denied the request, stating that the inaccuracies were "not substantial enough to warrant a new hearing." Bailey asserts that, at his

next parole hearing, the Board told him that it “no longer believed the prosecutor’s version of the offense.” Nevertheless, the Board denied him parole.

In 2015, Bailey learned that prisoners could obtain their Parole Candidate Information Sheet from the Board, so he filed a request for his sheet. The Board fulfilled Bailey’s request, which is when, he says, more “substantive and factual inaccuracies were discovered.” Bailey wrote the Board to request that the alleged errors be corrected. Three months later, the Board responded, correcting only the date that the offense was committed. The Board told Bailey that a case analyst had reviewed his *pre-sentence* investigation report and determined that it was accurate. Bailey responded to the Board, stating that this was impossible, because the government created only a *post-sentencing* investigation report, eleven years after his conviction. The Board acknowledged its mistake, but said it had merely mislabeled the report.

In 2016, Bailey filed a motion to correct his post-sentencing investigation report in the Lucas County Court of Common Pleas. Six days later, the state trial court denied his motion with no explanation. R. 1-1 at 1. The Ohio Court of Appeals affirmed the judgment, concluding (with little analysis) that the trial court lacked jurisdiction. *State v. Bailey*, No. L-16-1278, 2017 WL 3669499, at *2 (Ohio Ct. App. Aug. 25, 2017), *perm. app. denied*, 87 N.E.3d 1273 (Ohio 2017) (table).

Bailey then filed this petition. He challenges three specific facts in his Parole Candidate Information Sheet. First, he challenges the report’s assertion that “[t]he victim was laying on the floor begging Bailey not to shoot him” before Bailey “placed the gun to the back of the victim’s head and shot him.” Second, Bailey challenges the report’s description that the victim “was shot and killed execution style.” Third, Bailey challenges the following statement: “Bailey said he was in need of money and planned on performing robberies until he had the amount needed and stated the only way he was going to be successful was to kill all the witnesses.” In his petition, Bailey cites specific testimony that, he says, refutes these facts.

The district court denied Bailey’s petition, holding that he was not entitled to habeas relief, because Ohio inmates have no entitlement to parole. The district court also denied Bailey’s motion for reconsideration, and determined that there was no basis to issue him a certificate of appealability.

Bailey now asks this court for a certificate of appealability, which we may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). If the district court denied a petition on the merits, the petitioner must demonstrate “that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *See Miller-El*, 537 U.S. at 327 (internal quotation marks omitted).

As the district court correctly held, a prisoner has no “constitutional or inherent right” to parole. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979); *see Crump v. Lafler*, 657 F.3d 393, 397 (6th Cir. 2011). Although state law may create a “legitimate claim of entitlement” to parole, Ohio has not done so. *Inmates of Orient Corr. Inst. v. Ohio State Adult Parole Auth.*, 929 F.2d 233, 235-36 (6th Cir. 1991); *see also Michael v. Ghee*, 498 F.3d 372, 377-78 (6th Cir. 2007) (internal quotation marks omitted). Instead, Ohio’s parole system is “completely discretionary.” *Michael*, 498 F.3d at 378 (internal quotation marks omitted). Thus, even if the Parole Board corrects Bailey’s record, nothing guarantees that he would be released—which is the relief he seeks.

In response, Bailey cites an Ohio Supreme Court decision, which held that Ohio law “created a minimal due-process expectation” to a factually accurate parole record. *See State ex rel. Keith v. Ohio Adult Parole Auth.*, 24 N.E.3d 1132, 1137 (Ohio 2014). The court thus issued a writ of mandamus to the Parole Board to correct any inaccuracies in the petitioner’s record. *Id.* at 1138. Although this court has never recognized a due-process right related to parole when the state’s parole system is discretionary, *see Bell v. Anderson*, 301 F. App’x 459, 462 (6th Cir. 2008), some courts have. For example, the Third Circuit once held that “totally arbitrary parole decisions” violate the Due Process Clause, even if the prisoner has no constitutional interest in parole release. *See Block v. Potter*, 631 F.2d 233, 235-36 (3d Cir. 1980). And the court granted habeas relief on this ground. *See id.* at 241-42.

More recently, the U.S. District Court for the Southern District of Ohio held that a prisoner stated a valid § 1983 claim when the prisoner alleged that the Ohio Parole Board relied on falsified parole records. *See Kinney v. Mohr*, No. 2:13-CV-1229, 2015 WL 1197812, *5 (S.D. Ohio Mar. 16, 2015). The court interpreted the Ohio Supreme Court’s decision in *Keith* to

hold that the Parole Board “does not have discretion to rely upon falsified parole records, or refuse to investigate an inmate’s allegations of substantive errors in the parole record.” *Id. at* *4. The district court thus held that “knowing reliance on false information in a parolee’s file . . . can constitute a due process violation.” *Id.* To support its conclusion, the court cited an unreported case from this court, *Jergens v. Ohio Department of Rehabilitation and Corrections Adult Parole Authority*, 492 F. App’x 567 (6th Cir. 2012). In *Jergens*, another § 1983 case, the court stated that no Sixth Circuit case “forecloses the possibility that, in an appropriate case, a parole board’s reliance on unconstitutional factors—or even on false information in the parole file—could constitute a due-process violation.” 492 F. App’x at 571 n.5.

Given the lack of Sixth Circuit precedent on this issue and the decisions in the Third Circuit and the Southern District of Ohio—which recognized a constitutional right to an accurate parole record, even in a discretionary parole system—Bailey has shown that reasonable jurists could disagree with the decision below. He therefore is entitled to appeal the district court’s denial of his habeas petition.

Accordingly, Bailey’s application for a Certificate of Appealability is **GRANTED**, and counsel is hereby appointed to represent him on appeal, *see* 18 U.S.C. § 3006A(2)(B). The clerk shall issue a briefing schedule to determine the following issues: (1) whether factual inaccuracies in a state prisoner’s parole record violate the prisoner’s Fourteenth Amendment right to due process when the state’s parole system is discretionary; and (2) if they do, whether this violation entitles the prisoner to habeas relief under 28 U.S.C. § 2254. Bailey’s motion for leave to proceed in forma pauperis on appeal is **GRANTED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk