

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

FILED  
United States Court of Appeals  
Tenth Circuit

October 30, 2019

Elisabeth A. Shumaker  
Clerk of Court

HERMAN TRACY CLARK,

Petitioner - Appellant,

v.

JEROLD BRAGGS, Warden,

Respondent - Appellee.

No. 19-6105  
(D.C. No. 5:19-CV-00360-D)  
(W.D. Okla.)

**ORDER DENYING CERTIFICATE OF APPEALABILITY\***

Before McHUGH, KELLY, and MORITZ, Circuit Judges.

Petitioner-Appellant Herman Tracy Clark seeks to appeal from the district court's dismissal of his 28 U.S.C. § 2241 petition without prejudice. Clark v. Braggs, 2019 WL 2476751 at \*2 (W.D. Okla. June 13, 2019). The magistrate judge assigned recommended denial of the petition concluding that Mr. Clark lacks a protected property or liberty interest in discretionary parole, Clark v. Braggs, 2019 WL 2477634 at \*3 (W.D. Okla. May 9, 2019). See Burnett v. Fallin, 754 F. App'x 696, 702-03 (10th Cir. 2018). The district court agreed, but also construed the petition as challenging the validity of Mr. Clark's life sentence. The district court denied it reasoning that Mr. Clark would need

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\* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

authorization from this court to file a second or successive 28 U.S.C. § 2254 petition. 28 U.S.C. § 2244(b)(3); Clark, 2019 WL 2476751 at \*2. The district court also denied a certificate of appealability (COA), 28 U.S.C. § 2253(c)(2).

Mr. Clark is subject to filing restrictions in this court. In re Clark, 13-6053 (10th Cir. Mar. 15, 2013) (order) (“[W]e direct that any further applications, motions, or other filings collaterally attacking Mr. Clark’s 1975 Oklahoma murder conviction will be deemed denied on the fifteenth calendar day after filing unless this court otherwise orders.”). On July 18, 2019, we ordered Mr. Clark to show cause why these filing restrictions do not apply to this appeal.

Mr. Clark argues that the filing restrictions apply only to second or successive § 2254 applications, not petitions under § 2241. We are not persuaded, but regardless, the district court observed that this proceeding is an attempt to challenge the validity of Mr. Clark’s life sentence by a different procedural vehicle. Clark, 2019 WL 2476751 at \*1. We agree. Indeed, Mr. Clark’s petition states that he is challenging “[t]he validity of [his] conviction or sentence as imposed.” R. 4.

Mr. Clark also seeks to proceed in forma pauperis (IFP). He must show (1) that the appeal is taken in good faith, and (2) that he is unable to pay the required fees. *McIntosh v. United States Parole Comm’n*, 115 F.3d 809, 812 (10th Cir. 1997). In view of our determination that this proceeding is barred by the filing restrictions, we conclude that Mr. Clark fails to show that this appeal was taken in good faith. We also conclude that none of Mr. Clark’s papers show a “reasoned, nonfrivolous argument on the law and

facts in support of the issues raised on appeal.” Caravalho v. Pugh, 177 F.3d 1177, 1179 (10th Cir. 1999).

We DENY a COA, DENY IFP, and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.  
Circuit Judge

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

HERMAN TRACY CLARK, )  
Petitioner, )  
v. ) Case No. CIV-19-360-D  
JEROLD BRAGGS, Warden, )  
Respondent. )

O R D E R

This matter is before the Court for review of the Report and Recommendation [Doc. No. 6] issued by United States Magistrate Judge Suzanne Mitchell 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 Mitchell finds that the Petition should be summarily dismissed without prejudice because Petitioner plainly is not entitled to the relief sought, that is, release from custody due to an alleged denial of due process by the Oklahoma Pardon and Parole Board. Petitioner, a state prisoner appearing *pro se*, has filed a timely Objection [Doc. No. 7]. 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).

Despite the prolixity of Petitioner's arguments, it is difficult to determine his points of disagreement with Judge Mitchell. Liberally construing his arguments due to his *pro se* status, Petitioner primarily seems to disagree with Judge Mitchell's conclusion that the

underlying premise of all his claims is a constitutionally protected liberty or property interest in parole. But the Court cannot determine from Petitioner's arguments precisely where he believes Judge Mitchell has gone wrong, except perhaps for a contention that Oklahoma law mandates that he receive consideration for parole even if he is not entitled to parole itself. *See, e.g.*, Obj. at 6 ("the Pardon and Parole Board has a mandatory duty to consider inmates for parole after they have served one-third of their sentence").

However, Petitioner does not claim in this action that he has been denied parole consideration. Instead, Petitioner describes his claim to be that he "is being held in custody without a sentence because it was abolished upon eligibility for the Board to decide a new sentence." *See* Obj. at 9; *see also id.* at 10 (asking the Court to "declar[e] Petitioner's life sentence is unconstitutional because it is abolished by Legislature"). For some reason that is unclear, Petitioner seems to believe a legislative change empowered the Oklahoma Pardon and Parole Board to replace his life sentence with a term of years. *See id.* at 2 ("his **Life-sentence is unconstitutional** and new legislation gave a sentencing range to be determined by the Board upon his eligibility date") (emphasis in original). The Court is not aware of any such law, and none is identified in the Petition or in Petitioner's other filings.

In any event, to the extent Petitioner challenges the validity of his life sentence, his remedy would be a habeas action under 28 U.S.C. § 2254. But Petitioner well knows he cannot bring such an action without prior authorization from the court of appeals pursuant to 28 U.S.C. § 2244(b)(3); he has repeatedly been warned by the Tenth Circuit of possible

sanctions if he persists in filing collateral attacks on his 1975 Oklahoma murder conviction. *See In re Clark*, No. 13-6053, Order (10th Cir. March 15, 2013). This action appears to be Petitioner's latest attempt to evade procedural limits on federal habeas actions under § 2254.

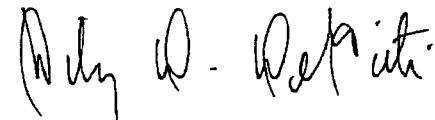
Upon *de novo* consideration of the issues raised by Petitioner's Objection, the Court concurs in Judge Mitchell's finding that the Petition fails to state a claim upon which relief can be granted under § 2241, and fully concurs in her recommendation for summary dismissal of the Petition without prejudice.

IT IS THEREFORE ORDERED that the Report and Recommendation [Doc. No. 6] is ADOPTED in its entirety. The Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241 is DISMISSED without prejudice to a future filing. 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 13<sup>th</sup> day of June, 2019.



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TIMOTHY D. DEGIUSTI  
UNITED STATES DISTRICT JUDGE

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

HERMAN TRACY CLARK, )  
Petitioner, )  
v. )  
JEROLD BRAGGS, )  
Respondent. )  
Case No. CIV-19-360-D

## **REPORT AND RECOMMENDATION**

Herman Clark (Petitioner), a state prisoner appearing pro se, brings this action for habeas relief under 28 U.S.C. § 2241. *See* Doc. 1.<sup>1</sup> United States District Judge Timothy D. DeGiusti has referred the matter to the undersigned Magistrate Judge for proceedings consistent with 28 U.S.C. § 636(b)(1)(B), (C). *See* Doc. 5.

For the following reasons, "it plainly appears from the petition and . . . attached exhibits that [P]etitioner is not entitled to relief," and the undersigned recommends summary dismissal of the petition without prejudice

<sup>1</sup> Citations to a court document are to its electronic case filing designation and pagination. The undersigned alters Plaintiff's use of the uppercase. Otherwise, quotations are verbatim unless shown.

to refiling. Rule 4, Rules Governing Section 2254 Cases in the United States District Courts.<sup>2</sup>

**I. The petition.**

**A. The decision Petitioner challenges in this Court.**

When prompted in his form petition to supply information about the decision or action he is challenging, Petitioner details his unsuccessful request for habeas relief in Oklahoma state district court<sup>3</sup> where he raised the following issues:

Legislature intent for a type of parole consideration that had been abolished the Parole Board must make rules to determine the sentence of 18-60 years [Petitioner] would have received under the appropriate matrix and failure to do so required immediate release because [Petitioner] has been imprisoned past the minimum sentence of 18 years established by statute violated due process guaranteed by the Fourteenth Amendment to the United States Constitution.

Doc. 1, at 2-3. Petitioner indicates that his challenge is also to the determination by the Oklahoma Court of Criminal Appeals that his "appeal d[id] not cite controlling authority supporting . . . his claim that Legislature

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<sup>2</sup> The court may apply 28 U.S.C. § 2254 rules to a § 2241 petition. See Section 2254 Rule 1(b) ("The district court may apply any or all of these rules to a habeas corpus petition not covered by [§ 2254].").

<sup>3</sup> On May 9, 2018, Petitioner filed a Motion to Assume Original Jurisdiction, Petition for Writ of Mandamus or Writ of Habeas Corpus in the District Court of Cleveland County, *Clark v. Fallin*, Case No. WH-2018-12. See Doc. 1, at 2 & Att. 1, at 30-38.

has tasked the Parole Board with mandated release dates for inmates eligible for parole consideration.” *Id.* at 2.<sup>4</sup>

**B. Basis for Petitioner’s challenge.**

As his single “ground (reason) t[o] support[ his] claim that [he is] being held in violation of the Constitution, laws, or treaties of the United States,” Petitioner alleges that “[t]he Oklahoma Pardon and Parole Board deprived [him] of the substantive predicate of State law which created a liberty and property interest protected by the Fourteenth Amendment to the United States Constitution.” *Id.* at 7.

**C. Petitioner’s supporting facts.**

Petitioner advises that he “was sentenced for a crime committed January 6, 1975 pursuant to the statute abolished by Legislature.” *Id.* He submits (1) the “Oklahoma statute governing the Pardon and Parole Board’s procedures were specific for a crime committed prior to July 1, 1998”; (2) “a person being considered for parole created for a type of parole consideration that has been abolished by Legislature shall be considered for parole except according to the current Pardon and Parole provisions”; and (3) “the Pardon and Parole Board shall promulgate rules and procedures for determining what sentence a person eligible for parole consideration after serving one-third (1/3) of his sentence,

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<sup>4</sup> See *Clark v. Fallin*, No. HC-2018-966 (Okl. Crim. App. Feb. 15, 2019). See Doc. 1, at 2 & Att. 1, at 1-4.

would have received under the applicable 18-60 year sentence matrix.” *Id.*

Petitioner submits that he “has been in prison past the minimum requirement of 18 years imprisonment” and “[f]or no reason the Pardon and Parole Board terminated [his] begotten rights to his eligibility-for-parole before meeting the specified outcoming of the mandatory language in the statute.” *Id.*

**D. Petitioner’s requested relief.**

For relief from the alleged constitutional deprivation, Petitioner asks this Court to do the following:

Issue judgment for . . . papers to release [him] immediately from the custody of the Oklahoma Department of Corrections — Warden Jerold Braggs. [Petitioner] has served sufficient time specified by State law. The substantive predicate was not met by the Pardon and Parole Board to employ explicit mandatory language specifying the outcome that must be reached before terminating [Petitioner’s] eligibility for parole consideration process, violating the Due Process Clause to the United States Constitution.

*Id.* at 8.

**II. Discussion.**

Along with his habeas petition and supporting documentation, Petitioner filed a combined memorandum of law and motion for a court order requiring Respondent to show cause why he “should not be ordered to release [Petitioner] from prison for failing to follow an individualized impartial investigation and study of [Petitioner’s] eligibility-for-parole-consideration . . .” Doc. 3, at 1. In concluding his memorandum, Petitioner argues that he “was denied a

substantive predicate of state law explicitly directing the Respondent state officials to take specific action which created a liberty and property interest that entitled him to due process protection under the Fourteenth Amendment . . . .” *Id.* at 18.<sup>5</sup> In addition, he contends those “[s]tate [o]fficials defaulted in their duty to employ ‘explicit mandatory language’ specifying the outcome that must be reached before terminating [his] extensive eligibility for consideration for parole due process without a reason.” *Id.*

To support his conclusions, Petitioner submits that he “is serving ‘Life’ for a crime committed prior to July 1, 1998, and the statute his crime and parole procedure fell under was abolished by [the] legislature.” *Id.* at 2. He contends the “Legislature defined ‘Life’ as 18-60 years and instructed the Board to promulgate rules for making that determination” but it failed to do so. *Id.* at 3. Petitioner explains that he is now “challeng[ing] the termination/interruption of his statutorily defined parole consideration benefits without an oral hearing before impartial decision-makers,” and he argues that his “subsequent continued imprisonment . . . violates his due process rights guaranteed by the Fourteenth Amendment . . . because his liberty interest in an impartial investigation . . . was unfair. . . and . . . because

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<sup>5</sup> Petitioner has named only one Respondent in this action—“Jerold Braggs, Warden.” Doc. 1, at 1.

his property interest under state statutes require a statement of reason and a hearing to appear fair and open before being terminated/interrupted.” *Id.* He claims, “Respondents could not terminate/interrupt [his] eligibility-for-parole-consideration property right without a reasonable cause, before, their mandatory duty to determine what sentence he would have received under the appropriate matrix.” *Id.*

Petitioner also claims “[t]he Department of Corrections is authorized to create a reentry program[,] 57 O.S. § 115(A)[, and] has instructions to consider a variety of offenders including those with long-term incarceration, violent offenders, and offenders with parole stipulations.” *Id.* He alleges that both “[t]he Governor and Pardon and Parole Board are instructed to work together with the Department of Corrections within the capabilities of the reentry program and have the mandatory authority to stipulate that an offender **shall be paroled** . . . conditioned upon completion of the program, without further hearing, recommendation or approval.” *Id.* at 3-4.

In sum, Petitioners’ habeas claims hinge on a premise that he enjoys a protected liberty or property interest in parole. This, however, is simply not the case.

[A]lthough convicted persons can have a constitutionally protected liberty interest in parole, *see Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), where parole is discretionary no such protected interest exists. And that is precisely the case with respect to parole

under Oklahoma's statutory scheme. See *Shabazz v. Keating*, 977 P.2d 1089, 1093 (Okla.1999); *see also Shirley v. Chestnut*, 603 F.2d 805, 807 (10th Cir.1979). Neither, contrary to [Petitioner's] assertion, does he have a protected property or liberty interest in accessing the parole process. As the Supreme Court has said, “[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.” *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) (citation omitted). Because [Petitioner] has no protected interest in parole itself, he has no protected interest in access to the parole process.

*Paige v. Oklahoma Dep't of Corr.*, 248 F. App'x 35, 36-37 (10th Cir. 2007).

Nor, notably, is parole mandatory under the reentry program Petitioner describes. Doubtless, “[t]he Governor and the Pardon and Parole Board . . . have the *authority* to stipulate that an offender shall be paroled, conditioned upon completion of the program, without further hearing recommendation or approval,” but Petitioner fails to point to any *requirement* that they do so. Okla. Stat. tit. 57, § 115(H) (emphasis added).

### **III. Recommendation and notice of right to object.**

Because “it plainly appears from the petition . . . that [P]etitioner is not entitled to relief in the district court,” the undersigned recommends its summary dismissal without prejudice to refiling. Rule 4, Rules Governing Section 2254 Cases in the United States District Courts.

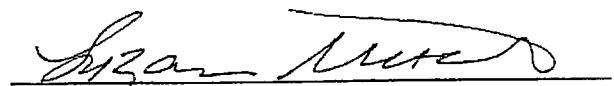
Adoption of this recommendation will moot Petitioner's motion for “an order to Respondent . . . to show cause why [Petitioner's] Petition for Writ of Habeas Corpus . . . should not be granted . . .” Doc. 3, at 1.

The undersigned advises Petitioner of his right to file an objection to this Report and Recommendation with the Clerk of Court on or before May 30, 2019, under 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). The undersigned further advises Petitioner that failure to file a timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

The Clerk of Court is instructed to electronically forward this report and recommendation to the Oklahoma Attorney General on behalf of Respondent at the following address: fhc.docket@oag.state.ok.us.

This Report and Recommendation disposes of all issues and terminates the referral to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 9th day of May, 2019.



Suzanne Mitchell  
SUZANNE MITCHELL  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

FILED  
United States Court of Appeals  
Tenth Circuit

December 3, 2019

Elisabeth A. Shumaker  
Clerk of Court

HERMAN TRACY CLARK,

Petitioner - Appellant,

v.

No. 19-6105

JEROLD BRAGGS, Warden,

Respondent - Appellee.

ORDER

Before McHUGH, KELLY, and MORITZ, 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.

Appellant's request to recall the mandate is also denied.

Entered for the Court

*Elisabeth A. Shumaker*

ELISABETH A. SHUMAKER, Clerk

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