

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

March 1, 2021

Christopher M. Wolpert  
Clerk of Court

ROBERT ALLEN CUSTARD,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 20-6092  
(D.C. No. 5:19-CV-00540-J)  
(W.D. Okla.)

ORDER AND JUDGMENT\*

Before PHILLIPS, McHUGH, and CARSON, Circuit Judges.

Robert Custard, an Oklahoma prisoner, appeals the district court's dismissal of his petition for habeas corpus under 28 U.S.C. § 2241. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

Custard is serving a 30-year prison sentence for a 1993 felony conviction in Stephens County, Oklahoma, for knowingly concealing stolen property after a felony

\* 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

conviction. Before October 2017, Custard was in federal prison for a separate 1993 felony conviction in the District of Colorado for kidnapping and possession of a firearm after a felony conviction. Originally, Custard’s federal sentence was 360 months’ imprisonment. But, following the Supreme Court’s decision in *Johnson v. United States*, 576 U.S. 591, 606 (2015), the federal court resentenced Custard in October 2017 to a shorter term of imprisonment: 137 months. Based on this new sentence, Custard had overserved his federal sentence by thirteen or fourteen years.<sup>1</sup>

Custard began serving his Oklahoma sentence, which the state court had made consecutive to his federal sentence, after his release from federal custody. Custard filed a § 2241 petition asserting he is constitutionally entitled to credit toward his Oklahoma sentence for the time he overserved on his federal sentence. The district court dismissed the petition and granted a certificate of appealability. Custard now appeals.

## DISCUSSION

Because he proceeds pro se, we construe Custard’s arguments liberally, but we “cannot take on the responsibility of serving as the litigant’s attorney in constructing arguments and searching the record.” *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). We review the district court’s dismissal of Custard’s § 2241 petition de novo. *See Abernathy v. Wandes*, 713 F.3d 538, 544 (10th Cir. 2013).

---

<sup>1</sup> The parties differ as to the exact date Custard’s revised federal sentence ended, but their disagreement is not material to this appeal.

This court has not squarely addressed the question Custard's petition presents. We have held a state prisoner is constitutionally entitled to credit against a consecutive state sentence for time served on a state sentence later determined to be erroneous. *See Goodwin v. Page*, 418 F.2d 867, 868 (10th Cir. 1969) ("To hold otherwise would abuse due process, shock the judicial conscience and effect the imposition of a cruel and unusual punishment under the eighth amendment."). We have also held, though, that a federal prisoner is *not* constitutionally entitled to credit against a federal sentence for time served on a state sentence even where the state court ordered the state sentence be concurrent with the federal sentence. *See Bloomgren v. Belaski*, 948 F.2d 683, 691 (10th Cir. 1991).

We have not previously addressed whether a state prisoner is constitutionally entitled to credit against a consecutive state sentence for time served on a federal sentence later determined to be erroneous. The Eighth Circuit, however, confronted this situation in *Bagley v. Rogerson*, 5 F.3d 325, 330 (8th Cir. 1993). The court rejected the prisoner's claim to credit against the federal sentence:

In short, the federal Constitution did not require the State . . . to grant [th<sup>e</sup> petitioner] credit on a state sentence on account of legal errors made by the federal district court that had sentenced him on federal convictions that were later reversed on appeal. If an injustice has been done, it has been done by the United States, not by the State . . .

*Id.* We conclude this reasoning is persuasive. Custard "owed a debt to two separate sovereigns, each of which ha[s] a right to exact its debt independently of the other." *Goode v. McCune*, 543 F.2d 751, 753 (10th Cir. 1976). And, neither the Due Process

Clause, the Eighth Amendment, nor any other constitutional provision requires that Oklahoma modify its sentence to account for the excessive length of a sentence imposed in a different jurisdiction for a different crime. The district court therefore correctly dismissed Custard's petition.

In light of this ruling, we need not consider the district court's rejection of Oklahoma's failure-to-exhaust argument.

#### CONCLUSION

We affirm the judgment of the district court. We deny Custard's motion for appointed counsel, and we deny as moot his motion for expedited ruling.

Entered for the Court

Gregory A. Phillips  
Circuit Judge

(Federal/State Order Appended)  
From - Accord: USCR R.14.h.i.ii.)

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

ROBERT ALLEN CUSTARD, )  
Petitioner, )  
v. )  
SCOTT CROW, )  
Respondent. )

APPENDIX B

Case No. CIV-19-540-J

ORDER

Currently pending is Respondent's motion to dismiss Petitioner's 28 U.S.C. § 2241 petition (Resp.'s Mot.) [Doc. No. 59]. Petitioner has responded (Pet.'s Resp.) [Doc. No. 63].<sup>1</sup> For the reasons discussed below, Respondent's motion is GRANTED.<sup>2</sup>

**I. Relevant Background**

Petitioner filed a federal writ of habeas corpus challenging the execution of his sentence (Pet.) [Doc. No. 1]. Liberally construing the Petition and taking judicial notice of court records, the Court noted the following events:

- March 31, 1993 – Petitioner pleaded guilty to kidnapping and possession of a firearm after a felony conviction in the United States District Court for the District of Colorado, Case No. 93-cr-0050-WYD, and was sentenced to 360-months imprisonment.
- October 21, 1993 – Petitioner was convicted for knowingly concealing stolen property after a felony conviction in Stephens County, Oklahoma, Case No. CFR-92-209, and was sentenced to thirty years, “to begin at and from the delivery of [Petitioner] to the Warden of the Lexington Assessment and Reception Center” and to be served consecutive to his federal sentence.
- Petitioner began serving his federal sentence first.

<sup>1</sup> The Court has considered all of Petitioner's documents, including [Doc. Nos. 64, 71].

<sup>2</sup> Citations to the parties' pleadings will refer to this Court's CM/ECF pagination.

- August 10, 2017 – the United States District Court for the District of Colorado granted Petitioner's 28 U.S.C. § 2255 petition and vacated his federal sentence under *Johnson v. United States*, 135 S. Ct. 2551 (2015).
- October 17, 2017 – Petitioner was resentenced in federal court to 137-months and 120-months, concurrently served, and the federal court noted his federal sentences had been completed.
- Based on the resentencing, Petitioner's federal sentences appear to have ended sometime in October 2003 to August 2004.<sup>3</sup>
- October 2017 – Stephens County issued an order directing officials to transport Petitioner to the Lexington Assessment and Reception Center.
- Oklahoma Department of Corrections (DOC) officials calculate Petitioner's thirty-year state sentence as beginning in October 2017.

*See* [Doc. No. 10].

Based on the foregoing, Petitioner filed a writ of habeas corpus in State court arguing that because his federal sentences ended in October 2003 (based on Petitioner's calculation), DOC officials should calculate his state court sentence from that date. *See* [Doc. No. 14-2]. The trial judge denied relief, holding both that Petitioner (1) was not entitled to state habeas relief because he "has failed to show that he is entitled to immediate release" and (2) DOC was not obligated to credit Petitioner's state court sentence based on time served on a federal sentence, citing *Floyd v. State*, 540 P.2d 1195 (Okla. Crim. App. 1975). *See id.* Petitioner did not timely appeal to the Oklahoma Court of Criminal Appeals (OCCA) and that court dismissed his appeal accordingly.

[Doc. No. 14-3].<sup>4</sup>

---

<sup>3</sup> The exact date Petitioner's federal sentences expired remains unclear.

<sup>4</sup> For more history, *see* [Doc. Nos. 25, 37-38, 65].

**II. Petitioner's Claims**

With liberal construction, Petitioner seeks federal habeas relief based on Oklahoma's failure to credit him with time spent in federal custody (after his sentence expired), alleging violations of due process, double jeopardy, and cruel and unusual punishment. *See* Pet. at 6-12.<sup>5</sup>

**III. Respondent's Motion to Dismiss**

Respondent seeks dismissal on two grounds. First, he argues Petitioner did not complete the state exhaustion process because he did not timely appeal to OCCA and thus his state habeas petition is unexhausted. *See* Resp.'s Mot. at 4-7. Second, Respondent claims Petitioner fails to show any federal constitutional right to having his state sentence credited for time spent in federal custody serving a void federal sentence. *See id.* at 7-9; *see also* [Doc. No. 14, at 4-9].<sup>6</sup>

The Court disagrees with Respondent's first argument but finds his second argument persuasive.

**A. Respondent's Exhaustion Defense**

In part, Respondent argues Petitioner did not exhaust his state judicial remedies because he did not properly appeal the denial of his state habeas petition to the OCCA. *See* Resp.'s Mot. at 4-7. The Court agrees that "the exhaustion of available . . . remedies is a prerequisite for § 2241

---

<sup>5</sup> Petitioner also alleges a violation of the Ninth Amendment, *see* Pet. at 7, which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. However, the Ninth Amendment only protects those rights not otherwise "enumerated in the Constitution." *Parnisi v. Colorado State Hosp.*, 992 F.2d 1223, 1993 WL 118860 at \*1 (10th Cir. 1993) (brackets omitted). As Petitioner has enumerated several other constitutional rights, the Court finds his Ninth Amendment claims "are indisputably meritless." *See id.* (finding plaintiff's Ninth Amendment claims meritless where the Eighth and Fourteenth Amendments protected an inmate from due process violations and cruel and unusual punishment).

<sup>6</sup> Respondent re-urged the arguments made in his previous motion to dismiss. *See* Resp.'s Mot. at 1.

habeas relief[.]” *Garza v. Davis*, 596 F.3d 1198, 1203 (10th Cir. 2010). However, in Oklahoma, a writ of habeas corpus is only available to an inmate who can show he would be entitled to immediate release if the writ is granted. *See Ochoa v. Bass*, 181 P.3d 727, 730 (Okla. Crim. App. 2008).

Respondent continues to assert that a state writ of habeas corpus was Petitioner’s available remedy, *see* [Doc. No. 67, at 2-3], but he also argues that, as of April 2020, Petitioner had 7,928 days remaining to serve on his sentence. *See id.* at 1. Moreover, Respondent claims DOC officials cannot even speculate as to whether Petitioner would be entitled to immediate release if his state sentence was credited for the time he remained in federal custody after his federal sentence expired. *See id.* at 3. In other words, despite Petitioner’s beliefs to the contrary, there is no actual evidence the he would be entitled to immediate release if granted the credits in question. The trial court agreed, because it listed Petitioner’s inability to prove he would be entitled immediate release as one ground for denying the writ in state court. *See supra* at 2.<sup>7</sup> Accordingly, the Court finds that a writ of habeas corpus was not (and is not) currently available to Petitioner, and thus he was not required to “complete the process of state court adjudication” in order to exhaust his state court remedies. *Farris v. Allbaugh*, 698 F. App’x 950, 957-58 (10th Cir. 2017) (discussing whether the exhaustion requirement can be met when a prisoner files a writ of habeas corpus in state court but is not entitled to immediate release). As no other remedy appears to be available to Petitioner, *see* [Doc. No. 67, at 4], the Court DENIES Respondent’s motion to dismiss on his exhaustion defense.

<sup>7</sup> Respondent claims the trial court “[a]ctually” found Petitioner had “failed to show that he is entitled to release and has failed to support his argument,” as to suggest this means the writ of habeas corpus was available to Petitioner. [Doc. No. 67, at 4]. But the trial court’s ruling was clearly based on both elements and the fact that it ultimately reached the merits does not alter the Court’s conclusion.

**B. Respondent's Merits Defense**

Respondent alternatively argues that Petitioner lacks any federal constitutional rights in having his state sentence credited for time spent in federal custody after his federal sentence expired. *See supra* at 3. On this point, the Court agrees.

**1. Due Process Rights**

**a. Federal Due Process**

Inmates are often sentenced to two or more consecutive sentences and periodically, as happened here, an inmate will serve all or some of the first sentence and then that sentence is vacated or otherwise modified. When that happens, and both sentences are from the same jurisdiction (either both federal or both state), the inmate is clearly entitled to credit under the federal constitution. *See Goodwin v. Page*, 418 F.2d 867, 868 (10th Cir. 1969) (in a case involving two state sentences, granting petitioner's request that credit for time spent on a vacated state sentence be applied to his consecutive state sentence because "To hold otherwise would abuse due process, shock the judicial conscience and effect the imposition of a cruel and unusual punishment under the eighth amendment."); *see also Miller v. Cox*, 443 F.3d 1019, 1020-21 (4th Cir. 1971) (holding, in a case involving consecutive sentences from the same jurisdiction, that "the state must credit the sentences remaining to be served on the valid convictions with the time served under the voided conviction" and noting "[c]ommon sense and fundamental fairness require that under such circumstances the state should not ignore the period of imprisonment under the invalid sentence when an appropriate remedy is so readily available").

However, the Tenth Circuit has never squarely addressed whether the federal constitution requires the application of credits when, as here, the sentences derive from two separate jurisdictions. Other circuits have addressed the issue however, and, relying on those cases, the

Eighth Circuit decided a case on substantially similar facts. The Court finds its reasoning persuasive.

In *Bagley v. Rogerson*, 5 F.3d 325 (8th Cir. 1993), the inmate was convicted on federal charges and after serving thirty-nine months in federal custody, he was transferred to Iowa where he was convicted on state drug charges. *See id.* at 327. The inmate was then transferred back to federal custody to serve the remainder of that sentence. *See id.* Thereafter, the inmate's federal conviction was reversed on appeal and Iowa lodged a detainer to ensure the inmate's return to state custody. *See id.* The inmate sought credit towards his Iowa sentence for time spent in federal custody on the vacated federal sentence, and officials refused. *See id.* After the inmate filed a state-suit, Iowa officials reversed their position and granted him credit; however, he later sued in federal court for damages under 42 U.S.C. § 1983 on grounds that the initial refusal violated his federal due process rights (and resulted in a longer incarceration). The district court denied the officials' motion for summary judgment based on qualified immunity and on appeal, the Eighth Circuit addressed the precise question currently before this Court: “[W]hether as a matter of federal constitutional law [the inmate] was entitled to receive credit on his [state] sentence for time served on his vacated federal sentences.” *Id.* at 329.

The court answered in the negative. In so doing, it examined those cases holding fundamental fairness required credits to be applied to an existing sentence that would have begun earlier but for detention on an invalid sentence. *See id.* (citing, in relevant part, *Miller*, 443 F.2d at 1020-21). But the court noted that those cases “generally concerned consecutive sentences within the same jurisdiction.” *Id.* It then examined cases from the First, Second, Fifth, and Eleventh Circuits which “found no due-process violation from a denial of federal credit for time served on a vacated state sentence, even when service of the state sentence delayed the start of a

federal sentence.” *Id.* at 330 (citing *Meagher v. Clark*, 943 F.2d 1277 (11th Cir. 1991); *Pinaud v. James*, 851 F.2d 27 (2d Cir. 1988); *Scott v. United States*, 434 F.2d 11 (5th Cir. 1970); *Green v. United States*, 334 F.2d 733 (1st Cir. 1964)). Applying those cases, the court held:

In short, the federal Constitution did not require the State of Iowa, or the two prison officials whom Bagley has named as defendants in this action, to grant Bagley credit on a state sentence on account of legal errors made by the federal district court that had sentenced him on federal convictions that were later reversed on appeal. If an injustice has been done, it has been done by the United States, not by the State of Iowa.

*Id.*

This Court finds the Eighth Circuit’s reasoning persuasive. There is no doubt that Petitioner served too many years in federal custody but responsibility for that lays in his federal sentencing court. Oklahoma played no part in that injustice and it has “a right to exact its debt independently of the [federal sentencing court].” *Goode v. McCune*, 543 F.2d 751, 753 (10th Cir. 1976) (not addressing the application of credits for time spent on a vacated sentence but holding inmate was not entitled to credit on his federal sentence for time spent serving his state sentence, even though both sentences derived from the same bank robbery, because he “owed a debt to two separate sovereigns, each of which had a right to exact its debt independently of the other”). Accordingly, the Court finds Petitioner lacks any due process rights, derived from the federal constitution, in having Oklahoma credit his state sentence for time spent in federal custody serving a void sentence.

**b. State Created Liberty Interest**

The Court must also examine whether Petitioner has a State-created liberty interest in having Oklahoma credit his state sentence for time spent in serving a void federal sentence. It concludes that he does not.

A “state-created interest is not protected by the procedural component of the Due Process Clause unless the interest is an entitlement – that is, unless the asserted right to property or liberty is mandated by state law when specified substantive predicates exist.” *Elliott v. Martinez*, 675 F.3d 1241, 1244 (10th Cir. 2012); *see also Sutton v. Mikesell*, \_\_ F. App’x \_\_, 2020 WL 1845283 at \*6 (10th Cir. 2020) (emphasizing *Elliott*’s holding that the right must be “*mandated*” by state law). Petitioner relies on Okla. Stat. tit. 22, § 976 and *Floyd*, *see Pet. at 5 & Pet.’s Resp. at 5, 20-21*, but the Court finds no mandated entitlement in either.

For example, the statute Petitioner relies on states, in relevant part, that “[i]f the defendant has been convicted of two or more offenses, before judgment on either, the judgment may be that the imprisonment upon any one may commence at the expiration of the imprisonment upon any other of the offenses.” Okla. Stat. tit. 22, § 976. This statute does not address the application of credits when the first sentence is improperly prolonged, and Oklahoma officials began Petitioner’s

*Not They Did Not Begin To On 10/18/17* state sentence when federal authorities released him from his federal imprisonment. *See supra* at (10/17/17) *Burder Doc 59, pg 64, SWRA.*  
2. In short, the Court finds that § 976 does not mandate Oklahoma officials grant Petitioner credit *But Does Not Mandate That They Don’t Extend.* on his Oklahoma sentence for time spent (improperly) in federal custody. *That They Don’t Extend.*

Examining *Floyd*, the Court finds the same lack of entitlement. In that case, the petitioner was convicted in two separate cases in the District Court of Garfield County and after serving time on the first conviction, it was vacated. *See Floyd*, 540 P.2d at 1196. He sought habeas relief in the OCCA, arguing that time spent on the reversed conviction should be applied towards his remaining sentence. The court, adopting the reasoning in *Miller*, 443 F.2d at 1019, agreed. *See id.* at 1197-98. But *Floyd* included two judgments from the same jurisdiction, as did *Miller*. *See supra* at 5. The OCCA has never addressed whether *Floyd* would be applicable in this situation,

where the convictions arise from different jurisdictions, so this Court must “endeavor to predict how that high court would rule.” *Johnson v. Riddle*, 305 F.3d 1107, 1118 (10th Cir. 2002).

“Where a state’s highest court has not addressed an issue of law, a starting point . . . is the decisions of the state’s intermediate court of appeals and those decisions are ‘not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.’” *Amparan v. Lake Powell Car Rental Co.*, 882 F.3d 943, 947-48 (10th Cir. 2018) (citation omitted). Thereafter, the federal court is “‘free to consider all resources available, including . . . other state courts and federal courts, in addition to the general weight and trend of authority.’” *Stuart v. Colorado Interstate Gas Co.*, 271 F.3d 1221, 1228 (10th Cir. 2001). In its analysis, the Court should be “‘generally reticent to expand state law without clear guidance from the state’s highest court’ for it is not a federal court’s place to ‘expand state law beyond the bounds set by the highest court of the state.’” *Amparan*, 882 F.3d at 948 (citation, internal ellipsis, and internal brackets omitted).

Here, the Court finds no OCCA authority on the precise issue before this Court and Oklahoma’s intermediate appellate court does not rule on criminal matters. *See, e.g., Lockett v. Evans*, 377 P.3d 1254 (Okla. 2018) (“In Oklahoma, we determine the courts having authority to issue [decision] in criminal matters are limited to the district courts and the Oklahoma Court of Criminal Appeals.”). However, Petitioner’s trial judge did issue an opinion on *Floyd*’s reach, holding:

In order to rule in Petitioner’s favor, this Court would have to expand the holdings in the cases provided by Petitioner, *Floyd v. State*, 540 P.2d 1195 ([Okla. Crim. App.] 1975), and *Foster v. Booher*, 296 F.3d 947 (10th Cir. 2002).<sup>8</sup> Under the holdings in these cases if Petitioner’s vacated sentence had occurred while he was

<sup>8</sup> In *Foster*, the Tenth Circuit applied *Floyd* to find that “under Oklahoma law, if [petitioner] is successful in voiding his McClain County sentence, the time served under that sentence will be credited towards his Cleveland County sentence.” *Foster*, 296 F.3d at 951.

serving time in Oklahoma for an Oklahoma case, he would be credited with the time on the consecutive sentence. However, Petitioner was in Colorado serving a federal sentence at the time he claims his federal sentence was vacated. Petitioner has presented no authority giving Oklahoma state prison administrators the discretion to credit banked time from his federal case.

[Doc. No. 14-2].

Mindful that it is not this Court's role to expand Oklahoma law, and considering the trial court's interpretation of *Floyd* and the federal courts who have addressed the issue, *see supra* at 6-7, the Court predicts that the OCCA would hold *Floyd* does not mandate that DOC officials grant Petitioner credit to his Oklahoma sentence for time spent in federal custody serving a void federal sentence. Accordingly, the Court finds Petitioner fails to establish a state-created liberty interest in the relevant credits.

## **2. Double Jeopardy Violation**

The Double Jeopardy Clause protects against "(1) 'a second prosecution for the same offense after acquittal,' (2) 'a second prosecution for the same offense after conviction,' and (3) 'multiple punishments for the same offense.'" *Warnick v. Booher*, 425 F.3d 842, 847 (10th Cir. 2005) (citation omitted). Clearly, neither the first nor second element applies here; and, Petitioner was convicted for different offenses in the state and federal courts, so the third element is also inapplicable. *See supra* at 1. Accordingly, the Court finds no double jeopardy violation in the State's decision not to credit Petitioner's state sentence for time spent in federal custody serving a voided federal sentence.

## **3. Cruel and Unusual Punishment**

"Imprisonment beyond one's term can constitute cruel and unusual punishment for purposes of the Eighth Amendment." *Mitchell v. New Mexico Dep't of Corr.*, 996 F.2d 311, 1993 WL 191810 at \*3 (10th Cir. 1993). However, Petitioner must first show an entitlement to release,

i.e., an underlying deprivation of his liberty. *See Waynewood v. Nelson*, No. 15-CV-00946-MEH, 2016 WL 54122, at \*1 (D. Colo. Jan. 5, 2016); *see also Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (“Detention beyond the termination of a sentence could constitute cruel and unusual punishment if it is the result of ‘deliberate indifference’ to the prisoner’s liberty interest[.]”). Petitioner has not done so. That is, Petitioner lacks a liberty interest in having the State credit his state sentence for time spent serving a voided federal sentence, *see supra* at 5-10, and thus he cannot show he has been imprisoned beyond the terms of his confinement. So, the Court finds no cruel and unusual punishment in Petitioner’s circumstances.

**IV. Conclusion**

For the reasons discussed above, the Court DENIES Respondent’s motion to dismiss for nonexhaustion but GRANTS Respondent’s motion to dismiss [Doc. No. 59] on the merits and DENIES Petitioner’s Petition [Doc. No. 1] for habeas relief. Petitioner’s motion asking the Court to consider various arguments [Doc. No. 71] is GRANTED and the Court considered such arguments herein. Petitioner’s other pending motions [Doc. Nos. 46, 69] are DENIED as moot.

Finally, 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. This requirement also applies when a state habeas petitioner is proceeding under § 2241. See Montez v. McKinna, 208 F.3d 862, 869 (10th Cir. 2000). A COA may issue only if the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Custard v Crow / USDC/WDOC

Case 5:19-cv-00540-T/Doc 731 Filed 6/2/20 / Page 12 of 12

Here, Petitioner has Admittedly Served Numerous Years On A Void Sentence  
And The 10th Cir Has Never Squashed Addressed Whether The Federal Constitution Would Require The  
State To Grant Him Credits Towards His Sentence Before Years Served During A Void Federal  
Sentence.

Moreover, The Court And I Disagree w/ This Court's Prediction Of How The OCCA Would Rule If  
Presented w/ The Question Of Whether Flag Mandates The Same. Accordingly, The Court Finds  
The Requisite Standard Is Met In This Case And Grants Petitioner A COA In This Action.

A Separate Judgment Shall Be Entered.

To The S Dated This 2<sup>nd</sup> Day Of June, 2020.

151

Bernard M. Jones  
WDOC /U.S.D.C. Judge

Submitted On Petition For Writ Of Certiorari @ APPENDIX B.

This 1<sup>st</sup> Day Of June, 2021.

RS/ 

Robert Allen Custard  
Petitioner, Pro Se.

---

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

---