

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-2686

Daniel Jose Gomez

Petitioner - Appellant

v.

Robert Dooley; Attorney General of the State of South Dakota

Respondents - Appellees

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:21-cv-04085-RAL)

JUDGMENT

Before LOKEN, STRAS, and KOBES, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

August 12, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix A 2)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

DANIEL JOSE GOMEZ, Petitioner, vs. ROBERT DOOLEY, ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, Respondents.	4:21-CV-04085-RAL ORDER DENYING PETITIONER'S MOTION FOR CERTIFICATE OF APPEALABILITY AND GRANTING PETITIONER'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL
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Petitioner Daniel Jose Gomez filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. Doc. 1. This Court granted Respondents' motion to dismiss for lack of subject matter jurisdiction because Gomez was not "in custody" when he filed his § 2254 petition. Doc. 15 at 3. Now, Gomez moves for a certificate of appealability and for leave to proceed in forma pauperis on appeal. Docs. 17, 18.

I. Motion for Certificate of Appealability

When Gomez filed this petition, he was not in custody of the South Dakota Department of Corrections. See Docket 15 at 3. "[A] state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition." Miller-El v. Cockrell, 537 U.S. 322, 335 (2003) (citing 28 U.S.C. § 2253). "Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA from a circuit justice or judge." Id. at 335–36. Such a certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing" is one that demonstrates "reasonable jurists would find the

Appendix C

district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). This Court lacks subject matter jurisdiction over Gomez's petition and Gomez has failed to make a substantial showing that his constitutional rights were denied. See Doc. 15 at 3. Thus, a certificate of appealability is not issued. See 28 U.S.C. § 2253(c)(2) ("A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.").

II. Motion for Leave to Proceed In Forma Pauperis on Appeal

Gomez filed a notice of appeal and moves for leave to proceed in forma pauperis on appeal. Docs. 16, 18. The filing-fee provisions of the Prison Litigation Reform Act do not apply to habeas corpus actions. Malave v. Hedrick, 271 F.3d 1139, 1140 (8th Cir. 2001). To determine whether a habeas petitioner qualifies for in forma pauperis status, the court need only assess (1) whether the petitioner can afford to pay the full filing fee, and (2) whether the petitioner's appeal is taken in "good faith." 28 U.S.C. § 1915(a)(1), (3). Gomez's appeal appears to be taken in good faith. After review of his financial affidavit, Doc. 18, this court finds that Gomez has insufficient funds to pay the \$505.00 appellate filing fee.


Therefore, it is hereby

ORDERED that Gomez's motion for certificate of appealability, Doc. 17, is denied. It is finally

ORDERED that Gomez's motion for leave to proceed in forma pauperis on appeal, Doc. 18, is granted.

DATED July 27th, 2021.

BY THE COURT:



ROBERTO A. LANGE
CHIEF JUDGE

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

DANIEL JOSE GOMEZ, Petitioner, vs. ROBERT DOOLEY, ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA, Respondents.	4:21-CV-04085-RAL OPINION AND ORDER GRANTING RESPONDENTS' MOTION TO DISMISS
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Petitioner Daniel Jose Gomez filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. Doc. 1. Respondents' move to dismiss and Gomez moves to appoint counsel and to electronically file. Docs. 6, 8, 12.

I. Judicial Notice

First, Respondents ask this Court to take judicial notice of the judicial rulings in Gomez's state criminal case, CRI 08-286, and his state habeas case, CIV-09-389. Doc. 9 at 1. Under the Federal Rules of Evidence Rule 201 a court may take judicial notice of "a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Respondents filed the judicial opinions and judgments from Gomez's state record. See Doc. 9. "A district court may properly take judicial notice of items in the public record, such as judicial opinions." Thompson v. R.J. Reynolds Tobacco Co., 760 F.3d 913, 918 (8th Cir. 2014) (citing Kent v. United of Omaha Life Ins. Co., 484 F.3d 988, 994 n.2 (8th Cir. 2007)). Because the judicial

opinions and judgments that Respondents filed are a part of the state public record, this Court takes judicial notice of these documents and will rely on them for the factual background.

II. Factual Background

On September 23, 2008, South Dakota First Judicial Circuit Court Judge Steven R. Jensen¹ entered judgment against Gomez for one count of Second Degree Escape in violation of SDCL § 22-11A-2.1. Doc. 9-1 at 3-5. Gomez was sentenced to 180 days with five years suspended and he was to remain on supervised probation for five years. Id. at 4-5. He was also given a time served credit for 62 days. Id. Gomez's judgment was thereafter amended twice. See Docs. 9-2, 9-3.

On June 22, 2009, Gomez was found to have violated the terms and conditions of his probation and his sentence was re-imposed (five years in the South Dakota State Penitentiary, with three years suspended). Doc. 9-4 at 3-5. On September 29, 2009, Gomez filed his state petition for writ of habeas corpus. Doc. 9-5. His writ was denied by South Dakota First Judicial Circuit Court Judge Arthur L. Rusch on April 26, 2010. Doc. 9-7 at 2. On April 8, 2014, the South Dakota Department of Corrections (DOC) discharged Gomez from custody. Id. at 3. He filed his federal habeas petition on May 7, 2021 and Respondents' move to dismiss. Docs. 1, 8.

II. Legal Analysis

Respondents assert that Gomez is not "in custody" for purposes of 28 U.S.C. § 2254. Doc. 9 at 5. When a petitioner has completed his/her sentence and has been discharged from parole they are no longer considered "in custody" for purposes of § 2254. Hogan v. Iowa, 952 F.2d 224, 225 (8th Cir. 1991). A federal court does not have subject matter jurisdiction "once the sentence for a conviction has completely expired" because the petitioner does not have

¹ He now is Chief Justice of the Supreme Court of South Dakota.

a habeas corpus remedy. Id. (quoting Maleng v. Cook, 490 U.S. 488, 492 (1989)). Gomez was discharged from DOC custody on April 8, 2014, and at the time he filed his complaint he was not in custody. Doc. 9-7 at 3. Thus, this Court does not have subject matter jurisdiction over Gomez's habeas petition.

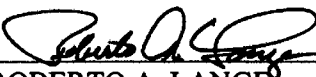
Therefore, it is hereby

ORDERED that Respondent's motion to dismiss, Doc. 8, is granted. It is further

ORDERED that Gomez's pending motions, Docs. 6, 12, are denied as moot.

DATED July 21st, 2021.

BY THE COURT:



ROBERTO A. LANGE
CHIEF JUDGE

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