FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-1527

JIMMY STEPHENS,

Petitioner,

v.

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

Petition for Writ of Certiorari—Original Jurisdiction.

September 22, 2021

PER CURIAM.

The Court denies the petition for writ of certiorari on the merits. *See Topps v. State*, 865 So. 2d 1253, 1258 (Fla. 2004) (explaining that a decision on an extraordinary writ petition that "clearly shows that the issue was considered by the court on the merits" is deemed a decision "which would later bar the litigant from presenting the issue under the doctrines of res judicata or collateral estoppel").

LEWIS, MAKAR, and BILBREY, JJ., concur.

APPENDIX-A

Recd 3-27-20 J.B.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

JIMMY STEPHENS, DC# 033503,

Petitioner,

v.

CASE NO.: 2017-CA-001481

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

_____/

ORDER DISMISSING PETITION FOR MANDAMUS RELIEF

THIS CAUSE came before the Court for consideration pursuant to Petitioner's Petition for Writ of Mandamus, filed July 12, 2017. The Court, having considered the pleadings, the applicable law, and being otherwise fully advised in the premises, finds as follows:

Petitioner is a life-sentenced inmate currently incarcerated at Blackwater River Correctional Facility. See Respondent's Notice of Withdrawal at 1; see also Department's Inmate Population Information Detail page at: http://www.dc.state.fl.us/offenderSearch/detail.aspx?Page=Detail&DCNumber=033503&TypeSearch=AI. Petitioner filed the instant petition on July 12, 2017, challenging Disciplinary Report ("DR"), DR log number 150-161387, that he received on September 14, 2016, for Participation in Riots, a violation of Rule 33-601.314 (2-1), Florida Administrative Code ("F.A.C."). See generally Petition. As a result of the DR, Petitioner forfeited thirty (30) days of gain-time and was placed in disciplinary confinement for sixty (60) days. See Appendix to Petition, Exhibit B. Petitioner raises claims of due process violations which he alleges occurred during the DR Investigation and Hearing process for the DR in question. See generally Petition. As relief, Petitioner seeks a writ

Appendix B

of mandamus compelling the Department to reverse the challenged DR, an order preventing the Department from "continuing to find inmates guilty of infractions based in whole or in part on the officer's statement in disciplinary report", and for the Court to conduct an evidentiary hearing. See Petition at 13.

On September 19, 2017, this Court issued an Order to Show Cause directing the Respondent to show cause as to why the relief requested in Petitioner's Petition should not be granted. On November 20, 2017, Respondent filed a Response to the Order to Show Cause arguing that Petitioner's Petition was time-barred, and arguing alternatively, in an footnote, that even if the Petition had been timely-filed, Petitioner lacked the requisite liberty interest to challenge his DR as he is serving a life-sentence.

On July 9, 2018, this Court dismissed Petitioner's Petition as time-barred. Petitioner subsequently appealed that decision to the First District Court of Appeal of Florida, which reversed that decision and remanded the case for an evidentiary hearing on the disputed fact of whether Petitioner's Petition was timely-filed. On December 16, 2019, pursuant to that decision, this Court entered an Order Upon Remand stating that an evidentiary hearing would be set by separate order to resolve the issue of whether Petitioner received the response to his grievance appeal.

On December 20, 2019, Respondent withdrew the argument that this case is time-barred and now rests on the previously-raised alternative argument that Petitioner's Petition is subject to dismissal for his lack of the requisite liberty interest because he is serving a life sentence.

Mandamus petitions seeking to overturn a prison disciplinary action invoke the courts review capacity and take the place of an appeal. *See Sheley v. Fla. Parole Comm'n*, 703 So. 2d 1202, 1205-1206 (Fla. 1st DCA 1997), *approved* 720 So. 2d 216 (Fla. 1998) (stating that due to absence of statutory right to appeal parole commission actions, mandamus has become the

accepted remedy for the review of a commission order); *Doss v. Fla. Dep't of Corr.*, 730 So. 2d 316 (Fla. 4th DCA 1999) (reasoning in *Sheley* applies to decisions of Department of Corrections on disciplinary violations). The traditional mandamus action requires the petitioner to establish a clear legal right to performance of the act requested, an indisputable legal duty by the public officer to perform the act, and no adequate remedy at law. *See Hatten v. State*, 561 So. 2d 562, 563 (Fla. 1990). In prison disciplinary proceedings, prisoners have a clear legal right to both the limited due process protections set out in *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445 (1985), as well as the Department rules which implicate those due process protections. The appellate review afforded by this type of mandamus action is a determination regarding whether the petitioner was afforded due process in his prison disciplinary proceedings. *Id.* The United States Supreme Court has stated that the standard analysis under the Due Process Clause "proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, ***and if so*** we ask whether the procedures followed by the State were constitutionally sufficient." *Swarthout v. Cooke*, 131 S. Ct. 859, 861 (2011) (citing *Ky. Dep't. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)) (emphasis added). If there is no liberty or property interest at issue, the analysis of whether a petitioner was afforded due process ends. *See Stanley v. St. Paul*, 773 F. Supp. 2d 926, 929 (D. Idaho 2011) (stating that, in the wake of *Swarthout*, "case law permitting due process claims in inmate settings where no liberty interest is found, e.g., *Burnsworth v. Gunderson*, 179 F.3d 771, 775 (9th Cir. 1999) no longer provide viable legal grounds for relief."). Therefore, in order to receive mandamus relief, a petitioner must show a liberty interest giving rise to the protection of the Due Process Clause. *See Sandin v. Connor*, 515 U.S. 472, 478 (1995); *Plymel v. Moore*, 770 So. 2d 242, 248-49 (Fla. 1st DCA 2002).

The Court finds that the Petitioner failed to show a right to due process protections because the Petitioner does not demonstrate a due process liberty or property interest sufficient to give rise to the protections of the Due Process Clause. *See Swarthout v. Cooke*, 131 S. Ct. 859, 861 (2011). Thus, the Petitioner was not entitled to the due process protections of advance notice, opportunity to present witnesses and evidence, or to be furnished a statement of the evidence relied upon for the guilty finding and the reasons for the disciplinary action. *See Sandin v. Conner*, 515 U.S. 472 (1995); *Wolff v. McDonnell*, 418 U.S. 539 (1974). Additionally, the "some evidence" standard is only triggered when a protected liberty interest is at issue, which is not present here since the Petitioner is life-sentenced and has no liberty interest in lost gain time. *See Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985) (stating that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board); *Stanley v. St. Paul*, 773 F. Supp. 2d 926, 929 (D. Idaho) (stating that, in the wake of *Swarthout*, "case law permitting due process claims in inmate settings where no liberty interest is found, e.g., *Burnsworth v. Gunderson*, 179 F.3d 771, 775 (9th Cir. 1999) no longer provide viable legal grounds for relief.").

Petitioner is not entitled to due process because he is currently serving a life sentence. Due to the fact that life-sentenced inmates are not eligible to earn any gain time[1] "the due process rights in 'liberty interests' of prisoners serving life sentences are very limited." *Sims v. Maddock*, 2 F. App'x 767, 768 (9th Cir. 2001) (finding no cognizable liberty interest where there was a minor loss of gain time credits unlikely to alter the balance of a prisoner's "life plus three-year" sentence).

[1] Gain time is available only to prisoners sentenced to a term of years. *See* § 944.275(2)(a) and § 944.275(4)(b), Florida Statutes; *see also* Rule 33-603.402(1)(a)5, F.A.C.; *Tal-Mason v. State*, 700 So. 2d 453, 455 (Fla. 4th DCA 1997) ("[U]nder a life sentence, [a prisoner] cannot earn gain time, no matter how exemplary his conduct may be while incarcerated."); *Jackson v. Fla. Dep't of Corr.*, 790 So. 2d 398, 400 (Fla. 2001) (noting that an inmate who is serving a life sentence is ineligible to earn gain time); *Clines v. State*, 912 So. 2d 550, 559 n. 5 (Fla. 2005).

Federal courts applying Florida law have held that a loss of gain time by a life sentenced inmate is insufficient to state a claim for a violation of due process. *See Ferguson v. Buss*, Slip Copy, 2011 WL 3625703, *1 (N.D. Fla. 2011) ("since Petitioner is serving a life sentence, he has no liberty interest protected by procedural due process in gaintime."), *Report and Recommendation Adopted by Ferguson v. Buss*, Slip Copy, 2011 WL 3611407 (N.D. Fla. 2011); *Osterback v. Crosby*, 17 Fla. L. Weekly Fed. D517, 2004 WL 964139 (M.D. Fla. 2004) ("the loss of gain time or the placement in administrative confinement is insufficient to sustain a procedural due process claim when a prisoner is serving a life sentence."). Because the Petitioner cannot "earn" gain time, he has no due process liberty interest in it. *Ferguson v. Buss, supra*; *Osterback v. Crosby, supra*; *Curtis v. Pataki*, 1997 WL 614285 (N.D.N.Y. 1997). Consequently, without a substantive liberty interest that requires due process protection, pursuant to *Sandin*, Petitioner's challenge to his DR fails to state a claim upon which relief can be granted.

A forfeiture of gain time does not vest a life-sentenced Petitioner with a liberty interest because the possibility of it actually affecting the length of his sentence is too attenuated. *See Burdick v. State*, 584 So. 2d 1035, 1038-39 (Fla. 1st DCA 1991) (noting that a prisoner serving a life term could accumulate incentive gain time "on paper," which would only be credited *if* the life sentence were commuted to a term of years, after service of the minimum mandatory term), *approved in part and quashed in part (other grounds)*, 594 So. 2d 267 (Fla. 1992). The Eleventh Circuit Court of Appeals has held that a life sentenced inmate does not have standing to seek expungement of prison disciplinary reports where the disciplinary reports do not affect the fact or duration of his sentence. *Rowan v. Harris*, 316 F. App'x 836, 838 (11th Cir. 2008) ("[A]s a life inmate in the Florida prison system, we fail to see how expungement of Rowan's disciplinary record creates a justiciable case or controversy.") As explained in *Batie v. Fla. Dep't. of Corr.*,

2009 WL 1490683, *3 (N.D. Fla. May 22, 2009) regarding the forfeiture of gain time from a life sentenced inmate:

> [A]s to the length of his sentence, he will neither receive the benefit of those days of gain time nor be affected by their loss unless his sentence is commuted to a term of years. In short, the possibility that the loss on paper of 120 days of gain time will lengthen Petitioner's term of imprisonment, which remains at life and has not been commuted to a term of years, is too attenuated and dependent on other factors to show his term of imprisonment would be shorter if the disciplinary findings were overturned because of constitutional irregularities in the proceedings.

Id.

Courts have also found too speculative arguments that a life sentenced inmate might potentially benefit from having a disciplinary report overturned. *See Sandin*, 515 at 487 ("The chance that a finding of misconduct will alter the balance [in consideration of parole] is simply too attenuated to invoke the procedural guarantees of the Due Process Clause."); *Conlogue v. Shinbaum*, 949 F.2d 378, 380 (11th Cir. 1991) (concluding no liberty interest arose from the possibility of a discretionary grant of incentive good time), *cert. denied*, 506 U.S. 841 (1992); *Cook v. Wiley*, 208 F.3d 1314, 1323 (11th Cir. 2000) ("Because the § 3621(d)(2)(B) sentence reduction [for conviction for a nonviolent offense] is left to the unfettered discretion of the BOP, the statute does not create a constitutionally protected liberty interest."); *Venegas v. Henman*, 126 F.3d 760, 764 (5th Cir. 1997) ("loss of the mere opportunity to be considered for discretionary early release is too speculative to constitute a deprivation for a constitutionally protected liberty interest"), *cert. denied*, 523 U.S. 1108 (1998); *Ferguson*, 2011 WL 3611407, *2 ("The effect of [a] disciplinary report upon [a prisoner's] future parole prospects is too speculative to give rise to any constitutional claim."). Additionally, an inmate has no liberty interest in the possibility of parole or clemency. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 283 (1998); *Walker v. Fla. Parole Comm'n*, 299 F. App'x 900, 901 (11th Cir. 2008); *Lynch v. Hubbard*, 47 F. Supp. 2d 125, 129 (D. Mass. 1999).

Petitioner also does not have a liberty interest based upon the "mandatory language and substantive predicates in the Department's rules and regulations" as was previously indicated in *McQueen v. Tabah*, 839 F.2d 1525 (11th Cir. 1988). This analysis was expressly abandoned by the United States Supreme Court in *Sandin v. Conner*, 515 U.S. 472 (1995), in favor of requiring a showing that the alleged restraint "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *See Magluta v. Samples*, 375 F.3d 1269, 1282, 1284 (11th Cir. 2004) (quoting *Sandin*, 515 U.S. at 484, 115 S. Ct. at 2300). "[I]n the wake of *Sandin,* the ambit of a prisoner's potential Fourteenth Amendment due process liberty claims has been dramatically narrowed and prisoners may no longer comb through state statutes and prison regulations searching for the 'grail of limited discretion' upon which to base a due process liberty claim." *Shaw v. Phillips*, 2011 WL 1474106 (N.D. Tex. 2011); *see also Sandin*, 515 U.S. at 481. Therefore, a mandamus petitioner's allegation of failure to follow a Department rule fails to state a claim upon which relief can be granted, absent a showing that 1) the petitioner has a due process liberty or property interest sufficient to invoke the Due Process Clause and 2) that the rule in question implicates the limited due process protections set out in *Wolff* and *Hill*. *See Black v. Warren*, 134 F.3d 732, 734 (5th Cir. 1998) (Holding that the role of the court is not to determine whether disciplinary hearings comport with every detail in administrative regulations but instead whether the hearings are consistent with the minimal safeguards afforded by the Due Process Clause). As explained above, Petitioner has no liberty interest to invoke the protections of the Due Process Clause. It is therefore,

ORDERED AND ADJUDGED that Petitioner's Petition is hereby **DISMISSED**.

JOHN C. COOPER
Circuit Judge
March 23, 2020

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

December 28, 2021

CASE NO.: 1D20-1527
L.T. No.: 2017-CA-001481

Jimmy Stephens	v.	Florida Department of Corrections
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion docketed December 03, 2021, for rehearing, rehearing enc, and suggestion for certified question is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Kristen Jennifer Lonergan, AAG
Jimmy Stephens

Lance Eric Neff, GC

th

KRISTINA SAMUELS, CLERK

Appendix C

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

JIMMY STEPHENS, DC# 033503,

Petitioner,

Case No.: 2017-CA-001481

v.

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER DENYING REHEARING

THIS CAUSE comes before the Court on Petitioner's "Motion for Rehearing," filed April 7, 2020. The instant motion is directed towards this Court's "Order Dismissing Petition for Mandamus Relief," rendered on March 23, 2020.

Upon review, the Court finds no legal or factual reason to recede from its earlier order, and hereby **DENIES** Petitioner's motion for rehearing. The Clerk is instructed to **CLOSE** this file.

DONE AND ORDERED in Chambers, Tallahassee, Leon County, Florida, on this 20th day of April 2020.

JOHN C. COOPER
Circuit Judge

Copies furnished to:

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Appendix - E

Copies Mailed and/or E-Served
by SB on APR 20 2020

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

December 04, 2020

CASE NO.: 1D20-1527
L.T. No.: 2017-CA-001481

Jimmy Stephens v. Florida Department of Corrections

Appellant / Petitioner(s), Appellee / Respondent(s)

BY ORDER OF THE COURT:

On the Court's own motion, this cause is hereby converted to a petition for writ of certiorari. *See Sheley v. Fla. Parole Comm'n*, 720 So. 2d 216 (1998). The notice of appeal is treated as invoking this Court's certiorari jurisdiction. Within 30 days of the date of this order, Petitioner shall file a petition for writ of certiorari that conforms to the requirements of Florida Rule of Appellate Procedure 9.100. The Court notes that the record on appeal has been transmitted. Accordingly, the parties may refer to the record in lieu of an appendix.

Petitioner's failure to comply with this order within the time allowed may result in dismissal of this cause without further opportunity to be heard. *See* Fla. R. App. P. 9.410.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Kristen Jennifer Lonergan, AAG
Jimmy Stephens
Lance Eric Neff, GC
Hon. Gwen Marshall, Clerk

co

KRISTINA SAMUELS, CLERK

DISTRICT COURT OF APPEAL FIRST DISTRICT STATE OF FLORIDA SAT CITO SI RECTE

Appendix H

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