

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 3, 2024

Christopher M. Wolpert
Clerk of Court

PHILLIP LEE KELLEY,

Plaintiff - Appellant,

v.

KEVIN STITT; LARRY MORRIS;
ADAM LUCK; SCOTT WILLIAMS;
ALLEN MCCALL,

Defendants - Appellees.

No. 23-6200
(D.C. No. 5:23-CV-00747-R)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON, BALDOCK**, and **McHUGH**, Circuit Judges.

Phillip Lee Kelley, an Oklahoma inmate appearing pro se,¹ appeals the dismissal of his 42 U.S.C. § 1983 claims against various prison officials. Exercising jurisdiction under 28 U.S.C. § 1291, we dismiss this appeal as frivolous.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

¹ Because Mr. Kelley proceeds pro se, we construe his arguments liberally, but we “cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record.” *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

ATTACHMENT "A"
(APPENDIX A')

Mr. Kelley's § 1983 complaint presented two claims: (1) that the governor of Oklahoma violated his constitutional rights by not signing legislation that would have brought about sentencing reform in the state and (2) that the lack of uniform criteria or specific rules governing Oklahoma's pardon and parole proceedings denied him due process of law. He sought to proceed in forma pauperis (IFP), under 28 U.S.C. § 1915. He originally sought to join as plaintiffs thirty other prisoners, but only he signed the complaint. The magistrate judge recommended dismissal of all other plaintiffs. Mr. Kelley then amended his complaint. The magistrate judge then recommended dismissal of the amended complaint for failure to state a claim. Mr. Kelley timely filed objections to the recommendation. The district court overruled the objections, adopted the recommendation, and dismissed the action without prejudice. This appeal followed.

"We review de novo the district court's decision to dismiss an IFP complaint under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim." *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007). In so doing, "[w]e apply the same standard of review . . . that we employ for Federal Rule of Civil Procedure 12(b)(6) motions to dismiss" *Id.* "Under this standard, we must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1282 (10th Cir. 2019) (internal quotation marks omitted).

Mr. Kelley's arguments on appeal do not engage with the reasoning in the district court's order or in the magistrate judge's report and recommendation. He

reiterates the logic underlying his claims, but he in no way addresses the core reason for the dismissal: he “cannot use a § 1983 action to challenge the fact or duration of his confinement. He must seek federal habeas corpus relief (or appropriate state relief) instead.” *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005) (internal citations and quotation marks omitted).

So, for the reasons set forth in the district court’s order adopting the magistrate judge’s report and recommendation, we dismiss the appeal as frivolous under 28 U.S.C. § 1915(e)(2)(B)(i). *See Ford v. Pryor*, 552 F.3d 1174, 1180 (10th Cir. 2008) (“An appeal is frivolous when the result is obvious.” (internal quotation marks omitted)). We deny Mr. Kelley’s motion to proceed IFP. *See DeBardleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991) (“In order to succeed on [an IFP] motion, an appellant must show . . . the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal.”). We also deny his motion for summary disposition.

This dismissal, in addition to the district court’s dismissal, operates as a strike under § 1915(g), so Mr. Kelley now has two strikes. *See Jennings v. Natrona Cnty. Ctr. Med. Facility*, 175 F.3d 775, 780 (10th Cir. 1999), *overruled in part on other grounds*, *Coleman v. Tollefson*, 135 S. Ct. 1759 (2015).

Entered for the Court

Bobby R. Baldock
Circuit Judge

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

PHILLIP KELLEY,)	
)	
Plaintiff,)	
)	
v.)	No. CIV-23-747-R
)	
KEVIN STITT, et al.,)	
)	
Defendants.)	

ORDER

Plaintiff Philip Kelley, a state prisoner proceeding pro se,¹ brought this civil rights action under 42 U.S.C. § 1983 against Governor Kevin Stitt and members of the Oklahoma Pardon and Parole Board. The matter was referred to United States Magistrate Judge Shon T. Erwin for initial proceedings in accordance with 28 U.S.C. § 636(b)(1)(B) and (C). Judge Erwin issued a Report and Recommendation [Doc. No. 10] recommending that Plaintiff’s Amended Complaint be dismissed upon screening because it asserts claims that are not properly brought under § 1983. Plaintiff filed a timely Objection [Doc. No. 11] and the Court must therefore make a de novo determination of those portions of the Report to which a specific objection is made. 28 U.S.C. § 636(b)(1); Fed R. Civ. P. 72(b)(3).

Plaintiff’s Amended Complaint asserts two claims. First, Plaintiff alleges that Governor Stitt violated Plaintiff’s constitutional rights by rejecting legislation that would “bring about sentencing reform” and “do away with indeterminate sentencing.” Doc. No.

¹ Because Petitioner is proceeding pro se, the Court affords his materials a liberal construction but does not act as his advocate. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

8 at 3. Second, Plaintiff alleges that the lack of uniform criteria or specific rules governing Oklahoma's pardon and parole proceedings violates his right to due process. *Id.* at 4. The Amended Complaint then requests a court order compelling Governor Stitt "to sign a sentencing reform (matrix) that will ensure uniform sentencing and do away with indeterminate unjust sentences" and to adopt certain rules governing parole proceedings or, alternatively, to pay damages to Plaintiff. The Amended Complaint also states that Plaintiff "is seeking to have his sentence modified to reflect the amount of time he has to serve to satisfy a Life or Life w/o Parole sentence[,] requests that "his sentence be set at a minimum of 18-60 years[,] and complains that Oklahoma's parole process denies him "a meaningful avenue in which to obtain relief from his unjust sentence[.]" Doc. No. 8-2 at 3-5.

Judge Erwin construed these claims as challenging the legality or execution of Plaintiff's sentence. And, as Judge Erwin correctly noted, claims challenging the legality or execution of a sentence must be brought in a petition seeking habeas relief. *See Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005) ("[A] prisoner in state custody cannot use a § 1983 action to challenge 'the fact or duration of his confinement.'"); *Davis v. Roberts*, 425 F.3d 830, 833 (10th Cir. 2005) ("[A] challenge to the execution of a sentence should be brought under 28 U.S.C. § 2241."). In his Objection, Plaintiff takes issue with this characterization and argues that he is asserting claims for violation of his Fourteenth Amendment Due Process rights.² Upon de novo review, the Court agrees that the

² Plaintiff's Amended Complaint also references the Equal Protection Clause of the Fourteenth Amendment and asserts that other state prisoners have achieved post-conviction

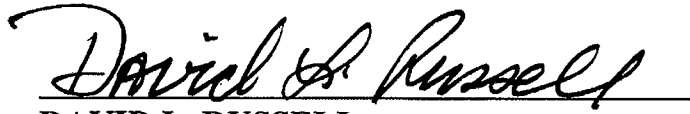
allegations in the Amended Complaint challenge the legality and execution of Plaintiff's sentence. Plaintiff specifically requests "sentencing reform" or additional parole procedures that would either modify the duration of his sentence or result in a speedier release via parole. Section 1983 is not the proper vehicle for these types of claims.

However, liberally construed, Plaintiff's second claim could also be read as raising a challenge to Oklahoma's parole process that would not necessarily undermine the fact or duration of Plaintiff's sentence. In that case, § 1983 would be the proper vehicle for the claim. *Wilkinson*, 544 U.S. at 81-82 (holding that "§ 1983 remains available for procedural challenges where success in the action would not necessarily spell immediate or speedier release for the prisoner"). But construing Plaintiff's challenge to Oklahoma's parole procedures as properly brought pursuant to § 1983 is ultimately of little help to Plaintiff because there is "no constitutionally protected due process liberty interest" in Oklahoma's discretionary parole system. *Griffith v. Bryant*, 625 F. App'x 914, 917 (10th Cir. 2015). Because there is no protected liberty interest, any alleged deficiencies in Oklahoma's parole procedures do not violate Plaintiff's due process rights.

Accordingly, upon de novo review, the Court finds that Plaintiff's Amended Complaint fails to state plausible claims under 42 U.S.C. § 1983. The Report and Recommendation is therefore ADOPTED and this action is dismissed without prejudice.

relief. The mere fact that other prisoners have been awarded post-conviction relief is not sufficient to state a plausible equal protection claim. *See Daniels v. Dowling*, 731 F. App'x 756, 759 (10th Cir. 2018) (petitioner failed to state plausible equal protection claim where he alleged that another prisoner submitted the same post-conviction application but failed to show that they were similarly situated).

IT IS SO ORDERED this 7th day of November 2023.

A handwritten signature in black ink, reading "David L. Russell", written over a horizontal line.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

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

PHILLIP KELLEY,

Plaintiff,

v.

KEVIN STITT, et al.,

Defendants.

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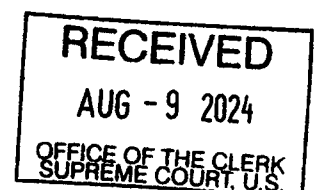
Case No. CIV-23-747-R

REPORT AND RECOMMENDATION

Plaintiff Phillip Kelley, appearing *pro se*, has filed an Amended Complaint under 42 U.S.C. § 1983, alleging various civil rights violations. (ECF No. 8). United States District Judge David L. Russell has referred this matter to the undersigned magistrate judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B)-(C). A review of the Amended Complaint has been conducted pursuant to 28 U.S.C. § 1915A(a). Based on that review, it is recommended that the Court **DISMISS** the Amended Complaint.

I. SCREENING REQUIREMENT

The Court must review each complaint in which a prisoner seeks redress against a governmental entity, officer, or employee and each case in which a plaintiff proceeds *in forma pauperis*. 28 U.S.C. § 1915A(a). The Court is required to dismiss the complaint or any portion of the complaint that is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b); *see also Kay v. Bemis*, 500 F.3d 1214, 1217–18 (10th Cir. 2007) (indicating that court uses same analysis for complaint’s sufficiency



whether performed sua sponte or pursuant to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)).

II. STANDARD OF REVIEW

The Court must accept Mr. Kelley's allegations as true and construe them, and any reasonable inferences to be drawn from them, in the light most favorable to Plaintiff. *See Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007). Since Mr. Kelley is proceeding *pro se*, his complaint must be construed liberally. *See id.* at 1218. The Court "review[s] the complaint for plausibility; that is, to determine whether the complaint includes enough facts to state a claim to relief that is plausible on its face." *Young v. Davis*, 554 F.3d 1254, 1256 (10th Cir. 2009) (quotations and citation omitted). "Plausible" in this context does not mean "likely to be true," but rather refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct," then the plaintiff has not "nudged (his) claims across the line from conceivable to plausible." *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility requirement "serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them." *Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008).

A complaint fails to state such a claim when it lacks factual allegations sufficient "to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (footnote and citation omitted). Bare legal conclusions in a complaint are not assumed to

be true; legal conclusions “must be supported by factual allegations” to state a claim upon which relief may be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Whether a complaint contains sufficient facts to avoid dismissal is context-specific and is determined through a court’s application of “judicial experience and common sense.” *Iqbal*, 556 U.S. at 679; *see also Gee v. Pacheco*, 627 F.3d 1178, 1184-85 (10th Cir. 2010) (discussing *Iqbal*).

III. THE AMENDED COMPLAINT

In the Amended Complaint, Mr. Kelley presents two claims. First, Plaintiff seeks liability against Governor Kevin Stitt for “reject[ing] Legislation passed by the House and Senate to bring about sentencing reform that would do away with indeterminate sentencing.” (ECF No. 8:3). In support of this claim, Plaintiff presents what he considers to be “14th Amendment Abuses” allegedly committed by the State of Oklahoma by means of various legislation related to sentencing. (ECF No. 8-2:1-5). Thereafter, Mr. Kelley makes the following statements:

- “Petitioner is not seeking Parole, he is seeking to have his sentence modified to reflect the amount of time he has to serve to satisfy a Life or Life w/o Parole sentence” and
- “The Fourteenth Amendment Due Process and Equal Protection Clause requires Petitioner be given an opportunity to litigate these claims in a hearing, or have his sentence set at a minimum of 18-60 years[.]”

(ECF No. 8-2:3, 4). Mr. Kelley also discusses the fact that he realizes that “the claims in his pleading can and should be raised in this Court in a Post-Conviction Application,” but that the Oklahoma Court of Criminal Appeals chose to dismiss his argument based on the

fact that it was apparently submitted untimely. (ECF No. 8-2:5). As relief, Plaintiff requests: (1) the Court order Governor Stitt to "sign a sentencing reform (matrix) that will ensure uniform sentencing and do away with indeterminate unjust sentences" or (2) monetary damages. (ECF No. 8:4).

In Claim Two, Plaintiff seeks liability against Governor Stitt and four members of the Oklahoma Pardon and Parole Board for failing to have "Uniform criteria for, who is eligible for commutation or parole." (ECF No. 8:4). In support of this claim, Mr. Kelley states that "Oklahoma's Statutes governing Parole and Commutation are grossly inadequate," which have "denied the Petitioner procedural due process[.]" (ECF No. 8-2:5). Plaintiff goes on to discuss various statutes and/or regulations implemented by the State of Nebraska related to parole, which Mr. Kelley believes ought to be implemented by the State of Oklahoma. *See* ECF No. 8-2:6-7. As relief on Claim Two, Plaintiff requests (1) that Governor Stitt and the Oklahoma legislature "put in place the same rules governing Pardons and Paroles that are found in Nebraska's state statutes" or (2) monetary damages. (ECF No. 8:4).

Regarding both claims, Mr. Kelley states:

The Petitioner is in essence being deprived of his Constitutional rights on both fronts; On the one hand he cannot obtain Commutation and or Parole because of the State's lack of Constitutional guarantees to a fair Parole/Commutation process [Claim Two]. And, on the other hand cannot seem to have his indeterminate sentence modified in accordance with other courts rulings to prevent them from serving in essence a Death by incarceration sentence [Claim One].

(ECF No. 8-2:7).

IV. DISMISSAL OF THE COMPLAINT

Liberally construing Plaintiff's claims, the Court should conclude that the allegations in the Complaint challenge the legality of Mr. Kelley's sentence (Claim One) and the execution of his sentence (Claim Two). The Court should dismiss these claims as improperly filed in a Complaint under 42 U.S.C. § 1983.

A. Plaintiff's Claims Challenging the Legality of his Sentence

The allegations challenging the legality of Mr. Kelley's sentence (which he believes is "indeterminate" and is, in effect, "Death by incarceration")¹, cannot be asserted under 42 U.S.C. § 1983. *See Wilkinson v. Dotson*, 544 U.S. 74, 78, (2005) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973)). Instead, Mr. Kelley must assert them in a habeas petition pursuant to 28 U.S.C. § 2254. *See Wilkinson*, 544 U.S. at 78; *see also Davis v. Roberts*, 425 F.3d 830, 835 (10th Cir. 2005). As part of this recommendation, the undersigned takes judicial notice of: (1) the fact that Mr. Kelley has previously filed a habeas petition in this court under Section 2254 and (2) 28 U.S.C. § 2244(b)'s limitations on a second or successive habeas petition filed pursuant to Section 2254. The undersigned, however, expresses no opinion on whether Mr. Kelley would be barred from filing a successive habeas petition.

B. Plaintiff's Claims Challenging the Execution of his Sentence

The allegations challenging the execution of Mr. Kelley's sentence which are based on an underlying issue involving a "lack of . . . procedures governing Parole" must be

¹ *See* ECF No. 8:3.

presented in a petition seeking habeas relief under 28 U.S.C. § 2241. *See Davis*, 425 F.3d at 833; *Dulworth v. Evans*, 442 F.3d 1265, 1268 (10th Cir. 2006); *see also Wilkinson*, 544 U.S. at 78–82. An inmate can properly challenge parole procedures under 42 U.S.C. § 1983 if all he is seeking is to overturn those procedures and if he is *not* seeking his immediate or a speedier release into the community. *See Wilkinson*, 544 U.S. at 82. But here, it appears that Mr. Kelley is seeking not only modifications to the regulations governing Oklahoma’s parole scheme, but also his own immediate or at least a speedier release. *See* ECF No. 8-2:7 (Plaintiff’s statement that “he cannot obtain Commutation and or Parole because of the State’s lack of Constitutional guarantees to a fair Parole/Commutation process.”). Such a claim must be asserted as a claim for habeas relief under 28 U.S.C. § 2241. *See Wilkinson*, 544 U.S. at 82; *Davis*, 425 F.3d at 833.

V. RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

For the forgoing reasons, the Court should dismiss the Complaint in its entirety. Plaintiff is hereby advised of his right to object to this Report and Recommendation. *See* 28 U.S.C. § 636. Any objection must be filed with the Clerk of the District Court by **October 13, 2023**. *See* 28 U.S.C. § 636(b)(1); and Fed. R. Civ. P. 72(b)(2). Failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal questions contained herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10thCir. 2010).

VI. STATUS OF THE REFERRAL

This Report and Recommendation terminates the referral by the District Judge in this matter.

ENTERED on September 26, 2023.

A handwritten signature in black ink, reading "Shon T. Erwin", written over a horizontal line.

SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE