

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

DEC 16 2004

PATRICK FISHER
Clerk

ANTHONY H. WARNICK x
Petitioner-Appellant x
v. x
GLYNN BOOHER x
Respondent-Appellee x

Case No. 02-5201

On Appeal from the United States District Court
For the Northern District of Oklahoma

The Honorable Terry C. Kern
Chief District Judge

D.C. No. 01-CV-031-K(C)

DEC 16 11:16

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

STATEMENT REGARDING ORAL ARGUMENT

Counsel respectfully requests oral argument

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INTRODUCTION

On June 28, 1998, after at least two audits, the State of Oklahoma certified that Mr. Warnick completed the first of two distinct criminal sentences that were to be served consecutively. Since that date, the Oklahoma prison system has continued to re-audit the good time credits that triggered that certification, thereby re-opening and, in effect, seeking to lengthen the duration of the first sentence. In its Brief, the State of Oklahoma offers two justifications for its practice of refusing to respect the certification of an initial sentence as complete: (1) that there is no constitutionally protected “expectation of finality” applicable to the recalculation of good time credits for an already completed sentence, *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980); and (2) that, to the extent such an expectation exists, it does not arise where a prisoner is serving a consecutive sentence (as opposed to being freed). Neither argument justifies its conduct at issue in this case.

ARGUMENT

I. Mr. Warnick Enjoys A Constitutionally Protected Interest in Finality As To the Term of His Sentence

Contrary to the Oklahoma prison system’s argument, the context of good time credits parallels that of sentencing and both contexts enjoy the

same level of constitutional protection. In particular, the Double Jeopardy and Due Process Clauses protect both contexts because the system of good time credits inheres in the sentencing regime itself. Consequently, these constitutional safeguards ensure an “expectation of finality” and afford prisoners a constitutionally protected interest in repose once a sentence is certified as complete. *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980).

At bottom, the constitutional analysis takes a functional view of whether the State has unreasonably lengthened a prisoner’s term of confinement. Thus, as the Supreme Court concluded in *Young v. Harper*, the relevant question for constitutional purposes is whether the program at issue functions in a manner similar to parole—i.e., governs the term of confinement. *See* 520 U.S. 143, 146-47 (1997). Similarly, in the case at bar, the focus should not be on the legal form justifying the release date, but on the reality of whether the State has deprived Mr. Warnick of a constitutionally cognizable liberty interest in an earlier release date. Thus, like the role played by a statute of limitations, it is important to remember that the Double Jeopardy and Due Process Clauses “promote repose by giving security and stability to human affairs.” *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

II. The Fact That Mr. Warnick Is Serving a Consecutive Sentence Does Not Alter the Constitutional Analysis

In principle, a consecutive sentence is entirely different from, and not logically connected to, an earlier sentence. Notably, it is well established that, for double jeopardy purposes, consecutive sentences are separate sentences and legally distinct from one another. Consequently, “the imposition of consecutive sentences for *separate* offenses does not implicate double jeopardy.” *Lucero v. Kerby*, 133 F.3d 1299, 1323 n.17 (10th Cir. 1998) (emphasis in original).

In this case, the Oklahoma prison system underscored the separate nature of Mr. Warnick’s two sentences by going through the effort to conduct a final audit of his first one and to certify it as complete. Because it did so, it was eminently reasonable for Mr. Warnick to have an expectation that his first sentence was fixed and finally served. To later call that expectation “disingenuous” and to suggest that the two consecutive sentences are, in fact, just “one continuous sentence” (Response to Appellant’s Supplemental Brief at 6, 7) conveniently overlooks that it was the prison system’s actions that gave rise to that expectation and a

constitutionally cognizable interest that could not later be disregarded.

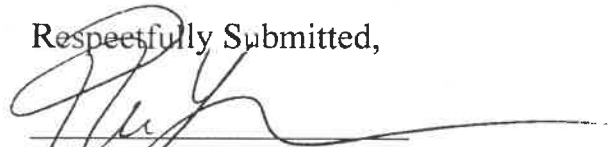
CONCLUSION

For the aforementioned reasons, this Court should REVERSE and REMAND the District Court's decision and instruct it to grant Mr. Warnick's petition for habeas corpus insofar as the Oklahoma prison system has disregarded his constitutionally protected interest in a fixed sentence term.

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B)

Counsel hereby certifies that this Reply Brief complies with the type-volume limitation set forth in F.R.A.P. 32(a)(7)(B). There are a total of 757 words in this brief, including headings, footnotes and quotations, but excluding tables and certificates and other items enumerated in F.R.A.P. 32(a)(7)(B)(iii).

Respectfully Submitted,



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