[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

No. 18-11732
Non-Argument Calendar

---

D.C. Docket No. 4:14-cv-00588-RH-GRJ

TOMMY LEE GAINES,

Petitioner–Appellant,

versus

ATTORNEY GENERAL, STATE OF FLORIDA,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA COMMISSION ON OFFENDER REVIEW,

Respondents–Appellees.

---

Appeal from the United States District Court
for the Northern District of Florida

---

(September 10, 2019)

Before MARCUS, ROSENBAUM and FAY, Circuit Judges.

PER CURIAM:

Tommy Lee Gaines, proceeding *pro se*, appeals the district court's denial of his 28 U.S.C. § 2241 petition without an evidentiary hearing. We affirm.

## I. BACKGROUND

In 1990, Gaines pled guilty to possession of a firearm by a convicted felon (Count 1) and unlawful possession of a controlled substance (Count 2). Gaines was sentenced by a Florida state court as a habitual offender to concurrent sentences of 30 years as to Count 1 and 10 years as to Count 2. The court stated that he "shall not be eligible for gain time granted by the [Florida Department of Corrections ("FDOC")] except that the [FDOC] may grant up to twenty days of incentive gain time each month as provided for in Florida Statute 944.275(4)(b)."

In 1993, Florida's Fifth District Court of Appeal ("DCA") reversed and remanded the summary denial of Gaines's Florida Rule of Criminal Procedure 3.850 motion for postconviction relief, in which Gaines had alleged that his trial counsel had failed to inform him about the loss of gain time resulting from his plea bargain.

In 2006, Gaines filed a state petition for mandamus relief in the Florida Second Circuit Court for Leon County, in which he argued, in relevant part, that he would not have accepted his plea agreement if he had been made aware that the "direct consequences" of his plea would have placed him on conditional release for a time period equivalent to his earned gain time. The state court denied Gaines's

request, concluding that the "[i]mposition of Conditional Release supervision has no bearing on [Gaines's] negotiated plea agreement" and the "plea agreement of thirty years has not been compromised" because his total sentence stayed the same regardless of where he served it.

In 2008, Gaines was released from prison on conditional release, which was revocable at the discretion of the Florida Commission on Offender Review ("FCOR"), if, among other things, he was found to have violated the law or statutory conditions of his release. In June 2012, Gaines was alleged to have committed battery; he waived his right to a revocation hearing. In July 2012, the FCOR revoked Gaines's conditional release and denied him credit for time served while out on conditional release.

In 2013, after the revocation of his conditional release, Gaines filed a mandamus petition in the Leon County Circuit Court, seeking credit for the 1,363 days he was out on conditional release prior to his revocation. The court denied the petition, determining that his previously accrued gain time was subject to forfeiture upon revocation; thus, the FDOC had properly calculated the time Gaines was required to serve.

In March 2014, Gaines filed in the Florida Second Circuit Court for Wakulla County a petition for habeas relief, in which he argued that (1) his gain time was revoked in violation of state law, and (2) his conditional release was revoked in

violation of Florida law and the Fourteenth Amendment because he was not provided sufficient notice of the basis for the revocation. The court denied Gaines's petition, concluding that: (1) the FDOC had properly forfeited his gain time and could not be ordered to reinstate it because the restoration of gain time was discretionary; (2) he had waived his right to challenge his revocation; (3) his claims were barred by *res judicata*; and (4) the basis for his revocation was factually supported.

In April 2014, the Florida Seventh Circuit Court for Putnam County dismissed for lack of jurisdiction a separate habeas petition, in which Gaines "[sought] immediate release relating to gain time issues." In August 2014, Gaines appealed the dismissal to the Fifth DCA, seeking to supplement the record on appeal with the plea agreement and plea colloquy. The Fifth DCA denied Gaines's motion to supplement the record without a written opinion.

In October 2014, Gaines filed an initial 28 U.S.C. § 2254 petition in the federal district court, in which he alleged he was being illegally detained past the completion of his sentence according to his "contract plea agreement," in violation of the Fifth, Eighth, and Fourteenth Amendments. Subsequently, a magistrate judge ordered Gaines to file a § 2241 petition because his claim amounted to an attack on the execution of his sentence, though the magistrate judge noted that § 2241 petitions are still subject to the same limitations as § 2254 petitions.

Gaines filed an amended § 2241 petition and memorandum in support thereof reasserting that he had entered into a contract plea agreement to 30 years of imprisonment as a habitual felony offender, minus 20 days a month in gain time. He argued that he was not awarded credit for the 1,362 days he spent on conditional release, thereby extending his maximum release date from April 8, 2020, to July 26, 2023. Gaines argued that his "sole point" was that his 30-year sentence as a habitual felony offender was completed after he was released early in 2008 due to his accrual of 12 years of gain time; thus, the state of Florida's later revocation of his gain time violated the terms of his plea agreement, in violation of the Fifth, Eighth, and Fourteenth Amendments.

A magistrate judge issued a report and recommendation ("R&R"). As an initial matter, the magistrate judge concluded that the FDOC had failed to show that Gaines had not exhausted his state remedies, as the FDOC conceded that it was unaware whether Gaines had exhausted his claims in state court.[1] The magistrate judge then stated that, regardless of whether Gaines had exhausted his claims, the judge had "no trouble" concluding that the claims were due to be denied on the merits. As for the assertion that the terms of the "contract plea agreement" were for a sentence of 30 years, minus 20 days a month in gain time,

[1] The R&R also interpreted Gaines's claims as arguing that the state court improperly calculated or revoked his gain time as a matter of state law, but that issue is outside of the scope of the issue presented in the COA. Thus, we will not address it.

the judge stated that it was illogical and contrary to the concept of how gain time was calculated, since gain time was dependent on good institutional behavior and subject to forfeiture. The judge further found that the forfeiture of gain time or the requirement that Gaines serve time on conditional release did "not thwart a plea agreement for a 30-year sentence as a habitual felony offender" or invalidate the plea and noted that Gaines would only serve his agreed-upon 30-year sentence despite the forfeiture of his gain time. Finally, the judge stated that Gaines had not shown how any alleged violation of the plea agreement amounted to a denial of his constitutional rights because the plea agreement was not in evidence and Gaines had not argued how the FCOR or FDOC had violated his constitutional rights in regard to the plea agreement. Accordingly, the magistrate judge recommended denying Gaines's § 2241 petition and a Certificate of Appealability ("COA").

The district court issued an order labeled "Order Denying the Petition and Denying a Certificate of Appealability."[2] The court found that gain time under Florida law is subject to forfeiture if the defendant commits a new offense. Thus, the court stated that a "state must comply with a plea agreement on which a guilty

[2] While in its order, the court stated that it was reviewing Gaines's § 2254 petition, it is unclear whether the district court treated Gaines's habeas petition as one filed under § 2241 or § 2254. However, the record reflects that the district court adopted the R&R's recommendation to deny the amended § 2241 petition, and the parties refer to the amended habeas petition. In any event, Gaines's petition is both authorized by § 2241 and governed by § 2254 because he was "in custody pursuant to the judgment of a State court." *See Medberry v. Crosby*, 351 F.3d 1049, 1062 (11th Cir. 2003). Consequently, we will refer to his amended petition.

plea is based . . . but Mr. Gaines has not shown that his plea agreement purported to countermand state law on gain time or conditional release, and his unsupported contrary conclusion makes no sense." The court concluded that, "bottom line," Gaines had received a proper 30-year sentence that fully complied with his plea agreement, which was "precisely in compliance with Florida law." The court adopted the R&R and denied Gaines's petition, but granted him a COA on the issue of whether his claim that the state violated his plea agreement by revoking his gain time was properly denied without an evidentiary hearing.

Our Court *sua sponte* vacated the COA and ordered a limited remand, instructing the district court to clarify its COA ruling, clarify the statutory basis of the habeas corpus petition, and correct the COA to identify an underlying constitutional claim. On limited remand, the district court clarified that due process under the Fourteenth Amendment obligated the state to comply with any plea agreement it entered into with a defendant. Thus, the district court determined that, if Gaines could show that his plea agreement in fact included a promise of irrevocable gain time that the state violated, reasonable jurists would agree that the state's actions violated Gaines's right to due process. Because reasonable jurists could debate whether Gaines was entitled to an evidentiary hearing on his claim, the district court granted him a COA on the issue of "whether Mr. Gaines's claim

that the state violated his plea agreement by revoking his gain time was properly denied without an evidentiary hearing."

## II. DISCUSSION

On appeal, Gaines states that he unsuccessfully attempted to obtain his plea agreement or plea-colloquy transcript and asserts that it was clearly unreasonable for the state court and magistrate judge to make assumptions regarding his plea agreement in denying him relief. Gaines also argues that he is entitled to immediate release because the state cannot refute his claim to relief in the absence of the plea agreement.[3] He asserts that the forfeiture of his gain time by the FDOC and FCOR frustrated the intent of his plea agreement, his sentence was completed upon his release in 2008 based on the gain time in which he had a vested interest, and, in the alternative, his case should be sent back to the state court for resentencing or withdrawal of his plea.

[3] The FDOC argues that Gaines's petition was rendered moot by his release from prison. Although the mootness issue was not presented as part of the COA, we must resolve the jurisdictional issue before proceeding to the merits of the constitutional claim for which the COA was granted. *Medberry*, 351 F.3d at 1054 n.3; *McCoy v. United States*, 266 F.3d 1245, 1248 n.2 (11th Cir. 2001). As indicated by the Notice of Change of Address that Gaines filed with our Court, he was released from prison in March 2019. As a result, he no longer automatically satisfies Article III's "case-or-controversy" requirement and bears the burden of showing that he still suffers some collateral consequence of the revocation of his conditional release. *Spencer v. Kemna*, 523 U.S. 1, 7, 14, 118 S. Ct. 978, 983, 986 (1998). However, he submitted an affidavit from the FDOC that indicates that his maximum release date has been extended from 2020 to 2023 due to the three years for which he did not receive credit while out on conditional release. Therefore, Gaines's petition is not moot because he has shown the existence of a collateral consequence of his revocation that survived his release from prison. *Mattern v. Sec'y, Dep't of Corrs.*, 494 F.3d 1282, 1285-86 (11th Cir. 2007).

Habeas petitions filed under 28 U.S.C. § 2241 by state prisoners "in custody pursuant to the judgment of a State court" are subject to the additional limitations of 28 U.S.C. § 2254 petitions.[4] *Medberry v. Crosby*, 351 F.3d 1049, 1062 (11th Cir. 2003) (quoting 28 U.S.C. § 2254(a)). In examining the denial of a petition filed under § 2254, we review questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error. *Stewart v. Sec'y, Dep't of Corrs.*, 476 F.3d 1193, 1208 (11th Cir. 2007). We review a district court's decision to grant or deny an evidentiary hearing for abuse of discretion. *McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005). The district court abuses its discretion by misapplying the law or making findings of fact that are clearly erroneous. *Id.*

As amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d) prohibits federal courts from granting habeas relief on claims previously adjudicated on the merits in state court unless the state court decision (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the U.S. Supreme Court, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1)-(2). However, where the state court did not adjudicate the petitioner's claim on the

[4] Because Gaines was incarcerated when he filed his petition, he satisfied the "in Custody" requirement of § 2254. *Spencer*, 523 U.S. at 7, 118 S. Ct. at 983.

merits, federal courts are not bound by the deferential standards in § 2254(d), and federal review of that claim is *de novo*. *Connor v. Hall*, 645 F.3d 1277, 1292 (11th Cir. 2011).

Before bringing a habeas action in federal court, a state petitioner must exhaust all available state court remedies for challenging his conviction. 28 U.S.C. § 2254(b), (c). "[T]he exhaustion rule, while not a jurisdictional requirement, creates a strong presumption in favor of requiring the prisoner to pursue his available state remedies." *Castille v. Peoples*, 489 U.S. 346, 349, 109 S. Ct. 1056, 1059 (1989) (quotation marks and citation omitted). The presentation of the facts necessary to support the federal claim or a similar state-law argument is insufficient to satisfy the exhaustion requirement. *McNair*, 416 F.3d at 1302. We require "that a petitioner presented his claims to the state court such that a reasonable reader would understand each claim's particular legal basis and specific factual foundation." *Id.* (quotation marks omitted). Moreover, "to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues." *Lucas v. Sec'y, Dep't of Corr.*, 682 F.3d 1342, 1352 (11th Cir. 2012) (quoting *Jimenez v. Fla. Dep't of Corr.*, 481 F.3d 1337, 1342 (11th Cir. 2007)). A petitioner also must fairly present his constitutional claim "in each appropriate state court (including a state supreme court with powers of discretionary review)" for the claim to be exhausted.

*Baldwin v. Reese*, 541 U.S. 27, 29, 124 S. Ct. 1347, 1349 (2004). However, a federal court may deny a petitioner's petition on the merits, even if he has failed to exhaust his state remedies. 28 U.S.C. § 2254(b)(2).

A habeas petitioner is only entitled to an evidentiary hearing "if he . . . alleges facts that, if proved at the hearing, would entitle [him] to relief." *Atwater v. Crosby*, 451 F.3d 799, 812 (11th Cir. 2006) (quoting *Breedlove v. Moore*, 279 F.3d 952, 960 (11th Cir. 2002)). However, a petitioner is not entitled to an evidentiary hearing when his claims are wholly incredible in light of the record. *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991). Where a petitioner's claim rests on occurrences outside the record, no evidentiary hearing is required if his allegations are so "palpably incredible or patently frivolous as to warrant summary dismissal." *Id.* (quoting *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989)). Finally, AEDPA mandates that a petitioner who failed to develop the factual basis for a claim in state court shall not be granted a federal evidentiary hearing absent certain extraordinary circumstances. 28 U.S.C. § 2254(e)(2); *McNair*, 416 F.3d at 1297.

For prisoners sentenced before 1994, the FDOC may award up to 20 days of incentive gain time per month served. Fla. Stat. § 944.275(4)(b)1. However, Florida law mandates that a Florida prisoner sentenced as a "habitual offender" shall be released on conditional release. *Id.* § 947.1405(2)(b). "Conditional release" is a statutorily-authorized post-prison supervision program for certain

types of offenders that the Florida legislature has determined to be in need of additional supervision following their release. *Rivera v. Singletary*, 707 So. 2d 326, 327 (Fla. 1998). Thus, a Florida prisoner sentenced as a "habitual offender" must remain under supervision for a period of time equal to the amount of gain time awarded and under supervision terms determined by the FCOR. *Mayes v. Moore*, 827 So. 2d 967, 971-72 (Fla. 2002). A releasee's violation of his conditional release prior to the expiration of his full prison term can lead to the revocation of his release and the forfeiture of accrued gain time. *See id.* at 972-74. A prisoner's time spent out of prison while under supervision will only be credited towards the service of his prison sentence when the supervisory period is successfully completed. *Thomas v. Moore*, 797 So. 2d 1196, 1198 (Fla. 2001).

Although the district court bypassed the question of whether Gaines exhausted his claim that the state violated his Fourteenth Amendment right to due process by violating the terms of his plea agreement, the record shows that Gaines has not previously raised that specific claim before a state court, despite his many prior filings. In 1993, Gaines alleged that, but for trial counsel's failure to inform him of the loss of gain time as a result of his guilty plea, he would not have entered the plea agreement. In 2006, Gaines challenged the voluntariness of his plea, arguing that his counsel and the state failed to explain to him how the terms of his plea agreement related to the nature of gain time and its relationship to conditional

release. However, whether Gaines was properly informed of the terms of his plea agreement and the function of gain time substantively differs from the question of whether the state violated the terms of a plea agreement that gave him a vested right in that gain time. In fact, Gaines's former claims contradict the one at issue here because they were premised on the assertion that his plea agreement did *not* entitle him to irrevocable gain time.

Similarly, Gaines's 2014 state habeas petition challenged the basis for the revocation of his conditional release and forfeiture of his accrued gain time but did not assert that the state violated his right to due process by violating the terms of his plea agreement. Although his reply to the state's response to his 2014 motion to supplement the record on appeal in the Fifth DCA alleged that the FDOC thwarted his plea agreement as a third party, he did not clearly indicate that his claim was under federal law. *See Lucas*, 682 F.3d at 1352. Because he has not fairly presented to the state court for consideration the specific constitutional claim at issue in the COA, the record shows that Gaines has failed to exhaust his instant due process claim. *Baldwin*, 541 U.S. at 29, 124 S. Ct. at 1349.

Even though Gaines failed to exhaust his state remedies, the district court was permitted to deny Gaines's claim on the merits. 28 U.S.C. § 2254(b)(2). Further, we are not bound by AEDPA's deferential requirements under § 2254(d) because Gaines's failure to exhaust his state remedies means that his claim has not

been adjudicated on the merits by a state court. *Connor*, 645 F.3d at 1292. Therefore, we may look to the entire record on appeal in determining whether the district court abused its discretion in denying Gaines's petition without an evidentiary hearing. *Id.*

The district court did not abuse its discretion in denying Gaines's petition without an evidentiary hearing because his claim that his plea agreement entitled him to irrevocable gain time is wholly incredible in light of the record. First, Gaines was sentenced in 1990 as a habitual offender, thereby qualifying him for the accrual of gain time and release on conditional release under Florida law. Fla. Stat. § 947.1405(2)(b). However, under Florida law, a prisoner sentenced as a habitual offender must remain on conditional release for the entire term of his sentence, which contradicts Gaines's allegation that his plea agreement contained terms that would have allowed him to finish his sentence early through the accrual of irrevocable gain time. *Mayes*, 827 So. 2d at 972. That conclusion is bolstered by the language in Gaines's criminal judgment that stated that the FDOC *may* award Gaines up to 20 days of gain time per month served-language in accordance with the Florida statute granting the FDOC the discretionary authority to award gain time-as well the state-court orders stating that the imposition of conditional release has no bearing on the terms of his plea agreement, and the FDOC retained the discretion to restore gain time. Fla. Stat. § 944.275(4)(b)1.

Gaines's 1993 and 2006 state petitions similarly undermine the plausibility that his plea agreement contained terms entitling him to irrevocable gain time that would effectively shorten his sentence. In those petitions, he argued that trial counsel was ineffective, and his plea was rendered involuntary because he was not made aware that his plea agreement only entitled him to be released on conditional release based on the amount of gain time accrued. These arguments conflict with his current claim that his plea agreement entitled him to irrevocable gain time that would lead to his early, unconditional release from prison, insofar as his earlier arguments acknowledged that the terms of his plea agreement did *not* entitle him to unconditional release or a shortened sentence. Therefore, the district court did not abuse its discretion in denying Gaines's habeas petition without an evidentiary hearing because Gaines's claim that the state violated his right to due process by revoking his accrued gain time is wholly incredible. *See Tejada*, 941 F.2d at 1559.

**AFFIRMED.**