

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Ronald Harley,

Petitioner,

v.

JT Shartle,

Respondent.

No. CV-15-00092-TUC-RM

ORDER

On April 6, 2017, Magistrate Judge D. Thomas Ferraro issued a Report and Recommendation (Doc. 26), recommending that Petitioner Ronald Harley's Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241 (Doc. 1) be denied. Petitioner filed an Objection (Doc. 27), to which Respondent replied (Doc. 28).

I. Standard of Review

A district judge "may accept, reject, or modify, in whole or in part," a magistrate judge's proposed findings and recommendations. 28 U.S.C. § 636(b)(1). The district judge must "make a de novo determination of those portions" of a magistrate judge's "report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The advisory committee's notes to Rule 72(b) of the Federal Rules of Civil Procedure state that, "[w]hen no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation" of a magistrate judge. Fed. R. Civ. P. 72(b) advisory committee's note to 1983 addition. *See also Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir.

1 1999) (“If no objection or only partial objection is made, the district court judge reviews
2 those unobjected portions for clear error.”); *Prior v. Ryan*, CV 10-225-TUC-RCC, 2012
3 WL 1344286, at *1 (D. Ariz. Apr. 18, 2012) (reviewing for clear error unobjected-to
4 portions of Report and Recommendation).

5 **II. Discussion**

6 In 1975, Petitioner was sentenced in the District of Columbia to an aggregate term
7 of 15-46 years for three counts of assault with intent to commit rape and one count of
8 sodomy. (Doc. 17-1 at 4.)¹ He was released on parole on December 12, 1988. (*Id.*)
9 Within a month of his release, he committed assault with intent to commit rape and
10 assault with intent to commit rape while armed. (*Id.*) His parole was thereafter revoked,
11 and on November 15, 1989, he was sentenced on the new offenses to an aggregate term
12 of 20 years to life. (*Id.*) Since 2003, the United States Parole Commission (“USPC”) has
13 repeatedly denied Petitioner’s requests for parole. (*Id.* at 5.)²

14 Petitioner’s § 2241 Petition (Doc. 1) challenges the USPC’s denial of parole after
15 a hearing held on February 4, 2014. (*See* Doc. 17-1 at 8-9, 11.) On April 5, 2017, Judge
16 Ferraro granted Petitioner’s Motion for Leave to Amend and/or Supplement his Petition
17 with materials concerning the USPC’s denial of parole after a hearing held on June 7,
18 2016. (*See* Docs. 22, 23, 25.)

19 The USPC provided written explanations of its 2014 and 2016 denials of parole.
20 (*See* Doc. 17-1 at 11; Doc. 22-1 at 11.) In the written explanation of its 2014 denial of
21 parole, the USPC acknowledged that the applicable 1987 District of Columbia Guidelines
22 (“D.C. Guidelines”) indicated that parole should be granted,³ but it found that a departure

23
24 ¹ Record citations refer to the page numbers electronically generated by the
Court’s electronic filing system.

25 ² The National Capitalization Revitalization and Self-Government
26 Improvement Act of 1997, which mandates that the federal Bureau of Prisons be
27 responsible for the custody of felons sentenced to incarceration pursuant to the D.C.
Code, transferred paroling authority from the D.C. Board to the USPC. *See Harvell v.*
28 *Winn*, CV-12-00751-TUC-RCC, 2015 WL 1883982, at *2 (D. Ariz. Apr. 24, 2015)
(citing D.C. Code § 24-101).

³ The USPC applies the 1987 Guidelines of the former District of Columbia

1 from the guidelines was warranted because there was a reasonable probability that
2 Petitioner would not obey the law if released and that his release would endanger the
3 public safety. (Doc. 17-1 at 9, 11.) The USPC noted that Petitioner was considered a
4 moderate to high risk of sexual recidivism based on his Static-99 Risk Assessment and
5 criminal history,⁴ and that he had not participated in any follow-up sex offender treatment
6 or mental health counseling since his last parole hearing. (*Id.*) The USPC further noted
7 that, at his prior parole hearing, Petitioner had stated that he did not need additional
8 treatment. (*Id.*) The USPC recommended that Petitioner participate in mental health or
9 additional sex offender treatment prior to his next parole hearing. (*Id.*)

10 In the written explanation of its 2016 denial of parole, the USPC again
11 acknowledged that the D.C. Guidelines indicated that parole should be granted but again
12 found that a departure from the guidelines was warranted because there was a reasonable
13 probability that Petitioner would not obey the law if released and that his release would
14 endanger the public safety. (Doc. 22-1 at 11.) The USPC again noted that Petitioner’s
15 Static-99 Risk Assessment indicated that Petitioner poses a moderate to high risk of
16 engaging in sexual-based offenses if released on parole. (*Id.*) The USPC also noted that
17 Petitioner has “over 10 prior arrests for various crimes including sexual assaults,
18 attempted murder and robbery,” and that “there is nothing to indicate [his] risk to public
19 safety has diminished.” (*Id.*) The USPC observed that Petitioner had not engaged in
20 additional programming to reduce his risk to public safety since his prior hearing, despite
21 the USPC’s recommendation of supplementary programming. (*Id.*) Finally, the USPC
22 stated that Petitioner became irritated with the examiner at his 2016 parole hearing and
23 then abruptly walked out of the hearing and refused to participate any further. (*Id.*) The
24 USPC found that “[t]hese factors highlight [Petitioner’s] high risk to engage in further
25

26 Board of Parole to any offender who committed his crime between March 4, 1985 and
27 August 4, 1998. *See* 28 C.F.R. § 2.80(o); *see also Harvell*, 2015 WL 1883982, at *3.

28 ⁴ In its Post-Hearing Assessment, the USPC noted that Petitioner has a
“history of violence,” including nine arrests for offenses such as rape and assault. (*Id.* at
8.)

1 criminal behavior if released on parole.” (*Id.*) The USPC denied parole and continued
2 the matter for rehearing in June 2021. (*Id.*)

3 In his § 2241 Petition, Petitioner alleges that his due process rights have been
4 violated by the USPC’s denial of parole. Judge Ferraro found that Petitioner has no
5 constitutionally protected liberty interest in parole upon which to base a procedural due
6 process claim. (Doc. 26 at 3-4.) Judge Ferraro recognized that there is some authority
7 for the proposition “that exceptionally arbitrary governmental conduct may in itself
8 violate the due process clause, whether or not a liberty interest is at stake.” (*Id.* at 5
9 (quoting *Harvell*, 2015 WL 1883982, at *10).) However, Judge Ferraro found that the
10 USPC set forth rational reasons for denying parole. (*Id.*) Accordingly, Judge Ferraro
11 recommended denying Petitioner’s § 2241 Petition on the grounds that Petitioner does
12 not have a protectable liberty interest in parole and that the USPC’s decision to deny
13 parole was not arbitrary. (*Id.* at 5-6)

14 In his Objection, Petitioner argues that the Report and Recommendation is based
15 upon an incorrect understanding of the facts surrounding Petitioner’s parole hearings and
16 the programming available to Petitioner. (Doc. 27 at 2, 6-9.) According to Petitioner, the
17 USPC’s decision to deny parole was arbitrary and capricious because it was based on
18 Petitioner’s Static-99 Risk Assessment score, even though that score is unchanging for a
19 man of Petitioner’s age, and upon Petitioner’s failure to participate in additional sex-
20 offender programming, even though Petitioner has completed the only sex-offender
21 treatment programming offered at USP Tucson. (*Id.* at 6-9.) Petitioner complains that he
22 has consistently fallen within the 1987 D.C. Guidelines’ standards for release and has
23 complied with all parole recommendations, and yet has repeatedly been denied parole.
24 (*Id.* at 2-3.)

25 Petitioner did not object to the Report and Recommendation’s finding that
26 Petitioner does not have a protected liberty interest in parole. Accordingly, the Court has
27 reviewed that finding for clear error, and has found none. There is no direct
28 constitutional liberty interest in parole. *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011)

1 (per curiam) (“There is no right under the Federal Constitution to be conditionally
2 released before the expiration of a valid sentence, and the States are under no duty to
3 offer parole to their prisoners.”) Furthermore, the applicable D.C. parole regulations do
4 not create a liberty interest in parole. *Blair-Bey v. Quick*, 151 F.3d 1036, 1047 (D.C. Cir.
5 1998) (finding that D.C. parole regulations do not create a protected liberty interest in
6 parole); *Harvell*, 2015 WL 1883982, at *9 (same); *see also* D.C. Code § 24-404(a)
7 (lacking mandatory language).

8 As Judge Ferraro recognized, “[t]here is some authority for the proposition that
9 exceptionally arbitrary governmental conduct may in itself violate the due process
10 clause,” even when there is no constitutionally protected liberty interest at stake. (Doc.
11 26 at 5 (quoting *Harvell*, 2015 WL 1883982, at *10).) However, Petitioner has not
12 shown that the USPC’s denial of parole “was so arbitrary as to violate due process.”
13 *Wallace v. Christensen*, 802 F.2d 1539, 1552 (9th Cir. 1986); *see also Harvell*, 2015 WL
14 1883982, at *10. The USPC provided written reasons for departing from the D.C.
15 Guidelines. *See Gambrell v. Fulwood*, 950 F. Supp. 2d 109, 118 (D.D.C. 2013) (“The
16 Commission . . . has broad discretion to depart from the D.C. Guidelines, and to do so the
17 Commission need only specify in writing” the factors supporting the decision to depart).
18 The USPC denied parole based upon Petitioner’s Static-99 Risk Assessment score, his
19 failure to participate in follow-up sex-offender treatment or mental health counseling, and
20 his criminal history.⁵ Petitioner complains that no additional sex-offender treatment
21 programming is offered at the facility in which he is housed, but he has not shown that no
22 mental health counseling or other programming is available. Furthermore, the USPC’s
23 reliance on Petitioner’s Static-99 Risk Assessment score is not arbitrary merely because
24 that score is unchanging for an individual of Petitioner’s age. Whether the score is
25 unchanging or not, it supports the USPC’s conclusion that Petitioner poses a moderate to

26
27 ⁵ In its 2016 denial of parole, the USPC relied on these factors as well as
28 Petitioner’s conduct during his parole hearing. Petitioner disputes the USPC’s
characterization of that conduct, but he concedes that he walked out of his parole hearing
early and refused to participate further. (*See* Doc. 22-1 at 1-3.)

1 high risk of sexual recidivism. Finally, the USPC rationally relied on Petitioner's
2 criminal history—which includes numerous sexual assaults, including two attempted
3 sexual assaults committed within one month of his release on parole in 1988—in denying
4 parole. *Cf. Zannino v. Arnold*, 531 F.2d 687, 691-92 (3d Cir. 1976) (finding that the
5 severity of petitioner's crime provided a rational basis for denial of parole). The USPC
6 had a rational basis for concluding that there is a reasonable probability that Petitioner
7 would not obey the law if released and that his release would endanger the public. Its
8 decision to deny parole was not arbitrary, much less so “exceptionally arbitrary” as to
9 violate due process even in the absence of a protected liberty interest. *See Harvell*, 2015
10 WL 1883982, at *10.⁶

11 Accordingly,

12 **IT IS ORDERED** that Petitioner's Objection (Doc. 27) is **overruled**. The Report
13 and Recommendation (Doc. 26) is **accepted and adopted in full**.

14 **IT IS FURTHER ORDERED** that Petitioner's § 2241 Petition (Doc. 1) is
15 **denied**. The Clerk of Court is directed to enter judgment accordingly and close this case.

16

17

18

19

20

21

22

23


24

25
26 ⁶ To the extent Petitioner is challenging the five-year setoff decision made
27 after Petitioner's 2016 parole hearing, that challenge also fails. Petitioner does not have a
28 protected liberty interest in a particular setoff period, and the USPC's decision to impose
a five-year setoff period was supported by rational written reasons. *See Blair-Bey*, 151
F.3d at 1047-48 (finding that the applicable D.C. regulations do not create a liberty
interest in a particular setoff period (citing *Stevens v. Quick*, 678 A.2d 28, 31-32 (D.C. Ct.
App. 1996))).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS FURTHER ORDERED that, pursuant to Rule 11 of the Rules Governing Section 2254 Cases, the Court declines to issue a certificate of appealability, because reasonable jurists would not find the Court's ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473, 478, 484 (2000).

Dated this 17th day of July, 2017.



Honorable Rosemary Márquez
United States District Judge