

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

HERMAN PATTERSON,)	
)	
Petitioner,)	
vs.)	NO. CIV-12-0738-HE
)	
MARTIN VAUGHN, Warden, <i>et al.</i> ,)	
)	
Respondents.)	

ORDER

Petitioner Herman Patterson, a state prisoner appearing *pro se*, filed this action seeking a writ of habeas corpus.¹ He claims the Oklahoma Department of Corrections is incorrectly administering his sentences. Consistent with 28 U.S.C. §636(b)(1)(B), the matter was referred to Magistrate Judge Robert Bacharach, who recommends that a motion to dismiss filed by respondents be granted and the petition be dismissed without prejudice because petitioner failed to exhaust his available state court remedy. The magistrate judge also recommended that a motion for “emergency action” filed by petitioner be denied on grounds of mootness.

Petitioner objected to the Report and Recommendation, stating that he “has given the State’s highest court(s) more than one opportunity to review his claims.” Objection, p. 4. Citing the application he filed for a *nunc pro tunc* order in state district court and the petition for writ of mandamus he filed in the Oklahoma Court of Criminal Appeals, petitioner asserts


¹Although he filed his petition under 28 U.S.C. § 2254, the magistrate judge treated it as if filed under § 2241, as petitioner was challenging the execution of his prison term rather than the validity of his conviction or sentence.

that he “would like to bring to light the futility of the exhaustion of state remedies in the lower court(s).” Objection, p. 16. However, as the magistrate judge explained, petitioner has failed to exhaust the available state habeas remedy.² Petitioner has not demonstrated otherwise.

Accordingly, having conducted a *de novo* review, the court adopts Magistrate Judge Bacharach’s Report and Recommendation and grants respondent’s motion to dismiss [Doc. #13]. The court also denies petitioner’s motion for emergency action [Doc. #3] as being moot.³ This action is dismissed without prejudice.

IT IS SO ORDERED.

Dated this 12th day of February, 2013.



JOE HEATON
UNITED STATES DISTRICT JUDGE

²*Petitioner characterizes his action as one brought for habeas relief and, alternatively, one brought under 42 U.S.C. § 1983. The court agrees with the magistrate judge that the action should not be recharacterized as a § 1983 action*

³*In his motion petitioner seeks the same relief as that requested in his habeas petition –immediate release – and an order enjoining defendants from retaliating against him for filing this action.*