IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN BRADIN,

Petitioner,

v. **CASE NO. 19-3041-JWL**

LINDA THOMAS, Warden, and UNITED STATES BOARD of PROBATION & PAROLE,[1]

Respondents.

MEMORANDUM AND ORDER

This matter is a petition for writ of habeas corpus filed under 28 U.S.C. § 2241. At the time of filing, Petitioner was in federal custody at Core Civic Leavenworth Detention Center in Leavenworth, Kansas ("Core Civic"). The Court dismisses some of Petitioner's claims for lack of jurisdiction, as successive and as moot, and denies the remaining claims.

Petitioner was arrested on state charges while on federal parole, and was subsequently convicted and sentenced in state court. The United States Parole Commission ("USPC") lodged a parole violation warrant as a detainer and deferred execution of the warrant pending Petitioner's completion of his state sentence. Petitioner argues that he is entitled to immediate release based on several grounds set forth in his Petition.[2] Petitioner claims that: 1) his state plea agreements were violated, rendering his state sentences void, and the Missouri Department of Corrections had a duty to transfer him to federal custody to serve his concurrent federal sentence; 2) deferring his parole revocation hearing pending expiration of his state sentences

[1] Petitioner incorrectly identified the United States Parole Commission as the "U.S. Board of Probation and Parole."

[2] Petitioner filed another copy of his petition and his suggestions in support on May 31, 2019, which were docketed as amendments. *See* Docs. 49, 50. The new filing are substantially the same as the original filings, and the Court has considered the original and amended pleadings in reaching its decision.

violated the Due Process and Double Jeopardy Clauses; 3) the denial of a parole violation hearing within ninety days of execution of his parole violation warrant violated due process; and 4) Respondents' violation of Petitioner's Eighth Amendment rights entitles him to "Compassionate Release" under the First Step Act. Petitioner asks the Court to order Respondents to immediately grant him Compassionate Release under the First Step Act and to order Respondents to vacate his state sentences and to show cause why he should not be released from illegal confinement.[3]

I. Facts

On October 20, 1975, Petitioner was sentenced in the Western District of Missouri to fifteen (15) years of imprisonment for bank robbery in violation of 18 U.S.C. § 2113(a)(d). (Doc. 43–1, at 2.) Petitioner was released on parole on June 10, 1980. *Id*. at 6. On January 31, 1986, the USPC issued a warrant for Petitioner's arrest for parole violations, and subsequently ordered Petitioner to serve sixteen (16) months of imprisonment for his violations without credit for any time spent on parole. *Id*. at 7–9, 15–17. Petitioner was subsequently released on parole again on June 2, 1987. *Id*. at 18.

On January 4, 1988, the USPC issued another warrant for Petitioner's arrest for violating the terms of his parole, and subsequently ordered Petitioner to be reparoled on July 5, 1988. *Id*. at 13, 19–22. Petitioner was then released again on parole on July 5, 1988. *Id*. at 23. On July 10, 1989, the USPC issued another warrant for Petitioner's arrest for violating parole, and

[3] Petitioner also sought relief pursuant to his motion for release of funds, which the Court previously dismissed. The Court held in its May 7, 2019 Memorandum an Order (Doc. 36) that "Petitioner's cause of action regarding his property is with the State of Missouri, and his cause of action regarding his loss of benefits is with the Social Security Administration. Petitioner's motions are dismissed for lack of jurisdiction." *Bradin v. Thomas*, 2019 WL 2005773, at *3 (D. Kan. May 7, 2019); *see also Bradin v. Astrue*, No. 1:12CV61 SNLJ, 2012 WL 1856496, at *2 (E.D. Mo. May 21, 2012) (finding that Petitioner "attacks the manner in which his benefits were taken away, an issue which should have been properly raised before the Social Security Administration through the administrative appeals process when his benefits were first taken away, as noted in the correspondence received by petitioner from the Social Security Administration.").

subsequently ordered Petitioner to serve twenty-eight (28) months in confinement, but credited Petitioner with time spent on parole from his most recent release on July 5, 1988. *Id*. at 24–27. The USPC's National Appeals Board reduced Petitioner's term of imprisonment to twenty-two (22) months and Petitioner was released on parole again on May 10, 1991. *Id*. at 29 – 30.

On September 9, 1992, the USPC issued a warrant for Petitioner's arrest for violating the terms of his parole by committing felony theft and forcible sodomy. *Id*. at 31–33. The USPC supplemented the warrant on June 4, 1993 with the information regarding Petitioner's convictions for robbery and armed criminal action in Missouri state court. *Id*. at 34–35.

Petitioner pleaded guilty to attempted robbery in Jasper County, Missouri, and was sentenced on May 17, 1993, to a ten-year sentence to run concurrently with any sentence for any offenses that occurred prior to that date. (Doc. 2–1, at 2.) Petitioner pleaded guilty in Jackson County, Missouri, Case No. CR92-5692 to: Count I Kidnapping, Class B Felony; Count II ACA, Class A Felony; Count III, Robbery Frist Degree, Class A Felony; Count IV, ACA, Class A Felony; Count V, Forcible Sodomy, ungraded felony; and Count VI, ACA, Class A Felony. *Id*. at 3. Petitioner was sentenced in Jackson County on November 3, 1993, to imprisonment for a period of fifteen (15) years, on Count I and twenty-five (25) years each on Counts II, III, IV, V and VI. *Id*. The Guilty Plea/Judgment in Jackson County provides that all the sentences in that case will run concurrently, and "concurrently with the sentence previously imposed in Case No. CR592-1517FX in Jasper County, Missouri, and concurrently with the sentence previously imposed in Federal Court Case No. 75CR50-W-2." *Id*. at 4. Petitioner received credit for time spent incarcerated from June 9, 1993, when the warrant was issued in that case. *Id*.

The Memorandum from the USPC to the United States Marshal regarding the September 9, 1992 Warrant Application and Warrant provides:

> Please assume custody as soon as possible or when located. NOTE: if the parolee is already in the custody of federal or state authorities, DO NOT EXECUTE THIS WARRANT. Place a detainer and notify the Commission for further instructions. Also, if a criminal arrest warrant has been issued for this parolee, execution of such criminal warrant shall take precedence and the Parole Commission is to be notified before its warrant may be executed.

Id. at 5. Petitioner's September 9, 1992 Warrant provided that Petitioner was released on parole on May 10, 1991, with 1603 days remaining to be served on his sentence in the Western District of Missouri. *Id*. at 6.

The USPC reviewed the warrant, which had been lodged as a detainer, on October 15, 2003, and chose to let the detainer stand in order to hear Petitioner's revocation hearing after he came into federal custody. (Doc. 43–1, at 36.) On November 2, 2018, United States Marshals executed the USPC's warrant for Petitioner's arrest for violations of the terms of his parole. *Id*. at 37. When the USPC's warrant was executed, the USPC was authorized to revoke Petitioner's parole and impose up to 1,602 days of confinement for Petitioner's parole violations. *Id*. at 38.

On April 24, 2019, the USPC formally offered Petitioner an Expedited Revocation Offer that would have revoked Petitioner's parole due to his Missouri convictions and released him from prison on July 22, 2019, in exchange for his waiver of a parole revocation hearing. *Id*. at 39–46. On May 13, 2019, Petitioner was transferred from Core Civic to the FTC Oklahoma City. *Id*. at 47. To date, Petitioner has not accepted the Expedited Revocation Offer and is currently waiting to be heard by the USPC at his revocation hearing scheduled for July 14, 2019, at FTC Oklahoma City. *Id*. at 49. Respondents assert that the USPC will credit Petitioner for the time he has spent in confinement since the USPC's warrant was executed on November 2, 2018, in accordance with 28 C.F.R. § 2.47(e), when it issues its final revocation decision.

II. Discussion

1. Standard of Review

To obtain habeas corpus relief, an inmate must demonstrate that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S. C. § 2241(c)(3). In addition, although a § 2241 petitioner is not required to obtain circuit authorization before filing a subsequent § 2241 petition in federal court, "his right to have his claims heard by that court [is] limited by both the bar erected in 2244(a) and the relevant case law." *Stanko v. Davis*, 617 F.3d 1262, 1269 (10th Cir. 2010). Section 2244(a) provides that:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

28 U.S.C. § 2244(a). Before the enactment of § 2244, "the Supreme Court developed several principles limiting the review of second or subsequent habeas petitions" and "[t]hese principles underlie the statutory bar in § 2244(a)." *Stanko*, 617 F.3d at 1269 (citing *McCleskey v. Zant*, 499 U.S. 467, 479–88 (1991) (discussing development of principles)).

One such principle authorized a federal court to decline consideration of a habeas petition if the claim presented had previously been raised and adjudicated in an earlier habeas proceeding, "unless the court determined that hearing the claim would serve the ends of justice." *Stanko*, 617 F.3d at 1269 (noting that when Congress enacted § 2244 it codified this principle) (citing *McCleskey*, 499 U.S. at 480–82). The "ends-of-justice" exception is limited in scope and affords relief only when there is "a colorable showing of factual innocence." *Hall v. Daniels*, 545 F. App'x 754, 755 (10th Cir. 2013) (unpublished) (citing *McCleskey*, 499 U.S. at 495) (internal quotation marks omitted).

Another principle—abuse of the writ—authorized a court to decline a subsequent habeas petition raising a claim that could have been presented in an earlier petition but was not. *Stanko*, 617 F.3d at 1269 (citing *McCleskey*, 499 U.S. 482–89). The Tenth Circuit in *Stanko* found that it is likely that Congress intended to bring § 2244(a)'s bar in line with claims historically barred as an abuse of the writ. *Id*. at 1270. Under the abuse of the writ doctrine, a petitioner must show that his failure to bring a claim in a previous petition "was not the result of inexcusable neglect in order to proceed on the new claim." *Id*. (citing *McCleskey*, 499 U.S. at 489). Standards governing procedural default determinations will govern determinations of inexcusable neglect—"the petitioner must establish cause for his failure to raise the claim in an earlier proceeding and resulting prejudice, . . . or, in the absence of cause, the petitioner must show that 'a fundamental miscarriage of justice would result from a failure to entertain the claim.'" *Id*. at 1271 (citations omitted).

2. Argument that State Sentence are Void

Petitioner argues that his plea agreements with the State of Missouri required his federal sentence to run concurrently with his Missouri state sentences. He argues that the Missouri Department of Corrections had a duty to transfer him to federal custody to serve his concurrent federal sentence, and the failure to do so violated his state plea agreements, rendering his state sentences void. Petitioner also argues that because the state sentences are void, he has actually served his federal sentence. Petitioner also argues that under *Chitwood v. Dowd*, 889 F.2d 781 (8th Cir. 1989), the Missouri Department of Corrections had a duty to turn him over to federal custody for the service of his concurrent sentences, and when they failed to do so it violated his liberty interest created by his expectation of concurrent service of sentences.

Petitioner filed a petition under 28 U.S.C. § 2241 in the U.S. District Court for the Western District of Missouri on September 4, 2018, arguing that the state court lacked jurisdiction and seeking an order to expunge all records of conviction. *See Bradin v. Norman*, Case No. 18-cv-03299-MDH (W.D. Mo.). Because Petitioner was in state custody at the time and argued that his state sentences were void due to a lack of jurisdiction, the court construed Petitioner's petition as one brought under 28 U.S.C. § 2254. *Id*. at Doc. 24. The court held that "[r]egardless of whether Petitioner's petition is brought under § 2241 or § 2254, Petitioner is not entitled to relief." *Id.* The court found Petitioner's petition untimely under 28 U.S.C. § 2244(d)(1) regarding his request that the court invalidate his state court convictions and sentences. *Id*. The court further held that:

> Petitioner fails to identify a federal sentence that has been improperly calculated and fails otherwise to establish that he is being held in federal custody in violation of the Constitution for purposes of § 2241. To support his petition, Petitioner has submitted a federal detainer that was submitted by the United States Marshal Service on September 22, 1992, which states, "When the subject is to be released from your custody, please notify this office at once so that we may assume custody, if necessary." Doc. 7-1, p. 4. Petitioner fails to establish how the federal detainer has violated his constitutional rights. Instead, Petitioner premises his argument for § 2241 relief on his claim that, because his Missouri convictions and sentences are invalid, the only source of his custody was the federal detainer. Doc. 1, p. 6. However, as set forth above, Petitioner has not previously established that his Missouri convictions and sentences are invalid, and the time for seeking § 2254 relief on such a claim has expired. This Court further notes that Petitioner recently informed the Court that he will be released from state custody on November 2, 2018. Doc. 22, p. 1. Petitioner fails to establish that any federal entity has acted on the detainer in a manner that has violated Petitioner's constitutional rights. *See Parrish v. Dayton*, 761 F.3d 873, 875–76 (8th Cir. 2014) (explaining ripeness); *United States v. Austin*, 580 F. App'x 504 (Mem), 505 (8th Cir. 2014) (affirming the denial of § 2241 relief where the United States Parole Commission had "not yet acted on the warrant that Austin claims is invalid.").

> Consequently, Petitioner also fails to establish that he is entitled to relief under § 2241.

Id. at 4. The court denied the petition, finding that Petitioner failed to establish that he is entitled to habeas corpus relief under either § 2254 of § 2241. *Id*. at 5. Petitioner filed a motion for relief from judgment under Rule 60(b)(4), which was denied on December 28, 2018. *Id*. at Docs. 27, 28. Petitioner also filed two petitions for writs of mandamus which were denied by the Eighth Circuit Court of Appeals. *See In re: John Bradin*, No. 18-3101 (8th Cir. Oct. 19, 2018); *In re: John Bradin*, Case No. 18-3656 (8th Cir. Jan. 9, 2019). In Case No. 18-3656 Petitioner filed a petition for rehearing, which was denied on February 13, 2019.

On November 6, 2018, Petitioner filed another petition for writ of habeas corpus under 28 U.S.C. § 2241 in the U.S. District Court for the Western District of Missouri. *See Bradin v. U.S. Board of Probation & Parole*, Case No. 18-cv-03375-MDH. In that case, the court dismissed the case without prejudice to Petitioner seeking and obtaining authorization to file a second or successive petition in the Eighth Circuit, holding that:

> Petitioner argues, *inter alia*, that the State of Missouri was without jurisdiction to run his state sentences concurrent with his federal sentence. Doc. 1, pp. 4-7. Petitioner, however, already has sought habeas relief on the same grounds in *Bradin v. Norman*, 18-3299-CV-S-MDH-P (W.D. Mo. Nov. 1, 2018), which was dismissed with prejudice. Pursuant to 28 U.S.C. § 2244(b)(3)(A), this Court is without jurisdiction to review a second or successive petition for writ of habeas corpus until authorized to do so by the United States Court of Appeals for the Eighth Circuit. Even if the present petition is not "successive" for purposes of § 2244(b)(3)(A), Petitioner's present petition appears to be nearly identical to the petition filed in Case No. 18-3299-CV-S-MDH-P and is subject to dismissal for the same reasons.

Id. at Doc. 6. Petitioner filed a motion for relief from judgment under Rule 60(b)(4) which was denied by the court on December 7, 2018.

The Court finds that Petitioner's claim regarding his state sentence is barred by § 2244(a) because it is successive to prior habeas petitions filed by Petitioner on the same grounds. *See Lee v. Maye*, 667 F. App'x 297, 297 (10th Cir. 2016) (affirming dismissal of § 2241 claim where claim was duplicative with one previously asserted and dismissed) (unpublished); *Sims v. Chester*, 446 F. App'x 128, 129 (10th Cir. 2011) (stating that "the provisions of § 2241 are subject to § 2244(a) and 'the traditional doctrines governing successive and abusive writs inform our application of that subsection's bar'") (unpublished) (citing *Stanko*, 617 F.3d at 1272).

Petitioner argues that his prior habeas cases filed in the Western District of Missouri do not preclude the instant § 2241 petition because his current petition does not contest the same points of law. Presumably Petitioner is referring to his argument that the Missouri Department of Corrections had a duty to transfer Petitioner to federal custody under *Chitwood v. Dowd*, 889 F.2d 781 (8th Cir. 1989). Under the abuse of the writ doctrine, a petitioner must show that his failure to bring a claim in a previous petition "was not the result of inexcusable neglect in order to proceed on the new claim." *Stanko*, 617 F.3d at 1270 (citing *McCleskey*, 499 U.S. at 489). Standards governing procedural default determinations will govern determinations of inexcusable neglect—"the petitioner must establish cause for his failure to raise the claim in an earlier proceeding and resulting prejudice, . . . or, in the absence of cause, the petitioner must show that 'a fundamental miscarriage of justice would result from a failure to entertain the claim.'" *Id*. at 1271 (citations omitted).

Petitioner has not shown why he failed to raise his argument based on the 1989 decision in *Chitwood* in his 2018 habeas action. The Court finds that the failure to entertain Petitioner's claim under *Chitwood* would not result in a fundamental miscarriage of justice. The facts in *Chitwood* are distinguishable. In *Chitwood*, the petitioner *escaped* from *state* custody and then

committed and was convicted of additional state crimes in a different state. *Chitwood*, 889 F.2d at 782. The petitioner in *Chitwood* was not on federal parole, and none of the statutes and regulations dealing with federal parole were relevant in that case. *See Morehead v. State*, 145 S.W.3d 922, n.7 (Mo. Ct. App. 2004) (noting that *Chitwood* was distinguishable where Morehead was on parole for previous offense at the time of subsequent offense and state statute provided that the court shall direct the manner in which the sentence or sentences imposed by the court shall run with respect to any resulting parole revocation term).

Petitioner's claims are barred by § 2244(a) and as an abuse of the writ. Petitioner raised his claim in his previous habeas action and has not shown that his failure to raise a new claim was not the result of inexcusable neglect. Petitioner has not shown that a fundamental miscarriage of justice would result from a failure to entertain the claim. The Court dismisses Petitioner's claims regarding his state sentences.

3. Arguments Regarding Detainer, Deferred Execution of Warrant, and Concurrency of Parole Violator Term

A. USPC has Discretion to Defer Execution of Warrant

Petitioner argues that the USPC was required to conduct his parole revocation hearing prior to him completing his state sentence. The USPC possesses broad discretion in issuing and disposing of its parole violator warrants. The USPC may issue a warrant or suspend issuance of a warrant pending disposition of a criminal charge. *See* 18 U.S.C. § 4213(b). "In the case of any parolee charged with a criminal offense and awaiting disposition of the charge, issuance of a summons or warrant may be withheld, a warrant may be issued and held in abeyance, or a warrant may be issued and a detainer may be placed." 28 C.F.R. § 2.44(b). "When a parolee is serving a new sentence in a federal, state or local institution, a parole violation warrant may be placed against him as a detainer." 28 C.F.R. § 2.47(a).

Petitioner argues that deferring the parole revocation hearing until the expiration of his state sentence violates due process. Petitioner raised this same claim in a petition for writ of mandamus filed in the United States District Court for the District of Maryland. In *Bradin v. Reilly*, the court denied the writ, finding that:

> Because Petitioner is currently confined pursuant to a valid conviction, he is not entitled to a prompt parole revocation hearing. *See Moody v. Daggett*, 429 U.S. 78, 87–88 (1976) (parole revocation warrant filed as a detainer at the prison where Petitioner is held pursuant to a conviction that is the basis for the parole revocation is not an executed warrant and does not give rise to a protected liberty interest requiring prompt hearing); *see also Larson v. McKenzie*, 554 F.2d 131, 132 (4th Cir. 1977). Absent a clear obligation to provide a parole revocation hearing, Petitioner is not entitled to mandamus relief and this case shall be dismissed by separate Order which follows.

Bradin v. Reilly, No. AW-13-cv-749, 2013 WL 5506028, at *2 (D. Md. Oct. 2, 2013). Petitioner's claim that deferring the execution of the warrant violated due process is denied for the same reasons set forth in *Bradin v. Reilly*.

B. A Warrant Lodged as a Detainer Tolls the Expiration of a Term of Parole and USPC has Discretion to Grant Concurrency of Parole Violator Term

Petitioner argues that the State of Missouri was required to transfer him to federal custody so that he could effectively serve his state sentence concurrently with any sentence imposed by the USPC; that his federal sentence continued to run; and that his parole term should have run concurrently with his state sentence.

Petitioner's federal sentence did not continue to run, because when the USPC issues a warrant or a parolee is convicted of a new crime, the parolee's parole term is tolled until the warrant is executed. *See* 28 C.F.R. § 2.47(e)(2) ("[I]t shall be the policy of the [USPC] that the revoked parolee's original sentence (which due to the new conviction, stopped running upon his last release from federal confinement on parole) again start to run only upon release from the

confinement portion of the new sentence or the date of reparole granted pursuant to these rules, whichever comes first."); *see also* 28 C.F.R. § 2.44(d) ("The issuance of a warrant under this section operates to bar the expiration of the parolee's sentence. Such warrant maintains the Commission's jurisdiction to retake the parolee either before or after the normal expiration date of the sentence and to reach a final decision as to revocation or parole and forfeiture of time pursuant to § 2.52(c).").

The USPC is also authorized by law to determine whether a parole violation term shall run concurrently with, or consecutively to, a new intervening sentence. Section 4210(b)(2) provides that:

> [I]n the case of a parolee who has been convicted of any criminal offense committed subsequent to his release on parole, and such offense is punishable by a term of imprisonment, detention or incarceration in any penal facility, the [USPC] shall determine, in accordance with the provisions of section 4214(b) or (c), whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense, but in no case shall such service together with such time as the parolee has previously served in connection with the offense for which he was paroled, be longer than the maximum term for which he was sentenced in connection with such offense.

18 U.S.C. § 4210(b)(2).

Petitioner's arguments are without merit, and in fact have been previously rejected in his mandamus action. The court in *Bradin v. Reilly* found that:

> To the extent that Petitioner alleges that the Commission is required to grant him concurrent service of his federal violator term with the balance of his state sentence, he is in error. The Commission's decision whether the parolee's violator term will run consecutively or concurrently to his new prison term is committed to the discretion of the Commission. *Garcia v. Neagle*, 660 F.2d 983, 988 (4th Cir. 1981) (holding Commission substantive decisions to set parole are committed to unreviewable agency discretion). The Commission's regulations provide as a

matter of policy that a parole violator term is to run consecutively to any new sentence a parole violator may receive. *See* 28 C.F.R. § 2.47(e)(2); *Smith v. U.S. Parole Commission*, 875 F.2d 1361, 1364 (9th Cir. 1989) (Commission has the sole authority to decide when to execute its warrant and "the federal government has no duty to take anyone into custody.")

The issuance of a federal parole violation warrant tolls the running of the sentence, and it does not begin to run again until the warrant is executed. *See Russie v. U.S. Dep't. of Justice*, 708 F.2d 1445, 1448 (9th Cir. 1983) ("such a warrant bars the expiration of a parolee's sentence and maintains the Commission's jurisdiction to retake the parolee even if the retaking occurs after the scheduled expiration date of the parolee's sentence.") The statutes establishing the federal standard for parole violation and service of a federal violator term may not be undercut by state authorities. In other words, state courts, in imposing state sentences, are not authorized to grant an individual credit against his federal sentence, but only against their own state sentence.

This result is compelled by the principle of dual sovereignty. As the U.S. Court of Appeals noted in *United States v. Sackinger*, 704 F.2d 29, 32 (2d Cir. 1983), "under the dual sovereignty principle [a defendant] could not, by agreement with the state authorities, compel the federal government to grant a concurrent sentence." Where federal officials are not parties to the state plea bargain and/or sentencing determination, courts "reject any implication that the federal court is obligated to comply with the terms of the plea agreement entered into between the defendant and state authorities." *Id*.; *see also Saulsbury v. United States*, 591 F.2d 1028, 1035 (5th Cir. 1979) ("Unless the United States has somehow induced a state guilty plea by making a representation as to concurrency . . . , a [parole violator] has no right to serve his sentences concurrently and may not protest when the federal government will not take him into custody until his intervening state sentence is served."); *Hawley v. United States*, 898 F.2d 1513, 1514 (11th Cir. 1990) (finding that in the absence of federal involvement in a state plea bargain, federal courts are "not bound by the state court's intentions and [are] free to use [their] own discretion in applying federal law to determine the conditions of the [defendant's] federal sentence").

Likewise, a state judge has no authority to direct the actions of the Commission. *See Cotton v. U.S. Parole Commission*, 992 F.2d 270 (10th Cir. 1993) (holding that the "Commission is an independent entity that is not bound by a state judgment in which it

> did not participate . . .” even if the Commission’s running of the violator’s term consecutive rather than concurrent to the state sentence frustrates the intent of the state sentencing judge.) *See also Meagher v. Clark*, 943 F.2d 1277, 1282 (11th Cir. 1991) (holding under principle of dual sovereignty, that petitioner could not be granted credit on federal sentence that he has resumed serving, as result of federal parole violation, for time incarcerated under voided, intervening state sentence, even though plea in state court provided that state and federal sentences were to run concurrently.”

Bradin v. Reilly, 2013 WL 5506028, at *2–3.

The USPC’s issuance of a warrant for Petitioner’s arrest for the violation of the terms of his parole on September 9, 1992, tolled the running of Petitioner’s period of parole originally scheduled to end on September 28, 1995, until the USPC’s warrant was executed on November 2, 2018. Any claim by Petitioner that his parole expired prior to the execution of the USPC’s warrant is without merit and denied. Any argument that the USPC is bound by his state plea agreement or is otherwise bound to run his parole term concurrently with his state sentence is likewise denied.

C. Execution of Warrant after Completion of State Sentence Does Not Violate Double Jeopardy Clause

Petitioner argues that the USPC’s delay until the termination of Petitioner’s intervening state sentence to conduct his parole revocation hearing violated the Double Jeopardy Clause. Petitioner’s argument is without merit, because the scope of the Double Jeopardy Clause is limited to criminal prosecutions. *Milberry v. Brown*, No. 05-1158, 2007 WL 433164, at *3 (W.D. Pa. Feb. 5, 2007) (citing *Breed v. Jones*, 421 U.S. 519, 528 (1975)). “A parole board hearing is not a criminal proceeding; thus, a parole board may deny parole, causing a convict to serve up to his maximum sentence, without violating the Double Jeopardy Clause.” *Id*. (citing *United States ex rel. Lawson v. Cavell*, 425 F.2d 1350, 1352 (3d Cir. 1970)); *see also Swisher v.*

Stovall, 977 F.2d 596, at *1 (10th Cir. 1992) (unpublished) (citing *United States v. Hanahan*, 798 F.2d 187, 189 (7th Cir. 1986)) ("[D]ouble jeopardy protections are not triggered by revocation of parole."); *see also United States v. Davis*, 951 F.2d 1261, at *1 (10th Cir. 1991) (unpublished) (holding that Appellant's double jeopardy rights are not implicated where consecutive sentences were imposed for two different crimes and "[t]his is true notwithstanding the fact that Appellant's second sentence is based upon the same conduct for which his parole from the first sentence was revoked"); *Fillingham v. United States*, 867 F.3d 531, 538 (5th Cir. 2017) (holding that "the Double Jeopardy Clause does not apply to parole revocation") (citation omitted). Petitioners claim is without merit and denied.

4. Delay in Parole Revocation Hearing

Petitioner's parole revocation hearing is scheduled for July 14, 2019. Petitioner argues that he was entitled to a parole revocation hearing within ninety days of the execution of the warrant on November 2, 2018, and the delay violates his due process rights.

It is undisputed that Petitioner did not receive a parole revocation hearing within the statutory and regulatory time limits. *See* 18 U.S.C. § 4214(c) ("Any alleged parole violator who is summoned or retaken by warrant under section 4213 . . . shall receive a revocation hearing within ninety days of the date of retaking"). However, Petitioner is not entitled to habeas corpus relief because he has alleged no facts showing that he was prejudiced by the delay.

In *Denoyer v. Warden*, this Court held that:

> "The Commission's failure to meet a statutory deadline, however, is not grounds for habeas corpus relief unless the delay is so prejudicial to the parolee that it violates his due process rights." *Howard v. Caufield*, 765 F.3d 1, 11 (D.C. Cir. 2014) (citing *Sutherland v. McCall*, 709 F.2d 730, 732 (D.C. Cir. 1983); see *Morrisey*, 408 U.S. at 488–89; *Nabors v. Warden, U.S. Penitentiary*, 989 F.2d 507, *2 (10th Cir. 1993 (unpublished). The Tenth Circuit has held that delays, such as those that occurred in

> petitioner's case, do not, per se, constitute a violation of due process entitling an accused parole violator to immediate release. *McNeal v. United States*, 553 F.2d 66, 68 (10th Cir. 1977). Instead, "to establish a legal right to habeas relief, the delay, taking into consideration all the circumstances, must also be prejudicial." *Id*.; see also *Harris v. Day*, 649 F.2d 75, 761–62 (10th Cir. 1981). Petitioner alleges in his petition only that the USPC violated his due process rights by not complying with federal deadlines. The federal statutes and regulations "do not obviate the need for a showing of prejudice." *Paul v. McFadin*, 117 F.3d 1428, *2 (10th Cir. 1997) (unpublished). While the specific time periods contained in statutes "bear upon whether the delay in this case was unreasonable, they do not entitle (petitioner) to habeas relief absent prejudice." *Id*. (citing *Villarreal v. USPC*, 985 F.2d 835, 837 (5th Cir. 1993)) (even though hearing was not held within the specific ninety-day period required by 18 U.S.C. 4214(c), habeas relief still requires a showing of prejudice, and 154-day delay between arrest and final hearing did not violate due process absent showing of prejudice).

Denoyer v. Warden, No. 16-3146-JWL, 2016 WL 5371862, at *5 (D. Kan. Sept. 26, 2016).

Petitioner has not alleged any prejudice resulted from the delay in scheduling his parole revocation hearing. Respondents allege that the USPC made an earlier attempt to have Petitioner transferred for a parole hearing scheduled for April 15, 2019, but the United States Marshal's Service was unable to facilitate the transfer due to the unavailability of an acceptable transport given Petitioner's medical infirmities. *See* Doc. 13, at 2. Respondents also assert that the USPC will credit Petitioner for the time he has spent in confinement since the USPC's warrant was executed on November 2, 2018, in accordance with 28 C.F.R. § 2.47(e), when it issues its final revocation decision.

Petitioner's parole revocation hearing is scheduled for July 14, 2019—the next available docket at FTC Oklahoma City. Therefore, Petitioner is not entitled to habeas corpus relief based on any of the alleged delays because "he has already received the only remedy to which he is entitled." *Id*. at *6 (citing *Nabors*, 989 F.2d 507, at *2). "When an inmate has not been afforded

a timely hearing . . ., the proper course is to grant him a hearing at the earliest possible date." *Id*. (citing *Nabors*, 989 F.2d 507, at *2) (citing *United States v. Miller*, 599 F.2d 249, 251 (8th Cir. 1979)). "During the delays, statutory law might have entitled petitioner to an order compelling a timely hearing or bail; however, 'the extreme remedy of release' was not available." *Id*. (citing *Barton v. Malley*, 626 F.2d 151, 159 (10th Cir. 1980); *Nabors*, 989 F.2d 507, at *2 (Without a showing of prejudice, the failure to hold a revocation hearing may be a ground for mandamus relief requiring the USPC to hold a hearing, but it is not a basis for habeas relief.)). Petitioner's claim is dismissed as moot.

5. Compassionate Release

Petitioner claims that Respondents are violating his Eighth Amendment rights by being deliberately indifferent to his medical needs as a 67-year-old amputee. Petitioner claims that medical devices have been recommended by medical staff but not approved by Respondents. Petitioner alleges that this situation renders him eligible for "Compassionate Release" under the First Step Act.

Any claim Petitioner may have under the Eighth Amendment is not properly before the Court in this habeas action. To obtain habeas corpus relief, an inmate must demonstrate that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S. C. § 2241(c)(3). A petition under 28 U.S.C. § 2241 provides the remedy to challenge the execution of a sentence. *Brace v. United States*, 634 F.3d 1167, 1169 (10th Cir. 2011). Thus, a petitioner may challenge the fact or duration of his confinement and may seek release or a shorter period of confinement. *See Palma-Salazar v. Davis*, 677 F.3d 1031, 1037 n.2 (10th Cir. 2012). Claims challenging a prisoner's conditions of confinement do not arise under Section 2241. *See McIntosh v. United States Parole Comm'n*, 115 F.3d 809, 811–12 (10th Cir. 1997)

(contrasting suits under Section 2241 and conditions of confinement claims). Petitioner may not bring an Eighth Amendment claim in a habeas corpus action; rather, he must proceed, if at all, in a civil rights action filed under 42 U.S.C. § 1983 or *Bivens*. *See Requena v. Roberts*, 552 F. App'x. 853 (10th Cir. April 7, 2014).

To the extent Petitioner alleges that he is entitled to compassionate release under the First Step Act, such a claim must be brought pursuant to a motion filed with the sentencing court. The First Step Act went into effect on December 21, 21018. *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. "Prior to the passage of the First Step Act, only the Director of the BOP could file a motion for compassionate release, and that very rarely happened." *United States v. Gutierrez*, 2019 WL 2422601, at *1 (D. N.M. June 10, 2019) (citation omitted). "Section 603(b) of the First Step Act modified 18 U.S.C. § 3582(c)(1)(A), however, with the intent of 'increasing the use and transparency of compassionate release.'" *Id*. That section now provides that a sentencing court may modify a sentence either upon a motion of the Director of the BOP "or upon motion of the defendant after [he] has fully exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on [his] behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility . . . ." *Id*. (citing 18 U.S.C. § 3582(c)(1)(A)).

The court in *Alexis v. Ortiz*, found that it could not make a determination on petitioner's compassionate release claim, stating that:

> [T]his Court has no authority under the First Step Act to consider a compassionate release claim in a § 2241 petition. 18 U.S.C. § 3582(c)(1)(A). Instead, the statute provides that a *sentencing court* may modify a sentence upon receiving a *motion* from the BOP or the defendant. *Deffenbough*, 2019 WL 1779573, at *2; *see also, e.g.,* 18 U.S.C. § 3582(c)(1)(A); *Himmel v. Upton*, No. 18-804, 2019 WL 1112923, at *2 n.6 (N.D. Tex. Mar. 11, 2019) ("any motion for compassionate release under the newly amended

> provision of 18 U.S.C. § 3582(c)(1)(A) should be filed in the sentencing court"); *Mohrbacker v. Ponce*, No. 18-513, 2019 WL 161727, at *1 n.1 (C.D. Cal. Jan. 10, 2019) (same).

Alexis v. Ortiz, No. 19-1085 (RBK), 2019 WL 2367034, at *2 (D. N.J. June 5, 2019).

In *Himmel v. Upton*, the petitioner argued that she was subjected to cruel and unusual punishment in violation of the Eighth Amendment when officials at FMC-Carswell failed to provide her with adequate care for her serious medical needs and failed to authorize a kidney transplant for her. *Himmel*, 2019 WL 1112923, at *1 (N.D. Tex. March 11, 2019). Petitioner argued that she should be granted compassionate release because she has a terminal medical condition and that she should be released from BOP custody to receive a kidney transplant. *Id.* The court noted that her claims of violations of her constitutional rights, even if true, would not impact the duration of her custody and therefore the court lacked jurisdiction to consider those claims. *Id*. at *2. The court further held that petitioner's claim for compassionate release was not properly sought in a petition under § 2241, and the petition must be dismissed for lack of jurisdiction. *Id*. (noting that the Fifth Circuit has found that a district court, other than the sentencing court, lacks jurisdiction to consider a § 3582(c) motion).

Likewise, this Court lacks jurisdiction to consider Petitioner's request for compassionate release under the First Step Act. Petitioner must seek such relief from his sentencing court. *See Deffenbaugh v. Sullivan*, No. 5:19-HC-2049-FL, 2019 WL 1779573 (E.D. N.C. April 23, 2019) (finding that if petitioner was seeking to file his own motion for compassionate release under First Step Act such a motion must be filed in the sentencing court, and discretion to release a prisoner to home confinement under Elderly Home Detention Program under First Step Act lies solely with the Attorney General under 34 U.S.C. § 60541 and court lacks authority to order

petitioner's release). Petitioner's Eighth Amendment and compassionate release claims are dismissed for lack of jurisdiction.

III. Pending Motions:

On May 31, 2019, Petitioner filed an Application to Proceed Without Prepayment of Fees and Affidavit by a Prisoner (Doc. 51); a Motion for Subpoena (Doc. 52); and a Motion for Release of Seized Assets for Hiring Counsel of Choice Pursuant to Amendment VI, U.S. Constitution (Doc. 53). These motions were filed as amendments because they were duplicates of previously-filed motions. *See* Docs. 3, 4, 5. Petitioner's original Application to Proceed Without Prepayment of Fees (Doc. 3) was granted in the Court's March 19, 2019 Order (Doc. 6), rendering moot his Application at Doc. 51. Petitioner's original Motion for Subpoena (Doc. 4) and Motion for Release of Seized Assets (Doc. 5) were dismissed in the Court's May 7, 2019 Memorandum and Order (Doc. 36). Because Petitioner's new motions seek the same relief, they are likewise dismissed for the reasons set forth in the Court's Memorandum and Order at Doc. 36.

IT IS THEREFORE ORDERED BY THE COURT that Petitioner's Eighth Amendment and compassionate release claims are **dismissed** for lack of jurisdiction; Petitioner's claims that his state sentences are void are **dismissed** as barred by § 2244(a) and as an abuse of the writ; Petitioner's claim that the delay in his parole revocation hearing violates due process is **dismissed** as moot; and Petitioner's remaining claims regarding the deferred execution of his parole revocation warrant, the tolling of his parole term, the concurrency of his parole violator term, and the violation of the Double Jeopardy Clause, are **denied.**

IT IS FURTHER ORDERED that Petitioner's Motion for Subpoena (Doc. 52) and Motion for Release of Seized Assets for Hiring Counsel of Choice Pursuant to Amendment VI, U.S. Constitution (Doc. 53) are **dismissed.**

IT IS FURTHER ORDERED that Petitioner's Application to Proceed Without Prepayment of Fees and Affidavit by a Prisoner (Doc. 51) is **denied as moot.**

IT IS SO ORDERED.

Dated in Kansas City, Kansas, on this 12th day of July, 2019.

S/ John W. Lungstrum
JOHN W. LUNGSTRUM
UNITED STATES DISTRICT JUDGE