

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

JIMCY MCGIRT,

Petitioner,

v.

WARDEN RICK WHITTEN;
UNIT MANAGER DAN GROGAN,

Respondents.

Case No. CIV-20-157-D

(Removed from Oklahoma County
District Court Case No: CV-19-2436)

**RESPONDENTS' REPLY TO
PETITIONER'S RESPONSE AND BRIEF IN SUPPORT**

Respondents, Whitten and Grogan, pursuant to Fed. R. Civ. P. 12(B)(6) and LCvR 7.1(i) respectfully submit their Reply to Plaintiff's Response [Doc. 23] to Respondents' Motion to Dismiss ("Motion") [Doc. 11]. In further support of these Respondents' Motion, Respondents submit the following:

**PROPOSITION I: PLAINTIFF STILL FAILS TO STATE A VALID CLAIM UPON
WHICH RELIEF MAY BE GRANTED**

The new factual assertions and exhibit in Plaintiff's response should not be considered. First, while the response largely reiterates the allegations of his initial Petition for Writ of Prohibition/Mandamus, the response now provides new factual allegations suggesting that he was able to hang such religious items on walls and bunks for years without fear of punishment and/or posing a threat to safety and security. Doc. 23 at ¶¶ 2-4. Specifically, he identifies another DOC officer, unit manager Rogers, as the individual in charge of imposing these "new" serious restrictions in 2019. *Id.* at ¶¶ 5-8. However, the purpose of the Motion to Dismiss is to test "the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994).

In this regard, in deciding the Motion the Court is limited to consideration of the allegations in the Petition and the documents incorporated therein by reference. *See Warrior v. Hope Comm. Servs., Inc.* Case No. CIV-17-630-R, 2017-WL 4158658, *2 (W.D. Okla. September 19, 2017) (recognizing that, even with respect to *pro se* plaintiff, factual allegations cannot be added in a response to a motion to dismiss); *see also Kobli v. McGee Eye Surgery Center, LLC*, No. CIV-17-542-C, 2017 WL 3392784, *3 (W.D. Okla. August 7, 2017) (holding that an attempt to bolster factual allegations in a complaint through factual allegations in a response to a motion to dismiss “is impermissible”). Here, Petitioner’s attempt to provide new factual assertions to undermine DOC and JCCC’s legitimate reasons for implementing the policy in the open bay barrack-style housing unit is impermissible and should not be considered.

Moreover, Petitioner’s attempt to belittle or dismiss JCCC’s compelling government interest in limiting visible religious iconography in the open barrack style housing unit is unpersuasive. In response, Petitioner claims that hanging his sacred items “does not pose a threat (hasn’t in 13 years and possibly never will) to the health or safety of staff, other inmates, or the public.” Doc. 23 at ¶ 14. As previously stated, according to DOC’s experience:

“[d]amage to or even the touching of sacred objects, whether intentional or accidental, can be offensive to the object’s owner. This can lead to confrontations and fights with staff and amongst inmates. The open and deliberate declaration by an inmate of his affiliation with a particular sect, religion, or group, known as “flying colors,” can similarly lead to confrontations with other inmates.”

Doc. 10 at p. 2. Just because Petitioner may or may not have had any incidents during his purported 13 years of hanging such objects does not mean DOC or JCCC does not have a legitimate interest in preventing potential harm to inmates or staff. For reasons fully set forth in Respondents’ Motion, Respondents respectfully request that this Court defer to prison

administration's experience in the adoption and execution of policies and practices, which, in their judgment, are needed to preserve internal order and discipline and to maintain institutional security. *Hudson v. McMillian*, 503 U.S. 1, 6 (1992).

CONCLUSION

For the reasons set forth above, and in these Respondents' Motion, Respondents respectfully request that this Court deny Petitioner's request for a writ of mandamus/prohibition and that this Court dismiss Petitioner's Petition for any and all relief as may be just and proper.

Respectfully submitted,

/s/ Jacqueline R. Zamarripa

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August 2020, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing. I further that a true and correct copy of the foregoing document was sent via the ECF System to the following persons who are registered participants:

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/s/ Jacqueline R. Zamarripa
Jacqueline R. Zamarripa