

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JUN 30 1999

PATRICK FISHER
Clerk

NELSON O. DUARTE,

Petitioner - Appellant,

v.

JOHN M. HURLEY,

Respondent - Appellee.

No. 98-1445

(D. Colorado)

(D.C. No. 98-N-377)

ORDER AND JUDGMENT *

Before **ANDERSON** , **KELLY** , and **BRISCOE** , Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Pro se petitioner Nelson Oliver Duarte, an inmate at the United States Penitentiary, Administrative Maximum, in Florence, Colorado, brought this 28

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

U.S.C. § 2241 habeas petition seeking to have four disciplinary reports expunged from his prison record. He alleges that the reports are false, were issued in retaliation for his participation in an action against federal officials, and negatively impacted the United States Parole Commission's decision on his release date.

On November 28, 1998, the magistrate judge issued a report and recommendation for dismissal of the petition, finding that Mr. Duarte's conclusory allegations of falsehood and retaliation were not supported by any evidence in the record. On December 2, Mr. Duarte filed objections to the report.¹ The district court ultimately adopted the magistrate's report and recommendation in a very brief order, in which the court erroneously observed that Mr. Duarte had not filed any objections. The court's order additionally failed to state specifically that it had conducted the requisite *de novo* review of the issues and record. The court denied Mr. Duarte permission to proceed *in forma pauperis* on appeal.

The government has filed a motion for a limited remand for the sole purpose of ensuring that the district court reviewed *de novo* the magistrate

¹Mr. Duarte also filed a notice of appeal on December 2, which was premature because the district court had not yet issued a final order. The appeal became ripe for review, however, when the district court filed its order on December 23, adopting the magistrate judge's report and recommendation.

judge's report. While we would ordinarily remand a case where there is a serious question whether the court conducted the requisite de novo review, in the unusual circumstances of this case, we decline to do so. We have ourselves reviewed de novo the record and the pleadings, and it is patently obvious that the district court would reach the same result on remand. In the interest of judicial economy and efficiency, we deny the government's motion for a limited remand. We grant Mr. Duarte's request to proceed *in forma pauperis* on appeal and, for substantially the reasons set forth in the magistrate judge's report and recommendation dated November 24, 1998, we AFFIRM the dismissal of this petition.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge