

UNITED STATES COURT OF APPEALS January 17, 2008

TENTH CIRCUIT

**Elisabeth A. Shumaker
Clerk of Court**

FRANK O'BRYAN,

Petitioner - Appellant,

v.

R. WILEY, Warden,

Respondent - Appellee.

No. 07-1328

(D. Colorado)

(D.C. No. 07-cv-01170-ZLW)

ORDER AND JUDGMENT*

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

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in 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.

Frank O'Bryan, a federal prisoner proceeding pro se, appeals the district court's denial of his 28 U.S.C. § 2241 petition. In his § 2241 petition, O'Bryan alleged the respondent warden had miscalculated his sentence by failing to give

*This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

him credit for time served prior to the imposition of his instant sentence for witness tampering.¹ The district court determined O’Bryan was not entitled, as a matter of law, to time-served credit because the time he served in custody prior to the imposition of the instant sentence was credited against previous sentences. 18 U.S.C. § 3585(b) (providing that a defendant shall not be given credit for prior custody if that prior custody was credited against another sentence); *see also United States v. Wilson*, 503 U.S. 329, 337 (1992) (“Congress made clear [in enacting § 3585(b)] that a defendant could not receive a double credit for his detention time.”). The district court’s resolution of O’Bryan’s § 2241 petition is undeniably correct. Accordingly, exercising jurisdiction pursuant to 28 U.S.C. § 1291,² we **AFFIRM**. O’Bryan’s request to proceed on appeal in forma pauperis is **DENIED**.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

¹O’Bryan’s sentence for witness tampering was ordered to be served consecutively to sentences he was then serving for violations of conditions of his supervised release.

²Because O’Bryan is a federal prisoner, he need not obtain a certificate of appealability before appealing the denial of his § 2241 petition. *McIntosh v. United States Parole Comm’n*, 115 F.3d 809, 810 n.1 (10th Cir. 1997).