APPENDIX - A

Submitted by:

JOHN GRAY, (PETITIONER PRO SE)
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TEAGUE, TEXAS 75860

(from Fifth Circuit U.S. Ct. of App. No. 17-50118)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50118

JOHN GRAY,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Western District of Texas

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

Before DENNIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:

(✓) The Motion for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Motion for Reconsideration is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition

for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50118
USDC No. 6:16-CV-10

A True Copy
Certified order issued Dec 15, 2017
Clerk, U.S. Court of Appeals, Fifth Circuit

JOHN GRAY,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Texas

O R D E R:

John Gray, Texas prisoner # 475245, is serving a 27-year prison sentence that he received after his conviction for indecency with a child. He moves this court for a certificate of appealability (COA) so that he may appeal the district court's decision to dismiss without prejudice in part and deny in part his 28 U.S.C. § 2254 application. In that application, he raised claims that (1) state courts have prevented him from asserting his right to postconviction relief; (2) the Board of Pardons and Paroles found him guilty of a felony without legal authority to do so; (3) the retroactive application of state laws governing credit for time spent on parole and mandatory supervision violates the Due Process and Ex Post Facto Clauses of the Constitution; (4) he was unconstitutionally

denied credit for time spent on parole and mandatory supervision; (5) he was denied due process and the right to confront and cross examine witnesses against him at the hearing where his mandatory supervision was revoked; and (6) his right to due process was violated when the Board of Pardons and Paroles found him guilty of a felony by a preponderance of the evidence rather than beyond a reasonable doubt.

In this court, Gray focuses his argument on the denial of credit against his prison sentence for the time he spent on parole and mandatory supervision and argues that the district court was biased against him and that he should have received an evidentiary hearing. He does not, however, press his claims that (1) state courts have prevented him from asserting his right to postconviction relief; (2) the Board of Pardons and Paroles found him guilty of a felony without legal authority to do so; (3) he was denied due process and the right to confront and cross examine witnesses against him at the hearing where his mandatory supervision was revoked; and (4) his right to due process was violated when the Board of Pardons and Paroles found him guilty of a felony by a preponderance of the evidence rather than beyond a reasonable doubt. Accordingly, he has abandoned them, *see Brinkmann v. Dallas Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987), and this court does not address them, *see Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

Gray is entitled to a COA if he makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). That is, he must establish that reasonable jurists would find the decision to deny relief debatable or wrong, *see Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000), or that the issues he presents deserve encouragement to proceed further, *see Miller-El*, 537 U.S. at 327. To the extent that the district court disposed of some of Gray's claims on procedural grounds and thus did not

reach their merits, this court will grant a COA if reasonable jurists would debate whether the district court's procedural ruling is correct and whether Gray states a valid claim of a constitutional deprivation. *See Slack*, 529 U.S. at 484; *Houser v. Dretke*, 395 F.3d 560, 561-62 (5th Cir. 2004).

Gray has not made the required showing. Reasonable jurists would not debate the district court's determination that some of Gray's claims are successive because Gray raised similar claims in an earlier § 2254 application. With respect to the district court's merits determinations, it is not debatable that Gray is not entitled to street-time credit based on Texas law governing parole and mandatory supervision for the reasons explained by the district court. As to Gray's argument that the forfeiture of street-time credits violated the Ex Post Facto Clause, he was not subjected to the application of a new law more onerous than the law in effect on the date of his offense: at the time he committed his offense, Gray did not have the right to street-time credit during release on mandatory supervision or parole. *See Ex parte Spann*, 132 S.W.3d 390, 393 & n.7 (Tex. Ct. Crim. App. 2004). Thus, the Ex Post Facto Clause is not implicated. *Thompson v. Cockrell*, 263 F.3d 423, 426 (5th Cir. 2001); *Haltom v. Owens*, 294 F. App'x 917, 918 (5th Cir. 2008).

Finally, Gray presents no evidence of bias on the part of the court other than the fact that the court ruled against him. This is insufficient to support the issuance of a COA. *See, e.g., Liteky v. United States*, 510 U.S. 540, 555 (1994) (explaining that adverse judicial rulings alone are generally insufficient to establish bias). Accordingly, Gray's motion for a COA is DENIED. His motions for bail pending appeal, to certify questions of state law to the Texas

Court of Criminal Appeals, and for permission to proceed under 42 U.S.C. § 1983 before a different district court judge are also DENIED.

/s/ James L. Dennis

JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JOHN GRAY #475245	§	
	§	
v.	§	**6:16-CV-010-RP**
	§	
LORIE DAVIS	§	

ORDER

Before the Court are Petitioner's Application for Habeas Corpus Relief under 28 U.S.C. § 2254 (#1); Respondent's Answer (#19); and Petitioner's response thereto (#23). Petitioner, proceeding pro se, has paid the filing fee for his application. For the reasons set forth below Petitioner's application for writ of habeas corpus is denied.

STATEMENT OF THE CASE

A. Background

According to Respondent, the Director has lawful and valid custody of Petitioner pursuant to a judgment and sentence of the 230th Judicial District Court of Harris County, Texas. Petitioner was convicted of indecency with a child and sentenced to 27 years in prison on February 17, 1988. On June 16, 1992, Petitioner was released on parole. Defs. Resp., Ex. A (#19-1). A pre-revocation warrant of arrest issued on July 12, 1999, and Petitioner's parole was revoked on August 12, 1999. *Id.* As a result of the revocation, Petitioner's street time was forfeited, and his sentence expiration date was recalculated. *Id.* Petitioner was returned to TDCJ custody on September 22, 1999, with jail credit allowed from July 14, 1999 to the date of next release on February 26, 2010. *Id.*

On February 26, 2010, Petitioner was released on mandatory supervision. *Id.* A pre-revocation warrant of arrest issued on August 24, 2014, and Petitioner's mandatory supervision

was revoked on September 12, 2014. *Id.* As a result of the revocation, Petitioner's street time was again forfeited, and his sentence expiration date was recalculated. *Id.* Petitioner was returned to TDCJ custody, with jail credit allowed from August 25, 2014 to the present. *Id.*

B. Grounds for Relief

Petitioner does not challenge his holding conviction. Rather, Petitioner raises the following grounds for relief:

1. State courts have unconstitutionally foreclosed his rights to habeas corpus for the retroactive application of the law governing street time credit.

2. The Board of Pardons and Parole (BPP) did not have legal authority to find Petitioner guilty of a felony.

3. Retroactive application of the law governing street time credit violates Petitioner's liberty and the Ex Post Facto Clause.

4. His revocation unconstitutionally canceled 4,096 calendar days served by withdrawing his street time credit.

5. He was denied the right to confront and cross-examine witnesses at his mandatory supervision revocation.

6. He was unconstitutionally denied due process at his revocation where he was found guilty of a felony by a preponderance of the evidence, rather than beyond a reasonable doubt.

Grounds 1, 3, and 4 all essentially claim that Petitioner was improperly deprived of street time credits in both his 1999 parole revocation and his 2014 mandatory supervision revocation. Petitioner contends that he was entitled to release on August 9, 2014, and the unconstitutional deprivation of his street time credits means he is now unlawfully confined. Grounds 2, 5, and 6 are all related to alleged due process violations at Petitioner's mandatory supervision revocation hearing in 2014.

DISCUSSION AND ANALYSIS

A. The Antiterrorism and Effective Death Penalty Act of 1996

The Supreme Court has summarized the basic principles that have grown out of the Court's many cases interpreting the 1996 Antiterrorism and Effective Death Penalty Act. *See Harrington v. Richter*, 562 U.S. 86, 97–100 (2011). The Court noted that the starting point for any federal court in reviewing a state conviction is 28 U.S.C. § 2254, which states in part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Court noted that "[b]y its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington*, 562 U.S. at 98.

One of the issues *Harrington* resolved was "whether § 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied." *Id.* Following all of the Courts of Appeals' decisions on this question, *Harrington* concluded that the deference due a state court decision under § 2554(d) "does not require that there be an opinion from the state court explaining the state court's reasoning." *Id.* (citations omitted). The Court noted that it had previously concluded that "a state court need not cite nor even be aware of our cases under § 2254(d)." *Id.*

(citing *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam)). When there is no explanation with a state court decision, the habeas petitioner's burden is to show there was "no reasonable basis for the state court to deny relief." *Id.* And even when a state court fails to state which of the elements in a multi-part claim it found insufficient, deference is still due to that decision, because "§ 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." *Id.*

As *Harrington* noted, § 2254(d) permits the granting of federal habeas relief in only three circumstances: (1) when the earlier state court's decision "was contrary to" federal law then clearly established in the holdings of the Supreme Court; (2) when the earlier decision "involved an unreasonable application of" such law; or (3) when the decision "was based on an unreasonable determination of the facts" in light of the record before the state court. *Id.* at 100 (citing 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). The "contrary to" requirement "refers to the holdings, as opposed to the dicta, of . . . [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Dowthitt v. Johnson*, 230 F.3d 733, 740 (5th Cir. 2000) (quotation and citation omitted).

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts.

Id. at 740-41 (quotation and citation omitted). Under the "unreasonable application" clause of § 2254(d)(1), a federal court may grant the writ "if the state court identifies the correct governing legal principle from . . . [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 741 (quotation and citation omitted). The provisions of § 2254(d)(2), which allow the granting of federal habeas relief when the state court made an

"unreasonable determination of the facts," are limited by the terms of the next section of the statute, § 2254(e). That section states that a federal court must presume state court fact determinations to be correct, though a petitioner can rebut that presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). But absent such a showing, the federal court must give deference to the state court's fact findings. *Id.*

B. Successive Petition

Petitioner's claims that his street time credit was unlawfully forfeited as a result of his 1999 parole revocation are successive. Title 28 U.S.C. § 2244(b) provides before a second or successive application for writ of habeas corpus is filed in the district court, an applicant must move in the appropriate court of appeals for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3). Here, Petitioner has challenged virtually identical aspects of his 1999 parole revocation and resulting forfeiture of street-time credit in two previous federal writs of habeas corpus. *See Gray v. Cockrell*, Civil Action No. H-02-CV-4338 (S.D. Tex. Jan. 2, 2003); *Gray v. Drekte*, Civil Action No. H-05-CV-2102 (S.D. Tex. July 26, 2005). Therefore, pursuant to § 2244(b), the Court is without jurisdiction over Petitioner's successive application on this ground. *See, e.g., United States v. Fulton*, 780 F.3d 683 (5th Cir. 2015) (holding the district court does not have jurisdiction to consider a successive § 2255 motion and remanding to the district court with instructions to dismiss the successive motion for want of jurisdiction). Thus, the Petition is dismissed, in part, for want of jurisdiction on the claims that Petitioner's street time credit was unlawfully forfeited as a result of his 1999 parole revocation. In any event, Petitioner's claims regarding the loss of street time credit due to his 1999 revocation are identical to his claims regarding the loss of street time credit due to his 2014 revocation discussed in section D. 1. below.

C. Unexhausted and Procedurally Barred Claim

Respondent admits Petitioner exhausted his state court remedies with respect to claims 1-5. However, Petitioner failed to properly exhaust his state court remedies with respect to his sixth claim regarding the burden of proof used during his 2014 revocation hearing. As a consequence, Petitioner's claim regarding the burden of proof is procedurally barred.

The exhaustion doctrine requires that the state courts be given the initial opportunity to address and, if necessary, correct alleged deprivations of federal constitutional rights. *Castille v. Peoples*, 489 U.S. 346, 349 (1989). In order to satisfy the exhaustionrequirement, a claim must be presented to the highest court of the state for review. *Richardson v. Procunier*, 762 F.2d 429, 431 (5th Cir. 1985). Moreover, all of the grounds raised in a federal application for writ of habeas corpus must have been "fairly presented" to the state courts prior to being presented to the federal courts. *Picard v. Conner*, 404 U.S. 270, 275 (1971). In other words, in order for a claim to be exhausted, the state court system must have been presented with the same facts and legal theory upon which the petitioner bases his assertions. *Id.* at 275–77.

Petitioner has not exhausted his claim that the wrong burden of proof was used for his mandatory supervision revocation. This claim was not raised in any of Petitioner's state applications for writ of habeas corpus. Therefore, by filing this federal writ of habeas corpus, Petitioner has bypassed the state courts and attempted to present an original claim to the federal courts before the state court has had the opportunity to review it.

With regard to this unexhausted claim, Petitioner is consequentially procedurally barred from federal habeas corpus review. Even where a claim has not been reviewed by the state courts, this Court may find that claim to be procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1

(1991). If a petitioner has failed to exhaust his state court remedies and the state court to which he would be required to present his unexhausted claims would now find those claims to be procedurally barred, the federal procedural default doctrine precludes federal habeas corpus review. *Id.*; *see Nobles v. Johnson*, 127 F.3d 409, 423 (5th Cir. 1997) (finding unexhausted claim, which would be barred by the Texas abuse-of-the-writ doctrine if raised in a successive state habeas petition, to be procedurally barred).

Here, Petitioner has failed to exhaust his claim that the wrong burden of proof was used for his mandatory supervision revocation. However, if the Court required Petitioner to present this claim to the Texas Court of Criminal Appeals to satisfy the exhaustion requirement, the Texas Court of Criminal Appeals would find it to be procedurally barred under the Texas abuse-of-the-writ doctrine. *See Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) ("[T]he highest court of the State of Texas announced that it would as a 'rule' dismiss as abuse of the writ 'an applicant for a subsequent writ of habeas corpus rais[ing] issues that existed at the time of his first writ.'") (quoting *Ex Parte Barber*, 879 S.W.2d 889, 892 n. 1 (Tex. Crim. App.1994). Further, the Texas habeas corpus statute prohibits a Texas court from considering the merits of, or granting relief based on, a subsequent writ application filed after the final disposition of an inmate's first application unless he demonstrates the statutory equivalent of cause or actual innocence. TEX. CODE CRIM. PROC. ANN. art. 11.07 § 4 (West Supp. 1996). In addition, for the Court to reach the merits of this claim, Petitioner "must establish cause and prejudice from [the court's] failure to consider his claim." *Fearance*, 56 F.3d at

642 (citations omitted). Petitioner has failed to establish cause and prejudice, and he has not shown that he is actually innocent.[1]

D. Exhausted Claims

The remainder of Petitioner's claims consist of his various assertions that (1) he was improperly deprived of street time credits and is now unlawfully confined; and (2) his due process rights were violated at the mandatory supervision revocation hearing.

1. Denial of Street Time Credit

Petitioner was convicted of indecency with a child and sentenced to 27 years in prison on February 17, 1988. On June 16, 1992, Petitioner was released on parole. Defs. Resp., Ex. A (#19-1). A pre-revocation warrant of arrest issued on July 12, 1999, and Petitioner's parole was revoked on August 12, 1999. *Id.* Petitioner was returned to TDCJ custody on September 22, 1999, with jail credit allowed from July 14, 1999 to the date of next release on February 26, 2010. *Id.* On February 26, 2010, Petitioner was released on mandatory supervision. *Id.* A pre-revocation warrant of arrest issued on August 24, 2014, and Petitioner's mandatory supervision was revoked on September 12, 2014. *Id.* Petitioner was returned to TDCJ custody, with jail credit allowed from August 25, 2014 to the present. *Id.*

The law in this Circuit establishes that time spent on parole or mandatory supervision does not operate to reduce the sentence of a parole or mandatory supervision violator returned to prison. The Fifth Circuit has consistently held that by violating parole or mandatory supervision a prisoner forfeits all credit of good conduct time accumulated prior to release and all credit for time on parole

[1]In any event, Plaintiff's claim has no merit. Plaintiff's mandatory supervision ultimately was not revoked on the basis that he allegedly made a terroristic threat.

or mandatory supervision before the violation. *See, e.g. Cortinas v. United States Parole Comm'n*, 938 F.2d 43 (5th Cir. 1991). Thus, Petitioner has no federal constitutional right to reduction of his sentence for time spent on parole or mandatory supervision. The Court also notes parole and mandatory supervision conditions are not additional to, but rather part of, the original sentence. *See Coronado v. United States Board of Parole*, 540 F.2d 216, 218 (5th Cir. 1976). Petitioner is not being forced to serve more than his original 27-year sentence. Instead, Petitioner violated the terms of his supervision, and as a result of the laws regarding revocation, lost any credit toward his 27-year sentence for the time he spent on mandatory supervision.

Petitioner is also not entitled to his street time credit based on Texas law governing parole and mandatory supervision. The Texas Court of Criminal Appeals has held that "[e]ligibility under § 508.283(c) for credit against sentence for time spent on early release is determined by the law in effect on the date the releasee's parole or mandatory supervision was revoked, including the version of § 508.149(a) in effect on the date of revocation," rather than on the date of the releasee's original offense. *Ex parte Hernandez*, 275 S.W.3d 895, 897 (Tex. Crim. App. 2009); *see also Ex parte Johnson*, 273 S.W.3d 340, 342-43 (Tex. Crim. App. 2008) (whether a person, whose mandatory supervision is revoked, is entitled to credit for time spent on release depends, in part, on whether he is serving a sentence for or has been previously convicted of an offense which makes him ineligible for mandatory supervision).

Under the Texas statute addressing street time credit in effect in 2014, at the time of Petitioner's revocation, Petitioner is not entitled to credit. That statute read in pertinent part:

> If the parole, mandatory supervision, or conditional pardon of a person described by Section 508.149(a) is revoked, the person may be required to serve the remaining portion of the sentence on which the person was released. The remaining portion is

> computed without credit for the time from the date of the person's release to the date of revocation.

TEX. GOV'T CODE ANN. § 508.283 (West 2014). Therefore, before an inmate can be entitled to restoration of street time credit, he must not be serving a sentence for, and must not previously have been convicted of, a crime described in section 508.149(a) of the Texas Government Code.

Petitioner is not entitled to street time credit because his holding conviction was for indecency with a child, one of the offenses listed in section 508.149(a) of the Texas Government Code. *See* TEX. GOV'T CODE § 508.149(a)(5). Because at the time of his parole revocation Petitioner was a person described in § 508.149(a), he was not entitled to street time credit on his sentence for time spent on parole prior to revocation pursuant to § 508.283(b).

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Additionally, this Court agrees that Petitioner has shown no error in the calculation of his 27-year sentence. Accordingly, Petitioner's claim does not warrant federal habeas relief.

2. Due Process at the Revocation Hearing

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Supreme Court fully discussed the rights that must be afforded a parolee in conjunction with parole revocation proceedings. The Supreme Court made the following introductory comments in listing the rights that must be afforded to the parolee:

> We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such aproceeding does not apply to parole revocations[.] Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court

> but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revocation deprives an individual, not of absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.

Id. at 480. The Supreme Court held that a parolee is entitled to a preliminary and final revocation hearing and that the revocation procedures must provide the following:

> 1. written notice of the alleged parole violations;
>
> 2. disclosure of the evidence against him;
>
> 3. an opportunity to be heard personally and to present evidence;
>
> 4. the right to confront and cross-examine adverse witnesses, unless the hearing officer finds good cause for not allowing confrontation;
>
> 5. a hearing before a neutral and detached body, and
>
> 6. a written statement by the factfinders describing the evidence reviewed and the reasons for revoking parole.

Id. at 489. *See also Meza v. Livingston*, 607 F.3d 392, 404 (5th Cir. 2010).

The Supreme Court emphasized that the final revocation hearing should not be equated to a criminal prosecution. *Morrissey*, 408 U.S. at 489. Moreover, the inquiry is narrow and should be flexible enough to consider evidence of letters, affidavits and other materials that would not be admissible in an adversarial criminal trial. *Id.* The right of confrontation and cross examination afforded a defendant at revocation hearings is qualified, and can be limited for good cause. *Id.*

Petitioner claims his rights were violated at his revocation hearing because (1) he was denied witnesses at his revocation hearing, and (2) the BPP had no authority to convict him of a felony. Petitioner raised these same claims in his state applications for habeas corpus relief, and the state court denied his claims.

On September 9, 2014, Petitioner's revocation hearing was held. Petitioner received written notice of his rights and the violations alleged. *See* Resp., Ex. C (#19-3) at 15-17; Pet., Ex. A (#1-2) at 5-7. In addition, Petitioner was notified of the evidence against him, received an opportunity to be heard in person and present witnesses and documentary evidence, received the conditional right to cross-examine and confront witnesses, and had a neutral decision maker. *See* Resp., Ex. C (#19-3) at 5-14. The hearing officer found that Petitioner had violated the conditions of his release by committing one after hours violation, two curfew violations, and committing a terroristic threat against his parole officer. *See* Resp., Ex. C (#19-3) at 10-12. The hearing officer recommended that Petitioner's mandatory supervision be revoked. *Id.* at 14.

Petitioner submitted a motion to reopen the hearing on October 28, 2014, which the BPP granted on November 10, 2014. *Id.* at 29. On December 22, 2014, a reopening hearing was held to hear additional evidence regarding whether Petitioner violated his mandatory supervision by committing terroristic threats. *See id.* at 20–28. The hearing section did not sustain the terroristic threats against public servant violation after reviewing the hearing officer's findings. *Id.* at 20. Thus, the BPP decided to sustain his revocation action for one after-hours violation and two curfew violations, but not for terroristic threats. *Id.* Petitioner received written notice of the reopening hearing. *Id.* at 29. Further, Petitioner was notified of the evidence against him, received an opportunity to be heard in person and present witnesses and documentary evidence, received the conditional right to cross-examine and confront witnesses, and had a neutral decision-maker. *Id.* at 20–28.

Petitioner alleges that he was denied witnesses at the hearing. Pet. at 12. Specifically, he complains that Parole Supervisor Pamela Caviel and Officer Kynde were not in physical attendance

at his hearing to be confronted and cross-examined. *Id.* In the context of a parole revocation proceeding, due process requires that the parolee have "the opportunity to be heard in person and to present witnesses" and other evidence. *Williams v. Johnson*, 171 F.3d 300, 304 (5th Cir. 1999) (citing *Morrissey*, 408 U.S. at 489). But, because a revocation hearing does not merit all the protections of a full scale trial, "[a] hearing body may still determine that good cause exists to disallow the confrontation of a particular witness and may bar the presentation of testimonial and documentary evidence not relevant or material to the violation or mitigative factors." *Williams*, 171 F.3d at 305. Furthermore, even if there is error, a federal district court can only grant relief if the error had a substantial and injurious effect on the hearing's outcome. *Id.*

Here, the absence of Pamela Caviel and Officer Kynde did not violate Petitioner's right to present testimony or confront witnesses. Plaintiff contends that both of these witnesses would have been cross-examined on the issue of the alleged terroristic threat. As explained above, while Petitioner was found to have committed a terroristic threat against a public servant at his revocation hearing, the finding was not sustained following the reopening hearing. *See* Resp., Ex. C (#19-3) at 20. Thus, the absence of these witnesses did not have a substantial or injurious effect on the outcome of the hearing. Any favorable evidence these witnesses may have presented regarding the alleged terroristic threat would have been cumulative because, even without their testimony, the terroristic threat accusation was reversed.

Finally, Petitioner also claims that the BPP does not have the authority to convict him of a felony. Again, Petitioner is alleging that the BPP revoked his mandatory supervision for committing the felony of terroristic threats. As described above, he was not revoked for that reason, thus any complaint about the authority of the BPP regarding the alleged felony of terrorist threats is meritless.

Having independently reviewed the entire state court record, this Court finds nothing unreasonable in the state court's application of clearly established federal law or in the state court's determination of facts in light of the evidence. Accordingly, Petitioner's claim does not warrant federal habeas relief.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, effective December 1, 2009, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In this case, reasonable jurists could not debate the dismissal or denial of the Petitioner's section 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, the Court shall not issue a certificate of appealability.

It is therefore **ORDERED** that Petitioner's Application for Habeas Corpus Relief under 28 U.S.C. § 2254 is **DISMISSED WITHOUT PREJUDICE IN PART** for want of jurisdiction and **DENIED IN PART**.

It is further **ORDERED** that a certificate of appealability is **DENIED**.

SIGNED on January 26, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE