

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD DELAIN KYLES - PETITIONER

VS.

LORIE DAVIS, DIRECTOR - RESPONDENT

IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

CONTENTS: DECISION OF THE UNITED STATES COURT OF APPEALS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20363
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

May 16, 2018

Lyle W. Cayce
Clerk

RICHARD DELAIN KYLES,

Petitioner-Appellant

v.

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

Respondent-Appellee

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:14-CV-2698

Before CLEMENT, COSTA, and WILLETT, Circuit Judges.

GREGG COSTA, Circuit Judge:*

Richard Delain Kyles, Texas prisoner # 257935, is serving a life sentence for a murder he committed in 1975. We authorized his appeal of the district court's rejection of his federal habeas petition challenging the 2013 denial of his parole application on ex post facto grounds. He argues that the Parole Board's retroactive application of Texas Government Code section 508.046

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

violates the Constitution. That current statute requires a 2/3 vote of all seven board members to parole an inmate convicted of a capital felony. The parole laws in effect at the time of Kyles's offense had a practice like the one federal courts of appeals use to decide cases: a group of three board members was selected to act as a panel in an individual prisoner's case; the prisoner then needed to convince a majority of the three.

Kyles raised a similar challenge to the Board's 2004 denial of parole. See *Kyles v. Quarterman*, 291 F. App'x 612 (5th Cir. 2008). The reasons we affirmed the dismissal of that habeas petition warrant the same treatment of this one. The amendments enlarging the size of parole panels do not "facially violate the Ex Post Facto Clause [because they] affect the discretionary procedure for determining suitability rather than eligibility for parole." *Id.* at 613 (citing *Wallace v. Quarterman*, 516 F.3d 351, 354-56 (5th Cir. 2008)). Application of the new procedure may nonetheless present an as-applied ex post facto problem if the prisoner can demonstrate that the change created a significant risk of increased confinement in his case. *Wallace*, 516 F.3d at 356; see also *Garner v. Jones*, 529 U.S. 244, 255 (2000). Kyles tries to make that showing by pointing to the two members of the Parole Board who favored his parole. If those two had been on a three-member panel selected under the old procedure, then he would have had enough votes for parole. The problem is the "if." Kyles cannot show that a randomly selected three-member panel would have included the two members who voted in his favor. His argument on this point is thus even more speculative than his prior challenge when he could point to three members who had supported parole. *Kyles*, 291 F. App'x at 614 (rejecting ex post facto claim because Kyles could not show the three who voted in his favor in 2004 would have been at least two of those selected to form a three-member panel). There is an additional layer of uncertainty on

top of the unknown board composition: the old regime required the Governor to approve any grant of parole the three-member panel recommended. See TEX. CONST. art. IV, § 11 (West 1974); TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 13, 15(a) (West 1974 & Supp. 1975). This conjecture about what would have happened under the old system is not enough to establish the likelihood of increased punishment that an ex post facto violation requires. *Wallace*, 516 F.3d at 356; *Kyles*, 291 F. App'x at 614.

To the extent that Kyles also raises a due process claim, this court denied a certificate of appealability on that issue.

AFFIRMED.

No. _____

IN THE
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CONTENTS: DECISION OF THE UNITED STATES DISTRICT COURT
- SOUTHERN DISTRICT OF TEXAS

APPENDIX B

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

RICHARD DELAIN KYLES,
(TDCJ-CID #257935)

Petitioner,

vs.

WILLIAM STEPHENS,

Respondent.

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CIVIL ACTION H-14-2698

MEMORANDUM ON DISMISSAL

On July 18, 2011, Richard Delain Kyles filed a petition for federal habeas corpus relief under 28 U.S.C. § 2254 in Civil Action Number 3:11-0444, challenging his state-court conviction. On February 25, 2013, the court granted the respondent's motion for summary judgment and dismissed that petition. On September 18, 2014, Kyles filed this petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging the same conviction. Kyles states that at the time of his conviction, an inmate convicted of a capital offense could be released to parole if he received a favorable vote from two of the three members of the parole panel. Kyles alleges that in 2004, Texas law changed to require a favorable vote from five of seven members of the parole panel. Kyles alleges that this change violated his right to due process, has extended his sentence, and is an ex post facto law.

The claims Kyles asserts in this civil action are similar to those presented in the habeas action he filed earlier, which the court dismissed. The court ruled as follows in dismissing the earlier petition:

When Kyles was convicted, a prisoner needed the vote of only a majority of a randomly selected three-member Parole Board panel to

be granted parole. In 1995, the legislature enacted a new law requiring a two-thirds vote of the entire Parole Board, then numbering eighteen, in order to grant parole to prisoners who, like Kyles, have been convicted of capital offenses. TEX. GOV'T CODE ANN. § 508.046; *Wallace v. Quarterman*, 516 F.2d 351, 353 (5th Cir. 2008). In 2004, the legislature changed the size of the parole board, reducing it from eighteen to seven members. TEX. GOV'T CODE ANN. § 508.031. Because it is presumably easier for a prisoner to win two out of three votes for parole than five out of seven, Kyles contends the current voting rules present a greater obstacle to parole and thus violate the Ex Post Facto Clause.

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In a habeas case raising a claim similar to the one Kyles asserts, the Fifth Circuit rejected an Ex Post Facto challenge to the 1995 changes in parole voting requirements. See *Wallace*, 516 F.3d at 355. The court noted that the earlier parole voting rule provided only that a three-member panel “may vote on parole and release,” and thus held that the 1995 law did not violate the Ex Post Facto Clause because “it is a discretionary rule[] affecting suitability,” rather than eligibility, for parole. *Wallace*, 516, F.3d at 355 (italics in original); see also *Goodrich v. Livingston*, 294 Fed. Appx. 983, 2008 WL 4488281 (5th Cir. 2008). While rejecting the position that the new Texas parole voting rule violates the Ex Post Facto Clause as a general matter, the Fifth Circuit proceeded to acknowledge that even a change in a discretionary parole rule could result in an ex post facto violation if the particular facts of a case show that the new law produced a “‘sufficient risk’ of increased confinement.” *Id.* at 356 (quoting *Morales*, 514 U.S. at 509). The *Wallace* petitioner failed to make that showing, however, because he could not demonstrate that the two members who voted in favor of his parole would have been assigned to his parole panel had it been a three-person panel. *Id.* Likewise, Kyles makes no such showing in this case.

The Court therefore finds that the state courts’ rejection of Kyles’s claim was not contrary to clearly established federal law or an unreasonable application of the law; rather, it was consistent with the Fifth Circuit rulings in *Wallace* and *Goodrich*. Kyles is therefore not entitled to federal habeas corpus relief and this case must be dismissed.

Kyles v. Thaler, Civil Action Number 3:11-0444 (Docket Entry No. 16).

The same reasons apply here. This case is dismissed, with prejudice, because it is without merit as a matter of law and because it is duplicative of the claims previously adjudicated in Civil Action Number 3:11-0444. Final judgment is separately entered.

SIGNED on June 1, 2015, at Houston, Texas.

A handwritten signature in black ink, appearing to read 'Lee H. Rosenthal', written over a horizontal line.

Lee H. Rosenthal
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RICHARD DELAIN KYLES,
(TDCJ-CID #257935)

Petitioner,

vs.

WILLIAM STEPHENS,

Respondent.

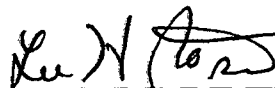
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CIVIL ACTION H-14-2698

FINAL JUDGMENT

For the reasons stated in this court's Memorandum on Dismissal entered this date, this civil action is dismissed with prejudice. This is a final judgment.

SIGNED on June 1, 2015, at Houston, Texas.



Lee H. Rosenthal
United States District Judge

NO. _____

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CONTENTS: ORDER DENYING REHEARING BY THE U.S. COURT OF APPEALS

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-20363

RICHARD DELAIN KYLES,

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 Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion May 16, 2018, 5 Cir., _____, _____ F.3d _____)

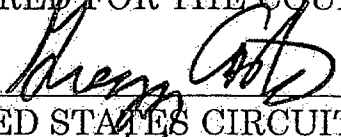
Before CLEMENT, COSTA, WILLETT, Circuit Judges.

PER CURIAM:

✓ Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of 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 DENIED.

- () Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. 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 DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**