IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-10180

STEPHEN SILAS THOMAS,

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 Northern District of Texas

O R D E R:

Stephen Silas Thomas, Texas prisoner # 317322, moves for a certificate of appealability (COA) to appeal the dismissal of his putative 28 U.S.C. § 2241 petition, in which he, inter alia, attacked his conviction for the state jail felony of burglary of a building and contended that his seven-month sentence for that offense should have run concurrently with his 60-year sentence for aggravated robbery. The district court should have construed the pleading as a 28 U.S.C. § 2254 application. *See Hartfield v. Osborne*, 808 F.3d 1066, 1071-73 (5th Cir. 2015). However, the district court's error was harmless because the court had jurisdiction to review the § 2254 application, and Thomas has moved for a COA in line with the requirements to appeal the denial of a § 2254 application. *See* 28 U.S.C. § 2253(c)(1)(A). Because the application was Thomas's first

attempt and opportunity to raise his instant claims, construing the pleading as a § 2254 application does not render it an unauthorized successive application. *See Leal Garcia v. Quarterman*, 573 F.3d 214, 220 (5th Cir. 2009).

Thomas argues that that he pleaded guilty to the burglary offense based on an understanding – which he asserts is reflected in his plea agreement and the judgment – that his sentence for that offense would run concurrently with the sentence for his aggravated-robbery conviction. He argues that the terms of his guilty plea, and the conditions in the judgment, were voided because his burglary sentence was served independently from his sentence for aggravated robbery. Thomas asserts that, as a result, his sentence for aggravated robbery wrongly was interrupted. To the extent that Thomas asserted other claims in the district court, he has abandoned them by not reasserting them in his COA motion. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

To obtain a COA, Thomas must make a substantial showing of the denial of a constitutional right. *See* § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Because the district court denied his claims on the merits, Thomas must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted).

Thomas has not made the required showing. Accordingly, his motion for a COA is DENIED. His motion for the appointment of counsel also is DENIED.

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10180

STEPHEN SILAS THOMAS,

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 Northern District of Texas

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

Before DENNIS, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:

(X) 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 DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

STEPHEN SILAS THOMAS,	§	
	§	
Petitioner,	§	
	§	
v.	§	2:14-CV-0025
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

**ORDER OVERRULING OBJECTIONS,
ADOPTING REPORT AND RECOMMENDATION
and DENYING PETITION FOR A WRIT OF HABEAS CORPUS**

Petitioner has filed with this Court a petition for a federal writ of habeas corpus. On January 17, 2017, the United States Magistrate Judge issued a Report and Recommendation in this cause, recommending therein that the instant habeas application be denied. On February 1, 2017, petitioner filed objections to the Magistrate Judge's Report and Recommendation.

The undersigned United States District Judge has made an independent examination of the record in this case and has considered the objections made by petitioner to the Report and Recommendation, as well any new and/or clarified claims made by petitioner in his pleadings. The Court finds no irregularities affecting the validity of petitioner's conviction or sentence or the constitutionality of his confinement. Petitioner's 1981 state conviction and sentence remains final, intact and enforceable.

The objections filed by petitioner are without merit and are hereby OVERRULED. The Magistrate Judge's Report and Recommendation is ADOPTED. Accordingly, the petition for a

Appendix B
(1)

writ of habeas corpus is DENIED.

IT IS SO ORDERED.

ENTERED this 21 day of February 2017.

MARY LOU ROBINSON
UNITED STATES DISTRICT JUDGE

Appendix B (2)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

STEPHEN SILAS THOMAS, Petitioner, v. LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § § § § § § § §	2:14-CV-0025

JUDGMENT

Of equal date herewith, the undersigned United States District Judge has entered an Order adopting the Report and Recommendation issued by the United States Magistrate Judge, and denying petitioner's application for a federal writ of habeas corpus.

JUDGMENT IS ENTERED ACCORDINGLY.

ENTERED this 8th day of February 2017.

MARY LOU ROBINSON
UNITED STATES DISTRICT JUDGE

Appendix B (3)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

STEPHEN SILAS THOMAS,	§	
	§	
Petitioner,	§	
	§	
v.	§	2:14-CV-0025
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER DENYING ISSUANCE
OF A CERTIFICATE OF APPEALABILITY

Having considered the record in this case, the undersigned is of the opinion petitioner has not made a prima facie showing for issuance of a certificate of appealability under 28 U.S.C. section 2253(c)(1). Consequently, for this reason and the reasons stated in the Report and Recommendation and the Order adopting the Report and Recommendation and denying the petition, a Certificate of Appealability is hereby ***denied***.

IT IS SO ORDERED.

ENTERED this 8th day of February 2017.

MARY LOU ROBINSON
UNITED STATES DISTRICT JUDGE

Appendix B (4)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

STEPHEN SILAS THOMAS,	§	
	§	
Petitioner,	§	
	§	
v.	§	2:14-CV-0025
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

REPORT AND RECOMMENDATION TO DENY PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

Petitioner has filed a Petition for a Writ of Habeas Corpus by a Person in State Custody under 28 U.S.C. § 2241 challenging how his sentence is being "administered" or "imposed."[1] For the reasons set forth below, it is the opinion of the undersigned United States Magistrate Judge that petitioner's federal application for habeas corpus relief should be DENIED.

I.
PROCEDURAL HISTORY

On February 20, 1981, petitioner was convicted in Dallas County, Texas, of the offense of aggravated robbery, such offense alleged to have been committed on October 28, 1980, and was sentenced to sixty (60) years confinement in the Texas Department of Criminal Justice, Correctional

[1] Petitioner has also filed two (2) petitions under 28 U.S.C. § 2254 challenging (1) respondent's calculation of time credits toward his sentence, *see Thomas v. Davis*, No. 2:14-CV-65; and (2) his 1981 conviction for aggravated robbery and the 60-year sentence assessed as a result. *See Thomas v. Davis*, No. 2:14-CV-27.

Institutions Division (TDCJ-CID). *State v. Thomas*, No. F80-15637-IN. After crediting petitioner's sentence with pre-sentence jail time, TDCJ calculated petitioner's sentence begin date as November 19, 1980.

According to petitioner, he was granted release to parole from this 60-year sentence on or about December 27, 2000, after serving approximately twenty (20) years and 1 month of his 60-year sentence. On August 10, 2006, petitioner was arrested in Dallas County, Texas for a theft offense and, on November 17, 2006, while on parole, was convicted of the theft offense in Dallas County, Texas and sentenced to one (1) year. *See State v. Thomas*, No. F-06-69177.[2] Petitioner states his parole from his 60-year sentence was revoked and, on or about January 31, 2007, he was returned to prison after having been on parole for approximately six (6) years.

Petitioner advises he was again granted release to parole on or about May 21, 2008, after serving approximately 21 years and 5 months of his 60-year sentence. In August 2010 and May 2012, petitioner was convicted of theft offenses and assessed sentences of less than one year which he subsequently discharged. *State v. Thomas*, No. F-1072136-M (Dallas Co.), and No. 1278149D (Tarrant Co.). Instead of being sent to TDCJ to serve those sentences, petitioner began serving the sentences in a state jail facility and was apparently assigned a new prisoner identification number. Petitioner's parole from his 60-year aggravated robbery sentence does not appear to have been revoked as a result of these new state jail felony convictions. They were revoked 01.31.07

On June 20, 2013, petitioner committed the offense of and was arrested for burglary of a building and, on July 19, 2013, was convicted in Dallas County, Texas of the state jail felony offense of burglary of a building and sentenced to "7 months state jail division, TDCJ." *See State v. Thomas*, No. F-13-57073-T. The state court judgment further provided, "This sentence shall run concurrently."

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[2]Petitioner filed a state habeas action challenging his conviction in No. 06-69177, which was denied August 15, 2007 without written order on the trial court findings without a hearing.

No other sentence, however, was identified as the sentence with which the burglary of a building sentence was to run concurrently. After crediting his sentence with pre-judgment confinement time, petitioner's begin date on this 7-month sentence was June 20, 2013.

On August 27, 2013, a parole revocation hearing was held on whether petitioner's parole from his 60-year aggravated robbery sentence in Cause No. F80-15637 should be revoked. On September 13, 2013, while serving this 2013 state jail offense sentence, petitioner's parole was revoked, after having been on release for approximately five (5) years and three (3) months. According to petitioner, his parole was revoked solely as a result of his new conviction in Cause No. F-13-57073.[3] It appears petitioner was granted early release from his 7-month state jail sentence on December 4, 2013 after serving 168 days of his sentence, but was not physically released from the state jail facility, possibly because of a parole revocation hold. On January 9, 2014, it appears petitioner was returned to prison on his original 60-year sentence. On January 15, 2014, it appears petitioner's 210-day sentence returned to prison 1-2013 discharged.

On January 17, 2014, petitioner requested, through TDCJ-CID's internal time credit dispute resolution process, a correction of time credited toward the completion of his 60-year sentence. *See* Tex.Govt Code Ann. § 501.0081. Petitioner appears to have requested (1) flat time credit for the period of time he spent on parole, and (2) flat time credit for time he served in a state jail facility on his 7-month sentence. It appears petitioner was denied review of his claim for time credits on February 12, 2014 because he had filed a prior time credit dispute and was only allowed one time credit dispute resolution per year. Petitioner has not provided the Court with copies of any previous time credit dispute claims he filed, nor has he challenged TDCJ's ruling.

Petitioner avers he placed the instant application for federal habeas corpus relief in the mail on

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[3] A June 25, 2013 Adjustment Statement, however, indicated petitioner had missed an MHMR appointment, had submitted a urinalysis which tested positive for drugs, and missed a scheduled home visit. The statement also indicated petitioner would not be eligible for ISF because of the charges pending against him.

February 12, 2014 because he had filed a prior time credit dispute and was only allowed one time credit dispute resolution per year. Petitioner has not provided the Court with copies of any previous time credit dispute claims he filed, nor has he challenged TDCJ's ruling.

It is unclear when petitioner placed the instant application for federal habeas corpus relief in the mail. However, such application was received and filed of record on February 7, 2014.

In October 2014, petitioner filed a state habeas corpus application identifying the burglary of a building state jail felony conviction as the trial court case number being challenged. On November 26, 2014, petitioner's state habeas application was dismissed with the notation that the sentence being challenged (the 7-month sentence) had been discharged. *In re Thomas*, No. WR-11,635-07. Petitioner then filed another application for a state writ of habeas corpus, this time challenging the execution of his 60-year sentence in his aggravated robbery case. On February 11, 2015, this application was dismissed without written order citing Texas Government Code § 501.008(b)-(c) for failure to use the prison time dispute resolution process of the Inmate Grievance System. *In re Thomas*, No. WR-11,635-08.

II.
PETITIONER'S ALLEGATIONS

Although it is somewhat unclear, petitioner's claims in this section 2241 habeas application appear to be:

1. Petitioner's 60-year sentence should be credited with the time he served on his 210-day state jail felony sentence, and the failure to credit his 60-year sentence with such flat or calendar time violates the *ex post facto* clause and constitutes a violation of due process and equal protection;

2. Petitioner's parole on his 60-year sentence should have been reinstated and he should have been again re-released to parole when he was released from his 210-day state jail felony sentence on December 4, 2013 or discharged his 210-day

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concurrently with his 60-year sentence in Cause No. F80-15637, his conviction in Cause No. F-13-57073 is void and, being void, the conviction could not have been used to revoke his parole from his 60-year sentence in Cause No. F80-15637.

First, to the extent petitioner contends his state jail felony conviction in Cause No. F-13-57073 is void, such is an attack on the validity of a conviction and is not proper in a 2241 proceeding. Second, even if petitioner's claim challenging the validity of his conviction was being properly presented in a section 2254 proceeding, petitioner's claim would be time barred because it was not raised in a proper federal habeas petition filed within one (1) year after petitioner's conviction became final. Third, even if such a claim were being properly presented in this proceeding and was not time barred, to the extent petitioner contends his state jail felony conviction in Cause No. F-13-57073 is void because the plea agreement in that case was breached, petitioner has not demonstrated any breach of any plea agreement. Fourth, even if such a claim were proper in this proceeding and not time barred, to the extent petitioner contends his state jail felony conviction in Cause No. F-13-57073 is void because the directive in the judgment was violated, petitioner has not demonstrated he was physically confined and serving another sentence, at the time his judgment in the state jail felony case was entered, with which sentence the state jail felony sentence could "run concurrently." Moreover, the inclusion of the language "run concurrently," although ineffectual to the extent it did not identify any other sentence and petitioner did not begin serving another custodial sentence until, at the earliest, September 13, 2013 when his parole was revoked, did not render the state jail conviction void. Fifth, even if such a claim were proper in this proceeding and not time barred, petitioner's challenge to his conviction would be moot since petitioner discharged the 7-month state jail sentence prior to filing his federal habeas petition.

* how the Convict is facing Admin

You stated Courts Order is violated