

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EARL MCBRIDE JR., - PETITIONER
VS.
LORIE DAVIS, DIR. - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Earl McBride Jr.,
Petitioner Pro se
TDCJ-ID #00315371 Ramsey Unit
1100 FM 655, Rosharon, Texas 77583

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

May 14, 2018

Lyle W. Cayce
Clerk

EARL MCBRIDE, JR.,

No. 16-20626
Summary Calendar

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. 4:16-CV-2012

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:*

Petitioner Earl McBride, Jr., Texas inmate # 315371, was convicted of capital murder in 1980 and sentenced to a life term of imprisonment. In 2016, McBride filed a 28 U.S.C. § 2254 petition asserting constitutional claims based on his factual allegation that he had been paroled in 2014 but his parole was improperly revoked before he was released. He specifically denied that he was

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

challenging any discretionary decision to grant or deny him parole. Without ordering a response and without the benefit of any state court records, the district court dismissed McBride's claims as a meritless challenge to a denial of parole. This court granted a certificate of appealability as to "whether the district court correctly dismissed [McBride's] constitutional claims as predicated on a denial, rather than a revocation, of parole."

Denial of parole and revocation of parole are subject to different constitutional standards. *See Morrissey v. Brewer*, 408 U.S. 471, 482-84 (1972); *Jennings v. Owens*, 602 F.3d 652, 657 (5th Cir. 2010); *Orellana v. Kyle*, 65 F.3d 29, 32 (5th Cir. 1995). The district court did not analyze McBride's claims under the standard applicable to revocation of parole and the limited record does not conclusively establish McBride's parole status. Merits briefing has not clarified matters. Accordingly, we conclude that the district court misconstrued the basis of McBride's constitutional claims and prematurely dismissed his § 2254 petition. *See Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999). We therefore vacate the judgment and remand for further proceedings consistent with this opinion. McBride's motion for appointment of counsel, construed as a motion for reconsideration of the denial of the original motion to appoint counsel, is denied without prejudice to reurging the motion on remand.

JUDGMENT VACATED AND REMANDED; MOTION FOR APPOINTMENT OF COUNSEL DENIED WITHOUT PREJUDICE.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20718

EARL MCBRIDE, JR.,

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

ORDER:

Petitioner Earl McBride, Jr., Texas inmate # 315371, was convicted by a jury of capital murder and sentenced to a life term of imprisonment. In 2016, McBride filed a 28 U.S.C. § 2254 petition asserting constitutional claims predicated on what he alleged was a revocation of parole. Following a previous appeal and remand, *see McBride v. Davis*, 722 F. App'x 366, 367 (5th Cir. 2018), the district court dismissed the petition as time barred. McBride now moves for a certificate of appealability (COA) to appeal that decision.

To obtain a COA, McBride must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Where, as here, the district court’s denial of federal habeas relief is based on procedural grounds, this court will issue a COA “when the prisoner 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.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Both showings are required. *See id.* at 484–85; *Houser v. Dretke*, 395 F.3d 560, 562 (5th Cir. 2004).

In light of the record developed on remand, McBride fails to make the requisite showing of a valid claim of the denial of a constitutional right based on the revocation, rather than denial, of parole. *See Slack*, 529 U.S. at 484–85; *Houser*, 395 F.3d at 562; *Teague v. Quarterman*, 482 F.3d 769, 774 (5th Cir. 2007). Accordingly, his motion for a COA is DENIED.



A True Copy
Certified order issued Jul 07, 2020

Tyler W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

A handwritten signature in black ink that reads "AS Oldham".

ANDREW S. OLDHAM
UNITED STATES CIRCUIT JUDGE

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APPENDIX B

FEDERAL RULES OF CIVIL PROCEDURE

RULE 56 Summary Judgment

(a) Motion for Summary judgment or Partial Summary Judgment.

A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do **not** establish the absence or presence of a genuine dispute, or that an adverse

party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible

Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that could be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;

- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials— including the ~~facts considered undisputed~~— show that the movant is entitled to it; or
- (4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may;

- (1) grant summary judgment for a nonmovant;
- (2) grant the motion on grounds not raised by a party; or
- (3) consider summary judgment on its own after identifying for the parties materials facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney fees, it incurred as a result. An offending party or attorney may also be held in contempt or subject to other appropriate sanctions.