FILED
United States Court of Appeals
Tenth Circuit

June 13, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERNIE SACOMAN,

Petitioner - Appellant,

v.

DWAYNE SANTISTEVAN, Warden,

Respondent - Appellee.

No. 23-2196
(D.C. No. 2:21-CV-00045-JB-JMR)
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **TYMKOVICH**, **BACHARACH**, and **CARSON**, Circuit Judges.

Ernie Sacoman is serving a life sentence in New Mexico state prison. He seeks to appeal the district court's dismissal of his most recent habeas application. We deny his request for a certificate of appealability and dismiss this matter.

In 1987, a jury convicted Mr. Sacoman of murder and other crimes. The state trial court sentenced him to life in prison on the murder count and to concurrent prison terms on the remaining counts. The original judgment ordered him to serve two years of parole after his release. In 2011, however, the trial court modified the judgment to require at least five years of parole. Mr. Sacoman became eligible for parole after serving 30 years.

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

See N.M. Stat. Ann. § 31-21-10(A). The parole board has denied him parole several times. Against this background, he filed the habeas application underlying these proceedings.

A state prisoner can file a habeas application under either 28 U.S.C. § 2241 or 28 U.S.C. § 2254. Section 2254 is the proper vehicle to challenge the validity of a state conviction and sentence, and § 2241 is the proper vehicle to challenge the execution of a sentence. *See Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000). The determination of whether a habeas claim falls under § 2241 or § 2254 can have significant consequences. For example, a district court lacks jurisdiction over the merits of a second or successive § 2254 claim unless the appropriate court of appeals has authorized the prisoner to file it. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008).

Mr. Sacoman purported to file the habeas application in this case under § 2241. His application raised two claims. First, he argued that the trial court illegally modified his parole term from two to five years. Second, he argued that the parole board should have granted him parole because he had "maintained clear conduct for over 30 years." R. at 9.

The district court dismissed both claims on procedural grounds. It concluded that Mr. Sacoman's challenge to the modification of his parole term was an unauthorized second or successive § 2254 claim. And it concluded that he had not exhausted his state-court remedies for his challenge to the parole board's decisions.

Mr. Sacoman cannot appeal unless he obtains a certificate of appealability. *See Montez*, 208 F.3d at 869. We can grant him one only if he shows that reasonable jurists

would find it at least debatable (1) whether his habeas application "states a valid claim of the denial of a constitutional right" and (2) whether the district court's procedural rulings were correct. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

Mr. Sacoman has not met this standard. In fact, he has not even tried to show that the district court's procedural rulings were debatable. He does not, for example, dispute that his challenge to the modification of his parole term was an unauthorized second or successive § 2254 claim. Nor does he dispute the district court's conclusion that he had not exhausted his challenge to the parole denials. By failing to address the district court's procedural rulings, he has waived any argument that reasonable jurists could debate them. *See United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003). And that waiver dooms his application for a certificate of appealability.

We recognize that Mr. Sacoman represents himself. We have therefore construed his filings liberally. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). But even the most liberal construction of Mr. Sacoman's papers reveals no argument against the district court's procedural rulings. And we cannot craft arguments against those rulings on his behalf because doing so would require us to take on an advocate's role. *See id.*

* * *

We grant Mr. Sacoman's motion to proceed without prepaying costs or fees. We deny his application for a certificate of appealability. We dismiss this matter.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

June 13, 2024

Ernie Sacoman
Lea County Correctional Facility
6900 West Millen
Hobbs, NM 88244
#11261

RE: 23-2196, Sacoman v. Santistevan
Dist/Ag docket: 2:21-CV-00045-JB-JMR

Dear Appellant:

Enclosed is a copy the court's final order issued today in this matter.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Jane Alissa Bernstein

CMW/lg

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ERNIE SACOMAN,

Petitioner,

v. 2:21-cv-00045-JB-JMR

DWAYNE SANTISTEVAN, Warden,

Respondent.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER is before the Court on petitioner Ernie Sacoman's Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241, filed on January 19, 2021. Doc. 1. Mr. Sacoman's petition raised two claims. *Id.* The Court dismissed Mr. Sacoman's first claim and ordered the respondent, Warden Dwayne Santistevan, to file an answer to Mr. Sacoman's second claim, which challenged the execution of his sentence. Doc. 5 at 11–12. Pursuant to the Court's order, Respondent filed his answer to the petition on March 13, 2023. Doc. 11. Mr. Sacoman filed two documents in reply.[1] *See* Docs. 17, 18. United States District Judge James O. Browning referred this case to me pursuant 28 U.S.C. §§ 636(b)(1)(B) and (b)(3), to conduct hearings, if warranted, and to perform any legal analysis required to recommend to the Court an ultimate disposition. Doc. 10. Having considered the parties' submissions, the relevant law, and the record in this case, I conclude that Mr. Sacoman did not exhaust his remaining claim in state court. Therefore, I recommend that the Court dismiss Mr. Sacoman's petition without prejudice.

[1] Mr. Sacoman's reply was due by July 31, 2023. Doc. 16. Mr. Sacoman's reply documents were received by the Court on August 7, 2023. Docs. 17, 18. The Court construes both of these documents as Mr. Sacoman's reply and will consider these late-received documents, which Mr. Sacoman claims to have mailed before the July 31, 2023 deadline. *See* Doc. 17 at 10; Doc. 18 at 43.

I. Procedural Background

On March 23, 1987, the Second Judicial District Court of the State of New Mexico found Mr. Sacoman guilty of first-degree murder (Count 1); conspiracy to commit murder (Count 2); armed robbery (Count 3); conspiracy to commit armed robbery (Count 4); and tampering with evidence (Count 6). Doc. 11-1 at 5–6 (Exh. B). The state court sentenced Mr. Sacoman to a term of life imprisonment for Count 1; nine years for Count 2; nine years for Count 3, plus one year for a firearm enhancement; three years for Count 4; and eighteen months for Count 6. *Id.* at 6. The state court ordered all sentences to run concurrently to one other. *Id.* The state court originally imposed a post-release parole period of two years. *Id.* However, on July 19, 2011, the state court corrected the judgment to reflect the statutorily required, five-year parole term. Doc. 11-1 at 114 (Exh. M); *see also* N.M. Stat. Ann. § 31-21-10(B) (1987) ("[A] person who was convicted of a capital felony shall be required to undergo a minimum period of parole of five years.").

Mr. Sacoman filed a direct appeal, and two petitions for relief under 28 U.S.C. § 2254. *See* Doc. 5 at 1–6 (providing a detailed procedural history). The Court need not revisit all the procedural history in assessing Mr. Sacoman's sole remaining claim in this case. Instead, the Court focuses on the two most recent petitions for post-conviction relief that Mr. Sacoman filed in state court, which are the only state court filings that are relevant to his current claim under 28 U.S.C. § 2241.

A. State Habeas Petitions

On November 7, 2018, Mr. Sacoman filed a *pro se* petition for writ of habeas corpus in state district court. Doc. 11-1 at 115–24 (Exh. N). There, he argued that the New Mexico Corrections Department ("NMCD") was running his sentences consecutively rather than

concurrently. *Id.* at 117–18. The state court asked Mr. Sacoman to file an amended petition further explaining his claims and attaching his good time figuring sheets to allow the court to assess how the NMCD was interpreting Mr. Sacoman's sentence. Doc. 11-1 at 128–29 (Exh. P). On March 27, 2019, Mr. Sacoman filed the amended petition, arguing that the NMCD was "erroneously calculating [his] sentences as conse[cu]tive, and beyond the 30[-]year life imposed." Doc. 11-1 at 130 (Exh. Q). On March 4, 2020, the state district court denied Mr. Sacoman's habeas petitions. Doc. 11-1 at 141–43 (Exh. T). The court found that, although Mr. Sacoman "claims he is receiving an illegal sentence because the NMCD is misinterpreting his sentence by requiring him to serve his sentences consecutively[,]. . . [his] good time figuring sheets indicate that the sentences are to be served concurrently." *Id.* at 142–43. The court, therefore, concluded that he was "not entitled to relief as a matter of law." *Id.* at 143. The court concluded that no other issues were before it. *Id.*

On April 14, 2020, Mr. Sacoman filed a *pro se* petition for a writ of certiorari to the New Mexico Supreme Court ("NMSC"). Doc. 11-1 at 144–48 (Exh. U). Here, Mr. Sacoman did not argue that he was serving consecutive rather than concurrent sentences, as he did in the district court below. *See id.* Instead, Mr. Sacoman raised a wholly different claim and argued that the district court erred in "enhancing [his] sentence from 2 years parole, to five years parole." *Id.* at 145.[2] He did not raise any other arguments in his petition to the NMSC. *See id.* at 144–48. On May 29, 2020, the NMSC denied the petition for writ of certiorari. Doc. 11-1 at 173 (Exh. Z).

[2] The State of New Mexico filed a response to Mr. Sacoman's petition for writ of certiorari. Doc. 11-1 at 166–72 (Exh. Y). The state pointed out that Mr. Sacoman had not raised the question of "whether the district court had incorrectly enhanced his term of parole to five years from two years" in the district court. *Id.* at 169. The state also pointed out that "nowhere in his petition does [Mr. Sacoman] raise the issue considered by the district court." *Id.*

B. Petitioner's § 2241 Claims

Mr. Sacoman filed his federal petition for habeas corpus relief under 28 U.S.C. § 2241 on January 19, 2021.[3] Doc. 1. Mr. Sacoman asserts two grounds for relief in this petition: (1) the state court violated his due process rights by amending his sentence in 2011 to require him to serve five years parole, rather than the two years indicated in his original sentence; and (2) the parole board violated his rights by continuing to deny him parole because he has served "the 30[-]year life sentence" and "maintained clear conduct for over 30 years." Doc. 1 at 6.

This Court already dismissed Mr. Sacoman's first claim—challenging a 2011 correction to the parole period of his sentence— finding that this claim constituted a successive habeas claim, and that the claim was time barred. Doc. 5 at 10. As to Mr. Sacoman's second claim, it has not been exhausted. I therefore recommend that the Court dismiss Mr. Sacoman's habeas petition without prejudice.

II. Exhaustion of State Court Remedies

A. Legal Standard

A state prisoner generally must exhaust available state court remedies before a federal court can consider the prisoner's habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) ("Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court."). If a petitioner fails to exhaust, this Court generally will dismiss the petition without prejudice. *Bland v. Sirmons*, 459 F.3d 999, 1012 (10th Cir. 2006).

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[3] Filings by *pro se* litigants are "to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). That means "if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so. . . ." *Id.* Still, a Court may not "assume the role of advocate for the *pro se* litigant." *Id.*

The exhaustion requirement applies to petitions under 28 U.S.C. § 2241, just as it applies to petitions under 28 U.S.C. § 2254. *See Montez v. McKinna,* 208 F.3d 862, 866 (10th Cir. 2000).

"The [exhaustion] doctrine reflects the policies of comity and federalism between the state and federal governments, a recognition that it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Demarest v. Price*, 130 F.3d 922, 932 (10th Cir. 1997) (citations and quotation omitted). A federal issue is exhausted if it "has been properly presented to the highest state court, either by direct review of the conviction or in a postconviction attack." *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir. 1994) (citation omitted). In addition, the petitioner must "fairly present his or her claims to the state courts before a federal court will examine them," which means that the "substance of the claim" must have been raised before the state court either on appeal or in post-conviction proceedings. *Demarest*, 130 F.3d at 932 (citation and quotation omitted). "This includes not only the [federal] constitutional guarantee at issue, but also the underlying facts that entitle a petitioner to relief." *Williams v. Trammell*, 782 F.3d 1184, 1210 (10th Cir. 2015) (citing *Gray v. Netherland*, 518 U.S. 152, 163 (1996) and *Fairchild v. Workman*, 579 F.3d 1134, 1149 (10th Cir. 2009)).

A "petitioner cannot assert entirely different arguments in his or her request for habeas relief from those raised before the state court." *Grant v. Royal*, 886 F.3d 874, 891 (10th Cir. 2018) (citation, quotation, and alteration omitted). Nor can a petitioner demonstrate exhaustion "if the claim before the state court was only somewhat similar to the claim pressed in the habeas petition." *Id.* Finally, it is not acceptable for petitioner to "shift the basis for his or her argument away from what was previously raised in state court." *Id.*; *see also Gardner v. Galetka*, 568 F.3d 862, 872 (10th Cir. 2009) (fact that petitioner raised ineffective assistance of counsel claims both

in state court and in his federal habeas petition not sufficient to show exhaustion because factual basis of the claims was different); *Smallwood v. Gibson*, 191 F.3d 1257, 1267 (10th Cir. 1999) (same).

B. Mr. Sacoman's Ground Two is not exhausted.

In Ground Two, Mr. Sacoman challenges the parole board's continued denial of parole, even though he claims he has served "the 30[-]year life sentence" and "maintained clear conduct for over 30 years." Doc. 1 at 6. However, Mr. Sacoman did not exhaust this claim because he did not present it to the state court. *See Dever*, 36 F.3d at 1534 (federal issue is exhausted only if it "has been properly presented to the highest state court"). In his state habeas petitions, Mr. Sacoman argued only that the NMCD was making him serve consecutive rather than concurrent sentences. *See* Doc. 11-1 at 115–19 (Exh. N); Doc. 11-1 at 130–36 (Exh. Q). The state court denied Mr. Sacoman's request for habeas relief on this basis. Doc. 11-1 at 141–43 (Exh. T). Mr. Sacoman did not appeal based on any error in the state court's finding that he was not serving consecutive sentences. Instead, Mr. Sacoman raised a completely new argument in his petition for certiorari to the NMSC—challenging the state court's correction of his sentence in 2011 to reflect a five-year term of parole, rather than a two-year term of parole. Doc. 11-1 at 144–47 (Exh. U). Because Mr. Sacoman failed to argue the same basis for relief in his petition for certiorari to the NMSC that he had made to the district court, none of the issues Mr. Sacoman raised in his state habeas petitions are exhausted. *See Dever*, 36 F.3d at 1534 (federal issue is exhausted only if it "has been properly presented to the highest state court").

Even more problematic, Mr. Sacoman never even raised the issue he makes in his federal habeas petition in the state courts. In his petition before this Court, Mr. Sacoman now challenges the parole board's repeated denials of parole. Doc. 1 at 6. And, in his reply, he argues for the very first time that the way the parole hearings are conducted violates his due process rights and

his right to be free from double jeopardy. Doc. 18 at 1, 5. None of these challenges were raised in his state habeas petitions. *See* Doc. 11-1 at 115–19 (Exh. N); Doc. 11-1 at 130–36 (Exh. Q). Therefore, Mr. Sacoman did not exhaust Ground Two of his federal habeas petition. *See Grant,* 886 F.3d at 891 ("petitioner cannot assert entirely different arguments in his or her request for habeas relief from those raised before the state court").

Respondent asserts that Mr. Sacoman exhausted state court remedies by arguing both in state habeas court and to the NMSC "that he is being detained in excess of what he understands to be the maximum period of incarceration." Doc. 11 at 3 n.2. I cannot agree.[4] Mr. Sacoman did not "fairly present" the claim he raises in this Court to the state courts because the "substance of his claim" raised here is meaningfully different from the "substance of his claim" raised in his state habeas petition. *See Demarest*, 130 F.3d at 932 (before this Court may consider a claim, the "substance of the claim" must have been raised before the state court either on appeal or in post-conviction proceedings). "[C]laims in a significantly different legal posture must first be presented to the state courts." *Id.*; *see also Grant*, 886 F.3d at 891 (exhaustion not demonstrated where "the claim before the state court was only somewhat similar to the claim pressed in the habeas petition" or where petitioner "shift[s] the basis for his or her argument away from what was previously raised in state court").

For these reasons, I find that Mr. Sacoman's Ground Two is unexhausted. Therefore, I recommend the Court dismiss Ground Two of his petition without prejudice. *See Bland*, 459

[4] Upon initial review, this Court found that Mr. Sacoman did appear to have exhausted his state court remedies regarding Ground Two. Doc. 5 at 11 (citing the docket sheet from *Sacoman v. Santistevan*, No. S-1-SC-38254 (NMSC)). Now, however, with the benefit of a more complete record (Doc. 11-1), closer review reveals that Mr. Sacoman did not actually exhaust the substance of his Ground Two claim.

F.3d at 1012 ("Generally, a federal court should dismiss unexhausted claims without prejudice. . . .").

III. Certificate of Appealability

Lastly, I address whether Mr. Sacoman is entitled to a certificate of appealability. No appeal may be taken from a "final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" unless the petitioner first obtains a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A); *see also Montez*, 208 F.3d at 869 (holding that § 2253(c)(1)(A) applies to "challenges related to the incidents and circumstances of any detention pursuant to state court process under § 2241"). A certificate of appealability may issue only if Mr. Sacoman "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). As set forth above, I find that Mr. Sacoman has failed to make this showing because he has failed to exhaust his constitutional claim. Therefore, Mr. Sacoman is not entitled to a certificate of appealability.

RECOMMENDED DISPOSITION

For the reasons discussed above, I recommend that the Court dismiss Ground Two of Mr. Sacoman's petition without prejudice. Because this is Mr. Sacoman's only remaining claim, I further recommend that the Court dismiss Mr. Sacoman's habeas petition in its entirety.

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). Written objections must be both timely and specific. *United States v. One Parcel of Real Prop., With Buildings, Appurtenances, Improvements, & Contents, Known as: 2121 E. 30th St., Tulsa, Oklahoma*, 73 F.3d 1057, 1060 (10th Cir. 1996). A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. Failure to file timely and specific objections will result in waiver of *de novo* review by a district or appellate court. In other words, if no objections are filed, no appellate review will be allowed.

Jennifer M. Rozzoni

JENNIFER M. ROZZONI
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ERNIE SACOMAN,

Petitioner,

vs. No. CIV 21-0045 JB/JMR

DWAYNE SANTISTEVAN, Warden,

Respondent.

MEMORANDUM OPINION AND ORDER ADOPTING THE MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on: (i) the Magistrate Judge's Proposed Findings and Recommended Disposition, filed October 18, 2023 (Doc. 19)("PFRD"); and (ii) on the Petitioner's Objection to Proposed Findings and Recommended Disposition, filed November 6, 2023 (Doc. 20)("Objections").[1] The PFRD of the Honorable Jennifer Rozzoni, United States Magistrate Judge for the United States District Court for the District of New Mexico, notified the parties of their ability to file objections within fourteen days and that failure to file objections so waived appellate review. See PFRD at 9. On November 6, 2023, Sacoman filed his Objections to the PFRD. Objections at 1. The primary issue in the Objections is whether Sacoman's contention that the parole board violated his rights by continuing to deny him parole has been exhausted.[2]

[1]Sacoman's Objections were due by November 5, 2023. Sacoman states in his Objections that he did not receive the PFRD until October 27, 2023 -- nine days after Magistrate Judge Rozzoni filed the PFRD. See Objections at 4. Sacoman placed his Objections in the mail on November 1, 2023. See Objections at 7. The Objections arrived at the Court on November 6, 2023. See Objections at 7. Because of the delays in receiving the PFRD, and because Sacoman mailed his Objections at least three business days before they were due, the Court will consider them timely filed.

[2]Sacoman also argues in the Objection that the State court violated his due process rights by amending his sentence to require him to serve five years of parole as opposed to two years. See Objections at 1-3. As the PFRD notes, the Court dismissed this claim, which Sacoman first raised

See Objections at 5. Pursuant to rule 72(b) of the Federal Rules of Civil Procedure, the Court has conducted a de novo review of the record and has "given fresh consideration to" all parts of Magistrate Judge Rozzoni's PFRD to which Sacoman has properly objected. United States v. Raddatz, 447 U.S. 667, 675 (1980)("Raddatz"). After conducting this de novo review, the Court will adopt Magistrate Judge Rozzoni's conclusions and deny Sacoman's Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241 at 1, filed January 19, 2021 (Doc. 1)("Petition").

LAW REGARDING OBJECTIONS TO PROPOSED FINDINGS AND RECOMMENDATIONS

District courts may refer dispositive motions to a Magistrate Judge for a recommended disposition. See Fed. R. Civ. P. 72(b)(1) ("A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement."). Rule 72(b)(2) governs objections: "Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2). Finally, when resolving objections to a Magistrate Judge's proposal, "[t]he district judge must determine de novo any part of the Magistrate Judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). Similarly, 28 U.S.C. § 636 provides:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is

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in his Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241 at 1, filed January 19, 2021 (Doc. 1)("Petition"), in the Memorandum Opinion and Order to Answer and Dismissing Certain Claims at 10, filed January 27, 2023 (Doc. 5)("MOO Dismissing Certain Claims"). See PFRD at 4. After reviewing de novo the record and the relevant law, the Court concludes, as it did in the MOO Dismissing Certain Claims, that this claim is time-barred.

> made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1)(C).

"The filing of objections to a magistrate [judge]'s report enables the district judge to focus attention on those issues -- factual and legal -- that are at the heart of the parties' dispute." United States v. One Parcel of Real Prop., with Bldgs, Appurtenances, Improvements, & Contents, Known as: 2121 East 30th Street, Tulsa Okla., 73 F.3d 1057, 1059 (10th Cir. 1996) ("One Parcel")(quoting Thomas v. Arn, 474 U.S. 140, 147 (1985)). As the United States Court of Appeals for the Tenth Circuit has noted, "the filing of objections advances the interests that underlie the Magistrate's Act[, 28 U.S.C. §§ 631-639], including judicial efficiency." One Parcel, 73 F.3d at 1059 (citing Niehaus v. Kan. Bar Ass'n, 793 F.2d 1159, 1165 (10th Cir. 1986)).

The Tenth Circuit has held "that a party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." One Parcel, 73 F.3d at 1060. "To further advance the policies behind the Magistrate's Act, [the Tenth Circuit], like numerous other circuits, ha[s] adopted 'a firm waiver rule' that 'provides that the failure to make timely objections to the magistrate's findings or recommendations waives appellate review of both factual and legal questions.'" One Parcel, 73 F.3d at 1059 (quoting Moore v. United States, 950 F.2d 656, 659 (10th Cir.1991)). "[O]nly an objection that is sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute will advance the policies behind the Magistrate's Act." One Parcel, 73 F.3d at 1060. In addition to requiring specificity in objections, the Tenth Circuit has stated that "[i]ssues raised for the first time in objections to the magistrate judge's recommendation are deemed waived." Marshall v. Chater, 75 F.3d 1421, 1426

(10th Cir. 1996). See United States v. Garfinkle, 261 F.3d 1030, 1030-31 (10th Cir. 2001)("In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived."). In an unpublished opinion, the Tenth Circuit has stated that "the district court correctly held that [a plaintiff] had waived [an] argument by failing to raise it before the magistrate." Pevehouse v. Scibana, 229 F. App'x 795, 796 (10th Cir. 2007).[3]

The Tenth Circuit has also noted, "however, that '[t]he waiver rule as a procedural bar need not be applied when the interests of justice so dictate.'" One Parcel, 73 F.3d at 1060 (quoting Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991)("We join those circuits that have declined to apply the waiver rule to a pro se litigant's failure to object when the magistrate [judge']s order does not apprise the pro se litigant of the consequences of a failure to object to findings and recommendations.")). In One Parcel, the Tenth Circuit notes that the district judge decided sua sponte to conduct a de novo review despite the lack of specificity in the objections, but the Tenth Circuit held that it would deem the issues waived on appeal because such actions would advance the interests underlying the waiver rule. See 73 F.3d at 1060-61 (citing cases from

[3]Pevehouse v. Scibana is an unpublished Tenth Circuit opinion, but the Court can rely on an unpublished opinion to the extent its reasoned analysis is persuasive in the case before it. See 10th Cir. R. 32.1(A) ("Unpublished decisions are not precedential, but may be cited for their persuasive value."). The Tenth Circuit has stated:

> In this circuit, unpublished orders are not binding precedent, . . . and we have generally determined that citation to unpublished opinions is not favored. [. . .] However, if an unpublished opinion or order and judgment has persuasive value with respect to a material issue in a case and would assist the court in its disposition, we allow a citation to that decision.

United States v. Austin, 426 F.3d 1266, 1274 (10th Cir. 2005)(citing In re Citation of Unpublished Opinions/Ords. & Judgments, 151 F.R.D. 470 (10th Cir. 1993)). The Court concludes that Pevehouse v. Scibana has persuasive value with respect to a material issue and will assist the Court in its disposition of this Order.

other Courts of Appeals where district courts elected to address merits despite potential application of waiver rule, but Courts of Appeals opted to enforce waiver rule).

Where a party files timely and specific objections to the Magistrate Judge's PFRD "on . . . dispositive motions, the statute calls for a de novo determination, not a de novo hearing." Raddatz, 447 U.S. 674. The Tenth Circuit has stated that a de novo determination, pursuant to 28 U.S.C. § 636(b), "requires the district court to consider relevant evidence of record and not merely review the magistrate judge's recommendation." In re Griego, 64 F.3d 580, 583-84 (10th Cir. 1995). The Supreme Court of the United States has noted that, although a district court must make a de novo determination of the objections to recommendations under 28 U.S.C. § 636(b)(1), the district court is not precluded from relying on the Magistrate Judge's proposed findings and recommendations. See Raddatz, 447 U.S. at 676 ("[I]n providing for a 'de novo determination' rather than de novo hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate [judge]'s proposed findings and recommendations.")(quoting 28 U.S.C. § 636(b)(1)). See Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens Cnty., Okla., 8 F.3d 722, 724-25 (10th Cir. 1993)(holding that the district court's adoption of the Magistrate Judge's "particular reasonable-hour estimates" is consistent with a de novo determination, because "the district court 'may *accept*, reject, or modify, *in whole or in part*, the findings or recommendations made by the magistrate.'" (quoting 28 U.S.C. § 636(b)(1))(emphasis in Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens Cnty., Okla.)).

Where no party objects to the Magistrate Judge's proposed findings and recommended disposition, the Court has, as a matter of course in the past and in the interests of justice, reviewed the Magistrate Judge's recommendations. In Workheiser v. City of Clovis, where the plaintiff

failed to respond to the Magistrate Judge's PFRD, although the Court determined that the plaintiff "has waived his opportunity for the Court to conduct review of the factual and legal findings in the [PFRD]," the Court nevertheless conducted such a review. No. CIV 12-0485, 2012 WL 6846401, at *3 (D.N.M. Dec. 28, 2012)(Browning, J.). The Court generally does not review, however, the Magistrate Judge's PFRD de novo, and determine independently necessarily what it would do if the issues had come before the Court first, but rather adopts the PFRD where "[t]he Court cannot say that the Magistrate Judge's recommendation . . . is clearly erroneous, arbitrary, [obviously[4]] contrary to law, or an abuse of discretion." Workheiser v. City of Clovis, 2012 WL 6846401, at *3.

This review, which is deferential to the Magistrate Judge's work when there is no

[4]The Court previously used as the standard for review when a party does not object to the Magistrate Judge's PFRD whether the recommendation was "clearly erroneous, arbitrary, contrary to law, or an abuse of discretion," thus omitting "obviously" in front of contrary to law. Solomon v. Holder, No. CIV 12-1039, 2013 WL 499300, at *4 (D.N.M. Jan. 31, 2013)(Browning J.)(adopting the recommendation to which there was no objection, stating: "The Court determines that the PFRD is not clearly erroneous, arbitrary, contrary to law, or an abuse of discretion, and accordingly adopts the recommendations therein"); O'Neill v. Jaramillo, No. CIV 11-0858, 2013 WL 499521 (D.N.M. Jan. 31, 2013)(Browning, J.)("Having reviewed the PRFD under that standard, the Court cannot say that the Magistrate Judge's recommendation is clearly erroneous, arbitrary, contrary to law, or an abuse of discretion. The Court thus adopts Judge Wormuth's PFRD.")(citing Workheiser v. City of Clovis, 2012 WL 6846401, at *3); Galloway v. JP Morgan Chase & Co., No. CIV 12-0625, 2013 WL 503744 (D.N.M. Jan. 31, 2013)(Browning, J.)(adopting the Magistrate Judge's recommendations upon determining that they were not "clearly contrary to law, or an abuse of discretion."). The Court concludes that "contrary to law" does not reflect accurately the deferential standard of review which the Court intends to use when there is no objection. Finding that a Magistrate Judge's recommendation is contrary to law would require the Court to analyze the Magistrate Judge's application of law to the facts or the Magistrate Judge's delineation of the facts -- in other words performing a de novo review, which is required only when a party objects to the recommendations. The Court concludes that adding "obviously" better reflects that the Court is not performing a de novo review of the Magistrate Judges' recommendations. Going forward, therefore, the Court will review, as it has done for some time now, Magistrate Judges' recommendations to which there are no objections for whether the recommendations are clearly erroneous, arbitrary, obviously contrary to law, or an abuse of discretion.

objection, nonetheless provides some review in the interest of justice, and seems more consistent with the waiver rule's intent than no review at all or a full-fledged review. Accordingly, the Court considers this standard of review appropriate. See Thomas v. Arn, 474 U.S. at 151 ("There is nothing in those Reports, however, that demonstrates an intent to require the district court to give any more consideration to the magistrate's report than the court considers appropriate."). The Court is reluctant to have no review at all if its name is going at the bottom of the order adopting the Magistrate Judge's PFRD.

ANALYSIS

In the PFRD, Magistrate Judge Rozzoni concludes that Sacoman's argument challenging the parole board's continued denial of parole despite that Sacoman "claims he has served 'the 30-year life sentence' and 'maintained clear conduct for over 30 years'" (the "Parole Claim"), has not been exhausted, because Sacoman did not present the claim to the State court. PFRD at 6 (quoting Petition at 6). Magistrate Judge Rozzoni reasons that "Sacoman did not 'fairly present' the claim he raises . . . to the [S]tate courts because the 'substance of his claim' raised here is meaningfully different from the 'substance of his claim' raised in his state habeas petition." PFRD at 6 (quoting Demarest v. Price, 130 F.3d 922, 932 (10th Cir. 1997)). In his Objections, Sacoman argues that he properly raised the issue in State court and expresses that he cannot understand how his Parole Claim can be adjudged unexhausted when it has survived for three years in federal court. See Objections at 5.

To exhaust available State court remedies, a 28 U.S.C. § 2241 petitioner must fairly present the "substance of the claim" to the State court. Demarest v. Price, 130 F.3d at 932. "[T]here is no fair presentation if the claim before the state court was only 'somewhat similar' to the claim pressed in the habeas petition." Grant v. Royal, 886 F.3d 874, 891 (10th Cir. 2018)(quoting

Duncan v. Henry, 513 U.S. 364, 366 (1995)). The Court agrees with Magistrate Judge Rozzoni and concludes that Sacoman has not provided the State court with a fair opportunity to "apply controlling legal principles to the facts bearing upon his" due process Parole Claim. Anderson v. Harless, 459 U.S. 4, 6 (1982). Sacoman made claims in his State habeas petitions and subsequent appeals that he was denied effective assistance of counsel, see Petition for Writ of Habeas Corpus at 39-44 (date illegible), filed March 13, 2023 (Doc. 11-1), that "his conviction was not supported by substantial evidence," Memorandum in Support of Petition for Writ of Habeas Corpus at 75-83 (dated January 5, 1995), filed March 13, 2023 (Doc. 11-1), that his "sentence imposed was not authorized by law," Petition for Post Conviction Relief at 115-19 (dated November 7, 2018), filed March 13, 2023 (Doc. 11-1), that the "New Mexico Department of Corrections is erroneously calculating Mr. Sacoman's sentences," Petition for Post Conviction Relief at 130 (dated March 27, 2019), filed March 13, 2023 (Doc. 11-1), that the State court "enhanc[ed]" Sacoman's sentence by adding "3-years to his parole," Petition for Writ of Certiorari to the Second Judicial District Court of New Mexico at 146 (dated April 8, 2020)("Cert Petition"), filed March 13, 2023 (Doc. 11-1), and that he should be released because of the COVID-19 Pandemic, see Pro Se Motion for Immediate Release Due to Public Health Emergency at 174-83 (dated June 1, 2020), filed March 13, 2023 (Doc. 11-1)("COVID Motion").

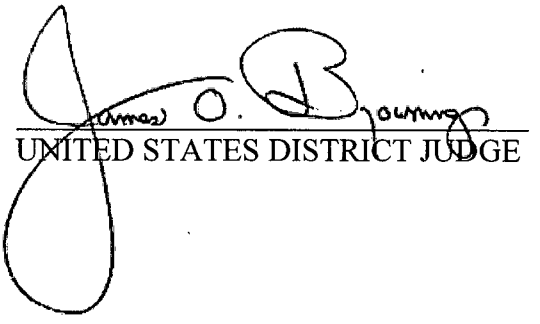
By contrast, Sacoman now argues that "he continues to be denied parole, even though he has never had a misconduct report" in violation of his due process rights. Petition at 1. Although Sacoman mentions that his parole was denied on multiple occasions in both his Cert Petition at 145 (describing the occasions on which parole was denied) and COVID Motion at 176 ("The Parole Board Continues To Deny Him."), Sacoman presents this fact in the context of his arguments that his term of parole was improperly extended and that he should be released because

of the COVID-19 pandemic. Sacoman never raised the argument that the denial of his parole is a violation of his rights under the Constitution of the United States. See Williams v. Trammell, 782 F.3d 1184, 1210 (10th Cir. 2015)(recognizing that the substance of the claim, which must be presented to the state court for the purposes of exhaustion, encompasses both the "underlying facts that entitle a petitioner to relief" and the "constitutional guarantee at issue"). Because Sacoman has "'shift[ed]' the 'basis for [his] argument' away from what was previously raised in state court," the Court concludes that Sacoman has not exhausted his Parole Claim and overrules the Objection. Grant v. Royal, 886 F.3d at 891 (quoting Gardner v. Galetka, 568 F.3d 862, 872 (10th Cir. 2009))(first alteration in Grant v. Royal). Accordingly, the Court will adopt Magistrate Judge Rozzoni's conclusions.[5]

IT IS ORDERED that: (i) the Petitioner's Objection to Proposed Findings and Recommended Disposition, filed November 6, 2023 (Doc. 20), is overruled; (ii) the Proposed Findings and Recommended Disposition, filed October 18, 2023 (Doc. 19), is adopted; (iii) Ground Two of the Petitioner's Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241, filed January 19, 2021 (Doc. 1), is denied without prejudice; (iv) a certificate of appealability is denied; and (v) the Petitioner's request to hold this case in abeyance while he exhausts Ground Two of the

[5]Sacoman correctly notes that the Court concluded, as an initial matter, that Sacoman "properly raises his challenge to the denial of his parole" in the Petition and "exhausted his State remedies by challenging his sentence's execution in the State trial court." MOO Dismissing Certain Claims at 11. As the PFRD notes, however, a review of Sacoman's State court challenges -- records of which were not presented to the Court until the filing of the Respondent's Answer to Ernie Sacoman's Pro Se Petition for Writ of Habeas Corpus (28 U.S.C. § 2241) [Doc. 1], filed March 13, 2023 (Doc. 11) -- indicates that the substance of Sacoman's Parole Claim was not fairly presented to the State court, despite the procedural appropriateness of addressing a denial of parole in a § 2241 petition. See PFRD ("[W]ith the benefit of a more complete record (Doc. 11-1), closer review reveals that Mr. Sacoman did not actually exhaust the substance of his Ground Two claim."); Discussion supra, page 7-9.

Petition in the state courts is denied.



UNITED STATES DISTRICT JUDGE

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