United States Court of Appeals for the Fifth Circuit

No. 24-20330

JAMES RUBIO,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Southern District of Texas
USDC No. 4:14-CV-1126

ORDER:

James Rubio, a former Texas prisoner, has filed a 28 U.S.C. § 2254 application challenging the order of civil commitment imposed after a jury determination that he was a sexually violent predator. He now seeks a certificate of appealability (COA) to appeal the district court's dismissal of his application on procedural default grounds. Rubio asserts that the district court erred in determining that 18 of his claims were not properly exhausted because he filed his appellate brief, which raised the claims, as an appendix to his petition for review before the Texas Supreme Court. In addition, he

contends that the state appellate court erred in determining that alternate remedies were available for him to pursue two of his claims. Finally, Rubio asserts that he presented evidence establishing that he was actually innocent, as he showed that he did not have and never had a mental or behavioral abnormality justifying his commitment. Rubio has not briefed, and has therefore abandoned, any challenge to the district court's finding that three of his claims were procedurally defaulted because the state appellate court found that he should have raised them in his civil commitment proceedings. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

To obtain a COA to appeal the dismissal of a § 2254 application, Rubio must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Because the district court dismissed Rubio's application on procedural grounds without reaching the merits of his claims, he must show "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*, 529 U.S. at 484.

Rubio has not made the requisite showing. Accordingly, his motion for a COA is DENIED. Rubio's motions for judicial notice and to supplement his COA brief are likewise DENIED.

/s/ Carl E. Stewart
CARL E. STEWART
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JAMES RUBIO, (SID # 03185085) Petitioner, vs. MARSHA McLANE, Executive Director of the Texas Civil Commitment Office,[1] Respondent.	§ § § § § § § § § §	CIVIL ACTION NO. H-14-1126

MEMORANDUM OPINION AND ORDER

James Rubio is a former Texas state inmate who is now in a Texas civil commitment facility. Representing himself, he filed a petition for a writ of habeas corpus in April 2014 challenging the 2011 civil commitment judgment. (Docket Entry No. 1). The court initially dismissed Rubio's petition without prejudice because he had not exhausted his state remedies. (Docket Entry Nos. 61, 62). Rubio has since exhausted his state remedies as to at least some of his claims, and the court reinstated this action at Rubio's request. (Docket Entry No. 97). The respondent answered Rubio's petition and filed a copy of the state-court records. (Docket Entry Nos. 109, 110, 111). Rubio filed a reply. (Docket Entry No. 113). Having reviewed the petition, the answer and reply, the record, and the law, the court concludes that Rubio's petition must be dismissed. The reasons for this ruling are explained below.

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[1]The Court substitutes Marsha McLane, Executive Director of the Texas Civil Commitment Office, for Bobby Lumpkin, Director of the Texas Department of Criminal Justice – Correctional Institutions Division, due to Rubio's release from incarceration to civil commitment. *See Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) ("[T]he proper respondent to a habeas petition is the person who has custody over [the petitioner]." (quoting 28 U.S.C. § 2242)).

I. Background

This case has a lengthy procedural history. On June 29, 1984, a Texas state-court jury found Rubio guilty of one count of rape. (Docket Entry No. 21-5, pp. 6-7). On June 10, 1992, Rubio pleaded nolo contendere to a charge of aggravated sexual assault. (*Id.* at 11-12). As Rubio neared the end of his prison sentence on the aggravated sexual assault conviction, the state filed a petition seeking to have him designated a "sexually violent predator" under Texas Health & Safety Code chapter 841. On September 8, 2011, a Montgomery County jury found Rubio to be a "sexually violent predator" as defined in Texas Health & Safety Code § 841.003(a). (Docket Entry No. 110-1, p. 290). The district court entered a judgment ordering Rubio to be civilly committed under Texas Health & Safety Code § 841.081. (*Id.* at 291-92). On October 21, 2011, Rubio appealed the civil commitment judgment to the Ninth Court of Appeals. (*Id.* at 335-36).

While that appeal was pending, Rubio removed his GPS tracking device and absconded from his assigned civil commitment facility. (Docket Entry No. 110-8). On December 6, 2012, the Ninth Court of Appeals ordered Rubio to either return to his assigned facility or surrender to authorities within ten days. (*Id.*). The court warned Rubio that if he failed to voluntarily return or surrender, his appeal of the civil commitment judgment would be dismissed under Texas Rule of Appellate Procedure 42.3(c) as a sanction for violating the court's order. (*Id.*). On January 7, 2013, Rubio was arrested without having voluntarily surrendered. (*Id.*). The Ninth Court of Appeals then dismissed Rubio's appeal of the civil commitment judgment under Rule 42.3(c). (*Id.*). *See In re Commitment of Rubio*, No. 09-11-00602-CV, 2013 WL 541896 (Tex. App.—Beaumont Feb. 14, 2013, pet. denied) (*mem. op., not designated for publication*). When the appeal was dismissed, Rubio had not yet filed a brief raising any issues for review.

Rubio filed a petition for review in the Texas Supreme Court, seeking review of the Ninth Court of Appeals' dismissal order and arguing only that the court of appeals had abused its discretion by dismissing his appeal as a sanction. (Docket Entry No. 110-15). The Texas Supreme Court denied Rubio's petition for review without written order on May 31, 2013. (Docket Entry No. 110-20).

While Rubio's petition for review was pending in the Texas Supreme Court, he pleaded guilty in Travis County, Texas, to a charge of failing to register as a sex offender. (Docket Entry No. 22-2, pp. 16-17). Rubio was sentenced to 10 years in prison, to run concurrently with his civil commitment judgment. (*Id.*).

On March 14, 2014, Rubio attempted to file an application for a state writ of habeas corpus in the Montgomery County court under Texas Code of Criminal Procedure article 11.07. (Docket Entry No. 27-1). On March 17, 2014, the Montgomery County Clerk returned the application, explaining that an 11.07 application was appropriate only to seek relief from a felony conviction and that Rubio did not have a Montgomery County felony conviction. (*Id.* at 3). The Clerk told Rubio that if he was trying to challenge his civil commitment judgment, he would need to "file the proper paperwork with the United States District Court of Texas-Southern Division." (*Id.*).

In an effort to follow the state court clerk's instructions, Rubio filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in this court, raising the following 23 claims:

1. The trial court erred by using Rubio's nolo contendere plea to aggravated sexual assault as an admission in the civil commitment action in violation of Texas Code of Criminal Procedure § 27.02(5).

2. Texas Health & Safety Code Chapter 841 violates equal protection because only male sex offenders are subject to commitment under the chapter.

3. The trial court erred by denying Rubio's pretrial motion to quash the petition for civil commitment under the 13th Amendment to the U.S. Constitution.

4. The trial court erred by denying Rubio's motion for continuance based on the allegedly untimely disclosure of evidence by the state.

5. Rubio was not properly admonished before entering his 1992 nolo contendere plea regarding the possible use of that plea in civil commitment proceedings.

6. The trial court erred in making evidentiary rulings in the civil commitment trial concerning the use of hearsay, expert testimony, and prison disciplinary records.

7. The trial court erred by permitting improper cross-examination by the prosecutor during the civil commitment trial.

8. The trial court erred by allowing the prosecutor to show the jury Rubio's mugshots from his prior criminal convictions at the civil commitment trial.

9. There was insufficient evidence to support the jury's verdict finding Rubio to be a sexually violent predator because he does not suffer from a behavioral abnormality that make him likely to engage in a predatory act of sexual violence.

10. The trial court confused the prospective jurors during voir dire about whether they could ask questions.

11. Chapter 841 proceedings are criminal in nature rather than civil because they result in punishment, including incarceration.

12. Chapter 841 is void for vagueness because it criminalizes unknown conduct and violates the separation of powers doctrine because it allows judges to make law.

13. The civil commitment multidisciplinary team meetings violate the Texas Open Meetings Act.

14. Section 841.123 violates the Equal Protection clause because it provides an evidentiary hearing for only some petitioners who file unauthorized petitions for review under § 841.122.

15. Collateral estoppel prohibits relitigating matters in the civil commitment proceeding that were already determined in the prior criminal proceeding.

16. Chapter 841 violates procedural due process because it does not require notice to the inmate of the initial screening for civil commitment proceedings and does not provide for representation during the initial screening period.

17. Chapter 841 proceedings are punitive in nature because civil commitment does not include adequate treatment programs.

18. The trial court erred when instructing the jury and by providing a verdict form that did not track the exact language of the statute.

19. Rubio does not meet criteria for civil commitment under Chapter 841.

20. Rubio should be provided with treatment for his alleged behavioral abnormality while he is in prison rather than only after his release to civil commitment.

21. The use of Rubio's prior conviction for aggravated sexual assault as an enhancement for the offense of violating sex offender registration laws violates double jeopardy.

22. The civil commitment judgment is void because it cites § 841.003 rather than § 841.062.

23. The state is violating the conditions of Rubio's civil commitment judgment by delaying civil commitment until after he serves a prison sentence for another offense.

(Docket Entry Nos. 1, 1-6).

On August 30, 2016, this court dismissed Rubio's petition for lack of jurisdiction because he was not in custody under the civil commitment judgment at that time. (Docket Entry No. 37). Rubio appealed, and the Fifth Circuit reversed and remanded for further consideration. *See Rubio v. Davis*, 907 F.3d 860 (5th Cir. 2018).

On remand, the respondent contended that Rubio's petition should be dismissed because he had failed to exhaust his available state remedies before filing his federal petition. (Docket Entry No. 56). Rubio replied, claiming that his attempt to file a petition with the Montgomery County clerk should be sufficient to satisfy the exhaustion requirement because he gave the state courts the opportunity to address his claims. (Docket Entry No. 57). This court dismissed Rubio's petition based on his failure to exhaust his available state remedies. (Docket Entry No. 61). The Fifth Circuit affirmed that dismissal. *See Rubio v. Lumpkin*, No. 20-20158, 2022 WL 1449702 (5th Cir. May 9, 2022) (per curiam).

On May 29, 2019, while his federal petition was still pending in this court, Rubio filed an application for a state writ of habeas corpus in the underlying Montgomery County civil commitment action. (Docket Entry No. 111-3, pp. 61-69). In that application, he raised the same 23 claims that he raised in his federal petition. (*Id.*). On June 27, 2022, the state habeas trial court denied relief. (Docket Entry No. 111-3, p. 90). On July 18, 2022, Rubio appealed to the Ninth Court of Appeals, raising the same 23 claims he had raised in his federal petition and state application. (Docket Entry Nos. 111-3, p. 130; 111-4). On July 27, 2023, the Ninth Court of Appeals affirmed the denial of the petition, addressing all of Rubio's issues in a detailed opinion. (Docket Entry No. 111-15). *See also Ex parte Rubio*, No. 09-22-00219-CV, 2023 WL 4781646 (Tex. App.—Beaumont, July 27, 2023, pet. denied) (*mem. op., not designated for publication*).

On August 14, 2023, Rubio filed a petition for review of the denial of his state habeas application in the Texas Supreme Court. (Docket Entry No. 111-18). In that petition, Rubio identified the following three issues for review:

1. Chapter 841 is "facially unconstitutional as applied to Rubio because it does not meet due process requirements."

2. Rubio's continued confinement violates due process because he does not have a behavioral abnormality that makes him dangerous.

3. Chapter 841 violates the Double Jeopardy Clause and the Ex Post Facto Clause because it is punitive in nature.

(Docket Entry No. 111-18, p. 4). Rubio attached the brief he filed in the Ninth Court of Appeals to his petition for review to "eliminate duplicity." (*Id.* at 5). On September 29, 2023, the Texas Supreme Court denied the petition for review without a written decision. (Docket Entry No. 111-19).

Once the Texas Supreme Court denied his petition for review, Rubio moved to reinstate this federal action. (Docket Entry No. 96). This court reinstated the action and ordered the

respondent to answer. (Docket Entry No. 97). The respondent filed an answer, again contending that Rubio had failed to exhaust his state remedies. (Docket Entry No. 109). Rubio filed a timely reply. (Docket Entry No. 113).

II. Discussion

A. Exhaustion and the Procedural Default Doctrine

Rubio's petition for federal habeas corpus relief is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). *See* 28 U.S.C. § 2254; *see also Woodford v. Garceau*, 538 U.S. 202, 207 (2003); *Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under AEDPA, "absent special circumstances, a federal habeas petitioner must fully exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief." *Henry v. Cockrell*, 327 F.3d 429, 432 (5th Cir. 2003) (quoting *Orman v. Cain,* 228 F.3d 616, 619-20 (5th Cir. 2000)); *see also* 28 U.S.C. § 2254(b)(1) ("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 unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State."). This requirement exists because, under § 2254, federal courts review a state court's decision on the petitioner's claims. *See Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc). If the petitioner did not raise his claims in the state court, there is no state court decision for the federal court to review. *Id.* Exceptions to the exhaustion requirement exist only when there is no available state corrective process or when that state process is ineffective to protect the petitioner's rights in his particular circumstances. *See* 28 U.S.C. § 2254(b)(1)(B).

To exhaust state remedies under § 2254(b)(1)(A), a habeas petitioner must fairly present the substance of his claims to the state courts. *See Vasquez v. Hillery*, 474 U.S. 254, 258 (1986); *Johnson v. Cain*, 712 F.3d 227, 231 (5th Cir. 2013). Proper exhaustion requires the petitioner to

pursue his claims to the state's highest court through every available procedure and in a procedurally proper manner. *See Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Busby v Dretke*, 359 F.3d 708, 723 (5th Cir 2004). If the petitioner files his federal petition while he still "has the right under the law of the State to raise, by any available procedure, the question presented," he has not exhausted his state remedies. 28 U.S.C. § 2254(c). In Texas, this requires the petitioner to pursue all of his claims "through one complete cycle of either state direct appeal or post-conviction collateral proceedings" before filing his federal petition. *Busby*, 359 F.3d at 723.

When a petitioner fails to properly exhaust the available state remedies, or when those remedies are made unavailable by a petitioner's own procedural default, federal courts generally may not review the petitioner's claims. *See Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995); *see also Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *Mercadel v. Cain*, 179 F.3d 271, 276-77 (5th Cir. 1999) (per curiam) (unexhausted claims may not provide the basis for habeas relief). Procedurally defaulted claims are barred from federal habeas review unless the petitioner can show (1) cause for the default and resulting prejudice, or (2) that the federal court's failure to consider the claims would result in a "fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

B. Rubio's Claims

1. Claims 1 through 8, 10, 12, 13, 14, 15, 17, 18, 20, 22, and 23

A thorough review of the state-court records shows that Rubio has failed to exhaust claims 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15, 17, 18, 20, 22, and 23. As explained above, to properly exhaust these claims, Rubio was required to present them "through one complete cycle of either state direct appeal or . . . collateral proceedings." *Busby*, 359 F.3d at 723. Rubio did neither.

Rubio took a direct appeal from the civil commitment judgment, but that appeal was dismissed as a sanction before Rubio raised or presented any claims. Rubio sought review in the Texas Supreme Court, but the only issue he identified for review was whether the dismissal sanction was properly imposed. (Docket Entry No. 110-15). Because of this dismissal, Rubio did not exhaust any of his current claims in his state direct-appeal proceedings.

In Rubio's state habeas application, he initially presented the same 23 claims that he presents in his federal petition. He presented the same 23 claims on appeal to the Ninth Court of Appeals, which denied his petition in a detailed decision. But Rubio's petition for review to the Texas Supreme Court, even construed broadly, raised only 5 of his original 23 claims. Because Rubio did not pursue the remaining 18 claims through one complete cycle of either direct or collateral review, he did not exhaust his state remedies as to those 18 claims.

In his response to the respondent's answer, Rubio insists that he presented all 23 of his claims to the Texas Supreme Court because he attached the brief filed in the Ninth Court of Appeals to his petition for review in compliance with Rule 55.5 of the Texas Rules of Appellate Procedure. (Docket Entry No. 113, p. 2). Under Rule 55.5, a party is entitled to submit the brief filed in the court of appeals in place of a new brief on the merits in the supreme court. *See* TEX. R. APP. P. 55.5 ("As a brief on the merits or a brief in response, a party may file the brief that the party filed in the court of appeals."). But Rule 53.2(f) of the Texas Rules of Appellate Procedure provides that "[t]he petition [for review] must state concisely all issues or points presented for review." TEX. R. APP. P. 53.2(f). In addition, Rule 55.2 of the Texas Rules of Appellate Procedure provides that only those issues *specifically identified* in the petition for review are properly before the supreme court. *See* TEX. R. APP. P. 55.2 ("The petitioner's brief on the merits must be confined to the issues or points stated in the petition for review."). Claims included in a brief attached under

Rule 55.5 but not specifically identified as issues in the petition for review are considered waived and are not before the Texas Supreme Court for review. *See Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 782 (Tex. 2020) (appellate courts "may not reverse a trial court judgment on a ground not raised" in the petition for review); *Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771, 780 (Tex. 2021) (claims not raised in a petition for review are waived); *In re C.O.S.*, 988 S.W.2d 760, 769 (Tex. 1999) (the only claims properly before the supreme court were those identified in the petition for review and review was limited to those claims despite the petitioner having filed the brief he submitted in the court of appeals, which contained additional claims).

Rubio's petition for review identified only the following issues for review:

> (1) Chapter . . . 841 is facially unconstitutional as applied to RUBIO, because it does not meet due process requirements. (2) RUBIO's continued confinement under the scheme violate[s] his due process rights because he does not have a behavioral abnormality that renders him dangerous, & (3) RUBIO being subjected to § 841 violates the constitution's double jeopardy and ex post facto clauses because the scheme is punitive in nature.

(Docket Entry No. 111-18, p. 4). These issues roughly correlate to claims 9, 11, 16, 19, and 21 of Rubio's state habeas application and federal habeas petition. Rubio's remaining claims, which were not specifically identified in his petition for review, were not raised in the Texas Supreme Court in a procedurally proper manner and so were waived.

Because Rubio waived review of all but 5 of his claims in the Texas Supreme Court, the remaining 18 claims are procedurally defaulted. "A procedural default . . . occurs when a [petitioner] fails to exhaust available state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Nobles v. Johnson,* 127 F.3d 409, 420 (5th Cir.1997) (quoting *Coleman,* 501 U.S. at 735 n.1) (cleaned up). To avoid the procedural default, Rubio must show either cause for the default with resulting prejudice or that a "fundamental miscarriage of justice"

will result from the failure to review the claims. *Coleman*, 501 U.S. at 749-50. But Rubio alleges no facts to satisfy either means of avoiding the procedural default.

To show cause for a procedural default, a petitioner must show that some objective factor external to the petitioner impeded his efforts to comply with the state's procedural rules. *See Coleman*, 501 U.S. at 753; *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Rubio's waiver of 18 of his claims by failing to include them in his petition for review, whether intentionally or because of his misunderstanding of the Rules of Appellate Procedure, does not constitute cause for purposes of the procedural default rule. *See, e.g., Saahir v. Collins*, 956 F.2d 115, 118-19 (5th Cir. 1992) (neither the petitioner's self-representation nor his ignorance of the law constitutes "cause" for failing to include a legal claim in a prior petition). Because Rubio does not demonstrate cause for the procedural default, the court need not consider the prejudice element. *See Matchett v. Dretke*, 380 F.3d 844, 849 (5th Cir. 2004) (per curiam) ("If a petitioner fails to demonstrate cause, the court need not consider whether there is actual prejudice."). Rubio is not entitled to review of the 18 defaulted claims under the cause-and-prejudice exception.

The "fundamental miscarriage of justice" exception applies only when the petitioner can make a persuasive showing that he is actually innocent of the charged conduct. *See Coleman*, 501 U.S. at 750; *see also Sawyer v. Whitley*, 505 U.S. 333, 339 (1992); *Hughes v. Quarterman*, 530 F.3d 336, 341-42 (5th Cir. 2008). To fall within the miscarriage-of-justice exception, the petitioner must point to evidence showing that, as a factual matter, he did not engage in the conduct charged by the state. *See Sawyer*, 505 U.S. at 335-36; *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001). The exception focuses solely on the petitioner's factual innocence and does not arise based on "how wrong" the petitioner believes the state court's decision may have been.

Rubio does not allege facts showing that he falls within the miscarriage-of-justice exception because he has not made a colorable showing of factual innocence. While Rubio insists that he does not now have, and never did have, a behavioral abnormality sufficient to subject him to civil commitment under Chapter 841, he offers no evidence to support this claim. Instead, he simply argues that Chapter 841 is unconstitutional and the jury got it wrong. These allegations are insufficient to satisfy the miscarriage-of-justice exception to the procedural default rule, and Rubio is not entitled to review of the 18 defaulted claims under the miscarriage-of-justice exception.

Rather than addressing either the cause-and-prejudice exception or the miscarriage-of-justice exception, Rubio contends that he should be excused from complying with the exhaustion requirement because of the long delays that occurred during the state habeas proceedings. Specifically, he points to the three-year delay in obtaining a ruling from the state habeas trial court. But "AEDPA contains no exception based on alleged irregularities in the state habeas process." *Rubio v. Lumpkin*, No. 1:18-cv-088, 2024 WL 1520383, at *13 (S.D. Tex. Apr. 5, 2024). No judicial exception to the exhaustion requirement arises when state habeas review fails to comply with a petitioner's expectations. *Id.* In addition, infirmities or errors that occur during state collateral review proceedings "do not constitute grounds for relief in federal court." *Rudd v. Johnson*, 256 F.3d 317, 319 (5th Cir. 2001) (quoting *Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999)). Further, Rubio cites no authority holding that the state court's delay in processing a state collateral proceeding excuses the petitioner's failure to properly present his claims to the state court. Because the lack of exhaustion results not from the state court's delay but instead from Rubio's failure to properly raise all of his claims in the state courts, the court does not find this delay to be a legal basis for excusing Rubio from the exhaustion requirement.

The state-court records show that Rubio had the opportunity to exhaust his claims by including all of them in his petition for review to the Texas Supreme Court. Rather than doing so, Rubio included only 5 of his claims in his petition for review and so waived collateral review of the remaining 18 claims. Rubio has not alleged facts showing that an exception to the exhaustion requirement applies. Rubio failed to exhaust his state-court remedies as to claims 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15, 17, 18, 20, 22, and 23, so they are barred from review by this court. Relief on these 18 claims is denied with prejudice.

2. Claims 11, 16, and 21

Rubio raised the substance of claims 11, 16, and 21 in his petition for review to the Texas Supreme Court, so he exhausted his state remedies as to these claims. But because the state court denied these claims on an adequate and independent state-law ground, Rubio is not entitled to federal habeas relief.

In recognition of the limited role that federal courts play in reviewing state-court judgments, the procedural-bar doctrine provides that "federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds." *Dretke v. Haley*, 541 U.S. 386, 392 (2004). This doctrine "procedurally bars federal habeas petitions where the last state court to review the petitioner's claims unambiguously based its denial on a state procedural bar." *Mullis v. Lumpkin*, 47 F.4th 380, 387 (5th Cir. 2022) (quoting *Gonzales v. Davis*, 924 F.3d 236, 243 (5th Cir. 2019) (per curiam)). For the doctrine to apply, the last state court rendering a judgment in the case must "clearly and expressly" state that the judgment rests on a state procedural bar. *Harris v. Reed*, 489 U.S. 255, 263 (1989); *see also Amos v. Scott*, 61 F.3d 333, 338 (5th Cir. 1995). That bar must be independent and adequate, meaning that it must not "rest primarily on

federal law" or "be interwoven with the federal law," and it must be "strictly or regularly followed by the cognizant state court." *Amos*, 61 F.3d at 338-39 (collecting cases).

Under Texas law, if a petitioner fails to bring record-based claims on direct appeal, those claims may be procedurally barred. *See Dorsey v. Quarterman*, 494 F.3d 527, 532 (5th Cir. 2007); *see also Buntion v. Lumpkin*, 982 F.3d 945, 951 (5th Cir. 2020) (per curiam) ("Texas courts have long held that 'the writ of habeas corpus should not be used to litigate matters which should have been raised on direct appeal.'" (quoting *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004) (en banc))). The requirement that record-based claims be raised on direct appeal or else be forfeited constitutes an adequate and independent state law ground barring federal habeas review. *See Dorsey*, 494 F.3d 527 at 532.

The Texas Supreme Court denied relief on claims 11, 16, and 21 without a written opinion, but the Ninth Court of Appeals issued a written judgment on these claims. When there has been one reasoned state-court judgment rejecting a petitioner's habeas claim, later unexplained orders upholding that judgment or rejecting the same claim are presumed to rest upon the same grounds identified in the earlier judgment. *See Ylst v. Nunnemaker,* 501 U.S. 797, 803 (1991); *Finley v. Johnson*, 243 F.3d 215, 218–19 (5th Cir. 2001). Under *Ylst*, this court looks back to the last reasoned state-court judgment, which in this case is the decision from the Ninth Court of Appeals denying Rubio's state habeas application. That court denied claims 11, 16, and 21 because they could have been raised in his original civil commitment proceeding, whether in the trial court proceedings or on appeal. *See Ex parte Rubio*, 2023 WL 4781646, at *3. As such, the claims were "not cognizable in a post-judgment habeas proceeding." *Id.* (citing *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004) ("Even a constitutional claim is forfeited if the applicant had the opportunity to raise the issue on appeal."))). This procedural bar is an adequate and

independent state-law basis for the denial of these claims. As such, claims 11, 16, and 21 were procedurally defaulted in the state courts and may not be considered in this federal habeas proceeding. Claims 11, 16, and 21 are denied with prejudice under the procedural-default doctrine.

3. Claims 9 and 19

The state habeas court found that Rubio was not entitled to habeas relief on claims 9 and 19 because other remedies remained available to him under state law. The Ninth Court of Appeals reasoned as follows:

> Under the Texas civil commitment statute, Rubio may file an unauthorized petition for release. *See* Tex. Health & Safety Code Ann. § 841.122. Thus, since an avenue of relief from a civil commitment order is available to those who are the subject of sexually violent civil commitment orders if they establish they are no longer likely to engage in a predatory act of sexual violence, habeas does not offer an alternative avenue of relief. Therefore, Rubio's claim alleging he no longer has a behavior abnormality was not a cognizable issue for habeas review.

Ex parte Rubio, 2023 WL 4781646, at *4. The court denied relief by reasoning that this alternate avenue of relief precluded resort to the "extraordinary remedy" of habeas. *Id.* This court agrees that Rubio is not entitled to habeas relief on these claims, but not for the reason relied on by the state courts. *See Russell v. Denmark*, 68 F.4th 252, 262-63 (5th Cir. 2023) (noting that federal habeas review is limited to considering the state-court's *decision* rather than its reasoning).

In claims 9 and 19, Rubio argues, in substance, that the evidence presented at his civil commitment trial was insufficient to support the jury's finding that he was a sexually violent predator, as that term is defined in § 841.003(a). This challenge to the sufficiency of the evidence to support the judgment could and should have been raised on direct appeal. *See In re Commitment of Walsh*, 661 S.W.3d 861, 865 (Tex. App.—Beaumont 2022, pet. denied) (en banc). But Rubio did not raise this claim on direct appeal, and he was therefore precluded from raising it in a state application for habeas corpus relief. *See Buntion*, 982 F.3d at 951. The requirement that claims

be raised on direct appeal or else be forfeited constitutes an adequate and independent state-law ground that constitutes a procedural default. *See Dorsey*, 494 F.3d 527 at 532. And because Rubio procedurally defaulted these two claims in the state courts, he is not entitled to federal habeas corpus relief. Claims 9 and 19 are denied with prejudice under the procedural-default doctrine.

III. Certificate of Appealability

Rubio has not requested a certificate of appealability, but Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner. *See* 28 U.S.C. § 2253; *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). A certificate of appealability will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires the petitioner to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El*, 537 U.S. at 336 (quoting *Slack*, 529 U.S. at 484). When the denial of relief is based on procedural grounds, the petitioner must show not only that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," but also that they "would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. A district court may deny a certificate of appealability on its own, without requiring further briefing or argument. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (per curiam).

After carefully considering the pleadings and matters of record, the court concludes that jurists of reason would conclude without debate that the procedural rulings in this case are correct. There are no grounds to issue a certificate of appealability.

IV. Conclusion

Rubio's petition for a writ of habeas corpus, (Docket Entry No. 1), is dismissed with prejudice. All pending motions are denied as moot. A certificate of appealability is denied. Final judgment is separately entered.

SIGNED on July 12, 2024, at Houston, Texas.

Lee H. Rosenthal
United States District Judge

United States Court of Appeals for the Fifth Circuit

No. 24-20330

JAMES RUBIO,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division,*

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:14-CV-1126

UNPUBLISHED ORDER

Before STEWART, HAYNES, and HIGGINSON, *Circuit Judges.*
PER CURIAM:

A member of this panel previously DENIED Appellant's motions for certificate of appealability, for judicial notice and to file a supplemental brief

in support of certificate of appealability. The panel has considered Appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

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