

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41618
USDC No. 3:16-CV-244



A True Copy
Certified order issued Nov 01, 2017

Steph W. Cayer
Clerk, U.S. Court of Appeals, Fifth Circuit

GREGORY DONEL JOHNSON,

Petitioner-Appellant

v.

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

Respondent-Appellee

Appeal from the United States District Court for the
Southern District of Texas

ORDER:

Gregory Donel Johnson, Texas prisoner # 1779137, moves for a certificate of appealability (COA) from the dismissal of his 28 U.S.C. § 2254 petition in which he challenged a prison disciplinary conviction and punishment. Johnson maintains that he was denied due process during the disciplinary proceedings and that the punishment imposed was too severe. He also contends, for the first time before this court, that the punishment implicated a protected liberty interest because the disciplinary action taken against him resulted in the loss of the opportunity to earn good time credit (including diligent participation credit) and the denial of parole. We do not

No. 16-41618

consider claims raised for the first time in a COA motion. *See Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

Johnson fails to show that jurists of reason would find the district court's decision debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). He thus fails to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Accordingly, his motion for a COA is DENIED.

/s/Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

ENTERED

September 29, 2016

David J. Bradley, Clerk

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

GREGORY DONEL JOHNSON,
TDCJ #01779137,

Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.¹

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CIVIL ACTION NO. 3:16-CV-244

MEMORANDUM OPINION AND ORDER

The petitioner, Gregory Donel Johnson (TDCJ #01779137), is a state inmate incarcerated in the Texas Department of Criminal Justice - Correctional Institutions Division ("TDCJ"). Johnson has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 to challenge the result of a prison disciplinary proceeding (Dkt. 1 at p. 2). After reviewing all of the pleadings and the applicable law under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court concludes that this case must be **DISMISSED** for the reasons set forth below.

¹ Johnson lists former Director William Stephens as the respondent. Current Director Lorie Davis has been substituted as the proper respondent pursuant to Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

I. BACKGROUND

Johnson is serving 26 years in the Darrington Unit for robbery (Dkt. 1 at pp. 1–2). In this habeas proceeding, Johnson challenges not his underlying conviction but the result of a prison disciplinary proceeding lodged against him (Dkt. 1 at pp. 2, 5). In his habeas petition, Johnson explains that he was charged in disciplinary case #20160348124 with use of an alcoholic beverage (Dkt. 1 at pp. 5–6). He was found guilty as charged on July 19, 2016 and, as punishment, had his custody classification reduced and was placed on visitation, commissary, and recreation restriction for 30 days (Dkt. 1 at pp. 5–7). Johnson did not lose any previously earned good-time days (Dkt. 1 at p. 5).

In the pending petition, Johnson contends that he was denied his rights to attend the disciplinary hearing and challenge the sufficiency of the evidence and that the penalty imposed was too severe (Dkt. 1 at pp. 6–7). For the reasons set forth below, the Court holds that Johnson fails to state an actionable claim under the standard of review that governs disciplinary proceedings in the prison context.

II. PRISON DISCIPLINARY PROCEEDINGS

Johnson seeks a federal writ of habeas corpus to challenge a prison disciplinary conviction. The federal writ of habeas corpus is an extraordinary remedy which shall not extend to any prisoner unless he is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. §§ 2241(c)(3) & 2254(a); *Brecht v. Abrahamson*, 507 U.S. 619, 633–34 (1993) (explaining that “the writ of habeas corpus has historically been

regarded as an extraordinary remedy, a bulwark against convictions that violate fundamental fairness”). Thus, a habeas corpus petitioner must establish a constitutional violation in order to prevail. Johnson’s claims, on their face, fail to make the requisite showing.

A. Due Process

An inmate’s rights in the prison disciplinary setting are governed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Prisoners charged with institutional rules violations are only entitled to relief under the Due Process Clause when the disciplinary action may result in a sanction that will infringe upon a constitutionally protected liberty interest. *Sandin v. Conner*, 515 U.S. 472, 483–84 (1995). These protected liberty interests can emanate from either the Due Process Clause itself or from state law—*Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989)—but the range of constitutionally protected liberty interests is a “narrow” one. *Orellana v. Kyle*, 65 F.3d 29, 31–32 (5th Cir. 1995) (citing *Sandin*).

Johnson does not identify any particular right found in the Due Process Clause upon which his habeas petition is grounded. To the extent that the disciplinary conviction and its consequent reduction in his time-earning classification may affect Johnson’s eligibility for early release from prison, the Due Process Clause does not include a right to conditional release before the expiration of a valid sentence. *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979). Under these circumstances, then, Johnson’s

petition depends on the existence of a constitutionally protected liberty interest created by state law.

The Supreme Court has decided that only those state-created substantive interests which “inevitably affect the duration of [a prisoner’s] sentence” may qualify for constitutional protection under the Due Process Clause. *Sandin*, 515 U.S. at 487; *see also Kyle*, 65 F.3d at 31–32. In Texas, only those inmates who are eligible for mandatory supervision have a constitutional expectancy of early release. *Malchi v. Thaler*, 211 F.3d 953, 956–59 (5th Cir. 2000) (addressing the mandatory supervision scheme in place prior to September 1, 1996); *Teague v. Quarterman*, 482 F.3d 769, 774–77 (5th Cir. 2007) (discussing the mandatory supervision schemes in place both before and after September 1, 1996). It follows that a Texas prisoner cannot demonstrate a constitutional violation without first establishing: (1) that he is eligible for early release on mandatory supervision; and (2) that the disciplinary conviction at issue resulted in a loss of credit for good conduct (*i.e.*, good-time credit). *Malchi*, 211 F.3d at 956–59 (explaining that only those Texas inmates who are eligible for early release on mandatory supervision have a protected liberty interest in their previously earned good-time credit).

Johnson concedes that he did not lose good-time credit as a result of his disciplinary conviction (Dkt. 1 at p. 5). This is fatal to his due process claims. *Id.*

It is true that the disciplinary conviction at issue resulted in a reduction in Johnson’s custody classification; but the Fifth Circuit has held that reductions in a prisoner’s time-

earning status, and the potential impact of those reductions on good-time credit earning ability, are too attenuated from the prisoner's ultimate release date to invoke the procedural guarantees of the Due Process Clause. *Malchi*, 211 F.3d at 958–59; *Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995); *Neals v. Norwood*, 59 F.3d 530, 533 (5th Cir. 1995). Moreover, the changes in the conditions of Johnson's confinement that are attendant to the reduction in his custody classification do not affect the duration or fact of Johnson's confinement and do not constitute atypical, significant hardships that go beyond the ordinary incidents of prison life. They therefore do not implicate due process concerns. *Madison v. Parker*, 104 F.3d 765, 768 (5th Cir. 1997); *Malchi*, 211 F.3d at 958 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 493 (1973)). The same is true of the temporary limitations imposed on Johnson's privileges. *Id.*

Because the sanctions at issue do not implicate a protected liberty interest, Johnson cannot demonstrate a violation of the Due Process Clause. Absent an allegation that the petitioner has been deprived of some right secured to him by the United States Constitution or laws of the United States, federal habeas corpus relief is not available. *See Kyle*, 65 F.3d at 31–32; *Hilliard v. Board of Pardons and Paroles*, 759 F.2d 1190, 1192 (5th Cir. 1985). Thus, the pending federal habeas petition must be dismissed.

III. CERTIFICATE OF APPEALABILITY

The federal habeas corpus petition filed in this case is governed by the Antiterrorism and Effective Death Penalty Act (the "AEDPA"), codified as amended at 28 U.S.C. § 2253. Therefore, a certificate of appealability is required before an appeal may proceed. *See*

Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); *see also Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir. 1997) (noting that actions filed under either 28 U.S.C. § 2254 or § 2255 require a certificate of appealability).

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), which requires a 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)). Under the controlling standard, a 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. Where 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, *sua sponte*, without requiring further briefing or argument. *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). After careful review of the pleadings and the applicable law, the Court concludes that reasonable jurists would not find its assessment of the constitutional claims debatable or wrong.

Because the petitioner does not otherwise allege facts showing that his claims could be resolved in a different manner, a certificate of appealability will not issue in this case.

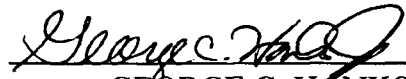
IV. CONCLUSION

Based on the foregoing, the Court **ORDERS** as follows:

1. The habeas corpus petition is **DENIED**, and this case is **DISMISSED** with prejudice.
2. A certificate of appealability is **DENIED**.
3. All pending motions are **DENIED** as moot.

The Clerk shall provide a copy of this order to the parties.

SIGNED at Galveston, Texas, on September 29, 2016.



GEORGE C. HANKS, JR.
UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas

ENTERED

September 29, 2016

David J. Bradley, Clerk

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

GREGORY DONEL JOHNSON,
TDCJ #01779137,

Petitioner,

V.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

§ 87(2)(b)

CIVIL ACTION NO. 3:16-CV-244

FINAL JUDGMENT

For the reasons set forth in the Court's simultaneously issued *Memorandum Opinion and Order*, this case is **DISMISSED WITH PREJUDICE**. The habeas corpus petition is **DENIED**.

This is a FINAL JUDGMENT.

The Clerk will provide a copy of this order to the parties.

SIGNED at Galveston, Texas, on September 29, 2016.

George C. Zerk

GEORGE C. HANKS, JR.
UNITED STATES DISTRICT JUDGE

ENTERED

January 03, 2017

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISIONGREGORY DONEL JOHNSON,
TDCJ #01779137,
Petitioner,
VS.§
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CIVIL ACTION NO. 3:16-CV-244

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.**ORDER**

Gregory Donel Johnson (TDCJ #01779137) is a state inmate incarcerated in the Texas Department of Criminal Justice - Correctional Institutions Division ("TDCJ") who filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 to challenge the result of a prison disciplinary proceeding. The Court dismissed the petition for failure to state a cognizable claim (Dkt. 5). Johnson has filed a notice of appeal and seeks permission to proceed *in forma pauperis* ("IFP") on appeal.

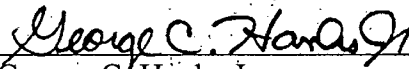
The Court will grant Johnson's motion. Although this Court denied a certificate of appealability because Johnson did not make a substantial showing of the denial of a Constitutional right, the Court cannot say that an appeal from the final judgment in this case would be objectively frivolous. *United States v. Youngblood*, 116 F.3d 1113, 1115 (5th Cir. 1997); *see also Thomas v. Zatecky*, 712 F.3d 1004, 1006 (7th Cir. 2013) ("A frivolous appeal never meets the standard for a certificate of appealability. But an appeal can be non-frivolous and still flunk the standard established by [28 U.S.C.] § 2253(c)(2),

which conditions a certificate of appealability on a substantial showing of the denial of a constitutional right.”) (quotation marks omitted).

The Court **GRANTS** Johnson’s motion for leave to appeal IFP (Dkt. 13). The Court will not assess an appellate filing fee. *Garza v. Thaler*, 585 F.3d 888, 889–90 (5th Cir. 2009).

The Clerk of this Court shall send a copy of this Order to the parties and to the Clerk of Court of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit docket number is 16-41618.

SIGNED at Galveston, Texas, this 3rd day of January, 2017.



George C. Hanks Jr.
United States District Judge

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