United States Court of Appeals for the Fifth Circuit

No. 25-40069

RODNEY JAMES DILWORTH,

Petitioner—Appellant,

versus

ERIC GUERRERO, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Eastern District of Texas
USDC No. 4:21-CV-659

ORDER:

Rodney James Dilworth, Texas prisoner # 00632515, was convicted of unauthorized use of a motor vehicle and attempted murder for which he was sentenced, respectively, to 60 years and 99 years in prison. He was released on parole in 2007. He filed in the district court a federal habeas application to challenge the subsequent revocation of his parole and his continued incarceration pursuant to that revocation. Dilworth now moves for a certificate of appealability (COA) to appeal the dismissal of his habeas application, which the district court construed as a 28 U.S.C. § 2254

application, and the denial of his Federal Rule of Civil Procedure 59(e) motion.

In his pro se COA brief, Dilworth contends that the district court erred by declining to construe his claims as arising under 28 U.S.C. § 2241 instead of § 2254 and by dismissing on the merits his due process claims. He further contends that the district court abused its discretion by rejecting his Rule 59(e) argument that the court, in violation of *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011), had improperly denied § 2254 relief based upon documents that were not before the state habeas court. Dilworth does not address, and has therefore waived any challenge to, the dismissal of his claim that the evidence was insufficient to show that he had violated one of his parole conditions by intentionally failing to pay his supervision fees. *See Yohey v. Collins*, 985 F.2d 222, 224–25 (5th Cir. 1993); *Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

To obtain a COA with respect to the denial of a § 2254 application, a prisoner must make a "substantial showing of the denial of a constitutional right" by "showing that reasonable jurists could debate whether . . . the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (citation modified); *see* 28 U.S.C. § 2253(c)(2). When constitutional claims have been rejected on the merits, the prisoner must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. To obtain a COA to appeal the denial of a Rule 59(e) motion, a prisoner must show that jurists of reason could conclude that the district court abused its discretion by denying the motion. *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

Dilworth fails to make the necessary showings. Accordingly, his motion for a COA is DENIED. His motion for leave to proceed in forma pauperis is also DENIED.

Dana M. Douglas

DANA M. DOUGLAS
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RODNEY JAMES DILWORTH, #632515	§	
	§	
VS.	§	**CIVIL ACTION NO. 4:21cv659**
	§	
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pro se Petitioner Rodney James Dilworth, an inmate confined in the Texas prison system, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred to United States Magistrate Judge Kimberly C. Priest Johnson for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636, and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

I. PROCEDURAL BACKGROUND

Petitioner is challenging his parole revocation. On November 18, 1992, Petitioner was convicted of attempted murder and unauthorized use of a motor vehicle in Collin County, Texas and sentenced to ninety-nine years' confinement on the attempted murder conviction and sixty years' confinement on the unauthorized use of a motor vehicle conviction, Cause Numbers 296-80696-92 and 296-80697-92. (Dkt. #18-22, pp. 43-45; Dkt. #17-1,[1] p. 3).

On May 14, 2007, Petitioner was released to parole. (Dkt. #17-1, p. 3). On December 1, 2018, the TDCJ Parole Division issued a warrant for his arrest. (Dkt. #17-1, pp. 3, 4). On July 17, 2019, Petitioner pled guilty to aggravated assault with a deadly weapon and was placed on five

[1] The Director filed as Exhibit A the Affidavit of Charley Valdez, Program Supervisor III for the Classification and Records Department of the Texas Criminal Justice/Correctional Institutions Division. (Dkt. #17-1).

years deferred-adjudication probation. (Dkt. #18-25, pp. 51-60; Dkt. #18-26, p. 2). Following a hearing, his parole was revoked on August 20, 2019, and he was transferred to TDCJ custody on September 11, 2019. (Dkt. #17-1, p. 4; Dkt. #17-2, pp. 3, 4; Dkt. #18-26, pp. 1-3).

Petitioner filed a motion to reopen the parole revocation hearing. (Dkt. #18-24, p. 22). On September 24, 2019, the Parole Board granted Petitioner's motion. (Dkt. #18-24, p. 22). Petitioner's second revocation hearing was held on November 4, 2019. (Dkt. #17-2, pp. 4, 5). On November 15, 2019, the Parole Board voted to continue the revocation action in effect as of August 20, 2019. (Dkt. #17-2, p. 9).

Petitioner filed another motion to reopen the parole revocation hearing. (Dkt. #18-24, p. 23). On February 4, 2020, the Parole Board granted his motion. (Dkt. #18-24, p. 23). Petitioner's third revocation hearing was held on September 2, 2020. (Dkt. #17-3, p. 4). On November 3, 2020, the Parole Board voted to continue the revocation action in effect as of August 20, 2019. (Dkt. #17-3, pp. 10-11). Following the Parole Board's final disposition on November 3, 2020, Petitioner filed a third motion to reopen the parole revocation hearing, which the Parole Board denied on February 22, 2021. (Dkt. #17-4, p. 2).

On December 1, 2020,[2] Petitioner filed an application for state habeas corpus relief challenging the revocation of his parole. (Dkt. #18-22, pp. 48-63). He filed an amended state habeas application on December 4, 2020. (Dkt. #18-22, pp. 74-76; Dkt. #18-23, pp. 1-5). On May 24, 2021, the state habeas trial court entered its Findings of Fact and Conclusions of Law, recommending that Petitioner's application be denied. (Dkt. #18-26, pp. 8-13). On July 7, 2021, the Texas Court of Criminal Appeals ("TCCA") denied the application without a written order on

[2] The prison mailbox rule applies to state habeas applications. *Richards v. Thaler*, 710 F.3d 573, 578-79 (5th Cir. 2013). Petitioner signed the state habeas application on December 1, 2020, and it was filed by the trial court on December 4, 2020. (Dkt. #18-22, pp. 48, 63).

the findings of the state habeas trial court without a hearing and on the TCCA's independent review of the record. (Dkt. #18-16).

Petitioner filed the instant petition on August 16, 2021.[3] (Dkt. #1). Petitioner asserts the following claims for relief:

Claim 1: Petitioner is confined pursuant to a void revocation order because his revocation was set aside when the Parole Board twice granted his motions to reopen revocation hearing.

Claim 2: Petitioner's revocation is void due to the Parole Board's failure to timely dispose of his revocation charges.

Claim 6: The evidence was insufficient to prove that Petitioner intentionally violated the terms of his parole by failing to pay supervision fees.

(Dkt. #1, pp. 6-7, 10).[4]

On April 29, 2022, the Director filed a response (Dkt. #17), asserting Petitioner's claims are not cognizable on federal habeas review and without merit. Petitioner filed two replies. (Dkt. ##19, 22).

II. STANDARD FOR FEDERAL HABEAS CORPUS RELIEF

The role of federal courts in reviewing habeas corpus petitions by prisoners in state custody is exceedingly narrow. A person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery v. Collins*, 988 F.2d 1354, 1367 (5th Cir. 1993); *Malchi v. Thaler*, 211 F.3d 953, 957 (5th Cir. 2000). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *West v. Johnson*, 92 F.3d 1385, 1404 (5th Cir.

[3] A *pro se* prisoner's habeas corpus petition is deemed filed, for the purposes of the Antiterrorism and Effective Death Penalty Act of 1996, when the prisoner delivers the papers to prison authorities for mailing. *Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002); *Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998). Petitioner declared under penalty of perjury that he deposited the petition in the prison mailing system on August 16, 2021. (Dkt. #1, p. 13).

[4] On Petitioner's own motion, Petitioner's Claims Three, Four, and Five were dismissed. (Dkt. #56).

1996); *Brown v. Dretke*, 419 F.3d 365, 376 (5th Cir. 2005). In the course of reviewing state proceedings, a federal court does not sit as a super state appellate court. *Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986).

The prospect of federal courts granting habeas corpus relief to state prisoners has been further limited by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The new provisions of § 2254(d) provide that an application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) was contrary to federal law then clearly established in the holdings of the Supreme Court; (2) involved an unreasonable application of clearly established Supreme Court precedent; or (3) was based on an unreasonable determination of the facts in light of the record before the state court. *See Harrington v. Richter*, 562 U.S. 86, 97-98 (2011).

The statutory provision requires federal courts to be deferential to habeas corpus decisions on the merits by state courts. *Renico v. Lett*, 559 U.S. 766, 773 (2010); *Moore v. Cockrell*, 313 F.3d 880, 881 (5th Cir. 2002). Furthermore, a state court's factual findings are entitled to deference and are presumed correct unless the petitioner rebuts those findings with clear and convincing evidence. *Wooten v. Thaler*, 598 F.3d 215, 218 (5th Cir. 2010); *Garcia v. Quarterman*, 454 F.3d 441, 444 (5th Cir. 2006); *Valdez v. Cockrell*, 274 F.3d 941, 947 (5th Cir. 2001); *see also Moore*, 313 F.3d at 881 (the statutory provision requires federal courts to be deferential to habeas corpus decisions on the merits by state courts). This deference extends not only to express findings of fact, but also to any implicit findings of the state court. *Garcia*, 454 F.3d at 444-45 (citing *Summers v. Dretke*, 431 F.3d 861, 876 (5th Cir. 2005)).

A decision by a state court is "contrary to" the Supreme Court's clearly established law if it "applies a rule that contradicts the law set forth in" the Supreme Court's cases. *Brown v. Payton*,

544 U.S. 133, 141 (2005) (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). A federal court's review of a decision based on the "unreasonable application" test should only review the "state court's 'decision' and not the written opinion explaining that decision." *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002). "Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas corpus court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411. Rather, that application must be objectively unreasonable. *Id.* at 409. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree'" on the correctness of the decision. *Richter*, 562 U.S. at 87 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98; *see Johnson v. Williams*, 568 U.S. 289, 293 (2013) (holding there is a rebuttable presumption that the federal claim was adjudicated on the merits when the state court addresses some claims, but not others, in its opinion).

"In Texas writ jurisprudence, usually a denial of relief rather than a 'dismissal' of the claim by the Court of Criminal Appeals disposes of the merits of a claim." *Singleton v. Johnson*, 178 F.3d 381, 384 (5th Cir. 1999); *see also Henderson v. Cockrell,* 333 F.3d 592, 598 (5th Cir. 2003); *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) (holding a "denial" signifies an adjudication on the merits while a "dismissal" means the claim was declined on grounds other than the merits). Thus, a state application that is denied without written order by the TCCA is an adjudication on the merits. *See Singleton*, 178 F.3d at 384; *Ex parte Torres*, 943 S.W.2d at 472. Where the decision is a summary denial or affirmance, however, a "federal [habeas] court should

'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "presume that the unexplained decision adopted the same reasoning."[5] *Wilson v. Sellers*, 584 U.S. 122, 125 (2018).

In addition to the standard of review imposed by the AEDPA, the petitioner must also show that any constitutional error had a "substantial and injurious effect or influence" on the verdict to be entitled to habeas relief. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The Supreme Court explained that, while the passage of the AEDPA "announced certain new conditions to [habeas] relief," it did not supersede or replace the harmless error standard announced in *Brecht*. *Brown v. Davenport*, 596 U.S. 118, 134 (2022). In other words, a habeas petitioner must also satisfy *Brecht*, even if the AEDPA applies. *See id.* ("[A] federal court must *deny* relief to a state habeas petitioner who fails to satisfy either [*Brecht*] or AEDPA. But to *grant* relief, a court must find that the petition has cleared both tests.") (emphasis in original).

Additionally, federal habeas relief is foreclosed if a claim: (1) is procedurally barred as a consequence of a failure to comply with state procedural rules, *Coleman v. Thompson*, 501 U.S. 722 (1991); or (2) seeks retroactive application of a new rule of law to a conviction that was final before the rule was announced, *Teague v. Lane*, 489 U.S. 288 (1989).

Thus, the federal writ serves as a "'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Richter*, 562 U.S. at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)). "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102.

[5] The Director may rebut this presumption by showing that the most recent state court's unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were argued or supported by the record that the state court reviewed. *See Wilson*, 584 U.S. at 125-26; *Wesson v. Dir., TDCJ-CID*, No. 1:19-CV-00187-H, 2022 WL 3928513, at *3 (N.D. Tex. Aug. 30, 2022), *appeal dismissed sub nom. Wesson v. Lumpkin*, No. 22-10990, 2023 WL 2881423 (5th Cir. Mar. 10, 2023).

III. ANALYSIS

A. Void Revocation Order (Claims 1 and 2)

In Claims 1 and 2, Petitioner argues he is confined pursuant to a void revocation order. Specifically, he asserts the parole revocation is void because: (1) it was set aside when the Parole Board twice granted his motions to reopen the parole revocation hearing, first on September 24, 2019, and again on February 4, 2020; and (2) the Parole Board failed to timely provide a final disposition of his revocation charges in violation of state procedure or its own administrative rules and regulations. (Dkt. #1, pp. 6-7; Dkt. #1-1).

"Federal habeas relief cannot be had 'absent the allegation by a [petitioner] that he or she has been deprived of some right secured to him or her by the United States Constitution or the laws of the United States.'" *Malchi*, 211 F.3d at 957 (quoting *Orellana v. Kyle*, 65 F.3d 29, 31 (5th Cir. 1995)). Arguments that the Parole Board violated state procedure and its own administrative rules and regulations do not, without more, present an issue of constitutional magnitude, and thus are not cognizable in a federal habeas corpus proceeding. *See, e.g.*, *Myers v. Klevenhagen*, 97 F.3d 91, 94 (5th Cir. 1996) (prison officials' failure to follow its own administrative rules and regulations does not raise federal constitutional issues as long as minimum constitutional requirements are met); *Hernandez v. Estelle*, 788 F.2d 1154, 1158 (5th Cir. 1986) (the failure of the Texas prison system to comply with its own rules does not amount to a constitutional violation); *Iruegas-Maciel v. Dobre*, 67 F. App'x 253 (5th Cir. 2003) (applying *Hernandez* rule in the context of habeas corpus); *Barksdale v. Stephens*, No. 3:15-CV-3080-L-BK, 2016 WL 3072197, at *3 (N.D. Tex. May 3, 2016) (the petitioner's challenge to the timing of the final revocation hearing raises only a violation of state law), *report and recommendation adopted sub nom. Barksdale v. Davis*, No. 3:15-CV-3080-L, 2016 WL 3057672 (N.D. Tex. May 31, 2016), aff'd, 726 F. App'x 244 (5th Cir.

2018); *Knod v. Dir., TDCJ-CID*, No. 6:11CV342, 2012 WL 3045004, at *4 (E.D. Tex. Apr. 30, 2012) ("The failure of the Texas prison system to comply with its own rules does not amount to a constitutional violation."), *report and recommendation adopted*, No. 6:11CV342, 2012 WL 3044374 (E.D. Tex. July 24, 2012); *Davis v. Cockrell*, No. 4:00-CV-1767-A, 2001 WL 1388026, at *6 (N.D. Tex. Nov. 5, 2001) (allegations that the Texas Board of Pardons and Parole failed to conduct revocation hearings within the statutory time period in violation of state law principles is not cognizable in this federal habeas corpus proceeding); *Morris v. Johnson*, No. 2:97-CV-469, 2001 WL 169587, at *3 (N.D. Tex. Jan.17, 2001) (same). Accordingly, Petitioner's argument that the Parole Board violated state procedure or its own administrative rules and regulations by failing to timely provide a final disposition of his revocation charges is not cognizable in this § 2254 proceeding.

Moreover, Petitioner's argument that his revocation order was set aside and thus void is without merit. As previously stated: Petitioner's parole was initially revoked on August 20, 2019, following a revocation hearing; the Parole Board granted Petitioner's motion to reopen the parole revocation hearing on September 24, 2019; Petitioner's second revocation hearing was held on November 4, 2019, and on November 15, 2019, the Parole Board voted to continue the revocation action in effect as of August 20, 2019; the Parole Board granted Petitioner's second motion to reopen the parole revocation hearing on February 4, 2020; Petitioner's third revocation hearing was held on September 2, 2020, and on November 3, 2020, the Parole Board voted to continue the revocation action in effect as of August 20, 2019; and the Parole Board denied Petitioner's third motion to reopen the parole revocation hearing on February 22, 2021. (Dkt. #17-4, p. 2). Thus, the final disposition by the Parole Board was to continue Petitioner's revocation, not set it aside.

Finally, Petitioner does not allege—and the parole record does not reflect—that he was denied any of the procedural protections guaranteed by *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). In *Morrissey*, the Supreme Court found that a person on parole is not due the full panoply of rights that apply in a criminal prosecution. 408 U.S. 471; *Williams v. Johnson*, 171 F.3d 300, 304 (5th Cir. 1999); *see also Barnes v. Johnson*, 184 F.3d 451 (5th Cir. 1999) (applying *Morrissey* standard to mandatory supervision revocation proceeding). Nevertheless, some procedural safeguards are necessary to protect the limited liberty interest at stake in a revocation hearing. *Barnes*, 184 F.3d at 454. At the revocation hearing, a "parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." *Morrissey*, 408 U.S. at 488. The Supreme Court held that a parolee is entitled to: (1) written notice of the alleged violation; (2) disclosure of the evidence against him; (3) an opportunity to be heard personally and to present evidence; (4) confront and cross-examine adverse witnesses, unless there is good cause for not allowing confrontation; (5) a hearing before a neutral body; and (6) a written statement describing the evidence reviewed and the reasons for revoking parole. *Id.* at 489; *Barnes*, 184 F.3d at 484.

The parole record reflects Petitioner was afforded constitutional due process at the relevant, most recent revocation hearing. (*See generally* Dkt. #17-3). Petitioner received written notice of his rights and the alleged parole violations; he was notified of the evidence against him; a hearing was held on September 2, 2020, during which he had an opportunity to be heard personally and present evidence; the revocation hearing was held before a neutral decisionmaker (Dkt. #17-3, p. 6 ("There was not a challenge to the neutrality of the Hearing Officer."); and Petitioner was given a written statement as to the evidence relied on and the reasons for revoking parole.[6] The hearing

[6] Petitioner refused to sign the HS-135R form, which notified him of the Parole Board's disposition on December 3, 2020. (Dkt. #17-3, p. 12). Both the parole officer and corrections officer signed the form to confirm Petitioner's

officer denied Petitioner the opportunity to confront and cross-examine witnesses in order to contest the aggravated assault charge, which formed the basis of three of the parole revocation allegations, finding "[g]ood cause does exist to disallow" the confrontation and cross-examination of the witnesses "[a]s the case [has] been tried in the court of law and will not be Re-litigated in the Parole Hearing." (Dkt. #17-3, p. 7).

In sum, the Court finds Petitioner's Claims 1 and 2 are not cognizable on federal habeas review to the extent they allege violations of state procedure or the Parole Board's own administrative rules and regulations; alternatively, Petitioner's Claims 1 and 2 are without merit to the extent they allege a federal due process violation.

B. Sufficiency of the Evidence (Claim 6)

Petitioner also contends there was insufficient evidence to revoke his parole on the grounds that he failed to pay supervision fees. (Dkt. #1, p. 10). Specifically, Petitioner argues the evidence was insufficient to prove that he "intentionally failed" to pay the fees. (Dkt. #1, p. 10).

"A revocation proceeding is not a criminal trial." *Manzano v. Dretke*, No. 3:02-CV-0799-L, 2004 WL 583591, at *3 (N.D. Tex. Mar. 23, 2004). A criminal prosecution is governed by the reasonable doubt standard, while the State's burden of proof in a parole revocation hearing is considerably less. *See Villarreal v. U.S. Parole Comm'n*, 985 F.2d 835, 839 (5th Cir. 1993) (stating the standard of review applied by a federal court considering a habeas petition based on a parole revocation is "quite circumscribed"). A federal court "simply ask[s] whether 'there is some evidence' in the record to support the . . . decision"; "[o]nce that minimum threshold is met," the court must affirm. *Id.*; *see also Williams v. Dir., TDCJ-CID*, No. 9:07CV67, 2007 WL 2408529, at *5 (E.D. Tex. Aug. 21, 2007). The decision will be affirmed unless the decision "is flagrant,

refusal. Furthermore, the parole record reflects that Petitioner must have been timely notified of the revocation, because he asked to reopen the hearing on December 29, 2020. (Dkt. #17-4).

unwarranted, or unauthorized." *Maddox v. U.S. Parole Comm'n*, 821 F.2d 997, 1000 (5th Cir. 1987). As previously stated, the Court must review the state proceedings to determine if they resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. The Court must further consider whether the state court proceedings resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence.

On state habeas corpus review, the trial court rejected Petitioner's insufficiency of the argument claim, finding that, at the revocation hearing, Petitioner admitted he had not paid the fees. (Dkt. #18-26, p. 12, ¶¶ 31-32). The TCCA denied Petitioner's application based on the state habeas trial court's findings and on the TCCA's independent review of the record.

The revocation records provided documentation showing there was at least some evidence to support the revocation based on Petitioner's failure to pay fees. Petitioner was accused of violating several rules/conditions of his release, including as relevant here:

> Rule #: 9C: I shall pay, during the period of my supervision, any and all outstanding fines, court costs and fees adjudged against me, to the clerk of the court of conviction, and I Agree to provide by Parole Officer with documentation verifying payment of said amounts. I shall pay a supervision fee for each month that I am required to report to a Parole Officer as instructed by my Parole Officer.

(Dkt. #17-3, p. 3). Rule #9C does not state that Petitioner must "intentionally" fail to pay fees in order to violate the condition.

In his federal petition, Petitioner admits that "a computer-generated fee sheet [submitted by his Parole Office] . . . reflected [that he] was assessed $1460.00 in fees and paid $1420.00." (Dkt. #1, p. 10). Petitioner does not refute the validity of this fee sheet. Thus, by Petitioner's own admission, there was some evidence to support the Parole Board's finding that he violated Rule

#9C. Furthermore, Petitioner's parole revocation is also supported by evidence of other rules/conditions violations, which were based on his aggravated assault charge.

Because there is "some evidence" to support the Parole Board's decision to revoke Petitioner's parole, the Court finds the state court proceedings did not result in a decision that is contrary to federal law or based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. This claim does not warrant relief and should be denied.

IV. CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the Court of Appeals from a final order in a proceeding under 28 U.S.C. § 2254 unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). Although Petitioner has not yet filed a notice of appeal, it is respectfully recommended that the Court, nonetheless, address whether Petitioner would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (holding that a district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before that court," noting that "[f]urther briefing and argument on the very issues the court has just ruled on would be repetitious").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a substantial showing of the denial of a constitutional right in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district

court's assessment of the constitutional claims debatable or wrong. *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). When a district court denies a motion on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

In this case, it is respectfully recommended that reasonable jurists could not debate the dismissal of Petitioner's § 2254 petition on procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is respectfully recommended that the Court find that Petitioner is not entitled to a certificate of appealability.

V. RECOMMENDATION

It is recommended that the above-styled petition filed under 28 U.S.C. § 2254 be dismissed with prejudice. It is further recommended that a certificate of appealability be denied.

Within fourteen days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(c). To be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district

court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

So ORDERED and SIGNED this 25th day of June, 2024.

KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE

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