

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

DESIREE ANN SHAW §  
v. § CIVIL ACTION NO. 9:07cv146  
DIRECTOR, TDCJ-CID §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION  
OF THE UNITED STATES MAGISTRATE JUDGE  
AND DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT

The Petitioner Desiree Shaw, proceeding *pro se*, filed this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the legality of her confinement. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

This is the second federal habeas corpus petition which Shaw has filed concerning this conviction. Her first petition was denied on January 4, 2006, because of the expiration of the statute of limitations, and the Fifth Circuit denied a certificate of appealability on November 14, 2006.

The present petition was dismissed on July 17, 2007, because Shaw failed to show that she had secured leave from the Fifth Circuit Court of Appeals to file a successive petition, as required by 28 U.S.C. §2244(b). Following the dismissal, Shaw filed a motion for a hearing on August 20 and a motion to compel discovery on August 22, which were denied on August 30, 2007.

On September 7, 2007, Shaw filed a motion for a declaratory judgment, and then filed objections to the Report recommending dismissal and a motion to stay or hold her case in abeyance. The Magistrate Judge construed these motions together as a motion to alter or amend the judgment under Rule 60(b), Fed. R. Civ. P.

On September 13, 2007, the Magistrate Judge recommended that Shaw's request to alter or amend the judgment be denied. In so doing, the Magistrate Judge observed that neither the motion for a declaratory judgment nor Shaw's objections addressed the central issue in the case, which is the fact that Shaw attempted to present a successive petition without first obtaining permission from the Fifth Circuit. Shaw attempted to appeal the Report of the Magistrate Judge, but the appeal was dismissed because such reports and recommendations are not appealable. This Report was adopted by the Court and Shaw's motions were denied on October 9, 2007.

Shaw did not appeal the Court's denial of her motions, but filed yet another Rule 60 motion for reconsideration on February 8, 2008. In this motion, she again argues that the state court's dismissal of her state habeas petition was improper because it was done without a hearing, that she is thereby entitled to a hearing in federal court, she has newly discovered evidence, and her claim of actual innocence should toll the statute of limitations.

On February 13, 2008, the Magistrate Judge issued a Report recommending that Shaw's Rule 60 motion be denied. The Magistrate Judge observed that all of Shaw's claims have been heard and rejected by the district court and by the Fifth Circuit Court of Appeals. The Magistrate Judge also noted that Shaw's motion failed to address the central issue in her case, which is the fact that her petition is successive and she cannot pursue it until the Fifth Circuit grants her leave to do so. The Magistrate Judge stated that in the event that Shaw receives permission from the Fifth Circuit to pursue a successive petition, her claims and issues will be addressed by the district court at that time, but until she secures such permission, the district court lacks jurisdiction to consider her claims. Crone v. Cockrell, 324 F.3d 833, 838 (5th Cir. 2003).

Shaw filed objections to the Magistrate Judge's Report, together with a request for a certificate of appealability, on February 22, 2008. In her objections, Shaw says that permission from the Fifth Circuit to pursue a successive petition is "virtually impossible to obtain without the district court's certificate of probable cause." She says that a Rule 60 motion which attacks only the procedural basis for an earlier dismissal is not a successive petition and does not require the approval

of the circuit court. Shaw then argues that she is entitled to a certificate of appealability and discusses the merits of her claims at some length.

While it is true that Rule 60 motions challenging only the procedural basis for an earlier dismissal are not "successive petitions," Shaw has not shown how this is relevant. The present action was not commenced by a Rule 60 motion, but by an application for the writ of habeas corpus (docket no. 1).. In addition, this application did not challenge only the procedural basis for the dismissal of her first petition, but expressly argued the merits of her claims. This application was denied because Shaw has not obtained permission to pursue a successive petition, and Shaw has failed to show that this was improper.

In her latest Rule 60 motion, Shaw says that permission to file a successive petition is "almost impossible to obtain" without the issuance of a certificate of probable cause. In fact, the obtaining of permission to file a successive petition is governed by the criteria set forth in 28 U.S.C. §2244, and is a decision made entirely by the Court of Appeals; the district court need not issue a certificate of probable cause, nor a certificate of appealability, as a prerequisite for the granting of permission to pursue a successive petition.

Shaw's present petition was filed without the receipt of such permission, and so the district court lacks jurisdiction to consider it. While she discusses at length the merits of her claims, including her contentions that the prosecution's evidence against her was "weak," she was denied the right to call witnesses, trial counsel was ineffective, a reasonable trier of fact would not have found her guilty beyond a reasonable doubt, the State failed to turn over exculpatory evidence, the police investigator restaged the scene after cameras arrived, elected officials (the judge or the prosecutor, or both) were under the undue influence of a county commissioner, she was improperly denied an evidentiary hearing in state court, and she is actually innocent, these claims do not confer jurisdiction on the district court where jurisdiction is absent as a result of the failure to obtain permission to pursue a successive petition. As the Magistrate Judge stated, the issues and claims which Shaw raises will be addressed at such time as she secures permission from the Fifth Circuit

Court of Appeals to pursue a successive petition, but until she secures such permission, the district court lacks jurisdiction to consider any claims raised in a successive petition,

The Court has conducted a careful *de novo* review of the pleadings in this cause, including the Petitioner's pleadings, the Report of the Magistrate Judge, and the Petitioner's objections thereto, as well as all other pleadings, records, and documents in the case. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the objections of the Petitioner are without merit. It is accordingly

ORDERED that the Petitioner's objections are overruled and that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the Petitioner's motion to set aside the judgment (docket no. 36), as well as her motion for a certificate of appealability (docket no. 41) are hereby DENIED. The denials of these motions are without prejudice to Shaw's right to seek permission from the Fifth Circuit Court of Appeals to file a successive petition.

So ORDERED and SIGNED this 19 day of March, 2008.



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Ron Clark, United States District Judge