

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

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

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
ON PETITIONER'S POST-JUDGMENT MOTIONS

The Petitioner Desiree Shaw, an inmate of the Texas Department of Criminal Justice, Correctional Institutions Division proceeding *pro se*, filed this application for the writ of habeas corpus under 28 U.S.C. §2254 challenging the validity of her conviction. The petition was referred to the undersigned 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 complaining of this same conviction. Her first petition was styled Shaw v. Director, TDCJ-ID, Civil Action No. 9:05cv32, and was dismissed on January 4, 2006, because the statute of limitations had expired. Shaw filed a notice of appeal and an amended notice of appeal, and the Fifth Circuit docketed them separately (assigning case no.'s 06-40170 and 06-40300). The appeal in case no. 06-40300 was dismissed on April 19, 2006, for failure to pay the docketing fee. On October 3, 2006, Shaw filed a motion in the Fifth Circuit in her other case to compel the State to show cause for not producing discovery she had sought. On November 14, 2006, the Fifth Circuit entered an order denying the motion to compel, and also denying Shaw's request for a certificate of appealability.

On July 17, 2007, the present habeas petition was dismissed because Shaw failed to show that she had received permission from the Fifth Circuit Court of Appeals to file a successive petition,

as required by 28 U.S.C. §2244(b). On August 20, 2007, Shaw filed a motion for a hearing. She then filed a motion to compel discovery on August 22. These motions were denied on August 30, 2007.

On September 7, 2007, Shaw filed a motion for a declaratory judgment, following this with objections to the Report of the Magistrate Judge recommending dismissal of her case, as well as a motion to stay or to hold her case in abeyance. In the interests of justice, these motions will be considered together as a motion to alter or amend the judgment under Rule 60(b), Fed. R. Civ. P.

In her motion for a declaratory judgment, Shaw essentially argues that her first habeas petition should not have been dismissed because she has evidence that she is actually innocent. She also complains that the trial court failed to carry out a mandamus order handed down by the Texas Court of Criminal Appeals.

In her objections to the Magistrate Judge's Report, Shaw asks that the Court hold her case in abeyance so that she can return to state court on unexhausted claims. She says that she has evidence making it more likely than not that no reasonable juror would have convicted her, and says that the delay in exhausting her claims was due to no fault of her own, but rather the dilatory actions of the state courts.

Neither of Shaw's motions addresses the central issue in the present case, which is the fact that she is seeking to present a successive petition in the district court without obtaining permission to do so from the Fifth Circuit Court of Appeals, as required by 28 U.S.C. §2244(b). The present petition cannot be used to re-litigate the issues in her first federal habeas petition, which was dismissed in the district court and a certificate of appealability denied by the appellate court. In the event that Shaw secures permission from the Fifth Circuit Court of Appeals to file a successive petition, the issues and claims which she presents will be addressed at that time. Until she secures such permission, the district court lacks jurisdiction to consider any claims raised in a successive petition. Crone v. Cockrell, 324 F.3d 833, 838 (5th Cir. 2003).

RECOMMENDATION

It is accordingly recommended that the Petitioner's motion for a declaratory judgment (docket no. 16) and motion for stay and abeyance (docket no. 17) be DENIED. It is further recommended that the Clerk be instructed to accept no further motions in the present case, save and except for a notice of appeal of the present order and a request for leave to proceed *in forma pauperis* on appeal should a notice of appeal be filed.

A party's failure to file objections to the findings, conclusions, and recommendations contained in this Report within ten days after service with a copy thereof shall bar that party from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

So ORDERED and SIGNED this 13 day of September, 2007.


JUDITH K. GUTHRIE
UNITED STATES MAGISTRATE JUDGE

*Schlup gateway
for Rule 60(b)
does not require
5th Circuit permission.