IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-50288

WILFRED WARREN SHEPPARD,

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 Western District of Texas

O R D E R:

Wilfred Warren Sheppard, former Texas prisoner # 201700009139, seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 application for failure to exhaust all of his claims in state court. In that application, Sheppard challenged his state court conviction and sentence for criminal mischief. He raised numerous claims of trial and sentencing error and asserted that he had been denied the effective assistance of counsel both at trial and on appeal.

We will issue a COA only if Sheppard has "made a substantial showing of the denial of a constitutional right." § 2253(c)(2). When, as in this case, an applicant is appealing a procedural ruling, a COA may issue only if he shows that "jurists of reason would find it debatable whether the petition states a

valid claim of the denial of a constitutional right and . . . would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

After his direct appeal was denied, Sheppard did not file a petition for state habeas relief. He contends, however, that he adequately raised each of his claims in state court on direct review and that the district court erred in determining that he had not exhausted all of his state court remedies. He also argues that the district court should have considered his claims despite any failure to exhaust because he established exceptional circumstances. Therefore, he argues, the district court erred in dismissing his § 2254 application.

As a general rule, a prisoner must fully exhaust his state court remedies before seeking habeas relief in federal court. § 2254(b)(1)(A); *see Mercadel v. Cain*, 179 F.3d 271, 275 (5th Cir. 1999). In *Rose v. Lundy*, the Supreme Court held that mixed § 2254 applications containing both exhausted and unexhausted claims should be dismissed without prejudice so the applicant can present his unexhausted claims to the state court in the first instance. 455 U.S. 509, 510, 518-22 (1982).

I. Exhaustion Requirement

The exhaustion requirement is satisfied when the substance of a federal habeas claim has been presented to the highest state court either through direct appeal or on collateral review. *Hatten v. Quarterman*, 570 F.3d 595, 605 (5th Cir. 2009). The substance of a claim is fairly presented only when the applicant files his claims "in a procedurally proper manner according to the rules of the state courts." *Mercadel*, 179 F.3d at 275 (cleaned up). To have fairly presented a claim on direct review in Texas state court, the applicant must have raised the issue both before the appeals court and in his petition for

discretionary review. *Myers v. Collins*, 919 F.2d 1074, 1076 (5th Cir. 1990). A claim that was raised for the first and only time in a petition for discretionary review is not exhausted. *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

Only one of Sheppard's claims—that he was denied the effective assistance of counsel because his attorney failed to request a jury instruction on the defense of necessity—was exhausted in the state courts. Sheppard presented that claim to the state appeals court in a procedurally proper manner in his appellate brief, and it was considered by the appeals court. While Sheppard argued in a pro-se brief that the trial judge was biased against him and unconstitutionally relied on the testimony of the state's sentencing witness, those claims were not presented in a procedurally proper manner because Sheppard was represented by counsel on appeal and lacked authority to file a pro se pleading. *See Satterwhite v. Lynaugh*, 886 F.2d 90, 92-93 (5th Cir. 1989). Because Sheppard did not present the claims in a procedurally proper manner, he effectively raised them for the first time in his petition for discretionary review to the TCCA, and claims raised for the first and only time in a petition for discretionary review, are not exhausted for purposes of § 2254. *See Mercadel*, 179 F.3d at 275; *Castille*, 489 U.S. at 351; *Satterwhite*, 886 F.2d at 92 n.2 (noting that discretionary review in the TCCA is limited to issues that were properly presented to the appeals court).

Sheppard suggests that his remaining claims are exhausted because the documents he provided in support of his § 2254 application were "presented and reviewable within his petitions for discretionary review." Even assuming arguendo that Sheppard raised those claims in the TCCA, they are not exhausted for purposes of § 2254 because they were raised for the first time in a petition for discretionary review. *See Castille*, 489 U.S. at 351. Jurists of

reason would not debate whether the district court correctly found that Sheppard failed to exhaust all of his § 2254 claims. *See Slack*, 529 U.S. at 484.

II. Exceptional Circumstances

Sheppard also argues that he has established exceptional circumstances, and therefore the district court should have considered his claims despite any failure to exhaust. He contends that he filed his § 2254 application to avoid having it barred by the one-year limitations period in 28 U.S.C. § 2244(d). Sheppard has cited no authority to suggest that application of the § 2244(d) limitations period constitutes the type of exceptional circumstance that would excuse his failure to exhaust, and his claims were not in danger of being time barred when he filed his § 2254 application. His conviction did not become final until February 26, 2018, when the Supreme Court denied his petition for rehearing of his petition for a writ of certiorari. *See* § 2244(d)(1)(A); *Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003). When Sheppard's § 2254 application was received on March 28, 2018, he had, even without tolling, almost 11 months remaining on the § 2244(d) limitations period in which to exhaust his claims in state court. Jurists of reason would not debate whether the district court was correct in determining that Sheppard failed to allege exceptional circumstances that would excuse the exhaustion requirement. *See Slack*, 529 U.S. at 484.

III. Dismissal Without Prejudice

When the district court dismissed Sheppard's § 2254 application without prejudice, Sheppard could still have pursued state court remedies for most of his claims.[1] When Sheppard filed his § 2254 application, he had not previously

[1] Only Sheppard's claim of insufficient evidence would have been barred if Sheppard had attempted to raise it in a new state habeas application. *See Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004) (noting that a challenge to the sufficiency of the evidence is not cognizable in a Texas application for a writ of habeas corpus). That claim is procedurally

filed an application for habeas relief in state court. Accordingly, his unexhausted claims would not have been procedurally barred if he had attempted to raise them in state court. *See* TEX. CODE CRIM. P. ANN. art. 11.07, § 4. Also, the time for seeking habeas relief in Texas is limited only by the doctrine of laches. *Ex parte Perez,* 398 S.W.3d 206, 219 (Tex. Crim. App. 2013).

Because Sheppard's § 2254 application contained exhausted claims, a technically exhausted claim, and unexhausted claims that were not procedurally barred, it was a mixed application that the district court had authority to dismiss without prejudice. *See Rose,* 455 U.S. at 510, 518-22; *cf. Bagneris v. Cain,* 254 F. App'x 351, 352 (5th Cir. 2007). Jurists of reason would not debate whether the district court was correct in dismissing Sheppard's mixed § 2254 application without prejudice. *See Slack,* 529 U.S. at 484.

Sheppard has not shown that jurists of reason would debate the district court's dismissal of his claims. *See Slack,* 529 U.S. at 484; *Rose,* 455 U.S. at 518-22; *Satterwhite,* 886 F.2d at 92-93. His motions for a COA and for a stay of his state judgment of conviction are DENIED. Sheppard's motion to supplement the record on appeal is GRANTED.

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

A True Copy
Certified order issued Mar 18, 2019

Clerk, U.S. Court of Appeals, Fifth Circuit

defaulted and "technically exhausted" for purposes of § 2254. *Coleman,* 501 U.S. at 731-33; *Jones,* 163 F.3d at 296.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

WILFRED WARREN SHEPPARD	§	
(Bell County #201700009139)	§	
	§	
V.	§	**W-18-CA-094-RP**
	§	
LORIE DAVIS[1]	§	

ORDER

Before the Court is Petitioner's Application for Writ of Habeas Corpus under 28 U.S.C. § 2254. Petitioner, proceeding pro se, has paid the filing fee. For the reasons set forth below, Petitioner's application for writ of habeas corpus is dismissed without prejudice for failure to exhaust state court remedies.

DISCUSSION

According to Petitioner, he was convicted of criminal mischief in Bell County on September 19, 2016 and sentenced to twelve months imprisonment. Petitioner appealed his conviction and on June 28, 2017, the Court of Criminal Appeals refused his petition for discretionary review. Petitioner did not file a state application for habeas corpus relief.

ANALYSIS

A fundamental prerequisite to federal habeas corpus relief under Title 28 U.S.C. §2254 is the exhaustion of all claims in state court prior to requesting federal collateral relief. *Sterling v. Scott*, 57 F.3d 451, 453 (5th Cir. 1995). Section 2254(b) provides:

> (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:

[1] Petitioner names Attorney General Ken Paxton as Respondent, but Lorie Davis is the proper Respondent and will be substituted as such.

> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254. This requirement is designed in the interests of comity and federalism to give state courts the initial opportunity to pass upon and correct errors of federal law in a state prisoner's conviction. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). The purpose and policy underlying the exhaustion doctrine is to preserve the role of the state courts in the application and enforcement of federal law and prevent disruption of state criminal proceedings. *Rose v. Lundy*, 455 U.S. 509, 518 (1982)(citing *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490-91 (1973)).

A petition under 28 U.S.C. § 2254 "must be dismissed if state remedies have not been exhausted as to any of the federal claims." *Castille v. Peoples*, 489 U.S. 346, 349 (1989). The exhaustion doctrine "requires that the Texas Court of Criminal Appeals be given an opportunity to review and rule upon the petitioner's claim before he resorts to the federal courts." *Richardson v. Procunier*, 762 F.2d 429, 431 (5th Cir. 1985). Once a federal claim has been fairly presented to the Texas Court of Criminal Appeals, either through direct appeal or collateral attack, the exhaustion requirement is satisfied. *See Castille*, 489 U.S. at 351. In order to avoid piecemeal litigation, all grounds raised in a federal application for writ of habeas corpus must first be presented to the state's highest criminal court prior to being presented in federal court. *Rose*, 455 U.S. at 522. If even one claim is unexhausted, the entire petition must be dismissed for failure to exhaust state remedies. *Id.* A federal district court may take notice *sua sponte* of the lack of exhaustion. *Shute v.* Texas, 117 F.3d 233, 237 (5th Cir. 1997). Federal courts can dismiss

without prejudice the entirety of a federal habeas petition that contains any unexhausted grounds for relief. *See Rose*, 455 U.S. at 510; *Thomas v. Collins*, 919 F.2d 333, 334 (5th Cir. 1990).

In the present case, Petitioner has not presented all of his claims to the Texas Court of Criminal Appeals. Petitioner's recitation of the procedural background of his case and a review of both his own exhibits and the Texas Court of Criminal Appeals' docket reflects that Petitioner has not satisfied the exhaustion requirement as to the claims presented in the instant petition for writ of habeas corpus. Nevertheless, the exhaustion requirement can be excused when exceptional circumstances exist. *Deters v. Collins*, 985 F.2d 789 (5th Cir. 1993). However, Petitioner makes no allegations that any exceptional circumstances are present in this case warranting federal intrusion at this juncture. The Court finds that Petitioner has failed to exhaust his state court remedies and has failed to allege any circumstances which would allow the Court to excuse the exhaustion requirement.

Therefore, the Court dismisses Petitioner's Application for Writ of Habeas Corpus without prejudice for failure to exhaust available state court remedies.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2254 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Proceedings, effective December 1, 2009, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

A certificate of appealability may issue only if a movant 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 a petitioner's 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.* "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's 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, reasonable jurists could not debate the dismissal of the Petitioner's section 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, a certificate of appealability shall not be issued.

Accordingly, it is **ORDERED** that Petitioner's petition for writ of habeas corpus is **DISMISSED WITHOUT PREJUDICE** for failure to exhaust available state court remedies.

It is finally **ORDERED** that a certificate of appealability is hereby **DENIED**.

SIGNED on April 3, 2018.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

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FOR THE FIFTH CIRCUIT

No. 18-50288

WILFRED WARREN SHEPPARD,

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeal from the United States District Court
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Before DENNIS, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motions for a certificate of appealability and a stay of his state judgment of conviction and granted his motion to supplement the record on appeal. The panel has considered appellant's motion for reconsideration of the denial of a certificate of appealability. IT IS ORDERED that the motion is DENIED.