

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

November 29, 2021

Lyle W. Cayce
Clerk

REBEKAH RACHELL SHROPSHIRE,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Southern District of Texas
USDC No. 6:19-CV-80

ORDER:

Rebekah Rachell Shropshire, Texas prisoner # 1495618, was convicted by a jury of murder and was sentenced to 75 years of imprisonment. Shropshire moves for a certificate of appealability (COA) to appeal the dismissal of her 28 U.S.C. § 2254 petition as time barred.

In order to obtain a COA, Shropshire must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). However, Shropshire does not meaningfully challenge the district court’s determination that her § 2254 petition is time barred. By failing adequately to address the sole basis for the district court’s denial of relief, Shropshire

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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NEW ORLEANS, LA 70130

November 29, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-40082 Shropshire v. Lumpkin
USDC No. 6:19-CV-80

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk
Christina Rachal

By: Christina C. Rachal, Deputy Clerk
504-310-7651

Mr. Nathan Ochsner
Ms. Rebekah Rachell Shropshire
Ms. Casey Leigh Jackson Solomon

No. 21-40082

has abandoned the only cognizable issue on appeal. *See Hughes v. Johnson*, 191 F.3d 607, 612-13 (5th Cir. 1999). She has thus failed to show that jurists of reason could debate the district court's determination that her § 2254 petition is time barred. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Accordingly, Shropshire's COA motion is DENIED.

Cory T. Wilson
CORY T. WILSON
United States Circuit Judge

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

REBEKAH SHROPSHIRE, #1495618

§

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§

VS. CIVIL ACTION NO. V-13-052
WILLIAM STEPHENS

REPORT AND RECOMMENDATION

Before the Court, by referral from the Honorable Gregg Costa, United States District Judge, is the “Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody” of Rebekah Shropshire, an inmate in the custody of the Texas Department of Criminal Justice. Having conducted a preliminary review of Shropshire’s Petition, pursuant to Rule 4 of the “Rules Governing Section 2254 Cases in the United States District Court,” the Court now submits this Report and Recommendation to Judge Costa.

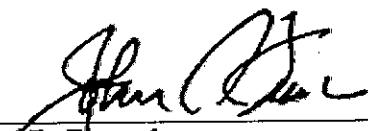
According to Shropshire's Petition, she was convicted by a jury in DeWitt County, Texas, and sentenced to 75 years of confinement. Shropshire appealed her conviction to the Court of Appeals of the 13th District. Her conviction was affirmed on October 22, 2009. Shropshire concedes that she never presented her claims to the Texas Court of Criminal Appeals, either by direct review or through the post-conviction procedures available under Article 11.07 of the Texas Code of Criminal Procedure. Consequently, it is clear that Shropshire has not exhausted her state court remedies. See Richardson v. Procunier, 762 F.2d 429, 431-32 (5th Cir. 1985) ("A Texas inmate seeking federal habeas relief who, in directly appealing his state criminal conviction, has by-passed the Texas Court of Criminal Appeals will not be deemed to have exhausted his state court remedies until he has raised his claims before the state's highest court through collateral

review provided by state habeas procedures.") Unfortunately, for Shropshire, the exhaustion of state court remedies is a necessary prerequisite to the bringing of a federal habeas corpus petition. See Picard v. Connor, 404 U.S. 270, 275 (1971), see also, Rose v. Lundy, 455 U.S. 509 (1982)

Because it plainly appears from the face of her Petition that Shropshire is not presently entitled to seek habeas relief in federal court, this Court RECOMMENDS that the "Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody" of Rebekah Shropshire, be **SUMMARILY DISMISSED**.

The Clerk **SHALL** send a copy of this Report and Recommendation to the Parties who **SHALL** have until **Friday, September 20, 2013**, to have written objections, filed pursuant to 28 U.S.C. §636(b)(1)(C), **physically on file** in the Office of the Clerk. The Objections **SHALL** be electronically filed and/or mailed to the Clerk's Office at P.O. Drawer 2300, Galveston, Texas 77553. Failure to file written objections within the prescribed time **SHALL** bar any Party from attacking on appeal the factual findings and legal conclusions accepted by the District Judge, except upon grounds of plain error.

DONE at Galveston, Texas, this 20th day of August, 2013.



John R. Froeschner
United States Magistrate Judge

ENTERED

December 08, 2020

David J. Bradley, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION**

REBEKAH RACHELL SHROPSHIRE,

§

Petitioner,

§

v.

§

Civil Case No. 6:19-CV-00080

BRYAN COLLIER and LORIE DAVIS,

§

Respondents.

§

MEMORANDUM OPINION AND ORDER

Pending before the Court is the Memorandum and Recommendation (“M&R”) signed by Magistrate Judge Julie K. Hampton on August 5, 2020. (Dkt. No. 10). In the M&R, Magistrate Judge Hampton recommended granting Respondent’s Motion for Summary Judgment, dismissing as untimely Petitioner Rebekah Rachell Shropshire’s (“Shropshire”) Petition for Writ of Habeas Corpus (“Petition”) pursuant to 28 U.S.C. § 2254, and denying Shropshire a Certificate of Appealability. (*Id.*). Shropshire was provided proper notice and an opportunity to object to the proposed findings and recommendations. *See* 28 U.S.C. § 636(b)(1); General Order No. 2002-13, art. IV. The deadline for Shropshire to file objections was August 19, 2020, however, she filed her objections on August 20, 2020. As discussed below, Shropshire forfeited her right to this Court’s review by failing to timely file objections. Accordingly, the M&R is **ACCEPTED** as this Court’s Memorandum and Order, Respondent’s Motion for Summary Judgment is **GRANTED**, and Shropshire’s Motion for a Certificated of Appealability is **DENIED**.

I. BACKGROUND

On August 30, 2019, Shropshire petitioned this Court for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Dkt. No. 10 at 1). Respondent filed a Motion for Summary Judgment on January 6, 2020, (Dkt. No. 10 at 1; Dkt. No. 5), and Shropshire timely responded, (Dkt. No. 10 at

Appendix B

1; Dkt. No. 7). On July 23, 2020, the case was referred to Magistrate Judge Hampton. (Dkt. No. 9). Magistrate Judge Hampton issued an M&R on August 5, 2020. (Dkt. No. 10). The M&R notified Shropshire of her right to file written objections in the following manner:

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within FOURTEEN (14) DAYS after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1), General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within FOURTEEN (14) DAYS after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

(*Id.* at 9).¹ The docket entry for the M&R in the case's civil docket sheet shows that all parties were given electronic notice of its filing the same day it was issued. (Dkt. No. 10). The fourteenth

¹ The Court notes that the comment to Rule 72 of the Federal Rules of Civil Procedure suggests that a court must review a magistrate's report and recommendation for "clear error" when no proper objection is made. Fed. R. Civ. P. 72(b) advisory committee's note. But that same advisory comment states that Rule 72 is inapplicable in the habeas corpus context. *See id.* ("This rule does not extend to habeas corpus petitions, which are covered by the specific rules relating to proceedings under Sections 2254 and 2255 of Title 28."); *see also Nara v. Frank*, 488 F.3d 187, 194 (3d Cir. 2007) (finding that Rule 72(b) "is inapplicable to habeas corpus cases" (citing Fed. R. Civ. P. 72(b) advisory committee's note)); *U.S. ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1011 n.1 (7th Cir. 1987) (finding that Rule 72(b) "does not apply to habeas corpus actions" (citing Fed. R. Civ. P. 72(b) advisory committee's note)); *Cavanaugh v. Kincheloe*, 877 F.2d 1443, 1449 (9th Cir. 1989) ("Rule 72(b) does not apply to habeas corpus petitions filed under 28 U.S.C. § 2254. The commentary to Rule 72(b) contains the following instruction concerning the limited reach of this rule."). Rather, Rule 8 of the rules governing AEDPA cases provides instructions on the timely filing of objections which in relevant part mirror 28 U.S.C. § 636(b)(1)(C). *Compare* Rule 8, Rules Governing Section 2254 Cases ("Within 14 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation."), *with* 28 U.S.C. § 636(b)(1)(C) ("Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those

(continue)

day from the date the M&R was filed and served on Shropshire was August 19, 2020. The docket entry specifically notes that written objections to the M&R were due by that day. (*Id.*). Despite having notice of the deadline, Shropshire failed to follow the prescribed timeline. Instead, she filed her objections on August 20, 2020, a day after the deadline passed. (Dkt. No. 11). She did not request an extension of time prior to filing her objections, nor did she attempt to explain why she filed them late. (*See id.*).

II. ANALYSIS

In relevant part, 28 U.S.C. § 636(b)(1)(C) provides:

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.

28 U.S.C. § 636(b)(1)(C). The Supreme Court has clarified that this statute “does not on its face require any review at all, by . . . the district court . . . , of any issue that is not the subject of an objection.” *Thomas v. Arn*, 474 U.S. 140, 149, 106 S.Ct. 466, 472, 88 L.Ed.2d 435 (1985); *see also Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (finding that the district court may accept conclusions in an M&R “by stating that the objections do not address a particular proposed finding or conclusion”), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1); *McGill v. Goff*, 17 F.3d 729, 732 (5th Cir. 1994) (“The district judge has jurisdiction over the case at all times. He retains full authority to decide whether . . . to review the magistrate’s report, . . .” (ellipses added) (quoting *Thomas*, 474 U.S. at 154, 106 S.Ct. at 474)), *overruled on*

portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.”). Thus, this Court considers only Rule 8 and § 636(b)(1)(C) in weighing the effect of a failure to timely object to an M&R.

other grounds, Kansas Reins. Co. v. Cong. Mortg. Corp. of Tex., 20 F.3d 1362, 1373–74 (5th Cir. 1994); *Scott v. Alford*, 62 F.3d 395, 1995 WL450216, at *2 (5th Cir. 1995) (unpublished) (finding that, pursuant to § 636(b)(1), a district court “need not consider late objections” at all (citing *Thomas*, 474 U.S. at 154, 106 S.Ct. at 475)). Rather, district courts have “discretion . . . to allow objections after the [fourteen] day period.” *Scott*, 1995 WL450216, at *2; *see also Rodriguez v. Bowen*, 857 F.2d 275, 277 (5th Cir. 1988) (finding that a district court that reviewed a magistrate judge’s report despite a late-filed objection did so at “its discretion”); *McGill*, 17 F.3d at 732 (“[W]hile the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard.” (quoting *Thomas*, 474 U.S. at 154, 106 S.Ct. at 474)).

Here, Shropshire had proper notice of the 14-day deadline and failed to timely object to the M&R. Accordingly, she has provided no timely objections to any particular proposed finding or conclusion in the M&R, and the Court is not obligated to engage in any review. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas*, 474 U.S. at 149, 154; 106 S.Ct. at 472, 474–55; *Douglass*, 79 F.3d at 1429; *McGill*, 17 F.3d at 732; *Rodriguez*, 857 F.2d at 277; *see also Scott*, 62 F.3d 395, 1995 WL450216, at *2. Nevertheless, the Court is satisfied that neither the M&R nor the record contain any clear error on its face.

The Court therefore **ACCEPTS** the M&R in its entirety as the opinion of the Court. (Dkt. No. 10). Accordingly, the Court **GRANTS** Respondent’s Motion for Summary Judgment, **DISMISSES WITH PREJUDICE** Shropshire’s Petition, and **DENIES** Shropshire’s Motion for a Certificate of Appealability.

United States Court of Appeals
for the Fifth Circuit

No. 21-40082

REBEKAH RACHELL SHROPSHIRE,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 6:19-CV-80

Before ELROD, OLDHAM, and WILSON, *Circuit Judges.*

PER CURIAM:

A member of this panel previously DENIED the motion for a certificate of appealability. The panel has considered Appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

Appendix A

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

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NEW ORLEANS, LA 70130

December 20, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-40082 Shropshire v. Lumpkin
USDC No. 6:19-CV-80

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk
Christina Rachal

By: Christina C. Rachal, Deputy Clerk
504-310-7651

Mr. Nathan Ochsner
Ms. Rebekah Rachell Shropshire
Ms. Casey Leigh Jackson Solomon

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