

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-7376

(Summary Calendar)

WILLIAM A. SHAW,

Petitioner-Appellant,

versus

EDWARD HARGETT, Superintendent,
Mississippi State Penitentiary,

Respondent-Appellee,

Appeal from the United States District Court
for the Northern District of Mississippi
(CA-1:92-123-S-D)

(June 13, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Petitioner William A. Shaw, proceeding pro se, appeals the federal district court's denial of his petition for habeas corpus relief under 28 U.S.C. § 2254 (1988). We affirm.

I

In 1985, a Mississippi jury convicted Shaw of murdering Arnold Milam, and he was sentenced to life imprisonment. Shaw previously

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

had been convicted of murdering Mary Bell Shaw, his ex-wife. On direct appeal of his conviction for killing Milam, the Mississippi Supreme Court upheld Shaw's conviction and sentence. *Shaw v. State*, 521 So. 2d 1278 (Miss. 1987). Shaw later sought permission from the Mississippi Supreme Court to file a motion for post-conviction relief.¹ The court denied Shaw's motion, holding that his application was untimely and, therefore, time barred. See Miss. Code Ann. § 99-39-5(2) (Supp. 1993) ("A motion for relief under this chapter shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the supreme court of Mississippi.").

Shaw subsequently commenced this federal habeas corpus action. The magistrate judge recommended denial of Shaw's petition, concluding that Shaw's claims were procedurally barred. Alternatively, the magistrate found Shaw's claims to be without merit. The district court adopted the magistrate court's report and recommendation, denied Shaw's habeas corpus petition, and issued a certificate of probable cause.

II

On appeal, Shaw has not submitted an opening brief. Instead, Shaw has submitted photocopies of his district court petition and his objections to the magistrate's report. The state, recognizing

¹ A prisoner seeking state habeas relief under the Mississippi Uniform Post-Conviction Relief Act must, if the Mississippi Supreme Court either affirmed his conviction on direct appeal or dismissed the direct appeal, present a motion to the supreme court seeking permission to file a petition for relief in the trial court. Miss. Code Ann. § 99-39-7 (Supp. 1993).

that Shaw did not submit a brief "as such," nevertheless answered. Shaw then submitted a reply brief. Granting Shaw's pro se submissions even the most liberal of interpretations, the photocopied district court pleadings he submitted do not meet the requirements of a brief. See Fed. R. App. P. 28(a). Consequently, Shaw has abandoned all arguments not raised in his reply brief. See *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (finding that a pro se habeas petitioner abandoned arguments contained in previous pleadings and incorporated only by reference in his appellate brief).

III

A

In his reply brief, Shaw contends that both his trial counsel and his counsel on direct appeal rendered ineffective assistance. The district court, relying on the Mississippi Supreme Court's decision finding that Shaw's motion to seek state habeas relief was time barred, concluded that Shaw's claims were procedurally barred.² Shaw attempts to circumvent the federal procedural bar rule by arguing that the Mississippi Supreme Court misinterpreted state law in holding that his state habeas corpus petition was time barred under the Mississippi Uniform Post-Conviction Relief Act. The Mississippi Supreme Court upheld Shaw's conviction in December 1987 and denied his motion for rehearing on April 6, 1988. *Shaw*,

² The Mississippi Supreme Court alternatively denied Shaw's petition on the merits. This alternative holding does not render the federal procedural bar rule inapplicable. See *Sawyers v. Collins*, 986 F.2d 1493, 1499 (5th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 2404, 124 L. Ed. 2d 300 (1993).

521 So. 2d at 1278. Under the Mississippi statutory scheme, Shaw had until April 8, 1991, to file his motion seeking post-conviction relief. See Miss. Code Ann. § 99-39-5(2). Shaw, however, filed the motion one day too late.

In *Alexander v. Black*, No. 92-7320, slip op. at 4-5 (5th Cir. Mar. 8, 1993), we held that a prisoner's failure to comply with Miss. Code Ann. § 99-39-5(2) constitutes a procedural default and bars federal habeas review.³ Consequently, we conclude that the district court correctly held Shaw's claims to be procedurally barred.

B

Federal courts may overlook a procedural default and consider the merits of a habeas petition in only two instances:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, ___, 111 S. Ct. 2546, 2565, 115 L. Ed.2d 640 (1991).

Shaw argues that his post-conviction attorney's failure to timely file his state habeas petition constitutes ineffective assistance of counsel. Shaw further contends that this ineffective assistance constitutes "cause" sufficient to excuse his procedural

³ Although Shaw maintains that he complied with § 99-39-5(2) by mailing his application within the three-year filing deadline, the Mississippi Supreme Court rejected this contention.

default. Shaw, however, had no constitutional right to an attorney in his state post-conviction proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993, 95 L. Ed.2d 539 (1987). Where there is no constitutional right to counsel, there can be no deprivation of effective assistance. *Wainwright v. Torna*, 455 U.S. 586, 587-88, 102 S. Ct. 1300, 1301, 71 L. Ed.2d 475 (1982). Consequently, Shaw must bear the burden of his lawyer's failure to timely file a state habeas corpus petition. See *Coleman*, 501 U.S. at ___, 111 S. Ct. at 2567 (rejecting habeas petitioner's assertion that his attorney's failure to timely file notice of his state habeas appeal constituted cause sufficient to excuse resulting default).⁴

IV

In his reply brief, Shaw asserts for the first time that the trial judge made prejudicial remarks to the jury regarding the testimony of state witness. Shaw did not present this argument to the district court and, therefore, waived it. See *Jernigan v. Collins*, 980 F.2d 292, 297 n.5 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2977, 125 L. Ed. 2d 675 (1993); *Fransaw v. Lynaugh*, 810 F.2d 518, 523 (5th Cir.), *cert denied*, 483 U.S. 1008, 107 S. Ct. 3237, 97 L. Ed. 2d 742 (1987).⁵

⁴ Shaw asserted before the district court that failure to consider the merits of his petition would result in a fundamental miscarriage of justice because he is "actually innocent" of Milam's murder. Shaw, however, has abandoned this argument on appeal by not raising it. See *Yohey*, 985 F.2d at 225.

⁵ Shaw further contends that his trial counsel rendered ineffective assistance during his trial for murdering Mary Bell Shaw. Because Shaw's trial for murdering Milam was separate from his trial for murdering Mary Bell, we refuse to address this claim.

V

For the reasons stated above, we AFFIRM the judgment of the district court.