IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-11027

JAMES ARTHUR MEEKS, III,

Petitioner-Appellant

v.

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

Respondent-Appellee

Appeals from the United States District Court
for the Northern District of Texas

O R D E R:

James Arthur Meeks, Texas prisoner # 543366, was convicted of aggravated robbery and sentenced to 75 years of imprisonment. He now moves this court for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition and postjudgment motion. Meeks further moves for leave to proceed in forma pauperis (IFP) on appeal, for appointment of counsel, and for leave to amend his COA motion. The motion for leave to amend his COA motion is GRANTED. This court has also considered Meeks's supplemental arguments regarding his motion for leave to proceed IFP.

To obtain a COA, Meeks must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S.

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473, 484 (2000). Where, as here, the district court denied relief on procedural grounds, a COA should be granted "when the prisoner 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." *Slack*, 529 U.S. at 484. To obtain a COA as to the denial of his request for postjudgment relief, Meeks must show that reasonable jurists could debate whether the district court's denial of his request for postjudgment relief was an abuse of discretion. *See Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

Meeks has not made the requisite showing. *See Slack*, 529 U.S. at 484; *Hernandez*, 630 F.3d at 428. Accordingly, Meeks's COA motion is DENIED. His motions for leave to procced IFP on appeal and for appointment of counsel are also DENIED.

Gregg Costa

GREGG J. COSTA
UNITED STATES CIRCUIT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAMES ARTHUR MEEKS III,	)	
ID #543366,	)	
Petitioner,	)	
vs.	)	**No. 3:18-CV-1537-D**
	)	
LORIE DAVIS, Director,	)	
Texas Department of Criminal	)	
Justice, Correctional Institutions Division,	)	
Respondent.	)	

JUDGMENT

This action came on for consideration by the court, and the issues having been duly considered and a decision duly rendered,

It is ordered and adjudged that:

1. The petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 is denied with prejudice as barred by the statute of limitations.

2. The clerk shall transmit a true copy of this judgment and the order adopting the findings and recommendation of the United States Magistrate Judge to all parties.

Signed July 26, 2018.

Sidney A. Fitzwater

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

APPENDIX B.

WRIT NO. W89-85562-T(D)

EX PARTE	§	**IN THE 283RD JUDICIAL**
	§	**DISTRICT COURT**
JAMES ARTHUR MEEKS III	§	**DALLAS COUNTY, TEXAS**

STATE'S RESPONSE TO APPLICATION FOR WRIT OF HABEAS CORPUS

The State, having considered the allegations contained in Applicant's Application for Writ of Habeas Corpus in the above-numbered and entitled cause, makes the following response:

I.

HISTORY OF THE CASE

Applicant pled not guilty to the charged offense of aggravated robbery. A jury found him guilty and assessed punishment at 75 years' confinement in the Texas Department of Criminal Justice, Institutional Division. Applicant's conviction and sentence were affirmed on direct appeal. *Meeks v. State,* No. 05-90-00553-CR (Tex. App.—Dallas March 14, 1991, pet. ref'd) (not designated for publication) (attached herein as State's Exhibit A).

Applicant has previously filed application for writ of habeas corpus challenging his conviction and sentence in this cause. Applicant's first two applications for writ of habeas corpus filed in this cause were denied on the merits

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on June 26, 2002 and January 12, 2005, respectively. Applicant's third application is currently pending before the Court of Criminal Appeals.[1]

II.

ISSUES RAISED IN APPLICATION

In the instant application, Applicant alleges a single ground for relief: "prejudiced jury." *See* Application at 6–7.

III.

STATE'S RESPONSE

Procedurally Barred as a Subsequent Writ Application

Applicant is procedurally barred from having the present application considered because it is a subsequent application and does not meet the requirements to be considered under Article 11.07, § 4.

Article 11.07 restricts habeas applicants to "one bite at the apple" except in specified circumstances. *See Ex parte Torres*, 943 S.W.2d 469, 473–74 (Tex. Crim. App. 1997). Specifically, Section 4 of Article 11.07 bars a court from considering the merits of a subsequent application challenging the same conviction unless the applicant alleges sufficient specific facts establishing that: (1) the

[1] While the instant application has been labeled as Applicant's "D" writ application, it appears that Applicant intended to supplement his "C" writ application. As to Applicant's "C" writ application, this Court signed an order on April 2, 2018 finding no controverted, previously unresolved facts material to the legality of Applicant's confinement, and concluded that that the application was procedurally barred as a subsequent writ application.

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current claims have not and could not have been presented previously because the factual or legal basis for the claim was unavailable when the previous application was filed, or (2) "by a preponderance of the evidence, but for the violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." Tex. Crim. Proc. Code art. 11.07, § 4(a); *see also Ex parte McPherson,* 32 S.W.3d 860, 861 (Tex. Crim. App. 2000). An applicant must state sufficient facts to establish an exception to Section 4's procedural bar. *See, e.g., Ex parte Sowell*, 956 S.W.2d 39, 40 (Tex. Crim. App. 1997) (holding that applicant failed to establish an exception to Section 4 because application merely tracked statutory language without setting forth sufficient specific facts establishing an exception).

A factual basis for a claim was "unavailable" on the date the previous application was filed if it was not ascertainable through the exercise of reasonable diligence on or before that date. *See Ex parte Lemke*, 13 S.W.3d 791, 793 (Tex. Crim. App. 2000). A legal basis for a claim was unavailable if it was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a state court of appellate jurisdiction on or before the date the previous application was filed. *Ex parte Sledge*, 391 S.W.3d 104, 106 (Tex. Crim. App. 2013).

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The instant application does not fall within an exception to the subsequent application bar. Accordingly, because Applicant has previously filed multiple applications requesting relief, and this subsequent request for writ relief does not prove the required facts under Article 11.07, § 4(a), this subsequent writ is procedurally barred and should be dismissed.

General Denial

The State generally denies Applicant's allegations in their entirety.

Applicant has not provided sufficient proof to merit consideration of his claims. In any post-conviction collateral attack, the burden of proof is on the applicant to allege and prove sufficient facts, which if true, would entitle him to relief. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). The standard of proof is by a preponderance of the evidence. *See Ex parte Adams*, 768 S.W.2d 281, 287–88 (Tex. Crim. App. 1989).

Applicant has failed to meet his burden of proof, and thus, his request for habeas relief should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a file-marked copy of the State's Response will be served on Applicant, James Arthur Meeks III, TDCJ # 00543366, Leblanc Unit, 3695 FM 3514, Beaumont, Texas 77705, by placing it in the United States mail on or before May 11, 2018.

/s/ Rebecca D. Ott

Rebecca D. Ott

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response is 947 words in length according to Microsoft Word, which was used to prepare the response. *See* Tex. R. App. P. 73.3; Tex. R. App. P. 73.1(f).

/s/ Rebecca D. Ott

Rebecca D. Ott

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CAUSE NO. W89-85562-T(D)

EX PARTE	*	IN THE 283RD JUDICIAL
JAMES ARTHUR MEEKS,	*	DISTRICT COURT
APPLICANT	*	DALLAS COUNTY, TEXAS

ORDER FINDING NO CONTROVERTED, PREVIOUSLY UNRESOLVED FACTUAL ISSUES REQUIRING A HEARING

Having considered the applicant's Application for Writ of Habeas Corpus and the Respondent's Original Answer, the Court finds that there are no controverted, previously unresolved facts material to the legality of the Applicant's confinement which require an evidentiary hearing.

Although filed as a "D" writ by the District Clerk's Office, this is a supplement to Applicant's third writ, the "C writ", which is pending before the Court of Criminal Appeals. The "C writ" was received by the Court of Criminal Appeals on May 8, 2018. On or about April 2, 2018, the trial court signed an Order Finding No Controverted Issues in the "C writ".

Applicant's first and second writ applications were denied on the merits on June 26, 2002 and January 12, 2005, respectively, by the Court of Criminal Appeals. Applicant does not allege specific facts establishing that the current claims and issues have not been, and could not have been, presented previously in an original application. Thus, this supplemental application or ground for review is procedurally barred.

The Clerk of the Court is **ORDERED** to immediately transmit a copy of this order, the application, and any answers filed to the Court of Criminal Appeals.

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The Clerk of the Court is **ORDERED** to send a copy of this order to the Applicant, James Arthur Meeks, # 00543366, LeBlanc Unit, 3695 FM 3514, Beaumont, TX 77705, and to counsel for the State, Rebecca Ott, Dallas County District Attorney's Office, Appellate Division, 133 N. Riverfront Blvd., LB-19, Dallas, TX 75207.

Signed this 15 day of May, 2018.

Livia Liu Francis, Judge

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11027

JAMES ARTHUR MEEKS, III

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 Northern District of Texas

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

Before DENNIS, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:

(✓) The Motion for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Motion for Reconsideration is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition

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for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

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