UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2407
Summary Calendar

JOHN MCADAMS,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director
Texas Dept. of Criminal Justice
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Texas
CA H 91 1979

(August 11, 1993)
( )

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.*

GARWOOD, Circuit Judge:

Petitioner-appellant, John McAdams (McAdams), appeals the dismissal of his fourth habeas petition challenging his Texas conviction for aggravated robbery and his life sentence therefor imposed under the habitual offender statute. The district court

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* Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

dismissed the petition for abuse of the writ and because McAdams' claims lacked merit. We affirm.

Facts and Proceedings Below

In 1978, McAdams was convicted on three counts of aggravated robbery with a deadly weapon. The jury also found that McAdams had two prior felony convictions, enhancing his sentence to life imprisonment under the Texas habitual offender statute. The state trial judge made an affirmative finding that McAdams had used a deadly weapon in the commission of the three charged robbery offenses. McAdams is currently serving his sentence in the custody of the Texas Department of Criminal Justice.

In 1982, McAdams' conviction was affirmed on direct appeal by the Texas Court of Criminal Appeals in an unpublished opinion. Since then, McAdams has filed five applications for state writs of habeas corpus challenging his conviction and sentence. Four of these petitions were denied without written order on November 10, 1982, March 16, 1983, June 15, 1983, and May 29, 1991, respectively. In response to the other habeas petition, the Texas Court of Criminal Appeals granted partial relief by deleting the trial court's affirmative finding that McAdams used a deadly weapon in the commission of his robbery offenses.

McAdams also previously filed three federal habeas petitions in the district court below under 28 U.S.C. § 2254 (1988).[1] In his

[1] The records and judgments in these three cases are not in the record for this case. However, McAdams has admitted that the issues discussed in our opinion as being raised in those petitions were actually raised in those petitions and that those petitions were denied on the merits.

first two petitions, McAdams challenged his 1978 robbery sentence enhancement under the habitual offender statute, claiming that his two prior convictions were invalid. Both petitions were denied on the merits in 1985 and 1987, respectively.

In his third federal petition, McAdams directly challenged the instant convictions for aggravated robbery. He raised three issues in that petition: (1) whether the evidence was sufficient to support his conviction for aggravated robbery; (2) whether the indictment failed to give him notice that he would be prosecuted under the law of the parties, thereby violating his due process rights; and (3) whether the charge of the court erroneously allowed the jury to convict him under the law of the parties, because that theory was not alleged in the indictment. The third federal petition was denied on the merits in 1987.

On July 17, 1991, McAdams filed the instant federal habeas petition, his fourth. This petition raised the same three grounds of relief raised in his third federal petition and also alleged that his constitutional rights were violated when the district court made an affirmative finding that he personally had used or exhibited a deadly weapon in connection with his robbery offenses and that the automatic life imprisonment sentence under Texas' then existing habitual offender law constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments.[2]

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[2] We observe that the Supreme Court has held that the Texas Habitual Criminal Statute did not violate the cruel and unusual punishment clause. *Rummel v. Estelle*, 100 S.Ct. 1133 (1980). *See Passman v. Blackburn*, 797 F.2d 1335, 1350-51 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 1609 (1987) (first time armed robbery offender's ninety-nine-year sentence without parole not cruel or

Sua sponte the district court issued McAdams a Rule 9 Order to Show Cause why his petition should not be dismissed for abuse of the writ, specifically citing his three prior federal habeases. McAdams responded to that order by stating that he had not abused the writ for the following reasons: (1) lack of the assistance of counsel in pursuing his habeas claims combined with his lack of legal knowledge; (2) his medical condition precluded him from bringing these claims in prior petitionsSQhe was treated by psychologists with psychotropic medicine periodically during his incarceration and he was not in his right frame of mind when the prior petitions were dismissed; and (3) he is factually innocent inasmuch as "I was only present when an offense was committed" and there was a "lack of evidence" and "I am innocent."[3] McAdams did not allege any evidence or specific facts which would tend to support his conclusory assertion of actual innocence.

The matter was referred to a magistrate judge who on April 3, 1992, recommended dismissal for abuse of the writ, and alternatively, dismissal because McAdams' claims lacked merit. McAdams did not file objections to the magistrate judge's report. The district court adopted the magistrate judge's report and entered a final judgment dismissing McAdams' petition. McAdams filed a timely notice of appeal and the district court issued a

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unusual).

[3] In its opinion on direct appeal the Texas Court of Criminal Appeals rejected the contention that the evidence was insufficient and, discussing the evidence, held it sufficed to show McAdams' guilt under the law of parties, even though, when present at the robbery site with his companion, he did not display a gun or speak to the victims.

certificate of probable cause.

Discussion

Preliminarily, McAdams' claim that his constitutional rights were violated when the state trial court made an affirmative finding that he personally used or exhibited a deadly weapon in connection with his offenses has been mooted by the ruling of the Texas Court of Criminal Appeals granting McAdams full relief on this ground. We therefore will not consider this claim.

We now address whether McAdams abused the writ by raising claims that were denied on the merits in his prior federal habeas petitions and by raising new claims that could have been but were not raised in his prior federal petitions. The same general test applies to claims that were raised and rejected on the merits in prior petitions and new claims that could have been but were not raised in prior petitions. If the petitioner raises a claim that a federal court has already considered or a claim that could have been but was not raised in a prior petition, the merits of the claim will only be addressed if the petitioner can show cause and prejudice. *Sawyer v. Whitley*, 112 S.Ct. 2514, 2518 (1992). If the petitioner cannot show a legitimate cause, a new or successive claim will still be considered if it is supplemented with a colorable showing that a fundamental miscarriage of justice would result from the failure to consider the claim. *Sawyer*, 112 S.Ct. at 2518-2519. In habeas cases, the phrase "fundamental miscarriage of justice" has been construed to mean "'a colorable claim of factual innocence.'" *Sawyer*, 112 S.Ct. at 2519.

To establish a legitimate cause, a petitioner must "show that

at the time he filed his previous habeas petitions, some factor external to his defense prevented him from discovering the claims he now raises or from uncovering them through reasonable investigation." *Saahir v. Collins*, 956 F.2d 115, 118 (5th Cir. 1992); *McQueen v. Whitley*, 989 F.2d 184, 185 (5th Cir. 1993). Legitimate causes include government interference and the reasonable unavailability of the actual or legal basis of the claim. *Saahir*, 956 F.2d at 118. The petitioner's pro se status or lack of counsel at previous habeas proceedings do not qualify as legitimate causes because these conditions are not external to his defense.[4] *Id.* (petitioner's inadequate legal research not legitimate cause). Similarly, "the mere fact that counsel [at trial] failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause." *Murray v. Carrier*, 106 S.Ct. 2639, 2644 (1986) (rule for "cause and prejudice test" applied to determine whether court will grant habeas review to matters not objected to at trial); *Coleman v. Thompson*, 111 S.Ct. 2546, 2566 (1991) (counsel failure not legitimate cause where matter not raised in prior state habeas proceedings).

McAdams offered two reasons for failing to bring these claims in prior petitions. First, McAdams states that the lack of assistance of counsel combined with his lack of legal knowledge are

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[4] There is no constitutional right to counsel in federal habeas matters and there can be no claim of ineffective assistance of counsel where counsel does participate in habeas proceedings. *See generally Coleman v. Thompson*, 111 S.Ct. 2546, 2556-66 (1991).

legitimate reasons for failing to plead his claims properly. This is not a legitimate cause. *See Saahir*, 956 F.2d at 118. Second, McAdams states that his medical condition precluded him from bringing these claims in prior petitionsSQhe was treated by psychologists with psychotropic medicine periodically during his incarceration and he was not in his right frame of mind when the prior petitions were dismissed. We find this reason unconvincing. McAdams was able to file three previous federal habeas petitions and five state habeas petitions, all of which contained arguable claims, during the time period that he claims that the drugs affected him. McAdams even obtained partial relief on one claim. The fact that he was capable of filing these petitions shows that his mental condition was not significantly impaired and that he was capable of raising in his prior petitions the new claims raised in this petition. McAdams has not shown how his treatment for mental illness prevented him from raising in his prior petitions the new claims raised in this petition or how this treatment forced him to raise the old claims again in this petition. Neither of McAdams' reasons are legitimate causes for reconsidering the claims ruled on in prior petitions or considering the new claims that should have been raised in prior petitions.

Since McAdams has not offered a legitimate cause for failing to assert his new claims in prior petitions or for again bringing his old claims in this petition, it is unnecessary to consider whether he will be prejudiced by the failure of the court to consider his claims on the merits. *McCleskey v. Zant*, 111 S.Ct. 1454, 1474 (1991).

Finally, McAdams has failed to allege a colorable claim of factual innocence. Although McAdams states vehemently that he is innocent of the offenses, he offers no facts or evidence in support of this claim.[5] Since McAdams has failed to offer a legitimate reason for bringing his new and successive claims and has not alleged anything which would establish that the matters complained of resulted in the conviction of one who is factually innocent, the district court acted properly in dismissing his petition for abuse of the writ.

Conclusion

McAdams has failed to show that he has not abused the writ. Accordingly, the district court's dismissal of his fourth federal habeas petition is

AFFIRMED.

[5] The reasoning of the Texas Court of Criminal Appeals in finding the evidence sufficient on direct appeal (see note 3, *supra*) appears persuasive and sound, and McAdams suggests no reason to question it (or its recitation of the relevant evidence) or to otherwise support his bald assertion of innocence.