

APPendix D

OPinion(s) of Lower Court

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 16-41350  
USDC No. 4:12-CV-430

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A True Copy  
Certified order issued Oct 02, 2017

WILLIAM W. FREY,

*Jyle W. Cayce*  
Clerk, U.S. Court of Appeals, Fifth Circuit  
Petitioner-Appellant

v.

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

Respondent-Appellee

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Appeal from the United States District Court for the  
Eastern District of Texas, Sherman

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ORDER:

William W. Frey, Texas prisoner # 1718159, pleaded guilty in January 2010 to aggravated assault with a deadly weapon, but adjudication of guilt was deferred and Frey was placed on community supervision. In May 2011, the trial court revoked Frey's community supervision, adjudicated him guilty, and imposed a 20-year sentence of imprisonment. Frey's 28 U.S.C. § 2254 petition was dismissed as time barred.

On appeal, this court determined that the district court had correctly concluded that Frey's claims regarding the 2010 guilty plea proceeding were time barred. *Frey v. Stephens*, 616 F. App'x 704, 708 (5th Cir. 2015). However, in view of the intervening decision in *McQuiggin v. Perkins*, 133 S. Ct. 1924,

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1928 (2013), the matter was remanded for the district court to consider, in the first instance, Frey's claim of actual innocence. *Frey*, 616 F. App'x at 708-09. A remand was also ordered for the district court to consider, in the first instance, Frey's claims of ineffective assistance of counsel and violations of *Brady v. Maryland*, 373 U.S. 83 (1963), with respect to the 2011 adjudication proceeding. *Frey*, 616 F. App'x at 710.

Frey now seeks a certificate of appealability (COA) to appeal the district court's denial of relief on his federal habeas claims following the remand of his § 2254 petition. A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court has rejected 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller-El*, 537 U.S. at 338. When the district court dismisses claims on procedural grounds, the petitioner is required to show both "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.

Frey asserts that he is actually innocent of the offense of aggravated assault with a deadly weapon. In support of his actual innocence claim, Frey contends that the victim, Chastity Hanson, made recorded statements to the effect that she fabricated her report of the incident that was the subject of his guilty plea. Frey also claims that the prosecution violated *Brady* by withholding compact discs that contained recordings of Hanson's statements.

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As to these issues, Frey fails to make the showing required to obtain a COA. *See Miller-El*, 537 U.S. at 338.

Frey has waived his claims of ineffective assistance of counsel by failing to brief them. *See Hughes v. Johnson*, 191 F.3d 607, 612-13 (5th Cir. 1999). Frey raises several other grounds for relief, including witness tampering, knowing use of perjured testimony, actual innocence, fraud on the court, and government interference, but this court does not consider such claims as they were not covered by the remand order or are being raised for the first time in Frey's COA motion. *See United States v. Lee*, 358 F.3d 315, 321, 323 (5th Cir. 2004); *Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

In view of the foregoing, Frey's request for a COA is DENIED. His motion to proceed in forma pauperis is likewise DENIED.

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/s/ Patrick E. Higginbotham  
PATRICK E. HIGGINBOTHAM  
UNITED STATES CIRCUIT JUDGE