

United States Court of Appeals
for the Fifth Circuit

No. 21-50305

United States Court of Appeals
Fifth Circuit

FILED

February 23, 2022

DARRYN ROBERT BURGESS,

Lyle W. Cayce
Clerk

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 Western District of Texas
USDC No. 5:19-CV-541

ORDER:

Darryn Robert Burgess, Texas prisoner # 2047103, seeks a certificate of appealability (COA) to appeal the denial of a 28 U.S.C. § 2254 application challenging his conviction for assault on a public servant (habitual) with an affirmative deadly weapon finding. He contends that the trial court violated his purported constitutional right to an indictment by a grand jury by submitting a deadly-weapon instruction to the jury in the absence of a corresponding allegation in the indictment. Burgess is not entitled to a COA because he fails to show that reasonable jurists could disagree with the district

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court's resolution of the claim. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Additionally, Burgess contends that his trial counsel should have raised the alleged amendment to the indictment in a motion for a directed verdict and that his appellate counsel also was ineffective for failing to raise the issue. Burgess is not entitled to a COA for these claims as he fails to show that the district court's application of deference under the Antiterrorism and Effective Death Penalty Act of 1996 to the state court decision denying the claims is "debatable amongst jurists of reason." *Id.* at 336.

Accordingly, the motion for a COA is DENIED.



DON R. WILLETT

United States Circuit Judge