United States Court of Appeals for the Fifth Circuit

No. 21-40073

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GARY LYNN MCDUFF,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:17-CV-391

UNPUBLISHED ORDER

Before HIGGINBOTHAM, DUNCAN, and WILSON, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that Appellant's motion for leave to file his motion for reconsideration out of time is GRANTED.

This panel previously DENIED Appellant's motion for a certificate of appealability, motion for a Rule 10(e)(1) hearing with a Fifth Circuit Mediator to facilitate an agreement on the record on appeal, and alternative motion to remand the case to the trial court to conduct a hearing. The panel

has considered Appellant's instant motion for reconsideration as to the denial of a certificate of appealability only. That motion is DENIED.

IT IS FURTHER ORDERED that Appellant's motion for protection is DENIED.

United States Court of Appeals for the Fifth Circuit

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Fifth Circuit
FILED
November 10, 2022
Lyle W. Cayce
Clerk

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UNITED STATES OF AMERICA,

Plaintiff—Appellee,

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Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court for the Eastern District of Texas
USDC No. 4:17-CV-391

Before HIGGINBOTHAM, DUNCAN, and WILSON, *Circuit Judges.*

PER CURIAM:

Gary L. McDuff, federal prisoner # 59934-079, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion, in which he challenged his 2013 conviction and cumulative three-hundred-month sentence of imprisonment for conspiring to commit wire fraud and for money laundering in violation of 18 U.S.C. § 1349 and § 1956(a)(1)(B)(I), respectively.

In his petition, McDuff alleges that the Government failed to produce evidence in violation of *Brady v. Maryland*, 373 U.S. 82 (1963), and knowingly

used false testimony at trial in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). McDuff also asserts that the magistrate judge and district court violated *Haines v. Kerner*, 401 U.S. 519 (1972), by failing to consider supplemental exhibits he sought to submit on appeal. He alleges his appointed appellate counsel provided ineffective assistance by failing to raise certain arguments on direct appeal. Finally, he maintains that he is actually innocent.

To obtain a COA to appeal the denial of a § 2255 petition, the petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "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). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that issues presented are adequate the deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. If the district court denies relief on procedural grounds, a COA should issue if the movant demonstrates, 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.

McDuff has failed to make the requisite showing. Accordingly, Appellant's motion for a certificate of appealability is DENIED.

IT IS FURTHER ORDERED that Appellant's motion for a Rule 10(e)(1) hearing with a Fifth Circuit mediator to facilitate an agreement on the record on appeal is DENIED. IT IS FURTHER ORDERED that

Appellant's alternative motion to remand case to the trial court to conduct the hearing is DENIED.