

United States Court of Appeals
for the Fifth Circuit

No. 23-11231

United States Court of Appeals
Fifth Circuit

FILED

March 7, 2024

DONALD RAY MALENA,

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
the United States District Court
for the Northern District of Texas
USDC No. 7:23-CV-82

ORDER:

Donald Ray Malena, Texas prisoner # 02408951, seeks a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 application challenging his guilty-plea conviction for driving while intoxicated and felony repetition. In his COA pleadings, Malena argues that he received ineffective assistance when his trial counsel failed to challenge the admissibility of certain inculpatory statements on the ground that they were made while Malena was in custody without any prior warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966). He additionally contends that he received ineffective

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assistance because his counsel generally failed to prepare and investigate various aspects of his case. Furthermore, Malena argues that his Fifth Amendment rights were violated under *Miranda*, the evidence was insufficient to sustain his conviction, and his offense was erroneously enhanced based on a prior conviction.

As a preliminary matter, Malena did not raise in the district court his claims, currently raised in his COA pleadings, that the prosecution engaged in misconduct by suppressing exculpatory evidence and failing to correct “false evidence.” As such, this court lacks jurisdiction to consider those claims. *See Black v. Davis*, 902 F.3d 541, 545-46 (5th Cir. 2018).

In order to obtain a COA, Malena must make “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, 336 (2003). When the district court denies relief on the merits, an applicant must show 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). When the district court denies relief on procedural grounds, a COA should issue if an applicant establishes, at least, that jurists of reason would find it debatable whether the application states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Id.*

Malena has failed to make the requisite showing. *See Slack*, 529 U.S. at 484. As such, a COA is DENIED.



ANDREW S. OLDHAM
United States Circuit Judge

Exhibit 4

Donald Ray Malena # 2408951

Cause 23-11231 Judgment Fifth Circuit Court

1

Attach. ①

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

DONALD RAY MALENA,
No. 2408951

Petitioner,

V.

§ NO. 7:23-CV-082-O

DIRECTOR, TDCJ,

Respondent.

ORDER AND INSTRUCTIONS TO PARTIES

Petitioner, Donald Ray Malena, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, and motion for leave to proceed *in forma pauperis*. The Court **GRANTS** the motion.

After preliminary review of the petition, the Court **ORDERS** the parties to comply with the following instructions and the clerk of Court to take the following action:

RESPONDENT'S ANSWER. Under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, Respondent shall file an answer to this petition within 60 days of this order. The answer shall comply with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts. If Respondent believes that the petition is wholly barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or the statute of limitations, he may file a preliminary answer asserting any such bar prior to answering the petition on its merits.

REPLY. Under Rule 5(e) of the Rules Governing Section 2254 Cases, Petitioner may file a reply within 30 days from the date of service of Respondent's answer, motion, or other pleading.

BRIEFS. Briefs shall comply with the 25-page limitation under Local Rule 7.2(c) and be submitted on letter-size paper and double spaced. Each argument advanced in the brief must specify the ground and numbered paragraph of the pleading that it seeks to address. Briefs are required or permitted as follows:

1. **Respondent's Brief.** Respondent may file any brief that it deems appropriate.
2. **Reply Brief.** A reply brief is not required. However, in any case in which Respondent has filed a brief, Petitioner may file a reply brief that is no longer than 10 pages. Should Petitioner choose to file a reply brief, he must do so within 30 days following service of Respondent's brief. Such brief must only reply to Respondent's argument(s). Under no circumstances will any statement or argument contained in a reply brief be

considered a new ground for habeas relief or a supplement to any grounds initially raised by Petitioner in the petition.

attach ①

In every case, a copy of the petition, pending motions, and any orders shall be served on the Attorney General, counsel for the State of Texas, by electronic means.¹ *See* N.D. Tex. Civ. R. 5.1(e). If Petitioner is proceeding pro se, the clerk of Court shall mail him a copy of any brief, pleading, motion, or order that is filed in this case. *Id.* If Petitioner is represented by counsel, any brief, pleading, motion, or order that is filed in this case shall be served electronically on Petitioner's counsel.

SO ORDERED this 6th day of September, 2023.


Reed O'Connor
UNITED STATES DISTRICT JUDGE

¹ Based upon communication with the Texas Attorney General's Office, the Court will not serve copies of the petition, attachments, pending motions, and orders upon TDCJ Director Bryan Collier. Instead, copies of such documents will be served electronically on the Texas Attorney General, counsel for the Director, and will be directed to the attention of Edward Marshall, Chief, Criminal Appeals Division, Office of the Attorney General of Texas, Austin, TX 78711-2548. *See* FED. R. CIV. P. 5(b)(2)(E).