

United States Court of Appeals
for the Fifth Circuit

No. 23-11231

United States Court of Appeals
Fifth Circuit

FILED

March 7, 2024

Lyle W. Cayce
Clerk

DONALD RAY MALENA,

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

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