UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

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Mr. John S. Pallas
Office of the Attorney General
of Michigan
P.O. Box 30217
Lansing, MI 48116

Mr. Imran J. Syed
University of Michigan Law School
Michigan Innocence Clinic
701 S. State Street
Ann Arbor, MI 48109

Re: Case No. 19-1222*, Fredrick Freeman v. Pat Warren*
Originating Case No. : 2:17-cv-13278

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Sharday S. Swain
Case Manager
Direct Dial No. 513-564-7027

cc: Mr. David J. Weaver

Enclosure

No mandate to issue

No. 19-1222

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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FREDRICK FREEMAN,

Petitioner-Appellant,

v.

PAT WARREN, Warden,

Respondent-Appellee.

O R D E R

Fredrick Freeman, a Michigan prisoner proceeding through counsel, appeals the judgment of the district court denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Freeman has filed an application for a certificate of appealability ("COA") in this court. *See* Fed. R. App. P. 22(b)(1).

In 1986, Scott Macklem was shot and killed in Port Huron, Michigan. Macklem was dating Crystal Merrill at the time of his murder. Before the murder, Freeman had briefly dated Merrill and had threatened to kill Macklem multiple times. No direct evidence linked Freeman to the scene and nine witnesses testified at trial that they saw Freeman hundreds of miles away from Port Huron on the day of the murder. Nevertheless, Rene Gobeyn identified Freeman as the man he saw driving away from where Macklem's body was found, and Richard Krueger identified Freeman as the man he saw standing in the parking lot where the murder occurred approximately one hour before Macklem was shot. Both Gobeyn and Kreuger identified Freeman from a photographic lineup and later made in-court identifications. The jury ultimately convicted Freeman of first-degree murder, and he was sentenced to life in prison without the possibility of

parole. Freeman appealed, arguing among other claims that his identification by Gobeyn and Krueger was the product of suggestive pre-trial identification procedures. The Michigan Court of Appeals affirmed his conviction, and the Michigan Supreme Court denied leave to appeal. Freeman also unsuccessfully pursued post-conviction relief in state court.

In 2007, Freeman filed a petition for a writ of habeas corpus, alleging the ineffective assistance of trial and appellate counsel and prosecutorial misconduct. The district court determined that appellate counsel was ineffective and conditionally granted Freeman's habeas petition in part and granted a COA in part. The State appealed, and this court reversed the district court's order and remanded the case for entry of an order dismissing the petition as time-barred. *Freeman v. Trombley*, 483 F. App'x 51 (6th Cir. 2012).

In 2012, Freeman again moved for post-conviction relief in state court on the basis of the newly discovered evidence of the original photographic lineup from which Gobeyn and Krueger identified him. At an evidentiary hearing in the trial court, a private investigator testified that, although the original photographs had been requested over the years but could not be found, he located them in January 2008 (while Freeman's first habeas petition was pending). The investigator explained that the original photos were cropped and used to create trial exhibit 26—which was a composite of the lineup shown to Gobeyn and Krueger. In the trial exhibit, each photo represented an individual in profile.

> In the uncropped originals, Freeman is holding a placard with Pleasant Ridge Police Department on it. The other individuals are holding placards bearing "Port Huron Police Department." In the profile pictures, Freeman is turned to his right, while the other subjects are turned to their left. Further, horizontal stripes are shown in the background of Freeman's picture, but the other photos have a white background. The mug shots from the Port Huron [sic] are also faded.

People v. Freeman, No. 311257, 2015 WL 4599481, at *2 (Mich. Ct. App. July 30, 2015) (per curiam). A psychologist specializing in eyewitness identification testified that the differences between Freeman's photograph and that of the others drew attention to him, rendered the lineup "highly suggestive," and "could have affected the reliability of Gobeyn and Krueger's

identifications." *Id.* at *3. The original prosecutor, a detective, and Freeman's trial and appellate counsel also testified at the hearing.

Ultimately, the trial court concluded that Freeman was not entitled to relief from judgment because the original photographs did not constitute new evidence, were not impermissibly suggestive, and would not have "made a different result probable on retrial." *Id.* at *4. The Michigan Court of Appeals affirmed the trial court's decision, agreeing that the photos were not unduly suggestive and would not have made a difference at trial in light of the other evidence implicating Freeman. *Id.* at *10–11. The Michigan Supreme Court denied leave to appeal.

In 2017, Freeman filed an application in this court to file a second or successive habeas petition, seeking to raise a claim that the prosecution failed to disclose the original photographs, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Alternatively, Freeman sought to raise a claim that trial counsel was ineffective if he had access to the original photographs and failed to either view them or use them in Freeman's defense. He also sought to pursue a freestanding actual innocence claim. This court concluded that Freeman's actual innocence claim was foreclosed, except in the context of a sufficient showing under 28 U.S.C. § 2244(b)(2)(B)(ii) to file a second or successive petition, but that his *Brady* and ineffective-assistance-of-counsel claims warranted leave to file. We therefore granted the application as to those claims. *In re Freeman*, No. 17-1280 (6th Cir. Oct. 2, 2017) (order).

Freeman then returned to the district court and filed his habeas petition, raising the two claims allowed by this court. The parties agreed that, although this court had concluded that Freeman had made a prima facie showing that satisfied § 2244(b)(2)(B)'s requirements for filing a second or successive petition, the district court had to determine whether Freeman actually satisfied the requirements of § 2244(b)(2)(B). That is, Freeman had to establish that:

> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B). Assuming diligence, the district court concluded that Freeman "failed to show by clear and convincing evidence that no reasonable juror would have found him guilty if the jurors would have been presented with the original, uncropped photographs." R. 14 at 32." The district court therefore denied Freeman's petition and denied a COA.

Freeman now requests a COA from this court. To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He may do so by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). When, as here, a court has denied the claims on procedural grounds, "a COA should issue when the prisoner shows, 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.

Reasonable jurists could not debate the district court's denial of Freeman's petition. As the Michigan courts and the district court found after examining the voluminous trial record, the addition of the original photographs could not prove by clear and convincing evidence that "no reasonable factfinder would have found" Freeman guilty. The original photographs were not exculpatory evidence; rather, they would have served at most to cast some doubt on Gobeyn's and Krueger's identifications. But plenty of other evidence supported the jury's verdict. As Merrill testified, Freeman threatened to kill Macklem multiple times. Gobeyn, Krueger, and another eyewitness observed the suspicious man in the parking lot wearing a green army-style jacket. Police found a green army-style jacket in Freeman's car after arresting him, which the eyewitnesses said looked like the coat they saw in the parking lot. Freeman called Merrill eight days after the murder, asking questions about the killing and the investigation. He asked Merrill if the murder had made the news and became "quite upset" when she told him it hadn't. R. 8-9 at 121. When Merrill asked what he had been doing lately, he replied "with a kind of a chuckley voice, just driving around, shooting people." R. 8-13 at 38. He added in the phone call that "I

didn't own the murder weapon and they're never going to find it." R. 8-13 at 36. He also told Merrill, "you caused me a problem so I took care of it." R. 8-9 at 125. In light of all of the evidence, we must agree with the district court that no reasonable jurist could find it debatable that Freeman has not proven by clear and convincing evidence that no reasonable factfinder would have found him guilty.

Freeman makes two counterarguments, but neither persuades.

First, Freeman argues that the district court misstated the legal standard under § 2244(b)(2)(B)(ii), rendering the rest of its analysis suspect. We disagree. The district court stated that in order to satisfy § 2244(b)(2)(B)(ii), "Freeman must show, by clear and convincing evidence, that *all jurors* would have found him innocent if they had been presented with the original, uncropped photographs." R. 14 at 23. Freeman observes that the statute requires only that "no reasonable factfinder would have found him guilty," so he thinks the district court tilted the scales unfairly against him by requiring a showing that "all jurors" would find him "innocent." But the Supreme Court has articulated § 2244(b)(2)(B)'s standard as requiring a showing by the prisoner "that the facts underlying the claim establish his innocence by clear and convincing evidence." *Calderon v. Thompson*, 523 U.S. 538, 558 (1998). And the district court stated the law correctly when it ultimately held that "Freeman has failed to show by clear and convincing evidence that no reasonable juror would have found him guilty if the jurors would have been presented with the original, uncropped photographs and had been able to consider that evidence along with the other evidence presented at trial." R. 14 at 32. No reasonable jurist would find it debatable whether the district court's paraphrase of the rule caused it to issue an incorrect ruling.

Second, Freeman argues that the district court improperly restricted its analysis by declining to consider additional evidence beyond the evidence presented at trial and the original photographs. Relying on district court opinions and the Tenth Circuit's opinion in *Case v. Hatch*, 731 F.3d 1015, 1033 (10th Cir. 2013), the district court determined that it could consider only the *Brady* evidence and the evidence that was actually presented at trial when making a determination under § 2244(b)(2)(B)(ii), and could not consider any "new" evidence that Freeman presented in

his first habeas petition. As Freeman points out, the Fourth Circuit has held that "a court must make its § 2244(b)(2)(B)(ii) . . . determination . . . based on 'all the evidence, including that alleged to have been illegally admitted [and that] tenably claimed to have been wrongly excluded or to have become available only after the trial.'" *United States v. MacDonald*, 641 F.3d 596, 612 (4th Cir. 2011) (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995)). Freeman thinks that if the district court had followed the Fourth Circuit's approach and considered other evidence not presented at trial—including alibi testimony from his then-girlfriend and the recantation of a jail-house informant—it would have ruled in his favor. But as the district court correctly observed, the choice between the two approaches made no difference to Freeman: "[E]ven if this Court *could* consider the evidence Freeman asks it to, it could not find such evidence indicative of a not guilty verdict when the Sixth Circuit previously found just the opposite." R. 14 at 29. In 2012, we found that the other evidence Freeman identifies would not made it more likely than not that no reasonable juror would have found Freeman guilty of Macklem's murder. *See Freeman*, 483 F. App'x at 57–64. The addition of the original photographs to that equation would not change our calculation.

We therefore **DENY** Freeman's application for a COA.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk