

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

April 19, 2011

Lyle W. Cayce
Clerk

No. 10-50933
Summary Calendar

VERTEN DODSON, III,

Petitioner-Appellant

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:10-CV-99

Before JOLLY, GARZA, and STEWART, Circuit Judges.

PER CURIAM:*

Verten Dodson, III, Texas prisoner # 1485604, filed a 28 U.S.C. § 2254 application challenging his jury verdict conviction for murder. In that application, he alleged that: (1) he was denied access to his trial transcript, resulting in the denial of his right to file a proper appeal; (2) he was denied a fair trial, resulting in a miscarriage of justice, because the trial court should have declared a mistrial based upon the sole eyewitness's perjured testimony; (3) the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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evidence was factually insufficient to support the jury's verdict; and (4) his trial counsel rendered ineffective assistance by (a) failing to investigate the life insurance policy that the victim had allegedly taken out on his life and present a life insurance company representative as a defense witness, (b) failing to investigate the toxicology of the victim's blood and to present an expert toxicologist witness, and (c) failing to object and/or move for a mistrial based upon the eyewitness's perjured testimony. The district court dismissed that application with prejudice after holding that Dodson's claim of factual insufficiency was not cognizable under § 2254 and that the remaining claims were procedurally barred due to his failure to exhaust them. Dodson seeks a certificate of appealability (COA) to appeal that dismissal.

With respect to the district court's determination that Dodson's challenge to the factual sufficiency of the evidence did not allege a cognizable § 2254 claim, Dodson has failed to adequately brief that claim in his COA motion. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999) (holding that arguments not briefed in a COA motion are waived); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (holding that even pro se litigants must brief arguments adequately in order to preserve them). Dodson has also failed to show that reasonable jurists would find it debatable whether the district court's procedural rulings were correct as to his claims that he was denied a fair trial, his trial counsel was ineffective as to the subject of toxicology, and his trial counsel was ineffective for failing to move for a mistrial. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Dodson's motion for a COA is denied with respect to those claims.

Contrary to the district court's ruling, Dodson may have exhausted his claim regarding his trial transcript by submitting that claim in a motion that accompanied his first state habeas corpus application. *See Mercadel v. Cain*, 179 F.3d 271, 275 (5th Cir. 1999). However, the record makes it clear that reasonable jurists could not debate whether Dodson has made a valid constitutional claim regarding this issue. Accordingly, we deny Dodson's motion

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for a COA as to this claim. *See Houser v. Dretke*, 395 F.3d 560, 562 (5th Cir. 2004).

Reasonable jurists would find it debatable whether the district court correctly determined that Dodson failed to exhaust his claim that his trial counsel was ineffective for failing to investigate the life insurance policy that the victim had allegedly taken out on his life and present a life insurance company representative as a defense witness in support of his self-defense theory. Because the record is not sufficiently clear to determine whether reasonable jurists could debate whether Dodson has made a valid claim of a constitutional deprivation on this basis, Dodson warrants a COA as to this specific claim. *See id.*

Therefore, we grant Dodson a COA as to whether his trial counsel was ineffective for failing to investigate the life insurance policy that the victim had allegedly taken out on his life and present a life insurance company representative as a defense witness in support of his self-defense theory. We vacate the judgment of the district court with respect to that portion of Dodson's application, and we remand this case for further proceedings as necessary.

COA DENIED IN PART, GRANTED IN PART; VACATED AND REMANDED IN PART.