

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 96-40348  
Summary Calendar

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CHARLES KENNETH NELSON,

Petitioner-Appellant,

versus

GARY L. JOHNSON, Director,  
Texas Department of Criminal Justice,  
Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court for the  
Southern District of Texas  
(C-95-163)

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January 16, 1997  
Before GARWOOD, JOLLY and DENNIS, Circuit Judges.\*

PER CURIAM:

Charles Kenneth Nelson, Texas prisoner # 503292, appeals the judgment of the district court denying his second petition for habeas corpus relief pursuant to 28 U.S.C. § 2254. Nelson has not established cause and prejudice for failing to raise his Sixth

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\*Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Amendment claim of ineffective assistance of counsel in his first habeas corpus petition. *Duff-Smith v. Collins*, 995 F.2d 545, 546 (5th Cir.), *cert. denied*, 509 U.S. 933 (1993). Although Nelson asserts his innocence, he has not supplemented his Sixth Amendment claim with a colorable showing of factual innocence; therefore, the miscarriage-of-justice exception does not apply. See *Callins v. Johnson*, 89 F.3d 210, 213 (5th Cir.), *cert. denied*, 1996 WL 625764 (U.S. Dec. 2, 1996) (No. 96-6391). Nelson has not shown that it is more likely than not that but for the asserted errors of his counsel no reasonable juror would have convicted him. *Schlup v. Delo*, 115 S.Ct. 851, 867 (1995). The judgment of the district court in favor of the respondent is AFFIRMED on grounds that Nelson's second habeas corpus petition constitutes an abuse of the writ. See Rule 9(b) of the Rules Governing 28 U.S.C. § 2254 Cases.

AFFIRMED