

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-31337
Summary Calendar

ABDULLAH MUHAMMAD, also known was Kirk Spencer,

Petitioner-Appellant,

versus

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 98-CV-2510-T

July 11, 2000

Before SMITH, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:*

Abdullah Muhammad ("Muhammad"), Louisiana prisoner # 107286, seeks a certificate of appealability ("COA") to appeal the district court's denial of his 28 U.S.C. § 2254 petition. See § 2253(c)(1)(A). He argues that the district court erred in dismissing, on the merits, his claim that counsel rendered ineffective assistance by failing to cross-examine a witness properly. Muhammad also argues that the district court erred in dismissing, on failure-to-exhaust grounds, his claim that counsel

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

was ineffective for failing to file a motion to reconsider his sentence.

To obtain a COA for constitutional issues, Muhammad must make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). To obtain a COA for procedural issues, such as whether the district court correctly dismissed a claim in a § 2254 petition for failure to exhaust, Muhammad must show that "jurists of reason would find it debatable whether [he] 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 v. McDaniel, 120 S. Ct. 1595, 1604 (2000).

Muhammad has failed to make a substantial showing of the denial of a constitutional right with respect to his first argument. He has failed to show that the district court erred in dismissing his claim that counsel rendered ineffective assistance by failing to cross-examine a witness properly. See Strickland v. Washington, 466 U.S. 668, 688 (1984). COA to appeal the first argument is DENIED.

Muhammad has shown that jurists of reason would find it debatable whether the district court was correct in its procedural ruling to dismiss his second argument for failure to exhaust and whether he stated a valid claim of the denial of a constitutional right. Muhammad exhausted his available state remedies with his "valid" claim that counsel was ineffective for

failing to file a motion to reconsider his sentence. COA to appeal the second argument is GRANTED.

The district court's judgment dismissing, on failure-to-exhaust grounds, Muhammad's claim that counsel was ineffective for failing to file a motion to reconsider his sentence is hereby VACATED, and this case is REMANDED to the district court for consideration of the claim.