

ON REHEARING

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-277

In Re: RICHARD EDWARD CABEY,

Movant.

On Motion for Authorization to File Successive Application.

Submitted: January 10, 2006

Decided: June 30, 2006

Before LUTTIG* and DUNCAN, Circuit Judges, and Eugene E. SILER, Jr., Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

Authorization denied by unpublished per curiam opinion.

James Phillip Griffin, Jr., NORTH CAROLINA PRISONER LEGAL SERVICES, INC., Raleigh, North Carolina, for Movant. Roy Cooper, Attorney General, Clarence Joe DelForge, III, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Respondent.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

*Judge Luttig was a member of the original panel and participated in the decision to grant panel rehearing but did not participate in the panel's decision on rehearing. This opinion is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

PER CURIAM:

Richard E. Cabey has filed a motion for authorization to file a successive 28 U.S.C. § 2254 (2000) petition pursuant to 28 U.S.C. § 2244 (2000). Cabey seeks to challenge the execution of his sentence based on factual developments that occurred after his earlier petitions for post-conviction relief were adjudicated. Because he could not have litigated claims based on these new factual developments in his earlier petitions, we conclude that a § 2254 petition raising such claims is not "second or successive" for purposes of the gatekeeping provisions of § 2244. Accordingly, we deny Cabey's motion for authorization as unnecessary. See In re Taylor, 171 F.3d 185 (4th Cir. 1999); see also Medberry v. Crosby, 531 F.3d 1049 (11th Cir. 2003), cert. denied, 124 S. Ct. 2098 (2004); James v. Walsh, 308 F.3d 162 (2d Cir. 2002); Crouch v. Norris, 251 F.3d 720 (8th Cir. 2001). Further, we instruct the district court to accept for filing Cabey's § 2254 petition challenging the execution of his sentence.

AUTHORIZATION DENIED