

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-7030

MILTON ORRETT COLE,

Petitioner - Appellant,

v.

GENE M. JOHNSON, Director of the Virginia Department of
Corrections,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern
District of Virginia, at Norfolk. Walter D. Kelley, Jr.,
District Judge. (2:07-cv-00489-WDK-JEB)

Submitted: November 12, 2008

Decided: December 11, 2008

Before NIEMEYER, KING, and GREGORY, Circuit Judges.

Dismissed in part; vacated and remanded in part by unpublished
per curiam opinion.

Rion O'Neal Latimore, Cincinnati, Ohio, for Appellant. Robert H.
Anderson, III, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA,
Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Milton Orrett Cole seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2254 (2000) petition.* The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2000). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001).

We have independently reviewed the record and conclude that Cole has not made the requisite showing with respect to his § 2254 claims alleging ineffective assistance of counsel. With regard to Cole's challenge to his continuing detention by the Department of Homeland Security, we vacate the district court's

* Cole initially filed his habeas petition under 28 U.S.C. § 2241 (2000). However, it was construed by the district court as a § 2254 petition.

order and remand so that this claim may be properly considered under 28 U.S.C. § 2241 (2000) and in light of relevant precedent of the United States Supreme Court. See Clark v. Martinez, 543 U.S. 371 (2005); Demore v. Kim, 538 U.S. 510 (2003); Zadvydas v. Davis, 533 U.S. 678 (2001).

Accordingly, we deny a certificate of appealability and dismiss the appeal in part, and vacate and remand in part for further proceedings. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED IN PART;
VACATED AND REMANDED IN PART