

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-6660

CHARLES JERALL SMITH,

Petitioner - Appellant,

v.

GENE M. JOHNSON,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. M. Hannah Lauck, Magistrate Judge. (3:05-cv-00196-MHL)

Submitted: August 21, 2009

Decided: September 11, 2009

Before MOTZ, KING, and SHEDD, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Charles Jerall Smith, Appellant Pro Se. Karen Geneva Misbach, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Charles Jerall Smith seeks to appeal the magistrate judge's order treating his Fed. R. Civ. P. 60(b) motion as a successive 28 U.S.C. § 2254 (2006) petition, and dismissing it on that basis.* The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2006); Reid v. Angelone, 369 F.3d 363, 369 (4th Cir. 2004). 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) (2006). A prisoner satisfies this standard by demonstrating that reasonable jurists would find the district court's assessment of the constitutional claims, and any dispositive procedural ruling, debatable or wrong. 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, 683-85 (4th Cir. 2001). We have independently reviewed the record and conclude Smith has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal.

Additionally, we construe Smith's notice of appeal and informal brief as an application to file a second or successive

* The parties consented to have the case decided by a magistrate judge in accordance with 28 U.S.C. § 636(c) (2006).

petition under 28 U.S.C. § 2244 (2006). United States v. Winestock, 340 F.3d 200, 208 (4th Cir. 2003). In order to obtain authorization to file a successive § 2254 petition, a prisoner must assert claims based on either: (1) a new rule of constitutional law that was previously unavailable and made retroactive by the Supreme Court to cases on collateral review; or (2) newly discovered evidence that was not previously discoverable by due diligence and that would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the petitioner guilty of the offense. 28 U.S.C. § 2244(b)(2) (2006). Smith's claims do not satisfy either of these criteria. Therefore, we deny authorization to file a successive § 2254 petition.

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