

FILED: March 12, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7450
(1:18-cv-01389-LO-MSN)

MAURICE PATRICK FORTUNE, III

Plaintiff - Appellant

v.

COMMONWEALTH OF VIRGINIA

Defendant - Appellee

O R D E R

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Motz, Judge Keenan, and Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 18-7450

MAURICE PATRICK FORTUNE, III,

Plaintiff - Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, District Judge. (1:18-cv-01389-LO-MSN)

Submitted: January 22, 2019

Decided: January 25, 2019

Before MOTZ, KEENAN, and FLOYD, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Maurice Patrick Fortune, III, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Maurice Patrick Fortune, III, a Virginia inmate, seeks to appeal the district court's order construing his 42 U.S.C. § 1983 (2012) complaint as a successive habeas petition under 28 U.S.C. § 2254 (2012) and dismissing the petition without prejudice for lack of prefiling authorization.* The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). 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) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

Because Fortune's informal brief does not challenge the basis for the district court's disposition, Fortune has forfeited appellate review of the court's order. *See 4th Cir. R. 34(b); Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues

* Our decision in *Goode v. Cent. Va. Legal Aid Soc'y, Inc.*, 807 F.3d 619 (4th Cir. 2015), does not preclude this appeal because the district court dismissed the petition for a "reason[] unrelated to the contents of the pleadings." *Id.* at 624.

preserved in that brief.”). Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA**

Alexandria Division

Maurice Patrick Fortune III,)
Petitioner,)
)
v.) 1:18cv1389 (LO/MSN)
)
Commonwealth of Virginia,)
Respondent.)

ORDER

Maurice Patrick Fortune III, a Virginia inmate proceeding pro se, filed a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court of the Western District of Virginia. Dkt. No. 1. By Order dated November 8, 2018, petitioner's complaint was construed as a petition for a writ of habeas corpus pursuant to § 2254, challenging the constitutionality of petitioner's conviction in the Circuit Court for the City of Richmond, and the matter was transferred to this Court. Dkt. No. 5.

Petitioner previously filed a § 2254 habeas corpus petition regarding the same conviction, which was reviewed and dismissed on the merits as time barred.¹ Fortune v. Herring, 1:16cv586 (E.D. Va. August 29, 2016) (appeal dismissed). Title 28 U.S.C. § 2244(b) compels the district court to dismiss a second or successive habeas corpus petition absent an order from a panel of the court of appeals authorizing the district court to review such a petition. The court of appeals will only authorize such a review if a petitioner can show that (1) the claim has not been previously presented to a federal court on habeas corpus, and (2) the claim relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, or

¹ In his "complaint," petitioner references that the underlying criminal case he is challenging is case number CR09F04820, which is the criminal case that was challenged in the previous § 2254 petition.

the claim relies on facts which could not have been previously discovered by due diligence and which show "by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). Petitioner has neither provided an appropriate order from the United States Court of Appeals for the Fourth Circuit nor demonstrated his compliance with the standard for obtaining a certificate from the Fourth Circuit pursuant to § 2244(b)(2)(B). Therefore, this Court lacks jurisdiction to consider this successive petition.

Accordingly, it is hereby

ORDERED that this action be and is DISMISSED, WITHOUT PREJUDICE to petitioner's right to move a panel of the United States Court of Appeals for the Fourth Circuit for an order authorizing this Court to consider the petition.

To appeal this decision, petitioner must file a written notice of appeal with the Clerk's Office within thirty (30) days of the date of this Order. A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order petitioner wants to appeal. Petitioner need not explain the grounds for appeal until so directed by the Court. Petitioner must also request a certificate of appealability from a circuit justice or judge. See 28 U.S.C. § 2253 and Fed. R. App. P. 22(b). This Court expressly declines to issue such a certificate.

The Clerk is directed to send a copy of this Order and a standard §2244 form to petitioner and to close this civil case.

Entered this 19th day of November 2018.

Alexandria, Virginia

/s/
Lynn O'Grady
United States District Judge
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