

FILED: July 29, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6225
(5:18-cv-00144-FDW)

ROBERT H. JOHNSON

Petitioner - Appellant

v.

DREW STANLEY, Superintendent, Warren Correctional Institution

Respondent - Appellee

O R D E R

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Floyd, Judge Quattlebaum, and
Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

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

No. 19-6225

ROBERT H. JOHNSON,

Petitioner - Appellant,

v.

DREW STANLEY, Superintendent, Warren Correctional Institution,

Respondent - Appellee.

Appeal from the United States District Court for the Western District of North Carolina,
at Statesville. Frank D. Whitney, Chief District Judge. (5:18-cv-00144-FDW)

Submitted: April 25, 2019

Decided: April 30, 2019

Before FLOYD and QUATTLEBAUM, Circuit Judges, and TRAXLER, Senior Circuit
Judge.

Dismissed by unpublished per curiam opinion.

Robert H. Johnson, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Robert H. Johnson seeks to appeal the district court's order denying his motions to clarify and to appoint counsel in his 28 U.S.C. § 2254 (2012) proceedings. This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291 (2012), and certain interlocutory and collateral orders, 28 U.S.C. § 1292 (2012); Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949). The order Johnson seeks to appeal is neither a final order nor an appealable interlocutory or collateral order. Accordingly, we deny Johnson's motion to appoint counsel and we dismiss the appeal for lack of jurisdiction. 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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
5:18-cv-00144-FDW

ROBERT H. JOHNSON,

Petitioner,

vs.

DREW STANLEY,

Respondent.

ORDER

THIS MATTER is before the Court upon Petitioner Robert H. Johnson's combined Motion for Clarification and Motion for Appointment of Counsel. (Doc. No. 11.)

Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in this Court on September 4, 2018. (Doc. No. 1.) Respondent filed a Motion for Summary Judgment seeking a ruling by the Court that Respondent is entitled to judgment as a matter of law. (Doc. No. 6.) Thereafter, the Court issued an Order pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), notifying Petitioner of his right to respond to the Motion for Summary Judgment. (Doc. No. 8.) Among other things, the Court admonished that to defeat the Motion for Summary Judgment:

Petitioner may not rely upon mere allegations or denials of allegations in his pleadings. See id. at 324. Instead, Petitioner must cite, or provide, documents that support the allegations made in his Petition. See Fed. R. Civ. P. 56(c). Those may include court orders, transcripts of proceedings, filings by the parties in the state courts, etc.

The Court notes that Respondent has filed portions of the state record with the summary judgment Motion. (Doc. Nos. 7-2 thru 7-15.) Petitioner may cite evidence from those documents to support his allegations and may file additional documents which he believes show that there is a genuine issue for trial. See id.

(Roseboro Order 2, Doc. No. 8.)

Petitioner has filed the instant Motion asking the Court to clarify what it means by “cite” and what he should send the Court to prove his innocence. (Mot. to Clarify 1, Doc. No. 11.) The Court is prohibited from providing legal advice to anyone, and Petitioner’s Motion amounts to a request for legal advice. All the Court may do is notify Petitioner of his right to respond to the Motion for Summary Judgment and of the requirements of the summary judgment rule, Rule 56 of the Federal Rules of Civil Procedure.

In its Roseboro notice, the Court summarized the requirements of Rule 56 in language meant to clarify the Rule for a layman, apparently without success in this instance. The Court provides the relevant portions of the actual Rule here:

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

- (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
- (B) showing that the materials cited [by the other party] do not establish the absence . . . of a genuine dispute, or that [the other] party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Fed. R. Civ. P. 56(c). In the context of Rule 56, the word “cite” may be used interchangeably

with “refer,” “point,” “quote,” or “identify.”

In his Motion, Petitioner also seeks appointment of counsel. (Mot. to Clarify 1.) There is no constitutional right to counsel in a § 2254 proceeding. Crowe v. United States, 175 F.2d 799 (4th Cir. 1949). Rules 6(a) and 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts mandate the appointment of counsel when discovery is necessary or if the matter proceeds to an evidentiary hearing. Id., 28 U.S.C.A. foll. § 2254. The Court also has discretion to appoint counsel to financially eligible persons in a § 2254 action upon finding that “the interests of justice so require.” 18 U.S.C. § 3006A(a)(2)(B).

After reviewing the record before it, the Court concludes that, at this point, Petitioner has not shown circumstances demonstrating the need for appointment of counsel. As such, Petitioner’s Motion for Appointment of Counsel will be denied.

IT IS, THEREFORE, ORDERED that Petitioner’s combined Motion for Clarification and Motion for Appointment of Counsel (Doc. No. 11) is **DENIED**.

Signed: January 25, 2019



Frank D. Whitney
Chief United States District Judge



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from this filing is
available in the
Clerk's Office.**