

UNPUBLISHED**UNITED STATES COURT OF APPEALS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

No. 19-6499

DAVID LEE SMITH,

Petitioner - Appellant,

v.

RICK JACKSON,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (5:06-hc-02061-BO)

Submitted: August 22, 2019

Decided: August 27, 2019

Before KING and RICHARDSON, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

David Lee Smith, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

David Lee Smith seeks to appeal the district court's order denying his motion for release pending appeal of the court's order denying his Fed. R. Civ. P. 60(b) motions for reconsideration of the court's order denying relief on his 28 U.S.C. § 2254 (2012) petition. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Smith v. Jackson*, No. 5:06-hc-02061-BO (E.D.N.C. Mar. 21, 2019). We deny Smith's motion for a certificate of appealability as unnecessary. 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.

AFFIRMED

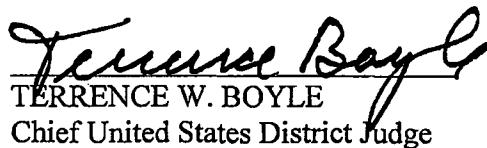
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:06-HC-2061-BO

DAVID LEE SMITH,)
Petitioner,)
v.) ORDER
RICK JACKSON,)
Respondent.)

Petitioner, a state inmate, filed this petition for a writ of habeas corpus *pro se* pursuant to 28 U.S.C. § 2254, and the court granted respondent's motion for summary judgment on February 26, 2007. On June 13, 2018, the court denied petitioner's motions for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). The matter now is before the court on petitioner's January 24, 2019, motion for release pending appeal (DE 59). On January 25, 2019, the Fourth Circuit Court of Appeals dismissed petitioner's pending appeal. (See (DE 60)). Because the Fourth Circuit dismissed petitioner's appeal, petitioner's motion for release pending appeal (DE 59) is DENIED as MOOT.

SO ORDERED, this the 20 day of March, 2019.


TERRENCE W. BOYLE
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:06-HC-2061-BO

DAVID LEE SMITH,

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Petitioner,

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ORDER

RICK JACKSON,

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Respondent.

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Petitioner, a state inmate, filed this petition for a writ of habeas corpus *pro se* pursuant to 28 U.S.C. § 2254, and the court granted respondent's motion for summary judgment on February 26, 2007. Petitioner subsequently filed a motion for reconsideration, which the court denied. Petitioner next appealed, and the Fourth Circuit Court of Appeals dismissed petitioner's appeal on July 24, 2007. See Smith v. Jackson, No. 07-6411 (4th Cir. July 24, 2007). Then, on December 11, 2017, the court denied three post-judgment motions to amend filed by petitioner. The court next denied petitioner's motion captioned "Motion to Vacate Judgment" on January 3, 2018. The matter now comes before the court on petitioner's motions for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) (DE 41-45, 47):

As stated in the court's December 11, 2017, and January 3, 2018, orders, petitioner's Rule 60(b) motions, filed more than ten years post-judgment are untimely.¹ See Fed. R. Civ. P. 60(b). Moreover, petitioner has not presented any argument warranting reconsideration. See, e.g., Nat'l

¹ The court notes that petitioner's new challenge to his sentence calculation in his April 16, 2018, filing would not have been ripe when the action was dismissed on February 26, 2007.

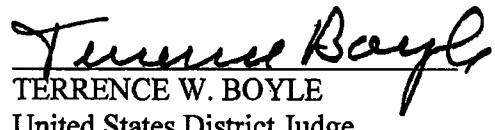
Credit Union Admin. Bd. v. Gray, 1 F.3d 262, 264 (4th Cir. 1993). Finally, in the context of a Rule 60(b) motion in a § 2254 action, “a motion directly attacking the prisoner’s conviction or sentence will usually amount to a successive application, while a motion seeking a remedy for some defect in the collateral review process will generally be deemed a proper motion to reconsider.” United States v. Winestock, 340 F.3d 200, 207 (4th Cir. 2003); 28 U.S.C. § 2244(b)(3)(A) (“Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.”); In re Wright, 826 F.3d 774, 783 (4th Cir. 2016). Here, petitioner attempts to directly attack his conviction and sentence. Thus, petitioner’s motions amount to successive § 2254 motions.

To the extent petitioner construes his filing as a writ of mandamus, he still is not entitled to relief. (See (DE 45). Specifically, petitioner may not circumvent 28 U.S.C. § 2244(b)(3)(A)’s bar on second or successive petitions by labeling his filing a petition for a writ of mandamus. See Winestock, 340 F.3d at 207; Melton v. United States, 359 F.3d 855, 857 (7th Cir. 2004) (“Call it a motion for a new trial, arrest of judgment, mandamus, prohibition, coram nobis, coram vobis, audita querela, certiorari, capias, habeas corpus, ejectment, quare impedit . . . or an application for a Get-Out-of-Jail-Card; the name makes no difference. It is substance that controls.”). Based upon the foregoing, petitioner’s motions are DENIED.

In summary, petitioner’s Rule 60(b) motions (DE 41-45, 47) are DENIED. Additionally, petitioner has had more than ample opportunity to raise any post-judgment issues in this action.

Where the case file is long closed, the clerk of court is DIRECTED to dispense with the taking into the record of this case any new materials. Petitioner must bring any new claim in a separate action.

SO ORDERED, this the 12 day of June, 2018.


TERRENCE W. BOYLE
United States District Judge

FILED: October 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6499
(5:06-hc-02061-BO)

DAVID LEE SMITH

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O R D E R

The court denies the petition for rehearing.

The court denies the motion to remand case.

Entered at the direction of the panel: Judge King, Judge Richardson, and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: October 29, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6499
(5:06-hc-02061-BO)

DAVID LEE SMITH

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O R D E R

The court strictly enforces the time limits for filing petitions for rehearing and petitions for rehearing en banc in accordance with Local Rule 40(c). The petition in this case is denied as untimely.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk