

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**No. 04-6868**

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EMORY MITCHELL,

Petitioner - Appellant,

versus

RICHARD SMITH, Warden; HENRY MCMASTER,  
Attorney General of South Carolina,

Respondents - Appellees.

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Appeal from the United States District Court for the District of South Carolina, at Beaufort. Henry M. Herlong, Jr., District Judge. (CA-03-2529-9-20BG)

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Submitted: December 9, 2004

Decided: December 15, 2004

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Before NIEMEYER, WILLIAMS, and TRAXLER, Circuit Judges.

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Dismissed by unpublished per curiam opinion.

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Emory Mitchell, Appellant Pro Se. Donald John Zelenka, Chief Deputy Attorney General, John William McIntosh, Assistant Attorney General, Samuel Creighton Waters, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, for Appellees.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Emory Mitchell seeks to appeal the district court's April 8, 2004, order, denying his 28 U.S.C. § 2254 (2000) petition, because he failed to object to the magistrate judge's report and recommendation. Because Mitchell informed the court that he did not receive the magistrate judge's report and recommendation, the district court granted Mitchell's Fed. R. Civ. P. 60(b) motion, vacated its April 8th order, and reissued the recommendation so that Mitchell could object. Thus, there has been no final order entered in the case. This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291 (2000), and certain interlocutory and collateral orders, 28 U.S.C. § 1292 (2000); Fed. R. Civ. P. 54(b); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). The order Mitchell seeks to appeal is neither a final order nor an appealable interlocutory or collateral order. Accordingly, we deny a certificate of appealability and 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 the court and argument would not aid the decisional process.

DISMISSED