

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-6294

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

FRED T. MORGAN,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Senior District Judge. (3:97-cr-00083-jhm-AL; 7:05-cv-00224-jct-mf)

Submitted: April 20, 2006

Decided: April 26, 2006

Before MICHAEL, KING, and DUNCAN, Circuit Judges.

Affirmed in part, and dismissed in part by unpublished per curiam opinion.

Fred T. Morgan, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.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

PER CURIAM:

Fred Morgan, a federal prisoner, seeks to appeal the district court's order dismissing his motion filed pursuant to Fed. R. Civ. P. 60(b), which the district court construed as a successive 28 U.S.C. § 2255 (2000) motion. The order also denied Morgan's motion for downward departure.

The portion of the district court's order dismissing Morgan's Rule 60(b) motion is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2000); Reid v. Angelone, 369 F.3d 363, 369 (4th Cir. 2004). A certificate of appealability will not issue for claims addressed by a district court absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that the district court's assessment of his constitutional claims is debatable or wrong and that any dispositive procedural rulings by the district court are also debatable or wrong. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683 (4th Cir. 2001). We have independently reviewed the record and conclude that Morgan has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss this portion of the appeal.

Additionally, we construe Morgan's notice of appeal and informal brief on appeal as an application to file a second or successive motion under 28 U.S.C. § 2255. See United States v. Winestock, 340 F.3d 200, 208 (4th Cir. 2003). In order to obtain authorization to file a successive § 2255 motion, a prisoner must assert claims based on either: (1) a new rule of constitutional law, previously unavailable, made retroactive by the Supreme Court to cases on collateral review; or (2) newly discovered evidence that would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the petitioner guilty of the offense. 28 U.S.C. §§ 2244(b)(2), 2255 (2000). Morgan's claims do not satisfy either of these conditions. We therefore deny authorization to file a successive § 2255 motion.

Finally, we have reviewed the record and the district court's opinion and find no error in the denial of Morgan's motion for downward departure. Accordingly, we affirm this portion of the district court's order for the reasons stated by the district court. See United States v. Morgan, Nos. 3:97-cr-00083-jhm-AL; 7:05-cv-00224-jct-mf (W.D. Va. Jan. 31, 2006). 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.

AFFIRMED IN PART;
DISMISSED IN PART