

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-7664

FRANK E. KESSLER, JR.,

Petitioner - Appellant,

versus

GEORGE DEEDS, Warden, Keen Mountain Correc-
tional Center,

Respondent - Appellee.

Appeal from the United States District Court for the Western Dis-
trict of Virginia, at Roanoke. Jackson L. Kiser, Chief District
Judge. (CA-95-89-R)

Submitted: April 15, 1996

Decided: April 25, 1996

Before ERVIN and MOTZ, Circuit Judges, and CHAPMAN, Senior Circuit
Judge.

Dismissed by unpublished per curiam opinion.

Frank E. Kessler, Jr., Appellant Pro Se. Thomas Drummond Bagwell,
Assistant Attorney General, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.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

PER CURIAM:

Appellant seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 (1988) petition. We have reviewed the record and the district court's opinion accepting the recommendation of the magistrate judge and find no reversible error. Accordingly, we deny a certificate of probable cause to appeal and dismiss the appeal substantially on the reasoning of the district court. Kessler v. Deeds, No. CA-95-89-R (W.D. Va. Sept. 19, 1995). We note that Appellant may have suggested in his state habeas petition that his procedural default was due to attorney error. However, we conclude that Appellant failed to bear his burden of proving prejudice as a result of that error either in the state court or in district court. See Murray v. Carrier, 477 U.S. 478 (1986); United States v. Frady, 456 U.S. 152 (1982). Consequently, his procedural default is not excused. 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