

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-7925

RICHARD LAMAR FENSTERMACHER,

Petitioner - Appellant,

versus

RONALD J. ANGELONE,

Respondent - Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, District Judge. (CA-95-1165-R)

Submitted: March 21, 1996

Decided: April 10, 1996

Before NIEMEYER and MICHAEL, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Richard Lamar Fenstermacher, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.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

PER CURIAM:

Appellant appeals from the district court's order dismissing without prejudice his 28 U.S.C. § 2254 (1988) petition. The district court's dismissal without prejudice is not appealable. See Domino Sugar Corp. v. Sugar Workers' Local Union 392, 10 F.3d 1064, 1066-67 (4th Cir. 1993). A dismissal without prejudice could be final if "no amendment [to the petition] could cure defects in the plaintiff's case." Id. at 1067. In ascertaining whether a dismissal without prejudice is reviewable in this court, the court must determine "whether the [petitioner] could save his action by merely amending the [petition]." Id. at 1066-67.

Because Appellant could have amended his petition to assert some claims, the dismissal order is not appealable. Accordingly, while we grant Appellant's motions to amend his informal brief, we deny a certificate of probable cause to appeal 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