

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

LARRY L. STEWART,

Petitioner-Appellant.

v.

No. 95-6919

RONALD J. ANGELONE, Director of
the Virginia Department of
Corrections,
Respondent-Appellee.

LARRY L. STEWART,

Petitioner-Appellant.

v.

No. 95-7236

RONALD J. ANGELONE, Director of
the Virginia Department of
Corrections,
Respondent-Appellee.

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
J. Calvitt Clarke, Jr., Senior District Judge.
(CA-94-704-2)

Submitted: September 19, 1995

Decided: March 11, 1996

Before WIDENER, HALL, and WILLIAMS, Circuit Judges.

No. 95-6919 vacated and remanded and No. 95-7236 dismissed by
unpublished per curiam opinion.

COUNSEL

Larry L. Stewart, Appellant Pro Se. Donald Richard Curry, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.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

OPINION

PER CURIAM:

In these consolidated appeals, Larry Stewart seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 (1988) petition, and the district court's order denying him leave to proceed on appeal in forma pauperis. Our review of the record in appeal number 95-6919 reveals that Stewart's habeas petition contained both exhausted and unexhausted claims, including an unexhausted claim of actual innocence based on an affidavit of the victim of the crime underlying Stewart's conviction. Because of Stewart's unexhausted claim of actual innocence, which was based on newly discovered evidence, the district court should have either dismissed Stewart's entire petition without prejudice, or permitted Stewart to amend his petition to drop this unexhausted claim. See Rose v. Lundy, 455 U.S. 509, 520, 522 (1982). Accordingly, in appeal number 95-6919 we grant leave to proceed in forma pauperis and a certificate or probable cause to appeal, vacate the district court's order, and remand for further proceedings consistent with these options.

Regarding appeal number 95-7236, we note that Fed. R. App. P. 24(a) does not contemplate appeals from district court orders denying leave to proceed in forma pauperis on appeal, but rather directs a litigant whose motion is denied by the district court to file a successive and independent motion for such relief in the court of appeals. See United States v. Boutwell, 896 F.2d 884, 889 (5th Cir. 1990). Stewart

did not file such a motion and were we to construe his appeal as such a motion, it would be denied. We therefore deny a certificate of probable cause to appeal, deny leave to proceed in forma pauperis, and dismiss appeal number 95-7236. 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.

No. 95-6919 - VACATED AND REMANDED

No. 95-7236 - DISMISSED