

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 03 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT SMITH, Jr.,

Petitioner - Appellant,

v.

BELINDA STEWART, Superintendent,
Stafford Creek Corrections Center; et al.,

Respondents - Appellees.

No. 07-35355

D.C. No. CV-07-00166-RSL

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Submitted June 18, 2008**

Before: THOMAS, W. FLETCHER and CLIFTON, Circuit Judges.

Washington state prisoner Robert Smith, Jr. appeals from the district court's judgment dismissing his 28 U.S.C. § 2254 petition as second or successive. We

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253, and we reverse and remand.

In his § 2254 petition, Smith challenges the Indeterminate Sentence Review Board's 2005 decision denying him parole and does not challenge his underlying conviction or sentence. His parole claims have never been decided on the merits and could not have been raised in his earlier petitions challenging his conviction and sentence. Accordingly, the district court erred in dismissing the petition as second or successive. *See Hill v. Alaska*, 297 F.3d 895, 898-99 (9th Cir. 2002).

We reverse and remand to the district court for further proceedings. We express no opinion on whether Smith has properly exhausted his state court remedies.

Smith's motion for judgment on the pleadings is denied.

REVERSED and REMANDED.