

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA)	
)	
)	Case No. 1:08CR00024-032
)	
v.)	OPINION AND ORDER
)	
ANTHONY EUGENE DUTY,)	By: James P. Jones
)	United States District Judge
Defendant.)	

Anthony Eugene Duty, Pro Se Defendant.

Anthony Eugene Duty has filed a motion seeking to vacate my July 24, 2013, Opinion and Order, denying relief on his Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. *See* Fed. R. Civ. P. 58(e). Finding no merit to his arguments, I will deny his motion.

Duty asserts that he is entitled to relief based upon the following alleged errors by the court's failure (1) to issue a certificate of appealability based on "a circuit split" as identified on page 11 of the Opinion; (2) to allow discovery; (3) to notify Duty, as required under *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), that the government's Motion to Dismiss might be treated as one seeking summary judgment; and (4) to deny the government's Motion to Dismiss based upon disputes between the parties' supporting affidavits and potential witness testimony.

Reviewing the record, however, it is clear that none of the alleged errors occurred. First, I denied Duty a certificate of appealability because I found then, as I find now, that he has not made the requisite showing of denial of a substantial right.¹ Second, the court did, in fact, issue a “Roseboro Notice,” warning Duty that the government’s Motion to Dismiss might be treated under the summary judgment standard and granting him an opportunity to respond with affidavits. (ECF No. 2937.) Third, I find no basis for Duty’s claim that denial of discovery was error, because he has not made a showing of good cause, as required under Rule 6 of the Rules Governing 2255 Proceedings. Finally, Duty fails to identify any disputed fact on which I relied in denying his § 2255 motion and fails even now to forecast particular testimony his desired witnesses would present on which he could prove a claim for relief.

¹ Duty’s “circuit split” argument rests on my citation of a decision by the United States Court of Appeals for the Sixth Circuit which has been vacated pending a rehearing en banc. *See United States v. Blewett*, Nos. 12-5226, 12-5582, 2013 WL 2121945, at *6 (6th Cir. May 17, 2013) (finding that constitutional considerations require retroactive application of the Fair Sentencing Act to crack offenders who were sentenced before the adoption of the FSA), *vacated and reh’g en banc granted* (July 11, 2013). Under current precedent from the Fourth Circuit and the United States Supreme Court, I do not find that my refusal to resentence Duty under the FSA constitutes a denial of any substantial right, as required for issuance of a certificate of appealability under 28 U.S.C. § 2253(c)(2). *See Dorsey v. United States*, 132 S. Ct. 2321, 2335 (2012) (finding that FSA’s “new, lower mandatory minimums . . . apply to the post-Act sentencing of pre-Act offenders” and noting that disparity between these offenders and others sentenced pre-Act is consistent with ordinary federal sentencing practice); *United States v. Bullard*, 645 F.3d 237, 248 (4th Cir.), *cert. denied*, 132 S. Ct. 356 (2011) (finding that FSA does not apply retroactively to cases pending on direct appeal), *limited in part by Dorsey*, 132 S. Ct. at 2335 (regarding defendant sentenced post-Act).

For the stated reasons, it is **ORDERED** that defendant's motion (ECF No. 3056) is DENIED.

ENTER: October 23, 2013

/s/ James P. Jones
United States District Judge