

No. 20-5906

In The
Supreme Court of The United States

ORIGINAL

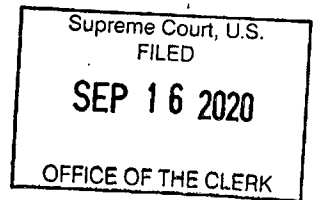
Demetrius Barber

Petitioner

vs.

James Burke, P. Riley, R. Pennington

Respondent(s)



On Petition for a Writ of Certiorari To
United States Court of Appeals (Fifth Circuit)

(Name of Court that last ruled on merits of your case)

Petition For Writ of Certiorari

Demetrius Barber.. MDOC K6330 #

MSP, Unit 30 D

Mississippi State Penitentiary

Parchman, Mississippi

38738

Question Presented

Petitioner Present the Question for the U.S. Supreme Court, Where under 28 U.S.C.A. F.R.A.P. Rule 4 (c)⁽¹⁾ and Rule 4 (d). U.S. 5th circuit court of appeal's circuit clerk, cause error by not forwarding Petitioner first Direct Appeal to the U.S. District Court for the Northern District of Mississippi Clerk. As in Accordance with F.R.A.P. 4(d) Where Petitioner mistakenly filed in the wrong court. But timely filed under Rule 4(c) which should had been Petitioner Appeal 5th circuit ruled upon, instead of the second one Petitioner had to rush to put together to send back in, Because Petitioner was misinformed in letter from U.S. 5th circuit clerk, Petitioner left out one of the U.S. District Judge Court ruling on the hearing. And the 5th circuit Judges dismissed Petitioner Direct Appeal. Which was error. Petitioner request from the U.S. Supreme Court to review this error set forth in this writ of Certiorari, Along with the Proof Petitioner Present to show error made by 5th circuit Judges, And Petitioner request to have the ruling reverse and order the 5th circuit to rule upon Petitioner Direct Appeal.

List of Parties

☐ All parties appear in the caption of the case on the cover

Page. _____

☒ All parties do not appear in the caption of the case on the cover page. A list of all parties to the Proceeding in the court whose Judgment is the subject of this Petition is as follows:

Respondent(s)

U.S. Magistrate Judge

Shane M. Virden

Respondent(s)

P. Riley

R. Pennington

Related cases

Demetrius Barber -v- James Burke "et al" No. 4:18 CV 149-JMV

Northern District of Mississippi Judgment entered Jan. 10, 2019

Demetrius Barber -v- James Burke "et al" No. ~~42~~ 4:18 CV 149-JMV

Northern District of Mississippi Judgment entered May 6, 2019

Demetrius Barber -v- James Burke "et al" No. 4:18 CV 149-JMV

Northern District of Mississippi Judgment entered Jan, 6, 2020

~~Continued~~ Continue

Demetrius Barber - v - James Burke, "et al" No. 20-60093

U.S. Court of Appeal 5th cir. Judgement entered July 7, 2020

Demetrius Barber - v - James Burke, "et al" No. 20-60093

U.S. Court of Appeal 5th cir. Judgement entered Sept. 3, 2020

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Appendix A.

Barber-v-Burke "et al" No. 20-60093 5th circuit Denied
Judgement entered July 7, 2020. (Notice of appeal)

Appendix B.

Barber-v-Burke "et al" No. 4:18 cv 149-JMV Northern District of
Mississippi Dismissed Judgement entered Jan. 10, 2019 (Final Judgement)

Appendix C.

Barber-v-Burke "et al" No. 4:18 cv 149-JMV Northern District of
Mississippi Denied Judgement entered May 6, 2019 Motion for
(Reconsideration and Summary Judgement construed.)

Appendix D.

Barber-v-Burke "et al" No. 20-60093 5th circuit Denied
Judgement entered Sept. 3 2020 (Motion for Reconsideration)

Appendix E.

~~Barber-v-Burke~~ Barber-v-Burke "et al" No. ~~20-60093~~ 4:18 cv 149-JMV Northern
District of Mississippi Dismissed as unnecessary Judgement entered Jan.
6, 2020. (Certificate of Appealability as unnecessary)

e.g.

Table of Authorities cited

Cases	Page Number
Houston-v-Luck, 487 U.S. 266 108 S.Ct. 2379, 101 L.Ed.2d 245, 56 USLW 4728, 11 Fed. R. Serv. 3d 849	9
Fullen-v-United States, 378 U.S. 139, 84 S.Ct. 1689, 12 L. Ed. 2d 976	9

Statutes And Rules

F.R.A.P. Rule 4 (c) (1)	28. U.S.C.A	P. 9
F.R.A.P. Rule 4 (d)	28. U.S. CH.	P. 8
F.R.A.P. Rule 3 (a)		P. 10
28 U.S.C. 2107		P. 10

Other's

Proof Certificate of Appealability (1) (Appendix E)	P. 7
Proof MDOC mailing log (2)	P. 7, 8
Proof letter from 5 th circuit clerk (3)	P. 7, 8

In the
 Supreme Court of the United States
 Petition for Writ of Certiorari

Petitioner respectfully prays that a Writ of Certiorari issue
 to review the Judgment below,

Opinions Below

☒ For cases from Federal Courts:

The Opinion of the United States Court of Appeals appears at Appendix
A to the Petition (Notice of Appeal) and is

☐ reported at 11/11; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The Opinion of the United States Court of Appeals appears at Appendix
D to the Petition ~~and is~~ (for Panel Rehearing) and is

☐ reported at ; or,

☐ has been designated for publication but is not yet reported; or

☒ is unpublished.

The Opinion of the United States district Court appears at Appendix
B to the Petition (Final Judgment) and is

☐ reported at ; or,

☐ has been designated for publication but is not yet reported; or

☒ is unpublished

The Opinion of the United States district court appears at Appendix C to the Petition ~~rebuttal~~ (Motion for Reconsideration and Summary)

Judgment construed. And is

☐ reported at ; or

☐ has been designated for Publication but is not yet reported; or,

☒ is unpublished.

The Opinion of the United States district Court appears at Appendix

• E to the Petition (Certificate of Appealability) and is

☐ reported at ; or,

☐ has been designated for Publication but is not yet reported; or,

☒ is unpublished

Jurisdiction

X For cases from Federal courts:

The date on which the United States Court of Appeals decided my case was July 7, 2020.

[] No Petition for rehearing was timely filed in my case.

X A timely Petition for rehearing was denied by the United States Court of Appeals on the following date: Sept. 3, 2020, and a copy of the order denying rehearing appears at Appendix D.

[] An extension of time to file the petition for a writ of Certiorari was granted to and including ~~and~~ (date) on (date) in Application No. A .

Constitutional and Statutory Provisions involved

28 U.S.C.A. Federal Rules of Appellate Procedure Rule, 4 (c) (1)

Appeal by an Inmate confined in a Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of Appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and;

28 U.S.C.A. Federal Rules of Appellate Procedure Rule, 4 (d)

(d) Mistaken Filing in the Court of Appeals

If a notice of Appeal in either a civil or a criminal case is mistakenly filed in the court of Appeals, the clerk of that court must note on the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

Federal Rules of Civil Procedure's 60

Appendix A

Federal Rules of Appellate Procedures Rule 3 (a)

Statement of the Case

Petitioner filed a 42 U.S.C.A. civil law suit in the Northern District of Mississippi. The civil law suit was dismissed Jan. 10, 2019. Also Petitioner filed a motion for reconsideration and summary judgement and the district Judge Magistrate Judge Suwe. M. Virden construed these filings as a motion for relief from judgement under Federal Rules of Civil Procedure 60 and denied relief May 6, 2019. And Petitioner filed a motion for a Certificate of Appealability and Magistrate Judge dismissed as unnecessary Jan. 6, 2020. And after receiving this last court order on Jan. 6, 2020 Petitioner filed a Notice of Appeal with the U.S. Court of Appeals Fifth circuit on Jan. 14, 2020. And Petitioner received a response from the Fifth circuit Clerk stating: 'That the court was of limited jurisdiction and could only act on cases that was filed and decided in a U.S. district court.' But the circuit Court Clerk never noted the notice of Appeal as F.R.A.P. Rule 4(d) stated, or mailed it back to Petitioner. And Petitioner receiving the letter on Jan. 28, 2020 only left Petitioner a few days to decide too rewrite the notice of appeal, which the deadline date would be Feb. 6, 2020. But the Institution legal

mail pick up was on Feb. 4, 2020. And in a rush putting together another Notice of Appeal Petitioner overlooked putting the last district Court order dismissing Petitioner Certificate of Appealability on Jan. 6, 2020 into the second notice of appeal, which Petitioner had it all in the first notice of appeal, which should have been the Notice of Appeal the Fifth Circuit Court Judges read and order upon. But the circuit clerk never noted and mailed the notice of appeal to the District Court Clerk as Rule 4(a) states. And because of the Fifth circuit court mishandling of the first notice is why Petitioner was time barred. But the first Notice of Appeal was timely filed right after the district Court last order on Petitioner motion, for a Certificate of Appealability. But the Fifth Circuit Judges ruled upon the second notice of appeal, where Petitioner forgot to add the Magistrate Judge last order dismissing Petitioner Certificate of Appealability. And the 5th circuit Judges dismissed Petitioner Notice of Appeal for being time barred and lack of Jurisdiction. Also Petitioner filed a timely motion for rehearing with the 5th circuit court of appeals And it was also denied for lack of Jurisdiction Sept. 3, 2020,

Petitioner present to the Court, a error that was made by the 5th Circuit court of Appeals that is in conflict with U.S.C.A. 28 of The F.R.A.P. Rule 4 (c) (1) And Rule 4 (d). Petitioner rights to file a timely notice of appeal, even if the notice of appeal is mistakenly mailed to the wrong address as in U.S. Circuit Court of appeal Circuit Clerk office instead of U.S. District Court district Clerk office, Where Petitioner received a response back from the U.S. District Court that Petitioner Certificate of Appealability was being dismissed as unnecessary on Nov. 6, 2020, And Petitioner filed a notice of appeal and mailed it off Nov. 14, 2020 which was less than the 30 days require to file a notice of appeal, After a Judge order. Petitioner received a letter in the mail from the Clerk office of the Fifth Circuit which is attached and label [Proof 3] Also the C.O.A. in the Appendix is label (E) [Proof 1] and Petitioner MDOC legal mail document to show date of notice of appeal mailed off on Nov. 14, 2020. label [Proof 2]. And Circuit Clerk letter read [This is a court of limited jurisdiction. This means we can only act on cases which have been filed

And decided in a U.S. District Court, or an agency with this circuit,
But this letter never stated that the Circuit Clerk noted the Appeal
And forwarded the notice of Appeal to the U.S. District Court as 28
U.S.C.A. F.R.B.P. Rule (4)(d) states: (Mistaken Filing in the Court of
Appeals) If a notice of appeal in either a civil or a criminal case is
mistakenly filed in the court of appeals, the clerk of that court must
note on the Notice the date when it was received and send it to the
district clerk. The notice is then considered filed in the district court
on the date so noted. Petitioner received this letter on Jan. 28, 2020
And it only leaves confusion, the letter do not say it was forwarded to
the U.S. District Clerk office or the notice of Appeal would be return.
Therefore to be sure the notice of Appeal is timely filed Petitioner rewrote
the Notice in a hurry, to meet the dead line date. which is Feb. 6,
2020. But the Prison legal mail; Mailing date is on a Tuesday which was
Feb. 4, 2020. But Petitioner forgot to include the District Court order dis-
missing Petitioner Certificate of Appealability. And the Fifth Circuit Judge's
dismissed the second Notice of Appeal, Because the District Court order
on Jan. 6, 2020 was left out. Saying Petitioner was time barred. But
Petitioner should and never had to rewrite the notice of Appeal, Because

According to F.R.A.P. Rule 4 (c) (1) Appeal by an Inmate Confined in Institution, (1) If an institution has a system to receive the benefit of this Rule 4 (c) (1). If a inmate files a notice of appeal in either a civil or a criminal case the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

Therefore the Fifth Circuit was wrong here and this is really a fault
Petitioner can not correct, Because Petitioner can not retract the mail.
And change the mailing address on Petitioner first Notice of Appeal, back to
the District Court Clerk office. *Houston-V-Luck*, 487 U.S. 266 108 S.Ct.
2379, 101 L.Ed. 2d 245, 56 USLW 4728, "Fed. R. Serv. 3d 849: Held: Under
rule 4(a) (1), Pro se prisoner's notice of appeal was "filed" at the moment
of delivery to Prison authorities for forwarding to the district Court. Cf.
Fallen V. United States, 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed. 2d 760 (Stewart,
J., concurring). Unskilled in law, unaided by counsel, and unable to leave
the Prison, A Pro se Prisoner's control over the processing of his notice nec-
essarily ceases as soon as he hands it over to the only public officials to
whom he has access - the Prison authorities and the only information he will
likely have is the date he delivered the notice to those authorities and the

date ~~be~~ ultimately stamped upon it. The 30-day deadline for filing notices of appeal set forth in 28 U.S.C. 2107, which applies to civil actions including habeas proceedings, does not preclude relief for Petitioner, since that statute does not define when a notice has been "filed" nor in any way suggests that, in the unique circumstance of a pro se prisoner, it would be inappropriate to conclude that such filing occurs at the moment of delivery to prison officials. Such conclusion is not negated by the fact that Rule 3(a) and 4(a)(1) specify that the notice should be "filed with the clerk of the District Court," since the relevant question is one of timing, not destination, and neither Rule sets forth criteria for determining the moment at which the filing has occurred. The general rule that receipt by the court clerk constitutes filing, although appropriate ^{*}267 for most civil appeals, should not apply in the pro se prisoner context. Nothing in either Rule 3(a) or Rule 4(a)(1) compels the conclusion that receipt by the clerk must be the moment of filing in all cases, and, in fact, a number of Federal courts have recognized exceptions to the general principle. Moreover, the rationale for the general rule is that ~~the appellant has no control over delay's after the court clerk's receipt of the notice - a rationale that suggests that the moment of filing with the clerk here should be the moment when the pro se prisoner necessarily~~

loses control over his notice: the moment of delivery to Prison Authorities for forwarding. The bright-line rule recognizing receipt by Prison Authorities as the moment of filing will all decrease disputes and uncertainty as to when a filing actually occurred, since such Authorities keep detailed logs for recording the date and time at which they receive papers for mailing and can readily dispute a prisoner's contrary assertions. Relying on the date of receipt, by contrast, would raise difficult questions ~~about~~ whether the Prison authorities, the Postal Service, or the court clerk is to blame for any delay. Pp. 2381-2385.

Also what did the Fifth circuit clerk do with the notice of Appeal. She did not file the notice of Appeal, nor return it back to me, and for this reason set forth Certiorari should be granted and the Fifth circuit should be order to rule on my notice of Appeal, that was timely filed on Jan. 14, 2020.

Conclusion

The Petition for a writ of Certiorari should be granted
for this reason set forth, and sent back to the
6th circuit for the notice of Appeal can be reviewed.

Respectfully submitted,
Gregory Baker

Date:

9-15-20