

22-5464 NO. ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
JUL 18 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BARNEY ADRIAN DUNLAP - PETITIONER

VS.

DAVID MITCHELL - RESPONDENT(s)

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BARNEY ADRIAN DUNLAP

0864594

633 Old Landfill Rd.
Taylorsville, NC 28681

NO Phone

QUESTIONS

- 1) Has the trial court erred by refusing to instruct the jury on lesser included offenses supported by the evidence, in violation of Dunlap's state and federal constitutional right to due process of law?
- 2) Has the trial court erred by charging the jury with an insufficient definition of deliberation, in violation of Dunlap's state and federal constitutional right to due process of law?
- 3) Did counsel provide ineffective assistance by failing to perfect direct appeal, in violation of Dunlap's state and federal constitutional right to due process of law?

Jurisdictional statement.DUNLAP V. MITCHELL

Date Filed: 11-2-2015

Assigned to: Chief Judge Martin Reidinger

Date Terminated: 12-10-2015

case in other courts: Caldwell County Superior Court, Jury Demand: None

08CR551335, 51353

Nature of suit: 530 Habeas corpus

4th circuit, 16-06521

(General)

4th circuit, 21-02216

Jurisdiction: Federal question

4th circuit, 22-187

In re BARNEY ADRIAN DUNLAP

Cause: 28 U.S.C. 2254 for Writ of Habeas Corpus (state)

Petitioner

BARNEY ADRIAN DUNLAP

Represented by Barney Adrian Dunlap

v.s.

0864594

Respondent

Alexander Correctional Institution

DAVID MITCHELL

633 Old Landfill Road

Superintendent, Lanesboro Correctional

Taylorsville, NC 28681

Institution

PRO SE

STATE PROCEEDINGS

June 2, 2008, two Grand Jury indictments, §14-17, single count - First degree murder.

Sept. 2, 2011, jury found Dunlap guilty, two counts, first degree murder - malice aforethought.

Sept 9, 2011, timely Notices of Appeal filed.

July 20, 2012, defendant/appellant's brief filed in N.C. Court of Appeals, (NCCOA)

NO Perfected Brief Filed by state appointed counsel, James Glover

Feb. 5, 2013, NCCOA filed Unpublished opinion NO. COA12-657.

Feb. 7, 2014, pro se Motion for Appropriate Relief filed in Superior Court, Denied.

Aug. 19, 2014 pro se writ of certiorari in NCCOA, to review Superior Court ORDER, Denied.

Feb. 3, 2015, pro se Writ of cert. via Art. IV Extraordinary Writs, rule 21 review of NCCOA direct appeal unpublished opinion filed in N.C. Supreme Court, Denied.

All claims presented in 28 U.S.C. 2254 Petition are exhausted by State courts.

Nov. 2, 2015, Petition 28 U.S.C. 2254 filed in WDNC, (Dec. 10, 2015 case closed).

Dec. 22, 2015, motion to alter or amend judgment filed in WDNC, (Denied 3-23-2016).

April 7, 2016, in-formal brief filed in USCA4, Denied

April 28, 2016, Motion for ineffective assistance of counsel hearing, deferred and 10-14-2016 Denied.

Nov. 10, 2016, Petition for rehearing deemed out-of-time, Denied

March 30, 2021, Writ of certiorari in U.S. Supreme Court, out-of-time April 14, 2021 Denied.

Aug. 12, 2021, Fed.R.Civ.P. 60(b)(6) in WDNC Granted relief from 2012 interlocutory action.

Sept. 13, 2021, the USCA4 granted in forma pauperis [21-7216] civ. doc. 33

Sept. 14, 2021, informal brief filed in USCA4 decided, "lack of jurisdiction 3-31-2022".

May 10, 2022, petition for rehearing en banc, "Denied rehearing May 10, 2022"

May 25, 2022, the USCA4 reassigned case name and number to [22-187],

In re BARNEY ADRIAN DUNLAP, movant

May 10, 2022, Denial of rehearing en banc is date used for certiorari review.

July 18, 2022, Writ of certiorari filed in U.S. Supreme Court,

July 28, 2022, Petition returned for corrections and resubmit within 60 days.

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APPENDIX Exhibits

- A1-A2 March 31, 2022, USCA4 decision, certificate unnecessary, lack of jurisdiction.
- B May 10, 2022, USCA4 (hand written copy) en banc rehearing, Denied
- C May 25, 2022, USCA4 (hand written copy) reassigned new case name and number to: [22-187] In re BARNEY ADRIAN DUNLAP

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Cases, Authorities, and Statutes Involved

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| ② | <u>Rodriguez v. U.S.</u> , 395 U.S. 327, at Synopsis (1969) | 1 |
| ③ | <u>Beck v. Alabama</u> , 447 U.S. 625, at FN. 12 (1980) | 2 |
| ④ | <u>State v. Freeman</u> , 275 N.C. 662, 668, 170 S.E. 2d 461, 465, at 669 (1969) | 2 |
| ⑤ | <u>Beck v. Alabama</u> , 447 U.S. 625, at FN. 11 (1980) citing Stevenson (1896) | 2 |
| ⑥ | <u>Evitts v. Lucey</u> , 469 U.S. 387, 83 L.Ed. 2d 821 (1985) | 2 |
| ⑦ | N.C. G.S. § 15A-1444(d), (states... appeal must be perfected...) | 2 |
| ⑧ | N.C. G.S. § 17-4, constitutional provisions, Art. 2, (exclusive jurisdiction) | 3 |
| ⑨ | U.S. constitution Art. I sec. 9., (Habeas corpus shall not be suspended) | 3 |
| ⑩ | <u>U.S. v. Gaudin</u> , 515 U.S. 506, 522-23 (1995) | 4 |
| ⑪ | <u>Eddings v. Oklahoma</u> , 455 U.S. 104, at HN.[4] (1982) | 4 |
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| ⑮ | <u>Anders v. State of Cal.</u> , 386 U.S. 738 (1967) | 4 |
| ⑯ | <u>Coleman v. Thompson</u> , 501 U.S. 722, at HN.[20] (1991) | 4 |
| ⑰ | <u>Slack v. McDaniel</u> , 529 U.S. 473, at HN.[7] (2000) | 5 |

STATEMENT OF THE CASE.

The trial court erred by (1) not instructing jury on lesser-included offenses supported by evidence, and (2) omitting the mitigating factors from the deliberation element definition.

Defense counsel did not perfect direct appeal, causing procedural default. That triggered appellate court filing an unpublished opinion based on incomplete pleadings.

Precedent requires perfecting direct appeal, because doing otherwise violates the appellant's right to effective assistance of counsel and due process of law.

I, Barney Dunlap am a N.C. prisoner that was unlawfully convicted on two noncapital first degree murder charges. I am serving two consecutive life sentences without parole. And due to ineffective assistance of counsel on direct appeal, I am incarcerated in violation of the U.S. constitution. [1]

This is the only court with jurisdiction and should grant certiorari review. To aid the United States Court of Appeals Fourth Circuit, (USCA4) that determined they lack jurisdiction. Because the lower courts decided an important federal question--post answer default judgment--in a way that conflicts with relevant decisions of this court. [2]

The critical issue at this juncture is ineffective assistance of counsel. But I will also show the trial issues caused structural damage to the trial.

REASONS FOR GRANTING THE WRIT:

I discovered my wife, Roslyn and Mr. Lakey in bed together naked in one of our houses during her normal working hours. They were both shot once and fatally wounded. I immediately went to police requesting an ambulance.

During trial the state's witnesses, S.B.I., city detectives, and deputy sheriffs offered evidence of a struggle for control of the firearm that could cause an accidental death and pictures of my injured right hand.

The defense was manslaughter, so instructions requested were involuntary manslaughter and self-defense in Lakey's case and voluntary manslaughter in both cases. However the state alleged, "there was no evidence to support the instructions." All the request were denied, precluding the defense. Exceptions were noted, see TPP, 605-614.

The jury was instructed on first degree and second degree murder and not

guilty. Two first degree murder convictions ensued, and timely appeal filed.

On direct appeal appointed counsel, Glover raised the sole issue of, "failure to instruct the jury on voluntary manslaughter," in the original brief.

The state's brief made numerous allegations that I expressly deny. They were disputed at trial, refused by the court, or unsupported by evidence. The state also conceded constitutional error but said, "it was not prejudicial error."³ Then cites state case law from other circuits that by 1980 the states converted to N.C. and Federal Standards.⁴ ⁵

Glover did not perfect direct appeal as required by N.C. Criminal Procedure that provides, "the appeal must be perfected." Therefore he did not point-out the flaws in the state's brief or dispute the allegations on appellate review. Which gives the state grounds for procedural default, that triggered the ensuing action, causing me injury in fact and legal injury, see exhibit D.⁶ ⁷

The following records are under seal via interlocutory appeal in U.S. District Court, (USDC) in 2012. Thus, I am relying on court cited case law, the state's allegations, and various court orders.

When the appeal was not perfected, the prosecution filed a motion to dismiss and for judgment on the pleadings in N.C. Court of Appeals, (NCCA), who filed an interlocutory appeal in USDC who converted to summary judgment and summarily disposed of the appeal in an unpublished opinion/disposition. Glover's response was filing a § 2254 petition that was denied. Then he filed a motion to alter or amend judgment, it was denied. There is no indication^{he} filed notices of appeal from the denials.

Which causes the federal courts to lack jurisdiction in subsequent filings,

And since Federal Courts obtained exclusive jurisdiction from the state courts
[8]
all state habeas petitions were and will be denied.

Therefore the same attorney that defaulted direct appeal and deprived me
of fair process-- de novo review of the trial record-- has managed to get me
barred from state and federal courts in habeas action. Which denies my first
Amendment right to redress the courts. Hence I can not show cause for pro-
cedural default of direct appeal.

On Feb. 5, 2013 NCCOA rendered their opinion, Glover resigned that day. He
did not file a Petition for Discretionary Review, (PDR) in N.C. Supreme Court to
review the NCCOA unpublished opinion. Neither did he supply me with any of
the required information so I could file pro se. Nor did he provide my copy of
the trial transcripts or record on appeal materials until after time to file
the PDR expired.

The day he resigned I wrote N.C. Prisoner Legal Services asking for help.
They are the state's alternative to no prison law libraries, and told me not to
file anything during their review. After time expired to file the PDR they
declined to represent me.

Pro se, I filed a Motion for Appropriate Relief Feb. 7, 2014 with 33 days
of tolling remaining in the federal time limit. Where I raised *inter alia* ineff-
ective assistance of counsel at page 101, I stated, "there was no rebuttal to
the state's brief." But the court--unknown to me lacked jurisdiction-- denied all
claims without an evidentiary hearing. However Fed. R. Civ. P., rule 15(c) should
allow relation back to that time frame, see exhibit E.

I also raised the claim of, "the trial court erred by charging the jury with

an insufficient definition of deliberation," at TPP. 621. The charge omitted, "by lawful or just cause or legal provocation," from the element of deliberation.^[10] which obstructs the jury's ability to weigh mitigating factors in the evidence. Thereby rendering the § 14-17 statute dysfunctional as to proof beyond reasonable doubt.^[11]

The Standard of Review for ineffective assistance of counsel is (1) deficient performance and (2) a reasonable probability that but for counsel's errors the result of the proceeding would have been different.^[12]

The Standard of Review for a presumption of prejudice applies when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, where counsel is actually or constructively denied during a critical stage of the proceedings, or where there is various kinds of state interference with counsel's assistance.^[13]

Defense contends, the record shows there is a reasonable probability that but for Glover's failure to perfect direct appeal the NCCOA would have reviewed the trial record *de novo* rather than filing an interlocutory appeal, apparently due to default. Nor would the state have filed to dismiss and for judgment on the pleadings. Therefore the results would have been different.

Moreover, Glover not filing a perfected brief deprived me of counsel at a critical stage of the proceedings, and (2) there was no adversarial testing. That his lack of action as an active advocate denied my right to fair process, loss of my direct appeal entirely, and it should be presumed he provided me with ineffective assistance of counsel, from review of the record.^[14]

This court held in Coleman v. Thompson at HN 20,^[15] that if the procedural default

is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the state."

The Standard of Review for issuance of a certificate of Appealability, (COA) is, when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue if the petitioner shows, at least, that jurist of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurist of reason would find it debatable whether district court was correct in its procedural ruling.

Defense contends that, the above record shows that jurist of reason would find the procedural ruling debatable or wrong, and that jurist of reason would find the petition states a valid claim of the denial of a constitutional right.

This court in both Evitts and Rodriguez supra, determined a COA was unnecessary and remanded. And in this case the USCA4 likewise stated, "that a COA was unnecessary but lacks jurisdiction," and calls for the aid of this court's supervisory power.

CONCLUSION.

For the aforesaid reasons I pray this court for relief by granting Certiorari review for guidance as to the appropriate constitutional remedy. Thereby adhering to established precedent,

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| C | May 25, 2022, USCA4 (hand written copy) reassigned new case number and name to: [22-187], <u>In re BARNEY ADRIAN DUNLAP</u> | |
| D | Letter from Glover Jan. 21, 2013 "No Reply Brief Filed." | 2 |
| E | Page 101 of original Motion for Appropriate Relief, No Rebuttal brief filed to state's brief. | 3 |