Exhibit A-1

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-7216

BARNEY ADRIAN DUNLAP,

Petitioner - Appellant,

v.

DAVID MITCHELL, Superintendent, Lanesboro Correctional Institution,

Respondent - Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Frank D. Whitney, District Judge. (5:15-cv-00139-MR)

Submitted: March 29, 2022 Decided: March 31, 2022

Before HARRIS, QUATTLEBAUM, and HEYTENS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Barney Adrian Dunlap, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

Exhibit A-2

PER CURIAM:

Barney Adrian Dunlap seeks to appeal the district court's orders denying relief on his 28 U.S.C. § 2254 petition and denying his motion to alter or amend the judgment. We dismiss the appeal for lack of jurisdiction because the notice of appeal was not timely filed.

In civil cases, parties have 30 days after the entry of the district court's final judgment or order to note an appeal, Fed. R. App. P. 4(a)(1)(A), unless the district court extends the appeal period under Fed. R. App. P. 4(a)(5) or reopens the appeal period under Fed. R. App. P. 4(a)(6). "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

The district court entered its order denying the motion to alter or amend on March 23, 2016. Dunlap filed the notice of appeal at the earliest, on August 8, 2021, the date he certified he placed his notice of appeal in the mail. *See* Fed. R. App. P. 4(c); *Houston v. Lack*, 487 U.S. 266, 276 (4th Cir. 1988). Because Dunlap failed to file a timely notice of appeal or to obtain an extension or reopening of the appeal period, we dismiss the appeal.* We deny as unnecessary Dunlap's request for a certificate of appealability.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

* Moreover, Dunlap previously appealed the district court's orders denying his § 2254 petition and his motion to alter or amend the judgment and may not do so a second time.

FILED: March 31, 2022

UNITED STATES COURT OF APPEALS
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No. 21-7216
(5:15-cv-00139-MR)

BARNEY ADRIAN DUNLAP

Petitioner - Appellant

v.

DAVID MITCHELL, Superintendent, Lanesboro Correctional Institution

Respondent - Appellee

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied as unnecessary and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: May 10, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-7216
(5:15-cv-00139-MR)

BARNEY ADRIAN DUNLAP,

Petitioner - Appellant,

v.

DAVID MITCHELL, Superintendent, Lanesboro Correctional Institution,

Respondent - Appellee.

ORDER

The court denies the petition for rehearing and rehearing en banc and the motions to vacate convictions, for right to a jury trial, and to grant relief in an independent action. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Harris, Judge Quattlebaum, and Judge Heytens.

For the Court

/s/ Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
5:15cv139-FDW

BARNEY ADRIAN DUNLAP,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**ORDER**
	)	
DAVID MITCHELL,	)	
	)	
Respondent.	)	
	)	

THIS MATTER is before the Court upon Petitioner Barney Adrian Dunlap's Motion to Alter or Amend Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Doc. No. 6.) Also before the Court is Petitioner's Motion for Appointment of Counsel. (Doc. No. 9.)

I. BACKGROUND

Petitioner is a prisoner of the State of North Carolina who was convicted by a Caldwell County jury on September 2, 2011, of two counts of first-degree murder. State v. Dunlap, 737 S.E.2d 190, 2013 WL 432627, at *1 (N.C. Ct. App. 2013) (unpublished). The trial court instructed the jury on first and second degree murder but denied Petitioner's request for a jury instruction on voluntary manslaughter. Id. at *2. Upon the jury's return of verdicts of first-degree murder based upon premeditation and deliberation, the trial court sentenced Petitioner to two terms of life imprisonment without parole. Id.

Petitioner filed a direct appeal, and on February 5, 2013, the North Carolina Court of Appeals issued an unpublished opinion finding that no prejudicial error occurred in Petitioner's trial. Id. at *4. While the court agreed with Petitioner that the trial court should have given the jury an instruction on voluntary manslaughter, it found the error harmless because under North

Carolina law, "when the trial court submits to the jury the possible verdicts of first-degree murder based on premeditation and deliberation, second-degree murder, and not guilty, a verdict of first-degree murder based on premeditation and deliberation renders harmless the trial court's improper failure to submit voluntary or involuntary manslaughter." Id. at *3 (citation omitted). Petitioner did not file a petition for discretionary review in the North Carolina Supreme Court.

On or about February 7, 2014, Petitioner filed a Motion for Appropriate Relief ("MAR") in the Superior Court of Caldwell County; it was denied on June 20, 2014. (Order Den. MAR 11-14, Doc. No. 1-1.) Petitioner filed a petition for writ of certiorari in the North Carolina Court of Appeals, seeking review of the denial of his MAR. It was denied on August 29, 2014. (N.C. Ct. App. Order Den. Cert. 15, Doc. No. 1-1.)

On February 23, 2015, Petitioner filed a petition for writ of certiorari under North Carolina Rule of Appellate Procedure 21, seeking discretionary review in the North Carolina Supreme Court of the Court of Appeals' February 5, 2013 decision denying his direct appeal. (N.C. Order Den. Cert. Pet. 16, Doc. No. 1-1.) It was denied on June 10, 2015. (N.C. Order Den. Cert. Pet., supra.)

Petitioner filed a Petition for Writ of Habeas Corpus on October 28, 2015, when he signed and placed it in the prison mailing system. (Habeas Pet. 14, Doc. No. 1.) The Court entered judgment on December 10, 2015, dismissing the Petition as untimely because it was filed more than one year after Petitioner's judgment of conviction became final, see 28 U.S.C. § 2244(d)(1)(A), and denying Petitioner a certificate of appealability. (Doc. Nos. 2, 3.)

II. STANDARD OF REVIEW

The United States Court of Appeals for the Fourth Circuit has stated:

A district court has the discretion to grant a Rule 59(e) motion only in very narrow

> circumstances: '(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or to prevent manifest injustice.'

Hill v. Braxton, 277 F.3d 701, 708 (4th Cir. 2002) (quoting Collison v. Int'l Chem. Workers Union, 34 F.3d 233, 236 (4th Cir. 1994)). "Rule 59(e) motions may not be used to make arguments that could have been made before the judgment was entered." Hill, 277 F.3d at 708.

III. DISCUSSION

Petitioner contends the Court erred when it concluded that he is not entitled to statutory tolling of the limitations period for Grounds 2 through 5 of his habeas Petition pursuant to 28 U.S.C. § 2244(d)(1)(D). (Mot. to Alter or Am. J 2-4, Doc. No. 6.) Under that section, "[i]f the petition alleges newly discovered evidence, . . . the filing deadline is one year from 'the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.'" McQuiggin v. Perkins, 133 S. Ct. 1924, 1929 (2013) (quoting § 2244(d)(1)(D)). In its Order dismissing the habeas Petition, the Court found that because Grounds 2 through 5 alleged errors at trial, the factual predicates for those claims were known by Petitioner at that time. (Order 7-9, Doc. No. 4.) Petitioner asserts here, however, that he did not discover the factual predicates of his claims until sometime between December 1, 2013, and January 15, 2014, when he was granted leave from his prison job and was able to research case law. (Mot. to Alter or Am. J, supra, at 2-3.)

As the Court explained previously, "the statute of limitations begins to run under § 2244(d)(1)(D), 'when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance.'" (Order, supra, at 7 (quoting Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000)).) Petitioner acknowledges that his appellate attorney mailed him a copy of the appellate brief prior to the state court issuing its February 5,

2013 opinion on direct review, and that he (Petitioner) received a copy of his trial transcript on March 21, 2013. (Mot. to Alter or Am. J, supra, at 2-3.) Thus, the important facts were available and, through due diligence, discoverable by him no later than March 21, 2013. See Owens, 235 F.3d at 359. Applying § 2244(d)(1)(D) to this timeline, the federal statute of limitations ran from March 21, 2013 until February 7, 2014 (323 days), when Petitioner filed his MAR in Caldwell County Superior Court. The limitations period was then tolled under§ 2244(d)(2) until August 29, 2014, when the North Carolina Court of Appeals denied Petitioner's petition for writ of certiorari seeking review of the decision denying his MAR. From August 29, 2014, the statute of limitations ran for another forty-two (42) days until it fully expired on or about October 10, 2014. Even adopting Petitioner's timeline, his federal habeas Petition was untimely under § 2244(d)(1)(D) when he filed it more than a year later on October 28, 2015.

Petitioner's assertion that he is entitled to a belated commencement of the limitations period pursuant to § 2244(d)(1)(B) because he did not have access to a law library or adequate assistance from someone trained in the law is likewise rejected. (Mot. to Alter or Am. J, supra, at 4-6.) To warrant statutory tolling under § 2244(d)(1)(B), Petitioner must show that: "(1) he was prevented from filing a [federal habeas] petition (2) by State action (3) in violation of the Constitution or federal law." Egerton v. Cockrell, 334 F.3d 433, 436 (5th Cir. 2003).

"[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Lewis v. Casey, 518 U.S. 343, 346 (1996) (quoting Bounds v. Smith, 430 U.S. 817, 828 (1977) overruled on other grounds by Casey, 518 U.S. at 354). Petitioner must demonstrate that lack of access to a law library or inadequate assistance from persons trained in the law violated his constitutional

right of access to the courts, and prevented him from filing a timely habeas Petition. See Egerton, 334 F.3d at 436.

Although North Carolina prisons do not have law libraries, prisoners have access to North Carolina Prisoner Legal Services ("NCPLS"), which is staffed by persons trained in the law. See Casey, 518 U.S. at 346. As this Court explained in its Order dismissing the habeas Petition,

> Correspondence from NCPLS to Petitioner shows that at least one attorney at NCPLS evaluated his case for post-conviction assistance. . . . That evaluation included reading Petitioner's letters, studying his case file and court documents, researching legal issues, and discussing the case with other NCPLS attorneys. . . . Further correspondence shows that NCPLS offers legal representation in cases it views to be meritorious. . . . It can be inferred then that NCPLS declined to represent Petitioner because the attorneys determined from their evaluation that he did not have a meritorious post-conviction case.

(Order, supra, at 10 (internal citations omitted).) Assuming for the sake of argument that NCPLS's refusal to represent Petitioner in state post-conviction could support a claim of unconstitutional state action, Petitioner has not demonstrated how it prevented him from timely filing his federal habeas petition. See Wood v. Spencer, 487 F.3d 1, 7 (1st Cir. 2007) ("[A] state-created impediment must, to animate the limitations-extending exception [of § 2244(d)(1)(B)], 'prevent' a prisoner from filing for federal habeas relief.") (citation omitted)).

As he acknowledges in his Petition and in the instant Motion, NCPLS informed Petitioner by letter dated April 10, 2013 (Doc. No. 1-1 at 19), that it would not represent him in state post-conviction. At that point, the federal statute of limitations had run for less than 30 days. Although NCPLS's decision may have made it more difficult for Petitioner to file an MAR and petition for writ of certiorari in the state courts, it did not prevent him from doing so. Likewise, NCPLS's decision may have made it more difficult for Petitioner to file a timely federal habeas

petition, but he has provided no evidence that it prevented him from doing so.

Petitioner's placement in segregation without access to his legal materials for ten (10) days does not alter the Court's analysis.[1] Petitioner's segregation fell during the time the federal statute of limitations was tolled while he pursued state post-conviction relief. Furthermore, "so long as they are the product of prison regulations reasonably related to legitimate penological interests," periods of time during which a prisoner cannot access his legal materials "are not of constitutional significance even where they result in actual injury." Casey, 518 U.S. at 361-62. Petitioner failed to provide any proof that his placement in segregation for a disciplinary infraction[2] was not reasonably related to legitimate penological interests. See id.

IV: CONCLUSION

Petitioner has not shown the existence of the limited circumstances under which a Rule 59(e) motion may be granted. That is, Petitioner's motion does not present evidence that was unavailable when the Court dismissed his habeas Petition as untimely, nor does it stem from an intervening change in the applicable law, nor has he shown that there was clear error of law or that granting the motion would prevent manifest injustice. See Hill, 277 F.3d at 708.

Additionally, the Court concludes that appointment of counsel is not required in this case. Cf. 18 U.S.C. § 3006A(a)(2)(B) (authorizing appointment of counsel for a financially eligible habeas petitioner if the interests of justice so require); Rules Governing Section 2254 Cases in

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[1] Petitioner asserts that he was in administrative segregation July 15-25, 2014 and April 15–May 14, 2015. Only the first period of segregation is relevant here, as the second occurred months after the statute of limitations expired.
[2] Petitioner was placed in segregation for fighting. See N.C. Dep't of Pub. Safety Offender Pub. Info., http://webapps6.doc.state.nc.us/opi/viewoffenderinfractions.do?method=view&offenderID=0864594&searchOffenderid=0864594&listurl=pagelistoffendersearchresults&listpage=Y (last visited Mar. 22, 2016).

the United States District Courts, Rules 6(a) and 8(c) (mandating appointment of counsel where discovery is necessary or if the matter proceeds to an evidentiary hearing). Petitioner's motions shall be denied.

V. ORDER

IT IS, THEREFORE, ORDERED that:

1) Petitioner's Motion to Alter or Amend Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (Doc. No. 6) is **DENIED**;

2) Petitioner's Motion for Appointment of Counsel (Doc. No. 9) is **DENIED**; and

3) Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the Court declines to issue a certificate of appealability as Petitioner has not made a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003) (in order to satisfy § 2253(c), a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong); Slack v. McDaniel, 529 U.S. 474, 484 (2000) (holding that when relief is denied on procedural grounds, a petitioner must establish both that the correctness of the dispositive procedural ruling is debatable, and that the petition states a debatably valid claim of the denial of a constitutional right).

Signed: March 23, 2016

Frank D. Whitney
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
CIVIL CASE NO. 5:15-cv-139-MR

BARNEY ADRIAN DUNLAP,	)	
	)	
Petitioner,	)	
	)	**MEMORANDUM OF**
vs.	)	**DECISION AND ORDER**
	)	
DAVID MITCHELL, Superintendent	)	
Lanesboro Correctional Institution,	)	
	)	
Respondent.	)	
	)	

THIS MATTER is before the Court on the Petitioner's Motion to Reopen Time to Appeal, filed on May 24, 2022. [Doc. 27]. Also before the Court is Petitioner's Motion for Appointment of Counsel, filed on July 5, 2022. [Doc. 33].

I. PROCEDURAL BACKGROUND

Barney Adrian Dunlap (the "Petitioner") is a prisoner of the State of North Carolina. The Petitioner was convicted in Caldwell County on September 2, 2011 of two counts of first-degree murder. [Doc. 4 at 1]; State v. Dunlap, 2013 WL 432627, *1 (N.C. Ct. App. 2013)(unpublished). The Petitioner was sentenced to two terms of life imprisonment without parole. Id.

The Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in this Court on November 2, 2015. [Doc. 1]. On December 10, 2015, this Court entered an Order dismissing the petition as untimely filed. [Doc. 4]. On December 30, 2015, the Petitioner filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. [Doc. 6].

Prior to the Court's ruling on the Motion to Alter or Amend Judgment, the Petitioner filed a Notice of Appeal seeking review of the Court's order disposing of the § 2254 petition. [Doc. 7].

The Court entered an Order denying the Motion to Alter or Amend Judgment on March 23, 2016. [Doc. 11].

The Petitioner filed an Amended Notice of Appeal on April 7, 2016 seeking review of the Court's Order disposing of the Motion to Alter or Amend Judgment. [Doc. 12]. The appellate court dismissed the appeal on October 4, 2016. [Doc. 16].

The Petitioner filed an additional Notice of Appeal on August 12, 2021 seeking review of this Court's Orders denying his § 2254 petition and Motion to Alter or Amend Judgment. [Doc. 20]. On March 31, 2022, the appellate court entered an Order dismissing the appeal, noting that the Petitioner did

not file a timely notice of appeal or obtain from this Court an extension or reopening of the appeal period. [Doc. 24].

On May 24, 2022, the Petitioner filed a Motion to Reopen Time to Appeal, seeking to reopen the time period in which to appeal this Court's ruling on his Motion to Alter or Amend Judgment. [Doc. 27]. The Petitioner also seeks the appointment of counsel on his behalf. [Doc. 33].

II. DISCUSSION

A. Motion to Reopen Time to Appeal

The Petitioner moves this Court to allow him to reopen the time to appeal the Court's Order on his Motion to Alter or Amend Judgment on grounds of excusable neglect. [Doc. 27].

The Petitioner attaches a copy of a January 8, 2016 letter from the appellate court directed to the Clerk of this Court, in which the appellate court explains that because the Petitioner filed a Notice of Appeal prior to this Court's ruling on the Motion to Alter or Amend Judgment, that it would treat the Notice of Appeal as filed on the date this Court disposed of the motion. [Doc. 27-1 at 12]. The letter further states that if a party wishes to appeal this Court's disposition of the motion, then an amended notice of appeal must be filed within the time prescribed for appeal. [Id.]. The Petitioner states that he construed the letter to mean that a notice of appeal

was not necessary and that both courts were informed of his intent. [Doc. 27 at 2]. Had the letter been construed as an Order, the Petitioner claims that he would have filed an amended notice of appeal. [Id.]. The Petitioner also claims that he did not become aware that his Amended Notice of Appeal was untimely filed until March 31, 2022. [Id.].

Rule 4(a)(5)(ii) of the Federal Rules of Appellate Procedure provides that the district court may extend the time to file a notice of appeal if the party shows excusable neglect or good cause. "Factors to be considered in evaluating excusable neglect include '[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.'" Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 366 (2d Cir. 2003).

Rule 4(a)(6) provides that a district court may reopen the time within which to file an appeal if the moving party did not receive notice of entry of the order sought to be appealed within twenty-one days after its entry, the petitioner makes the motion to do so within 180 days after the judgement or order is entered or within 14 days after the moving party receives notice of the entry, and if the court finds no party would be prejudiced. Fed. R. App. 4(a)(6)(A)-(C).

The Court finds that the Petitioner fails to make a sufficient demonstration of excusable neglect or good cause under Fed. R. App. 4(a)(5)(ii) to justify any extension of time to file a notice of appeal. The letter provided by Petitioner clearly explains that the appellate court would treat his notice of appeal as filed as of the date this Court disposed of the Motion to Alter or Amend Judgment, and that if the Petitioner wished to appeal the Order on the Motion to Alter or Amend Judgment, that he would need to file an amended notice of appeal within the time prescribed for appeal. [Doc. 27-1 at 12]. The Petitioner's contention that he misconstrued the letter does not establish excusable neglect, nor does it show any circumstances beyond the Petitioner's reasonable control.

The Petitioner also fails to satisfy the requirements to reopen the time to file an appeal under Fed. R. App. 4(a)(6). He does not claim that he did not timely receive the Order from which he is seeking to appeal, nor does he comply with the requirements set forth in Rule 4(a)(6). As such, the Petitioner's request for relief is denied.

B. Motion for Appointment of Counsel

The Petitioner moves for the appointment of an attorney to represent him in this proceeding. [Doc. 33]. The Petitioner states that because portions

of the record are under seal, he is unable to access vital information and seeks counsel to assist him with further litigation. [Id.].

There is no constitutional right to the appointment of counsel in a § 2254 proceeding. Crowe v. United States, 175 F.2d 799 (4th Cir. 1949). The Petitioner sets forth no sufficient grounds to justify the need for appointment of counsel at this juncture. This matter was dismissed in 2015 and as set forth above, this Court denies the Petitioner's request to reopen the time period for seeking appellate review. Accordingly, the Petitioner's motion for appointment of counsel is denied.

III. CONCLUSION

Based on the foregoing, Petitioner fails to show any good cause or excusable neglect sufficient to justify reopening of the appeal period. The Petitioner is also not entitled to the appointment of counsel.

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the Court declines to issue a certificate of appealability. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 338 (2003)(noting that, in order to satisfy § 2253(c), a prisoner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong); Slack v. McDaniel, 529 U.S. 474, 484 (2000)(holding that, when relief is denied on procedural grounds, a prisoner must establish

both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right).

IT IS, THEREFORE, ORDERED that:

1. The Motion to Reopen Time to Appeal [Doc. 27] is **DENIED.**
2. The Motion for Appointment of Counsel [Doc. 33] is **DENIED**.
3. Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the Court declines to issue a certificate of appealability.

IT IS SO ORDERED.

Signed: August 22, 2022

Martin Reidinger
Chief United States District Judge