

23-5972

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NO.

ORIGINAL

FILED  
JUL 18 2023

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

Barney Adrian Dunlap - Petitioner

VS

David. Mitchell - Respondent

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.

1255 Prison Camp Road  
Whiteville, NC 28472.

QUESTIONS

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1. Since the U.S. District Court has subsequently confirmed that, the Notice of Appeal in question was, in fact, timely filed. Should the Court of Appeals Fourth Circuit's **DISPOSITION** on the notice of appeal issue be vacated?
2. Should a pro se appellant be notified by district court that, the appellant's motion, brief, or petition has been reclassified to a notice of appeal?
3. Whether the Court of Appeals should notify a pro se appellant that, their motion, brief, or petition must address the court's expected subject matter of a reclassified document prior to filing a **DISPOSITION**?
4. Does collateral estoppel classify as an impediment that prevents filing, in the context of § 2244 (d)(1)(B)?
5. When collateral estoppel via procedural default doctrine is enforced during direct appeal in a criminal case. Should it preclude a pro se, indigent appellant from litigating an ineffective assistance of counsel claim on appellate counsel?

### 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
08crs 51335, 08crs 51353	Nature of suit:	530 Habeas Corpus
4th Circuit, 16-06521	(T)	(General)
4th Circuit, 21-07216	(T)	Jurisdiction: Federal Question
4th Circuit, 22-187		In re Barney Adrian Dunlap
4th Circuit, 22-06967	(T)	
4th Circuit, 22-07396	(T)	
4th Circuit, 23-06700		

Cause: 28:2254 Petition for Writ of Habeas Corpus (state)

Petitioner

Barney Adrian Dunlap represented by Barney Adrian Dunlap  
# 0864594

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Columbus Correctional Institution

Respondent

David Mitchell 1255 Prison Camp Road  
Superintendent, Lanesboro Correctional Whiteville, NC 28472  
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.  
Sept. 9, 2011, timely Notices of Appeal Filed.  
July 20, 2012, defendant's brief filed in N.C. Court of Appeals [No. COA12-657]

\* No required perfected brief was filed.

Feb. 5, 2013, N.C. COA filed an unpublished opinion No. COA12-657 in direct appeal.

Feb. 7, 2014, Pro Se Motion for Appropriate Relief filed Superior Court; Denied.

Aug. 19, 2014, Writ of Certiorari filed 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, filed in N.C. Supreme Court, to review No. COA12-657; Denied [No. 79 P15]

All claims presented in 28 U.S.C. 2254 petition were presented to state courts.

Nov. 2, 2015, Petition § 2254 filed in (WDNC) (Dec. 10, 2015 sua sponte case CLOSED).

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

April 12, 2016, Motion for Evidentiary Hearing on ineffective assistance of counsel claim; Denied.

Nov. 10, 2016, Petition for Rehearing en banc deemed (out-of-time); Denied.

March 30, 2021, Writ of Cert. in U.S. Supreme Court, (out-of-time); (April 14, 2021; Denied)).

Aug. 12, 2021, Fed. R. Civ. P., rule 60(b)(6) in (WDNC) (Reclassified to Notice of Appeal).

Sept. 13, 2021, (USAP4 granted, in forma pauperis case No. [21-7216] doc. 23).

Sept. 14, 2021, informal brief order, filed in USAP4 decided; (lack of jurisdiction).

May 10, 2022, Petition for Rehearing en banc; (Denied May 10, 2022).

Aug. 14, 2022, Writ of Cert., Corrected, resubmitted docketed; Denied review.

April 24, 2023, USAP4 dismissed appeal, lack of jurisdiction in [22-6967].

April 25, 2023, USAP4 Affirmed USDC's Disposition in [22-7396].

June 28, 2023, USDC denied motion to alter or amend judgment; Denied.

Petitioner invokes this court's rule 12.4 that allows jurisdiction to review two judgments that are closely related questions. The dates of the USAP4 judgments I seek to have reviewed are April 24, 2023 case No. [22-6967] and April 25, 2023 case No. [22-7396].

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## CASES AND AUTHORITIES INVOLVED

- 1 Strickland v. Washington, 466 U.S. 668, 695, 80 L.Ed.2d 674 (1984)
- 2 United States v. Cronic, 466 U.S. 648, 658-59, 80 L.Ed.2d 657 (1984)
- 3 Murray v. Carrier, 477 U.S. 478, at [6] (1986)
- 4 Galloway v. Stephenson, 510 F. Supp. 840, at [6] (1981)
- 5 State v. Price, 344 N.C. 583, 590, 476 S.E. 2d 317, 321 (1996)
- 6 Evitts v. Lucey, 469 U.S. 387, at summary, 834, 400 (1985)
- 7 Lewis v. Casey, 518 U.S. 343, 354 (1996)
- 8 Bounds v. Smith, 430 U.S. 817, 821-28 (1977)
- 9 Stahl v. Com. of Kentucky, 613 S.W. 2d 617, at opinion of court (1981)
- 10 Coffman v. Bomar, 220 F. Supp. 343 (1963)
- 11 Galloway v. Stephenson, 510 F. Supp. 840, at [5] (1981)
- 12 Per Glover's Appointment Authorization (N.C. Court of Appeals and N.C. Supreme Court).
- 13 Slack v. McDaniel, 529 U.S. 473, at summary (2000)
- 14 Miller-El v. Cockrell, 537 U.S. 322, 338 (2003)

## AUTHORITIES INVOLVED

- i 28 U.S.C. § 2241(c)(3), in custody in violation of the U.S. Constitution
- ii 28 U.S.C. § 1448, Process after removal, right to move to remand the case.
- iii NCGS § 15A-1444(d), The appeal must be perfected.
- iv 28 U.S.C. § 1455(b)(2), Good Cause shown warrants relief from removal
- v 28 U.S.C. § 1446(c)(3), When removal should not be permitted
- vi 28 U.S.C. § 1447(e), case improvidently removed without S.M. Jurisdiction.
- vii 28 U.S.C. § 2244(d)(1)(B) tolling starts date unconstitutional state action removed

STATEMENT OF THE CASE

This case presents one important and specific question. When appellate counsel defaults direct appeal and the court(s) enforce procedural default doctrine. Do the federal court(s) have jurisdiction to adjudicate a timely filed ineffective assistance of appellate counsel claim filed after the courts actions?

I, Barney Dunlap am a pro se, indigent N.C. prisoner. Who is in custody in violation of the United States Constitution.<sup>[i]</sup>

I seek to address two procedural issues that I thought were resolved. That the lower courts filed barring issuance of a Certificate of Appealability.

The U.S. Court of Appeals Fourth Circuit, USAP4, filed a Disposition. Where the U.S. District Court, USDC, clerk reclassified a motion for Writ of Mandamus To Reinstate Direct Appeal, to Notice of Appeal, doc. 43. And did not notify me of the change. There was no answer filed by USDC, or notice of change in subject matter. The USAP4 sent an informal briefing order with case no. [22-07396]. On page one, I noted that, [I am filing on the premise that there are no plain procedural bars present, because they all were resolved]. Then explained Leave of Court and return to state courts is necessary.<sup>[ii]</sup> [T]he appeal was DISPOSED, because the informal brief did not address the notice of appeal issue, at doc. 12.

There was no notice USAP4 expected the brief to address the Notice of Appeal issue previously addressed from doc. 27 through 36, Where the Court held, lack of jurisdiction. Because of the alleged untimely filed Notice of Appeal. When doc. 12 shows the Notice of Appeal was, in fact, timely filed.

The USAP4 Disposed the case April 25, 2023, I received notice on May 12, 2023. That is 17 days, leaving only 4 days to respond and I had to work 10 hour shifts on two of those days. Without sufficient time to file for rehearing or a time extention. A motion to alter or amend judgment was filed in USAP4. Who sent it to USDC who subsequently confirmed the Notice of Appeal in question was, in fact, timely filed, see doc. 55. However USDC holds by their ruling. Because of USAP4 ruling and (2) the alleged untimely 2254 petition in (2015).

On October 4, 2016 the USAP4 Dismissal revealed, [Petitioner seeks to appeal the district court's denial of his 2254 petition (2012) and motion to alter or amend the judgment]... This newly discovered evidence alerted me that, this case was in federal court(s) during direct appeal without my knowledge.

The reason why is, appointed counsel James R. Glover did not perfect the appeal. Thereby causing procedural default. Because pursuant to state appellate procedure, [t]he appeal must be perfected. The default triggered collateral estoppel.

The N.C. Court of Appeals evidently enforced procedural default doctrine, to protect reasonable state appellate procedural rule. Rather than, ordering a belated direct appeal to obtain a merits adjudication of a conceded constitutional error. Thereupon, the state demonstrated harmless error by using felony murder, see TTP 605-608, citing State v. Price. Such action infers the state's opinion is based on default rather than a merits adjudication.

In the ensuing 2012 interlocutory action(s) this case was improvidently removed to federal court(s) without subject matter jurisdiction. Where USDC exceeded its jurisdiction by overriding U.S. Supreme Court precedent, by removing a criminal direct appeal via the collateral matter of default. And upheld the state court's position of, federal court(s) lack jurisdiction.

Such action deprived my right to effective assistance of counsel on appellate review. That is guaranteed by the 6th and 14th amendments of the U.S. Constitution. Furthermore, allowing conversion to a civil action enabled the state to demonstrate removal itself is permissible, which circumvents (1) U.S. Supreme Court precedent, (2) my right to counsel, and (3) a merits adjudication. And the estoppel deprives my federal 1st amendment right to redress the court(s).

Both Kentucky and Tennessee Supreme Courts hold that, when counsel defaults direct appeal in a criminal case. The state must grant either a belated direct appeal, or new trial, or release the prisoner. This remedy also complies with Evitts court. Whereas to enforce procedural default doctrine does not.

The state court of appeals should have immediately removed Glover from this case when he defaulted direct appeal. To prevent further injury to me and to the court(s) appeal process itself. And placed sanctions on him. Because he did not have authority to file the 2254 petition or motion on my behalf in federal court(s) according to his appointment authorization.

The record does not show Glover filed ineffective assistance on himself. And I am precluded from litigating the claim against him, due to his actions.

At doc. 42. the USAP4 noted, [M]oreover Dunlap previously appealed the district court's orders denying his 2254 petition and may not do so again.

Petitioner contends that none of the claims were adjudicated on the merits, though all claims were presented to the courts. Due to the estoppel. Thereby via Slack v. McDaniel, STANDARD OF REVIEW the 2015, 2254 petition does not qualify as a second or successive petition. See Slack at Summary

The USDC sua sponte Disposed this case via Clerk's Judgment in 2015, see doc. 4, 5 stating untimely filing. The opinion/disposition fails to account for the 2244(d)(1)(B) exception. That allows a later starting date. And since the federal court(s) commenced litigation in 2012, a 2015 filing could not be late.

That fact obstructs my capacity to show Cause for the default and prejudice from default of the appeal. Thereby making the estoppel itself premature.

Since default was prior to a merits adjudication, it is still pending.

Moreover the court(s) action(s) thus-far infer they hold to, lack of jurisdiction.

Neither court addressed the 2012 issue or 2244 (d)(1)(B) statutory exception. (vii)  
While estoppel -- to my knowledge -- remains active.

On August 12, 2021, doc. 20, I challenged the estoppel in a Fed. R. Civ. P. rule 60(b)(6) motion, and thought estoppel was vacated. But recently discovered the motion got reclassified to Notice of Appeal, I was not notified of the change. And received an informal briefing order from USAP4 with Notice of Appeal attached to the front page. It was assigned to the 2016 motion to alter or amend judgment. Rather than 2012 action(s) as intended, due to USAP4 response at doc. 16.

Pursuant to this court's precedent in Murray v. Carrier...

[I]f 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, at [s].

Pursuant to the Evitts court...

[A] state may certainly enforce vital procedural rule by imposing sanctions against the attorney, rather than against the client, at \*\*\* 832. [A] state may not extinguish this right because another right of the appellant -- the right to effective assistance of counsel -- has been violated, at 400.

With this shown, the estoppel activated before I could file an I.A.C. claim. And the State should have been estopped from removing the case, because according to Murray and Evitts courts the I.A.C. claim overrides the default and untimely issues.

Moreover the court(s) are punishing me for Glover's dereliction of duty. That was specifically forbidden by the Evitts court.

Thereto the state's imposed estoppel has also deprived my access to the courts. In violation of my rights to redress and due process of law. That are guaranteed by the U.S. Constitutional Amendments one and fourteen.

The courts should hold an evidentiary hearing because the record shows both cause for the default and presumed prejudice as a result.

Both lower federal courts have cited Rule 11(a) Rules Governing Section 2254 cases, to deny a certificate of appealability. Evidently due to procedural default.

The critical question however is, do federal courts have jurisdiction to review the ineffective assistance of counsel claim?

The STANDARD OF REVIEW for issuance of a certificate of Appealability is,

[A] petitioner must show that reasonable jurist could debate whether the petition should have been resolved in a different manner or that issues presented were adequate to deserve encouragement to proceed further,  
<sup>[14]</sup>  
see Miller-EL v. Cockrell and Slack v. McDaniel.

This petition demonstrates both standards set out in Miller-EL and Slack courts. And this holding is supported by established U.S. Supreme Court precedent and two state Supreme Courts as the appropriate constitutional remedy.

Therefore this court should grant certiorari review to resolve the conflict from other circuits and remand for a evidentiary hearing to resolve the contrary rulings that are in conflict with this court's binding precedent.

#### CONCLUSION

I pray this court vacates the USAP4 DISPOSITION in case no. 22-07396. And remands for further proceedings. Because there is no reason to disturb established binding precedent.

NOTICE: Appeal of related issues is presently in USAP4 case No, 23-6700.

Signature: Barney A. Dunlap

Date: October, 2023