UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-6967

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. Martin K. Reidinger, Chief District Judge. (5:15-cv-00139-MR)

Submitted: April 20, 2023 Decided: April 24, 2023

Before KING and QUATTLEBAUM, Circuit Judges, and FLOYD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Barney Adrian Dunlap, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

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 the judgment on March 23, 2016. Dunlap filed the notice of appeal, at the earliest, on May 19, 2022, 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 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 again.

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 initial review of Barney Adrian Dunlap's pro se Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) Also before the Court is Petitioner's motion to proceed in forma pauperis. (Doc. No. 3.)

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 North Carolina Court of Appeals summarized the State's evidence as follows:

> In the early morning hours of 8 May 2008, Officer Gary Dishman ("Officer Dishman") of the Lenoir Police Department pulled his patrol car into a parking lot. While Officer Dishman was in his vehicle, a white van parked beside him. Defendant exited the van and walked around to the front of Officer Dishman's patrol car. Officer Dishman exited his vehicle, and defendant told him, "Officer, I just killed my wife and my wife's boyfriend." Officer Dishman placed defendant in handcuffs, found two shotgun shells in defendant's pocket and secured defendant in the back of his patrol car. Defendant told Officer Dishman that there was shotgun in his van, and he asked the officer to send an ambulance to his wife's house in Lenoir, North Carolina.
>
> When Corporal James Moore ("Corporal Moore") of the Lenoir Police Department arrived at the residence, he found Roslyn Fox Dunlap ("Roslyn") lying naked on

the living room floor with a wound to her abdomen. She told Corporal Moore, "Help me please. My husband just shot me and killed my boyfriend." Corporal Moore found Gerald Lakey ("Lakey") in the back bedroom, naked, and partially lying on a mattress. Lakey was dead when medical personnel arrived. Roslyn was transported to the hospital, but she died on 10 May 2008. Dr. Donald Jason performed an autopsy on Roslyn and testified that her cause of death was a single shotgun wound to the upper abdomen. Dr. Ellen Riemer performed an autopsy on Lakey and testified that he died from a single shotgun wound of the chest and abdomen.

Special Agent Charlie Morris ("Agent Morris") of the State Bureau of Investigation testified regarding the collection and documentation of evidence from the scene. Investigators collected a bra and Lakey's blue jeans and underwear from the living room floor as well as a pair of blue jeans and panties turned inside out in the hallway. Agent Morris testified that he found a "battery powered device that had four vibrating cartridges" in the "on" position on the bedroom floor that he believed was "some type of sexual device," and that there were gunshot holes in the bed comforter.

Defendant and Roslyn first married in 1992, divorced sometime in the mid–1990s, and then remarried in 1998. Roslyn's daughter, Sierra Fox ("Sierra"), testified that during defendant and Roslyn's first marriage, the family resided in Roslyn's house in Lenoir. After they remarried, defendant, Roslyn, and Sierra moved to defendant's house in Hickory, North Carolina. Pursuant to the separation agreement signed by defendant and Roslyn in 2005, defendant transferred any and all interest he had in the Lenoir property to Roslyn. Approximately a week before the shooting, Roslyn moved out of the Hickory residence and moved back into her Lenoir residence, where the shooting occurred.

Sierra testified that for the past several years, defendant and her mother were sleeping in different bedrooms in the Hickory residence. Defendant told Sierra that her mother "wanted a divorce and that she was planning on leaving him." Sierra testified that on 8 May 2008, defendant arrived at his house and asked whether Roslyn was there. Defendant told Sierra that Roslyn said she was bringing a friend named Joe by the house to pick up some items. Sierra also testified that defendant said, " 'If she thinks she can bring another man in my house, then I've got something for her.' " When Sierra asked what he meant, defendant replied, " 'Nothing, never mind. I don't care what she does.' " Sierra thought defendant was angry throughout this exchange.

Dunlap, 2013 WL 432627, at *1-2. At the conclusion of all of the evidence, 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, 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.

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 Denying 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 the instant habeas Petition on October 28, 2015, when he signed and placed it in the prison mailing system. (Pet., supra, at 14, Doc. No. 1.)

II. STANDARD OF REVIEW

The Court is guided by Rule 4 of the Rules Governing Section 2254 Cases, which directs district courts to examine habeas petitions promptly. Rule 4, 28 U.S.C.A. foll. § 2254. When it plainly appears from any such petition and any attached exhibits that the petitioner is not entitled to relief, the reviewing court must dismiss the motion. Id.

III. DISCUSSION

A. In Forma Pauperis Motion

Federal law requires that a petitioner seeking habeas review of his state conviction and/or sentence in federal district court pay a filing fee in the amount of $5.00 or be granted leave by the court to proceed without prepayment of fees and costs. The petitioner must provide the court with an affidavit of indigency, and "a certified copy of the trust fund account statement (or the institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2).

The Court has reviewed Petitioner's affidavit of indigency and trust fund account statement which show that Petitioner had $56.40 in his trust fund account when he filed the instant habeas petition. (Affidavit 2, Doc. No. 3) His affidavit also states that Petitioner is employed by the prison and is paid $30.00 per month. (Affidavit, supra, at 1.) Based upon that review, the Court finds that Petitioner has sufficient funds to pay the $5.00 filing fee in this case. Consequently, his motion to proceed in forma pauperis shall be denied.

B. Habeas Petition

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides a statute of limitations for § 2254 petitions by a person in custody pursuant to a state court judgment. 28 U.S.C. § 2244(d)(1). The petition must be filed within one year of the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id.

Judgment was entered in Petitioner's case on September 2, 2011, when he was sentenced. As noted, the North Carolina Court of Appeals denied Petitioner's direct appeal on February 5, 2013. Dunlap, 2013 WL 432627, at *1. Petitioner then had thirty-five days to seek discretionary review of the Court of Appeals' decision in the North Carolina Supreme Court. See N.C. R. App. P. 15(b) ("A petition for review following determination by the Court of Appeals shall be . . . filed and served within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal."); N.C. R. App. P. 32(b) ("Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court twenty days after the written opinion of the court has been filed with the clerk."). Petitioner did not file a petition for discretionary review within that thirty-five (35) days. Therefore, his conviction became final on March 12, 2013, when the time for seeking such review expired. See § 2244(d)(1)(A); Gonzalez v. Thaler, 132 S.Ct. 641, 656 (2012) ("We hold that, for a state prisoner who does not seek review in a State's highest court, the judgment becomes 'final' on the date that the time for seeking such review expires.").

Petitioner, however, contends that his conviction did not become final until June 10, 2015, when the North Carolina Supreme Court denied his February 23, 2015 petition for writ of certiorari seeking review of the Court of Appeals' February 5, 2013 decision denying his direct appeal.[1] (Pet. 29, Doc. No. 1.) Petitioner is incorrect.

Petitioner filed his petition for writ of certiorari in the state Supreme Court under North

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[1] Petitioner actually asserts that his conviction did not become final until June 16, 2015, the date on which the Clerk of the North Carolina Supreme Court signed the order denying the petition. (Order Den. Cert. Pet. 16, Doc. No. 1-1.) The difference in the dates is unimportant, however, as the Petition is untimely under either date.

Carolina Rule of Appellate Procedure 21(a)(2). Appellate Rule 21(a)(2) allows the North Carolina Supreme Court, "in appropriate circumstances, to issue the writ of certiorari to permit review of the decisions and orders of the Court of Appeals when the right . . . to petition for discretionary review has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(2) (2009). Petitioner lost the right to petition the Supreme Court for discretionary review of the Court of Appeals decision on direct appeal when he failed to file such a petition by March 12, 2013. See N.C. R. App. P. 15(b) & 32(b). A petition pursuant to N.C. R. App. P. 21(a), on the other hand, is a request for extraordinary review and is outside the ordinary direct review process. See Saguilar v. Harkleroad, 348 F. Supp.2d 595, 599 (M.D.N.C. 2004). Therefore, a petition for certiorari brought under N.C. R. App. P. 21(a) does not determine the finality of conviction or the beginning of the one-year limitations period pursuant to 28 U.S.C. § 2244(d)(1).[2]

After Petitioner's conviction became final on March 12, 2013, the federal statute of limitations ran until February 7, 2014 (332 days), when Petitioner filed his MAR in Caldwell County Superior Court. The statute of limitations 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. The statute of limitations then ran for another thirty-three (33) days until it fully expired on or about September 30, 2014, more than a year before Petitioner filed the instant habeas Petition. Therefore, the Petition is untimely

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[2] Petitioner's reliance on Jimenez v. Quarterman, 555 U.S. 113 (2009), is misplaced. In Jimenez, the Supreme Court held that "where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet "final" for purposes of § 2244(d)(1)(A)." Id. at 121. Here, Petitioner was not granted the right to file an out-of-time appeal. As explained, supra, Petitioner sought relief by way of an extraordinary writ, not a direct appeal. Moreover, he did so after his state collateral review had ended.

under § 2244(d)(1)(A).

As an alternative basis for timeliness, Petitioner argues that the statute of limitations did not begin to run until he discovered the factual predicates for Grounds 2 through 5 of the instant Petition. See § 2244(d)(1)(D); McQuiggin v. Perkins, 133 S. Ct. 1924, 1929 (2013) ("If 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.'") (citing § 2244(d)(1)(D))). "Section 2244(d)(1)(D) gives [state prisoners] the benefit of a later start if vital facts could not have been known by the date the appellate process ended." Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000), as amended (Jan. 22, 2001); see also Cole v. Warden, Ga. State Prison, 768 F.3d 1150, 1155 (11th Cir. 2014), cert. denied, 135 S.Ct. 1905 (2015) (collecting cases). Moreover, the statute of limitations begins to run "when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." Owens, 235 F.3d at 359.

Petitioner asserts that he discovered the factual predicates for Grounds 2 through 5 after the Court of Appeals denied his direct appeal. However, each Ground involves an alleged error at trial: Ground 2 -- the trial court erred by giving a "mandatory presumption of malice" instruction to the jury; Ground 3 -- Petitioner's right to a jury trial was violated when the question of provocation was not presented to the jury; Ground 4 -- the State failed to prove every element of the crimes beyond a reasonable doubt; and Ground 5 -- the State erred by constructively amending the indictments during the trial.

At trial, Petitioner requested an instruction on the lesser-included offense of voluntary manslaughter. "Voluntary manslaughter is 'the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation.'" Id. (quoting State v.

Jackson, 550 S.E .2d 225, 229 (N.C. Ct. App. 2001)). "Voluntary manslaughter occurs when one kills intentionally, but does so in the heat of passion aroused by adequate provocation or in the exercise of self-defense where excessive force is used or defendant is the aggressor." Dunlap, 2013 WL 432627, at *2 (quoting State v. Lassiter, 586 S.E.2d 488, 497 (N.C. Ct. App. 2003) (internal quotation marks omitted). "Thus, for a defendant to be entitled to an instruction on voluntary manslaughter, the 'defendant must produce 'heat of passion' or 'provocation' evidence negating the elements of malice, premeditation, or deliberation.'" Dunlap, 2013 WL 432627, at *2 (quoting State v. Rainey, 574 S.E.2d 25, 30 (2002)). The trial court denied Petitioner's request.

Petitioner raised the issue on direct appeal, and the Court of Appeals agreed with him, concluding that he had presented sufficient evidence of provocation to support a reasonable inference that the killings were "the product of passion suddenly aroused" and that the trial court erred in refusing to give an instruction on voluntary manslaughter. Dunlap, 2013 WL 432627, at *3. Because Petitioner sought a voluntary manslaughter instruction at trial, the factual predicate for Grounds 2 and 3 were known to Petitioner when the court gave its instructions to the jury. See Owens, 235 F.3d at 359 (The statute of limitations begins to run "when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance.").

The same is true of Grounds 4 and 5. Ground 4 alleges that by giving an implied malice instruction and failing to give a voluntary manslaughter instruction, the trial court relieved the State of proving malice, premeditation, and deliberation beyond a reasonable doubt. (Mem. in Support of Habeas Pet. 34-37, Doc. No. 2.) In Ground 5, Petitioner alleges that during the trial, the State constructively amended the indictments, which, according to Petitioner, listed the

elements of malice, premeditation, and deliberation, by introducing evidence of, and seeking an instruction on, felony murder. (Mem. in Support of Habeas Pet., supra, at 38-42.) The trial court denied the State's request for a felony murder instruction. (Order Den. MAR 11, Doc. No. 1-1.) Because these alleged errors occurred at trial, the factual predicates of both Grounds 4 and 5 were known to Petitioner at that time.

For the foregoing reasons, Petitioner has failed to demonstrate that he is entitled to a later starting date for the statute of limitations pursuant to § 2244(d)(1)(D). Therefore, absent equitable tolling, his Petition is time-barred.

Equitable tolling requires a showing "(1) that [the petitioner] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" of filing a timely habeas petition. Holland v. Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)) (internal quotation marks omitted). Petitioner contends that ignorance of his legal rights, lack of access to legal resources, denial of appointment of counsel, and denial of assistance from North Carolina Prisoner Legal Services ("NCPLS") should excuse his failure to timely file his federal habeas petition. (Pet., supra, at 30-32.)

Unfamiliarity with the legal process and lack of legal representation do not constitute grounds for equitable tolling. United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004) (citing Cross-Bey v. Gammon, 322 F.3d 1012, 1015 (8th Cir. 2003) ("[E]ven in the case of an unrepresented prisoner alleging a lack of legal knowledge or legal resources, equitable tolling has not been warranted.")). Furthermore, although North Carolina prisons do not have law libraries, prisoners have access to NCPLS, which is staffed by persons trained in the law. See Bounds v. Smith, 430 U.S. 817, 828 (1977), overruled on other grounds by Lewis v. Casey, 518 U.S. 343, 354 (1996) ("[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."). "North Carolina's decision to utilize [NCPLS] in lieu of providing prison libraries at all of its correctional facilities is hardly an extraordinary circumstance unique to [P]etitioner." Bryant v. Hines, No. 5:12–HC2061–F, 2013 WL 4279101, at *5 (E.D.N.C. Feb.4, 2013) (unpublished). Nor is the fact that NCPLS declined to represent Petitioner. (April 10, 2013 Letter from NCPLS 19, Doc. No. 1-1.)

Correspondence from NCPLS to Petitioner shows that at least one attorney at NCPLS evaluated his case for post-conviction assistance. (April 10, 2013 Letter from NCPLS, supra.) 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. (April 10, 2013 Letter from NCPLS, supra.) Further correspondence shows that NCPLS offers legal representation in cases it views to be meritorious. (June 11, 2013 Letter from NCPLS 20, Doc. No. 1-1.) 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. In short, Petitioner received adequate assistance from those trained in the law. It is not an extraordinary circumstance that NCPLS declined to represent a prisoner in a case it did not view as meritorious.

Finally, Petitioner has not demonstrated how any of the foregoing circumstances prevented him from filing a timely federal habeas petition. Despite all of the alleged obstacles, Petitioner filed a pro se MAR before his statute of limitations expired, followed by a pro se petition for writ of certiorari in the Court of Appeals, which tolled the statute of limitations for 6 months. Petitioner does not explain how he managed to take such action while the statute of

limitations was running, but was unable to file his habeas petition for more than a year after his limitations period had expired. Indeed, there remained thirty-three days under the statute of the limitations in which he could have taken action in federal court after his state post-conviction process concluded.

Petitioner has failed to demonstrate that he has been pursuing his rights diligently and that some extraordinary circumstance prevented him from filing a timely habeas petition. See Pace, 544 U.S. at 418. He, therefore, is not entitled to equitable tolling of the statute of limitations, and his Petition is untimely under § 2244(d)(1)(A).[3]

V. ORDER

IT IS, THEREFORE, ORDERED that:

1) Petitioner's Petition for Writ of Habeas Corpus, Doc. No 1, is **DISMISSED** as untimely;
2) Petitioner's motion to proceed in forma pauperis, Doc. No. 3, is **DENIED**;
3) Petitioner shall have 14 days from entry of this Order to pay the $5.00 filing fee to the Clerk of Court; and
4) 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

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[3] The Court is aware of the Fourth Circuit's directive in Hill v. Braxton, 277 F.3d 701, 706 (4th Cir. 2002), that a court must warn a petitioner that his case is subject to dismissal before dismissing a petition as untimely filed when justice requires it. Here, however, such warning is not necessary because Petitioner addressed the statute of limitations issue in his § 2254 petition. (Pet. 29-32, Doc No. 1.)

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).

SO ORDERED.

Signed: December 10, 2015

Frank D. Whitney
Chief United States District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-7396

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. Martin K. Reidinger, Chief District Judge. (5:15-cv-00139-MR)

Submitted: April 20, 2023 Decided: April 25, 2023

Before KING and QUATTLEBAUM, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Barney Adrian Dunlap, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Barney Adrian Dunlap appeals the district court's August 23, 2022, order denying his motion to reopen the time to appeal. On appeal, we confine our review to the issues raised in the informal brief. *See* 4th Cir. R. 34(b). Because Dunlap's informal brief does not challenge the basis for the district court's disposition, he has forfeited appellate review of the court's order. *See Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief."). Accordingly, we affirm the district court's order. 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.

AFFIRMED

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