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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Greenville County Court of Common Pleas
The Honorable G. D. Morgan, Jr., Circuit Court Judge

Case No. 2021CP2301952

Antonio Calloway, #00343102,.....Petitioner,

v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL AND
RULE 243(c), SCACR EXPLANATION

The Petitioner, Antonio Calloway, by and through undersigned counsel, hereby appeals the Order of Dismissal of his post-conviction relief application issued by the Honorable G. D. Morgan, Jr. Undersigned Counsel received written notice of entry of the judgment on January 15, 2024 by mail. A copy of the Order of Dismissal is attached to this Notice. A copy of this Notice is forwarded to the Greenville County Clerk of Court, the Honorable Brice Garrett.

RULE 243(c), SCACR EXPLANATION

Summary dismissal based upon a finding that the Petitioner's PCR case was out of time and successive and *res judicata* was in error based upon the following:

The PCR Court erred in finding that the mental disability records and DSS records were previously litigated at Petitioner's previous PCR hearing. The wealth of information presented in these records had not been presented previously to any court. Moreover, Plea Counsel's already limited summation of Petitioner's background to the plea court for the purposes of sentencing mitigation was not only incomplete, but also blatantly contradicted the information that Plea Counsel was aware of and information that was available to him at the time.

The PCR Court also erred in finding that *Ramirez v. State*, 419 S.C. 14, 23, 795 S.E.2d 841, 845-46 (2017) was inapplicable to Petitioner's case on the basis that *Ramirez* did not involve a successive PCR and the defendant had a lower IQ than Petitioner. These factual differences are inconsequential as Petitioner's Response Opposing Summary Dismissal presents meritorious reasons as to why this case should receive a full evidentiary PCR hearing on the merits despite the bar against successive PCR applications and the statute of limitations. Moreover, *Ramirez* nor any other binding case sets forth a minimum IQ level that one must meet in order for an attorney to be deemed ineffective for failing to investigate a defendant's competency and mental disability.

The PCR Court also erred in finding that the grounds raised in the current PCR application, as well as the information set forth in the Petitioner's records, had already been used to challenge Petitioner's conviction and sentence, and therefore this PCR is barred by *res judicata*. In contrast to the PCR Court's findings, the grounds asserted in the current PCR application or the full extent of the records, had never been fully raised to any court or fully ruled upon.

In light of the foregoing, the PCR Court erred in granting Respondent's motion for summary dismissal. There is therefore an arguable basis for asserting that the determination by the PCR Court was improper and this appeal should be allowed to proceed.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Antonio Calloway, #382668, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2021-CP-23-01952 **FINAL ORDER OF DISMISSAL** ENTERED COMPUTER

Applicant, through counsel, filed the captioned application for post-conviction relief on April 27, 2021. Respondent made its return on July 28, 2021, and moved for summary dismissal. Respondent submitted that the action was not timely, was improperly successive, and barred by *res judicata.* After consideration of the application, return and relevant documents attached thereto, this Court issued a conditional order of dismissal, filed on August 3, 2021, finding that the action was procedurally barred as untimely, improperly successive and barred by *res judicata*. Applicant's counsel filed a response on October 18, 2022, and opposed summary dismissal.

This Court has reviewed its prior order and finds no cause as to why the Order should not become final. In particular, Applicant asserts in his response that he may not have been competent to plead guilty and generally asserts there is a wealth of evidence as to Applicant's mental disabilities that should have been presented to the plea judge. This is not new. In the evidentiary hearing held in the prior PCR action, Applicant testified he wanted plea counsel to present evidence on his "background and record" including records from "DJJ, DSS, social history mental health," and that he believed the records were important to show his "diminished capacity of what" he had "experienced from birth, my early age, early childhood." (Return Attachment, 2012 PCR Action Appeal, Appendix, Petition for Writ of Certiorari, at 41). Notably, Applicant,

under questioning by his PCR counsel, focused on receiving less time, not that the did not understand the proceedings. (*Id.*). Judge Welmaker, in denying relief, recognized Applicant's testimony that "counsel did not provide effective mitigation evidence – mental health and social history – to the plea judge." (Return Attachment, Case No. 2012-CP-23-6181, Order of Dismissal, p. 5). Judge Welmaker resolved:

> … the Applicant failed to meet his burden of proving plea counsel should have presented more thorough mitigation or obtained a mitigation expert. This Court notes plea counsel presented a detailed mitigation argument to the plea judge, including that the Applicant had no prior record, became the sole caretaker of his younger siblings at a young age, and performed well academically with no history of behavior misconduct at school. (Plea transcript, pp. 13-16). This Court notes that, as the Applicant has failed to present either mitigation evidence or a mitigation expert, it cannot speculate as to whether such information would have had an impact upon the Applicant's case. *Lorenzen v. State*, 376 S.C. 521, 530, 657 S.E.2d 771, 111 (2008) (finding that, as the applicant failed to present any expert testimony at the PCR hearing, "it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense"); *Dempsev v. State*, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative").

(Return Attachment, C/A 2012-CP-23-6181, Order of Dismissal, p. 7). Applicant further asserted on appeal, in his *pro se* filing, that his plea counsel was ineffective for failing to present evidence of his mental disabilities. (Return Attachment, Appellate Case No. 2014-000353, *pro se* brief filed January 22, 2015). Again, the basis and support for the claim is not new at all.

Applicant's reliance on *Ramirez v. State*, 419 S.C. 14, 23, 795 S.E.2d 841, 845–46 (2017) is misplaced. *Ramirez* does not address untimely presentation of a claim in a successive action. Moreover, the court in *Ramirez* was focused specifically on claim that plea counsel, though he had concerns about competency and secured a second opinion, had not sought reconsideration of the competency finding. *Id.*, at 19, 795 S.E.2d at 844. In contrast, plea counsel for Applicant

during the evidentiary hearing in the prior PCR action, testified that he relied on Applicant for background, and "saw no cause" to hire a mitigation investigator, nor did he believe having the assistance of an investigator would "have changed the outcome of the case." (2012 PCR Action Appeal, Appendix, Petition for Writ of Certiorari, at 51 and 55). Further, the defendant in *Ramirez* suffered, according to one expert, significantly disabilities, "a general IQ level between thirty-one and forty-four, falling within the range of Severe Mental Retardation, and was functioning at the intellectual level of a four to seven year old child." *Ramirez*, at 18, 795 S.E.2d at 843 (footnote omitted). Here, according to the documents that Applicant's has submitted in his response opposing summary dismissal, after removal from his home, his full-scale IQ significantly improved to 79 – not in the severe mental retardation range as referenced in *Ramirez*. (*See* Response Appendix, at 10).

But again, *Ramirez* does not touch on a failure to timely file or whether a successive application may be filed. Further, as demonstrated, Applicant had the assistance of counsel in his prior PCR action and was aware of background records that may have been relied upon if necessary. This Court rejects Applicant's argument as presented in the response in opposition.[1] Applicant has failed to show cause as to why the conditional order should not become final.

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[1] Applicant does not argue cause to excuse the procedural bars as to the claim that he did not knowingly and voluntarily waive his right to direct appeal. The Court agrees with Respondent that the issue was available for the prior PCR, was raised in the prior PCR, but no evidence was presented on the allegation. (*See* Return Attachment. C/A 2012-CP-23-6181, Order of Dismissal, p. 3, allegation 1, ee; p. 8). While the claim is not subject to a statute of limitations, it is subject to summary dismissal as improperly successive. *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008) (finding because the "petitioner clearly could have raised the issue of the denial of his right to direct appeal in his first PCR application but did not do so, "the PCR judge correctly found petitioner was barred from raising it in a successive application"). It is also subject to being barred by *res judicata. See Ford v. Watson*, 282 S.C. 66, 69, 316 S.E.2d 429, 431 (Ct. App. 1984) ("The essential elements of res judicata are identity of parties, identity of subject matter and adjudication in a former suit. A litigant is barred from raising any issue which was adjudicated in the former

Further, though Applicant argues his present claims have not been fully considered, the records before this Court support that Applicant has been afforded ample opportunity to test his plea and sentence. Notably, Applicant received the assistance of counsel and a full prior PCR proceeding, *see* 2012-CP-23-6181, and an appeal from that action; and a federal habeas corpus action, *see* District Court, District of South Carolina C/A No.: 4:15-2137-RMG-TER. He is due no more. *Robertson v. State*, 418 S.C. 505, 513, 795 S.E.2d 29, 33 (2016) ("[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application" and additional attempts at further litigation "are generally disfavored because they allow an applicant to receive more than 'one bite at the apple as it were.'") (quoting *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999)). *See also Foxworth v. State*, 275 S.C. 615, 617, 274 S.E.2d 415, 416 (1981) ("successive applications for post-conviction relief in the State courts, while not absolutely barred, are not looked favorably upon unless ample reason exists for a person under sentence to litigate again" and his opportunity for litigation through both state and federal remedies are considered); *Ford v. Watson*, 282 S.C. 66, 69, 316 S.E.2d 429, 431 (Ct. App. 1984) ("A litigant is barred from raising any issue which was adjudicated in the former suit and all issues which could have been raised in the former suit. ").

The noted procedural bars are well-established and applicable.

THEREFORE, this Court reaffirms all its specific findings in the conditional order of dismissal and concludes that the application must be summarily dismissed as untimely, improperly successive and barred by *res judicata*. This Court further finds that Applicant has

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suit and all issues which could have been raised in the former suit. "). *Accord Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002) ("the doctrine of laches may bar an action such as this where there is no applicable statute of limitations").

failed to show cause why the conditional order should not become final, and the application dismissed.

IT IS THEREFORE ORDERED that for the reasons set forth in the Court's conditional order of dismissal, specifically, that the application is untimely, improperly successive and barred by *res judicata* without exception, the application for post-conviction relief is denied and dismissed.

IT IS SO ORDERED this 2nd day of January, 2024.

G.B. Morgan, Jr., Chief Judge for
Administrative Purposes, Common Pleas
Thirteenth Judicial Circuit

Greenville, South Carolina

Copy mailed to
Attorney General / Lauren Hobbs
on 1 / 03 / 2024.