STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
DEC 27 2019
S.C. SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
The Honorable J. Derham Cole, PCR Judge

Appellate Case No. 2018-001854

ROBERT A. BAKER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

LILLIAN L. MEADOWS
S.C. Bar No. 103665
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

INDEX i

STATEMENTS OF THE ISSUES 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 9

ARGUMENT 10

In light of Petitioner's repeated failure to set forth cognizable PCR claims, the PCR court properly dismissed Petitioner's application for failure to prosecute based on unreasonable neglect where Petitioner failed to cooperate with both of his appointed attorneys; was afforded numerous opportunities to be heard through multiple scheduled hearings; and continuously filed frivolous motions and amended applications void of any supporting facts or circumstances such that the State was not on notice of the PCR allegations Petitioner planned to pursue. 10

CONCLUSION 19

PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

Whether the post-conviction relief (PCR) court erred in dismissing Petitioner's PCR application for failure to prosecute when the state claimed that it, "had no indication from [petitioner] what allegations he wanted to pursue at PCR," where there was no showing of unreasonable neglect demonstrated by Petitioner, and where Petitioner's amended PCR application had well defined allegations of ineffective assistance of counsel that put the state on notice as to the allegations he was going to pursue?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

In light of Petitioner's repeated failure to set forth cognizable PCR claims, the PCR court properly dismissed Petitioner's application for failure to prosecute based on unreasonable neglect where Petitioner failed to cooperate with both of his appointed attorneys; was afforded numerous opportunities to be heard through multiple scheduled hearings; and continuously filed frivolous motions and amended applications void of any supporting facts or circumstances such that the State was not on notice of the PCR allegations Petitioner planned to pursue.

STATEMENT OF THE CASE

In June 2009, the Lexington County Grand Jury indicted Petitioner for eight counts of second-degree criminal sexual conduct (CSC) with a minor and four counts of committing a lewd act upon a child.[1] The Lexington County Grand Jury subsequently indicted Petitioner for two additional counts of second-degree CSC with a minor and five additional counts of lewd act in July 2010. Assistant Public Defender David M. Mauldin of the Lexington County Public Defender's Office represented Petitioner. Assistant Solicitor Debra B. Moore of the Eleventh Circuit Solicitor's Office prosecuted the case.

On July 15, 2010, Petitioner appeared before the Honorable R. Knox McMahon and pleaded guilty as indicted to four counts of second-degree CSC with a minor (2009-GS-32-1597, -1600; 2010-GS-32-2101, -2103) and two counts of committing a lewd act upon a child (2010-GS-32-2105, -2108). Petitioner's remaining charges were dismissed in exchange for his guilty plea. (App. 14). Pursuant to the negotiated plea agreement, Judge McMahon sentenced Petitioner to an aggregate term of thirty years' imprisonment and ordered Petitioner to register as a sex offender.[2] (App. 31–32).

As a result of the plea, Petitioner's unrelated probationary sentence from a 2006 conviction was revoked.[3] (App. 24–30). Judge McMahon revoked in full, reinstated Petitioner's ten-year

---

[1] The lewd act statute was repealed in 2012, and the crime formerly known as lewd act is now classified as third-degree CSC with a minor under subsection 16-3-655(C) of the South Carolina Code (2015).

[2] Petitioner's sentence structure: ten years' imprisonment each for indictments 2010-GS-32-2103, -2105, and -2108; twenty years' imprisonment each for indictments 2009-GS-32-1597, -1600 and 2010-GS-32-2101. The twenty-year sentence on indictment 2009-GS-32-1600 runs consecutive to the ten-year sentence on indictment 2009-GS-32-2103. The remaining sentences on the 2009 and 2010 indictments run concurrent. (App. 33–34, 43).

[3] Petitioner was indicted for first-degree criminal sexual conduct with a minor in 2005 (2005-GS-32-04539). On December 7, 2006, Petitioner pleaded guilty before the Honorable Thomas W. Cooper, Jr., to the lesser-included offense of assault and battery of a high and aggravated nature

suspended sentence, and ran it consecutive to the new thirty-year sentence. (App. 32, 43; Supp. App. 39).

Petitioner did not appeal his guilty plea; however, he appealed his probation revocation on the 2006 conviction. (Supp. App. 40–42). Appellate Defender Kathrin H. Hudgins perfected Petitioner's appeal by filing an *Anders*[4] brief on his behalf with the Court of Appeals. (Supp. App. 44–54). Petitioner did not file a brief in response. On March 7, 2012, the Court of Appeals dismissed the appeal. *State v. Baker*, 2012-UP-159 (S.C. Ct. App. filed March 7, 2012) (Supp. App. 55).

Petitioner commenced this PCR action on March 12, 2012, challenging the CSC and lewd act convictions only. (App. 34–42). Specifically, Petitioner alleged trial counsel was ineffective for "failing to introduce evidence of mental incompetency." (App. 36). Petitioner failed to provide any facts to support this claim. Petitioner subsequently filed his first amended application on July 2, 2012, alleging trial counsel was ineffective for failure to introduce DNA evidence and re-alleging the failure to introduce evidence of mental incompetency claim. (Supp. App. 56–62). Petitioner also raised a claim of prosecutorial misconduct based on an alleged *Brady*[5] violation. (Supp. App. 58). Again, Petitioner did not provide any supporting facts.

The State made its return on July 10, 2012, moving to summarily dismiss the action as untimely pursuant to section 17-27-45(A) of the South Carolina Code (2014) because Petitioner's PCR application was filed approximately eight months after the statute of limitations expired. (App. 44–47).

(2006-GS-32-03893). Judge Cooper sentenced Petitioner to ten years' imprisonment suspended to five years' probation and ordered Petitioner to register as a sex offender. (Supp. App. 36–38).

[4] *Anders v. California*, 386 U.S. 738 (1976).

[5] *Brady v. Maryland*, 373 U.S. 83 (1963).

On May 28, 2015, a status conference was convened before the Honorable William P. Keesley, Chief Administrative Judge, who appointed Anna Good, Esquire, to represent Petitioner. (Supp. App. 63). The State thereafter made an amended return on July 9, 2015—moving again to summarily dismiss the action as untimely because the probation revocation appeal was irrelevant to the timeliness of the PCR action, which challenged the CSC and lewd act convictions only. (App 53–56).

On July 20, 2015, Petitioner, through Good, filed a second amended application and a motion seeking funds for a forensic psychiatrist to complete a mental health evaluation. (App. 49, 51). Judge Keesley granted the motion, and authorized the issuance of $5,000 for the services of Forensic Psychiatrist, Amanda Salas, MD. (App. 50). The amended application filed by Good raised claims of ineffective assistance of trial counsel based on "fail[ure] to properly have [Petitioner] evaluated for his mental health condition; fail[ure] to provide [Petitioner] regarding the probation violation associated with the plea; and fail[ure] to obtain medical records of [Petitioner] from the Lexington County Detention Center." (App. 49).

On September 18, 2015, while represented by counsel, Petitioner filed a document entitled, "Supplemental Amend to PCR to let Court, A.R. Good, and Atty. General Know Defs. tampering with my mails and lock down punished for others."[6] (App. 58–62). In this document, Petitioner accuses the South Carolina Department of Corrections of preventing Petitioner from visiting the

[6] This supplement was erroneously included as part of the lower court record in violation of Rule 210(c), SCACR, which prohibits appellant from including in the record matter not presented to the lower court. *See State v. Stuckey*, 333 S.C. 56, 57–58, 508 S.E.2d 564, 564 (1998) (recognizing that, since there is no right to "hybrid representation" under the United States and South Carolina Constitutions, substantive documents filed pro se by person represented by counsel are not accepted); *cf. State v. Devore,* 416 S.C. 115, 120, 784 S.E.2d 690, 692 (Ct. App. 2016) ("[If] the pro se letter is a substantive document filed while [the defendant] was represented by counsel, such that his representation is partially pro se and partially by counsel, it would be improper and could not be accepted. Rather, it would be considered a nullity.").

law library, receiving mail and using the phone in an effort to intercept Petitioner's mail and "forge court orders."[7] (App. 58). The document does not contain anything pertaining to Petitioner's PCR allegations.[8]

On June 29, 2016, Judge Keesley convened a second status conference, and scheduled a hearing on the State's motion to dismiss for August 1, 2016. (Supp. App. 65). Petitioner moved to relieve PCR counsel shortly thereafter on July 4, 2016, "alleging effective assistance of counsel is being denied by State appointed counsel Anna R. Good." (Supp. App. 67). Petitioner complained that he "will not get a fair PCR hearing because counsel will be biasis [*sic*] in all proceedings." (Supp. App. 67). The only specific complaint Petitioner provided was that Good came to visit him on June 23, 2015, and he had not heard from her since. (Supp. App. 68).

A hearing on Petitioner's motion to relieve PCR counsel and the State's motion to dismiss was convened before the Honorable Edward W. Miller on August 2, 2016. Judge Miller denied Petitioner's motion to relieve counsel, denied the State's motion to dismiss the application as untimely, and ordered the matter be scheduled for an evidentiary hearing. (Supp. App. 69).

An evidentiary hearing was scheduled before the Honorable R. Keith Kelly for November 15, 2016. However, prior to the hearing, Petitioner filed a second motion to relieve PCR counsel, alleging Good failed "to come and talk to [Petitioner] and strategize about [his] defends [*sic*] in [his] upcoming PCR case;" "failed to send [Petitioner] a copy of [his] discovery and documents Good obtained on [his] behalf;" and "failed to come and talk to [Petitioner] on amending [his]

---

[7] The document attached to Petitioner's one-page supplement is a form complaint used for filing civil suits in the United States District Court for the District of South Carolina. Petitioner's named defendants include, among others, the Director of the South Carolina Department of Corrections, Bryan Stirling; U.S. District Judge R. Bryan Harwell; U.S. Magistrate Judge Kevin F. McDonald; and "3,455 conspirators, et al." (App. 60–62).

[8] Petitioner incorrectly states this supplement "further explain[s] his allegations of ineffective assistance of counsel." (Pet. 3).

PCR." (Supp. App 72). Judge Kelly granted Petitioner's second motion to relieve counsel and ordered Petitioner to represent himself unless he retained private counsel. (Supp. App. 75).

On January 17, 2017, Petitioner filed a third amended application. (Supp. App. 78–85). This application "amended" Petitioner's prior PCR applications only by providing an amended answer to Petitioner's requested relief. (Supp. App. 78). The attached documents consists of a letter to Good requesting a copy of his file (Supp. App. 79–80), a letter requesting assistance with mental health treatment (Supp. App. 82), and a letter requesting copies of a 2009 trial court order allegedly ordering DNA testing. (Supp. App. 83).

On March 2, 2017, Petitioner filed a fourth amended application, alleging ineffective assistance of counsel, prosecutorial misconduct, conflict of interest, procedural default, and "protocol default." (Supp. App. 86). No further details were provided as to any of these claims nor were any facts proffered in support.

Judge Keesley convened a third status conference on June 1, 2017, "to find out where we are with regard to the status of this case and to address some of the issues that appear in the file." (App. 65). Following concerns regarding resolution of the case and questions about whether the mental health evaluation was completed, Judge Keesley ordered a second PCR attorney be appointed to represent Petitioner.[9] (App. 75). However, Judge Keesley made it abundantly clear to Petitioner that he "would have to do [his] best to get along with that lawyer." (App. 67). Petitioner assured Judge Keesley he understood, and that lack of communication was the main issue he had

[9] Petitioner incorrectly states that Judge Keesley presided over Petitioner's PCR hearing and the State's motion to dismiss and "allowed Petitioner's PCR matter to continue." (Pet. 4). As aforementioned, Judge Miller dismissed the State's motion to dismiss the application as untimely almost a year prior to this status conference with Judge Keesley. (Supp. App. 69). Judge Keesley never presided over *any* substantive hearing in Petitioner's case, and only handed administrative matters properly before him as the acting chief judge for administrative purposes. *See generally* S.C. Sup. Ct. Admin. Order No. 2011-02-04-01 (Amended by Order No. 2019-06-28-02).

with Good. (App. 67). Arthur K. Aiken, Esuire, was appointed to represent Petitioner on June 6, 2017. (Supp. App. 92).

An evidentiary hearing was scheduled for November 26, 2017, before Judge McMahon, but was continued on Aiken's motion. (Supp. App. 88–90). The PCR court then convened an evidentiary hearing on February 20, 2018, before the Honorable J. Derham Cole (PCR judge). Petitioner was present and represented by Aiken. Assistant Attorney General Sherrie Butterbaugh represented the State. At the outset of the hearing, the State moved to dismiss for failure to prosecute pursuant to Rule 41(b), SCRCP, based on Petitioner's unreasonable neglect in proceeding with his cause. [10] (App. 84). The State summarized the lengthy procedural history and appraised the court of Petitioner's multiple amended applications void of *any* specific allegations or factual support. (App. 84–86). The State argued that Petitioner's failure to set forth cognizable PCR claims, coupled with Petitioner's failure to cooperate with two very competent attorneys, left the State without notice as to the allegations it would be required to defend at the evidentiary hearing. (App. 86). In response, Aiken asked the court not to dismiss the action, however, he stated he had been unable to communicate with Petitioner about the PCR allegations Petitioner wished to pursue. (App. 86). Aiken informed the court that he called the prison twice during the week prior to the hearing, and SCDC staff told Aiken Petitioner did not want to speak with him.[11] (App.

---

[10] Petitioner incorrectly contends that the State moved to dismiss the application as barred by the statute of limitations at the February 2018 hearing. (Pet. 4). However, the State was merely informing the PCR court, as part of the procedural history, that the State initially "filed two returns and moved to dismiss both times for violation of the statute of limitations, arguing that [Petitioner's] application was untimely by about eight months. (App. 84–85). The State informed the PCR court that Judge Miller previously held a hearing on this motion and denied it. (App. 85).

[11] Petitioner misconstrues Aiken's representations to the PCR court, claiming Aiken stated, "he did not believe Petitioner caused the communication breakdown." (Pet. 6). Aiken never offered his opinion either way—he merely informed the PCR court of what SCDC told him versus what Petitioner told him about what happened during the scheduled telephone conferences. (App. 86–88).

86–87). However, Aiken also stated that Petitioner told him that was not correct, and that Petitioner did want to speak with him. (App. 87).

Upon inquiry from the PCR court, Aiken explained that the mental health evaluation ordered by Judge Keesley had been completed, and Petitioner was found competent.[12] (App. 91). Judge Cole granted the State's motion and dismissed the action with prejudice. (App. 91). The order of dismissal was issued on September 13, 2018. (App. 93–95). Petitioner appealed.

[12] Petitioner incorrectly claims it was the State who informed the PCR court that Petitioner underwent a mental health evaluation and was found competent. (Pet. 4–5). On the contrary, the State told the court at the beginning of the hearing that, "there is no word on whether that evaluation was ever done and the State has never received any report." (App. 85).

STANDARD OF REVIEW

In PCR cases, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

When reviewing "a PCR court's resolution of procedural questions arising under the Uniform Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure," appellate courts will analyze the matter solely to determine whether an abuse of discretion occurred. *Mangal v. State*, 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Kiriakides v. Sch. Dist. of Greenville County,* 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009).

ARGUMENT

On appeal, Petitioner argues he was denied his "one bite at the apple" when the PCR court dismissed Petitioner's PCR action for failure to prosecute. Petitioner specifically contends, "there was no showing of unreasonable neglect demonstrated by Petitioner and [that] Petitioner's amended PCR application had well defined allegations of ineffective assistance of counsel that put the state on notice as to the allegations he was going to pursue." However, the record reflects Petitioner continuously frustrated the process of prosecuting his case by failing to set forth cognizable PCR claims despite the numerous opportunities afforded to him through multiple attorneys and scheduled hearings. The amended application to which Petitioner claims put the State on notice was filed by Petitioner's first PCR counsel, who he fired *over two and a half years prior* to the hearing with Judge Cole. Coupled with Petitioner's numerous filings and amended applications, which were devoid of any specific facts, support the PCR court's finding that Petitioner was unreasonably neglectful in prosecuting his case. Ultimately, given multiple opportunities to bite the apple, Petitioner failed to do so and thus certiorari should be denied.

When seeking relief, every PCR applicant is entitled to a full and fair opportunity to present claims in one PCR application, or one "bite at the apple as it were." *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). However, a PCR action is civil in nature and, like a plaintiff in other civil actions, the PCR applicant bears the burden of proving the allegations set forth in his application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Pursuant to the requirements of the Uniform Post-Conviction Procedure Act, the applicant must set forth his claims for relief with *specificity*. S.C. Code Ann. § 17-27-50 ("The application shall . . . specifically set forth the grounds upon which the application is based, and clearly state the relief desire."); *see also* Rule 8(a)(2), SCRCP (requiring all civil pleadings to include "a short and plain

statement of the facts showing that the pleader is entitled to relief"). This requirement affords the State a fair opportunity to respond to the applicant's claim and prepare for the evidentiary hearing. *See Langston v. Niles*, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975) ("The purpose of pleadings is to place the adversary on notice as to what the issues are.").

Once appointed, however, PCR counsel has a duty to ensure the application complies with the necessary requirements and that the applicant's grounds are properly presented to the PCR court. *See* Rule 71.1(d), SCRCP ("Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary."). "All grounds for relief available to an applicant must be raised in his original, supplemental, or amended application." S.C. Code Ann. § 17-27-90.

Like other civil actions, a PCR court may properly dismiss an application for failure to prosecute to "maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed" with the action. *McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006); *cf. Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983) ("The plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause."). In considering a motion to dismiss for failure to prosecute, the PCR court must apply a "reasonableness standard" in balancing considerations of sound judicial administration with the sound public policy of deciding cases on their merits. *McComas*, 368 S.C. at 64, 626 S.E.2d at 905 (n.2);[13] *accord Nall v. Woolfolk,* 451 S.W.2d 389, 390 (Ky. 1970) ("The

[13] "Though Rule 41(b) does not require the defendant prove unreasonable neglect by the plaintiff to be granted a motion to dismiss for failure to prosecute, we find a reasonableness standard should apply in cases of this kind . . ."

power of dismissal for want of prosecution is an inherent power in the courts and necessary to preserve the judicial process.").

First, despite Petitioner's untimely filing, Judge Keesley held a status conference, appointed Petitioner counsel, and allocated funding for discovery. Judge Miller then denied the State's motion to dismiss and allowed Petitioner the opportunity to pursue his case on the merits via a full evidentiary hearing. Petitioner then appeared before Judge Kelly and chose to fire his attorney instead of present his claims to the PCR court. After Petitioner fired his first attorney, Judge Keesley convened *another* status conference and appointed counsel—Petitioner's *second* PCR attorney. Petitioner then refused to cooperate with Aiken, preventing Aiken from performing his duty to ensure Petitioner's claims were properly before the PCR court. The State, the Chief Administrative Judge, Petitioner's PCR attorneys, and the PCR court made every reasonable effort to move the case forward towards a resolution on the merits despite Petitioner's pattern of frivolous filings and abuse of the judicial process. Accordingly, the PCR court's discretionary decision to dismiss Petitioner's PCR action for failure to prosecute did not constitute an abuse of discretion nor an error of law.

Petitioner's February 20, 2018, evidentiary hearing commenced with the State's motion to dismiss for failure to prosecute based on unreasonable neglect. The State explained that it "had no indication from Petitioner what allegations he wanted to pursue in order for the State to prepare for the hearing in light of the numerous amended applications filed and the number of years the case had been pending." (App. 94). In particular, the State referred to an email from Aiken indicating Petitioner refused to speak with him about his PCR allegations, preventing both Aiken and the State from making any meaningful preparations. Aiken stated that during the week prior to the hearing, he attempted to speak with Petitioner on two separate occasions in order to

"determine exactly what [Petitioner] wanted to proceed with" at the evidentiary hearing. (App. 86). Both times Aiken attempted to contact Petitioner via scheduled telephone conferences, SCDC staff informed Aiken Petitioner did not want to speak with him. (App. 87). However, Aiken also informed the PCR court that Petitioner told Aiken prior to the hearing this was not true, and that Petitioner "did, in fact, want to speak with [him]." (App. 87).

Petitioner alleges the PCR court "mischaracterizes" Aiken's statements at the hearing by failing to address Aiken's alleged statement to the PCR court that Petitioner told Aiken "it was the facility that prevented Petitioner and Aiken's communication." (Pet. 5). However, while Aiken generously chalked the inability to communicate up to "confusion," it was clearly within the PCR court's discretion to make an implied finding as to the credibility of Petitioner. *See Sellner*, 416 S.C. at 610, 787 S.E.2d at 527 (stating appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them); *Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) ("[Appellate courts] give great deference to a judge's findings where matters of credibility are involved since [appellate courts] lack the opportunity to directly observe the witnesses."). The PCR court's questions to Aiken about what happened during the scheduled telephone conferences further demonstrates the PCR court's attempt to evaluate the credibility of Petitioner.

In support of Petitioner's contention that SCDC caused the communication breakdown, Petitioner cites to the September 2015 supplement wherein he accuses SCDC staff of intercepting his mail, prohibiting him from using the phone, law library, etc. (Pet. 5). Not only are the contents of the document patently questionable, the supplement was filed nearly *three years* before Aiken was appointed. Thus, none of the claims in the supplement could be construed to apply to communications between Petitioner and Aiken.

Most importantly, the supplement *was not properly before the PCR court* because Petitioner was represented by counsel (Good) at the time, and was therefore not authorized to file it. *See Stuckey,* 333 S.C. at 57–58, 508 S.E.2d at 564 (explaining that substantive documents filed pro se by a person represented by counsel are not accepted by the PCR court unless submitted by counsel, since there is no right to "hybrid representation" under United States and South Carolina Constitutions). Accordingly, *any reference* to the supplement in support of Petitioner's claim is improper.

Petitioner next claims that the second amended application "had well defined allegations of ineffective assistance of counsel that put the State on notice as to the allegations [Petitioner] was going to pursue." (Pet. 7). However, Petitioner fails to mention that this amended application was filed by Good, *who he fired.* Thus, Petitioner impliedly abandoned these allegations when he fired Good *almost two and a half years* prior to the hearing.

Additionally, Petitioner expressly abandoned all prior amended applications in the fourth amended application filed in March 2017.[14] Petitioner introduces the claims set forth in the fourth amended application as follows:

> Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby Amended as follows to include *in addition to the prior grounds stated in the original application* for post-conviction relief
> . . . .

(Supp. App. 86) (emphasis added). The State therefore had no reason to believe Petitioner planned to pursue claims set forth in any of his amended applications except those in the recently filed

[14] Interestingly, Petitioner fails to address the third and fourth amended applications in the Petition for Writ of Certiorari.

fourth amended application and the original application.[15] Moreover, the fourth amended application consists only of broad allegations, such as "ineffective assistance of counsel" and "protocol default." (Supp. App. 86). No specific claims or supporting facts were provided, nor were any substantive allegations "readily apparent from the underlying plea record." *Love v. State,* 428 S.C. 231, 242, 834 S.E.2d 196, 201 (2019). *See* S.C. Code Ann. § 17-27-50 (requiring an applicant to "specifically set forth the grounds upon which the application is based"); *accord Andiarena v. United States,* 967 F.2d 715, 719 (1st Cir.1992) (finding that claim that included "wholly conclusory. . . abstract allegation" was "properly subject to summary dismissal" in habeas petition). Thus, it was impossible to for the State to prepare for the hearing because it had no indication of the claims it would be required to defend.

While the State recognizes "the tension between the rights at stake in PCR proceedings and the application of traditional procedural requirements for the presentation and preservation of issues," this Court has generally refused "excuse the pleading . . . requirements that apply in all civil cases."[16] *Mangal*, 421 S.C. at 97, 805 S.E.2d at 574. Accordingly, the lower court's discretionary power to dismiss a civil action for failure to prosecute extends to PCR cases where

---

[15] Moreover, the only ground for relief Petitioner asserted in the original application was ineffective assistance of counsel and denial of due process based on failure to introduce evidence of mental incompetency. (App. 36). However, Aiken's statement at the PCR hearing is dispositive as to this issue. Aiken informed the PCR court that a mental health evaluation had been completed, and Petitioner was found competent. (App. 91).

[16] *See Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (holding that PCR actions are governed by the usual rules of civil procedure); *Sutton v. State*, 361 S.C. 644, 647, 606 S.E.2d 779, 780 (2004) ("A PCR action is a civil action generally subject to rules and statutes that apply in civil proceedings.") *overruled on other grounds by Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005); *Gamble v. State*, 298 S.C. 176, 177, 379 S.E.2d 118, 118 (1989) (holding that the South Carolina Rules of Civil Procedure apply to all civil actions, a petition for PCR is a civil action, the Act specifically incorporates the applicable rules of civil practice, and Rule 41(a) of the South Carolina Rules of Civil Procedure applies to PCR petitions).

applicants such as Petitioner unreasonably neglect to proceed with their cause of action by failing to set forth cognizable PCR claims. *See Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001) ("The purpose of a pleading is fair notice to the opponent and the court."). In *McComas,* our Court of Appeals indicated the following four factors were relevant in examining the propriety of a dismissal for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal.[17] 368 S.C. at 63, 626 S.E.2d at 904.

In *Finlayson v. State*, the Utah Court of Appeals applied essentially the same factors in upholding the lower court's dismissal of a PCR action for failure to prosecute where the applicant engaged in conduct *less dilatory*[18] than that of Petitioner. 2015 UT App 31, 345 P.3d 1266. In that case, the applicant argued that the interests of justice require the courts to apply a higher standard for dismissal based on failure to prosecute in PCR cases than other civil actions. *Id.* ¶ 8, 345 P.3d at 1269. However, the Utah Court of Appeals rejected the applicant's argument that the lower court should have "favored protecting the innocent and disregarded the potential prejudice to the State." *Id.* ¶ 16, 345 P.3d at 1271. Instead, the Court emphasized the importance of treating PCR cases like ordinary civil actions, noting first that the applicant is "primarily responsible for failing to move his petition forward. Second, a post-conviction proceeding is ultimately civil in nature, and does not implicate the same constitutional protections as do criminal prosecutions." *Id.* ¶ 17, 345 P.3d at 1271.

---

[17] To the State's knowledge, our appellate courts have not yet applied these factors when reviewing a PCR court's dismissal of a PCR action for failure to prosecute.

[18] Most notably, the applicant in *Finlayson* only had one attorney appointed to represent him and only appeared before the lower court for two hearings.

Similarly, Petitioner claims he was deprived of his "full and fair bite at the apple" because his action was dismissed "without a hearing." (Pet. 8). Petitioner further claims that the State's lack of notice as to the claims Petitioner planned on pursuing at the PCR hearing was "not the fault of Petitioner." (Pet. 10). Petitioner, however, fails to address the confusion created by Petitioner's filing of numerous motions and amended applications, including three amended applications, two motions to relieve counsel, a discovery motion, and a motion to access the law library. As to the claim Petitioner's action was dismissed without a hearing, Petitioner fails to acknowledge that, on at least two instances prior to being dismissed, Petitioner's case was scheduled for an evidentiary hearing. Both times the State prepared based on the amended allegations filed by Good. Petitioner's plea counsel, David Mauldin, was subpoenaed and prepared to testify at least three times.

The interests of justice further support the PCR court's dismissal of Petitioner's application for failure to prosecute in light of Petitioner's overt indifference to the rights of the State as well as the judicial system. *McComas*, 368 S.C. at 62–63, 626 S.E.2d at 904 ("In granting dismissal for failure to prosecute, there must be some showing of indifference to the rights of the defendant."). Petitioner's own actions interfered with the ability of the PCR court and the State from proceeding with Petitioner's evidentiary hearing or, "bite at the apple." It was not until the third scheduled evidentiary hearing where the PCR court resorted to dismissing Petitioner's action for failure to prosecute when he refused to cooperate with his second appointed PCR counsel. Thus, based on the totality of the circumstances, the PCR court did not abuse its discretion in dismissing Petitioner's action for failure to prosecute. *See Don Shevey,* 279 S.C. at 60, 301 S.E.2d at 758 (noting that such measures are "necessary if the courts are to control and efficiently manage an ever-expanding docket"); *see also Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 92, 399 S.E.2d

16, 19 (Ct. App. 1990) (finding that dismissal with prejudice is warranted where the plaintiff "has been given abundant opportunity to litigate" and has exceeded the "limit beyond which the court should allow a litigant to consume the time of the court and to prolong unnecessarily time, effort and cost to defending parties.

[*Conclusion and signature page to follow*]

CONCLUSION

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application for failure to prosecute. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

LILLIAN L. MEADOWS
Assistant Attorney General

for

BY:_____
Lillian L. Meadows
S.C. Bar No. 103665
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

December 23, 2019

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BERKELEY COUNTY
Court of Common Pleas
The Honorable J. Derham Cole, PCR Judge

Appellate Case No. 2018-001854

Robert A. Baker,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing one copy in the United States Mail, addressed to:

Victor R. Seeger, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29201

This 23rd day of December, 2019.

Sara F. Gunton
Assistant Attorney General for Respondent