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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Daniel D. Hall, Circuit Court Judge

DENNIS RODGER DAVIS, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-001116

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENTS IN REPLY

I.

Respondent has waived the affirmative defense of res judicata where Respondent did not specifically plead res judicata below and cannot plead res judicata for the first time on appeal.

The State moved to dismiss Petitioner's PCR application based on the alleged failure to file within the statute of limitations and successiveness. At no point did the State raise any other grounds for dismissal. Now for the first time, Respondent concludes that based on res judicata certiorari should be denied. However, Respondent did not plead res judicata below and cannot now rely upon the doctrine to deny Petitioner the ability to have his case heard by this Court.

Pursuant to S.C. Code Ann. §17-27-80, all rules and statutes that apply in civil proceedings apply to PCR matters. Under the South Carolina Rules of Civil Procedure, a party is required to affirmatively set forth his or her defenses in replying to a preceding pleading. Rule 8(c), SCRCP. "Every defense, in law or fact, to a cause of action in any pleading ... shall be asserted in the responsive pleading thereto...." Rule 12(b), SCRCP; see also Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007) ("[A]ffirmative defenses to a cause of action in any pleading must generally be asserted in a party's responsive pleading."). "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." Whitehead v. State, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002).

The doctrine of res judicata, also referred to as the defense of preclusion by a former judgment, is an affirmative defense that must be specially pleaded. Normandy Corp. v. S.C. Dep't of Transp., 386 S.C. 393, 408, 688 S.E.2d 136, 144 (Ct. App. 2009) citing Wagner v. Wagner, 286 S.C. 489, 491, 335 S.E.2d 246, 247 (Ct.App.1985). If the issue of the preclusive effect of a judgment is not raised below, it cannot be raised for the first time on appeal. Id. citing

Duckett v. Goforth, 374 S.C. 446, 465, 649 S.E.2d 72, 82 (Ct. App. 2007) (party cannot raise defense of collateral estoppel for the first time on appeal); S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (to be preserved for appellate review, issue must have been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity).

Respondent asserts a bald conclusion that res judicata governs this action. However, Respondent does not offer any facts or argument to support that position. The factors a court is to consider in determining res judicata are merely listed in the return, but never analyzed or applied to the present matter. Further, Respondent's return does not address the dismissal of Petitioner's application as time barred and successive, ostensibly because the dismissal is not defensible. In fact, Respondent suggest this Court act "regardless of the procedural posture." Return. Pg. 5. As former Chief Justice Toal stated in her concurrence in Atlantic Coast Builders and Contractors LLC v. Lewis, "the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw." 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012). Res judicata does not apply in this case.

II.

Petitioner's claim is not meritless. The language used in the statute creates a genuine question as to whether §44-53-370(b)(2) implicitly repeals §24-13-100 and -150 as it applies to third offense crimes.

Respondent asserts Petitioner's claim is meritless and first argues that the language of S.C. Code §44-53-370(b)(2) is "couched in negative terms as it relates to third-offense crimes not predicated solely on prior possessions charges." Return Pg. 7. However, this interpretation of the statute fails to consider the entire section as required by the rules of statutory interpretation. Courts, when interpreting a statute, should not concentrate on isolated phrases within the statute; a statute must be read as a whole and sections that are part of the same general statutory law must be construed together and each one given effect. Citizens for Quality Rural Living, Inc. v. Greenville County Planning Commission, 426 S.C. 97, 825 S.E.2d 721 (2019) (The intention of the legislature when enacting a statute must be gleaned from the entire section and not simply clauses taken out of context).

The language of S.C. Code Ann. §44-53-370(b)(2), as it relates to third offense crimes, first provides an affirmative grant of previously unavailable privileges. The section allows an offender to receive a suspended sentence or probation, and makes the offender "eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits." S.C. Code Ann. §44-53-370(b)(2). These listed privileges are expressly provided to offenders whose prior offenses were for possession. In all other cases, the statute specifically excludes the privilege of a suspended sentence or probation. However, nowhere in the plain language of the statute is the grant of parole eligibility, supervised furlough,

community supervision, work release, work credits, education credits, and good conduct credits specifically excluded from offenders "in all other cases."

As the Court of Appeals of Nebraska stated in Nelsen v. Grzywa, 9 Neb. App. 702, 706, 618 N.W.2d 472, 475 (2000), "[t]he intent of the Legislature is expressed by omission as well as by inclusion." Generally, it is presumed that the legislature acts intentionally and purposely when writing a statute. Following that presumption to its logical end, if the legislature intended for those incarcerated on third offense crimes to not be eligible for parole it would have expressly stated that intent. Instead in section 44-53-370(b)(2) the enumeration of the privileges unavailable to an offender convicted of a third offense not predicated solely on possession charges is definitive. It removes only the chance of a suspended sentence or probation.

Respondent next argues that Bolin v. S.C. Dept. of Corrections, 415 S.C 276, 781 S.E.2d 914 (Ct. App. 2016) does not support Petitioner's argument for implicit repeal as to third offense crimes. Admittedly, the holding in Bolin is not directly controlling over Petitioner's case, but it is highly persuasive authority for this Court to consider. The entire holding in Bolin was based on the implicit, not explicit, repeal of S.C. Code Ann. §24-13-100. The Court of Appeals held the language "notwithstanding any other provision of law" worked to implicitly repeal section 24-13-100 because "without this implicit repeal, the amendments would be meaningless." Id. at 282-83, 781 S.E.2d at 917.

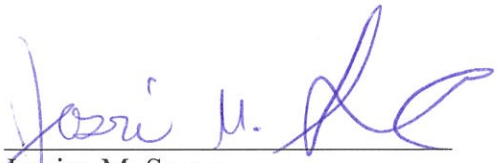
This same logic can, and should, be applied to the present matter. The language in Bolin that dealt with second offense crimes is nearly identical to the language in section 44-53-370(b)(2). The legislature used the same "notwithstanding any other provision" of law language which signals an implicit repeal of section 24-13-100 as it applies to third offense crimes. That 44-53-370(b)(2) implicitly repeals 24-13-100 to an extent is clear based on Bolin. The question

is whether the implicit repeal applies to all third offense crimes, not just those predicated on prior possession charges. This question has not been answered by this Court.

Finally, Respondent argues that "the intent of the legislature clearly was not to provide parole eligibility for third-offense convictions predicated on prior distribution charges." Return pg. 9. This statement contorts the expressed intent of the legislature to, among other things, use correctional resources most effectively to provide consistency in sentencing classifications, proportional punishments for the offenses committed, cost-effective prison release and community supervision mechanisms, and cost-effective and incentive-based strategies for alternatives to incarceration in order to reduce recidivism and improve public safety. 2010 Act no. 273 § 2; §44. If the legislature "clearly" intended anything it was to reduce the prison population by widening the definition of those offenders that are eligible for a suspended sentence, probation, parole, and early release credits.

CONCLUSION

Based on the arguments contained above, as well as those in the original Petition for Writ of Certiorari, Petitioner respectfully requests that this Court grant certiorari to allow for full briefing of the issues.



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This 9th day of September, 2021.