STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Lexington County

Honorable J. Derham Cole, Circuit Court Judge

ROBERT A. BAKER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001854

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the post-conviction relief court abused discretion when it dismissed 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?

STATEMENT

During the June 2009 term, the Lexington County Grand Jury indicted Petitioner for two counts of criminal sexual conduct with a minor in the second degree. App. 96 – 99. During the July 2010 term, the Lexington County Grand Jury indicted Petitioner on another two counts of criminal sexual conduct with a minor in the second degree and two counts of lewd act upon a child. App. 101 – 107.

On July 15th, 2010, Petitioner pled guilty before the Honorable R. Knox McMahon. App. 1. David M. Mauldin represented Petitioner. Id. Debra B. Moore represented the state. Id. As a result of this guilty plea, Petitioner violated his probation.[1] App. 4, ll. 4 – 9.

At the plea hearing Solicitor Moore explained the negotiated sentence, "[Petitioner] is pleading to six indictments... we have also entered into a negotiated 30-year sentence that we would ask Your Honor to consider." App. 14, ll. 9 – 21.

Judge McMahon accepted Petitioner's guilty plea as freely, voluntarily, knowingly, and intelligently made. App. 26, ll. 8 – 15. Judge McMahon sentenced Petitioner to twenty years' imprisonment for the criminal sexual conduct with a minor charges and ten years' imprisonment for the lewd act with a minor charges, to run consecutive to one another. App. 31, l. 8 – 32, l. 9.

Judge McMahon found that Petitioner willfully violated his probation and revoked Petitioner in full. App. 32, ll. 10 – 15. He stated, "whatever maximum amount I can sentence him to, consecutive on that." Id.

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[1] In 2006 Petitioner pled guilty to assault and battery of a high and aggravated nature (ABHAN). App. 24, ll. 11 – 19. As a result of the 2006 guilty plea, Petitioner was sentenced to ten years' imprisonment suspended to five years' probation. Id. Petitioner acknowledged that the present guilty plea would result in a willful violation of his probation. App. 24, l. 23 – 25, l. 4.

On August 23rd, 2010, an order was issued clarifying Petitioner's sentence. App. 43. The order explained that Petitioner's sentence, including the probationary sentence, totaled forty years' imprisonment. Id.

Petitioner filed a direct appeal, and on March 7th, 2012, the Court of Appeals in an unpublished opinion affirmed his convictions. State v. Baker, No. 2012-UP-159 (S.C. Ct. App. Mar. 7, 2012); App. 88, ll. 14 – 22. Petitioner filed an application for post-conviction relief (PCR) on March 12th, 2012. App. 34 – 42.

The state filed its Return on July 10th, 2012. App. 44 – 47. The state argued Petitioner's PCR application should be dismissed for being untimely pursuant to S.C. Code Ann § 17-27-45(a), which requires PCR applicants to file their PCR applications within one year after, "the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon appeal, whichever is later." Id.

On July 7th, 2015, through appointed PCR counsel Anna Good, Petitioner filed an amended PCR application with the allegations that plea counsel failed to have Petitioner's competency evaluated; plea counsel failed to advise Petitioner about how the consequences of his guilty plea would be affected by his probationary sentence; and plea counsel failed to obtain Petitioner's medical records from the Lexington County Detention Center. App. 49 – 50. Petitioner's July 7th, 2015 amended PCR application had well defined allegations of ineffective assistance of counsel; therefore, the state should have been on notice as to what Petitioner was going to argue at PCR.

On July 9th, 2015, the state filed an Amended Return and Motion to dismiss that again argued Petitioner's PCR application should still be dismissed for being submitted untimely pursuant to S.C. Code Ann § 17-27-45(a). App. 53 – 56. On September 12, 2015, Petitioner filed

a supplement to the Amended PCR application. App. 58 – 62. He explained in the supplement that the South Carolina Department of Corrections (SCDC) was preventing Petitioner from receiving mail, from using the phone, from seeing visitors, and from using the law library. Id. Which, as will be seen later, further support defense counsel Aiken's argument that SCDC caused the communication breakdown between Petitioner and himself.

Petitioner made two motions to represent himself and relieve PCR counsel Good on July 26th, 2016 and October 25th, 2016, and PCR counsel Good was relieved. App. 66, ll. 9 – 14; App. 65, l. 17 – 66, l. 7. On January 17th, 2017 and March 2nd, 2017, Petitioner filed two more amended PCR applications. Supp. App. 78; App. 86 – 87. Petitioner used boilerplate language for a supplemental PCR application in the preface that the allegations in this supplemental application were "in addition to prior grounds stated in the original application for post-conviction relief." App. 86. The use of that language did not constitute Petitioner expressly abandoning his allegations in his other amended PCR applications.

On June 1st, 2017, a status hearing was held before the Honorable William P. Keesley. App. 63. Petitioner represented himself, *pro se*. Id. Melody Brown represented the state. Id. At the status hearing, Petitioner explained to Judge Keesley that due to suffering from traumatic brain injury Petitioner had trouble understanding the consequences of representing himself. App. 66, l. 16 – 67, l. 1; App. 68, l. 19 – 69, l. 1. Petitioner stated there was "no way" he could represent himself at his PCR hearing. App. 67, ll. 3 – 8.

Due the damage from Petitioner's traumatic brain injury, Judge Keesley ordered that another PCR attorney be appointed[2] to represent Petitioner and ordered a competency evaluation for Petitioner, so the court can "know exactly what we're dealing with." App. 75, ll. 12 – 19.

[2] PCR counsel Aiken was later appointed to represent Petitioner. Supp. App. 89.

Notably, Judge Keesley made those orders after he heard the state's motion to dismiss Petitioner's PCR application for being untimely, and ultimately allowed Petitioner's PCR matter to continue. Id.

On November 26th, 2017, PCR counsel Aiken submitted a written motion for continuance where he explained that Petitioner was not at fault for Aiken needing the continuance in this case. Supp. App. 89 – 91. Aiken explained he was appointed June 6th, 2017 for the hearing scheduled on December 13th, 2017 and was never provided the "State's Return and attachments." Supp. App. 89. Aiken explained that he decided to *not* schedule a meeting with Petitioner and did not believe that this case would be called during this term because he did not receive a copy of the state's return and attachments. Supp. App 90. The continuance was granted, and Petitioner's PCR hearing was scheduled for February 20, 2018. App. 94.

The February 20th, 2018 PCR hearing, where Petitioner's PCR application was summarily dismissed, was held before the Honorable J. Derham Cole. App. 81. Arthur K. Aiken represented Petitioner. Id. Sherrie Butterbaugh represented the state. Id.

The state had a motion to dismiss and PCR counsel Aiken had a motion for a continuance. App. 83, ll. 4 – 21. The state's oral motion to dismiss Petitioner's PCR allegations was for failure to prosecute because the case had been pending for years and Petitioner did not specify the allegations he was proceeding on at PCR. App. 84, l. 9 – 86, l. 18.

PCR counsel Aiken stated that he has not been able to speak with Petitioner to prepare for the hearing. App. 86, l. 19 – 87, l. 25. Aiken explained that SCDC claimed that Petitioner refused to speak with Aiken. Id. However, Aiken added that Petitioner informed Aiken that he did want to speak with Aiken but, in accordance with Petitioner's September 2015 supplement to his amended PCR application, SCDC was preventing Petitioner from seeing visitors or using the

phone to speak with anyone. Id.; App. 58 – 62. Aiken also informed the PCR court that prior to the February 20th, 2018 hearing Petitioner underwent a mental health evaluation and was found to be competent. App. 91, ll. 1 – 6. The PCR Court made an in-court ruling dismissing Petitioner's case without a hearing. App. 91, ll. 11 – 13.

In an order filed on September 6th, 2018, Judge Cole denied Petitioner relief and dismissed his PCR application pursuant to Rule 41(b), SCRCP, because "[Petitioner] has shown unreasonable neglect in prosecuting his post-conviction relief action." App. 93 – 95; SCRCP 41. Judge Cole found that Petitioner was given multiple opportunities to be heard but "continually frustrated the process of prosecuting his case." Id.

The order stated Aiken indicated that the reason he and Petitioner could not communicate was because Petitioner refused to speak to him. Id. However, the order mischaracterized counsel Aiken's statements because Aiken actually explained that he believed it was confusion at SCDC that caused he and Petitioner to be unable to prepare for the hearing. Id.

Petitioner filed a petition for certiorari on July 8th, 2019. The state filed its return on December 23rd, 2019.

On January 7th, 2020 the South Carolina Supreme Court transferred this case to the Court of Appeals. On October 1st, 2021, this Court granted certiorari and ordered direct briefing. This brief follows.

STANDARD OF REVIEW

"Whether an action should be dismissed for failure to prosecute is left to the discretion of the [circuit court], and [its] decision will not be disturbed, except upon a clear showing of an abuse of discretion." McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006). An abuse of discretion occurs (1) when the court's ruling is based upon an error of law, such as application of the wrong legal principle; (2) when based upon factual conclusions, the ruling is without evidentiary support; (3) when the court is vested with discretion, but the ruling reveals no discretion was exercised; or (4) when the ruling does not fall within the range of permissible decisions applicable in a particular case. Ex parte: Capital U–Drive–It, Inc., 369 S.C. 1, 5, 630 S.E.2d 464, 467 (2006).

ARGUMENT

The post-conviction relief court abused its discretion when it dismissed 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.

Relevant Facts

Petitioner filed his initial PCR application on March 12th, 2012. App. 34 – 42. His allegation was that plea counsel failed to introduce evidence of mental incompetency at the time of the plea hearing. Id. Petitioner's allegations in the July 20th, 2015, amended PCR application were that: plea counsel failed to have Petitioner's competency evaluated; plea counsel failed to advise Petitioner about how his guilty plea would be affected by his probationary sentence; and plea counsel failed to obtain Petitioner's medical records from the Lexington County Detention Center. App. 49 – 50. Petitioner's subsequent amendments to his PCR application did not obfuscate his allegations such that the state had notice of the allegations Petitioner proceeding on at his PCR hearing. App. 58 – 62; App. 86, ll. 8 – 18; Supp. App. 56 – 62; Supp. App. 78 – 87.

Subsequently Petitioner filed two amended PCR applications. Supp. App. 78 – 87. The amended application filed on January 17th, 2017, simply stated a request for relief, specifically to vacate Petitioner's conviction and to "remand for further proceedings." App. 78. However, the amended application filed on March 2nd, 2017, added seven PCR allegations to his prior allegations. App. 86 – 87.

At the February 20th, 2018, hearing, the lower court dismissed Petitioner's PCR allegations without a hearing because Petitioner allegedly failed to prosecute pursuant to Rule 41(b), SCRCP. App. 91, ll. 11 – 13; App. 93 – 95. The order of dismissal stated that Aiken indicated Petitioner refused to speak to him and would not participate in the scheduled phone conference. App. 94. However, the record showed that Aiken also stated that Petitioner informed him it was the facility that prevented Petitioner and Aiken's communication. App. 88, l. 2 – 90, l. 4. Aiken then argued against the state's motion to dismiss Petitioner's PCR application, indicating he believed Petitioner's explanation as to what caused the communication breakdown over SCDC's. Id. Accordingly, the dismissal of Petitioner's PCR application for failure to prosecute was an error because there was no showing of deliberate delays or unreasonable neglect on Petitioner's part.

Discussion

"A defendant has the procedural right to one fair bite at the apple. That is, every defendant has a right to file a direct appeal and one PCR application." Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582–83 (2002). In this case, the PCR court abused its discretion when it improperly dismissed Petitioner's PCR application, without a hearing, for failure to prosecute and denied Petitioner his "one fair bite at the apple."

Petitioner's amended PCR applications put the state on notice as to what allegations Petitioner was going to argue at PCR. App. 49 – 50; App. 58 – 62; App. 86, ll. 8 – 18; Supp. App. 56 – 62; Supp. App. 78 – 87. As a rule, "the plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for the plaintiff's unreasonable neglect in proceeding with his case." Don Shevey & Spires, Inc. v. American Motors Reality Corporation, 279 S.C. 58, 301 S.E.2d 757 (1983). As such the dismissal for failure to prosecute was an abused of discretion

because the record did not support a finding that Petitioner was unreasonably neglectful in prosecuting the matter. See McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006).

The state argued in its Return that Petitioner relieving initial PCR counsel Anna Good as his counsel meant he "implicitly abandoned" the allegations in the amended PCR application that she prepared. Return, p. 14. Petitioner never waived the allegations in the July 20th, 2015 amended PCR application. An applicant has a right to full adjudication of one PCR application. Gamble v. State, 298 S.C. 176, 379 S.E.2d 118, 119 (1989). Waiver of PCR allegations must be *voluntary and knowing*; therefore, Petitioner relieving Anna Good as his counsel was not evidence that Petitioner "implicitly abandoned" the PCR allegations in the amended application she prepared while she represented him. See Narciso v. State, 397 S.C. 24, 33, 723 S.E.2d 369, 374 – 73 (2012) ("A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both.") (citing Brannon v. State, 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001)).

Moreover, it is of no consequence that Good was relieved as Petitioner's attorney "almost two and a half years prior to the hearing" because the allegations in the amended application gave the state notice of the allegations Petitioner planned to raise at his PCR hearing. Return, p. 15. The fact that some time had passed between Good being relieved and Petitioner's PCR hearing on February 20th, 2018 should not be used as evidence of Petitioner's alleged failure to prosecute because the simple passage of time cannot have caused the state's alleged confusion regarding Petitioner's PCR allegations. App. 86, ll. 8 – 18.

In its Return, the state also argued that Petitioner's March 2nd, 2017, amended application waived all of his prior allegations except for those in his original application because the fourth amended application stated Petitioner was adding those allegations to the "original application for post-conviction relief." Return, at 14 – 15. The state interpreted that to mean Petitioner was waiving the allegations raised in his other amended applications, but as seen earlier *a waiver of PCR allegations must be knowing and voluntary.* See Narciso, supra; See also Brannon, supra. There was no evidence presented that Petitioner's use of that generic language in the preface of his March 2nd, 2017 amended application was in any way a waiver of the allegations contained in his other amended PCR applications such that this alleged "waiver" cannot be said to be knowing and voluntary. Id. Accordingly, Petitioner's allegations in the July 20th, 2015 amended application and his other amended PCR applications were still preserved for Petitioner to argue at his PCR hearing.

In McComas v. Ross, supra, the Court of Appeals followed the four-factor test promulgated in the Fourth Circuit Court of Appeals case of McCargo v. Hendrick, 545 F.2d 393, 396 (4th Cir. 1976) to determine whether a case should be dismissed for failure to prosecute. McComas, at 63, 626 S.E.2d at 904. The prongs of the test were (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. Id.

Notably this Court observed that "dismissal is a *harsh sanction*, which 'should be *resorted to only in extreme cases.*' Dismissal is generally *permitted only in the face of a clear record of delay* or contumacious conduct by the plaintiff. The discretion should be exercised discreetly and *only after due consideration of the availability of sanctions less severe* than

dismissal." Id.; (citing McCargo v. Hendrick, 545 F.2d 393, 396 (4th Cir. 1976)) (internal citations omitted) (emphasis added).

In McComas, Sabrina McComas filed a negligence action in November of 2002 for medical bills, lost wages, physical injuries, and other damages. McComas, at 60, 626 S.E.2d at 903. McComas' trial was held on September 8th, 2004, and McComas was not present. Id., at 60 – 61; 626 S.E.2d at 903 – 04. McComas' counsel attempted to contact her by calling McComas on the day of trial and sending a paralegal to her house, but still could not reach her. Id.

McComas' counsel arrived at the courthouse at 2:00pm, selected a jury, and indicated to the trial court that he was unable to locate McComas. Id. McComas' counsel requested that the trial court continue the case until the next morning or until such time McComas could be located. Id. The trial court informed McComas' counsel that "the trial would proceed." Id.

Shortly after the trial started, McComas' counsel informed the trial court that McComas was on her way and the trial court recessed the trial until 4:00pm. Id. at 61, 626 S.E.2d at 904. At 4:16pm, McComas' was still not present and, upon the defendant's motion for dismissal, the trial court dismissed McComas' case for failure to prosecute. Id. McComas arrived at the trial court at 4:18pm. Id.

This Court held that dismissal was too harsh a remedy in McComas' case. Id., at 64 – 65; 626 S.E.2d at 905. Despite McComas not being present at her trial, this Court determined, "there [was] no indication McComas did not prosecute her case. She spent many months engaged in discovery and subpoenaed a total of five witnesses for trial. McComas actively pursued her case and was only personally delayed on the date of trial. Unlike other cases when the trial court has found unreasonable neglect by the plaintiff, McComas simply arrived late on the day of trial." McComas, at 63, 626 S.E.2d at 905. Importantly, this Court determined McComas' activity in

the preparation of her case, in that she engaged in discovery and subpoenaed multiple witnesses, was persuasive evidence that McComas did not unreasonably neglect prosecuting her case. Id.

In its Return the state cited Finlayson v. State, 345 P.3d 1266 (2015) and argued that Finlayson presented "essentially the same factors" as the present case. Return, p. 16. However, there are critical distinguishing aspects present in Finlayson, that are not present here.

In Finlayson v State, Finlayson was convicted of rape, forcible sodomy, and aggravated kidnapping in 1995 and filed a *pro se* application for PCR on January 27th, 2005. Finlayson, at 1268. In August of 2006, Finlayson asked the court to appoint counsel and in January of 2007 "pro bono" counsel was appointed. Id. In February of 2008, "pro bono" counsel obtained a court order to examine and copy handwritten notes referred to by the victim during her trial testimony. Id. In June 2010, Finlayson was reincarcerated in connection with new charges arising from another incident. Id.

In late 2010, Finlayson's counsel allegedly obtained new evidence pertaining to the PCR case, but never filed anything with the court or made an amendment to his PCR application. Id. In June 2011, Finlayson sent a letter to the district court asking for a status update[3] and was informed that his case file was destroyed in 2009. Id. Finlayson requested another status hearing in May of 2012 which was held in June of 2012. Id.

Following the second status hearing the state filed a motion to dismiss the case for failure to prosecute. Id. On November 9th, 2012, the district court heard argument on all pending motions. Id. In a memorandum decision issued on January 10th, 2013, the court granted the state's motion to dismiss for failure to prosecute and denied the remaining motions as moot. Id.

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[3] Finlayson did not take any action to prosecute his case from February 2008 to June 2011. Finlayson, at 1268.

The Utah Court of Appeals used a test similar to the test in McComas. Finlayson, at 1269. The factors of the test to determine if dismissal for failure to prosecute was proper were: (1) the conduct of both parties; (2) the opportunity each party has had to move the case forward; (3) what each party has done to move the case forward; (4) the amount of difficulty or prejudice that may have been caused to the other side; and (5) most important, whether injustice may result from the dismissal. Id. While the Utah Court of Appeals agreed with Finlayson that criminal defendants seeking post-conviction relief should be "somewhat 'insulated' from motions related to timeliness," it still held that Finlayson unreasonably neglected to prosecute his case. Id. at 1269 – 70.

Regarding the aforementioned test, the Utah Court of Appeals determined that Finlayson's inaction between February 2008 to June 2011 evinced his unreasonable neglect in prosecuting his case. Id. at 1270 – 71. While the state did not act to make progress in Finlayson's case, it did not actively prevent Finlayson from prosecuting[4] his case because the state's inaction did not amount to an "actual hindrance." Id. Accordingly, the Utah Court of Appeals held the district court did not abuse its discretion when it concluded the first three factors weighed against Finlayson. Id.

The fourth factor was aimed at prejudice "caused to the other side" by the alleged unreasonable neglect in prosecuting the case. Finlayson, at 1271 – 72. Thus, this factor weighed in favor of the state because "Finlayson was primarily responsible for the failure to move his petition forward." Id.

The final factor was the resulting injustice from dismissing the case. Finlayson, at 1272. Finlayson argued that injustice would result from dismissal because "he will be precluded from

[4] The Utah Court of Appeals determined that due to Finlayson's inaction from 2008 to 2011, the destruction of his case file in 2009 did not hinder his ability to prosecute "because neither Finlayson nor his attorney had made any attempt to access the court's files between February 2008 and June 2011, such that the destruction of the files in February 2009 could not have contributed to the delay." Finlayson, at 1271.

presenting his allegation based on newly discovered evidence and because dismissal could increase the time he spends in prison." Id. at 1272. The Utah Court of Appeals noted that "Finlayson's claims based on newly discovered evidence were never formally asserted because the [district] court denied his petition to amend as moot after dismissing the case." Id. Thus, Finlayson "would be free to seek to raise those claims in a new petition for post-conviction relief" such that no injustice would result from dismissing his current PCR case. Id.

Moreover, the dismissal would not increase his time spent incarcerated because he was "currently serving a sentence based on the [June 2010] convictions that would run concurrently to any sentence he may still be serving with this case." Id. Accordingly, the district court did not abuse its discretion when it granted the state's motion to dismiss for failure to prosecute. Id.

The first critical distinction between the present case and Finlayson is that Petitioner remained active throughout the preparation of his PCR case. In Finlayson, between February 2008 and June 2011, neither Finlayson nor his attorney filed *any* materials with the district court and did not "have any contact with counsel for the state." Finlayson, at 1271. The Utah Court of Appeals determined the three years where Finlayson *did nothing* to prepare for his case was especially persuasive evidence to affirm the district court's dismissal for failure to prosecute. Id., at 1270 – 71.

In the present case, as the state points out, and attempts use as evidence of his failure to prosecute, Petitioner filed multiple documents in preparation for his PCR case such that there was never any extended period of inactivity on Petitioner's part. App. 34 – 42; App. 58 – 62; Supp. App. 56 – 62; Supp. App. 67 – 68; Supp. App. 71 – 74; Supp. App. 78 – 87. Petitioner's case is more akin to McComas because like the plaintiff in that case Petitioner was actively participating in the preparation of his case. McComas, at 63, 626 S.E.2d at 905. Accordingly, unlike in Finlayson, Petitioner was not unreasonably negligent in his efforts to prosecute his PCR case.

The second difference here is that injustice *would* result from dismissing Petitioner's PCR case for failure to prosecute. Unlike the allegations in Finlayson, Petitioner's allegations were not based on newly discovered evidence. App. 34 – 42; App. 58 – 62; Supp. App. 56 – 62; Supp. App. 67 – 68; Finlayson, at 1272. So, while Finlayson was "free to raise" his PCR allegations based on newly discovered evidence in a subsequent PCR action, the dismissal of Petitioner's PCR application for failure to prosecute here resulted in Petitioner never being able to raise his PCR allegations again. Id. Accordingly, the dismissal for failure to prosecute resulted in injustice to Petitioner.

In Jordan v. State, 276 S.C. 168, 276 S.E.2d 781 (1981) Jordan filed an application for post-conviction relief asserting he was provided ineffective assistance of counsel when his trial counsel failed to file the direct appeal Jordan requested. Id. at 169, 626 S.E. 2d at 904. This Court disagreed because, "[Jordan] escaped from South Carolina custody... some sixteen months after his conviction... and [was] presently incarcerated in another state." Id. This Court held that Jordan's actions were the cause of the failure to prosecute because he evaded, "the process of the Court and refuse[d] to submit himself to its jurisdiction." Id. (citing State v. Murrell, 33 S.C. 83, 11 S.E.682 (1890); State v. Johnson, 44 S.C. 556, 21 S.E. 806 (1895)). Therefore, because Jordan was at fault for the delay, trial counsel was not ineffective for failure to prosecute and Jordan's convictions were affirmed. Id. at 169, 626 S.E. 2d at 904.

At Petitioner's February 20th, 2018 hearing, the state moved to have Petitioner's PCR application dismissed pursuant Rule 41(b), SCRCP, for failure to prosecute. App. 84, l. 9 – 86, l. 18. The state argued that since Aiken was appointed as Petitioner's attorney, "the state has had no indication from [Petitioner] what allegations he wants to proceed on." App. 86, ll. 5 – 7. The state further argued that they did not know what allegations Petitioner was going to proceed with because

the case had been pending since 2011, despite the initial PCR application being filed in March of 2012, and because Petitioner filed multiple amendments to his PCR application. App. 86, ll. 8 – 18.

The PCR court's order of dismissal determined Petitioner failed to prosecute his case in part because "[PCR counsel] indicated applicant refused to speak to him about what allegations he wished to argue at the hearing, and the applicant would not participate in a scheduled phone conference." App. 94. However, the record also showed that Aiken explained that the reason they failed to communicate was a result of confusion at SCDC. App. 86, ll. 19 – 25.

Aiken stated that SCDC *told* him Petitioner did not want to speak to him. App. 87, ll. 6 – 25. Aiken never stated SCDC's claim was correct. Additionally, Aiken explained that Petitioner informed him that Petitioner did want to speak to him, and it was the SCDC facility that caused the communication breakdown. Id. SCDC brought Petitioner to a phone to speak to Aiken and SCDC was supposed to call Aiken to connect them. Id. SCDC told Petitioner they called Aiken, but either the officers at the facility did not make that call or Aiken never received it. Id. Evincing the fact that Petitioner wanted to speak with Aiken to prepare for his PCR hearing, Petitioner waited for "four and a half hours" by the phone at SCDC, but never got a chance to speak to Aiken. Id. Moreover, Aiken specifically stated Petitioner had not been uncooperative with him, but that their lack of communication was a result of confusion at SCDC. App. 87, ll. 2 – 4. Accordingly, the PCR court abused its discretion when it dismissed Petitioner's case for failure to prosecute because, unlike in Jordan, Petitioner was not unreasonably neglectful in his prosecution of his PCR case as he did not make any deliberately dilatory actions.

The purported reason for dismissal for failure to prosecute was that the state did not know what allegations Petitioner was proceeding on because he did not speak to PCR counsel Aiken and because he filed "numerous" motions in this case. App. 86, ll. 8 – 18; App. 93 – 95. The confusion

as to what allegations Petitioner was proceeding on at PCR was caused by SCDC when they prevented Petitioner speaking to PCR counsel Aiken. App. 87, ll. 2 – 25. Thus, to the extent that the state was actually confused as to the allegations Petitioner was going to argue, despite being on notice from Petitioner's amended PCR applications, Petitioner should not be held responsible. See Jordan, supra.

The fact that Petitioner filed multiple amended PCR applications was not a reason to dismiss for failure to prosecute. Petitioner was entitled to file amendments to his PCR application and that should not be held against him. Rather than imposing the overly *harsh* remedy of dismissal, if the PCR court believed there was actual confusion as to what allegations Petitioner was raising it could have cured that confusion by ordering Petitioner to make a more definite statement either before or at the PCR hearing. See McComas, at 59, 626 at 904 – 05. (Holding dismissal for failure to prosecute is a harsh remedy that should be "resorted to only in extreme cases.") Petitioner could have then explained specifically the allegations he was going to argue and cleared the alleged confusion. Therefore, the dismissal for failure to prosecute pursuant to Rule 41(b) SCRCP was an abused of discretion because there was no evidence presented that Petitioner was unreasonably neglectful in the prosecution of his PCR case such that the harsh remedy of dismissal without a hearing for failure to prosecute was unwarranted. McComas, at 59, 62, 626 S.E.2d at 904. Accordingly, Petitioner was denied his "one bite of the apple" and should be granted a new PCR hearing. Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582–83 (2002).

CONCLUSION

By reason of the foregoing arguments, Petitioner requests this Court vacate the order of dismissal in this case and remand Petitioner's case for a new PCR evidentiary hearing to.

Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of October, 2021.