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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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.

BRIEF OF RESPONDENT

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 RESPONDEN

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PETITIONER'S STATEMENT OF ISSUE PRESENTED

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 PRESENTED

Petitioner is not entitled to remand where 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'x 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'x 31–32).

As a result of the plea, Petitioner's unrelated probationary sentence from a 2006 conviction was revoked.[3] (App'x 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'x 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.

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

Petitioner did not appeal his guilty plea; however, he appealed his probation revocation on the 2006 conviction. (Supp. App'x 40–42). Appellate Defender Kathrine H. Hudgins perfected Petitioner's appeal by filing an *Anders*[4] brief with this Court. (Supp. App'x 44–54). Petitioner did not file a *pro se* brief in response. On March 7, 2012, this Court issued an unpublished *per curiam* dismissing the appeal and granting appellate counsel's request to be relieved. *State v. Baker*, 2012-UP-159 (S.C. Ct. App. filed March 7, 2012) (Supp. App'x 55).

Petitioner commenced the instant PCR action on March 12, 2012, challenging the CSC and lewd act convictions only. (App'x 34–42). Specifically, Petitioner alleged plea counsel was ineffective for "failing to introduce evidence of mental incompetency." (App'x 36). Petitioner failed to provide any facts to support this claim. Petitioner subsequently filed his first amended application on July 2, 2012, alleging plea counsel was ineffective for failure to introduce DNA evidence and re-alleging the failure to introduce evidence of mental incompetency claim. (Supp. App'x 56–62). Petitioner also raised a claim of prosecutorial misconduct based on an alleged *Brady*[5] violation. (Supp. App'x 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 because Petitioner's PCR

Cooper, Jr., to the lesser-included offense of assault and battery of a high and aggravated nature (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'x 36–38).

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

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

application was filed approximately eight months after the statute of limitations expired. (App'x 44–47).

On May 28, 2015, a status conference convened before the Honorable William P. Keesley, Chief Administrative Judge, who appointed Anna Good, Esquire to represent Petitioner. (Supp. App'x 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'x 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'x 49, 51). Judge Keesley granted the motion, and authorized the issuance of $5,000 for the services of Forensic Psychiatrist, Amanda Salas, MD. (App'x 50). The amended application filed by Good raised claims of ineffective assistance of plea 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'x 49).

On September 18, 2015, while represented by counsel, Petitioner filed a document captioned, "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'x 58–62). In this document,

[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

Petitioner accuses the South Carolina Department of Corrections of preventing Petitioner from visiting the law library, receiving mail and using the phone in an effort to intercept Petitioner's mail and "forge court orders."[7] (App'x 58). The document does not contain anything pertaining to Petitioner's PCR allegations.

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'x 65). Petitioner moved to relieve PCR counsel shortly thereafter by motion filed July 4, 2016, "alleging effective assistance of counsel is being denied by State appointed counsel Anna R. Good." (Supp. App'x 67). Petitioner complained that he "will not get a fair PCR hearing because counsel will be biasis[*sic*] in all proceedings." (Supp. App'x 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'x 68).

A hearing on Petitioner's motion to relieve PCR counsel and the State's motion to dismiss 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'x 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

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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.").

[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'x 60–62).

[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] 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'x 75).

On January 17, 2017, Petitioner filed a third amended application. (Supp. App'x 78–85). This application "amended" Petitioner's prior PCR applications only by providing an amended answer to Petitioner's requested relief. (Supp. App'x 78). The attached documents consists of a letter to Good requesting a copy of his file (Supp. App'x 79–80), a letter requesting assistance with mental health treatment (Supp. App'x 82), and a letter requesting copies of a 2009 trial court order allegedly ordering DNA testing. (Supp. App'x 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'x 86). No further details were provided as to any of these claims nor were any facts provided 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'x 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.[8] (App'x 75). However, Judge Keesley made it abundantly clear

[8] 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." (BOP 5). 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'x 69). Judge Keesley did not hear any substantive matters 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).

to Petitioner that he "would have to do [his] best to get along with that lawyer." (App'x 67). Petitioner assured Judge Keesley he understood, and that lack of communication was the main issue he had with Good. (App'x 67). Arthur K. Aiken, Esquire, was appointed to represent Petitioner on June 6, 2017. (Supp. App'x 92).

An evidentiary hearing was scheduled for November 26, 2017, before Judge McMahon, but was continued on Aiken's motion. (Supp. App'x 88–90). The PCR court then convened an evidentiary hearing on February 20, 2018, before the Honorable J. Derham Cole. 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 case. (App'x 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'x 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'x 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'x 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.[9] (App'x 86–87).

[9] Petitioner misconstrues Aiken's representations to the PCR court, claiming Aiken somehow indicated he believed Petitioner's explanation as to what caused the communication breakdown over SCDC's. Aiken never offered his opinion either way—he merely informed the PCR court of

However, Aiken also stated that Petitioner told him that was not correct, and that Petitioner did want to speak with him. (App'x 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. (App'x 91). Judge Cole granted the State's motion and dismissed the action with prejudice. (App'x 91). The order of dismissal was issued on September 13, 2018. (App'x 93–95). This appeal follows.

what SCDC told him versus what Petitioner told him about what happened during the scheduled telephone conferences. (App'x 86–88).

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). Thus, "[w]hether an action should be dismissed for failure to prosecute is left to the discretion of the [PCR] court judge, and his 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) (citing *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970)). "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, status conferences, and scheduled hearings. The amended application to which Petitioner claims put the State on notice of the allegations he intended to pursue was filed by Petitioner's first PCR counsel—who he fired over two and a half years prior to the hearing—and which he expressly abandoned in a subsequent amended application. 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 the PCR court did not abuse its broad discretion in dismissing Petition's application for failure to prosecute.

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.").

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;[10] *accord Nall v. Woolfolk*, 451 S.W.2d 389, 390 (Ky. 1970) ("The power of dismissal for want of prosecution is an inherent power in the courts and necessary to preserve the judicial process.").

The PCR court's decision to dismiss Petitioner's PCR action for failure to prosecute constituted the exercise of sound judicial discretion which is supported by the record. First, despite

[10] "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 . . ."

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 first contends his amended applications put the State on notice as to the allegations he was going to pursue. Because the only allegations that were even arguably sufficient under section 17-27-50[11] are those found in the second amended application filed by the attorney he fired, Petitioner argues that he did not knowingly and voluntarily waive those allegations, citing *Brannon v. State*, 345 S.C. 437, 548 S.E.2d 866 (2001) and *Narciso v. State*, 397 S.C. 24, 33, 723 S.E.2d 369, 373 (2012). In both cases, our Supreme Court reiterated that [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

[11] "The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, **specifically set forth the grounds upon which the application is based,** and clearly state the relief desired." (emphasis added).

between the court and defendant, between the court and defendant's counsel, or both." *Brannon*, 345 S.C. at 439, 548 S.E.2d at 867; *Narciso*, 397 S.C. at 33, 723 S.E.2d at 374.

Both cases involved essentially whether the statutory right to pursue post-conviction relief was knowingly and voluntarily waived.[12] *Brannon* involved the knowing and voluntary nature of the withdrawal of a post-conviction relief action in its entirety while *Narcisco* involved the grant of *White* relief in conjunction with a waiver of all remaining PCR allegations. In both cases, the waiver ended the action at the lower court level and therefore foreclosed the applicant's ability to raise *any* allegations. Neither *Narcisco* nor *Brannon* suggest that a PCR applicant must be specifically advised of each and every allegation he could possibly raise and make a knowing and voluntary waiver on the record of each allegation he ultimately chooses not to raise.

Here, Petitioner did not waive the allegations raised in the second amended application—he abandoned them. In Petitioner's fourth amended application, which was properly filed because he was *pro se* at that time, he introduced the new claims 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'x 86) (emphasis added).

[12] *Brannon* involved the knowing and voluntary nature of the withdrawal of a post-conviction relief action in its entirety while *Narcisco* involved the grant of *White* relief in conjunction with a waiver of all remaining PCR allegations. While the State admits that *Narcisco* is somewhat closer to Petitioner's case in that it involved the waiver of PCR allegations rather than the waiver of the ability to pursue PCR as a whole,

Thus, at the time of the hearing, 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 fourth amended application. Petitioner nonetheless claims there was "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." (BOP 11). Again, the State did not and does not contend this language constituted a waiver; rather, it indicated expressly that he was abandoning all other allegations except those raised in the original and fourth amended application. Petitioner's contention that he was required to present evidence in conjunction with use of such "generic language" for the State to conclude as much is absurd.

Further, multiple times throughout his brief, Petitioner claims the State was on notice of the allegations he planned to pursue based on his amended applications. Petitioner apparently believes that labeling a document "amended application" is sufficient under section 17-27-50 regardless of the actual content of said document. For example, the fourth and most recent amended application consists only of the following allegations: ineffective assistance of counsel, due process, prosecutorial misconduct, conflict of interest, procedural default, and protocol default. (Supp. App'x 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"); *see also Andiarena v. United States*, 967 F.2d 715, 719 (1st Cir. 1992) (finding claim that included "wholly conclusory. . . abstract allegation" was "properly subject to summary dismissal" in habeas petition); *Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995) (noting that "conclusory allegations which are not

supported by a statement of specific facts do not warrant habeas relief"); *cf. United States v. Thomas*, 221 F.3d 430, 437 (3d Cir. 2000) ("[V]ague and conclusory allegations contained in a § 2255 petition may be disposed of without further investigation by the District Court."); *United States v. Dyess*, 730 F.3d 354, 359 (4th Cir. 2013) (noting the requirement that a habeas petition "is expected to state facts that point to a real possibility of constitutional error") (quoting *Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977)).

It is unclear how Petitioner expected the State to be prepared to address a claim such as "protocol default" without providing a single fact or indication as to what he is referring to. Aside from the allegation regarding Petitioner raised in his original application regarding mental competency,[13] it was impossible to for the State to prepare for the hearing based on the claims contained in the fourth amended application.

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," our appellate courts have generally refused "excuse the pleading . . . requirements that apply in all civil cases."[14] *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

[13] Petitioner's claim of mental incompetency is conclusively refuted by the record based on Aiken's statement that Petitioner received a mental health evaluation and was found competent. (App'x 91).

[14] *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).

where 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*, this Court found 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.[15] 368 S.C. at 63, 626 S.E.2d at 904.

Despite Petitioner's repeated attempts to blame SCDC, the record supports the PCR court's finding that Petitioner's failure to cooperate with two experienced attorneys and failure to pursue his case despite the scheduling of multiple hearings and status conferences favors dismissal as to the personal responsibility factor. Petitioner repeatedly mischaracterizes Aiken's statements to the court by claiming Aiken believed that SCDC prevented him from communicating with Petitioner. (BOR 4–6; 9; 17–18). Aiken, however, never took a position either way. Rather, he presented the court with the information he received from both parties; Petitioner claimed he spent four hours waiting to speak to Aiken while SCDC staff advised Aiken that Petitioner refused to speak with him.

Petitioner further claims that the "supplement" to his amended PCR application—captioned "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"—somehow lends credibility to "support . . . Aiken's argument that SCDC caused the communication breakdown between

[15] 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.

Petitioner and himself." (BOP 4). Again, Petitioner—not Aiken—blamed SCDC for his inability to communicate with his attorney. Nonetheless, Petitioner claims the aforementioned "supplement"—a form complaint used for filing civil suits in the United States District Court for the District of South Carolina which names defendants that 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."—lends credibility to his position that SCDC is entirely to blame. (App'x 60–62). 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.

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 Petitioner's credibility. Specifically, Aiken stated that Petitioner "apparently didn't understand that he was supposed to make himself available to speak with me and for that reason we never had a conversation." (App'x 87). The court then asked why Petitioner was not made available. (App'x 87). Aiken responded that SCDC staff told him "Mr. Baker did not want to speak with me but Mr. Baker tells me that's

not correct." (App'x 87). Coupled with Petitioner's previous complaints about his first PCR attorney and repeated attempts to blame SCDC[16] for his dilatory conduct, the PCR court's implicit finding as to Petitioner's lack of credibility are clearly supported by the record.

As to the second factor, the State submits that the prejudice inquiry extends to the prejudice other post-conviction relief applicants will inevitably face due to Petitioner's conduct.[17] *Quagliano v. United States*, 293 F. Supp. 670, 672 (S.D.N.Y. 1968) ("We are mindful that this is a harsh sanction. . . We must, however, look not just to the impact of our decision on the administration of justice in this case, but to all the cases in the Court House. The sanction is necessary if the thousands of other litigants are to have their day in court and if the rules and directions of the court are ever to be followed."). As the PCR court noted, Petitioner "was afforded numerous opportunities to pursue his case for relief, including the appointment of two experienced attorneys

[16] Prior to Petitioner's third status conference before Judge Keesley, Petitioner wrote Judge Keesley letters and filed a motion claiming SCDC was denying access to Liber's law library and that he was entitled to use of the law library anytime it is open. (App'x 65). A representative from SCDC's General Counsel's Office appeared at this hearing and explained to Judge Keesley that each dorm is assigned certain time slots where they are free to use the law library. She further explained that while the law library is open 37.5 hours per week, it is not required to be available to any particular inmate all 37.5 hours. (App'x 73–75). Petitioner did not like this answer, and continued to argue with the Court about this policy. (App'x 77–78).

[17] As the United States District Court for the Eastern District of Virginia noted in *Zaczek v. Fauquier Cty., Va.*,

> [C]ourts must examine the amount of prejudice which the plaintiff's actions have caused. This element may be reviewed from two different vantages. First, a court may assess the amount of prejudice which a defendant has sustained as a result of delay or the costs associated with defending frivolous pleadings and motions. Alternatively, in view of the dramatic increase in litigation, courts may also review the amount of prejudice which the other litigants before the court may face if the plaintiff's misconduct continues. Such a requirement ensures that district courts will have the tools required to efficiently administer cases and to protect the increasing number of individuals who seek access to the courts.

764 F. Supp. 1071, 1078 (E.D. Va. 1991), *aff'd,* 16 F.3d 414 (4th Cir. 1993) (citations omitted).

and the scheduling of both motions and evidentiary hearings." An inordinate amount of time and judicial resources were afforded to Petitioner yet he continued to frustrated the process of prosecuting his case.

As to the third *McComas* factor, the history of delay in this case further reinforces the PCR court's dismissal of Petitioner's case based on his own dilatory and contumacious conduct. For example, on June 29, 2016, Judge Keesley convened a second status conference in Petitioner's case and scheduled a hearing on the State's motion to dismiss for August 1, 2016. (Supp. App'x 65). A hearing was set for August 2, 2016, before Judge Miller. Prior to the hearing, Petitioner filed a motion to relieve counsel, which Judge Miller denied. (Supp. App'x 69). An evidentiary hearing was subsequently scheduled for November 15, 2016, before Judge Kelly. Petitioner filed a second motion to relieve counsel prior to the hearing; therefore, Judge Kelly heard that matter only. Judge Kelly ultimately granted Petitioner's second motion to relieve counsel and ordered Petitioner to represent himself unless he retained private counsel. (Supp. App'x 75). Judge Keesley subsequently convened a third status conference on June 1, 2017. Judge Keesley ultimately appointed Aiken to represent Petitioner while making it abundantly clear that he "would have to do [his] best to get along with that lawyer." (App'x 67). An evidentiary hearing was scheduled for November 26, 2017, before Judge McMahon, but was continued on Aiken's motion. (Supp. App'x 88–90). Finally, an evidentiary hearing was scheduled for February 20, 2018, before Judge Cole.

At that point, neither the State nor Petitioner's own lawyer had notice as to the allegations he wished to pursue. As aforementioned, Judge Cole made a credibility finding at that time, ultimately concluding that Petitioner's claim that SCDC was somehow preventing him from communicating with Aiken was not credible. Due to the previous mental health allegations, Judge Cole inquired with Aiken regarding the status of the mental health evaluation. Aiken advised the

court that Petitioner was found competent. Accordingly, the record amply supports Judge Cole's finding that there was a long history of delay, a large portion of which was occasioned by Petitioner's dilatory conduct.

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.

As to the fourth *McComas* factor—the effectiveness of sanctions less drastic than dismissal—the State admits that this factor presents a closer call. However, there is certainly evidence in the record showing that a lesser sanction would not have been effective given Petitioner's contumacious conduct throughout the proceedings. Petitioner claims the PCR court should have merely ordered him to file a more definite statement rather than dismissing the case. Had the only delay in Petitioner's case been caused by the purported confusion at SCDC that

[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.

resulted in his inability to speak with Aiken prior to the February hearing or had that hearing been the first opportunity afforded to Petitioner to be heard, the PCR court's dismissal of the action for failure to prosecute would have been improper. However, the PCR court must strike a balance between alleviating the congestion of its calendar and protecting Petitioner's right to due process and his chance to be heard. The court's appointment of two qualified attorneys, grant of funding for expert services, denial of the State's motion to dismiss, and scheduling of multiple status conferences and hearings to allow Petitioner to prosecute his action evidence the court's efforts to protect Petitioner's right to due process. At the time the court ultimately dismissed Petitioner's case for failure to prosecute, the action had been pending for six years, Petitioner was refusing to cooperate with his second appointed attorney, Petitioner had received three status conferences, and was unable to proceed with litigating his action at the third scheduled hearing he appeared for.

Petitioner's complaint that his action was "dismissed without a hearing" and that Petitioner "should not be held responsible" ignores the tortured procedural history of this case. Petitioner 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. Petitioner further 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

Based on the foregoing argument, this Court should affirm the PCR court's dismissal of Petitioner's PCR application for failure to prosecute.

Respectfully submitted,

ALAN WILSON
Attorney General

LILLIAN L. MEADOWS
Assistant Attorney General

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

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ATTORNEYS FOR RESPONDENT