STATE OF CONNECTICUT

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SUPERIOR COURT
G.A. 19

DOCKET NUMBER: CV19-5000182-S 2024 JUN -4 P 3:01 SUPERIOR COURT

BERNARD SMALLS (INMATE # 257120)	:	TOLLAND JUDICIAL DISTRICT
	:	HABEAS DOCKET
V.	:	
COMMISSIONER OF CORRECTION	:	JUNE 4, 2024

MEMORANDUM OF DECISION ON RESPONDENT'S MOTION TO DISMISS COUNTS ONE, TWO, AND THREE OF THE AMENDED PETITION

The petitioner, Bernard Smalls, initiated the present habeas matter, his third, on or about May 17, 2019. The operative amended petition, filed on or about January 3, 2024, with the assistance of assigned habeas counsel, sounds in four counts. The first count alleges the ineffective assistance of trial counsel at sentencing, the second count alleges the ineffective assistance of trial counsel in litigating a motion to suppress and in having the court, rather than a jury, decide his sentence enhancement, the third count alleges the ineffective assistance of first habeas counsel in failing to raise and litigate the aforementioned deficiencies against trial counsel, and the fourth count alleges ineffective assistance of second habeas counsel.

The respondent, Commissioner of Correction, filed a return to the operative petition on January 22, 2024, in which he denied the substantive allegations, and left the petitioner to his proof. The respondent additionally raised the special defenses of res judicata and/or collateral estoppel, claiming that the petitioner was barred from raising most of his allegations, which he already had the opportunity to fully and fairly litigate in his prior habeas proceedings. The petitioner filed a reply on March 19, 2024, averring that neither doctrine

barred him from raising his claims, which, according to him, he had not had the opportunity fully and fairly litigate during the prior habeas proceedings.

On March 19, 2024, pursuant to Practice Book § 23-29(3), the respondent filed a motion to dismiss counts one through three of the operative petition, arguing that those counts constituted successive claims that were barred by the doctrine of res judicata. The petitioner filed an objection thereto on April 18, 2024, arguing that the relief requested and facts presented differed so as to avoid dismissal under § 23-29(3). A hearing was held before this court on May 30, 2024, at which both parties presented their arguments to the court.

After reading the pleadings and motions, reviewing the petitioner's past habeas actions, listening to the arguments of counsel for both parties, and reviewing relevant law, including that cited by the parties, the court concludes that, for the reasons that follow, counts One through Three of the operative petition are successive. Therefore, the respondent's motion to dismiss Counts One, Two, and Three is GRANTED.

NATURE OF THE PROCEEDINGS AND RELEVANT FACTS

Many of the relevant facts and prior proceedings were set forth by the Appellate Court in its decision on the petitioner's second habeas action.

> On December 7, 2001, the petitioner was sentenced to a total effective sentence of fifty years incarceration after being convicted of murder by use of a firearm in violation of General Statutes § 53a-54a(a), risk of injury to a child in violation of General Statutes (Rev. to 1999) § 53-21(1), and criminal possession of a firearm in violation of General Statutes (Rev. to 1999) § 53a-217(a). His sentence was enhanced by a guilty finding of commission of a class A, B or C felony with a firearm in violation of General Statutes § 53-202k. The petitioner's conviction was affirmed on direct appeal. See State v. Smalls, 78 Conn. App. 535, 548, cert. denied, 266 Conn. 931 (2003).
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> The petitioner filed his first habeas petition in 2004. On July 31, 2007, the petitioner, who was then represented by Attorney Cheryl A. Juniewic, filed an amended petition, wherein he alleged, inter alia, that he was denied the effective assistance of his trial counsel, Michael Moscowitz. The petitioner claimed, inter alia, that Moscowitz "did not

adequately consult with or advise [the] petitioner concerning the status of any plea negotiations, any potential plea agreements or the consequences of accepting a plea agreement as opposed to the consequences of going to trial before a jury." The habeas court rejected the petitioner's claim, finding that "the twenty-five year offer of pleading to murder was in fact conveyed to [the petitioner], and he rejected that offer." Th[e Appellate] Court dismissed the petitioner's appeal from the judgment of the habeas court. See Smalls v. Commissioner of Correction, 146 Conn. App. 909 (2013), cert. denied, 311 Conn. 931 (2014).

On March 12, 2012, the petitioner commenced [his second] habeas action, claiming ineffective assistance by Juniewic in his prior habeas action. He filed a second amended petition on January 20, 2017, wherein he claimed that Juniewic rendered ineffective assistance by, inter alia, failing effectively to raise the claim that Moscowitz was ineffective for failing to fully explain the plea offer to him.

After a two-day trial, the habeas court rendered a decision rejecting the petitioner's claim that Juniewic rendered ineffective assistance to him in his previous habeas action. The habeas court concluded that the petitioner failed to prove that Juniewic's representation of him was deficient or prejudicial. The court explained its ruling as follows: "In the instant matter, all of the credible evidence adduced at the habeas trial clearly demonstrates that the petitioner would not have accepted any plea offer for a murder charge from the prosecuting authority. Attorney Moscowitz testified credibly at the habeas trial that he reviewed with the petitioner the nature and elements of the charges against him, the minimum and maximum sentences he could receive if convicted, and what the state would have to prove in order to convict the petitioner of the charges. Attorney Moscowitz also testified that he presented a twenty-five year offer to the petitioner and advised him to take it, but the petitioner refused to plead guilty unless the [principal charge was] reduced from murder to manslaughter, which [the state's attorney] was unwilling to do. The petitioner also testified at the habeas trial that he did not want to plead guilty to a murder charge. Furthermore, [the state's attorney] testified that he was responsible for all decisions regarding the charges the petitioner faced, and he was not willing to reduce the murder charge in this case. As a result, the court finds that Attorney Moscowitz properly conveyed the information regarding the plea offer to the petitioner, and therefore his conduct did not constitute deficient performance. Furthermore, it is not reasonably probable that the petitioner was going to accept the plea offer given the fact that he admitted that he did not want to plead [guilty] to a murder charge. As a result, the petitioner has failed to sustain his burden of establishing that Attorney Moscowitz was ineffective for failing to properly explain a plea offer, and therefore his claim of ineffective assistance against Attorney Juniewic must be denied." The habeas court granted the petitioner's petition for certification to appeal....

Smalls v. Commissioner of Correction, 188 Conn. App. 525, 526-29, cert. denied, 331 Conn. 920 (2019). The Appellate Court rejected the petitioner's claims on appeal. Id.

The petitioner filed the operative amended petition for a writ of habeas corpus on January 3, 2024. In Count One, he claims that trial counsel, Michael Moskowitz, was ineffective at sentencing for failing to adequately investigate, research and present to the sentencing court certain mitigating evidence. In Count Two, the petitioner claims that Moskowitz was ineffective during the suppression hearing regarding whether the petitioner should testify at such hearing, and was ineffective regarding his investigation of and advice on whether a jury, instead of the court, should decide his sentence enhancement. In Count Three, he claims that first habeas counsel was ineffective for failing to pursue the complaints against Moskowitz alleged in Counts One and Two. Count Four raises claims regarding the ineffective assistance of second habeas counsel, on which the respondent is not seeking dismissal.[1]

The respondent's return avers that the petitioner already had pursued claims of ineffective assistance of trial counsel in his two previous habeas petitions, and already had pursued a claim of ineffective assistance of first habeas counsel in his second habeas petition. The respondent argues that because the petitioner already had a full and fair opportunity to litigate any claims against trial or first habeas counsel, Counts One through Three are barred by the doctrine of res judicata or collateral estoppel.

The petitioner's reply denies that his claims are barred by res judicata because (1) he did not have a full and fair opportunity to litigate the allegations set forth in Counts One through Three, (2) he was seeking different relief than he had previously, and (3) "the

[1] On May 16, 2024, the habeas court, Bhatt, J., granted the petitioner's request to amend Count Four of his complaint. Because the respondent has moved to dismiss only Counts One through Three, any forthcoming amended pleading will not impact this court's decision regarding the present motion to dismiss.

ineffective assistance of both prior habeas counsel constitutes cause and prejudice to excuse the petitioner's failure to adequately plead, prove and argue these three claims at an earlier proceeding." Reply at 1.

On March 19, 2024, pursuant to Practice Book § 23-29(3), the respondent filed a motion to dismiss counts One through Three of the operative petition, arguing that those counts were successive in nature. The petitioner filed an objection conceding that some of his claims were successive in nature, but arguing that the relief requested and facts and evidence to be presented in support thereof, specifically, evidence regarding ineffective assistance of prior habeas counsel, differed so as to avoid dismissal under § 23-29(3).

DISCUSSION

A. Applicable Legal Principles

"Under the doctrine of res judicata, or claim preclusion, a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action on the same claim. A judgment is final not only as to every matter [that] was offered to sustain the claim, *but also as to any other admissible matter [that] might have been offered for that purpose.*" (Internal citations and quotation marks omitted) (Emphasis added) State v. Long, 301 Conn. 216, 236-37, cert. denied, 132 S.Ct. 827 (2011).

> Res judicata bars the relitigation of claims actually made in the prior action *as well as any claims that might have been made there....* Public policy supports the principle that a party should not be allowed to relitigate a matter which it already has had *an opportunity* to litigate.... Thus, res judicata prevents reassertion of the same claim *regardless of what additional or different evidence or legal theories might be advanced in support of it.*

(Emphasis added) Wheeler v. Beachcroft, LLC, 320 Conn. 146, 156-58 (2016). The doctrine applies to state habeas corpus proceedings where special care is taken to ensure that, in the interest of ensuring that no one is deprived of his or her constitutional liberty, "the application

of res judicata is limited to claims that actually have been raised and litigated in a prior proceeding." Diaz v. Commissioner of Correction, 125 Conn. App. 57, 63-64, cert. denied, 299 Conn. 296 (2011). A particular legal claim is "actually raised and litigated" if "it is properly raised in the pleadings, or otherwise submitted for determination, and in fact determined." Efthimiou v. Smith, 268 Conn. 499, 506-507 (2004).

Practice Book § 23-29(3) incorporates principles of res judicata (see Diaz, supra, at 64-65) by permitting a habeas court to dismiss a petition as successive if it presents "the same legal ground as a prior petition and fails to state new facts or proffer new evidence not reasonably available at the time of the prior petition." Conn. Prac. Bk. § 23-29(3); Anderson v. Commissioner, 114 Conn. App. at 793-94. In the context of successive habeas petitions, a "ground" has been defined as "a sufficient legal basis for granting the relief sought." Sanders v. United States, 373 U.S. 1, 16 (1963); Negron v. Warden, 180 Conn. 153, 158 (1980). Thus, it is well-established that that a Sixth Amendment claim of the ineffective assistance of a particular attorney is the "same legal ground" on which habeas relief is sought, regardless of what additional facts, evidence, or allegations may be presented in support thereof in a future habeas action. Smith v. Commissioner of Correction, 122 Conn. App. 637, 641-42 (2010). See James L. v. Commissioner of Correction, 245 Conn. 132, 141 (1998) ("Identical grounds may be proven by different factual allegations and supported by different legal arguments or articulated in different language.").

Thus, to avoid dismissal under § 23-29(3), the petitioner bears the burden of showing that Counts One through Three of his third habeas petition "do, indeed, involve different legal grounds, [and are] not merely verbal reformulations of the same grounds" presented in his prior habeas actions. Iasiello v. Manson, 12 Conn. App. 268, 272, cert. denied, 205 Conn.

811 (1987).

> A petitioner may bring successive petitions on the same legal grounds if the petitions seek different relief. But where successive petitions are premised on the same legal grounds and seek the same relief, the second petition will not survive a motion to dismiss *unless the petition is supported by allegations and facts not reasonably available to the petitioner at the time of the original petition.*

(Emphasis added) Anderson v. Commissioner, 114 Conn. App. at 794.

B. Counts One Through Three Are Successive Under § 23-29(3)

Counts One and Two, alleging ineffective assistance of trial counsel, and Count Three, alleging ineffective assistance of first habeas counsel, are successive, because the petitioner had the opportunity, during his first and/or second habeas actions, to fully and fairly litigate any claims regarding the ineffective assistance of trial and first habeas counsel. Although the petitioner may be pursuing different allegations against his trial and first habeas lawyers, the underlying legal ground for relief is, as it was in his prior two habeas actions, the Sixth Amendment deprivation of the effective assistance of trial and first habeas counsel. The fact that the identical grounds for relief (i.e., ineffective assistance of counsel) may now be supported by different facts, evidence, arguments, or legal theories does not save his successive claims from being barred by res judicata. State v. Long, 301 Conn. at 238. To the contrary, res judicata bars relitigation of his Sixth Amendment claims against trial and first habeas counsel regardless of what new, additional or different claims he now advances, because the petitioner had the *opportunity,* in his first and second habeas actions, to raise the very claims that he currently pursues against trial and first habeas counsel. Wheeler v. Beachcroft, LLC, 320 Conn. at 156-58. The fact that he did not take advantage of this opportunity is of no moment. Nor is the fact that he attributes his lost opportunity to the ineffective assistance of prior habeas counsel for failing to pursue these claims in the first

instance.[2] Again, a novel legal theory is insufficient to overcome the presumption against endless litigation of claims against counsel that could have been, but were not, raised previously. A belated understanding of facts, evidence or arguments that existed at the time of the first and second habeas petitions, but were never presented, is insufficient to overcome the hurdle of setting forth new facts and evidence that "were not reasonably available" to the petitioner at the time of his first petition. Conn. Prac. Bk. § 23-29(3). See Pierce v. Commissioner of Correction, 158 Conn. App. 228, 307 (judgment in one cause of action operates as bar to any claims relating to that cause of action which were actually made *or which might have been made*), cert. denied, 318 Conn. 907 (2015).

The petitioner contends that Count One, claiming ineffective assistance of trial counsel at sentencing, is not successive because the relief he seeks is a new sentencing hearing, rather than a new criminal trial. Pet's. Opposition at 3. "The reason of the law is not so thin, however, as to reward a petitioner merely for rewording the relief requested." Carter v. Commissioner of Correction, 133 Conn. App. 387, 394, cert. denied, 307 Conn. 901 (2012). The only remedy to which the petitioner would be entitled if he prevailed on Count One, and the only relief that a habeas court has the authority to order on a claim of ineffective

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[2] The petitioner acknowledges that Counts Two and Three of his amended petition are, by definition, successive. He avers, however, that his failure to previously raise the new allegations set forth in those counts was due to the ineffective assistance of prior habeas counsel, which, according to him, "meets the cause and prejudice standard sufficient to overcome dismissal." Pet's. Opposition at 5. The petitioner has cited no authority, and this court has found none, for the proposition that the "cause and prejudice" standard, set forth in Wainwright v. Sykes, 433 U.S. 72, 82-83 (1977), is the legal standard applicable to successive petitions. Instead, the legal standard is set forth in Practice Book § 23-29(3) and has been interpreted by our Appellate and Supreme Courts to bar claims of ineffective assistance, such as those in Counts Two and Three, from being litigated where identical claims were already raised, argued, litigated, and decided in a previous habeas trial. Diaz v. Commissioner, 125 Conn. App. at 64.

assistance of criminal trial counsel, is a new trial. Id. Thus, the fact that the petitioner seeks a new sentencing hearing rather than a new trial does not save his claim from being successive.

During the hearing on this matter, the petitioner's counsel orally cited to Chankar v. Commissioner of Correction, CV17-4009162-S, and Vivo v. Commissioner of Correction, CV13-4005234-S, as examples of cases in which habeas courts deciding claims of ineffective assistance of trial counsel ordered new sentencing hearings, rather than new trials. However, the court in Chankar ordered a new sentencing hearing on the independent, stand-alone ground that the petitioner's sentence was statutorily illegal and barred by both the equal protection clause and our Supreme Court's jurisprudence in State v. O'Neill, 200 Conn. 268 (1986). Vivo is similarly distinguishable because the petitioner there was improperly sentenced on a firearm enhancement under § 53-202k. The habeas court found that this improper enhancement was the result of ineffective assistance of trial counsel and remanded the case for a new sentencing hearing. That case is currently on appeal and is thus not a final judgment. AC 47144. Even if Chankar and Vivo were not inapposite, trial court decisions, while persuasive, are not binding on other trial courts. See Connecticut Nat. Bank v. Great Neck Dev. Co., 215 Conn. 143, 146 (1990) (one judge's exercise of discretion does not bind another).

CONCLUSION

For all of the foregoing reasons, this court concludes that Counts One, Two, and Three of the operative petition are successive and barred from relitigation by the doctrine of res judicata. Counts One, Two, and Three of the petition are, therefore, DISMISSED pursuant to Practice Book § 23-29(3).

Accordingly, the Respondent's motion to dismiss is GRANTED; the Petitioner's opposition thereto is DENIED.

Melissa L. Streeto

Hon. Melissa L. Streeto

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