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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Honorable Kristi F. Curtis, Circuit Court Judge

ANTHONY SANDERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001544

PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

1.

Did the post-conviction relief (PCR) judge correctly grant Petitioner a belated direct appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974)?

2.

Did the post-conviction relief (PCR) judge err by finding Petitioner knowingly and voluntarily waived his right to a jury trial where trial counsel advised Petitioner that the waiver agreement, which also required Petitioner to waive his right to any appellate, post-conviction, or habeas corpus review, was unenforceable, where trial counsel had a nonwaivable conflict of interest, and where Petitioner was prejudiced because the trial judge who presided over Petitioner's bench trial was previously informed Petitioner intended to plead guilty and the evidence against Petitioner was wholly circumstantial and far from substantial?

STATEMENT OF THE CASE

On August 30, 2007, a Dorchester County grand jury indicted Petitioner for three counts of murder. App. 795-800. The state sought the death penalty against Petitioner. On November 21, 2009, the Honorable R. Markley Dennis, Jr. presided over pretrial hearings. App. 1. On January 21, 2010, the parties again appeared before Judge Dennis for a status conference. App. 209. The state was represented by Russell Hilton and Blair Jennings. Petitioner was represented by Mark Leiendecker, Mitchell Farley, S. Boyd Young, and Laura Wood Young. App. 209. The purpose of the status conference was to place on the record a "Contractual Consent Order to Waive Rights to a Jury Trial." App. 209, ll. 14-20.

The solicitor and trial counsel explained the terms of the agreement as follows: the state would withdraw its notice of intent to seek the death penalty in exchange for Petitioner waiving his right to a jury trial, a direct appeal, and post-conviction relief. App. 211, l. 23 – 213, l. 9. Initially, the court engaged in a colloquy with trial counsel to determine whether they discussed the agreement with Petitioner. App. 213, l. 8 – 214, l. 1. Thereafter, Judge Dennis engaged in a colloquy with Petitioner concerning the agreement.

Judge Dennis explained that the purpose of the colloquy was to convince the court that the agreement was fair and that it truly represented the agreement of both sides. App. 217, ll. 22-25. Petitioner responded affirmatively that he had sufficient time to discuss the hearing and the agreement with his lawyers. App. 217, ll. 9-24. Petitioner informed the court that he wanted to accept the agreement. App. 218, ll. 4-6. The judge then informed Petitioner that he was giving up his right to have a "fair and impartial jury listen to the evidence and decide what they believe to be the true facts." App. 219, ll. 1-16. Petitioner was also giving up his right to have Judge Dennis's "decision reviewed by the [appellate] court." Judge Dennis explained that an

individual has a right to have a decision reviewed by another court to determine whether there "were any errors of law or any other issues" which may be addressed on appeal. App. 219, l. 17 – 220, l. 14. Petitioner responded affirmatively when Judge Dennis asked if he wanted to give up his right to appeal. App. 220, ll. 9-16.

Lastly, Judge Dennis explained the portion of the contract dealing with post-conviction relief. He told Petitioner PCR was "kind of a second trial" where an individual convicted of a criminal offense could present evidence "if they believe that their lawyers did something improper." Petitioner would have "a right to appeal from that hearing or have that matter reviewed by the [appellate] court." When asked, Petitioner said he wanted to "give up" the right to post-conviction relief too. App. 221, l. 17 – 222, l. 19.

Judge Dennis explained that in his seventeen years of being a judge, he had never been asked to accept an agreement in which a person waived his right to appellate review and collateral review. App. 226, l. 18 – 227, l. 3. Nevertheless, Judge Dennis accepted the agreement and found Petitioner entered into the agreement freely and voluntarily without any threat or coercion. App. 227, ll. 19-24.

The written agreement was a total of three pages with the final page primarily consisting of signatures. App. 236-238. In the third paragraph of the agreement, Petitioner purported to waive his right to a jury trial and agreed for the case to be resolved by bench trial before Judge Dennis. App. 236. The agreement further provided:

> [Petitioner] has been informed by his counsel that appealable error may have already occurred in evidentiary hearings or may occur during the bench trial which may entitle him to a new trial. [Petitioner] agrees to waive absolutely and unconditionally all future rights to appeal any legal issues associated with this case, or conviction in state or federal court. [Petitioner] waives the right to appeal any evidentiary rulings made by the Honorable R. Markley Dennis. [Petitioner] also waives the right to appeal the verdict and sentence entered by the trial judge. This waiver applies to all rights of judicial review, including, but not limited to

direct appeal, post-conviction proceedings, or habeas corpus proceedings in state or federal court.

App. 236-237. Petitioner, Petitioner's trial counsel, the solicitors, and Judge Dennis signed the agreement. App. 238.

On March 8, 2010, Petitioner proceeded to a bench trial before Judge Dennis. App. 239. At the start of the trial, Judge Dennis again broached the subject of the consent order. Judge Dennis asked Petitioner if he "confirmed and ratified" the consent order. Petitioner responded affirmatively. App. 248, ll. 18-25. The agreement was entered as a court's exhibit to the bench trial. App. 249, ll. 15. Thereafter, the parties proceeded with the bench trial. Judge Dennis ultimately found Petitioner guilty as indicted and sentenced him to life without parole. App. 507, ll. 16-20; App. 516, ll. 6-8.

Petitioner filed a *pro se* notice of appeal on March 24, 2010. App. 518-519. On April 22, 2010, the Court of Appeals dismissed the notice of appeal due to Petitioner's failure to provide the court with a proof of service showing the notice of appeal was timely served on opposing counsel. App. 520. Following subsequent communication between the court and Petitioner, the Court of Appeals finally dismissed the notice of appeal on July 14, 2010. App. 521-525. On August 25, 2010, the Court of Appeals issued remittitur. App. 526.

Petitioner filed an application for post-conviction relief (PCR) on January 6, 2011. App. 527-532. On May 4, 2011, the state filed a return to this application. App. 533-537. On May 17, 2012, the state signed and served a motion to dismiss Petitioner's application. App. 538-540. On May 22, 2012, the matter proceeded to a hearing before the Honorable DeAndrea G. Benjamin. App. 541. David Spencer represented the state and Jessica Cassick represented Petitioner. App. 541. On August 20, 2012, Judge Benjamin dismissed Petitioner's application based on the waiver agreement without an evidentiary hearing. App. 554-557. On August 28,

2012, Petitioner filed a motion for reconsideration. App. 558-559. The state filed a return to Petitioner's motion for reconsideration dated August 30, 2012. App. 560-562. Judge Benjamin ultimately denied Petitioner's motion for reconsideration. App. 563-564.

Petitioner filed a timely notice of appeal with this Court. App. 565-566. On July 5, 2013, Petitioner filed a petition for writ of certiorari. App. 567-585. On November 18, 2013, the state filed its return. App. 586-595. By order dated September 11, 2014, this Court granted the petition and ordered further briefing. App. 596. By opinion published June 17, 2015, this Court held the PCR court erred in dismissing Petitioner's application without an evidentiary hearing to determine whether Petitioner received effective assistance of counsel in being advised to enter into the agreement to waive his right to a jury trial and his right to any appellate, post-conviction, or habeas corpus review. Thus, this Court reversed and remanded the case for an evidentiary hearing on this narrow issue. App. 637-642; Sanders v. State, 412 S.C. 611, 773 S.E.2d 580 (2015). The remittitur was issued on July 6, 2015. App. 643.

On July 9, 2018, an evidentiary hearing was held before the Honorable Robin B. Stilwell. App. 644. Christian Saville represented the state and Leslie Sarji represented Petitioner. App. 644. Petitioner testified during the hearing that trial counsel advised him to sign the agreement waiving his right to a jury trial, a direct appeal, and post-conviction relief. However, Petitioner explained that during his discussion with counsel prior to signing the agreement, counsel told Petitioner that he did not believe the waiver would be enforceable. Counsel told Petitioner that he did not think Petitioner could waive his right to an ineffective assistance of counsel claim related to counsel's future performance given that Petitioner entered into the agreement before his trial. Petitioner told counsel that if he was convicted, he still planned to appeal. Counsel told Petitioner he could still appeal and "see what happens." App. 659, l. 1 – 660, l. 11.

Additionally, Petitioner testified that counsel did not tell Petitioner that counsel had a personal interest in having Petitioner sign the agreement waiving his right to later allege ineffective assistance claims involving counsel's performance or that counsel had a conflict of interest in discussing the waiver with Petitioner. App. 660, ll. 19-25.

Petitioner was adamant that he would not have signed the agreement if he believed it was enforceable. He only signed the waiver because trial counsel told him it was not enforceable. App. 662, ll. 6-11.

Boyd Young, Petitioner's lead trial counsel, corroborated Petitioner's testimony. Young testified that he told Petitioner the waiver was unenforceable. He explained, "I told him [Petitioner] that it was my belief, my personal belief, that he could not knowingly and intelligently waive a claim about future performance; that under the terms, the way this thing [the consent order] is written, Judge Dennis can show up drunk and sleep through the trial; I can show up drunk and sleep through the trial; and he couldn't do anything about it. And that would clearly be unenforceable." App. 669, l. 19 – 670, l. 2. Young admitted that he did not advise Petitioner during this discussion that he (Young) had a personal interest in Petitioner waiving his right to later allege ineffective assistance of counsel claims involving Young's performance. However, Young explained that, after Petitioner's case, he now hires private, independent counsel to advise clients about whether to waive their rights to a direct appeal and post-conviction relief. App. 670, l. 6 – 671, l. 1.

By order filed October 17, 2018, Judge Stilwell found Petitioner received ineffective assistance of counsel in being advised to enter into the agreement waiving his right to a jury trial and his right to appellate, post-conviction, and habeas review. Accordingly, Judge Stilwell ruled

the agreement was "invalid." He ordered a hearing be held on the merits of Petitioner's application for post-conviction relief. App. 684-689.

On July 18, 2019, Petitioner filed an amended application for post-conviction relief. App. 690-691. An evidentiary hearing was held on May 17, 2021 before the Honorable Kristi F. Curtis. App. 692. Benjamin Limbaugh represented the state and Leslie Sarji represented Petitioner. App. 692.

At the beginning of the hearing, PCR counsel argued the "entire" waiver, including the waiver of the right to a jury trial, the waiver of the right to a direct appeal, and the waiver of the right to post-conviction review is invalid. She argued that as a matter of law, Petitioner's convictions should be reversed and his case remanded for a new trial based on the invalidity of the waiver agreement. App. 700, l. 20 – 702, l. 5.

Petitioner testified at the hearing that trial counsel brought the contractual consent order to Petitioner to sign while he was incarcerated pretrial. The agreement required Petitioner to waive his right to a jury trial, a direct appeal, and a post-conviction relief action. In exchange, the state agreed to withdraw its notice of intent to seek the death penalty. Trial counsel told Petitioner he would have to accept the entire agreement. He could not accept "certain parts" of the agreement and reject "other parts." Petitioner ultimately accepted the agreement because trial counsel told him it was "the best approach." App. 704, l. 6 – 705, l. 13. However, based on trial counsel's statements, Petitioner understood that the waiver agreement was not enforceable and "it wasn't going to hold up in any respect later on." Petitioner wanted a jury trial and an appeal. App. 705, l. 23 – 7-6, l. 8. He would not have signed the waiver agreement if trial counsel had not told him it was unenforceable. App. 720, ll. 15-17.

Additionally, Petitioner testified that before trial he did not understand what a bench trial was. Trial counsel informed Petitioner that during a bench trial the judge is the person who hears all the facts and renders the decision as opposed to a jury. Counsel told Petitioner a bench trial "was going to be our best bet." Based on counsel's advice, Petitioner believed waiving his right to a jury trial would give him a "fair chance" of presenting a defense. However, when reflecting back now, Petitioner believes the bench trial "had the face of a trial" but was "just for show" and the waiver agreement was essentially a plea agreement. App. 721, l. 16 – 723, l. 1. Having never had a jury trial nor a bench trial before, Petitioner testified that he did not fully understand the right he was waiving when he ultimately waived his right to a jury trial. App. 725, ll. 14-22.

Boyd Young, Petitioner's trial counsel, testified that he asked the state "to include a severability provision" in the waiver agreement because he thought it "was a real problem putting the PCR waiver in the agreement." He thought the agreement "needed to make it clear that if that part [the PCR waiver] was struck down that the rest of the agreement would [still] be valid." However, the state "declined" to include such a provision. Young was concerned that if Petitioner's waiver of his right to post-conviction review was found to be invalid, the entire agreement would be invalidated, including Petitioner's waiver of his right to a jury trial. App. 744, l. 7 – 745, l. 3.

By order filed September 7, 2023, Judge Curtis granted Petitioner a belated direct appeal, but denied relief on Petitioner's remaining allegations. App. 772-794. The judge found Petitioner knowingly and voluntarily waived his right to a jury trial. App. 779. She concluded that the unenforceability of Petitioner's waiver of his right to appeal and to collateral review had no effect on Petitioner's waiver of his right to a jury trial. App. 779. In support of her finding, the judge found trial counsel articulated a valid strategic decision for advising Petitioner to waive

his right to a jury trial. App. 783. She also cited to Judge Dennis's colloquy with Petitioner in which Petitioner stated he understood he was giving up the right "to have a jury empaneled, a fair and impartial jury, to listen to the evidence and decide what they believe to be the true facts." App. 781.

Because Petitioner did not knowingly and voluntarily waive his right to a jury trial, but was correctly granted a belated direct appeal, this petition for writ of certiorari follows.

ARGUMENT

1.

The post-conviction relief (PCR) judge correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974).

The PCR court correctly granted Petitioner a belated direct appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974). The court found trial counsel was ineffective for advising Petitioner to "waive his right to appeal any trial errors where the trial had not yet occurred." App. 778. The court reasoned, "Unlike a guilty plea, where the defendant is admitting guilt and is only in front of the trial judge for acceptance of the plea and sentencing, a trial has an unlimited number of opportunities for legal error by the attorneys or the judge. It is difficult to conceive of a scenario where any pretrial waiver of the right to appeal errors of law committed during a future trial would be enforceable." App. 778-779. Thus, the court found "that such a waiver prior to trial is unenforceable as a matter of law," including the agreement Petitioner signed on January 21, 2010. App. 779.

The court further found Petitioner did not knowingly and voluntarily waive his right to appeal. App. 779. The court emphasized that Petitioner filed a *pro se* notice of appeal that was dismissed for failure to perfect the appeal. This evidence showed Petitioner "certainly wanted to appeal" his convictions and sentence of life without parole. App. 779. The court concluded Petitioner's "attempt to appeal was likely thwarted by" the unenforceable waiver agreement given that trial counsel did not file a notice of appeal due to the agreement. App. 779. Consequently, the court found Petitioner was entitled to a belated direct appeal.

"The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge's findings." Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624,

626 (1989). When a client is convicted and sentenced, trial counsel has a duty to make certain the client is fully aware of the right to appeal. In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991); White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967)." Smith v. State, 309 S.C. 413, 424 S.E.2d 480 (1992). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

Before Petitioner agreed to waive his right to a direct appeal, trial counsel told Petitioner such a waiver was not enforceable. The PCR court correctly found trial counsel was ineffective for advising Petitioner to waive his right to a direct appeal when his trial had not yet occurred and that the waiver was unenforceable. It is obvious Petitioner wished to appeal his convictions and sentence given he timely filed a *pro se* notice of appeal with the Court of Appeals but failed to provide the court with a proof of service showing the notice of appeal was timely served on opposing counsel.

This evidence supports the PCR court's conclusion that Petitioner did not knowingly and voluntarily waive his right to appeal. Because there is evidence of probative value to support the court's finding, respectfully, this Court should grant certiorari and consider Petitioner's belated direct appeal.

2.

The post-conviction relief court erred by finding Petitioner knowingly and voluntarily waived his right to a jury trial where trial counsel advised Petitioner that the waiver agreement, which also required Petitioner to waive his right to any appellate, post-conviction, or habeas corpus review, was unenforceable, where trial counsel had a nonwaivable conflict of interest, and where Petitioner was prejudiced because the trial judge who presided over Petitioner's bench trial was previously informed Petitioner intended to plead guilty and the evidence against Petitioner was wholly circumstantial and far from substantial.

The United States Constitution provides that "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. Const. art. 3, § 2. "Attorneys have a duty to consult with their clients regarding 'important decisions,' including questions of overarching 'defense strategy.'" Moore v. State, 399 S.C. 641, 732 S.E.2d 871, 873 (2012) (citing Florida v. Nixon, 543 U.S. 175, 187 (2004)). "This does not require counsel to obtain the defendant's consent on every strategic decision, but certain decisions regarding the waiver of basic trial rights cannot be made for the defendant by surrogate." Moore, 399 S.C. 641, 732 S.E.2d at 873 (citing Nixon, 543 U.S. at 187). "A defendant has the '*ultimate authority*' to determine whether to 'plead guilty, *waive a jury,* testify on his own behalf, or take an appeal.'" Id. (citing Nixon, 543 U.S. at 187) (emphasis in original). "A defendant's waiver of the right to a jury trial must be knowing, voluntary, and intelligent." Id. (citing Patton v. United States, 281 U.S. 276, 312-13 (1930). "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." Id. (citing Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000)).

In Brannon v. State, 345 S.C. 437, 548 S.E.2d 866 (2001), the defendant pled guilty to armed robbery and was sentenced to twenty-one years' imprisonment. The defendant filed a PCR claim seeking a more lenient sentence. Id. at 438, 548 S.E.2d at 867. The trial judge explained to the defendant that he did not have the authority to reduce his sentence, and counsel indicated that the defendant wanted to withdraw his PCR application. Id. The subsequent written order dismissed the application with prejudice. Id. This Court reviewed the case in order to determine whether the PCR court erred in dismissing the case without an inquiry as to whether the withdrawal was knowing and voluntary. Id. at 439, 548 S.E.2d at 867. This Court reversed and held 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 between the court and defendant, between the court and defendant's counsel, or both." Id. (emphasis added).

In Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008), this Court explained the appellate review of a knowing and voluntary waiver. In that case, the defendant pled guilty to murder, first degree burglary, and possession of a weapon during a violent crime. Id. at 139-40, 665 S.E.2d at 606. In accordance with the plea agreement, the trial court sentenced the defendant to life in prison without the possibility of parole. Id. at 140, 665 S.E.2d at 606. As part of the agreement, the defendant waived his right to all appeals and PCR applications. Id. However, following his incarceration the defendant filed a PCR application and alleged that the PCR court erred in dismissing that application pursuant to his plea agreement. Id.

This Court held that such waivers are effective only if they are made knowingly and voluntarily. Id. at 142, 665 S.E.2d at 607. In order to determine whether the agreement is knowing and voluntary, the Court examines the particular facts and circumstances in the case, including the background, experience, and conduct of the accused. Id. at 143, 665 S.E.2d at 607.

In applying this framework to the defendant in Spoone, this Court found his waiver was made knowingly and voluntarily. Id. at 143-44, 665 S.E.2d at 608. Although the defendant possessed only a ninth grade education, the text of the plea agreement was straightforward. Id. Moreover, the trial court specifically asked the defendant about the plea agreement in the language of the agreement, and in plain language. Id. The defendant was represented by two lawyers at the trial level, and both of these lawyers signed the plea agreement along with the defendant himself. Id. Thus, this Court held the PCR court correctly enforced the waiver, and dismissed the defendant's PCR application. Id.

In Moore v. State, 399 S.C. 641, 732 S.E.2d 871, 872 (2012), the defendant's trial counsel waived his right to a jury trial and opted instead for a bench trial as part of the defense strategy. The defendant claimed during PCR that he did not wish to waive his right to a jury trial, and as a result he received ineffective assistance of counsel. Id. Moore was charged with armed robbery. The state alleged Moore took several items off the shelf at Walmart and walked outside without paying for them. Id. A loss prevention officer confronted Moore on the sidewalk about the unpaid merchandise. Moore reached into his pocket, presented a gun, and later fled. Id. At the beginning of his jury trial, counsel informed the judge Moore wished to waive his right to a jury trial and proceed with a bench trial. The trial judge did not question Moore or counsel about this waiver. Id. at 641, 732 S.E.2d at 872.

Moore testified at the PCR hearing that he wanted a jury trial but "ended up with a bench trial." Id. The only thing Moore knew about a bench trial was there would be no jury present. Moore did not know ahead of time that that he was going to have a bench trial. He found out the day his jury trial was scheduled. Id. Moore's counsel testified that he "believed" he explained to Moore that by having a bench trial, Moore was waiving his right to a jury trial. Id. at 641, 732

S.E.2d at 873. However, counsel did not recall whether Moore had any questions. Moore's counsel also testified that he "believed" Moore understood he was waiving his right to a jury trial. Id.

This Court emphasized that, "The validity of a defendant's waiver does not turn on his communication with counsel, but rather on the presence of a record supporting the validity of that waiver." Id. at 641, 732 S.E.2d at 874. The Court determined that both the trial and the PCR courts conducted a deficient analysis of Moore's waiver. Id. The record was devoid of any evidence that Moore's counsel discussed the waiver with Moore at length. Moreover, the record showed there was no colloquy between the trial court and Moore's counsel or Moore regarding the waiver. Id. Accordingly, this Court concluded the waiver was not supported by a complete record and the PCR court erred in finding Moore made a knowing and voluntary waiver. Id.

In Sanders v. State, 412 S.C. 611, 614, 773 S.E.2d 580, 581 (2015), which as mentioned above involved Petitioner, Petitioner argued the PCR court erred in failing to allow him to present evidence that his waiver was entered into upon the advice of constitutionally ineffective trial counsel. This Court agreed. Petitioner conceded a waiver of post-conviction review was permissible under Spoone, but challenged trial counsel's conduct in advising Petitioner to enter into the waiver. Id. at 615, 773 S.E.2d at 582. This Court concluded that although a defendant may waive his right to collateral review, he is nevertheless entitled to challenge whether the advice he received in agreeing to that waiver was constitutionally defective. Id. at 617, 773 S.E.2d at 583. Accordingly, this Court held the PCR court erred in not allowing Petitioner to present evidence of ineffective assistance of counsel on the limited issue of his counsel's advice in connection with entering into the agreement. Id.

In a footnote in Sanders, this Court expressed its "concern with the ethical implications of a waiver of ineffective assistance of counsel claims." Id. at 616 n. 2, 773 S.E.2d at 582 n. 2. The Court noted that a "number of jurisdictions have acknowledged the conflict of interest that arises when an attorney counsels his client to waive the right to challenge his representation." Id. This Court found "this practice especially troubling where, as here, the defendant (Petitioner) enters into the agreement prior to a trial, which allows significantly more potential for error than a guilty plea." Id.

In his October 17, 2018 order, Judge Stilwell correctly found Petitioner received ineffective assistance of counsel in being advised to enter into the agreement waiving his right to a jury trial and his right to appellate, post-conviction, and habeas review. Judge Stilwell ruled the agreement was "invalid." App. 684-689.

Petitioner's testified at the evidentiary hearing before Judge Stilwell that he signed the waiver agreement based upon trial counsel's advice, that counsel advised him that the waiver was not enforceable, and that he would not have signed the waiver if he had believed it was enforceable. Additionally, Petitioner testified that trial counsel never told him counsel had a conflict of interest in advising him to sign a waiver that included a waiver of ineffective assistance of counsel claims.

Boyd Young, Petitioner's lead trial counsel, corroborated Petitioner's testimony. Young testified that he told Petitioner the waiver was unenforceable. Young also admitted that he did not advise Petitioner during their discussions that he (Young) had a personal interest in Petitioner waiving his right to later allege ineffective assistance of counsel claims involving Young's performance.

This evidence shows Petitioner did not knowingly and voluntarily waive his right to a jury trial nor his right to appellate, post-conviction, and habeas review. As Judge Stilwell found, the record simply does not support the validity of the waiver. Consequently, Judge Curtis erred by finding Petitioner knowingly and voluntarily waived his right to a jury trial.

Additionally, as Judge Stilwell found, trial counsel was ineffective for advising Petitioner to enter into the "contractual consent order" when counsel had an inherent conflict of interest. See Sanders, 412 S.C. at 616 n. 2, 773 S.E.2d at 582 n. 2; see also U.S., ex rel. U.S. Att'ys ex rel. E., W. Districts of Kentucky v. Kentucky Bar Ass'n, 439 S.W.3d 136, 145 (Ky. 2014). Because of counsel's ineffective assistance, Petitioner did not knowingly and voluntarily waive his right to a jury trial or his right to appellate, post-conviction, and habeas review.

Moreover, it appears undisputed that Petitioner's waiver of his right to appellate, post-conviction, and habeas review, which was made in conjunction with Petitioner's waiver of his right to a jury trial, was not knowing and voluntary and thus invalid. Significantly, the "contractual consent order" signed by Petitioner, his lawyers, and the attorneys representing the state did not include any sort of "severability provision." Trial counsel testified at the hearing before Judge Curtis that he requested the state "include a severability provision" in the waiver agreement because he thought it "was a real problem putting the PCR waiver in the agreement." He thought the agreement "needed to make it clear that if that part [the PCR waiver] was struck down that the rest of the agreement would [still] be valid." However, the state "declined" to include such a provision. See App. 744, l. 7 – 745, l. 3. Without a "severability provision" or some other record showing Petitioner understood that if the waiver of his right to appellate, post-conviction, and habeas review was found to be invalid, that the waiver of his right to a jury trial would still be valid, the waiver of Petitioner's right to a jury trial cannot be said to be knowing

and voluntary. The evidence shows Petitioner entered into the agreement and signed "the contractual consent order" believing it to be unenforceable. There is absolutely no evidence that Petitioner understood that if the waiver of his right to appellate, post-conviction, and habeas review was later found to be invalid, that the waiver of his right to a jury trial could or would still be valid.

Petitioner was prejudiced by the waiver of his right to a jury trial. First and foremost, Judge Dennis, the judge who presided over Petitioner's bench trial, was informed before trial that Petitioner intended to plead guilty. During the January 21, 2010 status conference, the solicitor told Judge Dennis: "You'll recall that on January 8th we had all congregated at the Dorchester County Courthouse, that we had all the physical evidence, and Mr. Sanders and his attorney looked through that evidence. Part of the premise of being there was based on prior conversations that **Mr. Sanders had intended to plead guilty that Friday to three counts of murder** . . . That Friday we were not able to execute the plea, but had some discussion at that time of the possibility of a bench trial." App. 211, ll. 6-22 (emphasis added).

At the evidentiary hearing before Judge Curtis, trial counsel explained that prior to Petitioner's bench trial, the parties "went to court to do the plea." Petitioner "signed off on two of the [sentence] sheets, and then on the third sheet said, I can't do it, I'm not going to do it." App. 731, ll. 7-18. This is further evidence that Judge Dennis was aware in the month leading up to the bench trial that Petitioner intended to plead guilty.

Rule 410, SCRE, excludes in part any evidence of a plea of guilty which was later withdrawn, or any statement made in the course of plea discussions which do not result in a plea of guilty. If Petitioner's case had been tried before a jury, the jury would not have known that Petitioner "intended to plead guilty . . . to three counts of murder" before trial. It was extremely

prejudicial to Petitioner to be tried before a judge who only a month before stood ready to accept Petitioner's guilty plea. Objectively, it is unlikely Judge Dennis could set aside Petitioner's previous willingness to plead guilty when determining whether the state proved Petitioner's guilt beyond a reasonable doubt.

Moreover, the evidence against Petitioner was entirely circumstantial and far from substantial. The only evidence against Petitioner was that his phone made calls using a tower near the apartment complex close in time to the murders, a bouncer identified him as shooting a weapon at a bar months before the deaths, the markings on the shell casings from that unrelated shooting matched the markings on the shell casings from the shooting in this case, Petitioner had a girlfriend who lived in the apartment complex, Petitioner kept a newspaper article describing the deaths, Petitioner had access to a .40 caliber weapon and ammunition, the DNA profile developed from the oral swab of one of the deceased "matched" Petitioner to the same extent that it would also match one out of two-hundred and sixty people randomly selected, and Petitioner's ownership of Nike Air Force One sneakers that were consistent in type and size with shoe impressions left at the apartment. The state presented no evidence of any relationship between Petitioner and the decedents and no motive for their deaths. The state's case was purely circumstantial and failed to amount to substantial circumstantial evidence of Petitioner's guilt.

Respectfully, this Court should hold Petitioner did not knowingly and voluntarily waive his right to a jury trial, reverse Petitioner convictions, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully request this Court grant the petition for writ of certiorari and consider his belated direct appeal. Petitioner ultimately request this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy_____________
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of March, 2024.