

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Kristi F. Curtis, Circuit Court Judge

Post-Conviction Relief Case No. 2011-CP-18-0027
Appellate Case No. 2023-001544

Anthony Sanders, #339645,.....Petitioner,

v.

State of South Carolina,.....Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the PCR court correctly determined Petitioner did not knowingly, voluntarily, or intelligently waive his right to a direct appeal, and accordingly, properly granted him belated appellate review of direct appeal issues pursuant to *White v. State*?
2. Whether PCR court properly concluded Petitioner knowingly and intelligently waived his right to a jury trial under the particular facts and circumstances of the case and therefore received effective assistance of counsel where: (1) Petitioner's waiver was established by a complete record consisting of a thorough colloquy between the court and Petitioner as well as a written contractual waiver signed by Petitioner, trial counsel, and the judge; (2) there was no inherent conflict of interest in trial counsel advising Petitioner regarding the waiver; (3) the choice to proceed with a bench trial before a judge who a month earlier had been poised to accept Petitioner's guilty plea was part of a valid defense strategy; and (4) Petitioner failed to carry his burden of proving prejudice?

STATEMENT OF THE CASE

Anthony Sanders (Petitioner) was indicted at the September 2007 term of the Dorchester County Grand Jury for three counts of murder (2007-GS-18-1296, -1297, & -1298). He was represented by S. Boyd Young and Laura Wood of the South Carolina Commission on Indigent Defense, as well as Mark A. Leinendecker and Mitchell Farley of the First Circuit Public Defender's Office. The State was represented by Assistant Solicitors Russell Hilton and Blair Jennings of the First Circuit Solicitor's Office.

On December 21, 2009, a hearing was held at the Dorchester County Courthouse before the Honorable R. Markley Dennis to address pretrial motions. (App.p.1-p.208). A month later, on January 21, 2010, Judge Dennis presided over a pretrial status conference to address a potential agreement that had been negotiated between the parties titled: "Contractual Consent Order to Waive Rights to Jury Trial." Petitioner was present with his attorneys, while Assistant Solicitors Jennings and Hilton appeared on behalf of the State. (App.p.209-p.210).

On March 8, 2010, when the case was called for trial, Judge Dennis confirmed with Petitioner that it was still his desire to go forward pursuant to the terms of the written waiver agreement as set forth in the Order. (App.p.248-p.249). On March 8-9, 2010, Petitioner proceeded to a bench trial before Judge Dennis. At the conclusion of trial, Judge Dennis found Petitioner guilty as charged and sentenced him to three concurrent terms of life imprisonment without the possibility of parole. (App.p.239-p.517; p.795-p.803).

On March 24, 2010, Petitioner attempted to file a notice of appeal (App.p.518-p.519); however, on April 22, 2010, it was dismissed due to Petitioner's failure to provide the court with a proof of service showing it was timely served on opposing counsel. (App.p.520). Petitioner submitted subsequent letters that were construed by the Court as a request to rehear the order of

dismissal, but by Order filed July 15, 2010, that request was denied. (App.p.521-p.525). The Remittitur was sent to the lower court on August 25, 2010. (App.p.526).

On January 6, 2011, Petitioner filed an application for post-conviction relief (PCR) (App.p.527-p.540), and on May 4, 2011, the State filed a return. (App.p.533-p.537). On May 17, 2012, the State filed a motion to dismiss the PCR application on grounds it violated the terms of a bargained-for agreement between the parties (App.p.538-p.540), and on May 22, 2012, the motion proceeded to a hearing in Orangeburg County before the Honorable DeAndrea G. Benjamin. Petitioner was present and was represented by Jessica Cassick, and the State was represented by Assistant Deputy Attorney General David Spencer. At the conclusion of the hearing, Judge Benjamin granted the State's motion to dismiss. (App.p.541-p.553). In an Order filed August 20, 2012, Judge Benjamin dismissed Petitioner's first PCR application with prejudice, finding Petitioner was precluded from seeking relief pursuant to the bargained for agreement between himself and the State. (App.p.554-p.557). On August 28, 2012, Petitioner filed a motion to reconsider, on August 30, 2012, the State filed a return, and in an Order dated September 19, 2012, and filed October 2, 2012, Judge Benjamin denied that motion. (App.p.558-p.565).

On October 11, 2012, Petitioner filed a notice of appeal with this Court challenging the dismissal of his PCR. (App.p.565-p.566). On July 5, 2013, he filed a petition for a writ of certiorari (App.p.567-p.585) and on November 18, 2013, the State filed a return. (App.p.586-p.595). By order dated September 11, 2014, this Court granted the petition and ordered further briefing. (App.p.596). The parties filed briefs arguing their respective positions (App.p.597-636) and in a published opinion filed June 17, 2015, this Court held the PCR court erred in failing to allow Petitioner to present evidence that his waiver of any right to further judicial

review, including direct appeal, PCR, or habeas proceedings was entered into upon the advice of constitutionally ineffective trial counsel. This Court remanded the matter to the PCR court “for an evidentiary hearing on the narrow issue of whether [Petitioner] received ineffective assistance of counsel in being advised to enter into the Agreement.” (App.p.637-p.642); *Sanders v. State*, 412 S.C. 611, 773 S.E.2d 580 (2015). The Remittitur was issued on July 6, 2015. (App.p.643).

On July 9, 2018, an evidentiary hearing was held in Dorchester County before the Honorable Robin B. Stillwell. Petitioner was present and was represented by Leslie T. Sarji, and the State was represented by Assistant Attorney General Christian Saville. (App.p.644-p.683). In an order dated October 1, 2018, and filed October 17, 2018, Judge Stillwell found that: “Applicant received ineffective assistance of counsel in being advised to enter into the agreement waiving his right to collateral review of his conviction.” (App.p.684). He held: “the ‘Contractual Consent Order to Waive Rights to Jury Trial’ wherein Applicant waived his right to collateral review of his conviction, including his right to seek post-conviction relief, is invalid,” and granted Petitioner an evidentiary hearing on the merits of his PCR. (App.p.689).

On July 9, 2018, Ms. Sarji filed an amended application for PCR on Petitioner’s behalf raising several allegations of ineffective assistance of counsel. (App.p.690-p.691). On May 17, 2021, an evidentiary hearing was held in Orangeburg County before the Honorable Kristi F. Curtis. Petitioner was present and was again represented by Ms. Sarji, and Assistant Attorney General Benjamin H. Limbaugh represented the State. (App.p.692-p.771). In an order dated September 1, 2023, and filed September 7, 2023, Judge Curtis granted Petitioner a belated direct appeal but denied relief on the remaining allegations. (App.p.772-p.794). On March 8, 2024, a petition for a writ of certiorari was submitted on Petitioner’s behalf by

Appellate Defender Laua M. Caudy of the South Carolina Commission of Indigent Defense.

This Return to Petition for a Writ of Certiorari now follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the appellate court. *Ervin v. State*, 438 S.C. 559, 565, 885 S.E.2d 387, 390 (2023) (citing *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018)); *Upson v. State*, 442 S.C. 359, 365, 897 S.E.2d 564, 568 (Ct. App. 2024). The appellate court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value in the record to support them. *Ervin* at 356, 885 S.E.2d at 390; *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); *Upson* at 366-67, 897 S.E.2d at 568. Questions of law are reviewed *de novo*, and the appellate court will reverse the PCR court's decision when it is controlled by an error of law. *Ervin* at 356, 885 S.E.2d at 390; *Bowman v. State*, 422 S.C. 19, 32, 809 S.E.2d 232, 239 (2018).

ARGUMENT

I.

There is evidence in the record to support the PCR court's determination that Petitioner did not knowingly, voluntarily, or intelligently waive his right to a direct appeal, and accordingly, the State does not contest the grant of belated appellate review of his direct appeal issues pursuant to *White v. State*.

Petitioner argues the PCR judge correctly granted him a belated direct appeal pursuant to *White v. State*. (Pet.p.10-p.11). At the evidentiary hearing, Petitioner acknowledged the contractual consent order removed the death penalty from consideration as intended; however, he also claimed he only agreed to sign it because trial counsel told him the waiver was

unenforceable. Petitioner testified Mr. Young said that even if he signed the waiver he would still be able to appeal any conviction that resulted. He testified he wanted an appeal. (App.p.704-p.706). Judge Curtis found trial counsel was ineffective for advising Petitioner to waive his right to appeal any trial errors where the trial had not yet occurred. She distinguished such a waiver from a waiver of appellate rights when the defendant was entering a guilty plea and held the waiver of appellate rights prior to a trial is unenforceable as a matter of law. (App.p.778-p.779).

Respondent does not challenge the PCR court's grant of *White* relief in this case. "Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal." *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (internal citations omitted). "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)." *Turner v. State*, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (internal citation omitted). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." *Simuel*, 390 S.C. at 271, 701 S.E.2d at 740 (citing *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (internal citation omitted). Here, there was evidence in the record to support the PRC court's finding that there was insufficient evidence Petitioner made a knowing and intelligent decision not to pursue a direct appeal; therefore, the State does not challenge the grant of a belated direct appeal pursuant to *White v. State*.

II.

The PCR court properly concluded Petitioner knowingly and intelligently waived his right to a jury trial under the particular facts and circumstances of the case and therefore received effective assistance of counsel because: (1) Petitioner's waiver was established by a complete record consisting of a thorough colloquy between the court and Petitioner as well as a written contractual waiver signed by Petitioner, trial counsel, and the judge; (2) there was no inherent conflict of interest in trial counsel advising Petitioner regarding the waiver; (3) the choice to proceed with a bench trial before a judge who a month earlier had been poised to accept Petitioner's guilty plea was part of a valid defense strategy; and (4) Petitioner failed to carry his burden of proving prejudice.

Petitioner argues the PCR court erred by finding he knowingly and voluntarily waived his right to a jury trial because: (1) trial counsel advised him the waiver agreement was unenforceable, (2) trial counsel had a nonwaivable conflict of interest, and (3) Petitioner was prejudiced where the trial judge who presided over his bench trial was previously informed Petitioner intended to plead guilty, and where the evidence against him was wholly circumstantial and not substantial. (Pet.p.12). The State disagrees and submits the PCR court properly concluded Petitioner knowingly and intelligently waived his right to a jury trial under the particular facts and circumstances of the case and that Petitioner therefore received effective assistance of counsel.

First, Petitioner's waiver was established by a complete record consisting of a thorough colloquy between the court and Petitioner as well as a written contractual waiver signed by Petitioner, his trial attorneys, and the judge. Second, there was no conflict of interest in trial counsel advising Petitioner regarding his waiver of the right to a jury trial, even if such a conflict arguably existed for waiving his right to a direct appeal and/or his right to collateral review of the conviction. Third, trial counsel articulated a reasonable and valid defense strategy in advising Petitioner to proceed with a bench trial before a judge who was aware of his prior

consideration of entering a guilty plea; therefore, trial counsel was not ineffective. Finally, Petitioner failed to carry his burden of proving prejudice due to having a bench trial rather than a trial by jury; therefore, the PCR court properly denied relief.

PCR Burden of Proof

Where the PCR application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.”

Strickland v. Washington, 466 U.S. 668, 686 (1984). In order to prove counsel was ineffective, an applicant must show counsel’s performance was deficient and the applicant was prejudiced by the deficient performance. *Id.* at 687. Counsel’s performance will be deemed deficient if it falls “outside the wide range of professionally competent assistance.” *Id.* The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight. *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). The applicant is prejudiced by the deficient performance if “there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Butler* at 442, 334 S.E.2d at 814 (quoting *Strickland* at 690). The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial

scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, as it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland* at 689; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "When counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Waiver of the Right to a Jury Trial

A defendant's waiver of the right to a jury trial must be knowing, voluntary, and intelligent. *Moore v. State*, 399 S.C. 641, 732 S.E.2d 871, 873 (2012) (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 colloquy between the court and defendant, between the court and defendant's counsel, or both. *Id.*; *Roddy v. State*, 339 S.C. 29, 528 S.E.2d 418 (2000). 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.*; *Spoone v. State*, 379 S.C. 138, 143, 665 S.E.2d 605, 607 (2008). 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 ____, 732 S.E.2d at 877.

Relevant Facts

At the January 21, 2010 status conference before Judge Dennis, Assistant Solicitor Jennings set the stage by describing a January 8, 2010, meeting at the courthouse during which Petitioner and his attorneys reviewed all of the State's evidence. He said the premise of that meeting was an understanding that, in exchange for taking the death penalty off the table, Petitioner intended to plead guilty to three counts of murder and a sentence of life without parole. When they were unable to execute the plea, however, the parties began discussing the possibility of a bench trial. Mr. Jennings said the State was prepared to consent to bench trial with a sentence exposure of thirty (30) years to life (rather than death) in exchange for Petitioner signing a contractual waiver of his rights to a jury trial as well as any appeal or PCR from that trial. (App.p.211-p.213). Mr. Young and Mr. Leinedecker told Judge Dennis they had discussed the waiver agreement with Petitioner and answered all of his questions, and that Petitioner wanted to accept the State's offer. (App.p.213-p.214). Judge Dennis proceeded to advise Petitioner about his right to remain silent, explaining that Petitioner had no obligation to say anything at all or to answer his questions, but that before the court could accept the waiver agreement, he would need to be convinced it was fair and valid in regard to both sides. Judge Dennis asked Petitioner if he was willing to give up his right to remain silent and to answer his questions, and Petitioner said he was. (App.p.215-p.216).

Judge Dennis then placed Petitioner under oath and thoroughly questioned him to ensure he was not under the influence of alcohol, drugs, or medications; he was not suffering from any emotional or mental conditions; he had sufficient time to discuss the agreement with his lawyers and his family; and that he wanted to accept the agreement. (App.p.216-p.218). Judge Dennis next questioned Petitioner about his choice to have a bench trial rather than a jury trial, and about

each right he was waiving under the terms of the agreement. Petitioner testified he understood he was **not** giving up his right to require the State to prove his guilt beyond a reasonable doubt because he was having a bench trial. Judge Dennis advised Petitioner he retained his right to remain silent during the trial and that court would not hold this against him in any way if he exercised that right. Petitioner testified he understood he was giving up his right to a jury trial, his right to a direct appeal where he would have been able to claim judicial error, and his right to PCR where he would have been able to claim ineffective assistance of counsel. He testified he had discussed each of these rights with his attorneys, that he understood these rights, and that he wanted to waive all of them to avoid the possibility of the death penalty. (App.p.218-p.224). Petitioner testified he was totally satisfied with his attorneys' representation, that he had made a conscious decision to reject the earlier plea agreement, and that he felt comfortable going forward with the bench trial. (App.p.224-p.227).

The trial court found Petitioner had demonstrated through his responses, facial expressions, and body language that he was aware of what was going on, fully appreciated the extent and depth of the agreement, and that he was making it freely and voluntarily without any threat or coercion. The court further found Petitioner had had the benefit of very competent counsel with whom he was totally satisfied, and that they had zealously represented him in negotiating the agreement and preparing for trial. Finally, the court found the agreement itself was fair and noted Petitioner would only be convicted at the bench trial if the State was able to convince him beyond a reasonable doubt of each element of the crimes charged. (App.p.227-p.229). The three-page consent order was signed by Petitioner, Mr. Young, Mr. Leiendecker, Solicitor David M. Pascoe, Jr., Assistant Solicitor Jennings, and Judge Dennis. (App.p.236-p.238). On March 8, 2010, when the case was called for trial, Judge Dennis again questioned

Petitioner and confirmed it was still his desire to go forward pursuant to the terms of the waiver agreement as set forth in the Order. (App.p.248-p.249).

At the PCR hearing, Mr. Young and Mr. Leindecker both testified that one of their main objectives was to remove the death penalty as a sentencing option. (App.p.733-p.734; 756-p.757). Mr. Young first described what he recalled about the facts of the case and the State's evidence. (App.p.727-p.730). He then provided additional details that had not been previously revealed regarding the plea deal that fell through shortly before trial. Mr. Young explained that Petitioner was never particularly excited about taking the State's offer but had agreed to the plea in order to avoid the death penalty. However, as he was signing the third sentencing sheet prior to entering the plea, Petitioner balked because he did not want to plead guilty in front of his family and son. At that point, Mr. Young told Petitioner they might be able to get the State to agree to a bench trial where he would not have to say he was guilty. He told Petitioner it was a circumstantial evidence case and that Judge Dennis would give him "as good of a trial as you're going to get on a circumstantial evidence case." They ended up being presented with the contractual agreement for a bench trial. (App.p.730-p.731). Mr. Young testified he told Petitioner he did not think the PCR waiver portion of the agreement was enforceable, "but we're going to get you as good a trial as you'll ever get with Judge Dennis." At that point, Petitioner agreed and signed the waiver. (App.p.732).

Mr. Young testified he felt that entering into the waiver was the best option to take the death penalty off the table. He further testified as to why he felt a bench trial was in Petitioner's best interest in this case. Mr. Young testified that the difficulty in selecting a jury in a death penalty case is that the court has to exclude those potential jurors who are opposed to the death penalty. The remaining jury panel then consists of those people who are willing

supporters of the death penalty. Mr. Young testified that in his experience, those jurors who are opposed to the death penalty are also the ones who tend to be more critical of police searches and more critical of police credibility. By losing that sector of the population, "it makes juries in capital cases much more likely to convict, even in innocent cases." Mr. Young noted he had been practicing in front of Judge Dennis for a number of years and had seen him handle a number of circumstantial evidence cases, cases where he had seen the judge direct verdicts of acquittal for murder. (App.p.733-p.734).

Mr. Young further testified that he thought a bench trial was a better option for Petitioner than a jury trial because of the relative weakness of the DNA evidence in Petitioner's case. In Petitioner's case, the DNA report indicated there was a 1 in 260 chance that the DNA belonged to someone other than Petitioner. Mr. Young testified that the DNA evidence in most criminal cases is much more statistically significant. He felt Judge Dennis, as a very experienced trial judge, would recognize how weak the DNA evidence was in this case, whereas a jury might not appreciate that weakness. (App.p.735-p.736; p.761-p.762).

Mr. Young also felt Judge Dennis would be a particularly good choice to hear the bench trial in Petitioner's case, which was based largely on circumstantial evidence. He felt Judge Dennis would be willing to hold the State to their high evidentiary standard. Given his prior experience with Judge Dennis, the horrific facts of the case, the weakness of the DNA evidence, and the circumstantial nature of the evidence, Mr. Young felt Petitioner's chances of acquittal were much better with a bench trial in front of Judge Dennis than with a jury trial. (App.p.733; p.735-p.736; p.739; p.753-p.755). Mr. Leiendecker agreed, testifying the "major play" was that in trying the case to the judge rather than a jury, they took death off the table, but part of the

conversation also focused on the benefits of a bench trial where it was a totally circumstantial case with no eyewitnesses and relatively weak DNA evidence. (App.p.756-p.757).

Discussion

Petitioner does not directly challenge the thoroughness of the colloquy covering his waiver and instead argues that despite that colloquy, the waiver was invalid because it was based on trial counsel's advice that the waiver, as-a-whole, was not enforceable. In support of this claim and as he argued to the PCR court, Petitioner suggests that because the waiver of his right to collateral review of the conviction was declared invalid by Judge Stillwell at the earlier PCR hearing, the current PCR court should have also invalidated the waiver of his right to a jury trial as the result of ineffective assistance of counsel. (Pet.p.16-p.17). He places great weight upon the October 1, 2018 Order issued by Judge Stillwell after the July 9, 2018, PCR hearing, claiming: (1) "Judge Stillwell 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" (Pet.p.6); and (2) "Judge Stillwell found trial counsel was ineffective for advising Petitioner to enter into the 'contractual consent order' when counsel had an inherent conflict of interest." (Pet.p.17). Petitioner also focuses on the lack of a "severability provision" in the waiver agreement arguing that "without a 'severability provision' or some other record showing [he] understood that if the waiver of his right to appellate and PCR, and habeas review were found to be invalid, that the waiver of his right to a jury trial would still be valid, the waiver of [his] right to a jury trial cannot be said to be knowing and voluntary." (Pet.p.17-p.18). The State disagrees and submits these arguments misconstrue the evidence presented to Judge Curtis regarding trial counsel's advice, the reach

of Judge Stillwell's ruling in the context of the entire record, and the relevance of the lack of a severability clause.

Validity of Waiver

First, the evidence in the record shows trial counsel did not specifically advise Petitioner that his waiver of the *right to a jury trial* was unenforceable. Furthermore, Petitioner's detailed colloquy with the trial court, where he never once told Judge Dennis about this alleged advice, belies his claims to the contrary. Petitioner claims that before he agreed to waive his right to a jury trial, Mr. Young told him such a waiver was unenforceable. Although Mr. Young seemed to endorse the idea that he told Petitioner the entire waiver agreement was not enforceable during the July 9, 2018 PCR hearing (App.p.669-p.670), he later specifically rejected that idea at the May 17, 2021 hearing before Judge Curtis. He testified that when he told Petitioner he believed the waiver was unenforceable he was referring to the portion of that waiver covering PCR. He also testified he had no recollection of telling Petitioner he would still be able to pursue a direct appeal of his case. (App.p.740, line 7-p.741, line 3). Similarly, Mr. Leindecker testified the discussions with Petitioner centered around his and Mr. Young's belief the PCR provision of the waiver would not be enforceable. He testified he did not recall anybody ever discussing that this would make the entire agreement unenforceable. (App.p.758, line 11-p.759, line 7). Thus, the only direct testimonial evidence heard by Judge Curtis supports the conclusion that Petitioner's waiver of his right to a jury trial was valid. (App.p.704-p.705).

In addition, and returning to the proceeding before Judge Stillwell, the Order is captioned as an order "Invalidating Waiver of Right to Collateral Review." On the first page

of that order Judge Stillwell found that: “Applicant received ineffective assistance of counsel in being advised to enter into the agreement waiving his right to collateral review of his conviction.” (App.p.684). At the end of the order, in conclusion, Judge Stillwell held: “the ‘Contractual Consent Order to Waive Rights to Jury Trial’ wherein Applicant waived his right to collateral review of his conviction, including his right to seek post-conviction relief, is invalid,” and granted Petitioner an evidentiary hearing on the merits of his PCR claims. (App.p.689). Thus, the order is specifically limited to **collateral review** and by its own terms did not reach any conclusions about the validity of Petitioner’s specific and distinct waiver of the right to a jury trial. Thus, Judge Stillwell’s prior decision did not control or limit Judge Curtis’ authority to evaluate the validity of Petitioner’s jury trial waiver. Judge Curtis’ evaluation of that waiver was thorough, and her conclusions are supported by substantial evidence in the record.

Further, the lack of a severability clause in the agreement itself is of no moment. Even though trial counsel testified he thought it “was a possibility” the lack of a severability clause could invalidate the whole agreement if the PCR waiver was deemed invalid (App.p.744, line 7-p.745, line 3), he offered no support for that concern and our courts have generally approved the concept of “severability” in criminal matters even when the document in question does not contain a severability clause. *See State v. Thompson*, 363 S.C. 192, 201-04, 609 S.E.2d 556, 561-63 (Ct. App. 2005) (finding the invalid portions of a search warrant relating to the search of defendant’s vehicle and luggage were severable from the authorization relating to the search of his person). Likewise, our courts have applied “severability” in the civil context, specifically in regard to the valid waiver of the right to a jury trial. *See Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002) (holding that an illegal clause in a lease agreement

purporting to waive the right to a compulsory counterclaim was severable from a valid clause waiving the right to a jury trial), *abrogated by Deutsche Bank Nat'l Tr. Co. as Tr. for NovaStar Mortg. Funding Tr., Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1 v. Est. of Houck*, 440 S.C. 409, 892 S.E.2d 280 (2023). Similarly here, the lack of severability clause does not render the entire agreement invalid simply because the waiver of collateral review was deemed invalid. In any event, trial counsel's concern with severability seemed to stem from wanting to ensure Petitioner's waiver of the jury trial withstood any other infirmities precisely so Petitioner would not face a retrial with the possibility of the death penalty if other portions of the waiver were deemed invalid. That concern does not translate into invalidation of the part of the waiver counsel actively sought and hoped to enforce as part of his valid trial strategy.

Here, Judge Curtis properly found that Petitioner knowingly and voluntarily waived his right to a trial by jury, which was established by a complete record consisting of a thorough colloquy between the court and Petitioner as well as a written contractual waiver signed by Petitioner, his trial attorneys, and the judge. She also properly found that trial counsel articulated valid, strategic reasons for advising Petitioner to waive his right to a jury trial. While Petitioner was not ultimately acquitted, the agreement accomplished the goal of removing the death penalty from consideration. Moreover, the standard for establishing ineffective assistance of counsel is independent from the trial outcome. What matters is whether counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. The PCR court appropriately concluded that trial counsel exercised reasonable professional judgment.

As noted by the PCR court, because Petitioner was given a full PCR hearing and is now getting a belated direct appeal, he actually has gotten a better bargain than he initially negotiated. Instead of waiving his right to a jury trial, his right to a direct appeal, and his right to collateral review of the conviction, he now in effect has only waived his right to a jury trial in exchange for the same concession from the State - the exact outcome trial counsel predicted when he craftily advised Petitioner to sign the waiver in the first place. With the help of counsel, Petitioner positioned himself to be one of those rare individuals who gets to “have his cake and eat it too.”

Conflict of Interest

Contrary to Petitioner’s assertion, there was no inherent conflict of interest in trial counsel advising Petitioner regarding his waiver of the right to a jury trial, even if such a conflict arguably existed for waiving his right to a direct appeal and/or his right to collateral review of the conviction. This is because unlike collateral review, whether Petitioner’s trial happened before a jury or the judge is wholly untethered from any concerns that the trial judge and trial attorneys would be insulated from respective claims of trial error or ineffective assistance of counsel by virtue of that waiver. As trial counsel himself recognized, any concerns with possible conflicts of interest or unenforceability of waiving collateral review simply do not carry over to a waiver of a jury trial. Mr. Young testified: “I think the decision about a jury trial versus a bench trial is generally a strategy one.” (App.p.732, line 12-p.733, line 4). Indeed, it is incongruous to equate the waiver of the right for judicial review of future performance (waiving direct appeal, PCR, and habeas review) with the waiver of a current criminal proceeding that is going to occur in the present (waiving a jury trial and electing a bench trial). The PCR court properly rejected this claim.

Prejudice from Presiding Judge

In addition to the overall claim that his waiver of the right to a jury trial should be encompassed in the finding that his waiver of collateral review was invalid, Petitioner also specifically argues that he was prejudiced at trial because the bench trial was conducted by the same judge who stood ready to accept his guilty plea. At the PCR hearing, Petitioner testified it was never his intention to plead guilty. (App.p.719).

It is clear from the record that there were unsuccessful plea negotiations prior to trial between the State and Petitioner. Judge Dennis was aware of the fact that plea negotiations took place in this case, as they do in the vast majority of criminal cases prior to trial. Judge Dennis also knew that Petitioner ultimately refused to accept the plea, even though he was facing the death penalty. The PCR court disagreed that the trial judge would have assumed, when Petitioner entertained plea negotiations, it was somehow an implied admission of his guilt. One could just as easily presume that the fact Petitioner refused to plead guilty, even when doing so would remove the threat of the death penalty, was because he was in fact innocent of the crime. As the PCR court noted, there were downsides to agreeing to a bench trial instead of a jury trial. However, those were well known to Petitioner and to his attorneys at the time he voluntarily entered into the waiver in exchange for the State's agreement to withdraw the death penalty. The PCR court found trial counsel exercised reasonable professional judgment in advising Petitioner to waive his right to a jury trial in exchange for the State withdrawing the death penalty, and denied relief on this ground. This finding was fully supported by evidence in the record.

In support of his claim that he was prejudiced because Judge Dennis presided over his trial, Petitioner argues the evidence against him was wholly circumstantial and far from

substantial. Yet here, there was significant and substantial circumstantial evidence that Petitioner was the person who killed the three victims with malice aforethought by intentionally shooting each of them to death with a .40 caliber handgun. Two residents from the apartment complex where the murders occurred heard multiple gunshots and a scream around 2:30 a.m. on July 10, 2007, shortly before the bodies of the first two victims were discovered on the floor of the apartment by the police. (App.p.250-p.258). The pathologist determined that all three victims died from perforating close-range gunshot wounds. Diane Grant was shot once, Jatavius Devore was shot twice, and Deanne Devore, who was found partially nude outside the apartment a short distance away from the other two victims, was shot four times. (App.p.440-p.456). The State's theory was that Petitioner was sexually assaulting Deanne when her brother and mother either walked in on the assault or woke up to find Petitioner in the apartment assaulting Deanna. The State theorized that Petitioner first shot and killed Diane and Jatavius, but that Deanne was able to flee from the scene before Petitioner chased her down and killed her behind the apartment building. (App.p.487-p.488).

Taken in the light most favorable to the State, the following reasonable inferences flowed from the evidence introduced at trial. At the time of the murders, Petitioner had a .40 caliber handgun and .40 caliber ammunition he obtained from his friend's truck. (App.p.418-p.429). Petitioner fired a .40 caliber handgun at a bouncer from a local bar three months prior to the murders. (App.p.407-p.415; p.418-p.419). The exact same .40 caliber handgun Petitioner fired at the bouncer was later used to murder the three victims. (App.p.382-p.394). Petitioner made almost constant phone calls from his cell phone both before and immediately after the murders, but he made no calls for the eighteen minutes leading up to the murders, and then called his girlfriend right after the last shots were fired, from a location at or near the

scene of the crime. (App.p.458-p.470; p.478-p.480). Petitioner ejaculated in fifteen-year-old Deanne Devore's mouth shortly before she was murdered (App.p.368-p. 375), and then after his arrest he showed concern about possible forensic evidence which might tie him to the crimes when he asked his friend if the friend knew anything about DNA. (App.p.418-p.429). Petitioner left shoeprints from his Nike Air Force Ones at the murder scene. (App.p.352-p.364). Finally, Petitioner made statements to the police indicating he had knowledge of what happened at the murder scene and the location of the gun used in the murders. (App.p.329-p.333). Based on the logical and reasonable inferences to be drawn from this evidence, Petitioner's guilt for the murders was sufficient for the trial court to convict Petitioner of three counts of murder. The strength of this evidence supports the PCR court's conclusion that Petitioner suffered no prejudice from Judge Dennis conducting his bench trial. Certiorari should be denied.

CONCLUSION

Based on the foregoing reasons, this Court should deny the petition for a writ of certiorari and let stand the decision of the PCR court finding Petitioner knowing and voluntarily waived his right to a jury trial. If the Court grants the petition, the State hereby requests permission under the rules to fully brief the issues contained herein.

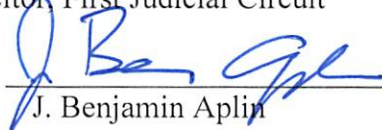
Respectfully submitted,

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