STATE OF SOUTH CAROLINA

IN THE SUPREME COURT



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Certiorari to Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

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ANTONIO BARNES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-210229

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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# INDEX

## ISSUE PRESENTED

Whether a juvenile defendant with an IQ of 73 who pleads guilty may validly waive the right to contest in a post-conviction proceeding his attorneys' performance during a family court transfer hearing determining his competency to stand trial?

## STATEMENT

On April 15, 2009, Antonio Barnes ("Barnes") was indicted for murder by a Richland County grand jury. App. 198. Barnes was fifteen years old at the time of the incident. App. 132, ll. 5 – 7. In April 2009, the family court transferred jurisdiction to General Sessions court. App. 141, ll. 6 – 16. On November 12, 2009, Barnes pled guilty before the Honorable L. Casey Manning. App. 1. Barnes' codefendant, Devion Jenkins ("Jenkins"), pled guilty at the same proceeding. App. 1. Barnes and Jenkins pled guilty to voluntary manslaughter with a negotiated sentencing range of fifteen to twenty-five years. App. 3, ll. 17 – 25. Eden Hendrick and Luck Campbell represented the State. App. 1. Robert W. Mills represented Barnes. App. 1. James H. May and Joanna K. Delany represented the codefendant. App. 1. Judge Manning deferred sentencing. App. 79, ll. 7 – 11. On January 12, 2009, Judge Manning pronounced sentence. App. 81. He sentenced Barnes to twenty-two years' imprisonment. App. 84, ll. 6 – 12. A motion to reconsider the sentence was denied by Judge Manning on February 1, 2010. App. 125. Barnes did not appeal.

On October 20, 2010, Barnes filed a PCR application. App. 86. Barnes' attorney subsequently filed a trial brief. App. 97. On January 11, 2012, a hearing was held before the Honorable J. Ernest Kinard, Jr. App. 127. David E. Belding represented Barnes. App. 127. Brian T. Petrano represented the State. App. 127. On March 12, 2012, Judge Kinard denied Barnes' application. App. 183. This petition follows.

## ARGUMENT

A juvenile defendant with an IQ of 73 who pleads guilty cannot validly waive the right to contest in a post-conviction proceeding his attorneys' performance during a family court transfer hearing determining his competency to stand trial.[1]

**Relevant Facts**

Plea counsel represented Barnes at the family court transfer hearing. App. 163, ll. 5 – 7. At the PCR hearing, plea counsel testified that he knew "we had a pre-waiver evaluation done." App. 163, ll. 17 – 23. Plea counsel did not remember whether psychological testing indicated that Barnes' IQ was 73. App. 38, ll. 2 – 6. He did recall that Barnes was found competent to stand trial. App. 164, ll. 7 – 10. Plea counsel testified that at the time, he felt Barnes was competent to stand trial. App. 166, l. 24 – 167, l. 4. He also claimed that this was based in part on "the evaluation that was done earlier." App. 170, ll. 16 – 171, l. 6.

After testimony at the PCR hearing concluded, the PCR court heard argument from Barnes' attorney. App. 178, l. 12 – 179, l. 18. PCR counsel began his argument by stating that he thought "the one sort of like an Anders brief issue that I find in this is that I'm disturbed about the voluntariness of the confessions and the statements before the Richland County Sheriff's Department." App. 178, ll. 12 – 17. The PCR judge ruled from the bench. App. 180, ll. 8 – 24. In his ruling, Judge Kinard said that he "sympathize[d]" with Barnes because of his low IQ, youth, and lack of family support, but stated, "I can't help him with any of that." App. 180, ll. 8 – 16. After

[1] At the PCR hearing, petitioner Barnes pursued an allegation that plea counsel was ineffective in advising Barnes to plead guilty because his statements to police were inadmissible and this issue was addressed by the PCR judge in the order of dismissal. In appellate counsel's opinion, this allegation, in the appellate context of this case, is unmeritorious. The issue presented in this Johnson petition was not presented to the PCR judge, but appellate counsel urges this Court to abandon traditional error preservation requirements and reach this issue, especially in light of petitioner's youth and diminished intellectual capacity.

expressing sympathy and even though the issue was not before him, Judge Kinard noted, "He was stipulated to be competent. There's nothing in front of me that shows he was not...." App. 180, l. 17 – 18.

The stipulation to which Judge Kinard referred was filed after Barnes' plea and before his sentencing. App. 123. It is signed by plea counsel and the solicitor. App. 123. This curious document states the following:

> During the plea the Attorney for the State, L. Eden Hendrick, and the Attorney for the Defense, Robert Mills, Esquire, stipulated for the record that the above mentioned Defendant was competent to stand trial. **Although the Defendant did not undergo a specific evaluation to address his competency to stand trial** but he did undergo several psychological and psychosocial evaluations that included Wechsler Intelligence Scale for Children Fourth Edition (WISC-IV) where **it was determined his IQ was 73 in the below average/borderline range. Both parties stipulate to the findings of this IQ test and that this Defendant is competent to stand trial and no further evaluation is needed.** Furthermore, Mr. Mills also supplemented the record with the most recent copy of the above mentioned Defendant's Individualized Education Plan to show his intellectual ability.

App. 123 (emphasis added). From this document, it appears that Barnes' competency was never evaluated by a doctor.

At the time of the incident, Barnes "was reading on a second grade and third grade level." App. 134, ll. 22 – 24. He was in the eighth grade and fifteen years old. App. 135, ll. 2 – 4. App. 132, ll. 5 – 8. When he was interrogated by the police, his mother abandoned him in police custody. App. 132, ll. 14 – 19. Barnes described his mother's conduct during the interrogation: "She came in the office and told me if I wasn't going to cooperate that she was leaving. She kissed me on my cheek and she left." App. 132, l. 22 – 133, l. 1.

After the transfer hearing, Barnes met with plea counsel "about 3 or 4 times" for "30 minutes to 45" each time. App. 142, ll. 7 – 12. They talked about pleading guilty. App. 142, ll. 13 – 17. On the day of his guilty plea, he did not find out until that morning that he was going to court.

App. 149, ll. 3 – 8. He met with plea counsel in the holding cell and again talked about pleading guilty. App. 149, l. 18 – 150, l. 1. Pleading guilty was "all" they discussed. App. 151, ll. 14 – 21. Barnes thought he was going to get a fifteen year sentence. App. 152, ll. 8 – 14.

Barnes did not remember any discussion with plea counsel about his competency to stand trial. App. 153, ll. 2 – 13. Barnes recalled meeting with psychologists. App. 153, ll. 14 – 18. He did not recall the result of these meetings. App. 153, ll. 19 – 20. When asked if he understood the proceedings before Judge Manning, Barnes replied, "I know I was supposed to get sentenced; that was it." App. 153, ll. 21 – 23.

At the plea hearing, Judge Manning asked the attorneys whether Barnes had "been ordered to submit to a mental examination to determine [his] competency to stand trial." App. 5, ll. 9 – 12. Barnes' codefendant's attorney replied, "At the waiver – pre-waiver hearing, they each were evaluated, they each were found competent to stand trial." App. 5, ll. 13 – 15. Barnes' attorney added, "That's correct." App. 5, l. 16. Judge Manning asked for a copy of the evaluation. App. 5, ll. 17 – 20. The solicitor stated that she could not provide a copy "of the pre-evaluation" and cited a concern about confidentiality. App. 5, ll. 21 – 24. She offered to stipulate that both defendants were found competent. App. 5, l. 21 – 6, l. 1. The court told her that he needed the record supplemented with the evaluation. App. 6, ll. 2 – 8. It appears that because no evaluation was done, the solicitor and the defense attorneys filed the stipulation that the defendants were competent after the plea hearing. App. 123.

At the plea hearing, Judge Manning reviewed the plea agreement. App. 24, l. 25 – 25, l. 22. Judge Manning stated, "Along with entering of that guilty plea, you both agree to waive any right to file an appeal or for post-conviction relief from any Family Court proceedings or from this plea." App. 25, ll. 19 – 22. The solicitor corrected Judge Manning and told him the defendants had a right

"to PCR the guilty plea." App. 26, ll. 6 – 11. She agreed with Judge Manning that Barnes had waived the right to appeal or challenge in post-conviction relief the proceedings in family court. App. 26, ll. 6 – 11. Barnes' attorney agreed. App. 26, ll. 12 – 15. After Judge Manning further explained these provisions to the defendants, the solicitor emphasized that the results of the family court proceedings were never going to be subject to any review whatsoever:

> THE COURT: All right. So with that in mind, I'm going to ask the Solicitor or somebody from the Sheriff's office to give me the facts of the case.
>
> MS. HENDRICK: I will, Your Honor. And just to make it clear again for the record, that **they cannot PCR or appeal the Family Court decision.**
>
> THE COURT: The Family Court decision, okay.
>
> MR. MAY: That's correct.
>
> MS. HENDRICK: **They cannot PCR that at all. I just want to make sure that's clear for the record,** that they –
>
> THE COURT: Well, they can't appeal this guilty plea?
>
> MS. HENDRICK: They cannot appeal the guilty plea.
>
> THE COURT: Not this guilty plea but they can file a post conviction relief?
>
> MS. HENDRICK: That's the only – that's the only thing they have not waived.

App. 28, l. 14 – 29, l. 7. The defendants' attorneys agreed. App. 29, ll. 8 – 12.

**Discussion**

Plea counsel's failure to have Barnes evaluated for competency is astonishing considering he had an IQ of 73, was fifteen years old, and reading at only a second grade level. App. 123. Even more troubling is the provision in Barnes' plea agreement in which he purports to abandon all review of this decision or any of the proceedings in family court. Because any waiver of a legal right must be knowing and voluntary, such a provision can never be enforceable when a juvenile's competency is at issue. If a defendant is not competent to stand trial, then logically he could not

make a knowing and voluntary waiver of the right to challenge his attorney's performance in addressing his competency.

A criminal defendant, who has been convicted of, or sentenced for a crime, has a statutory right to seek post-conviction relief of his conviction and sentences. S.C. Code Ann. § 17-27-20(a). "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." Moore v. State, 399 S.C. 641, 732 S.E.2d 871 (2012).

In Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008), this Court held a criminal defendant may waive his right to appellate and post-conviction review as long as the waiver is knowing and voluntary. Recognizing the issue was novel in South Carolina, this Court turned to federal precedent for guidance. First, this Court explained the Fourth Circuit Court of Appeals held a defendant may waive his federal statutory right to appeal just as he may waive his right to counsel and right to a jury trial. Id. at 142, 665 S.E.2d at 607 (quoting United States v. Wessells, 936 F.2d 165, 167 (4th Cir. 1991)). Turning to the issue of collateral review, this Court recognized the Fourth Circuit's holding that there was "'no reason to distinguish the enforceability of a waiver of direct-appeal rights from a waiver of collateral-attack rights' in a plea agreement." Id. (quoting United States v. Lemaster, 403 F.3d 216, 220 (4th Cir. 2005)).

Nevertheless, such waivers are only valid if entered into knowingly and voluntarily by the defendant. Id. This Court adopted the test announced by the Fourth Circuit to determine the validity of a waiver of direct appeal and post-conviction relief rights: the reviewing court examines the particular facts and circumstances surrounding the case, including the background,

experience, conduct of the accused, and whether the issue sought to be appealed falls within the scope of the waiver. Id. at 143, 665 S.E.2d at 607.

Despite a knowing and voluntary waiver, a plea agreement that waives the right to collaterally attack a conviction and sentence is unenforceable with respect to an ineffective assistance of counsel claim that challenges the voluntariness of the plea. United States v. Johnson, 410 F.3d 137, 151 (4th Cir. 2005)("[E]ven if the court engages in a complete plea colloquy, a waiver ... may not be knowing and voluntary if tainted by the advice of constitutionally ineffective trial counsel."); see also, United States v. Attar, 38 F.3d 727, 732 (4th Cir. 1994)(holding "a defendant's agreement to waive appellate review of his sentences is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations"). In Johnson, the Fourth Circuit explained that an appeal waiver pursuant to a plea agreement "cannot be knowing and voluntary when the plea agreement itself is the result of advice outside the range of competence demanded of attorneys in criminal cases." Johnson, 422 F.3d at 151 (internal quotations omitted).

The logic of Spoone and the federal cases applies with even more force when dealing with a defendant who may suffer from a mental disability. If Barnes—who was never evaluated for competency by a psychiatrist—was not competent, then his waivers at the plea hearing could not have been knowing and voluntary. From the scant evidence in this record, it appears that Barnes' attorney was ineffective during the family court transfer hearing. He failed to have his client evaluated for competency, even though he was borderline mentally retarded, read at a second grade level, and a juvenile. Not only did he fail to have his client evaluated, he was complicit in stipulating that Barnes was competent. The State was suspiciously obsessed with emphasizing that Barnes could not challenge his attorney's effectiveness during the transfer

hearing. Despite Judge Manning's request to see the evaluation, none was provided because no evaluation was performed. Under the facts and circumstances of this case, the Court should hold that Barnes' waiver was not voluntary and was unknowing.

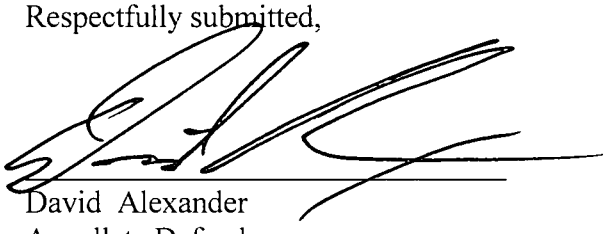
There can be no doubt that ineffective assistance at a transfer hearing can severely prejudice a juvenile. Instead of facing a juvenile sentence, they face the same sentences as adults. Barnes certainly suffered from the family court's decision to transfer the case to General Sessions. He received twenty-two years' imprisonment instead of a juvenile sentence and the chance of rehabilitation that comes with such a sentence.

Judge Kinard expressed his concern about whether the defendant's competency should have been challenged. App. 180, ll. 8 – 24. It is possible this issue was not raised to the PCR judge because of the purported waiver of the right to challenge the family court proceedings. In any event, because this case involves a juvenile and an unenforceable provision in a plea agreement that attempts to avoid any scrutiny of an important court proceeding, the Court should review this issue. But see In Interest of Antonio H., 324 S.C. 120, 477 S.E.2d 713 (1996). If the Court determines a juvenile's waiver of the right to challenge a competency determination in family court is unenforceable, then the appropriate remedy in this case would be to remand to the PCR court for a hearing on this issue.

## CONCLUSION

For the above-stated reasons, petitioner requests a remand to the PCR court to determine whether petitioner received ineffective assistance of counsel during proceedings in family court.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of December, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO RICHLAND COUNTY
J. ERNEST KINARD, JR., CIRCUIT COURT JUDGE

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ANTONIO BARNES,

PETITIONER,

V.

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RESPONDENT

APPELLATE CASE NO. 2012-210229

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Antonio Barnes states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on January 11, 2012. In his opinion seeking certiorari from the order of dismissal is without merit.

3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Antonio Barnes.

Respectfully submitted,

David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of December, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

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ANTONIO BARNES,

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CERTIFICATE OF SERVICE

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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Robert D. Corney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Antonio Barnes, # 338781, at Lee Correctional Institution this 6th day of December, 2013.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of December, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.