

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

DeAndrea G. Benjamin, Circuit Court Judge

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OCT 13 2014

S.C. Supreme Court

ANTHONY SANDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213162

BRIEF OF PETITIONER

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INDEX

INDEXi

TABLE OF AUTHORITIESii

ISSUE PRESENTED1

STATEMENT2

ARGUMENT

 The PCR court erred in summarily dismissing Petitioner’s
 application for post-conviction relief without affording Petitioner
 the opportunity to present evidence that his purported waiver of his
 right to seek collateral relief was tainted by the advice of
 constitutionally ineffective trial counsel.....4

CONCLUSION19

TABLE OF AUTHORITIES

Cases

<u>Brannon v. State</u> , 345 S.C. 437, 548 S.E.2d 866 (2001).....	12
<u>DeRoo v. United States</u> , 223 F.3d 919 (8 th Cir. 2000).....	14
<u>Jones v. United States</u> , 167 F.3d 1142 (7 th Cir. 1999).....	14
<u>Moore v. State</u> , 399 S.C. 641, 732 S.E.2d 871 (2012).....	12
<u>Roddy v. State</u> , 339 S.C. 29, 528 S.E.2d 418 (2000).....	12
<u>Spoone v. State</u> , 379 S.C. 138, 665 S.E.2d 605 (2008)	12, 13, 17
<u>United States v. Attar</u> , 38 F.3d 727 (4 th Cir. 1994).....	13
<u>United States v. Cockerham</u> , 237 F.3d 1179 (10 th Cir. 2001).....	13
<u>United States v. Henderson</u> , 72 F.3d 463 (5 th Cir. 1995).....	14
<u>United States v. Johnson</u> , 410 F.3d 137 (4 th Cir. 2005).....	13
<u>United States, ex rel. U.S. Attorneys, ex rel. Eastern, Western Districts of Kentucky v. Kentucky Bar Association</u> , ___ S.W.3d ___, 2014 WL 4159988 (Ky. August 21, 2014).....	16, 17
<u>United States v. Lemaster</u> , 403 F.3d 216 (4 th Cir. 2005).....	12
<u>United States v. Wessells</u> , 936 F.2d 165 (4 th Cir. 1991).....	12
<u>United States v. White</u> , 307 F.3d 336 (5 th Cir. 2002)	13
<u>Washington v. Lampert</u> , 422 F.3d 864 (9 th Cir. 2005).....	13

Statutes

S.C. Code Ann. § 17-27-20(a)	12
------------------------------------	----

Rules

Rule 1.7 (a), RPC, Rule 407, SCACR	14
Rule 1.8(h)(1), RPC, Rule 407, SCACR	15

Other Authorities

Advisory Comm. of the Supreme Court of Mo., Formal Op. 126 (2009)15

Ala. State Bar Office of Gen. Counsel, Formal Op. 2011-02 (2011)14, 15

Ky. Bar Ass’n, Advisory Op. KBA E-435 (2012).....15

Nat’l Ass’n of Criminal Def. Lawyers Ethics Advisory Comm., Formal Op. 12-02 (2012)15

Ohio Supreme Court Bd. of Comm’rs on Grievances & Discipline, Informal Op. 2001-06 (2001)
.....15, 16

Tigran W. Eldred The Psychology of Conflicts of Interest in Criminal Cases, 58 U. Kan. L. Rev.
43 (2009)..... 17

Vt. Bar Ass’n, Advisory Op. 95-04 (1995).....16

ISSUE PRESENTED

The PCR court erred in summarily dismissing Petitioner's application for post-conviction relief without affording Petitioner the opportunity to present evidence that his purported waiver of his right to seek collateral relief was tainted by the advice of constitutionally ineffective trial counsel.

STATEMENT

On August 30, 2007, the Dorchester County grand jury indicted Petitioner for three counts of murder. App. 359 – 360; App. 362 – 363; App. 365 – 366 (2007-GS0-18-1296, -1297, -1298). The prosecution sought the death penalty against Petitioner. On November 21, 2009, the Honorable R. Markley Dennis, Jr. presided over pretrial hearings. Supp. App. 1. On January 21, 2010, the parties again appeared before Judge Dennis for a status conference. The state was represented by Russell Hilton and Blair Jennings. Petitioner was represented by Mark Leiendecker, Mitchell Farley, Boyd Young, and Laura Wood. App. 1. The purpose of the status conference was to place on the record a “Contractual Consent Order to Waive Rights to a Jury Trial.” App. 2, lines 14 – 20. On March 8, 2010, Petitioner proceeded to a bench trial before Judge Dennis. App. 28. Judge Dennis found Petitioner guilty of all three counts of murder. App. 296, lines 16 – 20. Thereafter, Judge Dennis sentenced Petitioner to life imprisonment. App. 305, lines 6 – 8; App 361, App. 364; App. 367.

Petitioner attempted to file a pro se notice of appeal on March 24, 2010. App. 310 – 311. 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. 312 – 314. Following subsequent communication between the Court and Petitioner, the Court of Appeals finally dismissed the notice of appeal on July 14, 2010. App. 317 – 318. On August 25, 2010, the Court issued remittitur. App. 319.

Petitioner filed an application for post-conviction relief (PCR) on January 6, 2011. App. 320 – 326. On May 4, 2011, the state filed its return. App. 327 – 331. On May 17, 2012, the state signed and served a motion to dismiss Petitioner’s application for PCR. App. 332 – 334. On May 22, 2012, the matter proceeded to a hearing before the Honorable DeAndrea Benjamin.

David Spencer represented the state and Jessica Cassick represented Petitioner. App. 335. On August 20, 2012, Judge Benjamin dismissed Petitioner's application. App. 348 – 351. On August 30, 2012, Petitioner filed a motion for reconsideration. App. 352 – 354. The state, represented by Megan Harrigan, filed its return to Petitioner's motion for reconsideration. Subsequently, Judge Benjamin denied Petitioner's motion for reconsideration. App. 357 – 358.

Petitioner filed a timely notice of appeal. On July 5, 2013, Petitioner filed a petition for writ of certiorari. On November 18, 2013, the state filed its return. On September 11, 2014, Chief Justice Toal, Justice Pleicones, Justice Beatty, and Justice Kittredge granted the petition. Justice Hearn did not participate. In accordance with this Court's order, Petitioner now files this brief.

ARGUMENT

The PCR court erred in summarily dismissing Petitioner's application for post-conviction relief without affording Petitioner the opportunity to present evidence that his purported waiver of his right to seek collateral relief was tainted by the advice of constitutionally ineffective trial counsel.

Relevant facts

Relevant facts from the status conference.

On January 21, 2010, Petitioner, his trial attorneys, and the prosecutors appeared before Judge Dennis to place on the record a "Contractual Consent Order to Waive Rights to a Jury Trial." App. 1; App. 2, lines 14 – 20. The prosecutor and trial counsel explained the terms of the contract as follows: the prosecution would withdraw its notice of intent to seek the death penalty in exchange for Petitioner waiving his right to a jury, a direct appeal, and PCR. App. 3, line 23 – App. 5, line 9. Initially, the court engaged in a colloquy with trial counsel to determine whether they discussed the agreement with Petitioner. App. 5, lines 8 – App. 6, line 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. 7, lines 22 – 25. Petitioner responded affirmatively that he had sufficient time to discuss the hearing and the agreement with his lawyers. App. 9, lines 9 – 12; App. 9, lines 21 – 24. Petitioner informed the court that he wanted to accept the agreement. App. 10, lines 4 – 6. The judge then informed Petitioner that he was giving up his right to have the judge's decision reviewed by the 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 other issues which may be addressed on

appeal. App. 11, lines 17 – App. 12, line 14. Petitioner responded affirmatively when Judge Dennis asked if he wanted to give up his right to appeal. App. 12, lines 9 – 16.

Judge Dennis then explained the portion of the contract dealing with PCR as follows:

The Court: The second part of is kind of a second trial issue, if you will, they can arise in some cases – – not always but it certainly can. It's a very real and substantial right that you have as a person accused of a criminal offense in this state. That is after a person has concluded all their "options," so to speak, of having the matter reviewed, if they believe that their lawyer(s) did something improper or that the judge did something improper, it could be a legal decision issue. They're multiple, but those are statutorily provided. Your lawyers have talked with you about the post-conviction relief statute. Is that correct?

Defendant: Yes, sir.

The Court: And you understand that you're giving up that right, too, kind of a second review, if you will, really. This same process would apply. You'd have a right to a hearing where you'd present evidence, you've had a right to appeal from that hearing or have that matter reviewed by the Court. Do you understand?

Defendant: Yes, sir.

The Court: And you want to give up that right, too, this morning; is that right?

Defendant: Yes, sir.

App. 13, line 17 – App. 14, line 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. 18, lines 18 – App. 19, line 3. Nevertheless, Judge Dennis accepted the agreement and found that Petitioner entered into the agreement freely and voluntarily without any threat or coercion. App. 19, lines 19 – 24.

Relevant facts the bench trial.

At the start of the bench trial on March 2010, 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. 37, lines 18 – 25. The agreement was entered as a Court’s exhibit to the bench trial. App. 38, lines 2 – 15; App. 307-309. Thereafter, the parties proceeded with the bench trial.

The agreement was a total of three pages with the final page primarily consisting of signatures. In the third paragraph of the agreement, Petitioner purported to waived his right to a jury trial and agreed for the case to be resolved by bench trial before Judge Dennis. App. 307.

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. 307 – App. 308. Petitioner, Petitioner’s trial counsel, the prosecutors, and Judge Dennis signed the agreement. App. 309.

Although the facts of the underlying trial are not relevant to the issue presented, a brief recitation of the facts provides some context for consideration of the issue. The prosecutor’s closing argument demonstrates the weak case against Petitioner. As the prosecutor explained, the case was “truly the quintessential who-done-it.” The killings occurred “in the middle of the night with no eyewitnesses.” The state’s case was purely circumstantial. App. 275, lines 15-23.

The investigation began when officers, responding to a 911 call, found two dead bodies in an apartment with the door partially open on July 10, 2007. App. 49, lines 3-9; App. 50, lines 2-25. Officers obtained gel lifts of footwear in the apartment and found several shell casings. The shell casings were .40 caliber ammunition manufactured by Smith and Wesson and Federal. App. 60, lines 8-13; App. 64, line 6 – App. 65, line 8. While working the scene in the apartment, officers found a partially nude female behind an apartment in the same complex. App. 70, line 24 – App. 71, line 9. Officers found several shell casings, which were .40 caliber ammunition manufactured by Federal and Smith and Wesson, near the female’s body as well. App. 74, lines 2-18.

Officers recovered several pairs of Nike Air Force One sneakers from Petitioner’s bedroom, which he shared with his twin brother, and .40 caliber ammunition manufactured by Federal and Smith and Wesson. App. 80, lines 19-23; App. 81, lines 1-6. Officers also seized a safe from the bedroom. App. 81, line 10.

Using the Integrated Ballistics Identification System (IBIS), officers determined the markings on the shell casings matched markings on shell casings from two other shootings, one of which occurred at a local bar. App. 79, lines 1-11. Xavier Walker was a suspect, and had been charged, in the shooting at the bar. Officers interviewed Walker, who, “after some negotiations,” told them that Petitioner had committed one of the shootings despite the fact that several eyewitnesses had identified Walker as the shooter. In light of Walker’s cooperation, the charges against him were dropped. App. 124, lines 12-App. 125, line 22. A bouncer at the bar, Reginald Chavers, identified Petitioner as one of two shooters that night. He explained that on March 4, 2007, he removed Petitioner from the bar. He then observed Petitioner walk across the street and enter a truck. The front and back passenger windows then rolled down. Petitioner,

sitting in the back, fired a single shot from a semi-automatic handgun. Another individual, sitting in the front, fired multiple shots using a Tec-9 submachine gun. App. 196, line 21 – App. 198, line 17; App. 199, line 15 – App. 200, line 8; App. 202, line 15 – App. 203, line 15; App. 203, line 25 – App. 204, line 6; App. 205, line 14 – App. 206, line 13; App. 207, lines 18-25.

The State Law Enforcement Division (SLED) concluded that the gel lifts of the footwear impressions from the scene were consistent with the Nike Air Force One sneakers recovered from Petitioner's room. SLED's analysis merely determined the gel lifts were consistent with all Nike Air Force One sneakers of that type and size. SLED was unable to determine that Petitioner's shoes made the impressions. App. 147, line 4 – App. 148, line 25; App. 155, lines 13-16.

A partial DNA profile developed from oral swabs from the partially nude female found dead behind the apartment complex matched Petitioner's DNA profile. App. 162, lines 14-25. “[T]he probability of randomly selecting an unrelated individual having a DNA profile matching the semen on this item [was] approximately one in two hundred sixty.” In other words, one out of every two hundred and sixty people, who were unrelated to Petitioner, would have DNA matching the profile developed from the oral swab. App. 163, lines 1-8. SLED also developed a DNA profile that was a mixture of two individuals from the female's pajama pants. The major contributor was an unidentified male individual. App. 168, line 24 – App. 169, line 16.

Police obtained the phone records for Walker and Petitioner. Walker's phone was turned off from 10:30 p.m. on the night before the incident until 8:46 a.m. the morning after the incident. App. 251, lines 1-22. Petitioner's phone records showed multiple calls during the early morning hours of July 10, 2007, the day of the deaths. Petitioner's phone received a call at 2:06 a.m. and then someone using the phone placed a call at 2:24 a.m. App. 253, lines 3-9. An

officer testified that the first 911 call regarding the incident began at 2:24 a.m. App. 253, lines 10-14. The call placed at 2:24 a.m. was to Madea Thompson, Petitioner's girlfriend, who lived near the apartment complex. App. 254, lines 3-23.

An officer testified that the closest cell tower to the incident location was tower 6040. App. 258, lines 2-6. He further testified that when Petitioner's phone made calls from 1:38 a.m. until 2:26 a.m., the phone was pinging off Tower 6040. Thereafter, the phone pinged off towers 6139 and 6024. Over objection, the officer testified the changing of the towers would indicate the phone was heading southeast in the general direction of Petitioner's mother's apartment. App. 258, line 7 – App. 259, line 5. Importantly, officers found no numbers connected to the deceased individuals on the records of Petitioner or Walker. App. 259, lines 16-23. The records indicated Walker's phone was using cell tower 6040 prior to it being turned off at 8:46 p.m. App. 261, lines 14-25. The prosecutor presented no evidence connecting Petitioner to the deceased individuals.

In closing argument, the prosecutor argued that Petitioner shot and killed the three deceased individuals during the eighteen minute gap on his phone when no calls were placed or received. The prosecutor argued "it cannot be explained away as a coincidence that his phone – there's no activity while all these actions are going on." App. 277, line 4 – App. 278, line 10. The prosecutor argued the "most condemning piece of evidence" was the safe recovered from Petitioner's room. The safe contained photographs, correspondence, an arrest warrant, and a newspaper article about the deaths. The prosecutor argued the newspaper article was kept as a trophy or a memento of "what he did." App. 279, line 23 – App. 280, line 11.

The only evidence against Petitioner was that his phone made calls using a tower close to the apartment complex close to the time of the incidents, a bouncer identified him as shooting a

weapon at a bar months before the deaths, and the markings on the shell casings from that unrelated shooting matched the markings on the shell casings from the incident location, Petitioner had a girlfriend who lived in the area, 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 with shoe impressions left at the apartment. The prosecution presented no evidence of any relationship between Petitioner and the deceased individuals and no motive for their deaths. The state’s case was purely circumstantial and failed to amount to substantial circumstantial evidence indicating Petitioner’s guilt.

Relevant facts from the PCR hearing.

Although Petitioner specifically alleged in his PCR application that trial counsel “misadvised [him] with misleading statements that render[ed his] signing of the ‘Contractual Consent Order to Waive Right to Jury Trial’ involuntary and not an intelligent decision, especially in light of the prosecutor’s weak case,” Judge Benjamin refused to allow Petitioner to present evidence that his waiver was tainted by the advice of constitutionally ineffective trial counsel. Petitioner argued to the court that he did not enter into the waiver contract knowingly and voluntarily based upon ineffective assistance of trial counsel. App. 340, lines 14 – 17. Petitioner argued that the circumstances surrounding the waiver were questionable as to whether he had knowingly and voluntarily entered into the contract. In support of this argument, Petitioner explained that this waiver occurred during the context of plea negotiations in which Petitioner was presented with three options, one of which was the waiver contract. Petitioner signed the waiver within an hour of seeing it, and after signing the waiver, Petitioner asked his

attorneys if he could still appeal. Petitioner further noted that the caption of the contract was entitled “Waiver of Jury Trial” and made no mention of the additional significant rights that the contract attempted to waive. App. 344, lines 5 – 21. Specifically, Petitioner requested an evidentiary hearing to allow him the opportunity to present testimony that his entering into the contract was tainted by the ineffective assistance of trial counsel. App. 344, lines 22 – 24.

Based upon her reading of the contract and the transcript, Judge Benjamin determined that Judge Dennis covered everything he possibly could in his questioning; therefore, she granted the motion to dismiss. App. 346, lines 11 – 18.

Order of dismissal.

Judge Benjamin dismissed Petitioner’s application for PCR based upon Petitioner’s written waiver of his right to seek post-conviction relief. Judge Benjamin’s decision was based upon the arguments of counsel, the pleadings filed, Petitioner’s records from the Department of Corrections, the Clerk of Court’s records regarding the convictions, the trial transcript, and a transcript of the waiver hearing. App. 348. Despite the fact that Judge Benjamin dismissed the application based upon the waiver, she went on to find that Petitioner had freely and voluntarily waived his rights based upon the express terms of the agreements and the judge’s colloquy with Petitioner concerning the agreement. App. 350.

Petitioner requested the court reconsider its ruling dismissing the application without allowing Petitioner to present any evidence that he did not knowingly, voluntarily, or intelligently waive his right to seek PCR. App. 352. Specifically, Petitioner asked for an opportunity to present his case. App. 354. Judge Benjamin denied the motion. App. 357 – 358.

Discussion

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)(citing Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000)); see also, Brannon v. State, 345 S.C. 437, 548 S.E.2d 866 (2001).

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. Spoone concerned the general enforceability of a plea agreement in which a defendant waived his right to collaterally attack his conviction. Conversely, Spoone did not address whether a waiver of post-conviction relief remedies included waiving the right to challenge ineffective assistance of counsel as it affected the waiver itself.

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); see also Washington v. Lampert, 422 F.3d 864, 871 (9th Cir. 2005)(holding that a plea agreement that waives the right to file a federal habeas petition pursuant to 28 U.S.C. § 2254 is unenforceable with respect to an ineffective assistance of counsel claim that challenges the voluntariness of the waiver); United States v. White, 307 F.3d 336, 339 (5th Cir. 2002)(holding that a waiver of a right to file a petition for federal habeas corpus does not apply to a claim that the waiver was tainted by ineffective assistance of counsel); United States v. Cockerham, 237 F.3d 1179, 1183-1184 (10th Cir. 2001)(holding although a waiver of

collateral review rights is generally enforceable, such a waiver is unenforceable against a claim of ineffective assistance in connection with the negotiation of the waiver itself because it would deprive the defendant the opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation); DeRoo v. United States, 223 F.3d 919 (8th Cir. 2000)(“A defendant’s plea agreement waiver of the right to seek section 2255 post-conviction relief does not waive defendants’ right to argue, pursuant to that section, that the decision to enter into the plea was not knowing and voluntary because it was the result of ineffective assistance of counsel.”); Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999)(“Justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself – the very product of the alleged ineffectiveness.”); United States v. Henderson, 72 F.3d 463, 465 (5th Cir. 1995)(holding that a dismissal of an appeal based on a waiver in the plea agreement was improper where the motion to withdraw the plea incorporated a claim that the defendant’s waiver of appeal was tainted by ineffective assistance of counsel).

Furthermore, in recent years, several state ethics boards and at least one state supreme court have held that waivers of claims of ineffective assistance present a defense attorney with an impermissible conflict of interest. Several ethics boards have applied the equivalent of Model Rule 1.7 of the Rules of Professional Conduct¹ to find that waivers of ineffective assistance of counsel claims present impermissible conflicts of interest that may compromise the quality of representation. See, e.g., Ala. State Bar Office of Gen. Counsel, Formal Op. 2011-02 (2011)

¹ South Carolina prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest. Rule 1.7(a), RPC, Rule 407, SCACR. The Rule further defines a conflict of interest as one where there is a significant risk that the representation will be materially limited by a person interest of the lawyer. Rule 1.7(a)(2), RPC, Rule 407, SCACR.

(finding advising a criminal defendant to enter into an agreement prospectively waiving the client's right to assert an ineffective assistance of counsel claim against that lawyer would violate Alabama's professional conduct rule concerning conflicts of interest); Ky. Bar Ass'n, Advisory Op. KBA E-435 (2012)(stating that a criminal defense lawyer may not advise defendants to accept plea agreements waiving claims of ineffective assistance of counsel because such agreements create a conflict of interest); Advisory Comm. of the Supreme Court of Mo., Formal Op. 126 (2009)(finding that "[i]t is not permissible for defense counsel to advise the defendant regarding waiver of claims of ineffective assistance of counsel by defense counsel" due to the personal conflict of interest created by such waivers); Nat'l Ass'n of Criminal Def. Lawyers Ethics Advisory Comm., Formal Op. 12-02 (2012)(opining that "the rules of professional ethics prohibit a criminal defense lawyer from signing a plea agreement limiting the client's ability to claim ineffective assistance of counsel" based on the inherent conflict of interest. Thus, these ethics boards have concluded that attorneys cannot advise clients to waive future ineffective assistance claims because such would be advice to waive pending claims against them and an inherent conflict of interest.

Other state ethics boards have concluded that such agreements violate the rules that prevent an attorney from prospectively limiting the attorney's liability for malpractice as found in Model Rule 1.8(h) of the Rules of Professional Responsibility.² See Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Informal Op. 2001-06 (2001) (stating "[i]t is unethical ... for a ... criminal defense attorney to advise a defendant to enter a plea agreement that waives

² South Carolina prohibits a lawyer from making an agreement "prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." Rule 1.8(h)(1), RPC, Rule 407, SCACR.

the defendant's appellate or postconviction claims of ineffective assistance of trial counsel" as a violation of the rule prohibiting a lawyer from attempting to exonerate himself from liability for personal malpractice); Vt. Bar Ass'n, Advisory Op. 95-04 (1995)(stating that "[a]n attorney may not recommend that a client enter into a plea agreement in a criminal case that contains provisions waiving post-conviction rights or remedies that would be based on allegations of ineffective assistance of counsel" due to the ethical rules barring a lawyer from limiting his liability to a client for personal malpractice). These boards have recognized that malpractice and collateral review are not the same, they have found significant connections between the two to apply the rule to the waiver of collateral review setting.

Recently, the Supreme Court of Kentucky held that advising a defendant regarding a waiver of ineffective assistance claims in a proffered plea agreement constitutes professional misconduct by defense counsel as it presents an unwaivable conflict of interest. United States, ex rel. U.S. Attorneys, ex rel. Eastern, Western Districts of Kentucky v. Kentucky Bar Association, ___ S.W.3d ___, 2014 WL 4159988 (Ky. August 21, 2014). The court explained that "[w]hen defense counsel is forced, through the introduction of an IAC waiver in a plea agreement, to advise a client on the attorney's own conduct, a personal interest certainly exists." Id. Specifically, the court pointed to the time an IAC claim may consume for the attorney, the tarnish the attorney's reputation may suffer, the possibility of attorney discipline, and even serious financial consequences as examples of the personal interests a lawyer may have in such an agreement. Id. The court pointed to psychological studies that have "uncovered biases that make it extremely difficult for professionals, even those who are acting in good faith and whose only limitation is unconscious, to appreciate the deleterious consequences of conflicts of interest." Id. (quoting Tigran W. Eldred, The Psychology of Conflicts of Interest in Criminal

Cases, 58 U. Kan. L. Rev. 43, 48 (2009)). Due to how the human brain works when considering personal conflicts, “even an attorney acting in good faith, diligently attempting to provide the best advice for a client, is at risk of unconsciously painting an ethical gloss over his or her decision.” Id.

Further, the Kentucky Supreme Court found such agreements violated the state’s Rules of Professional Conduct prohibiting lawyers from making agreements prospectively limiting the lawyer’s liability to a client for malpractice. Id. The court recognized that advising a client to waive an ineffective assistance claim in a plea agreement was an indirect limit on an attorney’s malpractice, but found the limitation existed, nonetheless. Id. The court explained that a defendant’s attempt to prove the lawyer’s malfeasance was the proximate cause of the defendant’s conviction is “extraordinarily difficult, virtually impossible” unless the defendant can get his conviction overturned. Id. The court found it plainly evidence that advising a defendant to waive a potential ineffective assistance claim, which is one method of obtaining relief, limits the potential for malpractice liability. Id. “An attorney should not be allowed to do indirectly that which the attorney is prohibited from doing directly.” Id.

Following federal precedent, as this Court did in Spoone, supra, and in line with the governing Rules of Professional Conduct, this Court should hold that a defendant’s waiver of his post-conviction relief rights may not be voluntary and knowing if tainted by constitutionally ineffective assistance of counsel. A defendant who makes such a claim should be afforded an opportunity to prove his waiver was affected by ineffective assistance of counsel as the trial or guilty plea record is unlikely to provide evidence to support the claim. If the record before the lower court accepting the waiver contained such evidence, a lower court would never accept the waiver. Thus, the PCR court erred in denying Petitioner an opportunity to present evidence that

his waiver to seek PCR was tainted by the ineffective assistance of trial counsel. Petitioner's PCR application clearly explained he signed the "Contractual Consent Order to Waive Rights to Jury Trial" based upon misleading statements and advice falling outside the range of competent performance. Put simply, Petitioner argued his waiver was based upon ineffective assistance of counsel. Petitioner requires an opportunity to present facts to support his contention.

CONCLUSION

Petitioner respectfully requests this Court remand the matter to the Court of Common Pleas for a hearing on Petitioner's claim that his waiver of the right to seek PCR was tainted by ineffective assistance of trial counsel.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 13th day of October, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

DeAndrea G. Benjamin, Circuit Court Judge

ANTHONY SANDERS,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Megan Harrigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Anthony Sanders #339645, at Broad River Correctional Institution, 4460, Broad River Road, Columbia, SC 29210, this 13th day of October, 2014.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of October, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022