STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
DeAndrea G. Benjamin, Circuit Court Judge

Anthony Sanders,

Petitioner,

vs.

State of South Carolina,

Respondent.

BRIEF OF RESPONDENT

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ISSUE PRESENTED

The PCR court did not err in dismissing Petitioner's PCR application where the record firmly established his knowing and voluntary waiver of the right to file a PCR application pursuant to agreement with the prosecution.

STATEMENT OF THE CASE

Petitioner Sanders was indicted for three counts of murder. The prosecution was seeking the death penalty against Sanders. Sanders was represented by a team of four attorneys. On January 21, 2010, a hearing was held before the Honorable R. Markley Dennis, Jr., to place on record a "Contractual Consent Order to Waive Rights to a Jury Trial" and to establish that Sanders was freely and voluntarily entering the agreement, which included Sanders' waiver of: (1) the right to a jury trial, (2) the right to a direct appeal, and (3) the right to seek post-conviction relief (PCR).

Sanders proceeded to a bench trial before Judge Dennis on March 8, 2010, and Judge Dennis found Sanders guilty as charged for all three counts of murder. Judge Dennis sentenced Sanders to life imprisonment.

Sanders first attempted to violate the agreement by filing a *pro se* notice of appeal, but the appeal was dismissed for failure to provide the Court of Appeals a proof of service. Sanders filed an application for post-conviction relief (PCR) on January 6, 2011. The State filed its return on May 4, 2011. On May 17, 2012, the State filed a motion to dismiss the PCR application pursuant to the terms of the prior consent order. The matter was heard before the Honorable DeAndrea Benjamin on May 22, 2012. Judge Benjamin granted the State's motion to dismiss the application by order dated August 20, 2012. Sanders filed a motion for reconsideration on August 30, 2012. Judge Benjamin denied the motion for reconsideration.

Sanders filed a petition for writ of certiorari to this Court. This Court has granted Sanders' petition. The Brief of Respondent follows.

ARGUMENT

The PCR court did not err in dismissing Petitioner's PCR application where the record firmly established his knowing and voluntary waiver of the right to file a post-conviction relief application pursuant to an agreement with the prosecution.

Petitioner Sanders complains that the PCR court erred in dismissing his PCR application pursuant to the agreement he had entered into with the State to waive his right to file a PCR application. However, the PCR court did not err in granting the State's motion as Sanders failed to offer a specific reason why he believed his agreement was not voluntarily entered into.

The agreement is permissible under Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008). In Spoone, this Court found permissible the terms of a plea agreement where Spoone waived the right to file a direct appeal and the right to file a PCR application. In exchange, the State refrained from pursuing the death penalty. Like the instant case, Spoone filed a PCR application and the State moved for dismissal based on the written agreement. This Court declared "such a waiver will be held effective only if it is knowing and voluntary." Id., 379 S.C. at 142, 665 S.E.2d at 607.

This Court then examined the facts and circumstances of Spoone's case as follows:

> Looking at the particular facts and circumstances of the instant case, including: (1) the background, experience and conduct of the accused, (2) the text of the plea agreement, and (3) the transcript of the plea hearing, we find petitioner's waiver was voluntarily, knowingly, and intelligently made. Although petitioner only has a ninth grade education, the text of the written plea agreement was straightforward. Furthermore, the plea colloquy shows that the trial court specifically asked petitioner about the

> waiver both in the language of the plea agreement, as well as in plain language. Petitioner was represented by two attorneys at the trial level. Both lawyers attended the plea hearing and both signed the written plea agreement, along with petitioner himself.

Id., 379 S.C. at 143-44, 665 S.E.2d at 608.

In the instant case, Judge Dennis engaged in an extensive colloquy with Sanders and his attorneys concerning the terms of the agreement to ensure Sanders understood the terms of the agreement and that he wanted to enter into the agreement.

At the outset of the hearing, Assistant Solicitor Jennings explained the terms of the agreement as follows:

> [T]hat in return for the State asking that he would be sentenced from thirty years to life that he and his counsel are willing to waive that right to a jury trial, in addition to waiving any right to appeal Your Honor's – whatever that verdict might be – nor could he bring any PCR action.

App. p. 4, lines 14-21.

Attorney Boyd Young responded as follows:

> . . . the agreement before the Court signed by all the parties, the offer, uh, that the State would be basically withdrawing seeking the death penalty. The consideration is that withdrawal. We agree that in exchange for that to a trial before Your Honor, putting the burden on the evidence. We also agree to waive any appeal and/or PCRs from that trial. We accept their offer and are ready to proceed.

App. p. 5, lines 1-9. Young verified that he and co-counsel discussed the agreement fully with Sanders. App. pp. 5-6. Judge Dennis went over in detail the waiver of the right to direct appeal with Sanders. App. pp. 11-12.

Judge Dennis specifically went over Sanders' right to post-conviction relief and the fact he was waiving this right. Judge Dennis verified that the reason Sanders wanted

to waive that right was to avoid the death penalty as a possible punishment, which Sanders verified was a real benefit from his perspective. App. pp. 13-15. Judge Dennis' colloquy ensured that Sanders was making the decision voluntarily and that Sanders was comfortable with the decision. Judge Dennis asked Sanders if there was any reason from Sanders' vantage point that Judge Dennis should not accept the agreement, and Sanders responded in the negative. App. pp. 17-18.

Judge Dennis noted the following:

> And, Mr. Sanders, if the State is able to convince me beyond a reasonable doubt of each element of the crime or crimes charged, then of course it would be closure for you and for the family, too, because that will be the last proceeding in this process. Do you understand that?

App. p. 21, lines 5-11. Sanders indicated that he understood. App. p. 21, line 12.

Approximately six weeks after Sanders entered into the agreement, Judge Dennis asked Sanders at the beginning of the bench trial whether he still desired to go forward based on the consent order. Sanders indicated he still wished to go forward. App. pp. 37-38.

As in Spoone, the consent agreement itself is straightforward and not difficult to understand. App. pp. 307-310. The text of the agreement itself is barely more than two pages. In relevant part, the agreement indicates the following:

> Anthony Sanders 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. The Defendant waives the right to appeal any evidentiary rulings made by the Honorable R. Markley Dennis. The Defendant 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. pp. 307-308.

The consent order further states the following:

> e) He understands the provisions of this consent order are permanent and irrevocable such that he will not have a jury decide his guilt for the above referenced indictments, and he will never be entitled to appeal any aspect of this case.

App. p. 308.

During the hearing, PCR counsel asserted the following claims in response to the State's motion:

> The circumstances that surround the waiver is what is questionable as to his knowingly entering – voluntarily, excuse me, entering into it. There was a plea negotiations [sic] prior to the contract – him signing this contractual waiver that essentially discussed for a few months prior to and he was faced with three options, one of which was this contractual waiver. He signed it within an hour of seeing it, talking to his attorneys. He asked if he could still appeal. That, to me, shows that he did not know what everything means, that he was actually contracting away his rights, and the caption is entitled Waiver of Jury Trial. It doesn't indicate anything else, and that may not be significant but to Mr. Sanders **it may be** because that may be the one thing that is stuck in his head. He **may** not have realized that he waived his right to a direct appeal and to this post-conviction relief hearing.

App. p. 344, lines 5-21 (emphasis added).

The Uniform Post-Conviction Relief Act (PRC Act) imposes several requirements as to the pleadings. Integral to this case is the requirement that the PCR applicant set forth the facts within the applicant's knowledge in support of the applicant's claims. S.C. Code Ann. § 17-27-50. In the instant case, Sanders made a generalized allegation

that he was misadvised and misled by his trial counsel. Sanders does not assert how he was misadvised or how he was misled. These assertions, if based on fact, should be within Sanders' own personal knowledge. Besides the PCR application, Sanders had the ability to bring any alleged specific misadvice or misinformation to his PCR counsel's attention for the motion hearing. During the State's motion to dismiss, PCR counsel did not bring any specific facts to the PCR court's attention suggesting misadvice or misinformation. PCR counsel in fact only asserted that Sanders "may" have misunderstood or failed to understand something. The PCR court did not err in dismissing the case pursuant to the agreement based on generic and speculative pleading that failed to establish a fact in controversy.

The PCR Act specifically provides for dismissal of an application, as follows:

> (b) When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.

S.C. Code Ann. § 17-27-80. Dismissal is warranted where a PCR applicant fails to plead a specific claim for relief. Jones v. Gomez, 66 F.3d 199, 205 (9th Cir. 1995) (finding conclusory suggestions of ineffective assistance of counsel did not entitle petitioner to an evidentiary hearing).

Judge Benjamin did not err in dismissing the case as Sanders failed to show the existence of a material issue of fact. In his PCR application, Sanders failed to state a material issue of fact with any specificity showing he should be entitled to a hearing on the voluntariness of the agreement. The only response to the State's motion to support the need for an evidentiary hearing was the speculative assertion Sanders **may** have not realized he waived his right to direct appeal and post-conviction relief. The pleading and argument was insufficient to show an entitlement to an evidentiary hearing.

Further, the assertion that the agreement was involuntary is patently absurd. The record is replete with references to the waiver of direct review and post-conviction relief and Sanders' indication that he understood the rights he was waiving. In the time between the conference and bench trial, Sanders had six weeks to decide if it was a decision he regretted. Yet, Sanders indicated to Judge Dennis before the bench trial that he still wished to proceed with the agreement. Sanders never affirmatively claimed he did not understand the agreement and the waivers.

Sanders attempts to support his argument by claiming that the prosecution's case was weak. However, even viewing the evidence as summarized by Sanders in his petition, the State easily presented sufficient evidence for a jury to convict Sanders.[1] Accordingly, the contract represented a reasonable allocation of risk where the very real

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[1] Unlike analysis at the directed verdict state, which requires evidence be viewed in the light most favorable to the State, Judge Dennis found Sanders guilty beyond a reasonable doubt. See State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

possibility of the death penalty was removed for Sanders yet the State was still required to convince a fact finder of Sanders' guilt.[2]

This is the principal weakness in Sanders' argument. The argument appears to be premised on the belief the agreement is somehow facially unreasonable and Sanders **may** have misunderstood something, although he fails to affirmatively state what he misunderstood. However, the record is clear that it is an advantageous agreement for Sanders, that the terms of the agreement were made abundantly clear to him, and that he understood the terms of the agreement. Spoone, supra. Therefore, the PCR court did not err in dismissing the PCR application. See also Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (noting "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer").

Sanders, for the first time in Sanders' Brief of Petitioner, asserts that the agreement represents some sort of conflict of interest because counsel's advice would be tainted by the motive to avoid being called upon to discuss his performance in a PCR hearing.[3] This issue was not raised to the circuit court and therefore is not proper on

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[2] In some cases, it actually may be to the defendant's advantage to waive a jury trial. See Waiver, after not guilty plea, of jury trial in felony case, 9 A.L.R.4th 695 (1981) § 2[b] ("It may be obvious to defense counsel in a given case that it is to his client's advantage to submit a felony charge for trial by the court – where facts are particularly loathsome, where pretrial publicity has been so wide spread as to make change of venue ineffective, or where there is a possibility that the defendant's past record, attitude, or appearance seem clearly to suggest to counsel that the potential for conviction is more likely before a jury than before a judge.").

[3] The idea that counsel was motivated to advise Sanders to accept the agreement to avoid a claim of ineffective assistance of counsel is patently absurd. For one thing, the agreement was entered into six weeks prior to trial. Trial counsel would need to be clairvoyant to

appeal. Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) ("Since this issue was neither raised at the PCR hearing nor ruled upon by the PCR court, it is procedurally barred."). In the instant case, Sanders did not raise a conflict of interest claim, but instead vaguely and inadequately alleged his decision to enter the agreement was involuntary. Sanders also did not allege that such waiver agreements are categorically void. Accordingly, this argument should not be reviewed.

On the merits, the argument is misplaced. Sanders relies on ethics opinions issued in several states. However, such considerations have no place in PCR. This Court has said clearly, "the Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction. Their purpose is to regulate and guide the legal profession by defining proper ethical conduct and 'nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.'" Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993) (quoting Rule 407, SCACR and rejecting conflict of interest claim based on Rule 1.7 of the Rules of Professional Conduct).[4]

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believe counsel's performance would be deficient in the future.

[4] The reality is that while trial and appellate attorneys mostly provide objective testimony at PCR hearings, their bias is far more likely to be for their former client and not the State, and often, they will suggest they were ineffective. See generally Wright v. Hopper, 169 F.3d 695, 707 (11th Circuit 1999) (the issue of ineffectiveness is for the court to decide, so admissions of deficient performance by attorneys are not decisive – no error in finding trial strategy, even though counsel categorically denied making a strategic choice); Edwards v. LaMarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (a trial court is not obligated to "accept a self-proclaimed assertion of trial counsel"); Gentry v. Sinclair, 576 F.Supp.2d 1130, 1154 n.38 (W.D. Wash. 2008) (finding "counsel's current regret about their performance . . . does not support a claim that trial counsel performed deficiently at the time of trial").

In addition to the ethics opinions, Sanders cites United States v. Kentucky Bar Assoc., 439 S.W.3d 136 (Ky 2014). The Kentucky Supreme Court stated: "We concede that federal jurisprudential support for the waivers at issue here is nearly unanimous. Our research indicates that every federal circuit to consider the validity of an IAC waiver – ten out of twelve – has explicitly permitted defendants to plead guilty and waive collateral review, including IAC." Id. at 144. The Kentucky Supreme Court then found that the supremacy clause was not at issue because it was determining the ethical obligations of attorneys and not a constitutional issue. Id. In the instant case, the underlying substantive issue is Sanders' constitutional rights to effective assistance of counsel in entering an agreement that is permissible under the federal constitution. This is not an ethics case and the argument should not be considered.

The PCR court did not err in enforcing the bargained for agreement where Sanders failed to present any reasons to revisit the voluntariness of an agreement that was systematically established by Judge Dennis. No issue of fact was presented to Judge Benjamin requiring a hearing. Judge Benjamin's order should be affirmed.

CONCLUSION

For the above stated reasons, the PCR court's order dismissing the PCR application should be affirmed.

Respectfully submitted,

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February 11, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
The Honorable DeAndrea G. Benjamin, Circuit Court Judge

RECEIVED
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S.C. Supreme Court

Appellate Case No. 2012-213162

Anthony Sanders,.....Petitioner,

v.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Brief of Respondent** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

Susan B. Hackett, Appellate Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211

This 11h day of February, 2015.

DAVID SPENCER
ATTORNEY FOR RESPONDENT

SWORN to before me this 11th day of February, 2015.

Ashley Hawarth
Notary Public for South Carolina.
My Commission Expires: 3-18-23

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
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S.C. Supreme Court

February 11, 2015

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Anthony Sanders v. State of South Carolina
Appellate Case No. 2012-213162

Dear Mr. Shearouse:

Enclosed for filing are the original and thirteen (13) copies of Respondent's Brief of Respondent.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No. 68571

JCM/sbm
Enclosures

cc: Susan B. Hackett, Esquire
Trisha Allen, Victim's Services