

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

-----  
APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Honorable Perry M. Buckner, III

RECEIVED

MAR - 6 2015

S.C. Supreme Court

-----  
Appellate Case Number 2014-002155  
-----

DeAngelo Mickell,.....Petitioner

v.

State of South Carolina,.....Respondent

-----  
PETITION FOR WRIT OF CERTIORARI  
-----

James A. Brown, Jr., Esquire  
Attorney for Petitioner

Law Offices of Jim Brown, PA  
1600 Burnside St., Suite 100  
P.O. Box 592  
Beaufort, South Carolina 29901  
(843) 470-0003

## **QUESTIONS PRESENTED ON REVIEW**

Did the trial court err in failing to apply the doctrine of laches to deny the State's assertion of waiver of the Petitioner's Post Conviction Relief (PCR) rights?

Did the trial court err in failing to consider the voluntariness of the waiver of the Petitioner's PCR rights?

## **STATEMENT OF THE CASE**

On March 28, 2011, the Petitioner filed an application seeking post-conviction relief from his convictions for Conspiracy to Traffic and Trafficking Cocaine, 28-100 grams, first offense and his 18 year concurrent sentences. The State filed a return on September 27, 2012. The State amended this return on March 26, 2013.

The Petitioner moved to deny this amended return on March 28, 2013.

The trial court entertained two motions to quash subpoenas on May 7, 2014. The trial court then convened a hearing on May 8, 2014 regarding the State's motion to dismiss the application based upon waiver. At the May 8, 2014 hearing, the trial court granted the State's motion to dismiss based upon the Petitioner's waiver of his PCR rights.

The trial court issued a written order on May 14, 2014. The trial court denied a motion to alter or amend by order dated August 29, 2014. Undersigned counsel filed and served a notice of appeal on October 8, 2014 and this petition follows.

## **ARGUMENT**

The circuit court erred in denying the Petitioner's assertion of laches to the State's affirmative defense of waiver. Further, the circuit court erred in denying the Petitioner the opportunity to offer proof in support of his challenge to the knowing and voluntary nature of his waiver of his collateral challenge rights. As such, this Court should grant this Petition and allow

briefing on these two issues.

In South Carolina, statutory law provides a framework for collateral challenges to criminal convictions. See SC Code Title 17, Chapter 27. Generally, such challenges assert ineffective assistance of counsel as basis for relief. To prevail with such a claim, a petitioner must show both that counsel's performance fell below an objective standard of competency and that but for such failure there is a reasonable likelihood that the outcome of the proceeding would have been different.

However, like most states, an accused may waive his rights to bring a collateral challenge. See Spoone v. State, 665 SE2d 605 (SC 2008). Such a waiver is valid as long as it was made in a knowing, intelligent and voluntary fashion. Importantly for this petition, a waiver may be attacked as involuntarily, unknowingly, or unintelligently entered.

#### **Laches as a Bar to the Affirmative Defense of Waiver**

Collateral challenges in South Carolina are considered civil in nature. See SCRCP Rule 71.1. As such, the SC Rules of Civil Procedure generally apply. Some provisions, such as statute of limitations and discovery are modified by the statutory framework for post conviction challenges. SC Code Sections 17-27-45 & 17-27-150.

The SC Rules of Civil Procedure provide that affirmative defenses, such as waiver must be asserted in an answer or deemed barred by the doctrine of laches. See Whitehead v State, 547 SE2d 200, at 202 (SC 2002) citing SCRCP Rule 8( c). Laches is defined as an equitable doctrine, which arises upon the failure to assert a known right. Whitehead. This doctrine recognizes the unfairness presented when a party litigates matters and only later faces a challenge to the very litigation itself.

A determination of whether a claim is barred "is to be determined in light of the facts of

each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches.” Whitehead, at 202.

In the case at bar, the Petitioner submitted an application seeking post conviction relief on March 28, 2011. This application asserted one claim for relief; arguing that trial counsel was deficient in his investigation of the facts supporting the charge against the Petitioner. Appendix, p. 97-100. This application was amended on August 19, 2013 adding two more claims of ineffective assistance of counsel (IAC) and one claim asserting a Brady<sup>1</sup> violation. Appendix, p. 74-77

The two new claims of IAC alleged trial counsel was deficient for failing to challenge the search warrant and for failing to provide the Petitioner sufficient information to knowingly, intelligently, and voluntarily waive his Boykin<sup>2</sup> rights when he pled guilty. Both of these claims were centered around the unconstitutional search. The Brady claim involved the suppression of other police reports not at issue in this petition.

The State submitted its first return to this application on September 27, 2012. Appendix, p. 92-95. This return did not assert the defense of waiver. The State amended its return on March 26, 2013; asserting the affirmative defense of waiver. Appendix, p. 83-84.

The Petitioner replied on March 28, 2013 by filing a motion asserting the doctrine of laches as a bar to the State’s assertion of waiver. Appendix, p. 82. This motion was argued at a hearing on May 8, 2014. The trial court declined to apply the doctrine of laches and accepted the State’s assertion of waiver.

---

<sup>1</sup>Brady v Maryland, 373 US 83 (1963).

<sup>2</sup>Boykin v Alabama, 395 US 238 (1969).

In denying the Petitioner's claim of laches, the trial court found that the length of the delay in the assertion was "not sufficient for [him] to say that the equitable doctrine of laches, unreasonable delay should be applied here in this situation." Appendix, p 44, l. 22-25. The trial court calculated the delay as only 6 months, citing the passage of time from the original return and the amended return. Appendix, p. 45, l. 1-2. The trial court's ruling did not consider the Petitioner's assertion that the length of time should be considered from the March 28, 2011 filing of his first PCR Application until the March 26, 2013 assertion of waiver; a time period in which counsel and Petitioner labored diligently to prepare for a merits hearing in this matter. Appendix, p 36, l. 17- p. 37, l. 24.

Thus, the trial court erred when it declined to apply the doctrine of laches based upon an incorrect analysis of the time of delay in the assertion of this claim<sup>3</sup>.

#### **Petitioner's Offer of Proof Concerning Voluntariness of the Waiver of his PCR Rights.**

In Spoone v State, the SC Supreme Court affirmed the ruling of the circuit court affirming a provision in a plea agreement in which the petitioner waived his right to collateral challenges. Presenting a matter of first impression, the Spoone Court turned to federal law regarding waivers of challenges. First the court reviewed federal law regarding waiver of direct appeal rights and then cases involving waiver of collateral challenges.

The SC Court cited with approval an opinion from the US Court of Appeals for the Fourth Circuit which held: "no reason to distinguish the enforceability of a waiver of direct-appeal rights from a waiver of collateral-attack rights" produced as part of a plea bargain. Spoone, quoting US v Lemaster, 403 F3d 216, 220 (4<sup>th</sup> Cir. 2005). However, the Court in

---

<sup>3</sup>SCRCP Rule 12(a) specifically allows 60 days for the State to file a return to a PCR application if arising from a guilty plea.

Spoone made clear in the very next sentence of the opinion that such a waiver must be “knowing and voluntary.” Citing Lemaster at 220 and other citations omitted. Under Fourth Circuit law, to determine whether a waiver was knowing and voluntary a court must examine “ the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused.” Spoone, at 607 (internal citations omitted).

In the case at bar, the circuit court granted the State’s motion to dismiss based upon waiver. Appendix, p. 46, l. 2-3. The court did so by reviewing the four corners of the written plea agreement and the transcript of the plea and sentencing. The court explicitly ruled that he did “...not reach the issue today of the voluntariness of the waiver...” Appendix, p. 46, l. 2-3; also see Appendix, p. 65 (“This Court declines to reach the voluntariness issue raised because the transcript speaks for itself.”)

The court declined to allow the Petitioner to present evidence in support of his challenge to the waiver. Appendix, p. 46, l. 2-6. The Petitioner did briefly proffer the substance of this evidence. Succinctly, this evidence involved introduction of an original signature page from the search warrant underpinning the Petitioner’s challenged convictions and the testimony of the Petitioner and his trial counsel. Appendix, p. 38, l. 1-16; p. 47, l. 14- p. 48, l. 13; & p. 50.

As a factual context, the Petitioner pled guilty to Trafficking Cocaine, 28-100 grams, first offense and Conspiracy to Traffic Cocaine, 28-100 grams, first offense. Appendix, p 123-124. These charges were lesser included offenses from the true billed charges as they reduced the drug weight, only. The Petitioner was sentenced to terms of imprisonment on these charges of 18 years to be served concurrently with each other.

The State agreed that the evidence of both the trafficking and conspiracy primarily stemmed from the seizure of 355 grams of cocaine found in the trunk of a car located at 12

Christopher Lane, Hilton Head, South Carolina. Appendix, p. 27, l. 7- p. 29, l. 13. This was the Petitioner's mother's address. The Petitioner's mother and another woman were also charged with the Conspiracy count as well as various other counts of trafficking and distribution which were not asserted against the Petitioner.

This drug seizure was made by law enforcement during the execution of a search warrant. The drugs were located in the trunk of a car. Appendix, p 127, l. 20-24. However, the search warrant page particularly describing the place to be searched does not allow the search of any vehicles. Appendix, p. 50.

According to the Petitioner's proffer, this search warrant page is the only known search warrant page with an original signature in existence. The State conceded the authenticity of this document. This document was not known to the Petitioner's trial counsel and he did not review the importance of this item with the Petitioner before he pled guilty.

Had the PCR trial court allowed the Petitioner to challenge his waiver, trial counsel would have testified that he would have advised the Petitioner that a serious challenge to the seizure of the drugs existed and that a plea would not be in his interest with the search warrant challenge unresolved. The Petitioner would have testified that he did not receive any advice from his trial attorney concerning the deficiency in the search warrant. Further, the Petitioner would have testified that he would not have pled guilty if he had received this advice.

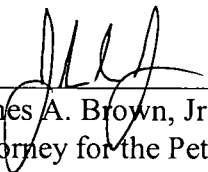
Assuming these facts proffered by the Petitioner at the circuit court hearing, the entire plea was not knowingly, voluntarily and intelligently entered and, thus, the terms of the plea agreement which included the PCR waiver are equally invalid. While the trial court indicated this information could possibly be presented at another time, challenge to the voluntariness of a waiver and plea are exactly the issues to be litigated when a court reviews a claim of waiver or a

challenge to a guilty plea. The court's confusing ruling constitutes reversible error.

**CONCLUSION**

Therefore, based upon the two issues raised today, this Court should grant the petition, allow briefing on this issue and then remand this matter for further hearings allowing the Petitioner to mount a collateral challenge.

Respectfully Submitted by:

  
\_\_\_\_\_  
James A. Brown, Jr.  
Attorney for the Petitioner

March 4, 2015  
Beaufort, SC

Law Offices of Jim Brown, PA  
1600 Burnside St, Suite 100  
PO Box 592  
Beaufort, SC 29901  
(843) 470-0003

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

MAR - 6 2015

S.C. Supreme Court

-----  
APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Honorable Perry M. Buckner, III

-----  
Appellate Case Number: 2014-002155  
-----

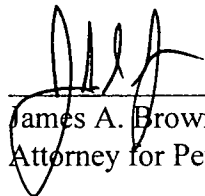
DeAngelo Mickell.....Petitioner

v.

State of South Carolina.....Respondent

-----  
PROOF OF SERVICE  
-----

Counsel for DeAngelo Mickell hereby certifies that he has prepared and served a Petition for Writ of Certiorari and the Appendix on this 4<sup>th</sup> day of March, 2015, upon the State, as specified in S.C. Code Section 203 (b) (1) , by depositing a copy, postage pre-paid, in the United States Mail, addressed to Attorney for Respondent, Ashley McMahan, Office of the Attorney General, PO Box 11549, Columbia, SC 29211-11549, (803) 734-3970.

  
\_\_\_\_\_  
James A. Brown, Jr.  
Attorney for Petitioner

March 4, 2015

Law Offices of Jim Brown, PA  
1600 Burnside St., Suite 100  
P.O. Box 592  
Beaufort, South Carolina 29901  
(843) 470-0003

**Law Offices of Jim Brown, P.A.**

1600 Burnside Street, Suite 100• P.O. Box 592

Beaufort, SC 29901-0592

Phone: (843) 470-0003 Fax: (843) 470-0004

[jimbrownlaw@hargray.com](mailto:jimbrownlaw@hargray.com)

March 4, 2015

The Honorable Daniel E. Shearouse  
Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

**RECEIVED**

MAR - 6 2015

**S.C. Supreme Court**

Re: DeAngelo Mickell v. State of South Carolina - 2014-002155

Mr. Shearouse:

Please find enclosed for filing in the above referenced matter the following: an original and six (6) copies of the Petition for Writ of Certiorari and two (2) copies of the Appendix. One of each is unbound. Also included is the Proof of Service for the same. Please contact me if you have any questions or concerns.

Sincerely,

  
Jim Brown

w/ enclosures

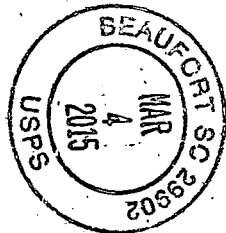
cc: Ashley McMahan, Office of the Attorney General, w/ enclosures  
DeAngelo Mickell, w/ enclosures

FROM:

Law Office of Jim Brown, P.A.  
PO Box 592  
Buckhorn, SC 29921

TO:

The Honorable Daniel J. Sheardust  
Clerk of Court  
Superior Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211



Retail

**P**

US POSTAGE PAID

**\$6.70**

Origin: 29902  
2 lb. 8.20 oz.  
03/04/15  
4505200859-08

1004

**PRIORITY MAIL® 2-DAY**

Expected Delivery Day: 03/06/15

USPS TRACKING NUMBER



9505 5111 1319 5063 6117 24

**PRIORITY MAIL**

**TRACKED INSURED**



For Domestic Use Only

Label 107R, July 2013

Utility Mail

10 1/2" x 16"

Ready to Post