

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

**ORIGINAL**

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Certiorari to Florence County

Honorable Michael G. Nettles, Circuit Court Judge

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ANTHONY LEMONT WILSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000543

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PETITION FOR WRIT OF CERTIORARI

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**RECEIVED**

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S.C. SUPREME COURT

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**ISSUE PRESENTED**

Whether the PCR court erred in denying Petitioner's application, where a conflict of interest prevented Petitioner's waiver of post-conviction relief contained in his plea agreement from being either knowing or voluntary, where plea counsel neither got a conflict waiver in writing nor allowed Petitioner to confer with independent counsel to determine if he wished to waive the conflict?

## STATEMENT

Petitioner was indicted by the State Grand Jury of South Carolina on or about October 22, 2015 for two counts of distribution of heroin and one count of conspiracy to traffic heroin, twenty-eight grams or greater. App. 100 – 105. On August 2, 2016, he appeared before the Honorable Roger E. Henderson to plead guilty to a lesser-included offense of trafficking between four and fourteen grams as well as the two counts of distribution of heroin. App. 3 ll. 18 – 24; App. 11 ll. 11 – 13. David Fernandez appeared on behalf of the State, and Justin Kata represented Petitioner. Petitioner pled guilty pursuant to a plea agreement. App. 3 l. 24 – App. 4 l. 10; App. 47 – 52.

The facts presented by the prosecution at the plea hearing were as follows: On November 7, 2014 law enforcement in Florence County used an informant to purchase heroin from Petitioner. App. 14 ll. 17 – 25. On November 19, a similar exchange allegedly took place. App. 15 ll. 1 – 7.

Judge Henderson found that the facts supported the plea, ruled that Petitioner freely, voluntarily, and intelligently entered into the plea, and accepted the plea. App. 16 ll. 3 – 11. Sentencing was deferred until November 16, 2016 before Judge Henderson with the same counsel present. App. 29 ll. 22 – 24; App. 32. The State recommended a sentence of fifteen to twenty years. App. 37 ll. 18 – 19. Petitioner was sentenced to fifteen years' incarceration. App. 44 ll. 20 – 25.

On or about March 20, 2017, Petitioner filed an application for post-conviction relief. App. 53. It contained multiple allegations of ineffective assistance of counsel. App. 55 – 66. The State filed its Return and Partial Motion to Dismiss on or about October 6, 2017. App. 67 – 73.

An evidentiary hearing was held on February 2, 2018 before the Honorable Michael G. Nettles. App. 75. Michael Abbott represented Petitioner, and Megan Jameson appeared on behalf of the State. Plea counsel and Petitioner testified. Judge Nettles granted the State's partial motion to dismiss and dismissed all post-conviction relief claims except for the issue regarding plea counsel's advice to enter into the plea agreement. App. 106 ll. 22 – 25. Judge Nettles also denied the application and issued an Order of Dismissal on or about March 20, 2018. App. 111 – 119.

This appeal follows.

## ARGUMENT

The PCR court erred in denying Petitioner's application, where a conflict of interest prevented Petitioner's waiver of post-conviction relief contained in his plea agreement from being either knowing or voluntary, where plea counsel neither got a conflict waiver in writing nor allowed Petitioner to confer with independent counsel to determine if he wished to waive the conflict.

At the evidentiary hearing in Petitioner's case, plea counsel claimed he explained to Petitioner the effects of a post-conviction relief waiver. App. 82 ll. 2 – 22. Although he initially answered in the affirmative when asked about the effects and if he provided examples, counsel then immediately vacillated and instead contended that he only discussed the effects. Id. Particularly, counsel testified that although he did not give examples, he advised Petitioner that “if he didn't feel that I did a good job or that if I didn't do the - - fulfill the duties that I needed to do, then he would have some challenges with challenging that.” App. 82 l. 23 – App. 83 l. 7.

According to the Plea Agreement entered into on August 2, 2016, the following restrictions were placed on Petitioner, including an outright bar, rather than a simple challenge, on averring ineffective assistance of counsel:

The Defendant, Anthony Lemont Wilson, agrees that as a part of the consideration for this plea he will not appeal his plea of guilty or any sentence he receives in General Sessions Court in South Carolina. The Defendant, Anthony Lemont Wilson, acknowledges that he understands that he has a right of direct appeal of his guilty plea or sentence and that he knowingly, voluntarily, and expressly waives this right of direct appeal. Additionally, the Defendant, Anthony Lemont Wilson, understands that he has a right to file a post-conviction relief (PCR) action in this case **but agrees to knowingly and voluntarily waive any post-conviction relief action except for claims that directly attack the effectiveness of advice to agree to this waiver.**

App 51 (emphasis added).<sup>1</sup>

The bolded section above appears to be a product of this Court’s decision in Sanders v. State, 412 S.C. 611, 773 S.E.2d 580 (2015). A similar agreement was entered into—Sanders acquiesced to a bench trial and waived any right to direct appeal, PCR, or habeas corpus proceedings—in exchange for the State not seeking the death penalty. Unlike the matter *sub judice*, the trial court in Sanders “engaged in a lengthy colloquy with Sanders” prior to approving the agreement. Id. at 612, 773 S.E.2d at 581. The plea judge in Petitioner’s case never inquired about plea counsel’s advice surrounding the waiver of post-conviction relief. App. 101 ll. 21 – 24.

“The court explained to Sanders he was giving up the right to have another court review its decision, and Sanders acknowledged he understood.” Id. “The court discussed PCR and stated Sanders would be waiving the right to challenge his attorneys’ actions afterward.” Id. Unlike Wilson, “Sanders said he had discussed the PCR statute with his lawyers and wanted to waive that right as well.” Id.

This Court “agree[d] with the wealth of federal jurisprudence which allows for ineffective assistance of counsel claims to proceed despite a previous waiver of collateral review where the challenge directly attacks the effectiveness of the advice to agree to that waiver.” Id. However, for the reasons discussed *infra*, Wilson was unable to freely and voluntarily waive any rights in the plea agreement.

The second footnote in Sanders mirrors many of the concerns expressed by PCR counsel in his discussions of these matters with the PCR judge and plea counsel. The Advisory Opinions of Ohio, Nebraska, North Carolina, and Utah all stand for similar propositions: an inherent

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<sup>1</sup> Interestingly, although each of the six pages of the agreement contains a line for Petitioner’s initials, the last page of the agreement is not initialed by Petitioner.

conflict exists when an attorney counsels his client to waive the right to challenge his representation. Notably, this Court referred to a recent opinion from the Supreme Court of Kentucky finding the use of an ineffective assistance waiver constitutes professional misconduct. U.S., ex rel. U.S. Attorneys ex rel. E., W. Districts of Kentucky v. Kentucky Bar Ass'n, 439 S.W.3d 136, 140 (Ky. 2014).

Plea counsel conceded that if Petitioner had “proven that [he] was ineffective in representing him in his criminal case that that would have formed the basis for a professional negligence action against [him] as an attorney.” App. 83 ll. 16 – 23.

With regards to Rule 1.7 of the Rules of Professional Conduct, PCR counsel inquired of plea counsel whether he explained to Petitioner that he “had a potential conflict of interest in advising him to waive his PCR rights.” App. 86 ll. 7 – 23. Plea counsel admitted that he did not discuss with Petitioner this conflict or have Petitioner sign a conflict waiver. Id.; App. 87 ll. 9 – 11. As articulated by PCR counsel: ~

Rule 1.7 relates to conflicts of interest in that said rule states that there ... will be a conflict of interest if there is a significant risk that the representation of one or more clients will be materially limited by ... a personal interest of the lawyer, and in this case the personal interest would be whether he could bring a malpractice claim.

App. 84 ll. 2 – 9. Following an objection to a question phrased using the above recitation, PCR counsel discussed with the PCR court that plea counsel had “an inherent conflict of interest in advising Mr. Wilson to waive his right to PCR counsel for ineffective assistance because it’s [in his] personal interest.” App. 84 l. 23 – App. 85 l. 6. If Petitioner could have proven ineffective assistance, according to PCR counsel, “then there’s a malpractice claim against counsel. So he has a conflict in advising him to waive that right to prove ineffective assistance so [he does not] get sued.” Id.

Plea counsel contended, without apparent reference to his notes or file, that he met with Petitioner for five-and-a-half hours. App. 90 l. 25 – App. 91 l. 1. Petitioner recalled it differently: he maintained that the single meeting lasted only fifteen minutes. App. 95 ll. 13 – 20. The remainder of Petitioner’s testimony is illustrative of the dangers surrounding a plea agreement which contains a post-conviction relief waiver. App. 96 l. 2 – App. 97 l. 16. Counsel did not explain many of the legal concepts to Petitioner and did not discuss the rights Petitioner was relinquishing. Had Petitioner known more about his right to post-conviction relief or plea counsel’s potential conflict, he would not have entered into this plea agreement. App. 97 ll. 17 – 22.

As evidenced by his testimony at the evidentiary hearing, Petitioner desires the ability to bring a complete action for post-conviction relief with all of his issues beyond whether counsel properly advised him to waive his right to post-conviction relief. App. 97 l. 23 – App. 98 l. 2.

### **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. However, because plea counsel was unaware of the conflict by virtue of

his failure to obtain a signed and written waiver from Petitioner, it naturally follows that Petitioner could have been unaware of the conflict. Therefore, Petitioner's waiver could not have been either knowing or voluntarily, as he was unaware of the conflict.

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 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> 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 (10<sup>th</sup> 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 Conduct<sup>2</sup> 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) (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

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<sup>2</sup> 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.

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.

Comment 20 to South Carolina's Rule 1.7 of the Rules of Professional Conduct provides the following:

The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved.

Rules of Professional Conduct: Rule 1.7, RPC, Rule 407, SCACR.

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.<sup>3</sup> 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 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 although 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:

[T]he use of IAC waivers in plea bargain agreements (1) creates a nonwaivable conflict of interest between the defendant and his attorney, (2) operates effectively to limit the attorney's liability for malpractice, and (3) induces, by the prosecutor's insertion of the waiver into plea agreements, an ethical breach by defense counsel.

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<sup>3</sup> 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.

U.S., ex rel. U.S. Attorneys ex rel. E., W. Districts of Kentucky v. Kentucky Bar Ass'n, 439 S.W.3d 136, 140 (Ky. 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.

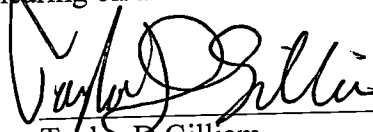
Further, the Kentucky Supreme Court found such agreements violated the state’s Rules of Professional Conduct prohibiting lawyers from making agreements prospectively limiting the lawyer’s liability to a client for malpractice. Id. The court recognized that advising a client to waive an ineffective assistance 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.

Petitioner cooperated with law enforcement; the State intended to utilize his testimony against one of his co-defendants. App. 37 ll. 10 – 17. However, Petitioner was unaware that his attorney was receiving a benefit under the plea agreement as well. The resulting conflict was not waived, may have been unwaivable, and prevents a knowing and voluntary waiver in this matter.

**CONCLUSION**

Based upon the foregoing, Petitioner respectfully requests this Court reverse the PCR court and remand this matter to allow for a full hearing on all PCR issues.



Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of November, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Florence County

Honorable Michael G. Nettles, Circuit Court Judge

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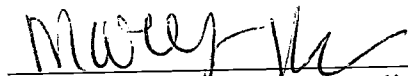
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Samuel Key, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Anthony Lemont Wilson, #370483, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 14th day of November, 2018.



\_\_\_\_\_  
Taylor D Gilliam  
Appellate Defender

SUBSCRIBED AND SWORN TO before me    ATTORNEY FOR PETITIONER  
this 14th day of November, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: 5/12/2027

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