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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Darlington County Court of Common Pleas
The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2021-001155

Cephas Cowick, #383684..Petitioner,

v.

State of South Carolina,...Respondent.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Questions Presented for Review....2

Statement of the Case....3-5

Statement of the Facts....6-12

Argument....13-24

Conclusion....25

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PCR COURT ERRED IN DISMISSING PETITIONER'S PCR APPLICATION UPON THE FINDING THAT THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS RAISED THEREIN FALL UNDER THE SCOPE OF THE PLEA AGREEMENT WAIVER.

II. WHETHER THE PCR COURT ERRED IN DISMISSING PETITIONER'S PCR APPLICATION UPON THE FINDING PETITIONER DID NOT RECEIVE CONSTITUTIONALLY DEFECTIVE ADVICE CONCERNING THE PLEA AGREEMENT OR WAIVER WHEN THE PCR COURT FAILED TO APPLY THE PROPER STANDARD AND THE RECORD FAILS TO ESTABLISH A KNOWING AND VOLUNTARY WAIVER.

STATEMENT OF THE CASE

In October 2016, the Darlington County Grand Jury indicted Petitioner on two charges of murder, criminal conspiracy, armed robbery, first-degree burglary, grand larceny, possession of a weapon during the commission of a violent crime, and third-degree arson. (App. pp. 191-219). Katherine Cowick, Petitioner's wife and codefendant, was charged with the same offenses and is still awaiting trial. Petitioner was represented by Emily T. Kuchar, Esq. and William S. McGuire, Esq. of the South Carolina Commission on Indigent Defense as well as by Nathan R. Scales, Esq., of the Public Defender's Office. Fourth Circuit Deputy Solicitor Kernard E. Redmond prosecuted the case and sought the death penalty against Petitioner and codefendant Katherine Cowick.

Petitioner pleaded guilty before the Honorable Eugene C. Griffith, Jr. via WebEx on June 24, 2020. In exchange for the State's withdrawal of the intent to seek the death penalty, Petitioner pleaded guilty on all charges as indicted and received life imprisonment without the possibility of parole (LWOP). The plea agreement also called for some waiver of Petitioner's rights to seek appellate and collateral relief, the scope of which is at dispute. The plea agreement negotiated by Petitioner's Counsel and the State was not memorialized into writing.[1] Judge Griffith ultimately accepted Petitioner's guilty plea and imposed the following sentences: LWOP for both murder charges; LWOP for possession of a weapon during the commission of a violent crime; thirty (30) years for armed robbery; thirty (30) years for first-degree burglary; fifteen (15) years for third-degree arson; five (5) years for

[1] Note that the plea judge mistakenly refers to a plea affidavit Petitioner had signed before the hearing as the "plea agreement" and "plea waiver" during the plea colloquy. (App. p. 103, line 25—p. 104, line 12; p. 104, lines 14-18; p. 108 lines 22-24). The plea affidavit makes no mention of a waiver of direct appeal, post-conviction relief, or habeas corpus. (App. pp. 180-190).

criminal conspiracy; and five (5) years for grand larceny. (App. p. 158, line 10—p. 161, line 5; pp. 191-219). The sentences were ordered to run concurrently. Petitioner did not appeal his conviction or sentence.

Represented by the undersigned William G. Yarborough, III, Esq. and Lauren C. Hobbis, Esq., Petitioner filed an application for post-conviction relief on March 11, 2021, alleging ineffective assistance of counsel on the following grounds:

- Counsel failed to undertake reasonable measures to engage in plea negotiation and bargaining opportunities with the State on the basis of Applicant's potential cooperation against his codefendant and assistance to the State.

- Counsel likewise failed to adequately inform or explain to Applicant any previously extended proffer and plea offers and the terms thereof, including cooperation against his codefendant, and advise him accordingly.

- Counsel failed to investigate evidence, witnesses, potential defenses, legal theories, and potential dispositive pre-trial motions available to Applicant. *See e.g.*, *Edwards v. State,* 392 S.C. 449, 456, 710 S.E.2d 60, 63 (2011).

- Counsel failed to explain the nature of the charges and the extent of the State's evidence against him. Counsel failed to adequately review discovery with Applicant and advise him accordingly, particularly in regard to whether certain incriminating hearsay statements and co-conspirator statements may or may not be admissible against him. Counsel likewise failed to advise him accordingly relative to his potential strategy and his chances of gaining a favorable outcome at trial.

- Counsel failed to adequately explain the plea agreement's terms and its relative advantages and disadvantages as opposed to proceeding to trial in light of the State's evidence against him. Counsel also failed to sufficiently advise Applicant on the nature and implications of entering a plea of guilty, including a sufficient advisement of the rights he would be waiving. Likewise, Applicant unknowingly, unintelligently, and involuntarily waived his rights to direct appeal of his conviction and sentence, as well as post-conviction relief because of Counsel's errors.

- Each of these errors not only impacted Applicant's decision on whether to plead guilty or proceed to trial, but also rendered his guilty plea not knowingly, intelligently, or voluntarily entered. But for these errors, Applicant would not have pleaded guilty and instead would have proceeded to trial.

- Counsel failed to adequately investigate mitigating circumstances relevant to sentencing, and consequently failed to adequately present these mitigating circumstances to the court during sentencing.

(App. pp. 85 – 95). Respondent filed a Return and Partial Motion to Dismiss on July 11, 2021, as amended on July 29, 2021, and requested a hearing pursuant to *Sanders v. State*.[2] (App. pp. 62 – 70; pp. 76 – 84). Respondent argued the PCR Court must dismiss the PCR application because:

> The record clearly shows that Applicant was informed of the extent of his waiver, and knowingly, voluntarily, and intelligently waived his rights to both a direct appeal and a PCR application. The record is also abundantly clear Applicant entered his guilty plea to avoid receiving the death penalty at trial, not because of any misunderstanding about the effects of the waiver. Furthermore, any deficiency that could conceivably exist in counsel's performance was cured by the court's thorough colloquy, thereby rendering any defect in counsel's representation harmless.

(App. p. 68). On June 23, 2021, Petitioner filed a Response Opposing Respondent's Motion to Dismiss and also requested a hearing on the matter. (App. pp. 71-75).

On August 24, 2021, Judge Michael G. Nettles held a Webex hearing on Respondent's Motion to Dismiss pursuant to *Sanders*. Petitioner was present for the hearing and testified via WebEx from McCormick Correctional Institution. Petitioner's attorneys of record, William G. Yarborough III, Esq., and Lauren C. Hobbis, Esq. appeared on his behalf. Assistant Attorney General William H. Ray, Esq. appeared for Respondent. Solicitor Redmond and one of Petitioner's prior attorneys, Mr. McGuire, also testified. His other plea attorneys, Ms. Kuchar and Mr. Scales inexplicably did not appear or testify at the hearing. Judge Nettles ultimately granted the State's Motion to Dismiss and dismissed Petitioner's PCR application by written order issued on September 30, 2021 and filed October 7, 2021. (App. pp. 1 – 14). This appeal follows.

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[2] 412 S.C. 611, 773 S.E.2d 580 (2015) (holding a PCR applicant is entitled to challenge the advice he received when entering into a plea agreement containing a PCR waiver and is entitled to a hearing on the validity and enforceability of the waiver).

STATEMENT OF FACTS

A. The Charges

As summarized by Solicitor Redmond at the plea hearing as well as at the Motion to Dismiss hearing, on the morning of July 17, 2016, codefendant Katherine Cowick drove Petitioner to the residence of fifty-one-year-old Denise Couplin. (App. p. 111; p. 27). Petitioner was alleged to have fatally shot Ms. Couplin and her nine-year-old granddaughter after breaking into the home. (App. pp. 111-114; p. 27). Ms. Couplin's Escalade and several other items were stolen from the home, including prescription drugs, money, and her debit card. (App. pp. 111-114; pp. 27-28). Surveillance cameras captured Petitioner and codefendant Katherine Cowick making several trips to a nearby convenient store in Hartsville both before and after the shooting, with Petitioner driving the escalade during the final sighting. (App. p. 115, lines 1-3; p. 18, lines 2-13; p. 28). The escalade was found burned a short distance away from the residence at around noon that same day. (App. p. 112; p. 28).

Law enforcement suspected Petitioner and codefendant Katherine Cowick as having been involved through information provided by family members and an unnamed individual that the couple had been looking to obtain a gun and had allegedly expressed a desire to kill Ms. Couplin. (App. p. 111, line 22—p. 112, line 22; p. 28). The couple was picked up and interviewed by law enforcement that same day. (App. p. 112, lines 22-25; p. 28). Petitioner initially denied involvement but after numerous hours of interrogation, he ultimately gave a statement admitting to his and Katherine's involvement. (App. p. 112, line 25—p. 113, line 25). Petitioner cooperated with law enforcement in regard to the gun used, how they obtained it, and where law enforcement would be able to locate it. (App. p. 113, lines 18-25). The prescription drugs, money, and Ms. Couplin's debit card were found in codefendant Katherine Cowick's purse. (App. p. 113, line 25 — p. 114, line 3).

B. Guilty Plea Hearing

Judge Griffith began by summarizing each indictment and explaining the trial rights waived by Petitioner's guilty plea. (App. p. 100, line 9—p. 109, line 11). Petitioner responded he understood the trial rights he was waiving and affirmed that his decision to plead guilty was made freely and voluntarily. (App. p. 103, line 24—p. 109, line 12; p. 110, lines 2-10). He also agreed with the summary Solicitor Redmond gave for the factual basis of the plea. (App. p. 117, lines 6-25). After further questioning, Judge Griffith was satisfied Petitioner had understood his conversations with counsel, did not require additional time to consult with them, and that he was competent to enter his guilty plea. (App. p. 121, line 5—p. 123, line 24).

In regard to the oral plea agreement, Judge Griffith inquired into Petitioner's understanding "of the negotiations that went on in regard to the ultimate result for you" in that he would receive a LWOP sentence on both murder charges. (App. p. 118, line 16—p. 119, line 2). In regard to the waiver, Judge Griffith asked if he understood he was "withdrawing or waiving any appellant rights, the rights of appeal...to forego any challenges for any improper procedures that have been made today in today's plea. Is that your understanding?" (App. p. (App. p. 120, lines 18 – 25). Petitioner confirmed this as his understanding of the waiver and no objection to the judge's description of the waiver was made by the State or his plea attorneys. (App. p. 120, line 22; p. 121, line 1). It was not until Judge Griffith later asked if any additional matters needed to be put on the record did Solicitor Redmond interject that the scope of the waiver also specifically included collateral relief or "collateral attacks" subject to "some possible caveats as a matter of law." (App. p. 124, line 17—p. 125, line 2). Ms. Kuchar then explained that as previously discussed with the Solicitor, the waiver included "post-conviction relief as to any issues that are now known to Mr. Cowick...He's unable under case law to waive issues that are unknown to him, but he will waive as far as known issues to him." (App. p. 125,

lines 3-19). Solicitor Redmond concurred with this explanation (App. p. 125, lines 20-21) and Judge Griffith summarized Ms. Kuchar's explanation for Petitioner as:

> [A]ny rights he may have that he's aware of, certainly he can waive those. But if something anew arises, at that time he can then make a decision as to whether or not to challenge it collaterally...So everything that you know is on the table. You've made this decision considering all of those things and this is binding upon you regarding...known facts that you understand right now. However, if something anew arises sometime after today, you would then have the ability to consider that and decide whether to challenge it on this new information or something you were not aware of currently.

(App. p. 125, line 22—p. 126, line 13). Petitioner stated he understood Judge Griffith's explanation (App. p. 126, lines 5, 14-16); however, Mr. McGuire then interjected to fully clarify the scope of the waiver:

> Mr. Cowick is waiving all of the claims to him unrelated to ineffective assistance. But the case law indicates that it would be unethical for us to counsel him to waive claims against us. So any known claims with regard to anything in his case that he knows about is waiving, but not specifically ineffective. We're not able to encourage him to do that.

(App. p. 126, line 22—p. 127, line 3). Mr. Scales also added: "[W]hat he's waiving is a maximum of what we can allow him to waive and I did have that discussed." (App. p. 127, lines 4-7). Solicitor Redmond made no objection to Mr. McGuire or Mr. Scales's explanation on the scope of the waiver. Judge Griffith then turned to Mr. Cowick with additional questions about his attorneys' representation; to which Petitioner stated he was satisfied with his attorneys and had understood the advice they had given him thus far. (App. p. 127, lines 8—p. 128, line 4). Petitioner was not asked whether he understood the scope of the waiver as it was last explained on the record by Mr. McGuire.

Lastly, Judge Griffith summarized the waiver upon accepting Petitioner's plea as: "Mr. Cowick has agreed to waive any known appellant rights he has at the current time or any collateral attacks that he may have known. Subject to the current state law, if he may have challenges, that will be determined with independent advice, if he so chooses." (App. p. 129, lines 6-10).

C. Motion to Dismiss Hearing Testimony

Deputy Solicitor Kernard E. Redmond

Solicitor Redmond testified he understood the plea agreement waiver as barring Petitioner from seeking direct appeal and collateral attacks on any claims, including claims of ineffective assistance of counsel and claims known to Petitioner or in existence at the time of the guilty plea hearing, as dictated by case law. (App. p. 33, lines 12-18). He explained it was made clear that allowing Petitioner to plead guilty and receive an LWOP sentence was conditioned upon the plea agreement's terms and waiver. (App. p. 35, lines 18-23; p. 36, lines 8-12). In his view, Petitioner had committed a material breach of the plea agreement by filing the instant PCR application, thus entitling the State to now void the agreement and guilty plea and re-seek the death penalty. (App. p. 32, lines 4-7; p. 36, lines 3-12). On cross-examination, Solicitor Redmond acknowledged he and defense counsel had never reduced the plea agreement to writing, but stated its terms are reflected in letters he received from defense counsel in September 2019 and January 2020. (App. p. 34, lines 16-25; p. 35, line 1). He read the letters (App. pp. 96-97) into the record at the Motion hearing, the first of which states, in pertinent part:

> [W]e are writing you to memorialize Cephas'[s] desire to plead guilty to the murders...for a sentence of life in prison without the possibility of parole. Cephas would give up the right to appeal this sentence or to seek PCR or habeas relief. His sentence would be final and he will die in prison.

(App. p. 29, lines 14-25). A follow-up letter by Mr. McGuire states in pertinent part:

> We continue today to be hopeful this case may be resolved by a plea to life without [ ] parole...Cephas understands that because you are seeking the death penalty, he will be sentenced under S.C. Code Ann. § 16-3-20...Cephas will further waive any appeals or collateral relief from his sentence. Under the proposed plea, Cephas's sentence will be final. He will never be eligible for parole or any reduction in his sentence, and he will die in prison.

(App. p. 30, lines 4-25). On cross-examination, Solicitor Redmond acknowledged neither of the letters bear Petitioner's signature, nor had he ever discussed with Petitioner the plea

agreement, scope of the waiver, or Petitioner's understanding of the waiver. (App. p. 34, lines 9-15).

Plea Counsel William S. McGuire, Esq.

Mr. McGuire testified that he and Ms. Kuchar came onto the case after the attorney originally representing Petitioner left SCCID. (App. p. 37, lines 16-21). Mr. McGuire recalled that the plea negotiation process began at the time he wrote that first letter to Solicitor Redmond. (App. p. 41, lines 6-17). He explained that although Petitioner did not want to engage in plea negotiations with the State, "We have an obligation to seek the best possible plea negotiation even if your client's against it." (App. p. 41, lines 1-5; p. 38, lines 4-6).

Mr. McGuire stated he met with Petitioner several times before the plea hearing and had explained to him that by entering into the plea agreement, he would be waiving his rights to direct appeal and post-conviction relief. (App. p. 42, lines 18-21). Mr. McGuire testified, however, that "[t]here were certain things we could not waive", including ineffective assistance of counsel claims because *Sanders* prevented him from advising a client to enter into a plea agreement under which the client would be waiving ineffective assistance of counsel claims involving himself. (App. p. 46, lines 5-13; p. 43, lines 16-24; p. 44, lines 11-16). Thus when counseling Petitioner to enter into the plea agreement and explaining the waiver to him, Petitioner was not advised that the waiver encompassed ineffective assistance of counsel claims. (App. p. 46, lines 5-13; p. 43, lines 17-20). Mr. McGuire testified he made the plea judge aware of this at the hearing. (App. p. p. 43, lines 19-24; p. 46, lines 5-13). Mr. McGuire had also discussed this and the *Sanders* case specifically with Solicitor Redmond during negotiations, as well as the limitation on the scope of the waiver as applying only to claims Petitioner had been made aware of at the time of his guilty plea. (App. p. 43, lines 17-24; p. 44, lines 11-16). He further explained the waiver was not supposed to bar anything "new" or previously unknown to Petitioner and used a violation of the prosecution's

continuous duty to disclose exculpatory evidence to the defense as an example. (App. p. 43, line 19—p. 44, line 5). However, whatever claims could be considered as "new" and "unknown" to Petitioner was not limited to just newly discovered evidence claims. (App. p. 44, lines 6-10).

Mr. McGuire acknowledged that the terms of the plea agreement and waiver were never reduced to writing; he stated the September 9, 2019 letter sent to Solicitor Redmond, however, encapsulated the terms of the plea agreement and the waiver. (App. p. 42, lines 10-14; p. 45, lines 12-17). On cross-examination, he clarified that this letter neither explains the waiver nor contains all terms of the plea agreement. (App. p. 43, lines 2-10). Mr. McGuire testified it was actually the plea affidavit that Petitioner had signed before the plea hearing that contained the whole plea agreement. (App. p. 43, lines 8-10). However, he subsequently clarified that the plea affidavit is a boilerplate-like form that fails to even mention the waiver, explaining that there were claims that could not be waived pursuant to *Sanders*. (App. p. 43, lines 11-24; p. 45, line 12—p. 46, line 13).

Mr. McGuire also testified he believed Petitioner was competent, and as for his capability to comprehend counsel's advice, he did not notice Petitioner having difficulty understanding what was explained to him and denied that Petitioner had ever reported issues with his memory or trouble focusing. (App. p. 47, lines 14-18; p. 48, lines 20-25). However, SCCID had obtained medical records detailing the trauma to the areas of Petitioner's brain that controlled executive functioning, focus, memory retention, impulse control etc., as a result of several prior head injuries he had sustained. (App. p. 46, line 14—p. 47, line 13). Mr. McGuire and the other attorneys had consulted with neurology experts before opening plea negotiations but had stopped short of obtaining an MRI recommended by their experts to further investigate the extent of his brain trauma because it did not have a significant relation to the commission of the offenses charged (App. p. 47, line 5—p. 48, line 3). Mr. McGuire also did not recall that Petitioner had been kept in

solitary confinement at the jail for the roughly three (3) years he spent awaiting trial. (App. p. 48, lines 4-13).

Petitioner Cephas Cowick

Petitioner testified that both Mr. McGuire and Ms. Kuchar were his lawyers, but that it was Ms. Kuchar who met with him most of the time about his case. (App. p. 50, lines 16-23). Petitioner stated he was in jail for roughly four (4) years following his arrest, spending a majority of that time in solitary confinement. (App. p. 50, line 24—p. 51, line 4). Most of his meetings with Ms. Kuchar thus took place while he was in solitary confinement and living that way was difficult on him as far as trying to assist in his own defense with his lawyers. (App. p. 51, lines 5-8).

Petitioner testified that when meeting with his lawyers about the plea agreement, he was told he would still be able to seek post-conviction relief on ineffective assistance of counsel claims as well as those based on "new knowledge." (App. p. 52, lines 8-20). Petitioner testified that he entered into the plea agreement believing he fully understood its terms. (App. p. 51, lines 13-14). Although the plea hearing was kind of confusing for him at times, he still felt he had understood the colloquy for the most part. (App. p. 52, lines 8-9). He testified the judge's explanations during the plea colloquy mirrored what his counsel had explained about the plea agreement in that he would still be able to seek ineffective assistance of counsel claims later on. (App. p. 51, lines 15-19; p. 52, lines 8-20). Understanding the plea agreement as not barring him from filing a PCR application, Petitioner accordingly had his family contact the undersigned's office to represent him in his PCR action. (App. p. 51, lines 20-23). On cross-examination, Petitioner answered in the affirmative when asked: "Do you recall telling the Court that you understood that you were waiving your rights to post-conviction relief?". (App. p. 53, lines 5-8). However, the plea hearing transcript demonstrates that Petitioner was neither asked nor stated that he understood the waiver as barring ineffective assistance of counsel claims.

ARGUMENT

In *Spoone v. State*, this Court considered the novel issue of whether a criminal defendant may waive his rights to appellate review and post-conviction relief by a written plea agreement. 379 S.C. 138, 141-42, 665 S.E.2d 605, 606-07 (2008). This Court looked to federal precedent on this issue as a guide to ultimately hold that such a waiver is valid and enforceable in this state so long as the waiver is knowingly and voluntarily made. *Id.* at 142-43, 665 S.E.2d at 607-08 (citations omitted). This determination is dependent upon the particular facts and circumstances surrounding the case, including the following relevant factors: the background, experience and conduct of the accused; the text of the plea agreement; the transcript of the plea hearing, and whether "the issue sought to be appealed falls within the scope of the waiver." *Id.* at 143-44 (first citing *United States v. Broughton-Jones*, 71 F.3d 1143, 1146 (4th Cir. 1995), then quoting *United States v. Cohen*, 459 F.3d 490, 494 (4th Cir. 2006)). *See also Sanders*, 412 S.C. at 614-15, 773 S.E.2d at 582; *e.g., Narcisco v. State,* 397 S.C. 24, 33, 723 S.E.2d 369, 374 (2012) ("'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'") (citations omitted). Later in *Sanders v. State*, this Court held that a PCR applicant is entitled to challenge the advice he received when entering into a plea agreement containing a PCR waiver and is entitled to a hearing on the waiver's validity and enforceability. 412 S.C. at 615.

In this case, the record demonstrates that the waiver was not to encompass ineffective assistance of counsel allegations like those raised in Petitioner's PCR application. The record further demonstrates that any waiver of his rights to raise such claims was not knowingly or voluntarily made due to counsel's constitutionally defective advice.

I. THE PCR COURT ERRED IN DISMISSING PETITIONER'S PCR APPLICATION BECAUSE THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS RAISED THEREIN FALL OUTSIDE OF THE SCOPE OF THE PLEA AGREEMENT WAIVER.

In dismissing Petitioner's PCR application, the PCR Court concluded that "the plea agreement's terms did encompass the claims of ineffective assistance counsel that he now seeks to raise." (App. p. 5; pp. 12-13). The PCR Court's conclusions are founded upon various errors of law and there is otherwise no evidence of probative value in the record to support its findings.

First, the PCR Court erroneously substitutes the plea agreement terms set forth on the record with the letters sent to Solicitor Redmond:

> [T]his Court interprets the testimony of the parties to indicate that the letters [ ] sent to Solicitor Redmond encompass the entirety of the plea agreement. Those letters are clear: 'Applicant will further waive any appeals or collateral relief from his sentence. Under the proposed plea, [Applicant]'s sentence will be final.' The text of the plea agreement cuts in favor of the waiver being effective.

(App. p. 12). Contrary to the PCR Court's findings, neither letter was read into the record, introduced as an exhibit, or otherwise given to the plea judge. *See infra State v. Thrift,* 312 S.C. 282, 295-96, 440 S.E.2d 341, 348-49 (1994) (holding plea agreements are to be enforced according to those terms set forth on the record). Thus, the letters do not control as the binding terms of the plea agreement. As discussed herein, this is significant as not only do the letters differ from one another, but they also conflict with the record because neither letter mentions the exception to the waiver for ineffective assistance of counsel claims or for claims unknown to Petitioner at the time of his plea. It is also significant that there is no evidence in the record that Petitioner signed, let alone read or was advised on the contents of either letter.

Next, the PCR Court incorrectly applied the rules of contract construction and enforcement in concluding: "A finding that [ineffective assistance of counsel] claims were excluded from the waiver would conflict with the express terms of the agreement". (App. pp.

12-13). *See e.g., State v. Compton*, 366 S.C. 671, 677-78, 623 S.E.2d 661, 664 (Ct. App. 2005) (explaining plea agreements between the State and a defendant are interpreted according to general contract principles and the rules of construction typically used to construe commercial contracts); *accord Reed v. Becka,* 333 S.C. 676, 685, 688, 511 S.E.2d 396, 401, 402 (Ct. App. 1999). The record demonstrates that ineffective assistance of counsel claims were explicitly carved out as an exception to the claims barred by the waiver. Indeed, Mr. McGuire had informed Judge Griffith during the plea hearing: "**Mr. Cowick is waiving all of the claims to him *unrelated to ineffective assistance***", explaining "case law indicates that ***it would be unethical for us to counsel him to waive claims against us.*** **So any known claims with regard to anything in his case that he knows about is [*sic*] waiving, *but not specifically ineffective. We're not able to encourage him to do that.*"** (App. p. 126, line 22—p. 127, line 3) (emphasis added). Mr. Scales likewise explained that the claims actually covered by the waiver was the "maximum of what we can allow him to waive." (App. p. 127, lines 4-7). Judge Griffith stated he understood this limitation and ultimately accepted the plea agreement. (App. p. 127).

As set forth on the record, the exception made for ineffective assistance of counsel claims is perfectly clear, plain, and capable of legal construction. *E.g., State v. Gates*, 299 S.C. 92, 94-95, 382 S.E.2d 886, 887 (1989) ("Where language used in an instrument is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument.") (internal citations omitted). Thus, by construing and enforcing the plea agreement as barring the ineffective assistance of counsel claims raised in Petitioner's PCR application, the PCR Court not only erroneously applied the rules of contract construction, but had also violated the rule established in *Thrift* that plea agreements are to be enforced according to the terms set forth on the record. 312 S.C. at 295-96, 440 S.E.2d at 348-49 ("[T]he complexity of cases dictates that a reliable record exist containing the specific terms of any plea

agreement...[A]ll plea agreements must be on the record and must recite the scope, offenses, and individuals involved in the agreement...review [is limited] only to those terms which are fully set forth in the record...neither the State nor the defendant will be able to enforce plea agreement terms which do not appear on the record before the trial judge who accepts the plea").

The record also clearly refutes the PCR Court's conclusion that the waiver was not intended to exclude ineffective assistance of counsel claims because such an arrangement would not have "induce[d] the concessions the State made in a case such as this." (App. pp. 12-13). Recall that Solicitor Redmond did not object to Mr. McGuire's explanation that the waiver covered claims *unrelated* to ineffective assistance of counsel. (App. pp. 126-127). *Cf. State v. Thomason*, 355 S.C. 278, 286, 584 S.E.2d 143, 147 (Ct. App. 2003) ("When the State's Attorney has given his word in the form of a plea bargain and that bargain is accepted by the trial court, *it behooves the State's Attorney to make every reasonable effort to correct any deviation from the bargain when the deviation is called to his attention.*") (quoting *Alston v. State*, 38 Md.App. 611, 379 A.2d 754, 757 (Md. 1978) (italics added)). Further, at the Motion to Dismiss hearing, Mr. McGuire reiterated that "there were things we could not waive" and testified he had discussed this limitation to the scope of the waiver pursuant to the *Sanders* case with Solicitor Redmond when finalizing the terms of the plea agreement. (App. p. 43, lines 16-43). Solicitor Redmond likewise acknowledged this as a "caveat" to the scope of the waiver at the plea hearing. (App. p. 99, lines 14-20; p. 124, line 19—p. 125, line 2). Petitioner's testimony that his attorneys had explained that the waiver would not prevent him from raising ineffective assistance of counsel claims in a subsequent PCR application is not only consistent with the statements made by his attorney and the Solicitor, but also further supports that the parties understood and agreed the waiver was not to encompass ineffective assistance of counsel claims. (App. p. 52, lines 8-20). Thus, despite the PCR Court's reasoning that the exception could not have been intended or agreed upon by the parties because it was

incompatible with the State's interests, this Court has specifically held: "Whether the plea agreement is wise, or even in the best interests of the State, is not the question before us" and "The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." *Thrift*, 312 S.C. at 293, 440 S.E.2d at 347; *Compton*, 366 S.C. at 678, 623 S.E.2d at 665. The record clearly demonstrates that the waiver's exception for ineffective assistance of counsel claims was mutually understood by the parties and nonetheless became a binding, enforceable term of the plea agreement in this case because it was clearly set forth on the record without objection and the plea agreement was accepted without objection. *See supra Reed* (holding a plea agreement, including an oral agreement, becomes binding upon acceptance by the plea judge). *See also United States v. Wood*, 378 F.3d 342, 350 (2004) (holding that the Government acquiesced to modification of the plea agreement by failing to object to the plea judge's explanation of the scope of the waiver which differed from that originally agreed upon and by making statements that appeared to buttress the judge's interpretation of the agreement). Moreover, in light of the parties' mutual understanding demonstrated in the record, by construing the plea agreement as barring the ineffective assistance of counsel claims Petitioner raised, the PCR Court violated the well-settled principle that "in interpreting plea agreements, it is error for a court 'to imply as a matter of law a term which the parties themselves did not agree upon.'" *Baughman v. State*, 311 S.C. 547, 549, 430 S.E.2d 505, 506-07 (1993) (internal citations omitted); *accord, Compton*, 366 S.C. at 678, 623 S.E.2d at 665 ("Unless intended by both parties, terms or conditions should not be read into a plea agreement.").

Additionally, even assuming *arguendo* the terms of plea agreement were ambiguous in regard to the exception made for ineffective assistance of counsel claims, this ambiguity would be construed against the State and thus Petitioner should be granted a full evidentiary PCR

hearing on the merits. *See e.g., United States v. Harvey,* 791 F.2d 294 (4th Cir. 1986); *United States v. Ringling* (holding that because the rights involved with plea agreements are fundamental and constitutionally based, plea agreements are construed more stringently than commercial contracts and the State is held to a higher degree of responsibility than the defendant for imprecisions or ambiguities in plea agreements). *See also United States v. Ziadeh*, 104 Fed. Appx. 869, 873 (4th Cir. 2004) (resolving the ambiguity of whether the appellate waiver included restitution-related issues against the Government, finding that "[i]f the Government intended [] to include a waiver of appellate rights related to restitution, it knew full well how to include such language in the plea agreement.").

The PCR Court also erred in concluding that such an exception to the waiver would defy "common sense" in that "[a] waiver of post-conviction relief that entirely excludes claims of ineffective assistance of counsel is effectively reduced to a nullity." (App. pp. 12-13). As previously discussed, such consideration is irrelevant here because the exception to the waiver was clearly established on record without objection, but for the sake of argument, the waiver is not rendered by a nullity by this exception because the other types of claims enumerated in the PCR Act are otherwise subject to the waiver's terms. *See* S.C. Code Ann. § 17-27-20.

The PCR Court likewise erred in construing the distinction between those claims known and unknown to Petitioner at the time of his guilty plea as barring the allegations currently raised in his PCR application:

> This Court finds that Applicant's plea...encompassed a broad waiver of post-conviction relief claims, limited only by the requirements of *Sanders* and its progeny, and by the mutual understanding of the parties that Applicant would be permitted to bring a PCR action should he discover some information then unknown to him which justifies relief. Applicant's current PCR application contains garden variety claims of ineffective assistance of counsel which all implicate counsel's performance *prior to his guilty plea.* Clearly, each of these claims are covered by the waiver.

(App. p. 12) (italics in original). This finding is erroneous for several reasons. First, according to the terms set forth on the record, claims of ineffective assistance of counsel were excluded from the scope of the waiver and nothing was established to nonetheless bar "garden variety" claims—the PCR Court is the first in its Order of Dismissal to use such a descriptor. *See supra Thrift* and *Baughman.* Furthermore, according to the record, the "known/unknown" distinction does not apply to claims of ineffective assistance of counsel. The specific language used by Mr. McGuire demonstrates that such claims were entirely excluded from the waiver because they had felt that a waiver that encompassed ineffective assistance of counsel claims would be unethical pursuant to *Sander*s. Whether Petitioner knew of any facts or information that would form the predicate of such claims has no effect on the ethical justifications for the categorical exclusion. In other words, pursuant to his attorney's reasoning, it would have been unethical under *Sanders* to counsel Petitioner to waive claims of ineffective assistance of counsel, including those he may or may not have been aware of at the time of his plea. Moreover, because this case ended with a guilty plea, any and all ineffective assistance of counsel claims Petitioner could ever possibly raise would inevitably pertain to counsel's performance prior to his guilty plea. Thus, the PCR Court's reasoning that the waiver barred the allegations now raised because they "implicate counsel's performance *prior to his guilty plea*" is erroneous, illogical, and conflicts with the terms of the plea agreement waiver put on the record. Additionally, and perhaps most significantly, even if *arguendo* the waiver did include any ineffective assistance of counsel claims that Petitioner knew of at the time of his plea, there is nothing in the record to actually establish which specific, if any, information or claims Petitioner had previously been made aware of at the time he pleaded guilty. *See supra Thrift.* Thus, it was error to conclude the allegations raised in Petitioner's PCR application were waived by his plea on the basis that they are among the claims he had been aware of at the time he pleaded guilty.

Lastly, to the extent that this term is rendered ambiguous by the silence in the record as to what, if any, information or claims he had been made aware of at the time of his plea, the ambiguity should be resolved in favor of Petitioner and he therefore should be granted a full evidentiary PCR hearing on the merits.

II. THE PCR COURT ERRED IN DISMISSING PETITIONER'S PCR APPLICATION UPON FINDING PETITIONER DID NOT RECEIVE CONSTITUTIONALLY DEFECTIVE ADVICE CONCERNING THE PLEA AGREEMENT OR WAIVER BECAUSE THE PCR COURT FAILED TO APPLY THE PROPER STANDARD AND THE RECORD FAILS TO ESTABLISH A KNOWING AND VOLUNTARY WAIVER.

The PCR Court's conclusion that the waiver was knowingly and voluntarily made is based upon various errors of law and there is otherwise no evidence of probative value to support its findings.

In regard to the second *Spoone* factor, the "text of the plea agreement", the PCR Court appears to entirely skip discussion of this factor or has conflated it with its findings on the scope of the waiver. This factor nonetheless clearly weighs in favor of Petitioner. There was no written plea agreement in this case, and although the PCR Court found that the letters sent to Solicitor Redmond embodied the entire plea agreement (App. p. 12), neither letter was read into the record, introduced as an exhibit, or otherwise given to the plea judge. There is also no evidence in the record showing Petitioner signed, read, or was specifically advised on either letter. In light of the rules established in *Thrift*, the letters do not control and only the terms appearing on the record comprise the plea agreement in this case. Given that the allegations raised in his PCR application would constitute as exceptions to the waiver, this factor clearly supports Petitioner's position. As per the terms actually put on the record at the plea hearing, two exceptions to the waiver were made: (1) ineffective assistance of counsel claims and (2) claims or information

unknown to Petitioner at the time of his plea. (App. p. 124, line 17—p. 125, line 2; p. 125, lines 14-21; p 126, line 22—p. 127, line 7). However, the terms of the agreement and the specific components of the second exception in particular, are not as straightforward as the written plea agreement in *Spoone*. Nothing in the terms stated on record in any way provided what claims or information, if any, Petitioner may have known about at the time of his guilty plea. Likewise, the plea agreement terms did not suggest the manner to prospectively determine which claims or information would be subject to the waiver as there is obviously no way to possibly discern the extent of Petitioner's knowledge given that the record is otherwise silent to this.

The plea colloquy factor also clearly weighs in favor of Petitioner. Throughout the colloquy with Petitioner, the plea judge used inconsistent descriptors for the types of remedies/rights included in the waiver and phrased the waiver's effect in terms that implied Petitioner would be free to decide to pursue any certain claim or remedy notwithstanding the waiver, for example:

> But if anything anew arises, at that time *he can then make a decision as to whether or not to challenge it collaterally*...if something anew arises sometime after today, *you would then have the ability to consider that and decide whether to challenge it*...Subject to the current state law, if he may have challenges, *that will be determined with independent advice, if he so chooses.*

(App. p. 125, line 22—p. 126, line 4; p. 126, lines 6-13; p. 129, lines 6-7) (italics added). Throughout the colloquy, the plea judge clumsily provided explanations on the plea agreement's terms and the scope of the waiver, which only continued to evolve with input by each of his plea attorneys and Solicitor Redmond. (App. p. 120, line 16—p. 121, line 1; p. 124, line 17—p. 126, line 19). Indeed, Petitioner testified at the Motion hearing that the plea colloquy was confusing to him. (App. p. 52, lines 8-9). It was not until just before the plea was accepted and found to be knowing and voluntary did Mr. McGuire specifically inform the plea judge that Petitioner's attorneys had not advised him on the waiver as barring ineffective assistance claims

due to their position that *Sanders* prevented them from counseling any client to enter a plea agreement that would waive claims against themselves. (App. p. 126, line 22—p. 127, line 7). Judge Griffith stated he understood Mr. McGuire's explanation but did not expand on this particular topic apart from a brief, passing statement: "It's their ethical responsibility to give you good advice and fair advice under the laws of South Carolina. But they can't encourage you to say they did a great job when in fact that may be - - somebody else says, you know what, I may have done something differently..." (App. p. 127, lines 17-23). Significantly and in marked contrast to *Spoone*, Judge Griffith did not inquire into Petitioner's understanding about this; Petitioner was never asked nor did he ever state that he understood the waiver as barring ineffective assistance of counsel claims. Judge Griffith instead posed a series of questions that each effectively asked whether Petitioner was satisfied with his attorneys' advice. (App. p. 127, line 8—p. 128, line 4). Petitioner's answers in the affirmative do not operate as a waiver of ineffective assistance of counsel and are not determinative as to whether his plea or waiver was knowing or voluntary. *See Kolle v. State*, 386 S.C. 578, 592, 690 S.E.2d 73, 80, fn. 5 (2010), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 181, 810 S.E.2d 836, 839, n. 2 (2018).

The testimony at the Motion hearing is consistent with the plea colloquy and provides further support under the third factor. Petitioner testified that from his discussions with his attorneys and with the plea judge, he believed he could still pursue ineffective assistance of counsel claims in addition to claims he had not been previously made aware of. (App. p. 51, lines 13-22; p. 52, lines 9-17). Mr. McGuire likewise testified that he was prevented from counseling Petitioner on the waiver as barring ineffective assistance of counsel claims made against himself or his other plea attorneys. (App. p. 46, lines 5-13). Although Mr. McGuire and Petitioner testified that they had discussed the plea agreement terms and the PCR waiver prior

to the plea, *there is no testimony that a waiver of ineffective assistance of counsel claims, specifically, was ever discussed.*

In regard to the second exception to the waiver specifically, despite being asked whether he had discussed with his attorneys "any challenges you may have towards that evidence [referring to the summary provided for the factual basis of the plea] and those witnesses and they've discussed with you any defenses you may have based upon their understanding of the law and their evaluation of the facts" (App. p. 118, lines 4-14), this inquiry is too vague and insufficient to categorize the allegations raised in Petitioner's PCR application as those known to him at the time of the plea and thus barred by the waiver. Apart from his previous head injuries, it is not as though there is anything in the entire record establishing which, if any, specific defenses or challenges were actually discussed with Petitioner.

In regard to the "background, experience, conduct of the accused" *Spoone* factor, although Mr. McGuire testified at the Motion hearing that he believed Petitioner was competent and experienced no difficulty comprehending their discussions, this factor does not cut in favor of the State's position as definitively as the PCR Court had concluded. Petitioner had been treated for mental illness just prior to the start of his case in 2015, which appears to have prompted a competency evaluation. (App. p. 122, lines 2-14). The plea judge had also paused his exchange with Petitioner to further inquire with Ms. Kuchar regarding Petitioner's mental state due to the character of his answers throughout the colloquy. (App. p. 122, lines 15-25). Petitioner was not on medication at the time of the plea hearing but had been previously treated for mental illness, including follow-up treatment and medication for his mental illness at the jail. (App. p. 122, line 24—p. 123, line 18). Petitioner had also sustained traumatic brain injuries as the result of several head injuries in previous years, which had prompted SCCID to begin an investigation and consult with experts in the field of neurology. (App. p 46, line 14—p. 47, line 13). The severity

of his brain trauma was insufficient to pursue for trial defense purposes but is otherwise well-documented. (App. p. 47, line 19—p. 48, line 3). Petitioner also testified that living in solitary confinement for a majority of the nearly four (4) years he spent awaiting trial impacted his ability to address his case during meetings with his attorneys. (App. p. 50, line 24—p. 51, line 12).

Lastly, the PCR Court erred as a matter of law by inserting into the analysis the standards and tests used in other ineffective assistance of counsel scenarios that are inapplicable to the issues at hand. In addition to the rule regarding conflict of interests under *Lomax v. State*, the PCR Court strayed outside of the relevant determinations to be made by conducting — an albeit incorrect—prejudice analysis that is rather applicable to different guilty plea-ineffective assistance of counsel issues. (App. p. 9, p. 13).

CONCLUSION

Therefore, under the factors set forth in *Spoone* and its federal predecessors, Petitioner's waiver was not knowingly or voluntarily made. The record and foregoing discussion also establishes that Petitioner received constitutionally defective advisement when entering into the plea agreement and agreeing to the waiver pursuant to *Sanders*. In concluding otherwise, the PCR Court made errors of law and misapplied the relevant standard and there is otherwise no evidence of probative value to support its findings.

Petitioner thus respectfully urges this Court to reverse the Order of Dismissal and remand for a full evidentiary PCR hearing on the merits with instructions that the plea agreement waiver does not bar the type of allegations currently raised in his PCR application as well as prospectively in a petition for writ of habeas corpus.

Respectfully Submitted,

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