

IN THE  
MISSOURI SUPREME COURT

CLARENCE BURGESS,	)	
	)	
Appellant,	)	
	)	
v.	)	No. SC91571
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY  
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 8  
THE HONORABLE TOM W. DEPRIEST  
JUDGE AT POST-CONVICTION PROCEEDINGS

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APPELLANT'S SUBSTITUTE REPLY BRIEF

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## **REPLY TO STATE'S POINT I**

**The motion court clearly erred in dismissing Appellant's Rule 24.035 motion because Appellant did not knowingly and voluntarily waive the actual conflict of interest between himself and plea counsel when he executed the invalid written waiver of his right to seek post-conviction relief in exchange for a suspended execution of a fifteen-year sentence and five years probation because the written waiver and the plea court's examination did not inform him of the conflict of interest.**

**1. This appeal should be not dismissed because Appellant's waiver is invalid because Appellant did not knowingly, intelligently, and voluntarily waive the conflict of interest between plea counsel and himself.**

The State cites cases from the Missouri Court of Appeals, federal courts, and other state courts that permit a defendant to waive post-conviction rights pursuant to an agreement with the government (Resp. Br. 13, 16). In Jackson v. State, 241 S.W.3d 831, 833 (Mo. App. E.D. 2007), State v. Valdez, 851 S.W.2d 20, 22 (Mo. App. W.D. 1993), United States v. Wessells, 936 F.2d 165, 167 (4th Cir. 1991), United States v. Lemaster, 403 F.3d 216, 220 (4th Cir. 2005), Stahl v. State, 972 So.2d 1013, 1015 (Fla. Dist. Ct. App. 2008), Allen v. Thomas, 458 S.E.2d 107, 108 (Ga. 1995), and Spoone v. State, 665 S.E.2d 605, 607-608 (S.C. 2008), the issue was whether a post-conviction movant could waive his right to seek post-conviction relief in return for a reduced sentence. Appellant's case is distinguishable because Appellant is raising the issue differently.

Appellant did not knowingly, intelligently, and voluntarily waive the *conflict of interest* between plea counsel and himself when the post-conviction waiver was entered.

**2. This appeal should be not dismissed because Appellant’s purported written waiver is invalid because it required Appellant to waive the Court imposing a sentence without jurisdiction, or a sentence imposed in excess of the maximum sentence authorized by law.**

Appellant’s written waiver required that he waive any claims of ineffective assistance of trial and appellate counsel, that the plea court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law (Supp. L.F. 1). Thus, from a plain reading of the written waiver, this Court must find the waiver was invalid because it required Appellant to waive illegal sentences (Supp. L.F. 1).

The enforceability of a waiver of direct-appeal rights and a waiver of collateral-attack rights in the plea agreement are not absolute. See DeRoo v. United States, 223 F.3d 919, 923 (8th Cir. 2000). For example, defendants cannot waive their right to appeal an illegal sentence or a sentence imposed in violation of the terms of an agreement. See United States v. Michelsen, 141 F.3d 867, 872 (8th Cir. 1998).

A decision to enter into 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.” Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)); Tollett v. Henderson, 411 U.S. 258, 266-67 (1973). Therefore, “[j]ustice 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.” Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999) (defendant convicted and entered into cooperation agreement before sentencing).

A defendant’s plea agreement waiving the right to seek post-conviction relief does not waive defendant’s right to allege that the decision to enter into the plea was not knowing and voluntary because it was the result of ineffective assistance of counsel. See DeRoo, 223 F.3d at 924. Other courts agree that a waiver of section 2255 rights does not automatically preclude a defendant from raising ineffective assistance of counsel claims in a post-conviction motion. See United States v. Henderson, 72 F.3d 463, 465 (5th Cir. 1995) (“dismissal of an appeal based on a waiver in the plea agreement is inappropriate where the defendant’s motion to withdraw the plea incorporates a claim that the plea agreement generally and the defendant’s waiver of appeal specifically, were tainted by ineffective assistance of counsel”); United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993) (stating waiver does not “categorically” foreclose defendant’s right to bring motion under section 2255 for ineffective assistance of counsel); see also United States v. Craig, 985 F.2d 175, 178 (4th Cir. 1993) (per curiam) (holding waiver did not preclude Rule 32(d) motion challenging validity of waiver due to ineffective assistance of counsel).

### **3. Advisory Committee of the Missouri Supreme Court Formal Ethics Opinion 126 affects the validity of Appellant's waiver.**

Appellant disagrees with the State's assertion that advising a client to waive post-conviction rights does nothing to advance the attorney's interest and the outcome of a post-conviction proceeding has no bearing on an attorney's potential liability in a subsequent claim for legal malpractice (Resp. Br. 19-20). Contrary to the State's assertions, Formal Ethics Opinion 126 states providing such advice would violate Rule 4-1.7(a)(2) and defense counsel certainly has a personal interest in a future claim that defense counsel was ineffective. See Mo. Advisory Comm. Op., Formal Op. 126 (2009).

The State asserts that Formal Opinion 126 is overbroad and has no effect on the validity of Appellant's waiver (Resp. Br. 20). To the contrary, Formal Opinion 126 is narrowly written and affects the validity Appellant's waiver because the opinion states it is not permissible for defense counsel to advise a defendant about a waiver of claims of ineffective assistance of counsel and that the conflict under Rule 4-1.7(b)(1) is not waivable. See Mo. Advisory Comm. Op., Formal Op. 126 (2009).

The State claims "[w]aiving the right to assert post-conviction claims does not preclude a later finding that counsel was ineffective. What it waives is a defendant's ability to employ *a certain procedure* to challenge counsel's effectiveness; it does *not* waive a defendant's right to receive the effective assistance of counsel or his right to challenge counsel's effectiveness (Resp. Br. 20). But this "certain procedure," Rule 24.035, is the proper and exclusive procedure under Missouri law for Appellant to

challenge the effectiveness of counsel. See State v. Carter, 62 S.W.3d 569, 570 (Mo. App. S.D. 2001).

The State claims that the second problem with Appellant's claim involves the interests Appellant identifies as belonging to himself – the interests in “challenging his convictions and avoiding a lengthy term of imprisonment.” (Resp. Br. 22). If this waiver is enforced, Appellant will be precluded from challenging his lengthy term of imprisonment of fifteen years. Appellant pled that he would testify that a fifteen-year sentence is not a “benefit of a bargain” because fifteen years is the maximum sentence for an unenhanced class B felony (L.F. 72).

The State asserts that that Formal Opinion 126 has no bearing on the enforceability of the “contract” that Appellant entered into with the State (Resp. Br. 23). To the extent contract law is even relevant to this issue, Appellant's written waiver was not a valid “contract” because Appellant did not know about the conflict of interest that existed between his plea counsel and himself.

This Court must find that this alleged contract was void either under the doctrines of unconscionability or mutual mistake. In Missouri, unconscionability has two aspects: procedural and substantive. Kansas City Urology, P.A. v. United Healthcare Services, 261 S.W.3d 7, 14-15 (Mo. App. W.D. 2008). Procedural unconscionability relates to the formalities of making the contract: whether or not one of the parties exerted heavy pressure on the other party during the negotiations, misrepresented material facts to the other party, or had a significantly unequal bargaining power over the other. Id. Substantive unconscionability focuses on the contract's terms: whether or not they are

unduly harsh. Id. For a contract to be void on the basis that it is unconscionable, it must be procedurally and substantively unconscionable, although not in equal amounts. Id. For example, a contract can be void because of a substantial amount of procedural unconscionability but only a small amount of substantive unconscionability, or vice versa. Id. Under this doctrine, this Court can find that the waiver was void because Appellant did not know about the conflict.

“Mutual mistake is one common to both or all parties, where each labors under the same misconception respecting a material fact, the term of the agreement, or the provisions of the written instrument designed to embody such argument.” Smith v. Githens, 271 S.W.2d 374, 379 (Mo. App. 1954). For there to be a sufficient mistake of facts to avoid a contract, the mistake must relate to a fact which contravenes or goes to the very essence of the contract, is material to one of the things contracted for, or relates to the subject matter of the contract. Byrd v. Liesman, 825 S.W.2d 38, 40 (Mo. App. S.D. 1992). Under the mutual mistake doctrine, this Court can find the waiver was void because the State, the plea court, and trial counsel made Appellant enter the waiver under the mistake that Appellant could waive this conflict.

The State is correct that defense counsel is duty-bound to advise a defendant when such an offer has been made by the State, so that a defendant can make an informed decision as to how his case might proceed. Supreme Court Rule 4-1.4(b); Resp. Br. 24-25. Similarly, the defense counsel must disclose the conflict of interest before a defendant waives post-conviction rights so that a defendant can make an informed decision about whether to plead guilty.

The State argues an alleged breach of ethical duties simply does not void an otherwise valid contract, citing United States v. Dorsey, 4 F.3d 986, 1993 WL 329985, \*2 (4th Cir. 1993). In its unpublished opinion, the Fourth Circuit stated that whether a plea agreement is constitutional and otherwise lawful is a question to be determined by the courts. Id. Whether the conduct of attorneys with respect to a plea agreement is ethical is a question addressed concurrently to the courts and the State Bar. Id. Like Dorsey, this Court must determine whether Appellant's plea agreement was ethical and constitutional. Under Missouri precedent, Appellant's waiver was invalid because an attorney cannot be put in the untenable position of litigating his or her own incompetence. See State v. Taylor, 1 S.W.3d 610, 612 (Mo. App. W.D. 1999); State v. Griddine, 75 S.W.3d 741, 743-744 (Mo. App. W.D. 2002).

#### **4. Under Missouri Law, Prejudice is Presumed**

Even before Formal Opinion 126 was issued, the prosecutor, plea counsel, and the plea court should have been aware of the case law that stated when a trial attorney represents a defendant on direct appeal and in a post-conviction motion in which the claim is ineffective assistance of trial counsel, this creates an inherent conflict of interest for the attorney. State v. Taylor, 1 S.W.3d 610, 612 (Mo. App. W.D. 1999) (defense counsel's advice not to file for post-conviction relief demonstrated actual conflict of interest from which prejudice would be presumed). "It puts the attorney in the untenable position of litigating his or her own incompetence." Id.; State v. Griddine, 75 S.W.3d 741, 743-744 (Mo. App. W.D. 2002) (trial counsel, who represented defendant on direct

appeal and who also advised defendant not to file post-conviction motion alleging a conflict of interest, presumptively caused prejudice to defendant).

In its brief, the State never addresses the Taylor and Griddine cases. Their rationale would apply precluding the same attorney from representing a client at a plea and simultaneously advising him about whether to waive post-conviction remedies because that would challenge counsel's own ineffectiveness. Plea counsel should have made the plea court aware of the cases and informed the court and prosecutor that plea counsel could not represent Appellant with that provision in the plea bargain based on a conflict of interest.

This Court should reverse the motion court's judgment and set aside his plea because the invalid waiver of post-conviction rights invalidated the plea. In the alternative, this Court should reverse the motion court's judgment and remand for findings or grant Appellant an evidentiary hearing.

## **II.**

**Appellant adopts and incorporates by reference Point Relied II and Argument from his opening brief without waiving any arguments.**

## **III.**

**Appellant adopts and incorporates by reference Point Relied III and Argument from his opening brief without waiving any arguments**

## **CONCLUSION**

WHEREFORE, based on his argument in Point I of his brief, Appellant requests that this Court reverse the motion court's judgment and set aside his plea because the invalid waiver of post-conviction rights invalidated the plea. In the alternative, this Court should reverse the motion court's judgment and remand for findings of facts and conclusions of law on the merits or grant Appellant an evidentiary hearing.

Based on his argument in Point II of his brief, Appellant requests that this Court reverse the judgment of the motion court and remand this cause for an evidentiary hearing or findings of facts and conclusion of law on the merits with a different judge from the Twenty-First Circuit. Alternatively, this Court should reverse the motion court's judgment and set aside his plea because the invalid waiver of post-conviction rights invalidated the plea.

Based on his argument in Point III of his brief, Appellant requests that this Court reverse the judgment of the motion court and remand this cause for an evidentiary hearing or findings of facts and conclusion of law on the merits. Alternatively, this Court should reverse the motion court's judgment and set aside his plea because the invalid waiver of post-conviction rights invalidated the plea.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE AND COMPLIANCE**

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this day, April 12<sup>th</sup>, 2011, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times Roman 13 point font. The word-processing software identified that this brief contains 2,267 words, excluding the cover page, signature block, and certificates of service and of compliance. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with Symantec Endpoint Protection software and found virus-free.

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