

No. SC91613

In the
Missouri Supreme Court

LESTER F. KRUPP, JR.,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable Colleen Dolan, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the dismissal of a motion to vacate judgment and sentence under Supreme Court Rule 29.15 in the Circuit Court of St. Louis County. The convictions sought to be vacated were for one count of felonious restraint, § 565.120, RSMo 2000, four counts of deviate sexual assault, § 566.070, RSMo 2000, and one count of first-degree sexual misconduct, § 566.090, RSMo 2000, for which Appellant was sentenced, pursuant to an agreement with the State, to a total of fifteen years imprisonment. This appeal was transferred by the Eastern District Court of Appeals to this Court pursuant to Rule 83.02.

STATEMENT OF FACTS

Appellant, Lester Krupp, Jr., was charged in the Circuit Court of St. Louis County with two counts of felonious restraint, four counts of forcible sodomy, four alternative counts of deviate sexual assault, one count of forcible rape, one alternative count of sexual assault, one count of second-degree domestic assault, and one count of first-degree sexual misconduct, involving three different victims. (L.F. 19-25).¹ Before trial, the court granted Appellant's motion to sever counts 12 and 13 (one count of felonious restraint and one count of second-degree domestic assault) for improper joinder. (L.F. 75). The court denied Appellant's motion to sever count 14 (first-degree sexual misconduct), and Appellant proceeded to jury trial on the twelve remaining counts beginning on March 31, 2008. (L.F. 12).

The jury found Appellant guilty of one count of felonious restraint, four counts of deviate sexual assault, and one count of first-degree sexual misconduct. (L.F. 115-119, 122). The jury acquitted Appellant of forcible rape and sexual assault. (L.F. 120-121). Following entry of the verdicts, Appellant waived his right to jury sentencing and entered guilty pleas to the two counts that had

¹ The record on appeal consists of a direct appeal legal file from ED92150 (L.F.), a trial and sentencing transcript from ED92150 (Tr.), a supplemental transcript from ED92150 (Supp. Tr.), and a post-conviction relief legal file (PCR L.F.).

previously been severed in accordance with a negotiated agreement with the State.

(Tr. 841). The prosecutor announced the following agreement:

Your Honor, the State's recommendation is for the Court to sentence the defendant on all the charges for a total of 15 years. In exchange for all of that, the defendant will waive his right to file a Post Conviction Relief Motion and waive his appeals on all the charges, and in some form or another the sentence will be a three, with a five consecutive to that, with a seven consecutive to that, for a total of 15 years, Your Honor.

(Tr. 842). Defense counsel added that the State also agreed not to file any additional charges. (Tr. 842). The court then addressed Appellant:

THE COURT: Did you just hear the announcements made by your attorney?

A. I did.

THE COURT: Has he explained to you that you are entitled to have a jury make a recommendation as to the sentences that should be imposed regarding the counts they found you guilty of last evening?

A. Yes.

THE COURT: Is it true you wish to waive your right to jury sentencing and submit to sentencing by the Court pursuant to an agreement your attorney has reached with the office of the Prosecuting Attorney?

A. Yes.

THE COURT: Is it also true you wish to waive your right to a trial on the remaining two counts and enter a plea of guilty to both of those pursuant to the State's recommendation?

A. Yes.

THE COURT: Is it also part of the agreement that you are agreeing to waive your right to an appeal, a Motion for New Trial, or Post Conviction Relief proceedings in this trial?

A. Yes.

(Tr. 842-843). The court then conducted the guilty plea hearing.² (Tr. 844).

During the plea hearing, the court ascertained that Appellant had a college education and was not under the influence of any drugs or alcohol. (Tr. 844). Appellant denied having any illness or injury affecting his ability to understand the proceedings. (Tr. 845). After the prosecutor discussed the charges and range of punishment, the court solicited the prosecutor's recommendation. (Tr. 846-848). Appellant acknowledged the prosecutor's recommendation and indicated that it was as he expected. (Tr. 848). Appellant then denied the existence of any threats or promises in exchange for his guilty pleas and affirmed that counsel had done

² The charges to which Appellant pled guilty were the subject of a separate appeal under Rule 24.035 in case number ED95023. The facts of the guilty plea, however, will be discussed to the extent relevant to the issues arising in this appeal.

everything he asked counsel to do. (Tr. 848). Appellant indicated that counsel answered all of his questions, that he had sufficient time to discuss the case with counsel, and that he had no complaints or criticisms of counsel. (Tr. 848). Appellant denied knowing of anything counsel could have done that he failed to do or any witnesses counsel could have contacted that he failed to contact. (Tr. 849). Appellant indicated that counsel had fully investigated the case to his satisfaction. (Tr. 849).

Appellant advised the court that counsel had fully advised him as to all aspects of his case, including his legal rights, and the possible consequences of his plea. (Tr. 849). Appellant indicated that counsel had adequately, completely, and effectively represented him in his defense to the charges. (Tr. 849). The court went through the various rights associated with trial, and Appellant acknowledged both understanding them and that he was waiving them by pleading guilty. (Tr. 849-851). He further indicated that it was his desire to waive those rights and plead guilty. (Tr. 851).

Appellant advised the court that he understood all of the questions that had been asked of him, and he denied being advised by anyone to lie to the court. (Tr. 851). The court accepted Appellant's guilty pleas and moved into the sentencing phase. (Tr. 851-852).

At the sentencing hearing, Appellant affirmed that he had pled guilty pursuant to an agreement with the State, and that the agreement contained his

decision to waive his right to any post conviction relief proceedings regarding both the guilty plea and the trial in exchange for a recommended sentence by the State. (Tr. 853-854). Appellant affirmed that counsel had explained his rights to a motion for new trial, a direct appeal if that motion were denied, and his right to file a motion for post-conviction relief upon delivery to the Department of Corrections. (Tr. 854). Appellant acknowledged that he agreed to waive all of those rights in exchange for a fifteen year sentence on all counts disposed of during trial and guilty plea. (Tr. 854-855). The court specifically addressed Appellant's waiver of his post-conviction remedies:

THE COURT: Mr. Krupp, do you understand that pursuant to Missouri Supreme Court Rule 29.15 you have the right to file a motion in this court seeking to vacate, set aside or correct the judgment of conviction or sentences imposed if you claim that your conviction or the sentences imposed violate the constitution and laws of this state or the constitution of the United States or that this Court is without jurisdiction to impose the sentence or that the sentences to be imposed are in excess of the maximum sentences authorized by law? Did you understand that?

A. Yes.

THE COURT: And did you also understand that you were waiving your right to claim that your attorney rendered ineffective assistance to you during the trial?

A. Yes.

(Tr. 855-856).

The State presented victim impact testimony, and then the court sentenced Appellant in accordance with the plea agreement to a total of fifteen years on all counts. (Tr. 856-860). Then, acknowledging that Appellant had already agreed to waive his post-conviction remedies, the court nevertheless explained Appellant's rights under the post-conviction rules. (Tr. 861-862). The court then examined Appellant regarding the assistance of counsel. (Tr. 862).

Appellant indicated that he had sufficient opportunity to confer with counsel during the trial, that counsel cross-examined all of the State's witnesses, that counsel called witnesses on Appellant's behalf, that Appellant chose not to testify and was not claiming that counsel prohibited him from doing so, that there were no further witnesses that Appellant wished counsel to contact or call to testify, that there was nothing counsel refused to do upon Appellant's request, that counsel refrained from doing things against Appellant's wishes, and that the decision to waive jury sentencing was Appellant's. (Tr. 863-864). Appellant acknowledged that his decision to waive jury sentencing and plead guilty to the remaining two counts was based upon the agreement reached between counsel and the State, and he agreed that the sentences he received were in accordance with that agreement. (Tr. 865-866). Appellant expressed absolute satisfaction with counsel's services.

(Tr. 866). The court again verified Appellant's decision to waive his rights to direct appeal and post-conviction relief. (Tr. 867).

Following his sentencing, in direct contravention of his plea agreement, Appellant filed both a direct appeal and a *pro se* motion for post-conviction relief. (L.F. 139-140; PCR L.F. 4-29). The Eastern District dismissed Appellant's direct appeal pursuant to the State's motion and Appellant's waiver. (PCR L.F. 36; Resp. Br. App. at A16). Before the direct appeal was dismissed, however, the motion court had appointed counsel and granted counsel's motion to hold the case in abeyance pending the outcome of the direct appeal. (PCR L.F. 30-33, 73). After the direct appeal was dismissed, appointed counsel filed an amended motion, raising three claims of ineffective assistance of trial counsel for: (1) failing to offer testimony from Appellant's mother to impeach one of the victims; (2) failing to submit a lesser included offense instruction; and (3) errantly advising Appellant to waive his right to direct appeal based upon mistaken advice that Appellant would serve only a few months of the agreed to fifteen-year sentence. (PCR L.F. 34-68). Although not a claim raised in the amended motion, Appellant also acknowledged his prior waiver as part of his plea agreement, but asserted that the motion court "undoubtedly recognizes that it was not a knowing and intelligent waiver," based upon language from Formal Opinion 126 of the Advisory Committee of the Supreme Court of Missouri. (PCR L.F. 35-36).

The motion court denied an evidentiary hearing. (PCR L.F. 69). In its findings and conclusions, the motion court first determined that Appellant “effectively waived his right to file a petition for post-conviction relief as part of his plea agreement.” (PCR L.F. 76). The motion court then discussed the Eastern District’s opinion in *Jackson v. State*, 241 S.W.3d 831 (Mo. App. E.D. 2007), holding that “a Movant can waive his right to seek post-conviction relief in return for a reduced sentence if the record clearly demonstrates that the movant was properly informed of his rights and that the waiver was made knowingly, voluntarily and intelligently.” (PCR L.F. 76). The motion court discussed the *Jackson* opinion in detail before concluding, “Similarly, in the case at bar, the record refutes Movant’s claims and demonstrates that Movant clearly understood the terms of the plea agreement: he would receive a reduced sentence and no additional charges, and he would waive his right to file a post-conviction relief motion.” (PCR L.F. 76-77). The motion court then discussed the various aspects of Appellant’s guilty plea illustrating the voluntary and knowing nature of his waiver and participation in the plea agreement. (PCR L.F. 78-79). The motion court determined that “Movant’s accusations that trial counsel and the assistant prosecuting attorney engaged in unethical conduct are unconvincing.” (PCR L.F. 79). The court noted that *Jackson* was the prevailing authority at the time the agreement was entered and that Formal Opinion 126 was not issued until over a year after Appellant’s sentencing date. (PCR L.F. 79). The court further noted

that the Advisory Committee “did not – and could not – reverse or overrule Jackson by filing Formal Opinion 126.” (PCR L.F. 80).

The motion court then gratuitously addressed the merits of the claims presented in the amended motion and determined that they were all without merit. (PCR L.F. 80-83). This appeal followed.

ARGUMENT

The motion court did not clearly err in denying Appellant’s Rule 29.15 motion because Appellant knowingly and voluntarily waived his right to seek post-conviction relief through a plea agreement in that Appellant agreed to waive his rights to direct appeal and post-conviction relief in exchange for a total sentence of fifteen years imprisonment; the trial court thoroughly examined Appellant regarding his understanding of the waiver; and Appellant received the benefit of the bargain insofar as he was sentenced to a total of fifteen years imprisonment. The motion court committed no error in determining that Appellant waived his right to seek post-conviction relief. (Responds to Appellant’s Points I, II, III, and IV).³

In his original brief in the Eastern District, Appellant challenged all of the motion court’s findings and conclusions but one – he did not challenge the motion court’s determination that he waived his right to seek post-conviction relief. And

³ Insofar as Appellant’s points on appeal address claims raised in his amended motion – the review of which Appellant waived through his plea agreement – Respondent will not address the merits of these claims. The motion court gratuitously addressed the merits and found all of these claims to be without merit. That determination, while unnecessary, was not clearly erroneous.

because his waiver was knowing and voluntary, this Court should dismiss Appellant's appeal pursuant to that waiver.

A. Appellant cannot now challenge the validity of his waiver when he failed to do so in either the motion court or in his brief before the Court of Appeals.

Appellant raised three claims of error in his amended motion: (1) ineffective assistance of counsel for failing to call a witness to impeach the victim; (2) ineffective assistance of counsel for failing to request lesser-included offense instructions; and (3) ineffective assistance of counsel for advising Appellant to waive his right to direct appeal. (PCR L.F. 36-37, 44-45, 56-57). Although Appellant acknowledged waiving his right to seek post-conviction relief, he did not raise as one of his claims that his waiver was invalid. (PCR L.F. 35). At best, Appellant cited Formal Ethics Opinion 126 and asserted that "this Court undoubtedly recognizes that it was not a knowing and intelligent waiver" based upon the ethics opinion. (PCR L.F. 35).

Then, in the "Standard of review and preservation" section of Appellant's first point relied on in his brief in the Eastern District, he again acknowledged his waiver of the right to seek post-conviction relief, but he reiterated the assertion from his amended motion that the waiver was "not a knowing and voluntary waiver because it was effectively an uncounseled choice where trial counsel could not ethically advise Appellant to waive Appellant's sole means for addressing trial counsel's effectiveness." (ED App. Br. 20). Appellant acknowledged that the

motion court discussed his waiver, but noted that the court did not enforce the waiver by dismissing Appellant's case. (ED App. Br. 20). Appellant then took the court's actions as a determination that the court found the waiver invalid. (ED App. Br. 30, 41). He made no challenge to the motion court's finding that he "effectively waived his right to file a petition for post-conviction relief." (ED App. Br. 15-18).

Now, in his substitute brief, Appellant has raised an entirely new point relied on challenging the validity of his waiver of the right to seek post-conviction relief, while still maintaining that the motion court "had reservations about the validity of Appellant's waiver of post-conviction relief." (App. Sub. Br. 28). Appellant's substitute brief relies not only on Formal Opinion 126, but also upon *Jackson v. State*, 241 S.W.3d 831 (Mo. App. E.D. 2007), *Nunn v. State*, 778 S.W.2d 707 (Mo. App. E.D. 1989), *Simpson v. State*, 90 S.W.3d 542 (Mo. App. E.D. 2002), *Chesney v. U.S.*, 367 F.3d 1055 (8th Cir. 2004), and a New York Times article – none of which were mentioned or discussed in either the motion court or Appellant's original brief before the Eastern District (with the exception of Formal Opinion 126). Thus, Appellant's new point relied on violates Rule 83.08(b).

"The substitute brief . . . shall not alter the basis of any claim that was raised in the court of appeals brief. . . ." Supreme Court Rule 83.08(b). "On transfer to this Court, appellants may not add new claims." *Dupree v. Zenith Goldline Pharmaceuticals, Inc.*, 63 S.W.3d 220, 222 (Mo. banc 2002); see also *State v.*

Moore, 303 S.W.3d 515, 523 (Mo. banc 2010); *Lane v. Lensmeyer*, 158 S.W.3d 218, 228-230 (Mo. banc 2005); *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. banc 1999); and *Linzenni v. Hoffman*, 937 S.W.2d 723, 727 (Mo. banc 1997); *but cf. State ex rel. Zobel v. Burrell*, 167 S.W.3d 688, 691 n.2 (Mo. banc 2005) (court reviewed new claims not presented to the Court of Appeals, but only because “the matter was expedited in the court of appeals and the parties were not permitted to file briefs and, instead, proceeded on their initial pleadings”).

While all of the authorities upon which Appellant now relies were discussed in Appellant’s response to Respondent’s motion to dismiss in the Eastern District, Rule 83.08(b) prohibits the raising of new claims. If Appellant had wanted to challenge the validity of his waiver, he should have raised the claim in his amended motion in the motion court and again before the Eastern District. But because he failed to do so, this Court should decline to review this new claim.

B. The motion court’s determination that Appellant validly waived his right to seek post-conviction relief was not clearly erroneous.

While Appellant does not directly challenge the motion court’s determination that his waiver was valid, what he does challenge is the Eastern District’s same finding. (Sub. App. Br. 23). Appellant avers that because the motion court addressed the merits of his claims after finding that he effectively waived his right to seek post-conviction relief that the court found the waiver invalid. (Sub. App. Br. 23, 28).

While the court did address the merits of Appellant’s claims, that did not mean that the motion court found Appellant’s waiver invalid. To the contrary, the court expressly found that Appellant “effectively waived his right to file a petition for post-conviction relief as part of his plea agreement.” (PCR L.F. 76). After discussing the waiver and determining that it was valid, the motion court went on to address the merits of Appellant’s amended motion, stating, “Nevertheless, Movant’s claims fail on other grounds.” (PCR L.F. 80). The motion court’s decision to gratuitously review the merits of Appellant’s claims does not negate its earlier determination that Appellant waived his right to seek post-conviction relief. And because Appellant does not directly attack the *motion court’s* determination that he validly waived his right to seek post-conviction relief, the reviewing court is to presume that that determination was correct. Accordingly, this Court should either affirm the motion court’s findings or dismiss this appeal.

“Appellate review of the motion court’s denial of postconviction relief motion is not a *de novo* review; rather, the findings of fact and conclusions of law of the motion court are presumptively correct.” *Dismang v. State*, 207 S.W.3d 663, 670 (Mo. App. S.D. 2006). “Where, as in this case, a movant totally ignores the specific findings of the motion court, we have no choice, based upon their presumptive correctness, other than to find that they are not clearly erroneous.” *Id.*

Because Appellant still fails to directly challenge the motion court’s determination that his waiver of the right to seek post-conviction relief was

voluntary, knowing and intelligent, the motion court's decision denying relief should be affirmed, or in the alternative, this appeal should be dismissed. But even if Appellant's attack on the Eastern District's determination is considered an indirect attack on the motion court's finding of a valid waiver, that finding was not clearly erroneous.

"A movant can waive his right to seek post-conviction relief in return for a reduced sentence if the record clearly demonstrates that the movant was properly informed of his rights and that the waiver was made knowingly, voluntarily, and intelligently." *Jackson v. State*, 241 S.W.3d 831, 833 (Mo. App. E.D. 2007); *see also State v. Valdez*, 851 S.W.2d 20, 22 (Mo. App. W.D. 1993).⁴ Here, as the motion court found, the record demonstrates that Appellant knowingly, voluntarily, and intelligently waived his right to collaterally attack his conviction.

Additionally, the post-conviction relief procedure through Rule 24.035 is not a right of constitutional magnitude to be strictly scrutinized. *Reuscher v. State*, 887

⁴ Federal courts and other state courts also permit a defendant to waive post-conviction rights pursuant to an agreement with the government. *See U.S. v. Wessells*, 936 F.2d 165, 167 (4th Cir. 1991); *U.S. 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); *Spoone v. State*, 665 S.E.2d 605, 607-608 (S.C. 2008).

S.W.2d 588, 590 (Mo. banc 1994) (“There is no constitutional right to a state post-conviction proceeding[.]”). In fact, movants often (and sometimes inadvertently) waive their rights to seek post-conviction relief, whether it be through untimely filing of a *pro se* motion, Supreme Court Rules 24.035(b) and 29.15(b); application of the escape rule, *State v. Troupe*, 891 S.W.2d 808, 809 (Mo. banc 1995); repeated assurances of satisfaction with counsel, *State v. Driver*, 912 S.W.2d 52, 55 (Mo. banc 1995); failing to include certain claims within the post-conviction motion, Supreme Court Rules 24.035(d) and 29.15(d); or simply deciding to forego post-conviction proceedings altogether. *Smith v. State*, 100 S.W.3d 805, 806 (Mo. banc 2003).

Here, Appellant’s waiver was not only voluntary and intentional, but, unlike movants in other waiver situations, Appellant actually received a benefit in exchange for his waiver – namely, he received a maximum sentence of fifteen years when he could have received up to 50 years,⁵ and he received a guarantee that no further charges would be brought by the State.

⁵ This number was reached by combining the maximum possible sentences on the seven class C felonies Appellant was convicted of (through both trial and guilty plea) plus the maximum possible sentence on the conviction for the class A misdemeanor.

It is important to allow defendants to use their post-conviction rights as bargaining chips in negotiations with the State. “If the government cannot obtain the benefit of avoiding collateral litigation . . . , then the government may not be willing to offer certain concessions, and a defendant may be unable to secure the bargain most favorable to his interests.” *Chesney v. U.S.*, 367 F.3d 1055, 1058-1059 (8th Cir. 2004). “To require that conclusion would seem . . . ‘to imprison a man in his privileges and call it the Constitution.’” *Id.* at 1059 (quoting Justice Frankfurter in *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 280 (1942)). A defendant should not be precluded from using his rights to negotiate a more favorable outcome, especially where agreements, such as this one, are entered into knowingly, voluntarily, and with a full understanding of the rights being waived. “A defendant can ‘maximize’ what he has to ‘sell’ only if he is permitted to offer what the prosecutor is most interested in buying.” *U.S. v. Mezzanatto*, 513 U.S. 196, 208 (1995).

“[A]s a logical matter, it simply makes no sense to conclude that mutual settlement will be encouraged by precluding negotiation over an issue that may be particularly important to one of the parties to the transaction.” *Id.* “A sounder way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips.” *Id.* (determining that a criminal defendant’s waiver of statutory exclusionary

provisions regarding statements made during plea negotiations was valid and enforceable if entered into knowingly and voluntarily).⁶

As the motion court found, Appellant's reliance on Formal Opinion 126 is misplaced because Formal Opinion 126 is overbroad and has no effect on the validity of Appellant's waiver.

In Formal Opinion 126, the Advisory Committee of the Supreme Court of Missouri indicated its belief 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." Advisory Comm. of the Supreme Court of Missouri, Formal Op. 126 (2009). In reaching this conclusion, the Advisory Committee determined that "[p]roviding such advice would violate Rule 4-1.7(a)(2) because there is a significant risk that the representation of the client would be materially limited by the personal interest of defense counsel." *Id.* The opinion also indicated that "it is inconsistent with the prosecutor's duties as a minister of justice and the duty to refrain from conduct prejudicial to the administration of justice for a prosecutor to seek a waiver of post-conviction rights based on ineffective

⁶ In dismissing Appellant's direct appeal, the Eastern District already determined that his waiver was knowing, intelligent and voluntary. Because the waiver of his right to seek post-conviction relief was part of the same waiver of his direct appeal, the same result should follow here.

assistance of counsel or prosecutorial misconduct.” *Id.* But this opinion has no bearing on the enforceability of the contract Appellant entered into with the State.

“The essential elements of an enforceable contract are: (1) parties competent to contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation.” *Dean Machinery Co. v. Union Bank*, 106 S.W.3d 510, 520 (Mo. App. W.D. 2003). Here, Appellant contests only the propriety of the subject matter of the contract based upon Formal Opinion 126. He makes no challenge to any of the other elements of an enforceable contract. But Formal Opinion 126 cannot void Appellant’s otherwise valid and enforceable contract.

First, the opinion discourages only counsel’s *advice* that a defendant waive; it does not preclude a defendant from actually waiving his right to collaterally attack his convictions. In other words, while the opinion has value in guiding counsel’s obligation to reflect upon his position, it does not automatically render counsel incapable of giving adequate advice.⁷ Certainly a defendant proceeding *pro se* would be permitted to waive his post-conviction rights, so long as the record

⁷ “[A] defense attorney is in the best position to determine when a conflict exists, [and] he has an ethical obligation to advise the court of any problem.” *Mickens v. Taylor*, 535 U.S. 162, 167 (2002) (citing *Holloway v. Arkansas*, 435 U.S. 475, 485-486 (1978)).

reflects that such waiver is knowingly, voluntarily, and intelligently entered into. The fact that a represented defendant had the added assistance of counsel in entering a waiver should not later provide blanket immunity from enforcement of the agreement, where the record demonstrates that he entered into it voluntarily, intelligently, and knowingly.

Second, even if defense counsel cannot ethically advise a defendant to waive his post-conviction rights, defense counsel is still ethically 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) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

Finally, Formal Opinion 126 is overbroad in its assumption that defense counsel’s advice that a defendant waive his post-conviction rights will always result in an *actual* conflict of interest.⁸ While the potential for a conflict certainly exists in that counsel could seek to insulate his or her actions by recommending that a defendant waive his post-conviction rights when doing so might not be in the defendant’s best interest, Formal Opinion 126 goes too far in assuming that

⁸ “In order to establish a violation of the Sixth Amendment, a defendant . . . must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.” *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

attorneys for the criminal defense bar will always seek to elevate their own interests above those of their client when given the opportunity. Indeed, in the absence of factual allegations indicating that “something [was] done by counsel, or something [was] forgone by counsel and lost to defendant, which was detrimental to the interests of defendant and advantageous to another,” *Helmig v. State*, 42 S.W.3d 658, 680 (Mo. App. E.D. 2001), it should be assumed that members of the criminal defense bar will carry out their other duties under the Rules of Professional Conduct (*e.g.* Rule 4-1.4(b)), candidly explain the consequences of a defendant’s waiver, and zealously represent their clients by aligning their interests to seek the best possible outcome for their clients, even if that means advising their clients to relinquish a rule-based right.⁹ “[W]hile *Strickland* does state that counsel owes the client a duty to avoid conflicts of interest . . . , this is just one duty listed among others – the duties to advocate the defendant’s cause, to consult with and keep the defendant informed, and to employ skill and knowledge on the defendant’s behalf.” *Beets v. Scott*, 65 F.3d 1258, 1272 (5th Cir. 1995). And, in

⁹ “[T]he possibility of conflict is insufficient to impugn a criminal conviction.” *Cuyler*, 446 U.S. at 350. “In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer’s performance.” *Id.* “[A] theoretical conflict does not establish a constitutional violation[.]” *Mickens*, 535 U.S. at 179.

fact, it appears that counsel in Appellant's case was focused on those other duties, considering that counsel did obtain a favorable outcome for Appellant, and Appellant's Rule 29.15 motion did not allege, for example, that counsel failed to explain that Appellant was giving up the opportunity to challenge counsel's performance through the formal post-conviction procedure.

It is enough that the criminal defendant know the general nature of the rights he is waiving; he is not required to be advised as to any specific claims of deficient performance that he might be able to later invoke in order for his waiver to be valid. “[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.” *U.S. v. Ruiz*, 536 U.S. 622, 629 (2002) (emphasis in original). “A defendant, for example, may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide.” *Id.* at 629-630. Even if a movant lacks “a full and complete appreciation of all of the consequences flowing from his waiver, it does not defeat the State’s showing that the information it provided to him satisfied the constitutional minimum.” *Patterson v. Illinois*, 487 U.S. 285, 294 (1988) (discussing waiver of right to counsel pursuant to *Miranda* warnings).

Here, Appellant was fully advised as to the rights Rule 29.15 was designed to protect and that he was relinquishing through his sentencing agreement, and he has not contended otherwise.

Formal Opinion 126 further indicated that negotiating a waiver of post-conviction rights would be unethical not only for defense counsel but also for the prosecutor: “We believe that it is inconsistent with the prosecutor’s duties as a minister of justice and the duty to refrain from conduct prejudicial to the administration of justice for a prosecutor to seek a waiver of postconviction rights based on ineffective assistance of counsel or prosecutorial misconduct.” Advisory Comm. of the Supreme Court of Missouri, Formal Op. 126 (2009) (*citing* Rules 4-3.8 and 8.4(d)). The opinion did not further elaborate as to how a prosecutor’s decision to seek such a waiver would violate these duties.

Contrary to the Advisory Committee’s belief, it is difficult to see how a prosecutor’s request that a defendant waive the right to collaterally attack a conviction – a proceeding that is not guaranteed by the Constitution – in exchange for a reduced sentence or other concessions would violate the prosecutor’s ethical duties. In the similar context of plea agreements, where the prosecutor asks the defendant to waive “the fundamental rights to a jury trial, to confront one’s accusers, to present witnesses in one’s defense, to remain silent, and to be convicted by proof beyond all reasonable doubt,” *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring) (internal citations omitted), the

United States Supreme Court has lauded the prosecutor's actions as "highly desirable." *Id.* at 261.

In praising the use of plea agreements, the United States Supreme Court identified various interests served by the process:

It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello, 404 U.S. at 261.

Much like plea agreements, there are multiple benefits to allowing a defendant to waive his post-conviction rights pursuant to a request from the prosecutor and advice from counsel. First, as in plea agreements, the waiver of post-conviction rights serves the interest of finality in criminal cases by ensuring that a defendant does not later involve the State, the witnesses, and the victims in more litigation over his valid conviction after experiencing "buyer's remorse" upon entering the penal system. *See U. S. v. Timmreck*, 441 U.S. 780, 784 (1979) ("Every inroad on the concept of finality undermines confidence in the integrity of

our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice.”).

Second, it provides a criminal defendant with a bargaining chip in plea negotiations to leverage a better position for himself when facing a loss of his liberty. As noted in *Mezzanatto*, “If prosecutors were precluded from securing such agreements, they might well decline to enter into cooperation discussions in the first place and might never take this potential first step toward a plea bargain.” *Mezzanatto*, 513 U.S. at 207-208. “If the government cannot obtain the benefit of avoiding collateral litigation . . . , then the government may not be willing to offer certain concessions, and a defendant may be unable to secure the bargain most favorable to his interests.” *Chesney*, 367 F.3d at 1058-1059. “[T]he procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities. What were contrived as protections for the accused should not be turned into fetters.” *Adams*, 317 U.S. at 279.

Because it is wholly consistent with a prosecutor’s ethical duties as a minister of justice to request a defendant’s waiver of certain Constitutionally-guaranteed rights when engaging in plea bargaining, a prosecutor cannot be deemed unethical in seeking the waiver of a non-Constitutionally-guaranteed

process in exchange for a sentencing cap as part of those plea negotiations.¹⁰ And while it is conceivable that in any given case, a prosecutor might request this concession, knowing of a valid claim of ineffective assistance, “[t]he mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether.” *Mezzanatto*, 513 U.S. at 210. In any event, Appellant does not challenge the propriety of the prosecutor’s actions in seeking the waiver.

But, regardless of the ethicality of defense counsel’s actions related to the waiver, the plea agreement contract remains enforceable.¹¹ “Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee to assistance of counsel.” *Nix v. Whiteside*, 475 U.S. 157, 165 (1986). “When examining attorney conduct, a court must be careful

¹⁰ Additionally, there was no reason for either the prosecutor or defense counsel in this case to believe that entering this agreement would constitute an ethical violation, given that established case law permitted defendants to waive their post-conviction rights in exchange for a sentence reduction at the time the agreement was entered. *Jackson*, 241 S.W.3d at 833; *Valdez*, 851 S.W.2d at 22; *Ferina v. State*, 742 S.W.2d 215, 217 (Mo. App. W.D. 1987).

¹¹ “A plea agreement is a binding contract between the state and a defendant.” *Evans v. State*, 28 S.W.3d 434, 439 (Mo. App. S.D. 2000).

not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." *Id.* While agreements that are predicated upon a violation of the law are illegal and unenforceable, *Deja vu of Missouri, Inc. v. Talayna's Laclede's Landing, Inc.*, 34 S.W.3d 245, 249 (Mo. App. E.D. 2000), a violation of the ethical code does not automatically render a contract unenforceable.

"Failure to comply with an obligation or prohibition imposed by a Rule [of Professional Conduct] is a basis for invoking the disciplinary process." Supreme Court Rule 4[19]. "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." *Id.* at [20]. "The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability." *Id.*

"Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." *Id.* "The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule." *Id.*

In short, an alleged breach of ethical duties simply does not void an otherwise valid contract. In fact, the Fourth Circuit, addressing a similar claim based upon the North Carolina ethics opinion noted in Formal Opinion 126, found that the defendant's "reliance on RPC 129 for the proposition that the plea is void is misplaced." *U.S. v. Dorsey*, 4 F.3d 986, 1993 WL 329985, *2 (4th Cir. 1993) (unpublished opinion, reported in a table). And in the context of criminal prosecution, a court should not tie a defendant's hands under the guise of protecting his legal rights. Where the record reflects that a defendant voluntarily, intelligently, and knowingly waived his right to collaterally attack a conviction in exchange for a reduced sentence, there is "no reason why such agreement should not be enforced." *Valdez*, 851 S.W.2d at 22. Because Appellant voluntarily, knowingly, and intelligently waived his right to collaterally attack his convictions, this appeal should be dismissed.

Appellant argues that dismissal of his post-conviction case "would . . . fundamentally rewrite Missouri precedent." (Sub. App. Br. 25). Appellant then cites *Simpson v. State*, 90 S.W.3d 542 (Mo. App. E.D. 2002), for the proposition that "The validity of that waiver of post-conviction relief is sufficiently important that the same Eastern District requires post-conviction counsel to be appointed to evaluate any waiver." (Sub. App. Br. 25). But Appellant's reliance on *Simpson* is misplaced.

In *Simpson*, the movant had filed a timely *pro se* post-conviction motion with an accompanying affidavit of indigence. *Id.* at 543. Finding that the movant had previously waived the right to seek post-conviction relief, the motion court dismissed the movant’s motion without first appointing counsel. *Id.* The Eastern District reversed, finding that the motion court’s failure to appoint counsel before dismissing the motion was a violation of Rule 24.035(e). *Id.* at 544. While the court did mention that “Before the validity of waiver can be determined, however, counsel must be appointed in accordance with Rule 24.035(e),” this statement was not based upon the importance of the waiver; it was based upon the mandates of the post-conviction rule. *Id.* Regardless what the movant’s claims had been, he was entitled to appointed counsel because he timely filed his *pro se* motion, along with an affidavit of indigence. *Id.* (“When movant timely filed his *pro se* motion and the *in forma pauperis* affidavit, the court was required to appoint counsel.”).

In any event, dismissal of Appellant’s case would not rewrite the law as discussed in *Simpson* because Appellant had appointed counsel in his post-conviction action, and appointed counsel was fully able to evaluate – and challenge – Appellant’s prior waiver. But, as noted above, Appellant raised no such challenge in his amended motion and instead treated the presumed invalidity of his waiver as a foregone conclusion. Appellant claims, however, that he “raised his waiver of appeal (and, of course, the corresponding waiver of post-conviction remedy) was premised on trial counsel’s faulty advice that Appellant would serve

but a few months in prison on his completed 15-year sentence.” (Sub. App. Br. 25) (citing PCR L.F. 58-60). But Appellant misrepresents the claim he actually alleged in his amended motion. While Appellant did challenge the validity of his direct appeal waiver, there was no challenge whatsoever in his claim regarding the waiver of his right to post-conviction relief. And his challenge to the validity of his waiver of direct appeal was premised entirely upon his assertion that he would have prevailed on a severance claim on direct appeal. (PCR L.F. 58-64). Nothing about this claim was related to the waiver of the right to seek post-conviction relief. And Appellant, himself, argues, “Waivers of post-conviction relief are not like waivers of direct appeal.” (Sub. App. Br. 27).

In sum, because Appellant voluntarily, knowingly, and intelligently waived his right to collaterally attack his convictions, the motion court’s decision should be affirmed, or in the alternative, this appeal should be dismissed.

CONCLUSION

The motion court did not err in denying Appellant's Rule 29.15 motion. The motion court's denial of the Rule 29.15 motion should be affirmed, or alternatively, this appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 7,594 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this _____ day of July, 2011, to:

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APPENDIX

Findings of Fact, Conclusions of Law, Order, Judgment, and Decree of Court on
Movant’s Motion to Vacate, Set Aside, or Correct the Judgment or Sentence
pursuant to Rule 29.15A1

Mandate from ED92150A16