No. SC91695

In the
Supreme Court of Missouri

WILLIE E. COOPER,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable Gloria Clark Reno, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATE OF MISSOURI

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STATEMENT OF FACTS

Defendant was charged in St. Louis County Circuit Court with one count of stealing over five hundred dollars worth of property, in each of two separate cases. (L.F. 8, 39-40).[1] On October 24, 2008, the state amended the charges to include allegations that Defendant was a persistent offender. (L.F. 4, 11-13, 36). That same day, Judge Melvyn W. Wiesman found beyond a reasonable doubt that Defendant was a persistent offender. (L.F. 12). Defendant decided to enter guilty pleas in both cases pursuant to a plea agreement with the state. (Tr. 13-14).

The Court read Defendant the information in the first case, which alleged that on April 9, 2005, Defendant and two other men appropriated 49 Timberland brand men's shirts, valued at $500 or more, from a Dillard's department store without the store's consent and with the purpose of depriving the store of the property. (L.F. 12). The court informed Defendant of the range of punishment, and asked him how he wanted to plead to the charge. (L.F. 13). Defendant informed the court that he wanted to plead guilty, that that decision was made of his own free will, and that no one had forced him to enter a guilty plea. (L.F. 13). Defendant admitted that he committed the act charged. (L.F. 13).

The court then read Defendant the information in the second case, which alleged that on February 7, 2006, Defendant appropriated 11 bottles of perfume, valued at $500 or more, from a Victoria's Secret store, without the store's consent and with intent of depriving the

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[1] The record on appeal consists of a legal file (L.F.), and a supplemental legal file (Supp. L.F.).

store of the property. (L.F. 13). The court asked Defendant how he wanted to plead to the charge, and Defendant replied, "Guilty, sir." (L.F. 13). Defendant affirmed that his guilty plea was entered voluntarily and that no one had forced him to plead guilty. (L.F. 13). Defendant admitted committing the act alleged in the information. (L.F. 13).

Defendant stated that he was satisfied with his attorney's representation. (L.F. 13). Defendant stated that everything his attorney did, he asked her to do. (L.F. 13). Defendant also affirmed that his attorney did everything he asked her to do, and nothing that he asked her not to do. (L.F. 13). Defendant denied that his attorney had put any pressure on him, or in any way forced him to plead guilty to either charge. (L.F. 13). Defendant also denied that anyone else had pressured him to plead guilty. (L.F. 13).

The court asked Defendant whose decision it was to plead guilty. (L.F. 13). Defendant replied, "Mine, sir." (L.F. 13).

Defendant stated that he has sufficient time to discuss the case with counsel before making that decision. (L.F. 13).

The prosecutor informed the Court of the terms of the plea agreement: in exchange for Defendant's guilty plea to both charges, and his waiver of his post-conviction relief remedies, the prosecutor recommended that Defendant be sentenced to fifteen years in the Missouri Department of Corrections, but that the execution of the sentences be suspended and that Defendant be placed on five years' probation with directions to pay $700 restitution to Victoria's Secret within six months. (L.F. 14).

Plea counsel affirmed the prosecutor's representation of the plea agreement and denied that any other benefits had been promised to Defendant in return for his guilty pleas. (L.F. 14).

Defendant likewise affirmed the prosecutor's representation of the plea agreement, and denied that he had been promised any other benefits in exchange for his guilty plea. (L.F. 14).

The trial court examined Defendant regarding his rights attendant to trial. (L.F. 14-15). Defendant affirmed that he understood each of those rights, and affirmed that he understood that he was giving up those rights by pleading guilty. (L.F. 15).

Defendant also acknowledged that, in exchange for the prosecutor's sentencing recommendation, he was waiving his right to file a motion to vacate his guilty plea under Supreme Court Rule 24.035. (L.F. 15; Supp L.F. 1). Defendant affirmed that this waiver was a free and voluntary decision by him. (L.F. 15; Supp L.F. 1). The trial court informed Defendant that under Rule 24.035, he had the right to ask the court to set aside his conviction on the bases that the court lacked jurisdiction over his case, that his sentence exceed the maximum permitted by law, or that his conviction or sentence violated the Constitution and Laws of the State of Missouri or the Constitution of the United States. (L.F. 15). Defendant executed a written waiver of his right to proceed under Rule 24.035 in which he also acknowledged these rights and in which he acknowledged that by pleading guilty he was waiving the right to claim that counsel provided ineffective assistance of counsel. (Supp. L.F. 1). In the written waiver, Defendant averred that his waiver was in exchange for a favorable recommendation from the prosecutor which was "knowingly, voluntarily, and

intelligently made, with a full understanding" of his rights under 24.035. (Supp. L.F. 1). Defendant affirmed that as a result of his waiver, he would be "forever barred" from raising any such claims. (Supp. L.F. 1). A copy of the written waiver of his Rule 24.035 rights is appended to this brief. (A-4). Defendant told the court that he understood his rights under Rule 24.035, and that his attorney had previously explained them to him. (L.F. 15).

Defendant again affirmed that he was satisfied with counsel's representation, and that she had done everything he had asked her to do. (L.F. 16). Defendant affirmed that the sentence that was described by the prosecutor was the sentence he expected to receive. (L.F. 16). Defendant again denied that his attorney had made any threats or promises to convince him to plead guilty. (L.F. 16). Defendant denied that his counsel had suggested that he give false answers to any of the court's questions. (L.F. 16). Defendant again affirmed that he was giving up his right to proceed under Rule 24.035. (L.F. 16).

The court accepted Defendant's guilty pleas as freely, voluntarily, and knowingly given. (L.F. 16). The court sentenced Defendant to current terms of fifteen years' imprisonment on both charges, but he suspended the execution of the sentences and placed Defendant on five years' probation. (L.F. 17).

On April 17, 2009, approximately seven months after sentencing, Judge Stephen K. Wilcox granted the state's petition to revoke Defendant's probation and executed the sentences after a hearing on the matter. (L.F. 28, 33, 45).

On May 18, 2009, in direct contravention of his plea agreement, Defendant filed a *pro se* motion for post-conviction relief pursuant to Rule 24.035. (L.F. 50-56). On December 4, 2009, post-conviction counsel filed an amended motion (L.F. 48, 60-70), which alleged that

his attorney coerced him into pleading guilty by threatening to withdraw from his case if he decided to go to trial, by promising him that he would receive the maximum sentence under the law, and by telling him, falsely that the two cases had been joined for trial. (L.F. 61-62). Defendant alleged further that, but for counsel's alleged coercions, he would not have pleaded guilty but would have insisted on going to trial. (L.F. 62).

On March 17, 2010, Judge Gloria Clark Reno issued written findings of fact, conclusions of law, and an order overruling Defendant's motion without an evidentiary hearing. (L.F. 48, 71-73).

Defendant appealed the motion court's judgment to the Missouri Court of Appeals, Eastern District. (L.F. 76-79). In its brief below, the State of Missouri argued that Defendant's appeal should be dismissed because he had waived his right to proceed under Rule 24.035 motion in exchange for a favorable recommendation from the prosecutor.[2] (Respondent Brief, 11). The Court of Appeals dismissed Defendant's appeal on the ground

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[2] In his substitute brief, Appellant states that he objected and responded to the State's motion to dismiss the appeal in the Court of Appeals. For the sake of clarity, Respondent did not file a stand-alone motion to dismiss in the Court of Appeals, but rather asked the court to dismiss the appeal in the Respondent's brief. Defendant did not file a reply brief or otherwise respond to this request in the Court of Appeals. Appellant also states that he made an argument in his brief below that his waiver should not be enforced. However, Appellant did not address the issue of waiver of his 24.035 rights in his brief in the Court of Appeals. (See Appellant's brief.).

that the record clearly reflected that Defendant had freely, voluntarily, and knowingly waived his rights under Rule 24.035. *State v. Willie Cooper,* No. ED94757, *opinion* at 5-6.

ARGUMENT

Defendant's appeal should be dismissed because he voluntarily waived his right to proceed under Rule 24.035. Moreover, the motion court did not clearly err in overruling his claims without an evidentiary hearing because his allegations were refuted by the record. (Responds to Appellant's Points I and II).

At his plea hearing, Defendant repeatedly and unequivocally affirmed that affirmed that he had freely decided to plead guilty and freely decided to waive his right to file a Rule 24.035 motion, and that he had done so without "any pressure" from counsel or anyone else. In exchange, the prosecutor recommended a suspended sentence, which Defendant received from the court. After receiving the benefit of the agreement, Defendant now wants to renege on the agreement and claim that the waiver of his trial and post-conviction rights was coerced by plea counsel. Defendant's claim is both affirmatively waived and conclusively refuted by the record.

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

In his amended motion, Defendant raised one claim of error, that counsel was ineffective for coercing him into pleading guilty by threatening to withdraw if he insisted on a trial, by telling him that if he were convicted he would automatically receive maximum and consecutive sentences, and by misinforming him that his two cases had been joined for trial. (L.F. 61-62). Defendant did not claim that the waiver of his Rule 24.035 right was in

anyway involuntary or coerced.[3] Nor did Defendant claim in his brief in the Eastern District that the waiver of his Rule 24.035 rights was not knowing or voluntary.

Now, in his substitute brief, Defendant raises an entirely new point relied on challenging the validity of his waiver of his Rule 24.035 rights. Thus, Defendant'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"). Appellant did not challenge the waiver of his Rule 24.035 rights in his amended motion, or in the Court of Appeals. Because he did not do so, this Court should decline to review this claim.

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[3] Defendant did allege that "the State required [him] to waive his right to post-conviction relief under Rule 24.035." (L.F. 63). However, this allegation is incorrect because Defendant was not "required" to waive these rights, he knowingly and voluntarily chose to waive them in exchange for a favorable sentencing recommendation. (Supp. L.F. 1).

Defendant suggests that the Eastern District erred in dismissing his appeal based on waiver because the State did not raise the issue in the motion court. (App. Br. 16). But there are two problems with Defendant's suggestion. First, although the record does not demonstrate that the State raised the issue in the motion court, it also does not demonstrate that the State did not. After Defendant filed his motion there was only one pre-trial conference which was memorialized only by a docket entry. (L.F. 48). Although the motion court did not address the issue of waiver of Rule 24.035 rights in its written judgment, the record is insufficient to establish that the State did not raise this issue.

Second Defendant fails to state how or when the State should have raised the issue. The motion court indicated at the hearing that it was going to deny Defendant's motion for an evidentiary hearing, and thus, there was no hearing at which the State could have raised the issue on the record. (L.F. 48). Moreover, Rule 24.035 does not require the State to file a responsive pleading. *Thomas v. State*, 808 S.W.2d 364, 369 (Mo. banc 1991). The first time that the State was required to respond to Defendant's claims was after he filed his brief in the Court of Appeals. At that time, the State responded by arguing in its brief that Defendant's appeal should be dismissed because he had affirmatively waived his right to proceed under Rule 24.035. (Respondent's Brief 11-13). Thus, the State raised this issue at the earliest possible opportunity.

B. Defendant voluntarily waived his rights under Rule 24.035.

This Court should dismiss Defendant's appeal because he voluntarily waived his right to challenge his conviction under Rule 24.035 in exchange for the prosecutor's recommendation that he be placed on probation. (L.F. 14, Supp. L.F. 1; A-4). "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." *Chaney v. State*, 323 S.W.3d 836, 838 (Mo. App. E.D. 2010) (citing *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). An appellate court "will conclude that a defendant has waived his right to appeal where his intention to voluntarily waive appears in the record." *State v. Sanning*, 271 S.W.3d 56, 58 (Mo. App. E.D. 2008). "Furthermore, when the defendant agrees to waive his right to appeal in exchange for a reduced sentence, then receives the 'benefit of the bargain,' the appellate court will not hesitate to hold the defendant to his part of the bargain." *Id*. A "[d]efendant's voluntary waiver precludes this Court from reviewing the merits of his appeal." *State v. Green*, 189 S.W.3d 655, 657 (Mo. App. S.D. 2006). "[A]ny other conclusion would amount to permitting the appellant to defeat the ends of justice by a trick played upon the district attorney and the trial court." *State v. Harmon*, 243 S.W.2d 326, 330 (Mo. 1951).

Federal courts and other state courts also permit a defendant to waive post-conviction rights pursuant to an agreement with the government. *See Garcia-Santos v. United States*, 273 F.3d 506, 509 (2nd Cir.2001); *U.S. v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005); *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir.1994); *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). *But see In re Acosta*, 480 F.3d 421, 422 (6th Cir.2007) ("claims that a guilty plea was not knowing and voluntary, or was the product of ineffective assistance of counsel . . . generally cannot be waived."). Defendant quotes

Chesney v. United States, 367 F.3d 1055, 1058-1059 (8th Cir. 2004) for the proposition that justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a plea agreement cannot be barred by that same plea agreement because it is the very product of the alleged ineffectiveness. Although the *Chesney* court cites other Eighth Circuit precedent for this proposition, it also went on to ask:

> If a criminal defendant is able to negotiate substantial concessions from the prosecution, but only on the condition that the defendant waive a potential future claim of ineffective assistance of counsel, does "justice" really dictate that this court refuse to enforce such an agreement in all circumstances? 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. To require that conclusion would seem, in Justice Frankfurter's famous words, "to imprison a man in his privileges and call it the Constitution."

Chesney, 367 F.3d at 1058-1059 (*quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 280, (1942)). After suggesting that waivers should be enforced where the record is clear that the defendant understood the rights that he was waiving, the *Chesney* court ultimately decided not to enforce the waiver because the record demonstrated only a vague recognition that the defendant was waiving his right to file "post sentencing pleadings." *Id.*

The facts in *Chesney* can be contrasted with the facts in a case recently decided by the Missouri Court of Appeals, Western District, *Dunkin v. State*, No. WD72817, 2011 WL 3273474 (Mo. App. W.D. August 2, 2011). There, the Western District upheld a waiver of

post-conviction rights where the record did not merely demonstrate that the defendant made a "bald assertion" that she was waiving all "post-conviction remedies" but that she specifically understood that she was giving up the right to later claim that counsel provided ineffective assistancel. *Id.* *5.

The facts in Defendant's case are much closer to those in *Dunkin* than those in *Chesney*. The record demonstrates that Defendant knowingly and voluntarily waived his right to seek post-conviction relief, both orally and in writing, in exchange for the state's agreement to recommend a suspended sentence. (L.F. 14-16; Supp L.F. 1; Appendix at A-4). Defendant argues that the plea court never pointed out that ineffective assistance of counsel claims must be raised in a Rule 24.035 motion. (App. Br. 20). But in his own pleading, Defendant specifically acknowledged that he was waiving his right to file a claim that he had received ineffective assistance of counsel. (Supp L.F. 1; Appendix at A-4). Defendant never alleged that his waiver of his right to proceed under Rule 24.035, was somehow involuntary. The record demonstrates that Defendant was advised extensively of his right to proceed under Rule 24.035 in the event that his probation was revoked and he was remanded to the Department of Corrections. (L.F. 14-16). Defendant's waiver was voluntary and he received the benefit of it when he received a suspended sentence and was placed on probation. (L.F. 21). This Court should hold Defendant to his part of the bargain. Moreover, other defendants should not lose the ability to bargain away their post-conviction rights because Defendant has belatedly regretted accepting a plea agreement after failing to comply with the conditions of his probation and being sent to prison. "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).

Defendant argues that his waiver should not be enforced because his counsel could not ethically advise him to waive his post-conviction rights or even counsel him on the subject because of Formal Opinion 126 of the Advisory Committee of the Supreme Court of Missouri, but that opinion does not invalidate Defendant'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 assistance of counsel or prosecutorial misconduct." *Id*.

Recently, this Court was called upon to address the implications of Formal Opinion 126. *Burgess v. State*, No. SC91571, 2011 WL 2848393 (Mo. banc. July 19, 2011). In *Burgess*, a majority of this Court remanded the case to the motion court because the it had not made any findings of fact or conclusions of law, but rather had just dismissed the movant's Rule 24.035 motion on the grounds that he had waived it. *Id.* at * 3. Three judges concurred in the majority opinion, but wrote separately to recommend that the motion court make specific factual findings so as to determine whether defense counsel or the prosecutor "went beyond the limits set forth in Formal Opinion 126." *Id.* at *4 (*Wolff, J., concurring*). The concurring opinion went on to state that formal opinions of the Missouri Supreme Court Advisory Committee are binding on attorneys and that that whether the ethical standards set forth in Formal Opinion 126 were violated "may go to the merits" of the movant's post-conviction claim. (*Wolff, J., concurring*).

In a footnote, the *Burgess* majority dismissed the concern about whether Formal Opinion 126 was violated. *Id.* at *3, n. 6. Although this Court acknowledged that Formal Opinions are binding on attorneys, it held that the binding effect was limited in several ways. *Id.* First, this Court held that the binding effect is limited to disciplinary proceedings, and even then, formal opinions are subject to review by the Missouri Supreme Court when it is petitioned by an aggrieved attorney. *Id.* Second, and closely related, this Court noted that in Formal Opinion 126, the Advisory Committee expressly stated that it was beyond the scope of the opinion to decide whether the waiver of post-conviction rights would violate the

Constitution or other laws. *Id.* Third, the Court noted that even with regard to disciplinary proceedings, Formal Opinions only affect actions which occur after the opinion is handed down. *Id.*

This Court's limitation on the application of Formal Opinion 126 on the issue whether a waiver of post-conviction rights is valid was well-founded for several reasons. First, the conclusion of the Advisory Committee that 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 was neither well-reasoned nor supported by precedent. 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. One such benefit is that, much like 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.").

Another benefit, mentioned above, is that 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.[4] 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.

The second reason that the *Burgess* court's limitation of the application of Formal Opinion 126 is well-founded is that regardless of the ethicality of defense counsel's actions related to the waiver, the plea agreement contract remains enforceable.[5] "Under the

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[4] 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).

[5] "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).

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 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.

Finally, Formal Opinion 126 has no bearing on the validity of Defendant's waiver, because it was not in effect at the time of his plea. Defendant waived his post-conviction rights in October 2008. (L.F. 14-16; Supp L.F. 1; Appendix at A-4). As this Court noted in *Burgess*, Formal Opinion 126 was handed down in May 2009, approximately seven months after Defendant's plea. *Burgess*, 2011 WL 2848393 at *3 n.6. The provisions of Formal Opinion 126 are not binding outside disciplinary proceedings, and, at any rate, have no effect on the validity of Defendant's plea which was freely and voluntarily made months before Formal Opinion 126 was issued. *Id.*

Defendant argues that his waiver should not be enforced because counsel operated under a conflict when she advised him concerning his post-conviction rights, and therefore, his waiver was uncounseled. Implicit in Defendant's argument is an assumption that an

actual conflict existed, but that assumption is not supported by the record or Defendant's factual allegations.

"[A] reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel." *Cuyler v. Sullivan*, 446 U.S. 335, 338 (1980). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id*. at 350. The *Cuyler* standard requires proof of effect upon representation, but once that effect is shown, a reviewing court presumes prejudice. *Mickens*, 535 U.S. at 173. The purpose of the presumed prejudice in *Cuyler* "is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *Id*. at 176. But the *Cuyler* standard is applicable only to conflict of interest situations involving multiple or serial representation; where the alleged conflict stems from a different source, such as the attorney's duty of loyalty to the client, the more stringent *Strickland* standard, requiring an affirmative showing of prejudice, applies. *Id*. at 175-176; *U.S. v. Acty*, 77 F.3d 1054, 1057 n.3 (8th Cir. 1996); and *Swanner v. Nelson*, 2008 WL 5120040 (D. Kan. 2008) (not reported in F.Supp. 2d).

Here, Defendant has failed to demonstrate an actual conflict of interest. Where joint representation is not the source of the alleged conflict, "the defendant's burden is to show that counsel actually acted in a manner that adversely affected his representation by doing something, or refraining from doing something, that a non-conflicted counsel would not have done." *U.S. v. Taylor*, 139 F.3d 924, 930 (D.C. Cir. 1998). To make this showing,

Defendant needed to demonstrate that counsel's motivation for advising him to waive his right to seek post-conviction relief was based upon a combination of counsel's knowledge that counsel had rendered ineffective assistance and counsel's desire to conceal that information, rather than upon counsel's legitimate trial strategy of achieving the best possible result for Appellant. *See e.g. Dukes v. Warden, Conn. State Prison*, 406 U.S. 250, 256 (1972) (nothing in the record established that counsel induced the defendant to plead guilty "in furtherance of a plan to obtain more favorable consideration from the court for other clients"); *Acty*, 77 F.3d at 1058 (nothing in the record "compels the conclusion that [counsel's] advice was motivated by an actual conflict"); *Ybarra v. Larkins*, 2009 WL 3160577 at *3 (E.D. Mo. 2009) ("To establish that there was a conflict in representation, Petitioner must show 'that the conflict caused the attorney's choice' to engage or not engage in particular conduct." (quoting *Covey v. U.S.*, 377 F.3d 903, 908 (8th Cir. 2004)); and *Swanner v. Nelson*, 2008 WL 5120040 at *5 (D. Kansas 2008) ("Petitioner has provided no evidence to demonstrate that [counsel's] decision to call some witnesses and not others was a result of the disciplinary complaint and not trial strategy.").

Nothing in either the record or Defendant's factual allegations supports the conclusion that counsel's advice that Defendant waive his right to seek post-conviction relief in exchange for probation as part of the plea agreement was motivated by anything other than counsel's desire to achieve the best possible outcome for her client. And absent a showing of an actual conflict of interest, Defendant was required to demonstrate *Strickland* prejudice, and he failed to do so.

Defendant also argues "the waiver of post-conviction rights is so important that Missouri case law requires post-conviction counsel to be appointed to evaluate the voluntariness of any such waiver." (App. Br. 16). To support this proposition, Defendant cites *Simpson v. State,* 90 S.W.3d 542, 543 (Mo. App. E.D. 2002), in which the court reversed the motion court's dismissal of a motion for post-conviction relief on the grounds that the movant had previously waived his right to file such motions. *Id*. But the holding in *Simpson* was not based on any constitutional grounds, or out of a concern that post-conviction rights are so important that they must be guarded by the appointment of counsel. The *Simpson* court stated only one reason for its holding: the appointment of counsel is required by Rule 24.035(e). *Id.*

The record demonstrates that Defendant knowingly and voluntarily waived his rights under Rule 24.035, and explicitly acknowledged that he would be forever barred from raising a claim that counsel was ineffective. (Supp. L.F. 1; A-4). Moreover, Defendant acknowledged that he was doing so in order to obtain a favorable sentencing recommendation from the State. (Supp. L.F. 1; A-4). The fact that Defendant, a persistent felony offender, received a suspended execution of sentence and probation on two separate cases of stealing over $500, which were at least Defendant's third and fourth felony convictions involving theft,[6] suggests that Defendant used his post-conviction rights as a bargaining chip in obtaining an especially favorable outcome to his charges. (L.F. 12).

[6] At the plea hearing, Defendant acknowledged having a previous conviction for second-degree robbery, and a previous conviction for felony stealing. (L.F. 12).

Defendant received the benefit of the bargain and has stated no compelling reason why he should be permitted to breach his agreement with the State of Missouri. His appeal should be dismissed.

C. The motion court correctly overruled Defendant's motion because his claims were refuted by the record.

The motion court's finding that Defendant's factual allegations were refuted by his testimony at the plea hearing that he was pleading guilty voluntarily, that no one forced him to plead guilty, and that he was satisfied with counsel's services was not clearly erroneous.

1. Standard of Review

In reviewing the denial of a motion for post-conviction relief, an appellate court should uphold the findings and conclusions of the motion court unless they are clearly erroneous. Rule 24.035 (k). Such findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made. *Edwards v. State*, 200 S.W.3d 500, 509 (Mo. banc. 2006).

A petition for post-conviction relief must meet three requirements to warrant an evidentiary hearing: (1) it must contain facts, not conclusions, which, if true, would warrant relief; (2) the alleged facts must not be refuted by the record; and (3) the matters complained of must have resulted in prejudice to the movant." *State v. Blankenship*, 830 S.W.2d 1, 16 (Mo. banc 1992). An evidentiary hearing is not required when the court determines and the record conclusively shows that the movant is not entitled to relief. Rule 24.035 (h).

2. Defendant's factual allegations were refuted by the record.

Defendant repeatedly informed the court that he was satisfied with counsel. (L.F. 13, 16). Defendant's responses of satisfaction did not consist merely of yes or no answers to the court's questions, because when the court asked Defendant if there was anything about counsel's services that he was dissatisfied with, Defendant replied, "Everything that she did, I asked her to." (L.F. 13). Defendant stated that he was pleading guilty voluntarily to both charges. (L.F. 13).

Defendant argues that the court's questions at the plea hearing were too broad so that his answers to the questions could not conclusively refute his allegations in his motion. But several of the court's questions were focused on a particular issue: the voluntariness of Defendant's plea. Defendant was asked if his attorney had put "*any pressure*" on him, or if she had "*in any way forced*" him to plead guilty to either of the charges. (L.F. 13 (*emphasis supplied*)). Defendant stated that she had not. (L.F. 13). Defendant stated that the decision to plead guilty had been his. (L.F. 13). Thus, his testimony at the plea hearing refutes his allegations, raised only after his sentence was executed, that his guilty plea was the result of undue coercion and pressure from plea counsel.

In his argument that the court's questions were too broad to conclusively refute his claim, Defendant cites exclusively to cases that review the sufficiency of the record to refute a claim of ineffective assistance of trial counsel. See App. Subst. Br. 31, citing *Schafer v. State*, 256 S.W.3d 140, 148 (Mo. App. W.D. 2008) (citations omitted); *State v. Driver*, 912 S.W.2d 52, 55-56 (Mo. banc 1995). However claims of ineffective assistance of plea counsel are often refuted by more general questions posed at a plea hearing, because, at plea hearings the court often gives "numerous opportunities to express dissatisfaction with the

performance of counsel." *Morrison v. State*, 65 S.W.3d 561, 564 (Mo. App. W.D. 2002) (citing *May v. State*, 921 S.W.2d 85, 86 (Mo. App. W.D. 1996)). Therefore, the answers to questions posed during a plea colloquy are often sufficient to refute a claim that the defendant was dissatisfied with plea counsel without meeting the specificity required by *Driver* to refute a specific claim of ineffective assistance of trial counsel. *Id.*

In "contexts where issues may be hidden from discovery by legal vagaries and complexities," more specific questioning may be necessary to conclusively refute the allegations raised in a post-conviction motion. *Cole v. State*, 2 S.W.3d 833, 836 (Mo. App. S.D. 1999). But the issues that Defendant raised in his motion where not hidden from discovery by legal vagueness or complexity. In his motion, Defendant alleged that he was coerced into pleading guilty by plea counsel. (L.F. 61-62). At the plea hearing, Defendant testified that counsel had not put "any pressure" on him, nor had she "in any way forced" him to plead guilty. The allegations in Defendant's motion and his testimony at the plea hearing cannot both be true. Therefore, his testimony at the plea hearing conclusively refutes his allegations in his motion.

Defendant argues that the record does not refute his allegations that counsel told him that the cases would be joined, and does not refute his allegations that he believed counsel would withdraw from his case. (L.F. 14-15). However, to prevail on a claim that plea counsel was ineffective, Defendant has to prove both that counsel's performance was constitutionally deficient, and that but for counsel's ineffectiveness, he would not have pleaded guilty but would have gone to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). That the defendant would not have pleaded guilty and would have insisted upon going to

trial is a necessary part of showing prejudice after a guilty plea. *Beach v. State*, 220 S.W.3d 360, 363-365 (Mo. App. S.D. 2007). "A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by [Defendant] as a result of the alleged deficiencies." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice. . . that course should be followed." *Id.* Defendant's allegations that, but for counsel's alleged coercion, he would have gone to trial were refuted by his testimony at the plea hearing that he was not coerced or pressured in any way to plead guilty. Because the record conclusively refutes his claim of prejudice, this Court need not consider whether the record refutes each and allegation regarding counsel's performance.

Defendant's claim is without merit and should be denied.

CONCLUSION

The motion court's judgment was not clearly erroneous. Its judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 7,147 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 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 18th day of August, 2011, to:

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APPENDIX