STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Case No. 2008-CP-30-0477

Ian Rice, ...Respondent,

v.

State of South Carolina, ... Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Clifton Newman's order dated July 9, 2013 and filed July 17, 2013 granting post-conviction relief to the Respondent. The State received notice of entry of the order on July 23, 2013. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

ALAN WILSON
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By: _____

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August 22, 2013

Other counsel of record:

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PROOF OF SERVICE

I, J. Rutledge Johnson, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Laura M. Saunders, Esquire
P.O. Box 731
102 Church Street
Laurens, South Carolina 29360

I further certify that all parties required by Rule to be served have been served this 22rd day of August, 2013.

J. RUTLEDGE JOHNSON
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STATE OF SOUTH CAROLINA COUNTY OF LAURENS IAN RICE #274002, Petitioner, v. STATE OF SOUTH CAROLINA, Respondent.	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT CA# 2008-CP-30-00477 **ORDER GRANTING APPLICANT POST-CONVICTION RELIEF**

This matter is before the Court pursuant to Ian Rice's ("Petitioner") Application for Post-Conviction Relief ("PCR") filed with the Laurens County Clerk of Court on June 9, 2008. Petitioner filed his original application for Post-Conviction Relief with the Laurens County Clerk of Court within the one year statute of limitations on June 9, 2008 and C. Alice Whitesides, Esquire was appointed to represent Mr. Rice. Ms. Whitesides was subsequently relieved as counsel on June 3, 2010 and M. Rita Metts, Esquire was appointed as substitute counsel on June 15, 2010. On May 20, 2011, M. Rita Metts was relieved as counsel due to her appointment as Magistrate Judge in Richland County and William K. Charles, Esquire was appointed to represent the Petitioner. On March 14, 2012, Mr. Charles requested to be relieved as counsel for Petitioner and Laura M. Saunders, Esquire was appointed to represent the Petitioner.

I. FACTS AND PROCEDURAL HISTORY

Petitioner is presently confined in the South Carolina Department of Corrections. Petitioner was indicted for Possession with Intent to Distribute Crack Cocaine within Proximity to a Park or School under indictment number 2006-GS-

30-1587 and Distribution of Crack Cocaine Third or Subsequent Offense under indictment number 2006-GS-30-1588. Petitioner was found guilty at trial on November 15, 2007 and was represented by Clyde L. Pennington, Jr. The Honorable D. Garrison Hill presided over the trial. Petitioner was concurrently sentenced to ten (10) years confinement for Possession with Intent to Distribute Crack Cocaine within Proximity to a Park or School and seventeen (17) years confinement for Distribution of Crack Cocaine Third or Subsequent Offense.

On March 11, 2013, Petitioner's evidentiary hearing was held before me in Greenwood, South Carolina. At the hearing, Petitioner was present with his attorney Laura M. Saunders of Laurens, South Carolina, and Assistant Attorney General Rutledge Johnson was present representing the State of South Carolina. Petitioner submitted a Memorandum of Law in support of his application for PCR, several witnesses were called and arguments presented to the Court. At the close of the hearing, this Court took the matter under advisement and granted both parties leave to supplement the record with an additional memorandum of law on the issue of trial counsel's failure to object to the closure of the courtroom for the confidential informant's testimony. Petitioner submitted a Supplemental Memorandum in Support of his application for PCR, and the State submitted a Memorandum in Opposition.

In making the following Findings of Fact and Conclusions of Law, this Court considered the arguments made at the evidentiary hearing, the testimony given at the hearing, the Petitioner's initial and subsequent applications, the trial

transcript, the records of the Spartanburg County Clerk of Court, as well as the briefs and memorandums of law submitted by each party.

Petitioner claims that a structural error occurred at his trial which caused a violation of his Sixth Amendment rights and denial of effective assistance of counsel, and that in turn Petitioner suffered prejudice by this denial of effective assistance of counsel. This Court agrees.

II. FINDINGS OF FACT

Petitioner's PCR counsel points out several instances at trial where trial counsel should have objected to the State's motion to close the courtroom. Trial Counsel failed to object to or to elicit the trial judge's reasons for closing the courtroom and failed to properly preserve the issues for appeal by way of objection. Trial counsel failed to object to the State's request to close the courtroom prior to the testimony of the State's confidential informant witness, in the presence of the jury. (Tr. 36, L. 13-25, Tr. 37, L. 1-9.) Petitioner's trial counsel failed to object to the State's request and therefore the record was unpreserved for appeal. At the evidentiary hearing on March 11, 2013, trial counsel admitted that he did not object to the State's request at trial and did not explain reasons for his failure to enter an objection. The confidential informant later testified regarding the closure in the presence of the jury furthering appealable significance of the closure issue. Nonetheless, there is no record for appeal based upon counsel's failure to object.

The State requested that the courtroom be closed prior to witness's testimony:

THE COURT: Thank you. Yes ma'am, you may call your first witness.

MS. ZIMMERMAN: Your Honor, the first witness is the witness that we have discussed previously that we would request the courtroom be cleared prior to her taking the stand. It is Miss Amanda Sanford.

THE COURT: Okay. Let me see the lawyers up here real quick.

(Unrecorded bench conference)

THE COURT: All right, ladies and gentleman, we're going to take just a short recess. Don't talk about the case, continue to keep an open mind. We'll take about a ten minute break. Thank you.

(The jury was excused from the courtroom)

THE COURT: We'll start back at 3:00 o'clock.

(Recessed at 2:50 p.m.)

(Reconvened at 3:02 p.m.)

THE COURT: Okay, bring the jury on back in.

(The jury returned to the Courtroom)

THE COURT: Okay, you may call your first witness.

MS ZIMMERMAN: The State Calls Amanda Sanford.

(Tr. 36, L. 13-25, Tr. 37, L. 1-9.)

The Confidential Informant testified regarding the closure in the presence of the jury on cross examination by trial counsel:

Q: Miss Sanford, I asked if you had ever made any other buys in front of these twelve people with common sense and you said no?

A: I didn't know I supposed to say that in public and give names. I didn't know. That is why they cleared the courtroom.

Tr. 65, L. 6-11.

III. LAW AND CONCLUSIONS OF LAW

A. INEFFECTIVE ASSISTANCE OF COUNSEL

A defendant has the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590 596 (2007), *cert. denied by* Ozmint v. Ard, 552 U.S. 944, 128 S.Ct. 370, 169 L.Ed.2d 247 (2007). However, the United States Supreme Court has recognized that in certain rare circumstances "prejudice is presumed." Strickland, 4666 U.S. at 692, 104 S.Ct. 2052 (citing State v. Cronic, 466 U.S. 648, 658, 104 S.Ct. 2039, 2047 (1984); see also Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (S.C. 2006). In Cronic, the Court identified three situations where counsel is per-se ineffective: (1) when there is a complete denial of counsel at a critical stage of trial, (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, and (3) when circumstances are so prejudiced against the defendant that competent counsel could not render effective assistance. Cronic, 466 U.S. at 659, 104 S.Ct. 2039; see also Nance, 367 S.C. at 552, 626 S.e.2d at 880 (stating that "per-se prejudice occurs if there has been a constructive denial of counsel").

Absent a showing of per-se prejudice under Cronic, an applicant must show "actual prejudice" under Strickland. See Nance, 367 S.C. at 552, 626 S.E.2d at 880

(citing Strickland, 466 U.S. at 692, 104 S.Ct. 2052; Cronic, 466 U.S. at 666 and n. 41, 104 S.Ct. 2039)). To establish a claim of ineffective assistance of counsel under Strickland, a Petitioner must show that: 1) counsel's performance was deficient, and 2) he was prejudiced by counsel's deficient performance. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. In a PCR proceeding, the Petitioner bears the burden of establishing that he is entitled to the relief sought. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "Where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable, and prejudice may be presumed." Cronic v. U.S., 446 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006).

Petitioner argues that 1) trial counsel was ineffective by failing to object to the State's motion to close the courtroom for the testimony of the confidential informant and he suffered prejudice by this failure; 2) trial counsel was ineffective because he failed to preserve the record for appeal such that Petitioner suffered prejudice; and 3) the closure of the courtroom constitutes a structural error which allows prejudice to be presumed to the Petitioner. The State argues that even if trial counsel's performance was deficient, the Petitioner does not make the required showing of prejudice because of the overwhelming evidence of guilt presented at trial. This Court disagrees.

B. THE SIXTH AMENDMENT RIGHT OF THE ACCUSED TO A PUBLIC TRIAL

The Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution guarantee a criminal defendant a public trial.[1] Waller v. Georgia is the seminal United States Supreme Court case to analyze the accused's explicit right to a public trial under the Sixth Amendment. 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). Waller also recognizes the coextensive nature between a defendant's right to a public trial under the Sixth Amendment and that of the public under the First Amendment:

> "Nevertheless, there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public. The central aim of a criminal proceeding must be to try the accused fairly, and "[o]ur cases have uniformly recognized the public trial guarantee as one created for the benefit of the defendant."
>
> Id. at 46 (quoting Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

The Waller Court stated that "This protection is for the benefit of the accused, so the public may see that he is dealt with fairly, and the public's presence may keep his triers aware of the importance of their functions." Id. at 46 (quoting In re Oliver, 333 U.S. 257, 270, n. 25 (1948), in turn quoting 1 T. Cooley, Constitutional Limitations 647 (8th ed.1927)). The Waller Court held further that

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[1]In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. U.S. Const. amendment VI.

"Trial by jury; witnesses; defense. The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both. (1970 (56) 2684; 1971 (57) 315.)" S.C. Const. art. I, section 14.

under the Sixth Amendment, any closure of a suppression hearing over the objections of the accused must meet the following test: the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; the closure must be no broader than necessary to protect that interest; the trial court must consider reasonable alternatives to closing the hearing; and it must make findings adequate to support the closure. 467 U.S. 39, 40 (1984).

In recent years, the United States Supreme Court stressed that "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." Presley v. Georgia, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010). In Presley, the Supreme Court analyzed the public trial right under the First Amendment in conjunction with the accused's right to a public trial under the Sixth Amendment. Id. The lower court in Presley excluded a member of the public from the voir dire of prospective jurors. The Presley Court reasoned that "The extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or in what circumstances the reach or protections of one might be greater than the other." Id. at 724.[2]

Our South Carolina Supreme Court acknowledges that the Sixth Amendment guarantees to a public trial extend to the accused, and "must be closely scrutinized to assure that there is no impermissible infringement of the right." State v.

[2] In other cases, our courts have analyzed the rights of the public's access, particularly the press, to criminal trials. The requirement of openness of criminal proceedings can be overcome only by a finding that closure is necessary to preserve higher values. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (holding that the guarantees of open public proceedings in criminal trials cover proceedings for the voir dire examination of potential jurors). "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 2829, 65 L.Ed.2d 973, 992 (1980).

Sinclair, 275 S.C. 608, 612, 274 S.E.2d 411, 413 (1981). In Sinclair, the Court analyzed whether the trial judge abused his discretion in ordering the exclusion of the public while the prosecuting witness testified. 275 S.C. 608 at 613-614, 274 S.E.2d 411 at 415-416. Somewhat contrary to the facts in Petitioner's case, the Court held that the trial judge was not in error in ordering the exclusion based upon the fact that "the trial judge took care to see that the order was carried out in a manner least likely to have an impression on the jury". Id. at 614. In addition, the Sinclair Court justified the trial court's closure and held that there was no abuse of discretion because the prosecution's witness was a nine year old girl who was a victim of sexual battery. Id. See also State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987) (holding that the trial judge's ruling to restrict the comings and goings of spectators during trial withstands constitutional scrutiny underlying a defendant's Sixth Amendment right to a public trial).

C. THE DENIAL OF RIGHT TO PUBLIC TRIAL IS A STRUCTURAL ERROR

The United States Supreme Court in Chapman v. California, 386 U.S. 18 (1967) first developed the "harmless constitutional error rule". Chapman reasoned that there are times when certain fundamental errors occur at trial which in turn assault the sanctity of a defendant's basic constitutional rights, and that these errors are inapplicable to the harmless error analysis and should be defined a constitutional error. In Chapman, the Court reversed and remanded the state court convictions of two defendants based upon the prosecution's inappropriate references to the defendants' failures to testify. The trial judge also charged the jury that they

could draw adverse inferences from the defendants' choice not to testify. The Chapman Court reasoned that before a federal constitutional error can be held as a harmless error, the court must "be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 24. In closing, the Chapman Court declared that "Petitioners are entitled to a trial free from the pressure of unconstitutional inferences." Id. at 26.

A Defendant's right to a speedy and public trial by an impartial jury is the only Constitutional guarantee that appears in the texts of the Constitution and in the Bill of Rights. See Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). In Neder, Supreme Court recently analyzed and held that the denial of a public trial is a "structural error" which defies any requirement for the harmless error analysis, no matter if there is overwhelming evidence of guilt. In Neder, the trial court omitted an element of the offense charged against the Defendant in its instruction to the jury. In a unanimous court opinion, Chief Justice Rehnquist related back to Waller, holding that the denial of a public trial is considered a structural error. Neder, 527 U.S. at 7. "Some structural errors, like the complete absence of counsel or the denial of a public trial, are visible at first glance." Id. at 37 (Scalia, J., concurring in part and dissenting in part). See also United States v. Hitt, 473 F.3d 146 (5th Cir. 2006). Further, the Court held pronounced that "The very premise of structural-error review is that even convictions reflecting the "right" result are reversed for the sake of protecting a basic right." Id.

Petitioner argues that trial counsel's failure to object at trial on the issue of closure of the courtroom for the informant's testimony constitutes ineffective assistance of counsel under Strickland and this Court agrees. The Chapman and Neder inquiries above provide the framework for identifying the structural error that occurred in Petitioner's trial and therefore, this Court agrees that under Cronic, prejudice may also be presumed as a result of this denial of such a fundamental right.

Trial counsel failed to object to the State's request to close the courtroom prior to the testimony of the State's confidential informant witness, in the presence of the jury. (Tr. 36, L. 13-25, Tr. 37, L. 1-9.) Counsel's failure to object effectively denied Petitioner the right to a fair, impartial and public trial under the Sixth Amendment, which has been held by the Supreme Court to be a fundamental or structural error. In addition, counsel's complete denial of counsel at such a critical stage of trial failed to preserve this structural error for appeal. See Tr. 17, L. 5; Tr. 36, L. 13-25; Tr. 37, L. 1-9; Tr. 65, L 9-11; Tr. 66, L 11-24.

Trial counsel's failure to object and make the appropriate legal arguments to challenge the courtroom closure falls below the test set forth in Strickland. The record is clear that trial counsel failed to object. At the evidentiary hearing on March 11, 2013, trial counsel admitted that he did not object to the State's request at trial and did not explain reasons for his failure to enter an objection. Petitioner suffered actual prejudice by counsel's errors. The State made its request to close the Courtroom in the presence of the jury which even prior to any objection would

implicate an issue that should have been preserved for an appeal. Counsel committed a blatant failure to object to this request. Therefore, the record was unpreserved for appeal. The confidential informant later testified regarding the closure in the presence of the jury furthering appealable significance of the closure issue. Nonetheless, there is no record for appeal based upon counsel's failure to object. For the foregoing reasons, Petitioner makes a showing of "actual prejudice" pursuant to Strickland.

More importantly, the denial of Petitioner's Sixth Amendment right to a public trial and the structural nature of this error, brought on by counsel's failure to object, calls for an analysis under United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) because prejudice may be presumed due to the fundamental and structural nature of such an error together with the clear denial of counsel at a critical stage of the trial. Applying Cronic, this failure meets two of the three situations where counsel is "per se" ineffective: where there is a complete denial of counsel at a critical stage of trial and when counsel entirely fails to subject the prosecution's case to a meaningful adversarial testing. 466 U.S. at 659. In Cronic, the Court reasoned "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Id. at 659.

The State argues that there was overwhelming evidence of Petitioner's guilt. However, applying the foregoing cases to the Petitioner's case, there can be no

question that the closure of the courtroom for the testimony of the confidential informant implicated Petitioner's Sixth Amendment Constitutional right to a public trial. The closure was a fundamental and structural error under the clear directives set forth in Chapman and Neder. Conclusively, even the existence of overwhelming evidence against Petitioner cannot subvert the fundamental nature of such an error that cuts straight to the pillars of our democracy. Trial counsel's failure to challenge the State's motion and the trial court's failure articulate his reasons for closure unmistakably demonstrate that Petitioner's trial lacked a crucial and distinctive *constitutionally required* step. In consequence, Petitioner experienced both a denial of effective assistance of counsel as well as a denial of his right to a public trial under the Sixth Amendment. Thus, prejudice is presumed in Petitioner's case based upon a showing that the clear error and denial of such a fundamental right create a trial process that is "presumptively unreliable" under Cronic. A structural error in the trial of this case occurred in the manner in which representations concerning the closing of the courtroom were made in the presence of the jury without objections. Additionally, an aura of credibility was afforded the testimony of the state's informant witness when she was allowed to testify without objection as to the reason the courtroom was closed.

CONCLUSION

For the foregoing reasons, Petitioner's application for Post-Conviction Relief is hereby GRANTED and remanded for a new trial.

AND IT IS SO ORDERED.

Clifton Newman
Presiding Judge

July 9, 2013
Columbia, South Carolina

A TRUE COPY OF ORIGINAL
Lynn W. Lancaster
Lynn W. Lancaster
Laurens County CCCP & GS

ALAN WILSON
ATTORNEY GENERAL

August 22, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Ian Rice, 274002 v. State of South Carolina**
2008-CP-30-0477

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. Proof of service of the Notice of Appeal on the Respondent.
2. A copy of the order which is to be challenged on appeal.

Sincerely,

J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Laura McCall Saunders, Esquire
Trisha Allen, Victim Services
SC Office of Indigent Defense
David Stumbo, Solicitor