ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Laurens County
Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2013-001781

IAN RICE,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

SUPPLEMENTAL APPENDIX

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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-30-0477 **MEMORANDUM IN SUPPORT OF APPLICATION FOR POST CONVICTION RELIEF**

The Petitioner Ian Rice, hereinafter "Petitioner", by and through his undersigned counsel files this Memorandum in Support of his Application for Post-Conviction Relief pursuant to South Carolina Code Annotated 17-27-10 et seq. and requests that his application for Post-Conviction Relief be granted for the following reasons:

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.

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. 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.

On October 13, 2008, trial counsel received a definite suspension of two years by Order of the South Carolina Supreme Court in reference to formal disciplinary charges brought by the Commission on Lawyer Conduct. In the Matter of Clyde L. Pennington, Jr., Opinion No. 26551, October 13, 2008. On July 11, 2011, trial counsel was disbarred by Order of the South Carolina Supreme Court following his suspension from the practice of law. In the Matter of Clyde Louis Pennington, Opinion No. 26999, July 11, 2011. To date, Petitioner has not had an evidentiary hearing on his post-conviction relief issues.

LEGAL ARGUMENT

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. To prove counsel's performance was deficient, the Petitioner must show that his counsel failed to render reasonably effective assistance under prevailing professional norms. Id.; Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (S.C. 1989). To prove he was prejudiced, by trial counsel's deficiency, a PCR applicant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine the confidence in the outcome of the trial." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). 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).

I. FAILURE TO COMMUNICATE STATE'S OFFER

Counsel's failure to communicate a plea offer constitutes deficient performance. *See* Davie v. State, 675 S.E.2d 416, 420 (S.C. 2009). In Davie, Counsel was found ineffective for failing to inform the Defendant of the State's initial written plea offer of fifteen years. The Court reasoned that that "such conduct constitutes unreasonable performance under the prevailing professional standards established by the American Bar Association or state-specific ethical rules of conduct. Pursuant to these professional standards, counsel is required to fully communicate with the

client so that the client can make an informed decision regarding any proposals by the State." Davie, 675 S.E.2d at 420.

In the instant case, Petitioner claims that Trial counsel failed to properly communicate the State's offer of eight (8) years. In addition, Petitioner claims that he accepted the State's plea offer of "4.5 years non-violent" at a bond hearing in September 2007. Petitioner claims that this offer was revoked by the Solicitor after he had accepted this offer on the date of his bond hearing. Petitioner is able to show that he suffered prejudice because had he known of the offer of eight years, Petitioner would likely have accepted the offer.

II. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE STATE'S MOTION TO CLOSE THE COURTROOM

Trial counsel's failure to object to the State's request to the trial judge to close the courtroom prior to the testimony of the State's star witness, the confidential informant, constitutes ineffective assistance of counsel which caused the Petitioner to suffer prejudice because counsel's failure to object a) denied Petitioner the right to a fair, impartial and public trial pursuant to the case law below and b) failed to preserve the record for an appeal. (Tr. 17, L. 5; Tr. 36, L. 13-25; Tr. 37, L. 1-9; Tr. 65, L 9-11; Tr. 66, L 11-24).

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. 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. Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). 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). Any order restricting the right to a public trial must be closely scrutinized to assure there is no impermissible infringement of the right. State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981). "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). "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).

a) **Denial of right to a fair trial.** Trial counsel's failure to object to the closure of the courtroom for the testimony of the confidential informant, and subsequent closure of the courtroom denied the Petitioner the right to a fair trial which is direct evidence of prejudice. (Tr. 17, L. 5; Tr. 36, L. 13-25; Tr. 37, L. 1-9). There is a reasonable probability that closing the courtroom improperly bolstered the confidential informant's testimony. There is no evidence in the transcript that Judge Hill articulated his reasons for closing the courtroom pursuant to case law.

There were a series of unrecorded bench conferences, presumably regarding the Solicitor's request, but no objection was entered on the record by Petitioner's trial counsel and there was no request by trial counsel that the Court articulate its reasons for closing the courtroom. (Tr. 17, L. 5; Tr. 36, L. 13-25) In addition, the transcript does not reflect that the courtroom was reopened after the confidential informant was excused and prior to the testimony of police officer Tyrone Goggins. (Tr. 66, L. 11-25). There exists a **reasonable probability** that the outcome of the trial might have been different had the courtroom been allowed to remain open to the public. Under the Strickland test, counsels failure to object constitutes deficient performance, and a reasonable probability that the outcome of the trial might have been different exists. Therefore, Petitioner suffered prejudice and his application for PCR should be granted.

b) **Failure to preserve record for appeal.** Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel. Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983). *See also* Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993). In Petitioner's case, Trial counsel failed to object to the State's motion for closure of the courtroom prior to the confidential informant taking the witness stand. This failure to enter an objection on the record denied the Petitioner a record which could be preserved for an appeal, which the Petitioner so desired after being found guilty of the alleged crimes. (Tr. 17, L. 5; Tr. 36, L. 13-25; Tr. 37, L. 1-9). This constitutes a failure of counsel to render reasonably effective

assistance under the prevailing norms. Trial counsel did not object for the record or request an articulation by the trial judge for the record the trial court's reasons for excluding the public during the confidential informant's testimony. Because of this failure to preserve what is arguably an appealable issue, Petitioner has no basis to successfully go forward on appeal. Thus, Petitioner has suffered prejudice due to counsel's ineffective assistance and his application should be granted.

III. FAILURE TO PERFECT APPEAL

All defendants who have been found guilty of a crime have a right to be informed of the possibility of appeal and the method for taking an appeal. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). In Frasier v. State, 410 S.E.2d 572, 574 (S.C 1991) the Court found trial counsel ineffective for failing to perfect Defendant's direct appeal. In Frasier, the Court reasoned:

> "Further, here it appears that petitioner retained his trial counsel, rather than having counsel appointed to him. Retained counsel possess the express duty to assist their clients to properly perfect their appeals. Rule 51(E)(4). Sup.Ct.Rules; Rule 602(E)(4), SCACR. **We hold that counsel was ineffective in failing to perfect petitioner's appeal, and that petitioner was prejudiced thereby because but for counsel's deficient performance, petitioner would have taken a direct appeal."**
>
> Frasier v. State, 410 S.E.2d 572, 574 (S.C 1991).

After discussions with the undersigned PCR counsel, Petitioner does not wish to pursue a direct appeal in the instant case. However, Petitioner asserts that counsel was ineffective in failing to perfect his appeal. Petitioner was found guilty and

sentenced to seventeen (17) years on November 15, 2007. Trial counsel filed a Notice of Appeal with the South Carolina Court of Appeals on November 26, 2007 on behalf of Petitioner. On November 26, 2007 trial counsel submitted a letter to the South Carolina Court of Appeals informing that he was filing the Notice of Appeal but would not be counsel of record for the appeal. Opposing trial counsel Mindy Zimmerman, Esquire was served the Notice of Appeal on November 27, 2007 and a Proof of Service was filed on December 3, 2007. On December 7, 2007, the South Carolina Court of Appeals issued an Order dismissing the Appeal pursuant to Rule 234(b) SCACR citing untimely service of the Notice of Appeal. On January 10, 2008, the South Carolina Court of Appeals issued the Remittitur dismissing the appeal.

CONCLUSION

For the foregoing reasons, Petitioner Ian Rice, by and through his undersigned counsel, requests that this Court issue an Order granting his application for Post-Conviction relief and remanding for a new trial.

-Signature on Next Page-

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Attorney for the Petitioner Ian Rice

March 11, 2013
Laurens, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN ITS ORIGINAL JURISDICTION

IAN RICE,

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Supplemental Appendix on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
South Carolina Office of Indigent Defense
1330 Lady St., Suite 401
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served.

This 13TH day of August, 2014.

CHANDRA E. YOUNG
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ALAN WILSON
ATTORNEY GENERAL

August 13, 2014

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

***RE:* Ian Rice v. State of South Carolina**
2013-001781

Dear Mr. Shearouse:

I am enclosing the original and one (1) copy of the Supplemental Appendix in the above case.

Sincerely,

J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Carmen V. Ganjehsani, Esquire
Trisha Allen, Victim Services