

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAR 14 2013

Certiorari to Saluda County

S.C. Supreme Court

William P. Keesley, Circuit Court Judge

JOSE ANTONIO ANZALDO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213423

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 4

CONCLUSION 6

PETITION TO BE RELIEVED AS COUNSEL 7

ISSUE PRESENTED

Whether defense counsel was ineffective in failing to subject the State's case to meaningful adversarial testing?

STATEMENT

On April 7, 2009, petitioner appeared before the Honorable L. Casey Manning in Saluda County and pled guilty to criminal sexual conduct with a minor – second degree and criminal sexual conduct with a minor – first degree. A ten (10) year sentence was imposed on each charge. John E. Duncan, Esquire, was plea counsel. (App. p. 1 – p. 14).

Petitioner filed an application for post-conviction relief on February 17, 2010. (App. p. 16 – p. 25). Respondent filed a return dated May 3, 2010. (App. p. 26 – p. 31). An evidentiary hearing was held on August 31, 2011, before the Honorable William P. Keesley. Petitioner was present and represented by Stephen D. Geoly, Esquire. Respondent was represented by Kaelon E. May, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 33 – p. 98).

On November 30, 2011, Judge Keesley issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 105 – p. 118).

This petition follows.

ARGUMENT

Defense counsel was ineffective in failing to subject the State's case to meaningful adversarial testing.

Petitioner testified at the evidentiary hearing that he did not commit the crimes that he pled guilty to. Plea counsel only came to see him two times at the jail. They talked only for about five minutes each time. He did not investigate his case. He did not even ask him if he was guilty. Counsel did not go over the discovery material with petitioner. There was no medical examination made of the victims. (App. p. 39, line 15 – p. 42, line 1).

As can be seen from petitioner's testimony, defense counsel was deficient in many respects. In Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006) this Court observed how prejudice may be presumed in the context of ineffective assistance of counsel:

The Supreme Court also recognized in both Strickland and Cronic that in certain circumstances "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry...is not worth the cost." Strickland, 466 U.S. at 692, 104 S.Ct. 2052 (citing Cronic, 466 U.S. at 658, 104 S.Ct. 2039). In *552 Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659, 104 S.Ct. 2039. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." *Id.* Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* (citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." Brown v. French, 147 F.3d 307, 313 (4th Cir. 1998).

367 S.C. at 551-552, 626 S.E.2d at 880.

Per se prejudice occurred in petitioner's case because defense counsel failed to subject the State's case "to meaningful adversarial testing."

CONCLUSION

Petitioner's writ should be granted and his guilty plea should be vacated.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of March, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SALUDA COUNTY
WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

JOSE ANTONIO ANZALDO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213423

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jose Antonio Anzaldo states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on August 31, 2011. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Jose Antonio Anzaldo.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of March, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Saluda County

William P. Keesley, Circuit Court Judge

JOSE ANTONIO ANZALDO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213423

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jose Antonio Anzaldo, #334118, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 14th day of March, 2013.

Robert M. Pachak
Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of March, 2013.

Robert M. Keesley (L.S.)
Notary Public for South Carolina

My Commission Expires: July 24, 2022.