STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Cherokee County

Roger L. Couch, Circuit Court Judge

JIMMY LITTLEJOHN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213169

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to grant relief based on trial counsel's refusal to provide Petitioner with discovery material provided to counsel by the State, when counsel was later relieved from representation, Petitioner proceeded to jury trial *pro se* and without the benefit of the discovery material and former counsel was appointed as stand by counsel during the trial?

STATEMENT

In November of 2004, the Cherokee County Grand Jury indicted Littlejohn for arson second degree and burglary first degree. On May 25, 2005, Littlejohn, *pro se*, proceeded to jury trial before the Honorable John C. Hayes, III. Attorney Michael Morin prosecuted the case on behalf of the State. The jury returned verdicts of guilty and Judge Hayes sentenced Littlejohn to concurrent 25 year sentences on each charge. A notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Littlejohn, Op. No. 2010-UP-199 (S.C. Ct.App. filed March 12, 2010).

On March 7, 2011, Littlejohn filed an application for post conviction relief. The State filed a return on February 23, 2012. On June 11, 2012, an evidentiary hearing was held before the Honorable Roger Couch. Attorney Thomas Killoren, Jr. represented Littlejohn at the PCR hearing. Attorney Ashleigh Wilson was present for the State. In a written order signed September 24, 2012, Judge Couch denied relief and dismissed the application. A timely notice of intent to appeal was served on October 11, 2012. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to grant relief based on trial counsel's refusal to provide Petitioner with discovery material provided to counsel by the State, when counsel was later relieved from representation, Petitioner proceeded to jury trial *pro se* and without the benefit of the discovery material and former counsel was appointed as stand by counsel during the trial.

On October 27, 2004, seven months prior to trial, Littlejohn appeared before the Honorable J. Mark Hayes, II and moved to relieve appointed counsel, Don Thompson. (App. pp 1-8). During the hearing attorney Thompson told Judge Hayes, "At that time Mr. Littlejohn wasn't happy with my services in the preliminary hearing and instructed me that I was fired. I received a letter from him a few days later. In that letter he instructed me that he no longer wanted my services, for me to make two copies of my file and give it to him." (App. p. 4, lines 11-22). Littlejohn advised Judge Hayes that he intended to hire an attorney. (App. p. 5, line 10 – 16). Judge Hayes granted the motion to relieve appointed counsel Thompson. (App. p. 8, lines 2-3).

On May 25, 2005, Littlejohn, *pro se*, proceeded to jury trial before the Honorable John C. Hayes, III. After jury selection, Judge Hayes appointed attorney Thompson, who had previously been relived as counsel, to act as stand by counsel. (App. p. 27, lines 11-21). The jury found Littlejohn guilty and Judge Hayes sentenced him to 25 years.

During the PCR hearing Littlejohn testified that he did not receive his discovery material from attorney Thompson until August 8, 2005, **after** Littlejohn's trial, conviction and sentencing. (App. p. 254, lines 6-19). Littlejohn testified that he repeatedly asked attorney Thompson for this material prior to trial. (App. p. 254, lines 20-22). Littlejohn testified that on December 21, 2004, prior to trial, he wrote to attorney Thompson requesting "every piece of paper you have on me and my jacket and I have asked you for this before, and don't make me have to make your people make you do the right thing, and these people who I was talking about was the people at the NAACP and

the ACL." (App. p. 256, line 22 – p. 257, line 1). The letter was marked as Applicant's Exhibit #1 and introduced in evidence. (App. p. 329). In response to the December 21, 2004, letter, attorney Thompson wrote Littlejohn a letter dated December 29, 2004. In the letter attorney Thompson states, "I am in receipt of your letter dated December 21, 2004. I no longer represent you in this matter. If you will remember, on October 27, 2004, you went before Judge Hayes and asked that I be discharged as your attorney. Judge Hayes granted your motion. A copy of his order is enclosed for you. You should now direct your threats to someone else." (App. p. 330). The letter was marked a Applicant's Exhibit #2 and introduced in evidence. There is no mention of attorney Thompson providing Littlejohn with the requested discovery material.

On July 13, 2005, after the trial, Littlejohn wrote attorney Thompson and again requested discovery material. (Applicant's Exhibit #3, app. pp. 331-333). On August 8, 2005, attorney Thompson provided Littlejohn with the discovery material he received. (Applicant's Exhibit #4, App. p. 334). Attorney Thompson noted that his file was probably not complete as he was relieved as counsel in October of 2004. (App. p. 334). The material provided included a family court order, a Gaffney Police Department incident report, a Gaffney Fire Department incident report and a consent to search. (Applicant Exhibits #5, #6, #7, #8, app. pp. 335-342).

During the PCR hearing attorney Thompson admitted that he did not turn his file over to Littlejohn after he was relieved as counsel. (App. p. 289, lines 20-22). Attorney Thompson admitted that the items provided on August 8, 2005, were not provided to Littlejohn prior to trial. (App. p. 296, line 19 – 25). Attorney Thompson admitted that he did not discuss the discovery material with Littlejohn. (App. p. 297, lines 1-14). Thompson testified that it is his general practice to provide the file to the client when requested. (App. p. 298, lines 11-15). Thompson, however, provided no explanation for his failure to provide the requested discovery material to Littlejohn

prior to trial. Both Applicant's Exhibit #1, the December 21, 2004, letter requesting "every piece of paper you have on me in my jacket" and attorney Thompson's testimony at the motion to relieve counsel hearing on October 27, 2004, that Littlejohn wrote to him requesting a copy of his file support the fact that Littlejohn requested a copy of his discovery material prior to trial. The requested material was not provided to Littlejohn prior to his trial where he was not represented by counsel.

In the order of dismissal the PCR judge wrote:

> This Court finds that the Applicant failed to meet his burden of proving that relieved counsel was ineffective for failing to turn over a copy of his file prior to Applicant's trial. This Court finds that relieved counsel adequately protected the interests of the Applicant after their attorney-client relationship ended. Counsel provided credible testimony that it is not his general practice to turn over his file as a matter of course after being relieved. Counsel testified further that when a file is requested, it is his general practice to turn it over to the client. This court finds that counsel properly turned over to the applicant a copy of his file after a written request from the Applicant on July 13, 2005. This Court finds that relieved counsel was not ineffective for failing to turn over a copy of the Applicant's Rule 5 discovery.

(App. p. 348). The PCR judge erred. The order ignores the fact that on at least two occasions, prior to trial, Littlejohn requested a copy of his discovery material from attorney Thompson. Thompson failed to provide Littlejohn with the requested material prior to Littlejohn proceeding, *pro se*, to trial. Counsel was ineffective in failing to provide the requested discovery material prior to trial.

Rule 1.16(d) of the South Carolina Rules of Professional Conduct provides, "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which client is entitled and refunding any

advance payment of fee or expense that has not been earned or incurred." Upon being relieved, counsel had an ethical duty to surrender to Littlejohn the discovery material counsel received from the State. Littlejohn was entitled to the discovery material. As a *pro se* litigant, in order to challenge the State's case against him, it was critical that Littlejohn know the evidence the State planned to use against him. Importantly, Littlejohn, on at least two occasions, asked counsel to provide the discovery and counsel refused. Counsel was ineffective in refusing to provide the discovery material to Littlejohn prior to trail.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686, 104 S.Ct. 2052).

Counsel's refusal to provide Littlejohn, as a *pro se* litigant, with requested discovery material, resulting in Littlejohn proceeding to trial without the benefit of the discovery material, undermines the proper functioning of the adversarial process such that the resulting trial cannot be relied on as having produced a just result. Counsel was deficient for refusing to provide the requested material prior to trial. While counsel was relieved, he had a duty to provide the requested material. The error was further complicated when, after being relieved, counsel was appointed as stand by counsel. At this point in time relieved but stand by counsel knew that Littlejohn had been unable to hire an attorney and was proceeding to jury trial *pro se*. The record reflects that Littlejohn and stand by counsel had at least one discussion during the course

of the trial. (App. p. 28, lines 16-19). Although counsel was relieved and acting as stand by counsel, he had a continued duty to provide the requested discovery material to Littlejohn.

In the order of dismissal the PCR judge wrote, "This Court finds that even if relieved counsel was deficient for failing to turn over a copy of his file to the Applicant prior to trial, the Applicant has failed to provide any evidence that the outcome of his trial would have been different if the Applicant had access to counsel's file prior to trial." (App. p. 348). First, the particular and unusual facts of this case warrant presumed prejudice where counsel's actions resulted in a *pro se* litigant proceeding to trial without discovery.

In Lorenzen v. State, 376 S.C. 521, 529-530, 657 S.E.2d 771, 776 (2008) the South Carolina Supreme Court, citing United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), wrote:

> In 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, 80 L.Ed.2d 657. 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).

While counsel was made available and Littlejohn elected to proceed *pro se*, the likelihood that any lawyer could have provided effective assistance of counsel without the benefit of the

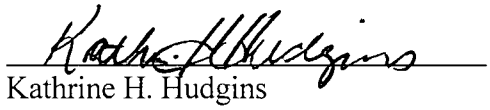
discovery material, as Littlejohn was forced to do, is so small that a presumption of prejudice is appropriate.

Second, Littlejohn demonstrated prejudice by counsel's failure to provide the requested discovery material. PCR counsel specifically argued that information contained in the fire department incident report, included in the discovery material provided to Littlejohn by counsel after trial, could have been used to impeach the credibility of the State's witness in regard to the extent of the damage caused by the fire. (App. p. 305, lines 13-21). Counsel was deficient in refusing to provide the requested discovery material prior to trial. Littlejohn was prejudiced by counsel's deficient performance.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of April, 2013.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and also served upon, Mr. Jimmy Littlejohn # 220769 Lieber Correctional Institution PO Box 205 Ridgeville, SC 29472 this 25th day of April, 2013.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day of April, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.