

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOSUE FIGUEROA,	:	CIVIL ACTION
Petitioner,	:	NO. 01-4405
	:	
vs.	:	
	:	
DONALD VAUGHN, ET AL.	:	
Respondents.	:	

MEMORANDUM AND ORDER

Josue Figueroa (“Petitioner” or “Figueroa”), a state prisoner, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Presently before this Court is Petitioner’s counseled Amended Petition (Doc. 28) and Respondents’ Answer to the Amended Petition (Doc. 30). Petitioner seeks to have his direct appeal reinstated. For the reasons stated below, this Court will grant Petitioner’s habeas corpus petition and reinstate his direct appeal nunc pro tunc in state court.

BACKGROUND

On January 25, 1993, Petitioner was sentenced to an aggregate sentence of 12 ½ to 25 years for rape, involuntary deviate sexual intercourse, indecent assault and corrupting the morals of a minor.¹ On March 25, 1993, the **Pennsylvania Superior Court** granted Petitioner’s motion for appointment of appellate counsel. Eugene R. Mayberry (“Mayberry” or “appellate counsel”) was

¹ For a full exposition of the factual and procedural background refer to the state courts’ various published opinions. See Commonwealth v. Figueroa, No. 1527/1987 (Pa. Commonw. Ct 1993); Commonwealth v. Figueroa, No. 00418 (Pa. Super. Ct. 1993); see also Commonwealth v. Figueroa, No. 2518 (PCRA 1999).

appointed to represent Petitioner on direct appeal. Mayberry contacted Petitioner by telephone on April 19, 1993. Petitioner, at that time, indicated that he had nearly completed his appellate brief. Mayberry suggested, due to time constraints, that Petitioner complete the brief and send a copy to him. Petitioner and Mayberry agreed that the Petitioner's brief would be submitted and that Mayberry would argue the merits before the court. On May 10, 1993, petitioner filed his brief in support of his appeal to the Superior Court. On August 18, 1993, without a hearing, the Superior Court issued an opinion affirming the judgment of sentence and denying Petitioner's appeal.

On January 5, 1996, Petitioner filed a pro se petition for collateral relief pursuant to the Post Conviction Relief Act ("PCRA"), 42 PA. CONS. STAT. ANN. § 9541 *et seq.* In that petition, Petitioner claimed that trial counsel was ineffective for various reasons. Regarding appellate counsel, Petitioner specifically claimed, "Attorney Mayberry...refused to enter his appearance on behalf of petitioner at the Superior Court level, and substantially prejudiced the petitioner when the *direct appeal was decided without counsel representation as indicated by the Sixth and Fourteenth Amendment[s]...*" (emphasis added). **PCRA Pet. p. 15, dated December 29, 1995.** On April 8, 1996, counsel filed amendments to the pro se petition indicating other grounds for relief.

On September 12, 1997, after a hearing, the PCRA court found that trial counsel was not ineffective and other claims were not cognizable as previously litigated. The PCRA maintained that the agreement between Petitioner and Mayberry was satisfactory, and thus, appellate counsel was not ineffective. Petitioner appealed the decision. The appellate court affirmed the PCRA's determination.

On August 29, 2001, Petitioner filed a pro se petition for habeas corpus; the case was

referred to Magistrate Judge Thomas Rueter for a report and recommendation. On March 12, 2002, the report and recommendation was entered. Subsequently, in the interest of justice, this Court allowed counsel to file an Amended Petition. Habeas counsel has properly characterized the claim as one for constructive denial of counsel. The petition having been amended, the Court will not adopt the Report and Recommendation of the magistrate judge.

STANDARD OF REVIEW

This petition is governed by the revision to the federal habeas statute enacted in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (1996) effective April 24, 1996 (“AEDPA”). AEDPA provides that:

When a federal court reviews a state court’s ruling on federal law, or its application of federal law to a particular set of facts, the state court’s decision must stand unless it is contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. §2254(d)(1).

Federal habeas relief is also available if the state court’s decision was based on an “unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.” 28 U.S.C. § 2254(d)(2). A state court decision is contrary to clearly established federal law “if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases,” or if it confronts a set of facts that are materially indistinguishable from a decision of this court and nevertheless arrives at a result different from our precedent.” Williams v. Taylor, 529 U.S. 362, 405-06 (2000)(quoted in Lam v. Kelchner, 304 F.3d 256, 263 (3d Cir. 2002)). Under the “unreasonable application” clause, habeas relief should be granted “when the state court correctly identifies the governing legal rule but applies it unreasonably to

the facts of a particular case.” Id. Furthermore, with respect to this clause, habeas relief will only be warranted if the “state court’s application of clearly established federal law was objectively unreasonable,” not merely “incorrect.” Id.

Section 2254(d)(1) applies to claims that were adjudicated on the merits in state court. If a claim was not adjudicated on the merits in state court proceedings then the restrictive standard of review in section 2254(d) does not apply and the claim should be reviewed de novo. See Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001). This court will review this matter de novo because the state court failed to accurately construe Petitioner’s claim against appellate counsel. The state court never cited or described the relevant federal precedent, and thus, never reached the merits of Petitioner’s Sixth Amendment claim. See Appel, 250 F.3d at 211.

DISCUSSION

The issue is whether Petitioner’s right to counsel on direct appeal was violated when Petitioner and appellate counsel agreed that Petitioner would submit his uncounseled pro se brief to the Pennsylvania Superior Court and counsel never appeared before the court on Petitioner’s behalf. On collateral review, the state court did not properly construe Petitioner’s claims against appellate counsel. The **PCRA court** considered the claim as one for ineffective assistance of counsel when it should have considered it as constructive denial of counsel. The two claims, however, are different and invoke a different analytical framework. The claim for ineffective assistance of counsel must be evaluated under the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). The constructive denial of counsel must be evaluated under the standards set forth in United States v. Cronin, 466 U.S. 648 (1984). This Court will turn to

the merits of the amended petition and limit its analysis to Petitioner's constructive denial of counsel claim.

A. Right to Counsel on Direct Appeal

Petitioner claims that his federal constitutional right to the assistance of counsel on direct appeal from the judgment of sentence in state court was abridged. Petitioner further claims that the failure of the court appointed counsel to enter his appearance, to seek an extension of time to file a brief, and to evaluate his case for merits review resulted in Petitioner conducting his appeal pro se. **Am. Pet.**, ¶¶ 1, 11. Respondent argues that state courts may recognize a petitioner's right to self-representation on direct appeal. Respondent further argues that Petitioner voluntarily and intelligently elected to submit his pro se brief and the Pennsylvania courts recognized his right to do so. **Resp't Answer**, ¶ 2.

The Sixth Amendment provides criminal defendants with the right to assistance of counsel, which attaches from arraignment through the first direct appeal. See Michigan v. Harvey, 494 U.S. 344 (1990). The Supreme Court, in countless cases, has articulated this constitutional guarantee. For example, in Douglas v. California, the Supreme Court recognized that the Fourteenth Amendment guarantees a criminal appellant the right to counsel on a first appeal as of right. 372 U.S. 353 (1963). In Anders v. California, the Court further held that a criminal appellant may not be denied representation on appeal based on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal. 386 U.S. 738 (1967) In Penson v. Ohio the Supreme Court explicitly stated, "the need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to the appellate stage. Both

stages of prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over.” 488 U.S. 75, 85 (1988). Douglas, Anders, Penson, collectively, reinforce the fundamental right that a criminal defendant has to representation by counsel from trial to the appellate level. As stated in Gideon v. Wainwright, “lawyers in criminal courts are necessities, not luxuries.” Gideon, 372 U.S. 335, 344 (1963).

The Supreme Court has held that the actual or constructive denial of the assistance of counsel is legally presumed to result in prejudice. See Penson, 488 U.S. 75 (1988); see also Strickland, 466 U.S. at 692. In order to obtain relief under Cronic, the Petitioner must demonstrate that he was denied counsel such that there was no meaningful adversarial testing. The Supreme Court noted that, “[i]n some cases, the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided.” 466 U.S. at 654 n.11. The Court further stated, “to hold otherwise could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution’s requirement that an accused be given assistance of counsel. Id. at 654.

The Third Circuit has also opined on constructive denial of counsel in violation of the Sixth Amendment. The most instructive case is Appel v. Horn, 250 F.3d 203 (3d Cir. 2001). In that case, counsel failed to represent the defendant at a competency hearing when defendant insisted upon self-representation. Prior to the competency hearing, the attorneys were appointed as counsel and were not yet relieved of their obligations leading up to the trial court’s competency hearing. The attorneys, however, did not conduct a background investigation, speak to relatives and friends, or obtain any health or employment records. Id. at 215. The Third Circuit

affirmed the district court's finding that Appel's counsel should have investigated, advocated, or otherwise acted to ensure that there was meaningful adversarial testing as required by Cronic. Id. at 217.

Courts have found a Cronic violation in various contexts. Courts have found a violation when counsel offered no assistance to defendant at plea proceedings, see Childress v. Johnson, 103 F.3d 1221, 1231 (5th Cir. 1997); acted as a mere spectator at defendant's sentencing, see Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992)(quoting Appel, 250 F.3d at 212). Defendants are constructively denied counsel when counsel sleeps through testimony of key witnesses. See Tippins v. Walker, 77 F.3d 682, 686 (2d Cir. 1996). Cronic also applies when counsel fails to play a role necessary to ensure that the proceedings are fair because the Sixth Amendment guarantees more than just a warm body to stand next to the accused during critical stages of the proceedings. Patrasso v. Nelson, 121 F.3d 297, 304 (7th Cir. 1997). Further, at the appellate level, defendant is constructively denied counsel when appellate counsel does nothing on his behalf. See Blankenship v. Johnson, 118 F.3d 312 (5th Cir. 1997)(quoting Appel v. Horn, No. 97-2809, 1997 WL 323805 (E.D. Pa. May 21, 1999)).²

In the present case, Petitioner sought appointment of counsel for his direct appeal in state court; subsequently, Mayberry was appointed as counsel. As appellate counsel, Mayberry was

² Pennsylvania courts have also found instances of denial of counsel when counsel neglected to file or amend a petitioner's brief. See Commonwealth v. Hampton, 718 A.2d 1250 (Pa. Super. Ct. 1998)(stating that a post-conviction petition is effectively uncounselled under a variety of circumstances whenever omissions of record demonstrate that counsel's inaction deprived the petitioner the opportunity of legally trained counsel to advance his position in acceptable legal terms)(quoting Commonwealth v. Sangricco, 490 Pa. 126 (1980)).

responsible for advocating on behalf of petitioner. That advocacy, included, but was not limited to, writing and submitting the appellate brief for judicial consideration and making any oral argument required. Appellate counsel's role as an advocate requires that he support his client's appeal to the best of his ability. Anders, 386 U.S. at 744; see also Evitts v. Lucey 469 U.S. 387, 394 (1985) ("attorney must be able to assist in preparing and submitting a brief to the appellate court" and "must play the role of an active advocate"). Counsel is able to **render** legal analysis that a pro se petitioner is not likely able. Counsel is responsible for framing the appellate issues in a meaningful and legally adept manner. Here, instead, appellate counsel relied upon and accepted the legal work of the Petitioner. Counsel claims to have reviewed the work and **provided a copy of a case that Petitioner requested. Reviewing the petitioner's pro se brief and providing** a single case does not constitute assistance of counsel.

The instant action warrants a finding that a Sixth Amendment violation occurred. Petitioner did not receive meaningful representation or meaningful adversarial testing of his case – at a critical stage Petitioner was left with no option but to navigate the appellate process without counsel. The adversarial system grinds to a halt when attorneys abdicate basic responsibilities of legal representation. **As the Supreme Court stated in Powell v. Alabama:**

[T]he right to be heard would be, in many case, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law....he requires the guiding hand of counsel at every step in the proceedings against him...If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense. 287 U.S. 45, 68-69 (1932).

This Court, adhering to Cronic, finds that mere formal appointment of appellate counsel, in this case, does not fulfill the constitutional guarantee of the Sixth Amendment. The adversarial process protected by the Sixth Amendment requires that the accused have “counsel acting in the role of an advocate.” Cronic, 466 U.S. at 656. Further, if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. Id. at 657. Here, counsel failed to act as an advocate — there was no meaningful adversarial challenge. Accordingly, this Court grants Petitioner’s writ of habeas corpus based on constructive denial of counsel.

B. The Agreement Between Petitioner and Counsel

Petitioner and Mayberry agreed that Petitioner’s pro se brief would be submitted to the court and Mayberry would argue the case before the court. The state court made the factual determination that the arrangement between Petitioner and Mayberry was satisfactory to both parties and thus, Petitioner did not have a claim for ineffective assistance of counsel. Respondent argues that Petitioner voluntarily and intelligently chose to proceed with his pro se brief. See Respt. Answer, ¶ 2. Respondent suggests that there was an implicit waiver of counsel when Petitioner decided to file his own brief. Petitioner counters that there cannot be a proper waiver of the right to counsel at the appellate level unless there is an on the record determination that the waiver is knowingly, intelligently, and voluntarily given. **Am. Pet., ¶ 13.**

The state court has placed significant emphasis on the agreement between Petitioner and appellate counsel. The state bears the burden of demonstrating that waiver of right to counsel was intentional. See Brewer v. Williams, 430 U.S. 387, 404 (1977). Further, waiver is not effective

unless a judge conducts colloquy to ensure that defendant's action is voluntary, knowing, and intelligent. See Faretta v. California, 422 U.S. 806 (1975). AEDPA, however, obligates this court to presume that a factual determination made by the state court is correct unless the petitioner can rebut that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Based on the PCRA testimony and the state court record, there is clear and convincing evidence that Petitioner sought counsel at every stage of his criminal prosecution and specifically sought appointment of counsel for his appeal.

Here, this case is not about the waiver of counsel; and for respondent to rely on that standard is erroneous. Petitioner, clearly, requested counsel. At the PCRA hearing held on September 12, 1997, Mayberry testified about the arrangements that were made for appeal. Via telephone and letter correspondence, Mayberry indicated that he would not enter his appearance on Petitioner's behalf. Specifically, "I said that I was not going to enter my appearance. He had told me he had been working on the brief and had it almost done - far along on having it done. I had very little concept of where the case was at the point....I suggested to him he either file a motion with the Court requesting a briefing – an extension on the briefing schedule. Or, if he concluded with the brief, that I would argue the brief orally when it came up for oral argument." See PCRA Test., pp. 90-95. Mayberry further indicated that Petitioner was satisfied with the arrangement and he mailed Petitioner a court case upon his request. Id. This was the extent of appellate counsel's representation. Appellate counsel did not write, amend, or submit a counseled brief to the Court. He did not argue the merits of the case since the court decided the appeal on the papers. Nor did appellate counsel seek an extension of time. Instead, appellate counsel, essentially, passed the buck to the Petitioner - instructing Petitioner to file a motion for extension.

At no point, on the record, did Petitioner indicate that he wanted to proceed pro se.

No matter how well-acquainted a defendant may be with the legal system, his or her legal knowledge should not be substituted for the professional legal acumen of an attorney. An informal agreement between counsel and client does not **obscure** the duties of counsel. In this case, there has been no showing that Petitioner was apprised of his fundamental right to counsel, the inherent difference in submitting his pro se versus a counseled brief, or the consequences of the agreement and the risk in pursuing such a course of action. As such, a mere agreement, without an on the record colloquy, cannot function to abridge Petitioner's right to counsel on direct appeal.

This court will not accept the state court's factual determination that the agreement between Petitioner and appellate counsel was satisfactory.

CONCLUSION

Petitioner's right to counsel on direct appeal was constructively denied. As a result of this constitutional violation, Petitioner's direct appeal must be reinstated within 90 days of the date of this Order. Figueroa's petition for habeas corpus is, therefore, granted.

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Petitioner,	:	NO. 01-4405
	:	
vs.	:	
	:	
DONALD VAUGHN, ET AL.	:	
Respondents.	:	

ORDER

AND NOW, this _____ day of September, 2005, upon consideration of Petitioner's Amendment to Petition for Writ of Habeas Corpus (Doc. 28) and Respondents' Answer thereto (Doc. 30), **IT IS HEREBY ORDERED AND DECREED** that Petitioner's Writ of Habeas Corpus under 28 U.S.C. § 2254 is **GRANTED**.

IT IS FURTHER ORDERED that the Commonwealth of Pennsylvania shall reinstate Petitioner's direct appeal nunc pro tunc within ninety (90) days of the date of this Order.

BY THE COURT:

Hon. Petrese B. Tucker, U.S.D.J.