

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

WILLIAM STOVALL,	:	
Petitioner	:	CIVIL ACTION
	:	
v.	:	NO. 03-5879
	:	
WARDEN, NEW JERSEY STATE	:	
PRISON, et al	:	
Respondents	:	

Diamond, J.

April 19, 2005

MEMORANDUM

William Stovall petitions for a writ of habeas corpus, seeking relief from his state court convictions. 28 U.S.C. § 2254. The Magistrate Judge has recommended that I deny the petition. Stovall objects, arguing that his Sixth Amendment rights were violated when he represented himself at trial, and that his appellate counsel was ineffective for failing to seek *allocatur* in the Pennsylvania Supreme Court. The Commonwealth concedes the ineffectiveness claim, which I grant.

FACTUAL AND PROCEDURAL HISTORY

In February 1984, Petitioner was an inmate at the Pennsylvania State Correctional Institution at Graterford. On February 2, 1984, while being transported to the Montgomery County Courthouse, Stovall pointed what appeared to be a small handgun at the officers in the van, and threatened them. (Habeas Corpus Exhibits, Exhibit B). After handcuffing the officers, he stole a hat, coat, and gun, and drove off in the van. Stovall was arrested in Philadelphia on

February 27, 1984, and charged with escape, weapons/implements for escape, kidnapping, possession of an instrument of a crime, robbery, theft of movable property, and unauthorized use of a motor vehicle. (Habeas Corpus Exhibits, Exhibit C at 3); 18 Pa. C.S. §§ 5121(a); 5122(a)(2); 2901(a)(1-4); 907(a); 3701(a)(1)(ii); 3928(a); 3921(a).

Petitioner was tried before a jury in the Montgomery County Common Pleas Court. Stovall represented himself, with an Assistant Public Defender serving as standby counsel. On November 14, 1984, Petitioner was convicted of robbery, kidnapping, theft, and unauthorized use of a motor vehicle. The trial court sentenced him to 15 to 34 years incarceration, to be served consecutively to his outstanding sentences.

A second lawyer represented Stovall at post-verdict motions and on direct appeal. The Pennsylvania Superior Court affirmed the judgment of sentence. Commonwealth v. Stovall, 512 A.2d 1292 (Pa. Super. 1986). No petition for allowance of appeal was filed.

On January 9, 1997, Petitioner, represented by a third lawyer, sought relief under Pennsylvania's Post Conviction Relief Act. 42 Pa. C.S. §§ 9451-9551. The Montgomery Common Pleas Court denied the petition on October 19, 2001; the Pennsylvania Superior Court affirmed. Commonwealth v. Stovall, No. 3030 EDA 2001 (2002). A petition for allowance of appeal to the Pennsylvania Supreme Court was dismissed as untimely. Commonwealth v. Stovall, No. 205 MM 2002 (Nov. 27, 2002).

For reasons unrelated to the instant petition, Stovall "is currently incarcerated at New Jersey State Prison." Stovall v. Warden, et al, Civ. Action No. 03-372 (D. N.J. 2003); (Commonwealth's Answer to Petition for Writ of Habeas Corpus at 1). On January 28, 2003, Stovall filed the instant habeas petition in the District of New Jersey, which transferred the

matter to this Court on October 23, 2003. Stovall contended that his conviction and sentence were obtained in violation of: 1) his Sixth Amendment rights to counsel and constitutionally effective assistance of counsel; and 2) his Fifth and Fourteenth Amendment rights to a fair, neutral, and impartial judge. (Petition for Writ of Habeas Corpus ¶ 12).

The matter was referred to a Magistrate Judge, who determined that: this Court had jurisdiction to hear the matter; Petitioner had exhausted his state court remedies; Petitioner knowingly, voluntarily, and intelligently waived his right to counsel; no conflict of interest arose between Petitioner and his counsel; and there is no evidence that the judge was unfair or partial. Accordingly, the Magistrate recommended that I dismiss the petition in its entirety.

Petitioner objects to the Magistrate's decision on two grounds: 1) she erroneously concluded that Stovall's representation of himself comported with the Sixth Amendment right to counsel; and 2) she failed to address the claim that Stovall's second lawyer was ineffective for failing to seek *allocatur*. The Commonwealth concedes that Stovall is entitled to relief on the ineffectiveness claim. (Respondent's Letter to Court, 04/04/05).

STANDARD OF REVIEW

The extent of District Court review of a Magistrate Judge's Report is committed to the Court's discretion. See Jozefick v. Shalala, 854 F. Supp. 342, 347 (M.D. Pa. 1994); see also Thomas v. Arn, 474 U.S. 140, 154 (1985); Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984); Heiser v. Ryan, 813 F. Supp. 388, 391 (W.D. Pa. 1993), aff'd, 15 F.3d 299 (3d Cir. 1994). The District Court must review *de novo* those portions of the Report to which objection is made. 28 U.S.C. § 636 (b)(1)(c) (2004); see generally Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984). The Court may "accept, reject or modify, in whole or in part, the magistrate's findings or recommendations."

Brophy v. Halter, 153 F. Supp. 2d 667, 669 (E.D. Pa. 2001).

DISCUSSION

I. Petitioner's Waiver of his Right to Counsel

On July 23, 1984, the Assistant Public Defender, in a motion also signed by Petitioner, sought trial postponement "to enable counsel to interview witnesses and prepare defenses." (Commonwealth's Answer to Petitioner's Objections, Exhibit A). Stovall claims that his counsel told him that the waiver would postpone the trial by 60 days. After 60 days had passed, Petitioner asked his family to tell counsel to file a motion to dismiss pursuant to Pa. R. Crim. P. 1100 for lack of a speedy trial. Stovall then filed a *pro se* motion to dismiss. Stovall has alleged that on the first day of trial, November 13, 1984, he learned that the waiver form he signed extended the speedy trial period for 120 days, rather than 60 days. Petitioner nonetheless asked the trial judge dismiss pursuant to Rule 1100. The trial judge denied Petitioner's motion. (N.T. 11/13/84 at 3-8).

On November 14, 1984, Stovall asked the court to replace the Assistant Public Defender with a new lawyer. Stovall argued that his disagreement with counsel as to whether they had sought a 60 or 120 day extension amounted to a "conflict of interest." Stovall protested his lawyer's "ineffectiveness of protecting [Stovall's] constitutional rights [under] the Sixth Amendment of the United States and Pennsylvania Constitutions, the right of a speedy trial." (N.T. 11/14/84 at 3-4). Petitioner asked the court to appoint counsel unconnected with the Public Defender's Office. (N.T. 11/14/84 at 3-4). When the trial judge refused, Stovall stated that he "would like to go *pro se* on this trial." (N.T. 11/14/84 at 6). The trial judge conducted a lengthy colloquy, describing the charges Stovall was facing, and highlighting the potential difficulties he

would face representing himself. (N.T. 11/14/84 at 5-22). Petitioner confirmed his decision to proceed *pro se*, and signed a waiver of counsel form. (N.T. 11/14/84 at 22).

Petitioner now claims that the trial judge forced him (in violation of the Sixth Amendment) to choose between "incompetent/conflicted" counsel and proceeding *pro se*. (Petitioner's Response to Commonwealth Answer to Objections at 4). Stovall further claims that the waiver of his right to counsel was not made knowingly, intelligently, and voluntarily because the trial judge failed to inform Petitioner of limitations on: (1) access to law books; (2) the right to call defense witnesses; and (3) his right to walk around the courtroom without handcuffs, leg-irons, and other restraints.

The Third Circuit has held that when a defendant seeks new counsel on the eve of trial, or seeks to represent himself, the Sixth Amendment requires the state trial court to conduct two lines of inquiry:

- (1) "the court must decide if the reasons for the defendant's request for substitute counsel constitute good cause and are thus sufficiently substantial to justify a continuance of the trial in order to allow new counsel to be obtained;" and
- (2) if the defendant decides to proceed *pro se*, the court "then has the responsibility of ensuring that any decision by the defendant to represent himself is intelligently and competently made."

McMahon v. Fulcomer, 821 F.2d 934, 942 (3d Cir. 1987) (citing United States v. Welty, 674 F.2d 185 (3d Cir. 1982)); see also Henderson v. Frank, 155 F.3d 159 (3d Cir. 1998) (the same two part inquiry is required in prosecutions brought in federal court, and in state court prosecutions later reviewed in federal court pursuant to § 2254).

The trial court met these requirements. Stovall told the trial court that his counsel misled him as to the length of his speedy trial waiver. (N.T. 11/14/84 at 3-4). Having ruled that

Petitioner's waiver was knowing, intelligent, and voluntary, the trial judge did not accept Stovall's allegation. (N.T. 11/14/84 at 4). Rather, the trial judge found that any difficulty between Petitioner and his counsel was created by Petitioner's "personal and subjective assertions." (N.T. 11/14/84 at 4). Finally, the trial judge noted that Stovall's eleventh hour continuance request was of a piece with the many motions he had filed, and was intended primarily to delay trial. (N.T. 11/14/84 at 4).

The trial court's actions were certainly reasonable. Petitioner and his counsel signed a *preprinted* form specifying a 120 day (not a 60 day) extension. Pennsylvania courts have repeatedly held that such a document, signed by a defendant and his attorney, is sufficient to demonstrate that the defendant was adequately informed of the document's contents.

Commonwealth v. Myrick, 468 Pa. 155, 161, 360 A.2d 598, 601 (1976); Commonwealth v. Wilson, 294 Pa. Super. 101, 104, 439 A.2d 770 (1982).

Moreover, at post-verdict motions, the trial court held an evidentiary hearing on Stovall's Rule 1100 claim. The Assistant Public Defender (who by then was no longer representing Stovall), testified that he needed the 120 day continuance to prepare for trial, and perhaps work out "a favorable plea bargain" on Stovall's behalf. (N.T. 5/1/85 at 6). He also testified that extending Stovall's Montgomery County trial by 120 days would make it more likely that Stovall's Philadelphia trial on related charges would begin first. Counsel hoped that this would create a basis for arguing that double jeopardy protections barred trial from proceeding in Montgomery County. (N.T. 5/1/85 at 6-7).

The Assistant Public Defender also testified that if Stovall had wanted only a 60 day extension, counsel -- in accordance with his usual practice -- would have hand written this

change on the preprinted continuance form. (N.T. 5/1/85 at 8).

Significantly, the Assistant Public Defender suggested that Stovall sought to replace him because he refused to state falsely that Stovall had agreed to only a 60 day continuance:

Mr. Stovall asked me to testify to something that was untrue, and I declined to do that for him.

(N.T. 5/1/85 at 18-19).

Stovall testified at the hearing that he agreed only to a 60 day continuance, and that he simply did not read that portion of the form stating that the continuance was 120 days. (N.T. 5/1/85 at 26).

The trial court did not credit Stovall's testimony, and found that Petitioner knowingly, voluntarily, and intelligently sought the 120 day extension. The trial court further found that Stovall's speedy trial protestations were, in fact, disingenuous:

The issue of only a sixty day continuance was an after-thought conjured up by the Defendant to avoid standing trial . . .

(Salus Opinion, Exhibit C at 6).

The state courts' findings are binding here. 28 U.S.C. § 2254(e)(1) (state court's factual determinations "shall be presumed to be correct."); Lambert v. Blackwell, 387 F.3d 210, 235 (3d Cir. 2004) (habeas relief may be granted only if a state court's decision is based on a factual determination that is "unreasonable in light of the evidence presented in the state court proceeding"); Miller-El v. Cockrell, 537 U.S. 322, 340, 154 L. Ed. 2d 931, 123 S. Ct. 1029 (2003) ("a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding."). Accordingly, I am bound to conclude

that Stovall invented a “conflict” with his lawyer as a pretext for continuing trial. In these circumstances, the trial court’s ruling that Stovall had not presented a reason “sufficiently substantial to justify a continuance of the trial” was certainly proper. McMahon v. Fulcomer, 821 F.2d at 942; see Word v. Carroll, 2004 U.S. Dist. LEXIS 17482, *27 (D. Del. Aug. 31, 2004).

The trial court also properly conducted McMahon’s second line of inquiry. Following Petitioner’s request to proceed *pro se*, the trial judge conducted a detailed colloquy, including descriptions of the pending charges and their maximum sentences. See Pa. R. Crim. P. 121 (2004). The trial judge fully explained the benefits of having experienced counsel, and the difficulties Stovall might face representing himself. The court detailed other factors Stovall should consider in deciding whether or not to represent himself: counsel’s ability to conduct direct and cross-examinations; counsel’s understanding of the rules of evidence; the possibility that Petitioner’s lack of training might result in waiver of important rights and defenses; and the possibility that Petitioner’s legal errors might harm him. (N.T. 11/14/84 at 5-21). Stovall stated that he understood each of these factors, and that he was freely waiving his right to counsel “without coercion (sic).” (N.T. 11/14/84 at 13). Significantly, throughout the colloquy, Stovall actively discussed with the court his rights and obligations as they were explained to him. (N.T. 11/14/84 at 12, 16).

The Third Circuit has stated that although "there is no talismanic formula for the court's inquiry," a defendant's waiver of counsel "must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all

other facts essential to a broad understanding of the whole matter." Peppers, 302 F.3d at 135 (quoting Welty, 674 F.2d at 188; Von Moltke v. Gillies, 332 U.S. 708, 724, 92 L. Ed. 309, 68 S. Ct. 316 (1948) (plurality opinion)); United States v. Thomas, 357 F.3d 357, 364 (3d Cir. 2004) (the Peppers' examples have been "interpreted as listing illustrative examples of factors that courts might discuss, not a mandatory checklist of required topics"); Government of Virgin Islands v. James, 934 F.2d 468, 473 (3d Cir. 1991) (no "rote dialogue" required, in the absence of which, a defendant's waiver of counsel would be *per se* invalid).

The proper measurement of the "effectiveness of a defendant's waiver of counsel is whether the . . . judge has made 'a searching inquiry sufficient to satisfy him that the defendant's waiver was understanding and voluntary.'" Id. at 473-474 (quoting Welty, 674 F.2d at 189). Whether a waiver is voluntary, knowing, and intelligent "depends in each case 'upon the particular facts and circumstances surrounding the case.'" Piankhy v. Cuyler, 703 F.2d 728, 730 (3d Cir. 1983) (quoting Edwards v. Arizona, 451 U.S. 477, 482, 68 L. Ed. 378, 101 S. Ct. 1880 (1981)).

Here, it is apparent that the trial judge conducted an adequate colloquy: Petitioner was aware of the nature of the charges and their range of punishments, as well as possible defenses and the facts essential to understanding his waiver of counsel. The law requires nothing more. See Peppers, 302 F.3d at 135; Thomas, 357 F.3d at 364; James, 934 F.2d at 473.

Finally, I reject Stovall's contention that his waiver of counsel was involuntary because the trial judge forced him to choose between "incompetent/conflicted" counsel and proceeding *pro se*. (Petitioner's Response to Commonwealth Answer to Objections at 4). "[A]ccompanying a self-representation request by expressions of feeling 'forced' to proceed uncounseled does not

render the request equivocal.” Pitts v. Redman, 776 F. Supp. 907, 915 (D. Del. 1991), aff’d 970 F.2d 899 (3d Cir. 1992), cert. denied, 506 U.S. 1003, 121 L. Ed. 2d 545, 113 S. Ct. 611 (1992) (citing United States v. Robinson, 913 F.2d 712, 714 (9th Cir. 1990), cert. denied, 111 S. Ct. 1006 (1991)). Nor is the voluntariness of a defendant's decision to proceed *pro se* weakened “because self-representation may be second choice to new counsel.” Pitts, 776 F. Supp. at 915 (citing Adams v. Carroll, 875 F.2d 1441, 1445 (9th Cir, 1989) (citation omitted)).

In sum, the trial judge’s second line of inquiry plainly comported with McMahon. In these circumstances, I agree with the Magistrate that Stovall’s waiver of his Sixth Amendment right to counsel was knowing, voluntary, and intelligent.

II. Ineffective Assistance of Counsel for Failure to File a Timely Petition for Allowance of Appeal

Stovall contends that his second lawyer was ineffective under the Sixth and Fourteenth Amendments for failing to file a petition for allowance of appeal in the Pennsylvania Supreme Court. The Commonwealth concedes this claim. The record confirms that after the Superior

Court denied Stovall's direct appeal in 1986, counsel apparently did not accede to Stovall's request that he seek *allocatur*. Accordingly, Petitioner must be given the opportunity to seek *allocatur nunc pro tunc*. See e.g., Nembhard v. United States, 56 Fed. Appx. 73, 74 (3d Cir. 2002) (unpublished opinion); McIntyre v. Klem, 347 F. Supp. 2d 206, 215 (E.D. Pa. 2004).

An appropriate Order follows.

By The Court

Paul S. Diamond, J.

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

WILLIAM STOVALL,	:	
Petitioner	:	CIVIL ACTION
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v.	:	NO. 03-5879
	:	
WARDEN, NEW JERSEY STATE	:	
PRISON, et al	:	
Respondents	:	

Order

AND NOW, this 19th day of April, 2005, upon consideration of the petition for writ of habeas corpus, Respondent's answer, the Magistrate Judge's Report and Recommendation, and Petitioner's Objections to the Report and Recommendation and the related responses, it is

ORDERED and DECREED that:

- (1) the petition is GRANTED as to Petitioner's claim of ineffective assistance of counsel for failure to seek *allocatur* in the Pennsylvania Supreme Court; and
- (2) the petition is DENIED as to all other claims.

Petitioner shall tender for filing a petition for allowance of appeal to the Pennsylvania Supreme Court on or before June 3, 2005. If Petitioner so tenders the petition, the writ shall issue unless the Pennsylvania courts permit Petitioner to file the petition *nunc pro tunc* in accordance with this Order on or before October 4, 2005.

Any granting of habeas relief pursuant to this Order shall not affect Petitioner's incarceration as to any unrelated convictions.

The Clerk of Court shall close this matter for statistical purposes.

BY THE COURT:

Paul S. Diamond, J.