EFiled: Mar 02 2018 11:33PM EST
Filing ID 61754074
Case Number 16,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EVERETT URQUHART,	:	
	:	
Defendant Below,	:	
Appellant.	:	No. 16, 2018
v.	:	
	:	
	:	ON APPEAL FROM
	:	THE SUPERIOR COURT OF THE
	:	STATE OF DELAWARE
STATE OF DELAWARE	:	I.D. NO. 1407012946
	:	
Plaintiff Below,	:	
Appellee.	:	

APPELLANT'S OPENING BRIEF

FILING ID 61754074

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Dated: March 2, 2018

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NATURE OF PROCEEDINGS

On July 18, 2014, Everett Urquhart was arrested in connection with a robbery that had occurred three days prior in the city of Wilmington. (A1). Mr. Urquhart was indicted on the following charges:

I. Robbery First Degree;

II. Possession of a Firearm During Commission of a Felony ("PFDCF");

III. Wearing a Disguise During the Commission of a Felony;

IV. Reckless Endangering First Degree; and

V. Possession of a Firearm By a Person Prohibited ("PFBPP").

(A10–12).

Raymond Armstrong, Esquire of the Office of the Public Defender ("Trial Counsel") was appointed to represent Mr. Urquhart. (A1). Trial began on February 3, 2015 and lasted three days. (A3). The jury returned a verdict on all five counts of the indictment. (A3).

On May 29, 2015, Mr. Urquhart was sentenced to 43 years at Level V incarceration, suspended after 15 years, followed by decreasing levels of community supervision. (A13–16). He filed a timely Notice of Appeal on June 8, 2015. (A3). The Delaware Supreme Court affirmed his conviction on February 26, 2016. (A5, A17–25).

Mr. Urquhart filed a timely *pro se* Motion for Postconviction Relief on April 25, 2016. (A5, A26–29). He filed a Supplemental Motion for Postconviction Relief and a Motion for Appointment of Counsel on June 20, 2016. (A30–42). The undersigned counsel were appointed and given leave to amend. (A7). Mr. Urquhart's Amended Motion for Postconviction Relief was filed on July 10, 2017. (A48–79). Trial Counsel filed an affidavit in response and the State filed an Answer. (A80–83, A84–96).

On December 7, 2017, the Honorable John A. Parkins denied the Amended Motion for Postconviction Relief. (A8–9, Exhibit A). Mr. Urquhart filed a timely Notice of Appeal. (A9). This is his Opening Brief.

SUMMARY OF THE ARGUMENT

I. The Superior Court erred in assessing Trial Counsel's performance under the *Strickland* standard. Trial Counsel did not meet or consult with Mr. Urquhart between arraignment and trial. Because Mr. Urquhart was constructively denied the assistance of counsel during a critical stage of the proceeding, prejudice is presumed pursuant to *United States v. Cronic*.

STATEMENT OF FACTS

The Robbery

In the direct appeal of Mr. Urquhart's convictions, the Delaware Supreme Court found that the evidence presented by the State at trial established the following facts:

> On July 15, 2014, a masked man wearing a black North Face coat and ski mask walked into the Lesly Grocery, a corner store in Wilmington. He approached the cashier and pulled out a gun. The robber demanded that the cashier hand over the money in the register and fired the gun near him. A security camera documented the robbery. Another camera captured a dark-colored Chrysler 300 driving by the store seventy-six seconds before the robbery.
>
> Wilmington Police Corporal Paul Demarco was on duty that day in the vicinity of the crime scene. A construction crew flagger approached Corporal Demarco and told him that someone was shooting inside the Lesly Grocery. After briefly checking on the welfare of the store occupants, Corporal Demarco walked up the street and encountered an unidentified woman. She appeared calm, but was whispering quietly as if she did not want to be seen speaking to police. The woman told Corporal Demarco that she saw someone flee the area and get into a green, four-door sedan. She also gave him its license plate number. Less than two minutes passed between the time Corporal Demarco radioed that he was responding to the call and the time he radioed the license plate number.
>
> DMV records showed that Caree Matsen owned a green Chrysler 300 bearing the license plate number that the woman provided. Matsen testified that she had loaned her car to her sister's boyfriend, Everett Urquhart. Police searched Matsen's residence and found Urquhart's belongings in Matsen's sister's bedroom. Police also found several pictures of Urquhart wearing a black North Face jacket with a hood. Urquhart was arrested and charged with robbery.

(A18–19).

The Preliminary Hearing

At the July 28, 2014 Preliminary Hearing, another Public Defender appeared on behalf of Mr. Urquhart's Trial Counsel. (A102). To establish probable cause for the offenses charged, the State called Detective Palmatary to testify. (A104). On cross-examination, Detective Palmatary admitted that he spoke to Matsen's sister, who denied knowing Mr. Urquhart and stated that she was at school when the robbery occurred. (A115).

The First Case Review

Mr. Urquhart's First Case Review was held on October 20, 2014. (A1). Another attorney from the Officer of the Public Defender attended on behalf of Trial Counsel, who was in a trial. (A140). No prosecutor appeared and no plea offer was tendered. (A82).

The Final Case Review

At Final Case Review on January 26, 2015, Trial Counsel, once again, asked another attorney from the Officer of the Public Defender to attend. (A100). A plea offer was made, but Mr. Urquhart rejected it. (A2, A100). This was conveyed to Trial Counsel by email:

> He rejected and set for trial on 2/3/15. This case involves video surveillance of the crime, a cell phone dump–neither of which appears to have made it to your file– and fingerprint latents with no comparison results. Kathryn met him at first case review– but no offer was in the file at that time– and I met him today at FCR.

> Your only contacts appear to have been phone calls he placed to you. No video or prison visit since his July 18, 2014 arrest. As soon as you can, I would suggest you turn your attention to this case to determine what you need to be prepared for trial.

(A100).

Colloquy with Trial Court

Trial began on February 3, 2015. Prior to jury selection, Mr. Urquhart asked to address the Court:

Urquhart:	Your Honor, I just want to know if somebody want to come to me and show me all the evidence that they want to pop up with tomorrow, next week, or whatever is going on, because every couple of seconds, or every other day, I'm getting stuff late. I don't know what's going on. I don't know why. I just came here today, I'm seeing pictures for the first time. I'm seeing a lot of stuff for the first time. I don't know nothing about that stuff.
Court:	What are you seeing for the first time, sir?
Urquhart:	Pictures. And also out of a cell phone that's not even mine– I don't know why this stuff is even being let in when it has nothing to do with me. I had my cell phone, my cell phone only. They don't have nothing on my cell phone. They have another cell phone I know nothing about. It's not mine. And, also, it just – it just – a lot of things that just – I don't understand it. I don't, at all. I don't know what's going on.
Court:	All right.

Urquhart: I came here today. I just want justice. I just want some help. I decided not to do this. I just want some help. I don't know what is going on.

Court: Are you telling me that you are dissatisfied with your representation?

Urquhart: I'm not saying – like I'm not saying I'm dissatisfied. It's that I don't know if they turn the stuff in late to him and he tried to pass it to me and I didn't catch it in time, I did not receive it in time.
I come here today. Now it's just, like – it's throwing me for a loop.

Court: Have you met with Mr. Armstrong before today?

Trial Counsel: No, Your Honor.
And I can explain why, Your Honor. I met with him back in July, and then I started a trial, a capital murder trial, that lasted from September to mid-December.
At his first case review the case was covered by Kathleen Van Amerongen.
The second case review, final case review, I was actually in another trial that did not end until Thursday of last week and that was the *State v. Hollis* case.

Court: Mr. Armstrong, I can understand your schedule.

Trial Counsel: We met today. I showed him the pictures. The pictures – I received a package from the State dated January 21st. It would have come while I was in the trial. I was not able to send it to him until the 28th, that's when my secretary was able to send it out. But he has not received them.

(A137–140).

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Court: Your client has not seen these until today?

Trial Counsel: He saw them this morning, Your Honor.

Court: I gather because of you schedule, Mr. Armstrong, you haven't had a chance to meet with your client?

Trial Counsel: Your Honor –

Court: Personally before today.

Trial Counsel: Before today; no, Your Honor, I have not.

Court: Have you been able to communicate with him by telephone?

Trial Counsel: He has written me letters, and I have not been able to – in response to a letter I did send it out, he hadn't received the information that I –

Court: Well, I can understand the schedule that you have, so don't feel that you are personally at issue here.

Trial Counsel: I understand that, Your Honor.

Court: But, has he heard from you before today?

Trial Counsel: No, he has not had that opportunity.
I went from one trial into another trial into another trial.

(A143–144).

Following this exchange, no continuance request was made by Mr. Urquhart's Trial Counsel. Instead, the Court inquired as to whether Mr. Urquhart was asking "*pro se* for a continuance." (A144). When Mr. Urquhart responded that he "just wanted to know . . . how is this stuff, like, allowed in," the Court asked again whether

Mr. Urquhart was asking to delay the trial. (A145). He answered, "No, sir." (A145). A jury was then selected and sworn. (A153).

Affidavit of Trial Counsel

Trial Counsel denied that he was completely absent prior to trial. (A81). Between Mr. Urquhart's arraignment and trial dates, Trial Counsel spoke to him on the phone once and mailed him two letters:

> On November 10, 2014, trial counsel spoke to client via phone. The note entry states, "Spoke to client. Explained that I was in trial. That discovery is still forth coming and that I would send it as I receive it." This entry is an indication to trial counsel that I pulled and reviewed discovery with client. I also explained the discovery process and my practices on discovery.
>
> On November 14, 2014 trial counsel provided client with a second copy of discovery to defendant. The note entry states, "Enclosed please find another copy of your discovery dated September 2, 2014."
>
> On January 28, 2015, trial counsel provided client with a copy of supplemental discovery received on January 21, 2015.

A82.

I. THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT WAS NOT DENIED COUNSEL AT A CRITICAL STAGE OF THE PROCEEDING AND, THUS, PREJUDICE COULD NOT BE PRESUMED UNDER *UNITED STATES v. CRONIC*.

A. Question Presented

Whether the Superior Court incorrectly held that prejudice is not presumed when trial counsel failed to meet and consult with the defendant to develop a timely defense strategy from the time of the arraignment until the morning of trial? This issue was preserved, as it was raised in the Amended Motion for Postconviction Relief.[1]

B. Standard and Scope of Review

The Superior Court's decision on a motion for postconviction relief is reviewed for abuse of discretion.[2] This Court must carefully review the record to "determine whether competent evidence supports the [lower] court's findings of fact and whether its conclusions are not erroneous."[3] A *de novo* standard is applied to legal and constitutional questions.[4] Thus, this constitutional claim is subject to *de novo* review.

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[1] Issued preserved at A70–73.
[2] *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013).
[3] *Capano v. State*, 889 A.2d 968, 974 (Del. 2006) (internal citations omitted).
[4] *Ploof*, 75 A.3d at 851.

C. Argument

1. Applicable Legal Precepts

The right to counsel, guaranteed by the United States Constitution under the Sixth Amendment and made applicable to the states through the Fourteenth Amendment,[5] has long been held to mean the right to the effective assistance of counsel.[6] Article I, § 7 11 of the Delaware Constitution likewise provides that a criminal defendant has "a right to be heard by himself or herself and his or her counsel."[7] Thus, a defendant in a criminal case is guaranteed the right to legal representation under Delaware state law as well.

A constitutional ineffective assistance of counsel claim is evaluated under the two-pronged test set forth in *Strickland v. Washington*.[8] To succeed, a petitioner must show that: (1) the attorney's performance fell below "an objective standard of reasonableness" (*i.e.*, the performance prong) and (2) confidence in the result of the original proceeding is undermined due to counsel's deficiencies (*i.e.*, the prejudice prong).[9]

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[5] U.S. Const. amend. VI; U.S. Const. amend. XIV.
[6] *Strickland v. Washington*, 466 U.S. 668, 686 (1984).
[7] Del. Const. art. I, § 7
[8] 466 U.S. 668 (1984); *see also*, *Williams v. Taylor,* 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003).
[9] *Strickland*, 466 U.S. at 688, 694.

To establish prejudice under *Strickland*, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[10] "The benchmark for judging any claim of ineffectiveness must be 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."[11]

However, when there is a complete denial of counsel at a critical stage of the proceeding, constitutional prejudice is presumed.[12] In *Bell v. Cone*,[13] the United States Supreme Court described the differences between claims governed by *Strickland* and those governed by *Cronic*. If *Strickland* applies, a defendant must typically demonstrate that specific errors made by trial counsel affected the ability of the defendant to receive a fair trial.[14] On the other hand, if a claim is governed

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[10] *Id.* at 694.

[11] *Cooke v. State*, 977 A.2d 803, 840 (Del. 2009) (quoting *Strickland*, 466 U.S. at 686).

[12] See *United States v. Cronic*, 466 U.S. 648, 659–662 (1984) (finding three scenarios in which prejudice is presumed: (1) when there is a "complete denial of counsel" at a critical stage of the proceeding; (2) when defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) if the attorney is asked to provide assistance under circumstances where "competent counsel likely could not").

[13] 535 U.S. 685 (2002).

[14] *Id*. at 695.

by *Cronic*, the defendant need not demonstrate any prejudice resulting from the lack of effective counsel. This is because, in some cases, the Sixth Amendment violations are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[15]

Denial of counsel during a critical stage of the proceeding amounts to a *per se* denial of the effective assistance of counsel.[16] In *Powell v. Alabama,* the Court described the pretrial period as "perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important."[17] The defendant must be provided counsel at "every step in the proceedings against him,"[18] which the *Powell* decision suggests includes the pretrial period at issue here.

2. Appellant Was Denied Counsel at a Critical Stage of The Proceeding

The Superior Court erred in denying Mr. Urquhart's postconviction claim that Trial Counsel provided ineffective assistance of counsel when he failed to meet and consult with Mr. Urquhart prior to trial. The Superior Court concluded that Trial

[15] *Id*. (quoting *Cronic*, 466 U.S. at 658).
[16] *Cronic*, 466 U.S. at 659.
[17] 287 U.S. 45, 57 (1932).
[18] *Id.* at 69.

Counsel's "conduct did not fall below *Strickland's* objective standard of reasonableness because he communicated with [Mr. Urquhart] on numerous occasions before trial about discovery."[19] Thus, the Court found that even if Trial Counsel's performance was deficient, prejudice could not be presumed.[20]

However, the Superior Court erred in assessing Trial Counsel's performance under *Strickland's* objective standard of reasonableness. Because Mr. Urquhart was constructively denied the assistance of counsel, this case falls under the umbrella of *Cronic*.

The United States Supreme Court has recognized that there are some circumstances in which, although counsel is present, "the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided."[21] Actual or constructive denial of the assistance of counsel is legally presumed to result in prejudice.[22] "[T]he Constitution's guarantees of assistance of counsel cannot be satisfied by mere formal appointment."[23]

Mr. Urquhart was arraigned on October 20, 2014 and trial began on February 3, 2015. Between those dates, Trial Counsel's only contact with Mr. Urquhart

[19] Exhibit A at pg. 1, 9–10.
[20] Exhibit A at pg. 10.
[21] *Cronic,* 466 U.S. 648, 654 n. 11 (internal citations omitted).
[22] *Strickland*, 466 U.S. at 692.
[23] *Avery v. Alabama,* 308 U.S. 444, 446 (1940).

consisted of one phone call and one form letter enclosing a copy of the State's initial discovery production.[24] It is indisputable that Trial Counsel never personally met with Mr. Urquhart until the morning of his trial.[25]

During their only phone conversation on November 10, 2014, Trial Counsel "[e]xplained that [he] was in [another] trial. That discovery is still forthcoming and that [he] would send it as [he] receive[s] it."[26] According to Trial Counsel, this suggests that he "reviewed discovery with the client."[27] But this phone call occurred before Trial Counsel received the surveillance footage from Lesly Grocery and the photographs of Mr. Urquhart wearing a black North Face jacket—the primary evidence in this case.[28] Without that evidence, Trial Counsel's review of the discovery was inconsequential and did not provide Mr. Urquhart an opportunity to appreciate the evidence against him. This is reflected in his comments to Superior Court:

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[24] Although Trial Counsel mailed Mr. Urquhart a copy the supplemental discovery on January 28, 2015, Mr. Urquhart did not receive this discovery prior to trial. (A140). Nor did he have the ability to view the security video without the assistance of his Trial Counsel, as he was incarcerated in default of bail. (A1, A13 (effective sentencing date is also the date of arrest)).

[25] A139, A91–92.

[26] A82.

[27] A82.

[28] *Cf. Weathers v. State*, 149 A.3d 1194, 1209 (Md. Ct. Sp. App. 2016) (questioning whether "defense could truly be prepared when he or she did not discuss the primary evidence in the case with the client prior to the commencement of trial").

- "I'm hearing both stuff for the first time today, and I don't-- I don't even know what's coming."[29]

- "I just want some help. I just need somebody to let me know something, what's going on. I never – nothing. All I know is this, Your Honor: A plea. That's all I keep hearing. Plea this, plea that."[30]

- "I just came here today, I'm seeing pictures for the first time. I'm seeing a lot of stuff for the first time. I don't know nothing about that stuff."[31]

- "Like, it was never explained to me why they're bringing this stuff into my case."[32]

When the Superior Court asked, on the morning of trial, whether Mr. Urquhart had heard from Trial Counsel prior to that day, he responded "No, [Mr. Urquhart] has not had an opportunity. I went from one trial into another trial into another trial."[33]

This Court's most recent decision in *Harden v. State*[34] is instructive. Because Trial Counsel needed more time to have "these fundamental conversations and investigate any leads that came out of them, he should have requested a postponement."[35] Instead, the Superior Court questioned Mr. Urquhart about his

[29] A130.
[30] A131.
[31] A138.
[32] A145.
[33] A144.
[34] 2018 WL 716854 (Del. Feb. 6, 2018).
[35] *Id*. at *9.

intentions of seeking a "*pro se* continuance,"[36] even though "[s]cheduling matters are plainly among those for which agreement by counsel generally controls."[37] Even more curious, Mr. Urquhart did not request a continuance. He asked for help—help which had been denied to him until that point.

Noticeably absent from Trial Counsel's Affidavit and, by extension, the Superior Court's analysis is any indication that Trial Counsel discussed, conferred, or consulted with Mr. Urquhart concerning the overarching defense strategy or the strength of the State's evidence prior to trial.[38] Trial Counsel did not attend Mr. Urquhart's arraignment or subsequent case reviews. Nor did Trial Counsel file any pretrial motions. The record reflects a total lack of communication and consultation with Mr. Urquhart in preparation for trial. As a result, his Trial Counsel failed to prepare an adequate defense, learn of potential witnesses, or develop a timely trial strategy. This "convert[ed] the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel."[39]

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[36] A144.

[37] *New York v. Hill*, 528 U.S. 110, 115 (2000) (holding that "only counsel is in a position to assess the benefit or detriment of the delay to the defendant's case and to assess whether the defense would even be prepared to proceed any earlier").

[38] See *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (holding that an attorney has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy) (internal citations omitted).

[39] *Avery,* 308 U.S. at 446.

Because Trial Counsel did not meet with Mr. Urquhart until the day of trial, there was no time to interview potential witnesses, discuss possible defense strategies, or prepare Mr. Urquhart to testify (or decide that he should not testify).[40] A complete lack of pretrial preparation puts at risk both the defendant's right to an ample opportunity to "meet the case of the prosecution" and the "reliability of the adversarial testing process."[41] The fatal flaw in Trial Counsel's pretrial performance was his failure to be present at "perhaps the most critical period of the proceedings."[42]

Although it is true that "[n]ot every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel,"[43] in this case, Trial Counsel's failure is an abdication of the minimum performance required of a defense attorney. One phone call and two "Enclosed please find" letters is so inadequate that Mr. Urquhart was, in effect, denied the assistance of counsel. And while public defenders across the nation face crushing caseloads, "a busy schedule simply cannot serve as a reasonable basis for failing to have personal contact with a client prior to

[40] See *Harden*, 2018 WL 716854 at *9.
[41] *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (internal citations omitted).
[42] *Powell*, 287 U.S. at 57.
[43] *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983).

that client's trial."[44] "Assistance begins with the appointment of counsel, it does not end there."[45]

Mr. Urquhart was constructively denied the assistance of counsel during the pretrial proceedings. This Sixth Amendment violation is "so likely to prejudice" Mr. Urquhart that the cost of litigating its effect is unjustified. Prejudice is presumed and reversal is required. Mr. Urquhart is entitled to a new trial.

[44] *Commonwealth v. Brooks*, 839 A.2d 245, 250 (Pa. 2003).
[45] *Cronic,* 466 U.S. at 654 n. 11.

CONCLUSION

For these reasons, Appellant Everett Urquhart respectfully requests that this Court reverse the Superior Court's judgement denying his Amended Motion for Postconviction Relief and remand for a new trial.

Respectfully submitted,

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