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 REPLY BRIEF

FILING ID 61939390

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Dated: March 19, 2018

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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. Argument

The State suggests that Mr. Urquhart's ineffective assistance of counsel claim fails on two fronts: (1) he waived it; and (2) it fails on the merits.[1] Neither is convincing.

1. Waiver

First, the State argues that Mr. Urquhart waived "any objections to counsel's pretrial performance when he declined a continuance and stated he wished to go to trial that day with his trial counsel."[2] But the State does not cite any caselaw to support its conclusion. Instead, the State cites to *Fowler v. State*[3] and *Stevenson v. State*.[4] Neither case provides authority for the assertion that Mr. Urquhart waived his ineffective assistance of counsel claim.

In *Fowler v. State*, the appellant argued that the Superior Court erred when it failed to, *sua sponte*, sever the trial so that Fowler could be tried separately from his codefendant.[5] But Fowler "failed to take the Superior Court up on what was in

[1] State's Answering Brief ("Answer") at 10.
[2] Answer at 5–6.
[3] *Fowler*, 2016 WL 5853434, at *2 (Del. Sep. 29, 2016).
[4] *Stevenson*, 2016 WL 5937897, at *9 (Del. Oct. 11, 2016).
[5] See *Fowler*, 2016 WL 5853434, at *2.

essence as offer to sever the trial" and, thus, waived any right to severance.[6] Here, unlike *Fowler*, Mr. Urquhart is not suggesting that the trial court erred by failing to postpone the trial. Quite the opposite, Mr. Urquhart maintains that his *trial counsel* should have requested more time to prepare. Even though he declined the opportunity to delay trial, Mr. Urquhart is not challenging the trial judge's lack of action, but rather, that of his own attorney. Therefore, *Fowler* is inapplicable.

Stevenson v. State is equally unavailing. In that case, Stevenson did not object to the admission of certain videotaped statements at trial.[7] Nevertheless, he raised the issue on appeal.[8] This Court held that "there is an express and effective waiver as to any appellate presentation on an issue where defense counsel responds to queries by a trial judge, by stating that there are no objections to the admission of evidence."[9] That is not the case here. Mr. Urquhart raised and analyzed his attorney's pretrial absence in his Amended Motion for Postconviction Relief, which is the appropriate vehicle for bringing ineffective assistance of counsel claims.[10]

Simply stated, Mr. Urquhart did not affirmatively (or implicitly) waive his claim regarding trial counsel's pretrial absence. Even if the Court were to hold otherwise,

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[6] *Id*.
[7] *Stevenson*, 2016 WL 5937897, at *9.
[8] *Id*.
[9] *Id*.
[10] *Sahin v. State*, 7 A.3d 450, 451 (Del. 2010) ("Generally, we do not consider claims of ineffective assistance of counsel in a direct appeal. The reason for that practice, in part, is to develop a record on that issue in a Superior Court Rule 61 post-conviction proceeding.").

there is no evidence to suggest that his waiver was made knowingly or voluntarily.[11] Thus, the issue is properly before this Court and ripe for a decision.

2. Denial of Counsel

i. Factual Grounds

On the merits, the State attacks Mr. Urquhart's use of undisputed facts as being contradictory to the Superior Court's findings.[12] But in doing so, the State engages in the same flawed reasoning as the trial court. To refute Mr. Urquhart's claim of absence during the pretrial period, the State first points to his preliminary hearing. But the preliminary hearing did not fall within the pretrial period, which is "the time of their arraignment until the beginning of their trial."[13] The same is true of Mr. Urquhart's meeting with trial counsel on August 14, 2014 and phone call on August 27, 2014.

It further defies logic to suggest that "the State's entire case was outlined for defense counsel [at the preliminary hearing], including the fact that a surveillance camera recorded the robbery,"[14] yet ignore that Mr. Urquhart was not shown the

[11] See Super. Ct. Cr. R. 61(e)(6)(i) (codifying the right to appeal the final disposition of the motion for postconviction relief); *MacDonald v. State*, 778 A.2d 1064, 1074 (Del. 2001) ("a defendant's plea agreement does not surrender the defendant's right to argue that the decision to enter into the plea was not knowing and voluntary because it was the result of ineffective assistance of counsel").
[12] Answer at 12.
[13] *Powell v. Alabama*, 287 U.S. 45, 57 (1932).
[14] Answer at 12–13.

surveillance footage until the day of trial.[15] Even more troubling, trial counsel knew (or at least should have known) that this video existed, but did not file a motion to compel its disclosure once the deadline for discovery had passed. As a result, Mr. Urquhart's attorney did not receive the crucial evidence in this case until about two weeks prior to trial.[16] Even then, his attorney did not make time to review the discovery and discuss with Mr. Urquhart its impact on their trial strategy. Instead, Mr. Urquhart was mailed a copy, which did not reach him prior to the start of trial.[17]

Rather than focus on trial counsel's absence during the pretrial period, both the State and the Superior Court rely on communications which predate Mr. Urquhart's arraignment. The record establishes that between arraignment and trial, Mr. Urquhart directly communicated with his trial attorney only once—a phone call in which he advised Mr. Urquhart that "discovery is still forthcoming."[18]

And while trial counsel's supervisor covered Mr. Urquhart's final case review, neither the video surveillance nor the cell phone evidence "appear[ed] to have made it to [Mr. Urquhart's] file."[19] Trial counsel's supervisor did not possess the critical facts required to accurately advise Mr. Urquhart. As Justice Harlan stated in a dissenting opinion, "[w]here counsel has no acquaintance with the facts of the case

[15] A137–141, A143.
[16] A97–A99.
[17] A143–144.
[18] A82.
[19] A100.

and no opportunity to plan a defense, the result is that the defendant is effectively denied his constitutional right to assistance of counsel."[20] This is precisely what happened in Mr. Urquhart's case.

ii. Legal Grounds

Finally, the State argues that the Superior Court "correctly determined that *Cronic* did not apply."[21] Not so. This case features one the "few exceptional circumstances that are so likely to prejudice the defendant that a reviewing court need not examine the consequences of the lawyer's conduct."[22]

"The constitutional guarantee of the assistance of counsel necessarily includes the 'opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense.' "[23] "No attorney could provide effective counsel without an opportunity for pre-trial consultation."[24] It is an undisputed fact that Mr. Urquhart was not afforded that opportunity.[25] Therefore, *Cronic* is the correct standard.

Although the State insists that the Superior Court correctly analyzed Mr. Urquhart's claim under *Strickland*, its argument ignores the constructive denial

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[20] *Chambers v. Maroney*, 399 U.S. 42, 59 (1970) (Harlan, J., concurring in part, dissenting in part).
[21] Answer at 17.
[22] *Mitchell v. Mason*, 325 F.3d 732, 748 (6th Cir. 2003).
[23] See *Roberts v. Moore*, 1998 WL 41683, at *2 (4th Cir. Feb. 4, 1998) (quoting *Cronic*, 466 U.S. at 654–55).
[24] *Fuller v. Sherry*, 405 Fed. Appx. 980, 986 (6th Cir. 2010) (citing *Hunt v. Mitchell*, 261 F.3d 575, 583 (6th Cir. 2001).
[25] A144.

component of *Cronic*. The Sixth Circuit concisely explained why *Strickland* is inapplicable when there is a total lack of pretrial consultation:

> The illogic of applying *Strickland* to these facts is manifest in that there are no conceivable tactical or strategic reasons for defense counsel to fail to consult with a client prior to trial. Such a meeting is vital if counsel is competently to develop a defense. If counsel does not meet with his client for more than two minutes at a time, the defendant is unable to confide truthfully in his lawyer and counsel will not know, for example, which investigative leads to pursue, whether there are witnesses for the defense, or what kind of alibi the defendant may have.[26]

The facts that prompted the Sixth Circuit's holding are similar—though not directly on point—to the facts of this case. In *Mitchell v. Mason*, the appellant was represented by his attorney at a preliminary hearing, during which he called one witness and argued against the denial of bail.[27] Mitchell's attorney next represented him, close to four months later, at the final conference.[28] But shortly thereafter, he was briefly suspended from practicing law, only to be reinstated on the day that jury selection began for Mitchell's trial.[29] Mitchell requested new counsel and alleged that his attorney had not visited him once in prison nor had Mitchell been given an opportunity to speak with his lawyer in court.[30]

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[26] *Mitchell*, 325 F.3d at 747.
[27] *Id*. at 735.
[28] *Id*.
[29] *Id*.
[30] *Id*.

On those facts, the Sixth Circuit held that the Michigan Supreme Court erred by rejecting the *per se* prejudice analysis and insisting on evaluating Mitchell's claim through the lens of *Strickland*.[31] Here, although Mr. Urquhart's trial attorney was not suspended from practice, he was completely unavailable to Mr. Urquhart due to his conflicting trial schedule. Because Mr. Urquhart maintains that his counsel was effectively absent during a critical period, the Superior Court should have applied *Cronic*, rather than *Strickland*, to his claim.

In short, Mr. Urquhart was constructively denied the assistance of counsel when his attorney failed to meet or consult with him from the time of his arraignment until the morning of trial. Because prejudice is presumed, Mr. Urquhart is entitled to a new trial.

[31] *Id*. at 748.

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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CERTIFICATE OF COMPLIANCE WITH
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1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word for Mac 2016 (Version 15.29.1).

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 2,058 words, which were counted by Microsoft Word for Mac 2016 (Version 15.29.1).