

18-8690

ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

DAGOBERTO ONTIVEROS

Petitioner

VS.

MICHAEL PACHECO, Warden, et al.

RESPONDENTS

Supreme Court, U.S.
FILED

JUN 06 2019

OFFICE OF THE CLERK

No. 18-8057

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE 10th CIRCUIT

PETITION FOR REHEARING

Petitioner, pro se
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WMCI, 7076 Road 55F
Torrington, Wyoming 82240

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SUPREME COURT, U.S.

PETITION FOR REHEARING

COMES NOW; petitioner *pro se* pursuant to Sup. Ct. R. 44.1 and presents his petition for a rehearing in the above-entitled cause, to address intervening circumstances of other substantial grounds not previously presented. Petitioner certifies that the petition for rehearing is presented in good faith and not for delay. On May 13, 2019, this Court denied the petition for writ of certiorari but, the principal ground was not cited by the Court's per curiam opinion in this case and the rendition of judgment in this matter came as a surprise to petitioner, who would have made arrangements to deal with it had it been expected. The Petition for Rehearing raises crucial matters that could not have been previously argued, as is shown in the petition itself and, in support of it, petitioner respectfully shows:

Grounds for Rehearing

A rehearing of the decision in the matter is in the interests of justice because:

Petitioner has a bona fide issue of factual innocence, if not for both trial and appellate counsels' constitutional deficiency, abandoning petitioner in the critical stage of his criminal process, he would have never been convicted of the crime or his conviction would have been reversed on direct appeal.

Petitioner did not engage in the conduct for which he was convicted of and did not engage in conduct constituting a lesser included or inchoate offense of the crime for which he was convicted; and did not commit any other crime arising out of or reasonably connected to the facts supporting the indictment or information upon which he was convicted. There is relevant forensic scientific evidence that was not available at the time of trial that undermines forensic evidence presented at trial. Forensic scientific evidence is to be considered as undermined if new research or information exists that repudiates.

The petitioner set forth facts supported by affidavits or other credible evidence at the time of a direct appeal. The specific evidence identified by the petitioner establishes factual innocence and is material to the case. A review of the trial and appellate records will establish that the petitioner's appellate counsel provided constitutionally ineffective assistance by failing to assert a claim that was likely to result in a reversal of the petitioner's conviction or sentence on his direct appeal.

Petitioner was constructively denied effective assistance of appellate counsel for his direct appeal when only "errors patent" brief was filed on his behalf and counsel subsequently withdrew via Anders brief that failed to mention any arguable issues of appeal; both actions left petitioner essentially without representation during court's decisional process, and counsel's decision that there was no merit in petitioner's appeal put him in role of judge rather than advocate. Petitioner's attorneys altogether failed to provide meaningful representation such that under the rule of *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), he need not show Strickland prejudice. "The general rule announced in Strickland ... is modified when the complained of performance results in the actual or constructive denial of any assistance of appellate counsel. In such a case, the petitioner need not demonstrate the typical Strickland-type prejudice because prejudice is presumed." *Harris v. Day*, 226 F.3d 361, 364 (5th Cir. 2000).

On direct appeal, petitioner's appointed appellate counsel filed an "errors patent" brief that did not raise any specific grounds for appeal and filed an Anders motion to withdraw. The state courts affirmed his conviction and sentence. Petitioner's habeas corpus petition was denied. On appeal petitioner argued he was effectively denied assistance of appellate counsel. The court held the "errors patent" brief, and subsequent Anders brief which pointed to no arguable issues, left

petitioner essentially without representation during the court's decisional process and counsel did nothing to attempt to aid the appeal, beyond the initial perfecting of the appeal itself.

When viewed with all other evidence in the case, whether admitted during trial or not, the evidence demonstrates that the petitioner is factually innocent; and the material evidence identified by the petitioner is not merely cumulative of evidence that was known, is not reliant solely upon recantation of testimony by a witness or merely impeachment evidence. Indeed, counsel's incompetence rises to the level of a constructive denial of counsel and constitutes constitutional error. Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all.

Except in cases in which counsel has filed a motion under L.A.R. 109.2 to withdraw under *Anders v. California*, 386 U.S. 738 (1967), parties represented by counsel may not file a brief pro se. If a party sends a pro se brief to the court, the clerk will forward the brief to the party's attorney of record, with notice to the pro se party. Counsel may or may not choose to include the arguments in his or her brief. A party may file pro se a motion for the appointment of new counsel or a motion to proceed pro se. The party may file no other motion or document pro se unless and until the motion for new counsel or to proceed pro se is decided.

The record does not otherwise reflect that petitioner knew of his right to appeal and the process involved to effectuate that right. The right to appeal, if that right is granted by a state, as Wyoming has, is a due process right. See *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S. Ct. 830, 834, 83 L. Ed. 2d 821 (1985); *Farbotnik v. State*, 850 P.2d 594, 598 (Wyo. 1993). Because of its constitutional magnitude, the right must be zealously protected.

Petitioner submitted a petition to the Wyoming Supreme Court requesting that they extend the time to file an appeal so that he could find counsel or obtain his transcripts. However, this

request was not granted and petitioner was unable to timely file an appellant brief without his transcripts and assistance from counsel. The Due Process Clause requires that states provide a "means of affording adequate and effective appellate review to indigent [criminal] defendants." *Entsminger v. Iowa*, 386 U.S. 748, 751, 87 S. Ct. 1402, 18 L. Ed. 2d 501 (1967) (quoting *Griffin v. Illinois* 351 U.S. 12, 20, 76 S. Ct. 585, 100 L. Ed. 891 (1956)). This requirement encompasses the right to have a transcript {850 P.2d 607} or the functional equivalent thereof, *Griffin*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585; the right to be represented by counsel on "the first appeal, granted as a matter of right," *Douglas v. California*, 372 U.S. 353, 356, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963); and the right to be provided with the effective assistance of counsel, *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). Anything short of a full transcript or its functional equivalent is incompatible with "adequate and effective appellate review." To suggest otherwise ignores both federal and local law as well as the basic tenets of effective appellate advocacy. See *Hardy v. United States*, 375 U.S. 277, 84 S. Ct. 424, 11 L. Ed. 2d 331 (1964); *Bearpaw*, 803 P.2d 70; *State v. Thomas*, 38 Wyo. 72, 264 P. 1017 (1928); and *Richardson v. State*, 15 Wyo. 465, 89 P. 1027 (1907).

Petitioner was not granted any opportunity by the Court to have an appeal once his appointed counsel withdraw and did not subject the crucial competency determination in his capital case to any adversarial testing. The Court improperly analyzed the ineffective assistance of counsel of claim under the Strickland Standard and never cited relevant Supreme Court case on constructive denial of counsel under the rule of Cronic, need not show Strickland prejudice when [the Supreme Court] spoke in Cronic of the possibility of presuming prejudice based on an attorney's failure to test the prosecution's case.

This case contains several crucial factual and procedural distinctions that warrant its determination by the same rule in an earlier decision by this Court and other U.S. Supreme Court rulings. This Court has noted that cases with these factual and procedural distinctions should be treated by the same rule of law of applicable decision that the Court, in its order, stated was controlling in this case.

A rehearing tightly focused on the issues raised and ruled on other cases that are arguably the same in this case, and whether these distinctions merit a different rule of law, is a matter of fundamental fairness to petitioner and would not unduly burden the Court.

CONCLUSION

For the reasons just stated, petitioner urges that this petition for a rehearing be granted, and that, on further consideration, the judgment of the lower court be reversed and that he be granted a new appeal and appoint effective counsel to represent him on appeal or as this court see appropriate.

RESPECTFULLY SUBMITTED this 6th day of June, 2019



Petitioner, *pro se*

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