IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSHUA MIRABAL,	§	
	§	No. 211, 2013
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	No. 1112000595
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: December 11, 2013
Decided: March 11, 2014

Before **HOLLAND**, **BERGER**, **JACOBS**, and **RIDGELY**, Justices and **GLASSCOCK**, Vice Chancellor,* constituting the Court *en Banc*.

O R D E R

On this 11th day of March 2014, it appears to the Court that:

(1) Defendant-Below/Appellant Joshua Mirabal appeals from a jury conviction in the Superior Court of Aggravated Possession, Criminal Impersonation, and Possession of Marijuana. In his single claim on appeal, Mirabal contends that he received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. The record shows that Mirabal's trial counsel held divided loyalties to a potentially adverse witness that affected trial counsel's performance and denied Mirabal his Sixth Amendment

* Sitting by designation pursuant to art. IV, § 12 of the Delaware Constitution and Supreme Court Rules 2 and 4 (a) to fill up the quorum as required.

right to the effective assistance of counsel. Accordingly, we reverse Mirabal's conviction and remand this case for a new trial.

(2) In December 2011, the Delaware River and Bay Authority Police Department pulled over a red Chevrolet Cavalier for traffic violations. The occupants included the driver, Rebecca Stafford, and two passengers, Mirabal and Bethany Santana. After requesting Stafford's license, registration, and proof of insurance, the officer requested identification from Mirabal and Santana. Mirabal provided the officer with the name Jose Zakeem Ramos. After checking the names, the officer suspected that Mirabal had provided a fake name. When asked about the name, Mirabal explained that he provided a false name because he thought there was a warrant out for his arrest. The officer ordered Mirabal to wait in the back of his squad car.

(3) Another officer then conducted a consent search of the Cavalier. Inside a woman's jacket within the vehicle, officers found a plastic bag filled with cocaine. Yelling from the back of the squad car, Mirabal confessed to possessing the drugs. All of the occupants in the Cavalier were taken into custody for further questioning. After a search incident to an arrest, officers also found marijuana in Mirabal's sock.

(4) Mirabal was charged with Aggravated Possession, Criminal Impersonation, and Possession of Marijuana. Before Mirabal's trial, the Public

Defender had represented Stafford on a charge arising from the same incident. Stafford was charged with Hindering Prosecution in violation of 11 *Del. C.* § 1244(c). She pleaded guilty on June 4, 2012 and was fined $200.

(5) Mirabal's trial began on October 11, 2012. Mirabal was also represented by an attorney from the Public Defender's Office ("trial counsel"), who was appointed to represent Mirabal on July 30, 2012. At trial, Mirabal sought to testify on his own behalf and to comment on prior admissions made by Stafford. Stafford had made statements in an affidavit that exculpated Mirabal. But Stafford later claimed that those statements were involuntary because Stafford was coerced by Mirabal into making the statements. If her admissions were to be introduced into evidence, the Prosecution intended to call her as a rebuttal witness. The Prosecutor alerted trial counsel about this potential conflict of interest. In addition, the Public Defender's Office held internal discussions concluding that there was a conflict of interest due to the prior representation of Stafford. But the parties agreed that there would be no conflict if Mirabal waived it. Mirabal declined to waive the conflict. Trial counsel raised the issue before the trial judge. The trial judge ruled that there would not be a conflict so long as Mirabal did not comment on Stafford's affidavit or Stafford was not called as a witness.

(6) At trial, Mirabal exercised his right to testify. He denied that the drugs were his, testified they were found in Stafford's jacket, and explained she had

"made an affidavit." The Prosecutor objected and the trial court ordered the jury to disregard the testimony about the affidavit. Ultimately, neither Mirabal nor the State called Stafford as a witness.

(7) The jury found Mirabal guilty of all three counts. The trial judge sentenced Mirabal to nine years and six months Level V incarceration, suspended after three years. This appeal followed.

(8) We review claims alleging the infringement of a constitutional right *de novo*.[1] Traditionally, claims of ineffective assistance of counsel on direct appeal are reviewed for plain error because they were not raised below.[2] But in this case, the record demonstrates that Mirabal did not waive his trial counsel's conflict of interest. Because a conflict of interest is a question of law, our review is *de novo*.[3]

(9) "Delaware law is well-settled that, on direct appeal, this Court will not hear any claims of ineffective assistance of counsel, which were not raised below."[4] As a reviewing Court, we require a complete record of the question of counsel's alleged inadequacies.[5] Generally, this includes an evidentiary hearing on the matter, factual determinations, and an opportunity for counsel to be heard and

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[1] *Williams v. State*, 56 A.3d 1053, 1055 (Del. 2012).
[2] *E.g.*, *Johnson v. State*, 765 A.2d 926, 929 (Del. 2000).
[3] *Hitchens v. State*, 931 A.2d 437, 2007 WL 2229020, at *2 (Del. 2007) (citing *Outten v. State*, 720 A.2d 547, 551 (Del. 1998)).
[4] *Duross v. State*, 494 A.2d 1265, 1267 (Del. 1985).
[5] *Harris v. State*, 293 A.2d 291, 293 (Del. 1972).

defend himself under Rule 61 of the Rules of Criminal Procedure for the Superior Court.[6]

(10) But this Court has recognized an exception to the Rule 61 procedure for raising an ineffective assistance of counsel claim. In *Lewis v. State*, we explained that where the alleged error constituting ineffective assistance existed "*ab initio* and potentially undermined the attorney's effectiveness during the *entire proceedings*," we may consider such claims on direct appeal.[7] Such ineffectiveness must be "so apparent from the record that this Court can fully consider obvious deficiencies in representation."[8]

(11) In this case, Mirabal has shown an actual conflict of interest in the Public Defender's dual representation of Mirabal and Stafford. That conflict prevented trial counsel from calling Stafford as a witness out of concern that she would either invoke her Fifth Amendment rights or potentially make self-inculpatory statements on the witness stand. Because trial counsel's divided loyalties diminished Mirabal's ability to present his defense that the drugs were

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[6] *Id.*; Super. Ct. Crim. R. 61.
[7] *Lewis v. State*, 757 A.2d 709, 712 (Del. 2000) (emphasis added). The error in *Lewis* was that trial counsel represented both Lewis and his co-defendant while presenting different, independent alibi defenses. *Id.*
[8] *Dobson v. State*, 80 A.3d 959, 2013 WL 5918409, at *2 (Del. 2013).

Stafford's and not his, Mirabal was denied his right to effective assistance of counsel under the Sixth Amendment.[9]

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **REVERSED** and this matter is **REMANDED** for a new trial.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[9] *See Lewis*, 757 A.2d at 714 ("The Sixth Amendment right to the effective assistance of counsel provides for representation that is "free from conflicts of interest or divided loyalties." (quoting *United States v. Acty*, 77 F.3d 1054, 1056 (8th Cir. 1996))).