

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSHUA MIRABAL)	
)	
Defendant-Below,)	
Appellant,)	No. 211, 2013
)	COURT BELOW: In the
v.)	Superior Court of Delaware, in
)	and for New Castle County
STATE OF DELAWARE)	I.D. No. 1112000595
)	
Plaintiff-Below,)	
Appellee.)	

APPELLANT JOSHUA MIRABAL'S OPENING BRIEF

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NATURE OF PROCEEDINGS

On July 17, 2012, Sean Motoyoshi, Esq. from the Office of the Public Defender was appointed to represent Defendant Joshua Mirabal. (A3, Docket Entry 22). Mr. Motoyoshi represented Mr. Mirabal at trial in the Superior Court in and for New Castle County during the trial stage of this action.

On October 12, 2012, a jury found Joshua Mirabal guilty of Aggravated Possession, Criminal Impersonation, and Possession of Marijuana. (A4, Docket Entry 31).

On February 6, 2013, Christopher S, Koyste, Esq. was appointed to represent Joshua Mirabal due to a conflict of interest with the Office of the Public Defender. (A4, Docket Entry 35).

On March 22, 2013, Joshua Mirabal was sentenced. (A4, Docket Entry 35, and Exhibit A attached to Opening Brief). A notice of appeal was timely filed on April 21, 2013 preserving Mr. Mirabal's right to a direct appeal to this Court. This is the Defendant's Opening Brief on direct appeal.

Summary of Argument

Joshua Mirabal asserts that his October 12, 2012 jury trial conviction for Aggravated Possession, Criminal Impersonation, and Possession of Marijuana should be overturned and a new trial should be granted due to the existence of a conflict of interest that prevented his Trial Counsel from independently and effectively representing him prior to and during trial. Trial Counsel had a conflict of interest in representing Mr. Mirabal which manifested prior to the trial as a result of The Office of the Public Defender previously representing Rebecca Stafford in a case arising out of the same underlying facts.

The conflict of interest created by the divided loyalty of Trial Counsel affected trial strategy and decisions such as who would be called to testify, in addition to the presentation of evidence pursuant to hearsay exceptions, if Ms. Stafford was unavailable to testify during the trial. When the conflict became readily apparent during the trial, the Trial Judge erred by failing to disqualify Trial Counsel from representing Mr. Mirabal and ordering a mistrial. The Trial Judge, despite Mr. Mirabal's refusal to waive the conflict and request to be appointed new counsel, permitted Trial Counsel to remain as counsel for Mr. Mirabal. The Trial Judge's failure to declare a mistrial denied Joshua Mirabal his Constitutional rights under the

Sixth Amendment to the United States Constitution and Art. 1 § 7. of the Delaware
Constitution.

Statement of Facts

On December 1, 2011, Officer Field of the Delaware River and Bay Authority Police Department, pulled over a red Chevrolet cavalier after witnessing the vehicle change lanes without signaling and for a rear brake light being inoperative. (A7, A8). The vehicle was occupied by three individuals, Rebecca Stafford, the driver, Defendant Joshua Mirabal, front right passenger, and Bethany Santana, back seat passenger. (A9). Officer Field made contact with the Rebecca Stafford and requested her license, registration, and proof of insurance. (A9). Mr. Mirabal, provided Officer Field the information regarding the registration and insurance of the vehicle. (A9).

Officer Field requested identification from both Mr. Mirabal and from Ms. Santana, however neither party was able to provide any form of identification. (A9). Mr. Mirabal provided Officer Field the name Jose Zakeem Ramos. (A9). Officer Field suspected that Mr. Mirabal provided false information when the name he provided produced no results from his in-car computer. (A9). After several attempts, Officer Field returned to the vehicle to speak further with Mr. Mirabal. (A10). When questioned further about the name provided, Mr. Mirabal provided Officer Field with his real name and his correct date of birth. (A11). Mr. Mirabal indicated that he provided the fake name because he believed there was an active warrant out for him.

(A11).

Ms. Stafford was placed in the back of Officer LaMora's police vehicle¹ and Mr. Mirabal was placed in the back of Officer Field's police vehicle. (A11). Officer LaMora received Ms. Stafford's consent to search the vehicle. (A15). Ms. Santana was removed from the vehicle while Officer LaMora conducted the search. (A11). While looking for identification for the occupants, Officer LaMora found a black jacket on the back seat of the vehicle. When he lifted the jacket open, he found a cigarette box containing a plastic bag containing cocaine. (A15). Officer LaMora instructed Officer Field to take Ms. Santana into custody and she was placed in the back of Officer LaMora's vehicle. (A12). At this time Officer Field noticed a commotion coming from his vehicle. Mr. Mirabal was screaming and shaking the vehicle. When asked what was wrong, Mr. Mirabal stated "[t]he work, it's mine." (A12). He further stated that "work" meant crack cocaine.² (A12). Mr. Mirabal was transported back to Troop 1 where he was further questioned. (A12). During a search incident to arrest conducted at the station, Officer Field found marijuana in

¹ Officer LaMora responded to scene in response to Officer Field's call for backup. (A15).

² At trial, after refreshing Officer Field's recollection he testified that Mr. Mirabal said that he placed the drugs inside the jacket. (A12).

Mr. Mirabal's sock. (A13). Ms. Stafford was also arrested under these same facts. She was charged and plead guilty to Hindering.³ (A9, A11, A12, A17).

Trial began on October 11, 2012; Mr. Mirabal was represented by Sean Motoyoshi, Esq. from the Public Defender's Office. (A3, Docket Entry 22, A4, Docket Entry 31, A6, A17). Before court reconvened on October 12, 2012, Trial Counsel addressed the Court:

"...after speaking with the prosecutor and learning that Mr. Mirabal – actually, after speaking with Mr. Mirabal first, he advised me that he wanted to address the Court, he wanted to call the witnesses Thomas Monahan and Rebecca Stafford that I was not going to call. And I advised him that if he, after speaking with the prosecutor, if he made a comment about the affidavit that Rebecca Stafford made out, that the State intends to then use rebuttal witnesses against him. I advised him that if that were to happen, because my office previously represented Ms. Stafford, it would create a conflict because then she would be an adverse witness. I advised him that if he were to do that, the judge would declare a mistrial. He advised that he does not want to waive the conflict, that he believes that a mistrial would be in his best interest. So his

³ See Court of Common Pleas Criminal Docket for State v. Rebecca R. Stafford. Attached as exhibit B1-B5 to the opening brief.

intention is to do just that.” (A17).

The Court addressed Mr. Mirabal in regards to this.

“THE COURT: ... If Ms. Stafford is a witness adverse to you, it creates a conflict in that potentially the Supreme Court would not view favorably, I have to guess now what the Supreme Court would say whether I should order you to go forward with Mr. Motoyoshi and they’ll think that the conflict is not so serious that it would be a problem either in his allegiance to you or the office’s allegiance to Ms. Stafford when they represented her. But my sense is given that her testimony would bear directly on whether you or she was responsible for the drugs in the car, my best estimate is that the Supreme Court will think that is a conflict of some significance.” (A18).

The Trial Judge inquired as to Mr. Mirabal’s understanding of the consequences of calling Ms. Stafford to testify. (A18). Mr. Mirabal commended Mr. Motoyoshi on the excellent job he was doing and stated that he understood that Ms. Stafford could possibly present testimony harmful to his defense. (A18). The Trial Judge than asked Mr. Mirabal whether he was willing to waive the conflict.

“THE COURT: But at this point it’s my understanding that you’re not willing to waive the conflict that Mr. Motoyoshi would have and allow the case to go

forward with Ms. Stafford testifying in this trial, you want another trial where you have an opportunity to bring her in, is that what I understand?

MR. MIRABAL: Yes.

THE COURT: You don't want Mr. Motoyoshi representing you because he may have a conflict, is that what I understand?

MR. MIRABAL: If it's a conflict, yes." (A18).

Mr. Mirabal desired to call as a witness Rebecca Stafford to testify as to the contents of an affidavit she submitted in relation to this case. (A18, A19). In response, the Prosecutor indicated that Ms. Stafford was unavailable to testify as she was invoking her 5th Amendment privilege.⁴ (A19). Mr. Motoyoshi further stated that if Ms. Stafford would testify he did not know that he would be able to effectively cross examine Ms. Stafford as a result of the conflict. (A19). The Court recessed in order for the attorneys and court to sort out this issue. (A20).

After the recess, the Court again took up the issue of conflict of interest. (A21). The Court anticipated that the Supreme Court would find the existence of a conflict of interest as Mr. Mirabal was not willing to waive the conflict of interest and Ms. Stafford had yet to waive the conflict. (A21). The Prosecutor stated "[y]our

⁴ The Court was under the impression that Ms. Stafford was waiving her Fifth Amendment. (A19).

honor, I do have to make a record that I had informed counsel that I thought there might be a potential conflict some time ago, and it was my understanding that the Office of the Public Defender determined that this was in fact not a conflict.” (A22). Trial Counsel admitted that “there was discussion in my office about whether it would be a conflict or not, multiple discussions actually all along the way as this case was progressing. I spoke with my superiors about and each step of the way we analyzed whether or not there was a conflict and whether or not – ” and the final consensus was that it was a conflict of interest. (A22). The Prosecution suggested and the Trial Counsel agreed that the problem was not ripe until Mr. Mirabal took the stand and testified to what he intended to testify to. (A22). Mr. Mirabal, after the Court conducted a colloquy, stated that he would still testify. (A22).

The Prosecution requested and the Court granted an order preventing Mr. Mirabal from testifying to the statements contained within the affidavit of Rebecca Stafford. (A22-23). Trial Counsel did not object to the granting of an order stating that “I agree with the State’s position at this point. Normally I’d ask for it to come in as a statement against interests. However, since there was a hearing scheduled before and I chose to not have the hearing, I think it’s only fair that he not be allowed to testify regarding that one issue.” (A23). Despite the order, Mr. Mirabal attempted

to testify as to the affidavit. On direct examination Mr. Mirabal testified that the drugs found inside the jacket were not his.

“MR. MOTOYOSHI:

Q. Now, the drugs were found in the jacket. Were they your drugs?

A. No, sir. Thank God I'm sober right now and I can honestly say that those drugs wasn't mine. I'm not going to say I'm Mr. Goody Two-Shoes, I did do something wrong that day, and that was lying to the authorities which caused me to get a charge for criminal impersonation, I believe. And I did possess the marijuana, that I gave them myself, they didn't find in the search, I hand gave them.

Q. So if there are drugs found in vehicle, you don't know whose drugs they were, correct?

A. No, I didn't.

Q. And you have no explanation for these drugs, correct?

A. The explanation, it was Rebecca's jacket, and she came, after the situation, after I got locked up and got released, she went on her own and made an affidavit.” (A29).

The Prosecutor immediately objected to the testimony and the Court instructed the

jury to disregard the testimony about the affidavit. (A29). Despite the Prosecution's request, the Court declined to declare anything based on the fact that Mr. Mirabal did not testify as to what Ms. Stafford said. (A29). Mr. Mirabal further testified that he did not place the drugs in the jacket.

“MR. MOTOYOSHI:

Q. All right. And did you yourself place those drugs that were found in that jacket, did you touch those drugs? (A29-30).

A. No, I didn't touch it. That's why I believe no fingerprints were found on it because I never touched it, or whatever. And once again, the affidavit explains that.” (A-30).

Again the Prosecutor objected to this testimony. (A-30). Despite the Prosecution's request for a mistrial, the Court only instructed the jury to disregard the testimony relating to the affidavit and instructed Trial Counsel to be careful with his questioning. (A30). Following cross examination and redirect of Mr. Mirabal, the Defense did not call any other witnesses and rested. (A31). It should be noted that Ms. Stafford, represented by an attorney, was subpoenaed and present within the courthouse. (A18, A21, A34).

The Jury found Mr. Mirabal guilty of Aggravated Possession, Criminal

Impersonation, and Possession of Marijuana. (A4, Docket Entry 31, A32). Mr. Mirabal seeks review of his conviction on all charges.

I. THE TRIAL JUDGE’S FAILURE TO DECLARE A MISTRIAL AFTER LEARNING OF TRIAL COUNSEL’S CONFLICT OF INTEREST DENIED MR. MIRABAL HIS RIGHT TO INDEPENDENT AND EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE 1 SECTION 7 OF THE DELAWARE CONSTITUTION

Question Presented

Whether the failure of the Trial Judge to declare a mistrial after learning of Trial Counsel’s conflict of interest violated Mr. Mirabal’s right to independent and effective assistance of counsel in violation of the 6th Amendment to the United States Constitution and Article 1 Section 7 of the Delaware Constitution. The Defense preserved this issue at trial by bringing the conflict of interest to the Trial Judge’s attention prior to the start of the second day of trial on October 12, 2012. (A17). Additionally, the issue was preserved when Mr. Mirabal refused to waive his conflict of interest and requested new counsel to be appointed. (A18).

Standard and Scope of Review

The standard of review for reviewing legal issues involving disqualifications of counsel due to a conflict of interest is reviewed *de novo* when raised to the trial court. *See Appeal of Infotechnology, Inc.*, 582 A.2d 215, 218 (Del. 1990).

Argument

This case involves a conflict of interest that manifested at the time the

Defendant was appointed an attorney from the Office of the Public Defender, as his *defacto* Co-Defendant, Ms. Stafford, was also represented by the Office of the Public Defender for charges arising from the same underlying facts. (Ex. B1-B5). As such, the representation of Mr. Mirabal was not independent and not effective before the trial and throughout the trial. This environment at trial, that Mr. Mirabal never consented to, violated his right to independent and effective assistance of counsel under the 6th Amendment to the United States Constitution and Article 1 Section 7 of the Delaware Constitution. The facts and circumstances in this case are materially similar to those in *Lewis v. State*, 757 A.2d 709 (Del. 2000), which is controlling in this matter, therefore warranting reversal of Mr. Mirabal's convictions.

It is well acknowledged that the Delaware Supreme Court does not usually review direct appeals dealing with the specific issue of ineffective assistance of counsel. *Lewis*, 757 A.2d at 712. However, this Court has reviewed claims of ineffective assistance of counsel when the error "potentially undermined the attorney's effectiveness during the entire proceedings." *Id.* "The Sixth Amendment right to the effective assistance of counsel provides for representation that is 'free from conflicts of interest or divided loyalties.'" *Id.* at 714 (citing *United States v. Acty*, 77 F.3d 1054, 1056 (8th Cir. 1996)). The right to effective assistance of counsel

with undivided loyalty is guaranteed to defendants regardless whether they privately retain an attorney or are appointed one. *Id.* at 715. Just as in *Lewis*, where this Court found that direct appeal was a proper path for addressing the issue of trial counsel's conflict of interest, the same applies here, as there is a clear record establishing the conflict of interest. *Id.* at 712, 720. Thus, Mr. Mirabal asserts that the issues in relation to Trial Counsel's conflict of interest and the Trial Judge's failure to declare a mistrial, which are clear on the record, should be raised in this direct appeal.

The Delaware Lawyers' Rules of Professional Conduct provide the guidelines for attorneys when considering conflicts of interests. *See Id.* at 712. Specifically, Rule 1.7 (a) provides "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Del. Rules of Prof'l Conduct R. 1.7 (2013).

A conflict of interest may occur due to the lawyer's continuing duty and responsibilities to other clients and former clients. Del. Rules of Prof'l Conduct R.

1.7 cmt. 1 (2013). Further, Rule 1.9 (a) provides that “a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.” Del. Rules of Prof’l Conduct R. 1.9 (2013). The attorney’s duty of loyalty to former clients mandated by Rule 1.9 also extends to any firm with whom the attorney is employed. *Sanchez-Caza ex rel. Sanchez v. Estate of Whetstone*, 2004 WL 2087922, at *2 (Del. Super. Ct. Sept. 16, 2004).⁵

Case law mandates that trial judges must take steps to prevent a defendant from having a trial with an attorney who has a conflict of interest with their client. It is apparent that “[w]hen a trial judge is alerted to possible conflicts of interest [the judge] must take adequate steps to ascertain whether the conflicts warrant separate counsel.” *Walker v. State*, 2002 WL 122643, *1 (Del. Jan. 24, 2002) (quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988)). A judge’s inquiry about a possible conflict must include “an analysis of the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise.” *Swan v. State*, 820 A.2d 342, 351 (Del. 2003) (citing Del. Rules of Prof’l Conduct R. 1.7 cmt. 1). If

⁵ Unreported decision attached as exhibit D to Opening Brief.

necessary, the trial court has the authority to disqualify counsel “to preserve the integrity of the adversary process in the actions before them.” *Lewis*, 757 A.2d at 714 (quoting *In re Waters*, 647 A.2d 1091, 1098 (Del. 1994)). A trial judge, finding a conflict, can inquire of a defendant as to whether the conflict is waived, as a defendant is permitted to waive his right to conflict free counsel. *Id.* (citing *Holloway v. Arkansas*, 435 U.S. 475, n. 5 (1978)).

A defendant must demonstrate the existence of an actual conflict of interest together with prejudice caused as a result of the conflict of interest. *See Lewis*, 757 A.2d at 718-20. However, if a defendant can show that his counsel “actively represented conflicting interests” and by doing so it “affected his lawyer’s performance”, prejudice will be presumed. *Id.* at 718 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)). “A conflict of interests exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities.” Del. Rules of Prof’l Conduct R. 1.7 cmt. 8. *See also Cuyler*, 446 U.S. at 356 n. 3.

This Court found a conflict of interest and prejudice where trial counsel, as a result of divided loyalties, could not effectively advocate on behalf of his clients.

Lewis, 757 A.2d at 719-20. In *Lewis v. State*, James Lewis and Linwood Black, co-defendants, were identically charged and indicted on Burglary First Degree, Unlawful Imprisonment First Degree, Assault Second Degree, Conspiracy Second Degree and two firearms offenses. *Id.* at 711. Lewis and Black were represented by the same Public Defender at trial. *Id.* at 712. Each defendant presented his own defense of mistaken identity and separate alibi defenses. *Id.* at 711, 712.

At trial, the State introduced the testimony of the two victims, Nicole Parks and Greg Selby. *Id.* at 711. Parks testified that she was awakened by two masked male individuals, one armed with a firearm, shouting at them in their bedroom. She testified that her arms were taped behind her by the unarmed individual. Further, she testified that she recognized the armed individual's voice as her former boyfriend, Linwood Black; she did not recognize the unarmed individual. *Id.* Selby testified that he was also awakened by the screaming and that he recognized the armed individual as Black. *Id.* Selby testified that he recognized the unarmed individual as Lewis, but his identification was based on a brief view of the exposed sections of Lewis's face not covered by the ski mask. *Id.* at 711, 719. Both Defendant's were found guilty of all offenses and Lewis filed a direct appeal challenging the conviction. *Id.* at 711.

On appeal this Court found that under a plain error analysis that a conflict of interest existed and that prejudice was sustained by Lewis. *Id.* at 712, 720. This Court first analyzed conflicts of interests and an attorney ethics, finding that pending unusual circumstances, an attorney should not represent co-defendants. *Id.* at 712-13. This Court looked at specifically Rule 1.7(b) and the comments to Rule 1.7 finding that “[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that *ordinarily* a lawyer should decline to represent more than one codefendant.” *Id.* at 712 (quoting Del. Rules of Prof’l Conduct R. 1.7 cmt. 23 (2013)). Further the ABA Standards for Criminal Justice also provides that except for unusual situations, a lawyer should refrain from representing multiple defendants in criminal case. *Id.* at 712 (citing ABA Standards for Criminal Justice: *Defense Function, Conflicts of Interest* § 4-3.5 (3d ed. 1993)).

Next this Court looked at the competing interests of a defendant’s Sixth Amendment rights and the trial court’s interest in ensuring procedural fairness. *Lewis*, 757 A.2d at 713. This Court noted that the United States Supreme Court has ruled that “the judiciary has an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings are fair.” *Id.* at 713 (citing *Wheat*, 486 U.S. 159-60). Further, that Sixth Amendment

right of choice is not absolute and, “[i]n fact, the right to effective representation by an attorney with undivided loyalty is so integral to the proper administration of justice that, in some cases, it must take precedence over the expressed preference of the defendants and their attorney. *Id.* (citing *Wheat*, 486 U.S. at 166; *United States v. Carrigan*, 543 F.2d 1053, 1058 (2d. Cir. 1976) (concurring opinion)). In order to ensure the proper administration of justice, this Court found that “trial judges have the power to disqualify trial counsel, when necessary, to preserve the integrity of the adversary process in the actions before them.” *Id.* at 714 (quoting *In re Waters*, 647 A.2d at 1098).

This Court recognized that a defendant “may waive his right to the assistance of an attorney unhindered by a conflict of interests.” *Id.* (quoting *Holloway*, 435 U.S. at n. 5). While this Court has not prescribed a particular procedure, pursuant to case law as well as Superior Court Criminal Rule 44©, the trial court must “conduct a pretrial inquiry into the propriety of joint representation and advise both defendants of their right to separate representation” and that the defendants are voluntarily waiving their right to conflict free counsel. *Id.* at 715-17 (citing Del. Super. Ct. Crim. R. 44©).

Lastly, this Court analyzed what is required to be proved in an ineffective

assistance of counsel claim. *Id.* at 718. This Court found that prejudice is presumed if a defendant shows that his counsel “actively represented conflicting interests” and that “an actual conflict of interest adversely affected his lawyer’s performance.” *Id.* (quoting *Cuyler*, 446 U.S. at 348). In determining if a conflict exists this Court adhered to the United States Supreme Court’s definition of a conflict of interest as “an actual, relevant conflict of interests [exists] if, during the course of the representation, the defendants’ interests do diverge with respect to a material factual or legal issue or to a course of action.” *Id.* (quoting *Cuyler*, 446 U.S. at 356 n.3).

Under a Plain Error Analysis, absent a valid 44© waiver, this Court found that the record reflected a conflict of interest and that prejudice was suffered as a result of what trial counsel did not do on behalf of his client. *Id.* at 720. This Court found that “given the disparity in the State’s evidence against Lewis and Black, the conflict for one attorney representing them both was manifest *ab initio*, e.g., during the pretrial case review and plea negotiation stages.” *Id.* at 719. Further, the conflict of interest became even greater as “the State’s evidence against Lewis and Black was not identical. Any attempt to exploit the weakness in the State’s identification evidence against Lewis would necessarily enhance the apparent strength of the identification evidence against Black.” *Id.* In regards to the alibi defenses, this Court

found that the State's ability to undermine Black's alibi had the potential for "spilling over" and also undermining Lewis's alibi defense. Furthermore, this Court found that the dual representation prevented trial counsel from arguing a lesser sentence for Lewis due to Black being the individual armed with the firearm. *Id.* at 720. As such, Lewis suffered prejudice and was denied his constitutional rights due to the dual representation. *Id.*

The facts in Mr. Mirabal's case present an even greater violation of the Defendant's constitutional rights. In *Lewis*, the defendant did not fairly present the issue to the trial court and therefore the claim was reviewed under a plain error analysis. *Id.* at 712. Here, the Trial Judge was abundantly aware of the conflict of interest and how the conflict was limiting Trial Counsel's ability to call witnesses, his ability to properly examine witnesses, and his ability to attempt to admit evidence pursuant to hearsay exceptions. (A17, A19, A21, A22, A23). Further, unlike *Lewis*, where the trial judge did not conduct any 44© inquiry, the Trial Judge inquired several times whether Mr. Mirabal was willing to waive his right to conflict free counsel to which he affirmatively stated he was not willing to waive and requested that new counsel be appointed. (A17, A18, A19, A21). Furthermore, it is readily apparent that the conflict of interest prevented Trial Counsel from effectively

advocating for his client “who at the moment was on trial”, Mr. Mirabal. While, the conflict did not prevent Counsel from challenging evidence as was the case in *Lewis*, the conflict prevented Counsel from pursuing the exculpatory testimony of Ms. Stafford, properly examining Ms. Stafford, as well as admitting the out of court statements through hearsay exceptions. (A17, A19, A21, A23).

However, in *Pettiford v. State*, this Court upheld the trial court’s finding of no conflict of interest. *Pettiford v. State*, 2011 WL 2361383, at *2 (Del. June 13, 2011).⁶ Defendant alleged that his appointed public defender had a conflict of interest and could not cross examine the State’s main witness because the witness had been previously represented by the Public Defender’s Office. *Id.* This Court agreed with the trial court’s finding that the record was clear that no conflict existed because during the period of time that the witness was represented by the public defender, the public defender never met with the witness nor obtained any information about the case. *Id. Pettiford*, is therefore distinguishable from the present case as the record reflects that Trial Counsel had knowledge of Ms. Stafford’s case and because of this knowledge Trial Counsel could not effectively cross examine nor treat Ms. Stafford as an adverse witness. (A17, A19).

⁶ Unreported decision attached as exhibit C to opening Brief.

Similarly, in *Walker v. State*, this Court found no conflict of interest and that the defendant did not suffer prejudice. 2002 WL at *1. Walker was charged with receipt of stolen property, possession of a firearm by a person prohibited, and carrying a concealed deadly weapon, after law enforcement found a stolen firearm following an altercation that involved his neighbor Murray. *Id.* Murray attempted to fire a gun at Walker and in response Walker pulled a gun on Murray. When law enforcement arrived Walker denied having a firearm. Law enforcement, after receiving Walker's consent, found a stolen firearm inside his residence. *Id.*

Walker was represented by the Office of the Public Defender. *Id.* During trial, Walker's counsel learned that his office previously represented Murray on charges arising from the same underlying facts, which was fully resolved by the time of Walker's trial. *Id.* This Court agreed with the trial court, finding "[t]he court considered the fact that Murray was not going to be called as a witness and determined that there was no material conflict requiring either Walker's counsel to withdraw or a mistrial. That ruling was correct, as Murray's involvement in the altercation did not bear on the charges against Walker, all of which related to Walker's possession of a stolen gun." *Id.*

This case is clearly distinguishable from the present case for multiple reasons.

First, Trial Counsel made the strategic decision to not call Ms. Stafford prior to trial, where as in *Walker*, counsel learned of the conflict during trial after trial counsel, without the taint of divided loyalties, had already made the decision to not call Murray as it was not beneficial to Walker's defense. (A17, A19, A21, A22). Additionally, this Court noted that Murray's testimony would in no way be relevant or helpful to Walker's defense; meaning that there was no prejudice caused by the divided loyalties. *Walker*, 2002 WL at *1. Here, Trial Counsel and the Trial Judge were aware that the testimony sought to be introduced by Mr. Mirabal was relevant and beneficial to Mr. Mirabal's defense; however, due to the divided loyalties of Trial Counsel, this testimony was not sought nor admitted. (A17, A18, A19, A21, A23).

In the present case, there was a conflict of interest that should have prevented the Trial Counsel from conducting the trial, and as the conflict became readily apparent during the trial, the Trial Judge should have declared a mistrial. Trial Counsel articulated divided loyalties on the record during the trial, in that he had owed loyalty to his current client Mr. Mirabal as well as loyalty to Ms. Stafford, who was a former client of the Public Defender's Office. (A17). The conflict of interest manifested prior to trial as the arrest and charging of Ms. Stafford was a result of the same facts in which Mr. Mirabal was charged and facing trial. (Ex. B1-B5, A11,

A12). In the proceedings against Ms. Stafford, she pled guilty to Hindering on June 4, 2012, while being represented by the Office of the Public Defender. (Ex. B1-B5, A17, A21). Thus, a conflict of interest became ripe the moment Mr. Motoyoshi and the Public Defender's Office was appointed to represent Mr. Mirabal in this case. (A3, Docket Entry 22).

The record at trial outlines an uncontroverted conflict of interest for the Public Defender's Office which should have resulted in a mistrial being called. (A17, A18, A19, A21, A22). Trial Counsel stated to the Court that "if he made a comment about the affidavit that Rebecca Stafford made out, that the State intends to then use rebuttal witnesses against him. I advised him that if that were to happen, because my office previously represented Ms. Stafford, it would create a conflict because then she would be an adverse witness." (A17). Trial Counsel also admitted that "if she testifies about all these things about Mr. Mirabal, she being afraid of him, and as advised, I think that I still have to then effectively cross-examine her, and I think she does become adverse. So I don't know that I'd be able to effectively do that considering the conflict." (A19). Mr. Mirabal never waived his right to conflict free counsel and requested to be appointed new counsel. (A17, A18, A21).

Trial Counsel stated that he had discussions with his superiors in the Office of

the Public Defender and that they believed that there was in fact a conflict of interest. (A22). Additionally, the Prosecutor in this case indicated “I had informed counsel that I thought there might be a potential conflict some time ago.” (A22). The Court also believed that the Supreme Court would find a conflict of interest. (A18, A21). The above noted comments paint the picture that it was readily apparent that a conflict of interest existed pursuant to Del. Rules of Prof’l Conduct R. 1.7 and 1.9, which required the Trial Judge to declare a mistrial as the Office of the Public Defender was conflicted from the onset of this case.

The divided loyalties of Mr. Mirabal’s Trial Counsel compromised his ability to independently and effectively represent Mr. Mirabal from the onset of the trial. The conflict of interest impacted Trial Counsel’s ability to make strategic decisions in regards to trial strategy and who to call to testify for the Defense’s case.⁷ Trial Counsel was informed that Ms. Stafford might assert her 5th Amendment privilege, yet he failed to have a record created by having her called to testify, away from the jury, to determine if she would actually assert her 5th Amendment privilege. (See A34). Trial Counsel instead tried to find a path during the trial so as to not impact the interests of another client, Ms. Stafford, while still trying to advocate for Mr. Mirabal.

⁷ Trial Counsel never intended to call Ms. Stafford (A17) although she was in the courthouse and available to be called by either the State or Trial Counsel. (See A34-35).

Yet, to do so, meant Trial Counsel was forced to make a compromise and to not call Ms. Stafford. (A17).

The trial record clearly shows the conflict of interest and how Trial Counsel compromised his representation due to his perceived duty to another client contrary to Del. Rules of Prof'l Conduct R. 1.7 and 1.9. (A17, A19). Trial Counsel acknowledged that if in fact Ms. Stafford "testified about all these things about Mr. Mirabal, she being afraid of him, and as advised, I think that I still have to then effectively cross-examine her, and I think she does become adverse. So I don't know that I'd be able to effectively do that considering the conflict." (A19). Furthermore, Trial Counsel believed that if Ms. Stafford would be called to testify that the court would need to declare a mistrial as a result of Trial Counsel not being able to treat her as an adverse witness due to the previous representation by the Public Defender's Office. (A17). Thus, the decisions made by his conflicted Trial Counsel created a factual atmosphere in which Mr. Mirabal then made the strategic choice to take the stand.

Part of Mr. Mirabal's decision to take the stand was his attempt to introduce what Mirabal perceived to be beneficial evidence of Ms. Stafford's out of court statements contained in an affidavit, despite the court order that he was not permitted

to do so.⁸ (A23, A24, A29, A30). Mr. Mirabal took the stand, without ever waiving the conflict of interest. (A17, A18, A19, A21). Mr. Mirabal several times during the trial indicated that he was not willing to waive his right to be represented by an independent attorney, as he repeatedly refused to waive the conflict and requested that he be appointed new trial counsel.⁹ (A18, A19, A21). Trial Counsel also did not seek to have Ms. Stafford waive her conflict. (A21).

The fact that Ms. Stafford and Mr. Mirabal were not on trial at the same time does not diminish the conflict of interest and the prejudice suffered by Mr. Mirabal in the presentation of his defense as a result of Trial Counsel only taking actions that he perceived were in conformity with his duty to Ms. Stafford. The facts here are indistinguishable from that of a co-defendant, in that Mr. Mirabal has advanced a theory placing the blame on his *de facto* Co-Defendant, Ms. Stafford, who was subpoenaed and present within the courthouse during the trial. (A18, A19, A29, A30, A34-35). This placed Trial Counsel in an impossible position where he could not independently and effectively represent Mr. Mirabal in the presentation of his

⁸ Mr. Mirabal believed that, if called, Ms. Stafford would provide exculpatory testimony. (A18, A19). The State moved for a mistrial due to Mr. Mirabal's repeated reference to an affidavit, which was refused by the Trial Judge. (A30).

⁹ Mr. Mirabal stated that despite his Counsel's "excellent job on everything," he did not want Mr. Motoyoshi representing him if it meant he had a conflict. (A18).

defense. Trial Counsel clearly placed himself at odds with the presentation of Mr. Mirabal's defense, leading Trial Counsel to take no action whatsoever to call Ms. Stafford as well as failing to introduce Ms. Stafford's hearsay statements against interest. (A17, A19, A21, A23, A34).

The very moment that Trial Counsel had to balance his loyalty to Mr. Mirabal and his loyalty owed to Ms. Stafford, the Court should have exercised its authority to disqualify Counsel and declare a mistrial. By permitting the conflicted Trial Counsel to continue on with the trial, Mr. Mirabal was placed in an environment in which he could not receive effective assistance of counsel, in violation of his rights under the Sixth Amendment and under Art. 1 § 7 of the Delaware Constitution. For this reason, Defendant Joshua Mirabal's conviction warrants reversal for a new trial.

A mistrial was warranted once Trial Counsel brought the conflict of interest and his inability to call a witness to the Court's attention. The remedy of mistrial is only appropriate where there is a "manifest necessity" or the "ends of public justice would be otherwise defeated." *Hendricks v. State*, 871 A.2d 1118, 1122 (Del. 2005) (quoting *Steckel v. State*, 711 A.2d 5, 11 (Del. 1998)). The trial judge is in the best position to determine whether a mistrial is appropriate. *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002). However, the Trial Judge failed to declare a mistrial, even

though the effects of the conflict of interest were apparent throughout Mr. Mirabal's trial.

A manifest necessity for a mistrial existed because Trial Counsel, as a result of his divided loyalties, could not pursue the testimony of Ms. Stafford and never had an independent duty to Mr. Mirabal. Due to his divided loyalties, Trial Counsel made the decision to not even attempt to place Ms. Stafford on the stand, despite being present and represented by an attorney, to determine whether she in fact would invoke her rights.¹⁰ (A17, A18, A21, A31, A34). Trial Counsel also did not attempt to introduce the out of court statements made by Ms. Stafford, some of which were contained in an affidavit that she signed, despite being admissible under Del. R. Evid. 804 or Del. R. Evid. 807.

Pursuant to DRE 804(a)(1) and 804(a)(5), Ms. Stafford was an unavailable witness had she asserted a privilege that the Trial Court would have granted in order

¹⁰ It is acknowledged that under Delaware case law, that a defendant has no right to have a co-defendant assert his Fifth Amendment privilege before the Jury. *Banther v. State*, 823 A.2d 467, 489 (Del. 2003). However, in *Banther* there was a clear record that the co-defendant was invoking the privilege against self-incrimination. In *Banther*, the defendant invoked his privilege via closed circuit television after his attorney had already stated his client was invoking his privilege. 823 A.2d at 489. Ms. Stafford at no time on the record ever invoked her Fifth Amendment privilege. (A19, A20, A31).

to prevent Ms. Stafford from testifying.¹¹ (A19). If Ms. Stafford was thereby unavailable to testify, the admission of her out of court statement through hearsay testimony of another witness is admissible if her statement was against interest. Del. R. Evid. 804(b)(3) provides a hearsay exception if “a statement which was, at the time of its making, so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the defendant the declarant to civil or criminal liability, ... that a reasonable person in the declarant’s position would not have made the statement unless the declarant believed it to be true.” Del. R. Evid. 804(b)(3).

The final prong under 804(b)(3) requires that “(a) statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement”. Del. R. Evid. 804(b)(3). This last prong would have been satisfied by calling Mr. Monahan to testify about the affidavit and the statements made by Ms. Stafford. (See A19). Thus, Ms. Stafford’s out of court statements including those contained in the affidavit were admissible through the testimony of another witness such as Mr. Monahan; Ms. Stafford’s statements met the 804 prongs of unavailability

¹¹ A declarant is unavailable if he/she “is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement” or “is absent from hearing and the proponent of the declarant’s statement has been unable to procure the declarant’s attendance by process or other reasonable means.” Del. R. Evid. 804(a)(1)&(5).

and trustworthiness and thereby were admissible under the statements against interest exception to hearsay.¹² Additionally, Ms. Stafford's hearsay statements would have also been admissible under the residual exception of DRE 807.¹³

Despite Trial Counsel being aware of the benefit of Ms. Stafford's out of court statements and their admissibility at trial, he took no steps to try to introduce the statements because of the conflict of interest.¹⁴ (A18, A19, A23). What is apparent upon a full review of the record in this case is that Trial Counsel should never have been in the situation of having to make such strategic decisions about witnesses or evidence to present at trial, due to his divided loyalties which became obvious as the trial evolved. Trial Counsel's continued representation of Mr. Mirabal, both before and during the trial, was compromised by the Public Defender's Office's representation of Ms. Stafford on the same matter in violation of Del. Rules of Prof'l Conduct R. 1.7 and 1.9.

¹² Arguably, the statements in the affidavit of Ms. Stafford could have been admitted through DRE 804 through additional testimony of Mr. Mirabal and the testimony of Thomas Monahan. (A19).

¹³ A statement, if not admissible under DRE 804, is admissible under DRE 807 if it is offered with equivalent circumstantial guarantees of truthfulness and is offered as evidence of a material fact, is probative on the point offered, and the interests of justice are best served by its admission. Del. R. Evid. 807.

¹⁴ As a result of the conflict of interest, Trial Counsel did not try to take the foundational steps to introduce the affidavit and continued on in the representation of Mr. Mirabal. (A23).

Of great importance is the fact that Mirabal recognized that a lawyer without a conflict of interest was needed to provide him advice and representation. (A18 He specifically requested another lawyer if there was a conflict. (A18) As there clearly was a conflict of interest, this Court is compelled at this late date to grant Mr. Mirabal's wish for a new independent and non-conflicted attorney to represent him at a new trial.

This Court's analysis and ruling in *Lewis v. State* is controlling, as the record readily demonstrates that Mr. Mirabal's Trial Counsel "actively represented conflicting interests" and that at numerous times throughout the trial, Trial Counsel's actions were materially limited by his duty to Ms. Stafford. *See Lewis v. State*, 757 A.2d 709, 718 (Del. 2000). As a result of Trial Counsel's divided loyalties, he had to make strategic decisions that are forbidden pursuant to *Lewis*. Thus, a remand for a new trial is required as the Trial Judge's failure to declare a mistrial prevented Mr. Mirabal from having a trial with an independent and effective trial counsel in violation of the United States Constitution and Delaware's constitution.

Conclusion

WHEREFORE, Mr. Mirabal respectfully request this Honorable Court to overturn the conviction rendered after jury trial. This case should be remanded to the Superior Court of the State of Delaware in and for New Castle County for a new trial consistent with the directions of this Court.

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