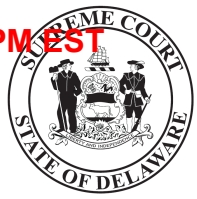

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL RODRIGUEZ,	:	
Defendant Below-	:	
Appellant,	:	
	:	
v.	:	**No. 25, 2013**
	:	
STATE OF DELAWARE,	:	
Appellee.	:	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY
ID No. 0903019123A

APPELLANT'S OPENING BRIEF

JOSEPH M. BERNSTEIN
DE Bar ID No. 780
800 N. King Street - Suite 303
Wilmington, DE 19801
302-656-9850
E-mail: jmbernstein@comcast.net

Attorney for Appellant

Dated: March 8, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Cases (continued ***Page***

Statutes and Court Rules

NATURE AND STAGE OF PROCEEDINGS

The Appellant, Michael Rodriguez ("Rodriguez" or "defendant"), was convicted in a jury trial of Possession of a Firearm During Commission of a Felony ("PFDCF") (3 counts); Assault Second Degree; Burglary First Degree; Aggravated Menacing; Reckless Endangering First Degree (2 counts); and, Conspiracy Second Degree. Rodriguez was sentenced by the court to a total of 54 years in jail, followed by probation. Rodriguez's convictions and sentences were affirmed on direct appeal.[1]

A timely Motion for Post-Conviction Relief ("Rule 61 Motion") was filed on September 12, 2011. (A8, Docket #91); (A11, *et seq.*). The Rule 61 Motion asserted a claim that the defendant's trial counsel had been "ineffective" in failing to challenge the admissibility of certain evidence on the ground that said evidence was obtained in violation of the Fourth Amendment and Article 1, §6 of the Delaware Constitution. The defendant's trial attorney filed an affidavit in response to the allegations in the Rule 61 Motion. (A19). On December 28, 2012, The Honorable E. Scott Bradley issued a decision (hereinafter "*Rule 61 Decision*"), which denied the Rule 61 Motion.[2]

On January 22, 2013, the defendant filed a timely appeal in this Court from the Rule 61 Decision. (A10, Docket #117). This is the defendant's Opening Brief in support of his appeal.

---

[1] See, *Rodriguez v. State*, 3 A.3d 1098, 2010 Del. LEXIS 453 (Del. September 13, 2010) (TABLE).

[2] In accordance with Supreme Court Rule 14(b)(vii), a copy of the *Rule 61 Decision* is appended to this Brief.

SUMMARY OF ARGUMENT

1. The defendant's trial attorney was "ineffective," under *Strickland v. Washington*, 466 U.S. 668 (1984),in failing to file a motion to suppress the "bullet evidence" that was recovered by Hospital personnel and subsequently turned over to the police following surgery for treatment of a gunshot wound sustained by the defendant.

2. Although defendant's trial attorney claimed that he made a "strategic" decision not to challenge the admissibility of the bullet evidence on Fourth Amendment grounds, that "strategy" was unsound because trial counsel should have known that the defendant did not consent to have the bullet that was removed from his person turned over to the police. Furthermore, the strategy was unsound because trial counsel should have known that the Hospital personnel were, in fact, acting as "agents" for the State in preserving the bullet evidence and subsequently turning that evidence over to the police.

3. The defendant was "prejudiced" by the failure to file a motion to suppress the bullet evidence because there was a reasonable probability that such a motion would have been successful. Furthermore, if the bullet evidence had been excluded, the State did not have sufficient evidence to convict the defendant because the bullet evidence was the only evidence linking the defendant to the charged offenses.

STATEMENT OF FACTS

Trial Proceedings

The historical facts that led to the defendant's convictions and sentences are not at issue in this appeal.[3] On March 17, 2009, Lamont Johnson ("Johnson") was at home, which was located in the Walkers Mill Mobile Home Park, in Bridgeville, Delaware. At approximately 10:00 p.m., while everyone inside the residence was watching TV in the living room, Johnson heard the screen door open and heard what he described as "kicking noises" at the front door. Johnson could see two people outside, but he could not identify them. Johnson then went into his bedroom and armed himself with a gun. As he was returning to the living room, he saw that one of the unknown persons was inside the house and the other person was standing at the front door. He heard shots being fired in his direction. Johnson fired three shots in the direction of the front door and both intruders fled from the residence. Johnson claimed that his weapon was a ".38 special."[4] Johnson was unable to identify either of the intruders.[5]

On March 17, 2009, at approximately 11:40 p.m., the police responded to Christiana Hospital, Newark, Delaware, concerning a male who had been dropped off at the hospital by an unknown person and who appeared to have been shot in the upper chest or back. This person, who was later identified as the defendant, Michael Rodriguez ("Rodriguez"), told the

---

[3] The historical facts set forth herein are adapted from the Rule 61 Decision of the Court below. Any additional facts, not included in the Rule 61 Decision, are annotated to the trial record in the court below.

[4] The weapon Johnson allegedly fired at the intruders was never recovered by the police. At trial, Johnson testified that he got rid of the weapon before the police arrived because he was a convicted felon who was prohibited from possessing a weapon. (Trial, Vol. A, pp. 115-116) (A23-A24); (Trial, Vol. A, p. 126) (A25).

[5] *Rule 61 Decision*, pp. 1-2

emergency room nurse that he had been shot in Wilmington. It was determined that Rodriguez had been shot in the chest and he immediately underwent surgery where a single bullet was removed from his chest. Following the surgery, the bullet that was removed from Rodriguez was turned over to City of Wilmington police by the hospital personnel and was ultimately turned over to the Delaware State Police by the Wilmington Police. At the trial, Carl Rone, an expert firearms examiner employed by the Delaware State Police, testified that the bullet that was recovered from Rodriguez during the surgery was fired from the same weapon as two other bullets that were recovered at the crime scene.[6] Other than Rone's testimony, there was no other evidence or testimony that linked the defendant to the home invasion.

The Direct Appeal

The only issue raised in the direct appeal was a claim that the defendant was denied a fair trial because, prior to jury selection, the court clerk had erroneously informed the jury panel that the defendant had been charged with Possession of a Deadly Weapon by a Person Prohibited when, in fact, that charge had been severed from the charges that went to trial. In affirming the defendant's convictions and sentence, this Court held that the jury's knowledge of that fact did not deprive the defendant of a fair trial. The Court noted that the trial court had given the jury a "curative instruction" to disregard the statement made by the court clerk and that the curative instruction was presumably followed by the jury. See, *Rodriguez v. State*, 2010 Del. LEXIS 453,at *4.

---

[6] *Rule 61 Decision*, p. 2

The Post-Conviction Proceedings

The only claim raised by the defendant in his Rule 61 Motion was the claim that his trial attorney was "ineffective" because he failed to file a motion to suppress the bullet that was removed from his body during the surgery and subsequently turned over to the police by Christiana Hospital personnel. See, Rule 61 Motion (A12); *Rule 61 Decision*, p. 4. The trial court requested the defendant's trial attorney to submit an Affidavit in response to allegations in the Rule 61 Motion. In his Affidavit, trial counsel stated his opinion that a "Motion to Suppress would not have been successful based on the law and the facts":

> In the present case, Mr. Rodriguez voluntarily sought medical attention for a gunshot wound at Christiana Hospital and consented to the surgical intervention. The surgical intervention was for the benefit of Mr. Rodriguez's health and welfare, and not a "search" implicating constitutional principles. The surgery and surgical removal of the bullet from Mr. Rodriguez was performed by Christiana Hospital doctors/staff, as a private actor, not acting at the request or direction of the government. Upon removal, Mr. Rodriguez had no possessory interest or any reasonable expectation of privacy with respect to the bullet. Affiant believed that the police had come into possession of the bullet lawfully and not in contravention of Mr. Rodriguez's 4th Amendment and Article 1, §6 of Delaware Constitution rights.

Affidavit of John P. Daniello, §5 and §7. (A19-A20).[7]

The trial court also requested the State to submit an affidavit from Christiana Hospital personnel explaining: (1)the procedure for preserving a bullet taken from a patient believed to be the victim of a crime at the time of the offenses in this case, and (2) the reasons for the procedure. In response to the court's request, the State submitted the Affidavit of

[7] In addition to his Affidavit, trial counsel also submitted a Memorandum to the trial court which advocated that there was no Fourth Amendment violation because Hospital personnel were acting as "private parties" rather than "agents of the State" when they removed the bullet and subsequently turned it over to the police. (A21-A22).

Anita Symonds, RN, a forensic nurse coordinator at Christiana Care. According to Ms. Symonds' Affidavit, the following procedures were utilized in March 2009:

> A bullet is removed in the operating room and it is placed in a container with a label that contains the patient's name, doctor's name and operating room nurse's initials. The Forensic Nurse Examiner responds to the operating room, signs a release form and takes the container with the bullet to the Forensic nurse's office and notifies the appropriate police agency. The container wit the bullet is placed in a locked locker in the Forensic nurse's office until it is picked up by the appropriate police agency. The police officer and the Forensic Nurse Examiner sign the Forensic Nurse Examiner Release of collected evidence form at the time the bullet is released to the police officer. **The purpose of this process is to preserve forensic evidence.**

(A38)(emphasis added).

The Rule 61 Decision

In its decision to deny post-conviction relief, the court below focused on the following issues: (1) whether trial counsel's decision not to challenge the bullet evidence based on a violation of the Fourth Amendment and Article 1, §6 of the Delaware Constitution was objectively reasonable performance, and (2) was there a reasonable probability that the outcome of the trial would have been different if the bullet evidence had been excluded? *Rule 61 Decision*, p.4.

The trial court first concluded that "the surgical procedure to remove the bullet from Rodriguez's body was not a search that implicated constitutional rights." *Rule 61 Decision*, p. 7. However, the trial court also concluded that the Hospital personnel were acting as "agents of the police" in preserving the bullet and turning it over to the police, *Id.*, at pp. 7-8. The trial court then concluded that the actions of the Hospital personnel did not constitute a "search" within the meaning of the Fourth Amendment and Article 1, §6 of the Delaware Constitution

because the bullet was not an "effect" of the defendant. Therefore, the trial court concluded that defense counsel's decision not to challenge the bullet evidence was proper and did not amount to ineffective assistance of counsel. *Id.*, at 8-10. The trial court therefore did not reach the "prejudice inquiry under *Strickland*.[8]

[8] Rather than deciding whether the defendant was "prejudiced" by the failure to file a suppression motion, the court below reasoned that defense counsel was not "ineffective" because the court ultimately concluded that a suppression motion would not have been successful. See, *Rule 61 Decision*, pp. 8-10. In reality, the court's conclusion amounts to a finding of "no prejudice."

ARGUMENT

I. THE DEFENDANT'S TRIAL ATTORNEY WAS INEFFECTIVE UNDER *STRICKLAND v. WASHINGTON* IN FAILING TO CHALLENGE THE ADMISSIBILITY OF THE "BULLET EVIDENCE" BASED ON A VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL PROTECTION FROM UNLAWFUL SEARCHES AND SEIZURES

Question Presented

Whether the defendant's trial attorney was "ineffective" under the Sixth Amendment and the Delaware Constitution in failing to challenge the admissibility of the "bullet evidence" based on a violation of the defendant's constitutional protection against unlawful searches and seizures? This issue was raised in the court below in Appellant's Rule 61 Motion. (A12).[9]

Scope of Review

Claims of ineffective assistance of counsel are viewed as mixed questions of law and fact and, therefore, are reviewed *de novo. Strickland v. Washington*, 466 U.S. 668, 697-698 (1984). Subsidiary findings of fact made by the trial court in the course of deciding an ineffectiveness claim are entitled to deference. However, the trial court's ultimate conclusion that counsel rendered effective assistance is a legal conclusion that is reviewed *de novo*. *Id*.

Overview of Law: Ineffective Assistance of Counsel

In order to prevail on a claim which alleges ineffective assistance of counsel, the defendant has to meet the well established two-pronged test established in *Strickland v. Washington. In Strickland,* the Court identified the two components to any ineffective assistance claim as being: (1) deficient attorney performance; and, (2) prejudice.

---

[9] In the *Rule 61 Decision*, the Superior Court concluded that there were no procedural bars to relief to the claim which alleged ineffective assistance of counsel. *Id.*, at p. 5.

(1) Deficient Attorney Performance Under *Strickland*

Under *Strickland*'s performance component, a defendant must establish that his counsel's performance was deficient - "that under all the circumstances, the attorney's representation fell below an objective standard of reasonableness." *Hill v. Lockhart*, 474 U.S. 52, 57 (1985); *Cooke v. State*, 977 A.2d 803, 847 (Del. 2009) (the inquiry is "whether counsel's representation fell below an objective standard of reasonableness"); *Zebroski v. State,* 822 A.2d 1038,1043 (Del. 2003) (defendant must show that "counsel's actions fell below an objective standard of reasonableness").

In *Strickland* itself, the Court also adopted a somewhat deferential standard in reviewing counsel's performance and established a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. 689. Conversely, the Supreme Court has also squarely held that merely invoking the word "strategy" to explain attorney errors is insufficient. See, *Williams v. Taylor*, 529 U.S. 362, 396 (2000) ("counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not fulfilled their obligation to conduct a thorough investigation of the defendant's background").

The distinction between omissions that were the result of sound "strategy" and omissions that were the result of "prejudicial oversight" was parsed by the Third Circuit Court of Appeals in *Thomas v. Varner*, 428 F.3d 498 (3d Cir. 2005):

> Our review reveals a tiered structure with respect to *Strickland's* strategic presumptions. At first, the presumption is that counsel's conduct might have been part of a sound strategy. The defendant can rebut this "weak" presumption by showing either that the conduct was not, in fact, part of a strategy or by showing that the strategy employed was unsound...However, if the Commonwealth can show that counsel actually pursued an informed strategy (one decided upon after a thorough investigation of the relevant law and facts), the "weak" presumption becomes a "strong" presumption, which is "virtually unchallengeable."

Id., at 499-500.

In order to determine whether the failure to challenge the bullet evidence was an objectively reasonable "strategic" decision under *Strickland,* the Court must first examine the merits of the claimed error. See, *Smith v. State*, 991 A.2d 1169, 1174 (Del. 2010) ("The state of the law is central to an evaluation of counsel's performance ... a reasonably competent attorney patently is required to know the state of the applicable law"). In this case, it appears from trial counsel's Affidavit that the decision not to challenge the "bullet evidence" on Fourth Amendment grounds rested on trial counsel's belief that: (1) the defendant consented to the surgical procedure and therefore consented to the turnover of the bullet to the police; or (2) the Fourth Amendment and Article I, §6 was not implicated because the "search" was a "private" search conducted by hospital personnel.(A19-A20). It is submitted, however, that those explanations are insufficient to excuse the failure to file a suppression motion in this case.

Under Delaware law, a hospital is required to "report" incidents concerning the treatment of bullet wounds to appropriate police authorities.[10] Based upon information available to trial counsel through discovery, trial counsel should have known that what happened in this

[10] See, 24 *Del.C.* §1762.

case went far beyond merely "reporting" the treatment of a gunshot wound. A review of the medical records provided in discovery should have alerted defense counsel that the Hospital had a well established procedure for collecting foreign objects, such as bullets, that are recovered during surgeries and for preserving such objects as evidence to be turned over to the police. At trial, Amy Drejka, a Forensic Nurse employed by Christiana Care, testified that the consent of the "patient," i.e Rodriguez, is not required for the evidence collection procedure to be carried out. (Trial, Vol. B., p. 56) (A34).[11] In this case, defense counsel's cross-examination of Nurse Drejka confirmed that he was unaware of the Hospital's established policies and simply did not know whether or not his client had consented to the bullet being turned over to the police. (Trial Transcript, Vol. B, pp. 53-58)(A31-A36).

If trial counsel had known what he should have known about the Hospital's established policies for preserving "forensic evidence," he could have persuasively argued that the Hospital personnel were acting as "agents" of the State in preserving the bullet and then turning it over to the police for subsequent forensic examination. In fact, that was precisely the conclusion reached by the court below:

> **I agree that, at this point, the hospital personnel were acting as an agent of the police. The hospital personnel had no reason to preserve the bullet for their own purposes.** Keeping it clearly was not necessary to Rodriguez's medical treatment. The only reason that the hospital personnel kept the bullet was to preserve forensic evidence, a purpose relevant only to the police...the form that the hospital personnel use is called a "release of evidence" form. This suggests that the police knew that hospital personnel would collect bullets for them and do so in such a manner that would establish an adequate chain of custody, allowing the police to use the evidence for their own needs.

[11] See, State's Exhibit No. 13 (A37).

Rule 61 Decision, pp. 7-8 (emphasis added).[12]

Even if it is assumed that defense counsel made a "strategic" decision not to file a suppression motion, that decision nevertheless amounted to deficient attorney performance under *Strickland*. Defense counsel's decision was "unsound strategy" because he did not know what he clearly should have known: (1) that the defendant did not consent to have the bullet turned over to the police, and (2) that the hospital had established procedures for collecting and preserving "forensic evidence" for use by the police. See, *Varner*, 428 F. 3d at 499-500 (defendant can rebut *Strickland's* "weak" strategic presumption by showing either that the conduct was not, in fact, part of a strategy or by showing that the strategy employed was unsound). If the Court agrees with the above conclusion, the Court should proceed to make a *de novo* determination whether the defendant was "prejudiced" by the failure to file a suppression motion. See, *Smith*, 991 A.2d at 1177 n. 41 (determination of "prejudice" is a legal conclusion that is reviewed *de novo*).

(2) Determination of "Prejudice" under *Strickland*

Although *Strickland* phrases the "prejudice" inquiry in terms of "proving" prejudice, in reality, the "prejudice" determination is a

[12] Although so-called "private searches" do not implicate the Fourth Amendment and are not subject to the exclusionary rule, *Virdin v. State*, 780 A.2d. 1024, 1030 (Del. Super. Ct. 2001), the Fourth Amendment and Article 1, §6 of the Delaware Constitution does apply when a private party conducts a search as an "instrument or agent" of the government. *Id.* The Court must consider the following factors in determining whether the person is an instrument or agent of the State: (1) "whether the government knew of and acquiesced in the intrusive conduct and whether the private party's purpose in conducting the search was to assist law enforcement agents or to further [its] own ends;" (2) "whether the private actor acted at the request of the government and whether the government offered the private actor a reward." *Id.*, at 1030-1031.

three-step process.[13] First, it is the defendant's burden to identify and substantiate the errors made by trial counsel. See, *Varner*, 428 F.3d at 502, n12 ("As it is the petitioner's burden to show prejudice, it is his responsibility to develop a record under which the merits of the [claimed error] can be determined"). Second, the petitioner must show that he likely would have prevailed on the merits of the claimed attorney error. *Id.*, at 502 ("Were it likely that the suppression motion would have been denied (or the objection overruled), then [petitioner] could not show prejudice"). If the petitioner succeeds in the first two steps, the court then decides, as a matter of law, whether, in the words of *Strickland*, the error[s] were "pervasive" or "trivial." See, *Strickland*, 466 U.S. at 696 ("A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"); *Buehl v. Vaughn*, 166 F.3d 163, 172 (3d Cir. 1999) ("A court simply cannot make [*Strickland's* prejudice] determination without considering the strength of the evidence against the accused").

If the Court agrees that the defendant has established that a suppression motion should have been filed, the next steps, as outlined above, require the Court to determine whether the defendant "likely would have prevailed on the merits and whether the error was "trivial" or "pervasive." Those questions are discussed in the following sections.

(A) Scope of Protection Against Unreasonable Searches and Seizures

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

[13] The prejudice standard under *Strickland* is not a stringent one. See, *Jacobs v. Horn*, 395 F.3d 92, 105 (3d Cir. 2005) (the defendant "need not show that counsel's deficient performance 'more likely than not altered the outcome in the case' -- rather, he must show only 'a probability sufficient to undermine confidence in the outcome'").

> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The language of the Delaware Constitution affords nearly identical protections:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.

Del. Const. art I, § 6.[14]

Under the above provisions, it is well established that "searches and seizures are per se unreasonable, in the absence of exigent circumstances, unless authorized by a warrant supported by probable cause." *Hanna v. State*, 591 A.2d 158, 162 (Del. 1991). The warrant requirement is also applicable to searches and seizures for incriminating evidence which involve bodily intrusions:

> Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no

---

[14] In several cases, this Court has interpreted Art. I, §6 to afford greater protections than those afforded under the Fourth Amendment. See, *Jones v. State*, 745 A.2d 856, 861-869 (Del. 1999)(declining to follow *California v. Hodari D*, 499 U.S. 621 (1991), and holding that under Art. I §6, a "seizure" occurred when the defendant walked away after the police told him to stop and remove his hands from his pockets); *Dorsey v. State*, 761 A.2d 807, 820 (Del. 2000) (declining to adopt the "good faith" exception to probable cause established in *United States v. Leon*, 468 U.S. 897 (1984); *Flonnory v. State*, 805 A.2d 854 (Del. 2001)(Art. 1, § 6 expands the level of corroboration required under *Florida v. J.L.*, 529 U.S. 266 (2000) for an anonymous tip); *Mason v. State*, 534 A.2d 242, 248 (Del. 1987)(more than probable cause needed for nighttime warrant; "Delaware's independent interest in protecting its citizens against unreasonable searches and seizures did not diminish after the adoption of the Fourth Amendment ..."); *Donald v. State*, 903 A.2d 315 (Del. 2006)(declining to follow *Samson v. California*, 547 U.S. 843 (2006), that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee).

> less could be required where intrusions into the human body are concerned...The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

Winston v. Lee , 470 U.S. 753, 761 (1985) (quoting *Schmerber v. California*, 384 U.S. 757, 770 (1966)).

A "search" occurs when a governmental actor carries out an activity that infringes on an "expectation of privacy that society is prepared to consider reasonable." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (standing to challenge the constitutionality of a search or seizure does not depend upon a property right in the place searched, but rather upon a legitimate expectation of privacy in that place).[15] See also, *California v. Ciraolo*, 476 U.S. 207, 211 (1986) ("*Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?").

The preeminence of the "expectation of privacy" approach, however, was substantially eroded last year by the decision of the United States Supreme Court in *Jones v. United States*, 132 S. Ct. 945 (2012). In *Jones*, the Court found that the warrantless attachment of a GPS device on a defendant's car to track the vehicle's movements on public streets was an unconstitutional search. Reviving the "trespass theory," the Court emphasized that "we must 'assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted'

[15] The "expectation of privacy" standard articulated in *Katz* has been adopted by the Delaware Supreme Court for purposes of Article I, §6 of the Delaware Constitution. See, *Hanna*, 591 A.2d at 163 (adopting the *Katz* "expectation of privacy" analysis in determining whether a search violated the Delaware Constitution or Delaware statutes).

... [F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates. *Katz* did not repudiate this understanding." *Id.*, at 950. The Court found that because Jones' vehicle was plainly an "effect" within the meaning of the Fourth Amendment, the trespassory placing of the GPS tracking device on the exterior of the vehicle and subsequent monitoring of the vehicle's movement amounted to a search. As the Court explained:

> It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.
>
> * * * *
>
> The text of the fourth amendment reflects its close connection to property, since otherwise, it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous. Consistent with this understanding, our Fourth amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century.

Id., at 949.

The "trespass" approach, which was reaffirmed in *Jones*, is applicable to what happened in this case: During a surgical procedure, hospital personnel removed a bullet from the defendant's body and then proceeded to turn that bullet over to the police. Even if it is true that the defendant consented to the surgery and the removal of the bullet, there is no evidence in the record to suggest that the defendant

consented that the bullet be turned over to the police.[16] When the Hospital personnel removed the bullet during the surgery, they intended to turn the bullet over to the police. That intent was not a mere afterthought, but was in accordance with the Hospital's standard policies. That intent transformed otherwise lawful conduct into a "trespass" because the conduct of the Hospital personnel exceeded the scope of the "consent" obtained from the defendant.[17]

(B) Discussion of "Prejudice" Under *Strickland*

Based on the discussion and arguments above, it is submitted that *Varner's* second factor has been satisfied, i.e that the defendant has established that a suppression motion would likely have been successful. Thus, the final step in the *Varner* calculus is for the Court to weigh the error against the other evidence in the case to determine if the error would have reasonably affected the outcome of the trial. In this case, the answer to that question is clear. The bullet evidence was the **only** evidence that arguably linked the defendant to the home invasion. If that evidence had been suppressed, the State would have been unable to prosecute the defendant for the charged offenses.

---

[16] On cross-examination by defense counsel, Nurse Drejka testified that the defendant's consent to turn the bullet over to law enforcement was neither sought after or obtained. (Trial, Vol. B, p. 56)(A34).

[17] The trial court reasoned that no constitutionally protected "search" occurred because "Rodriguez did not own the bullet and had no possessory interest in it. Thus, it was not an "effect" of his..." *Rule 61 Decision*, p. 10. Even though the trial court's decision on this point is reviewed *de novo*, the reasoning employed by the trial court is fundamentally flawed. Whether or not Rodriguez "owned" the bullet or had a possessory interest in it is irrelevant. See, *Scott v. State*, 672 A.2d 550, 553 (Del. 1996) ("the scope of a search is determined by the language used in giving the consent").

CONCLUSION

For the reasons and upon authorities set forth herein, the Court should grant Appellant's Motion for Post Conviction Relief and remand the case to the Superior Court for a new trial.

Respectfully submitted,

/s/ Joseph M. Bernstein
JOSEPH M. BERNSTEIN (#780)
Attorney for Appellant

Dated: March 8, 2013