



IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAMAZAN SAHIN	:	
Defendant Below-	:	
Appellant,	:	
	:	
v.	:	No. 357, 2012
	:	
STATE OF DELAWARE,	:	
Appellee.	:	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY
ID No. 0710019209

APPELLANT'S OPENING BRIEF
(CORRECTED)

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Dated: January 3, 2013

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NATURE AND STAGE OF PROCEEDINGS

The defendant/Appellant, Ramazan Sahin ("Sahin"), was convicted in a non-jury trial of Rape First Degree (nine counts); Possession of a Deadly Weapon During Commission of a Felony ("PDWDCC") (nine counts); and Aggravated Menacing (one count).¹ Sahin was sentenced by the court to life imprisonment plus 138 years in jail, followed by six months probation.² Sahin's convictions and sentences were affirmed on direct appeal.³

A timely Motion for Post-Conviction Relief ("Rule 61 Motion") was filed on March 17, 2011. (A14, Docket #89); (A31, et seq.). In general, the Rule 61 Motion asserted claims based on alleged ineffective assistance of counsel at trial. Sahin's trial attorney filed an affidavit in response to the allegations in the Rule 61 Motion and also gave a statement in the evidentiary hearing held by the Court in the Rule 61 proceedings. On March 22, 2012, Commissioner Lynne M. Parker issued a Report and Recommendation that Sahin's Rule 61 Motion be denied.⁴ Sahin filed a timely appeal from the Commissioner's Report. (A17, Docket #106). The Rule 61 Decision was adopted by the Superior Court on June 8, 2012. (A17, Docket #109).⁵

¹ The original Indictment charged the defendant with 61 separate felonies, including multiple counts of Rape First Degree, Kidnaping Second Degree and PDWDCC. Except for the 19 charges that went to trial, all of the remaining indicted charges were *nolle prossed* by the State. (A1-A2).

² See, *Sahin v. State*, 7 A.3d 450, 451 (Del. 2010) ("*Sahin I*").

³ *Sahin I*, at 454.

⁴ See, *State v. Sahin*, 2012 Del. Super. LEXIS 131 (Del. Super. 2012) ("*Rule 61 Decision*").

⁵ In accordance with Supreme Court Rule 14(b)(vii), a copy of the *Rule 61 Decision* is appended to this Brief.

On June 28, 2012, Sahin filed a timely appeal in this Court from the Rule 61 Decision. (A18, Docket #110). This is Sahin's Opening Brief in support of his appeal.

SUMMARY OF ARGUMENT

1. Under the Sixth Amendment to the United States Constitution, the right to decide whether to plead guilty or have a trial belongs exclusively to the defendant.

2. If the defendant chooses to have a trial, his attorney must refrain from taking any actions that might undermine the defendant's chosen objective to seek a "not guilty" verdict, even though the attorney strongly believes that the defendant has made an unwise, or even a foolish, choice.

3. In this case, the defendant's objective to secure a "not guilty" verdict was compromised when defense counsel told the trial judge, after the defendant had decided to waive a jury trial, that he had strongly advised the defendant that he should accept the State's plea offer rather than have a trial.

4. In this case, the defendant's objective to secure a "not guilty" verdict was also compromised when defense counsel made comments to the trial judge which attacked the credibility of the defendant.

5. The above errors by defense counsel amounted to "structural errors" that went to the integrity of the trial process itself and did not require a separate showing of "prejudice."

6. The statements by defense counsel to the court concerning the credibility of the defendant were such that a reasonable outside observer would have reason to doubt the ability of the trial judge to impartially evaluate the defendant's credibility.

STATEMENT OF FACTS

The historical facts that led to the defendant's convictions and sentence are not at issue in this appeal. Those facts are summarized in considerable detail in the Commissioner's Rule 61 Decision. In general, the charges that went to trial involved claims by 8 women who alleged that they had been sexually assaulted by the Defendant. *Rule 61 Decision*, at *6. All of the alleged assaults fit a common pattern: Seven of the eight women were prostitutes; all of the women were sexually assaulted at the canal banks of the C & D Canal between February 2007 and October 2007; each of the women were picked up by someone fitting Sahin's description, driven to the canal banks, and forced at knifepoint to perform sexual acts; after the sexual assault had been completed, six of the women were told to get out of the car to retrieve napkins or paper towels from the assailant's trunk, and when they got out of the car, the assailant drove off and left them stranded. One of the women managed to free herself at the canal banks and ran away. The last one of the eight women was driven by the assailant back to the apartment complex from which she had been picked up. *Id.*, at *11-*12.⁶

By October 2007, the Delaware State Police, Governor's Task Force, realized there was an assailant picking up women (mostly prostitutes), taking them to the canal banks, forcing them at knifepoint to perform sexual acts, and then leaving them stranded at the canal banks. *Id.*, at *36. The Delaware State Police set up a surveillance at the canal banks. The police were looking for a person fitting the description provided by the alleged victims, driving a car fitting the description of the car described by the alleged victims, with knives in the car, and most likely

⁶ A detailed account of the testimony of each of the complaining witnesses who testified at trial can be found in the Rule 61 Decision, at *12-*35.

having a prostitute as a passenger. *Id.*, at *37. On October 16, 2007, the police stopped a black Honda Prelude with Delaware tags at the canal banks. Defendant Sahin was driving the car and a female prostitute, who Sahin said he met in Maryland that evening, was in the front passenger seat. When he was stopped, Sahin told the police officers that he was lost. Once the police became aware that the female passenger was a prostitute, they quickly realized that Sahin fit the profile of the suspect they were looking for and took Sahin into custody. *Id.*, at *37-*38.

Following his arrest, Sahin was interviewed by the police. All of Sahin's interviews with the police took place on October 16, 2007, the date of his arrest. The first interview was conducted at Delaware State Police Troop 2. During Sahin's first interview with the police, he admitted, among other things, to having picked up women, taking them to the canal banks by the C&D Canal, forcing them at knifepoint to have sexual relations with him, and then leaving the women stranded at the canal banks in the dark. *Id.*, *7-*8. His second interview with the police was conducted at the canal banks where he showed the police, among other things, his various crime scenes. Sahin's third interview with the police was conducted back at Delaware State Police Troop 2. *Id.*, at *8. During these interviews, Sahin explained that he began sexually assaulting women in 2007 and that all of his sexual assaults took place that year. Sahin explained to the police how each of his assaults followed a precise *modus operandi*. He explained that he only assaulted women at the canal banks. He would drive around and pick up women, who he believed to be prostitutes, and then take them to the canal banks. When he reached the canal banks, he would usually make a U-turn so that his car would be facing out. He would then retrieve a knife and force the

women to perform sexual acts at knifepoint.⁷ After he completed the sexual assaults, he would direct his victims to get out of the car and get something out of his trunk, usually napkins or paper towels and would pop the trunk from the inside of his car. When the women got out of the car, he would then drive off, leaving them stranded in the dark by the canal. *Id.*, at *9. In addition, Sahin told the police that on one occasion, after sexually assaulting a woman at the canal banks, he then returned her to the apartment complex where he had picked her up. He also admitted that a few of the women that he took to the canal banks to sexually assault managed to get away him. *Id.*, at *10-*11.

Sahin's defense at trial was that although he admitted that he had sexually assaulted women at the canal banks, he denied ever seeing, nor ever having any sexual contact of any nature whatsoever, with any of the eight complaining witnesses. *Id.*, at *12.⁸ Prior to the start of the trial, the defendant waived his right to a jury trial. *Id.*, at *4. After hearing all of the evidence, including testimony from the defendant himself, the trial court found the defendant guilty as to all of the charges. *Id.*⁹

The Direct Appeal

In the defendant's direct appeal, the only claim that was raised was a claim that his trial counsel was ineffective because he told the trial

⁷ Two knives were found in Sahin's car. Both of the knives were found in the driver side interior door panel. *Id.*, at *43.

⁸ This was not a consent case. Sahin did not claim that any sexual relations with the eight women were consensual. His defense was that he did not have any sexual contact with any of the complaining witnesses. *Id.*, at *12.

⁹ The defendant elected to testify in his own defense at trial. (Trial, 6/1/09, pp. 14-24) (A26-A28). As noted above, the defendant testified that he had taken other women down to the canal banks, but none of those women were the women who testified against him at trial. (Trial, 6/1/09, p. 20) (A27); (Trial, 6/1/09, p. 22) (A28).

judge that the defendant should have accepted the State's plea offer and also expressed his opinion that the defendant was untruthful about his need for an interpreter. The defendant claimed that these statements made by his defense counsel prior to and during the bench trial violated his *Sixth Amendment* right under the United States Constitution to a fair trial and to the effective assistance of counsel. *Sahin I*, at 451.

This Court agreed that the statements made by the defendant's trial "are very troubling and give rise to great concern," because Sahin elected to have a bench trial:

When Sahin rejected the State's plea offer, the defense attorney should have simply stated that fact. Instead, the defense attorney stated that Sahin's rejection of the State's plea offer and decision to have a trial was against the advice of counsel. That not only divulged a confidential communication but also indicated the defense attorney's belief in either the strength of the State's case, or the weakness of the only defense evidence (Sahin's testimony), or both.

Id., at 452-453.

This Court also found that the defendant's trial attorney "advised the trial judge on several occasions that Sahin was not credible when he said he needed an interpreter." *Id.*, at 453.¹⁰ The court concluded that these statements were "unfairly prejudicial" to the defendant because the credibility of the defendant, versus the credibility of the complaining witnesses, "was the central issue for the trial judge to determine." *Id.*, at 453.

Nevertheless, in the direct appeal, this Court declined to address the defendant's claim of ineffective assistance of counsel, but affirmed the defendant's convictions and sentence:

¹⁰ These statements were based upon counsel's personal assessment of the defendant's ability to engage in confidential communications with defense counsel, unless the defendant decided to "play dumb." *Id.*, at 453.

Despite the troubling questions raised by the present record, that record is insufficient for this Court to determine Sahin's claim that he was denied his *Sixth Amendment* right to the effective assistance of counsel. The judgment of the Superior Court is affirmed without prejudice to the ineffective assistance of counsel claim being raised in a timely filed Rule 61 motion for post-conviction relief, at which a complete record can be developed.

Id., at 454.

In the direct appeal, this Court also held that any prejudicial effects from defense counsel's statements concerning the credibility of the defendant "will not be determined by the subjective good faith efforts of the trial judge to be fair but by whether the actions by Sahin's attorney created an objective 'stigma surrounding the appearance of an inability to assess credibility fairly.'" *Id.*, at 453.¹¹

The Post-Conviction Proceedings

In the post-conviction proceedings in the Superior Court, the defendant raised the very same claims of ineffective assistance of counsel that had been presented in the direct appeal. *Rule 61 Decision*, at *45; *id.*, at *1. As a threshold matter, the court below concluded that the defendant's claims of ineffective assistance of counsel should be decided under the framework established in *Strickland v. Washington*.¹² The court below also rejected the defendant's contention that his claims should be decided under the framework established in *United States v.*

¹¹ This Court also directed that "the issue of an objective appearance of prejudice should not be decided by the judge who presided over Sahin's bench trial. Therefore, in the event that Sahin files a Rule 61 motion for post-conviction relief, it should be assigned to another judge. *Id.*, at 453-454.

¹² 466 U.S. 668 (1984).

Cronic.¹³ In rejecting the defendant's argument that *Cronic*, rather than *Strickland*, was controlling, the Superior Court noted that "in the subject action, the Delaware Supreme Court on direct appeal has already held that it is the *Strickland* standard that controls in this case. *Rule 61 Decision*, *59-*60.¹⁴ Applying the *Strickland* formulation, the court below found that trial counsel's statements to the court concerning the defendant's rejection of the State's plea offer and his opinions concerning the credibility of the defendant's need for an interpreter amounted to deficient performance under *Strickland*. *Id.*, at *62. The Superior Court concluded, however, that the defendant was not entitled to relief because the defendant had failed to establish "prejudice" under *Strickland* from his attorney's statements to the trial court:

In this case, the evidence against Sahin was overwhelming. There was a large quantity of undisputed corroborating evidence and Sahin made many material inconsistent statements to the police. The evidence in this case was so one-sided in favor of the prosecution that no reasonable fact finder could have failed to convict. There was no reasonable probability that the outcome of the trial would have been different absent counsel's statements. Sahin cannot establish actual prejudice under the facts of this case.

Id., at *62-*63.

The Superior Court also concluded that any prejudice caused by trial counsel's statements concerning the defendant's insistence on having a

¹³ 466 U.S. 648 (1984). In *Cronic*, a companion case to *Strickland*, the United States Supreme Court held that there are three scenarios in which the defendant need not satisfy *Strickland*'s "prejudice" test, because prejudice is presumed: (1) where there is a complete denial of counsel; (2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) where counsel is asked to provide assistance in circumstances where competent counsel likely could not. See, *Cooke v. State*, 977 A.2d 803, 848 (Del. 2009).

¹⁴ The threshold question whether this Court was correct in its preliminary conclusion that this case is controlled by *Strickland* rather than *Cronic* is discussed in Argument I herein.

trial and the statements concerning the defendant's credibility did not deprive the defendant of a fair trial:

[The statements by trial counsel] did not create an objective stigma surrounding the appearance of an inability to assess credibility fairly. There was no objective appearance of prejudice. Defendant's claim fails.

Id., at *74.

Additional facts necessary for the resolution of the claims presented in this appeal are set forth in the Argument sections which follow.

ARGUMENT

I. THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED WHEN IT BECAME APPARENT THAT THERE WAS A FUNDAMENTAL CONFLICT BETWEEN THE DEFENDANT AND HIS ATTORNEY CONCERNING THE DECISION TO PROCEED TO TRIAL RATHER THAN PLEAD GUILTY. DEFENSE COUNSEL UNDERMINED THE DEFENDANT'S CHOICE TO HAVE A TRIAL BY MAKING PREJUDICIAL STATEMENTS TO THE COURT CONCERNING THE DEFENDANT'S CHARACTER AND CREDIBILITY

Questions Presented

The questions presented in this Argument are three-fold. First, was the defendant deprived of his Sixth Amendment right to the effective assistance of counsel and a fair trial when defense counsel told the trial court that the defendant had rejected a plea offer proffered by the State and that the defendant's decision to proceed to trial was against counsel's advice that he accept the State's plea offer. Second, was the defendant deprived of his Sixth Amendment right to the effective assistance of counsel and a fair trial when defense counsel made statements to the court concerning the defendant's character and credibility which undermined the defendant's objective to secure a "not guilty" verdict. Third, assuming that the conduct of defense counsel amounted to ineffective assistance, should the effect of those errors be judged under the well established "prejudice" formulation adopted in *Strickland*, or should the Court conclude that the errors warrant application of the exception to *Strickland* established in *Cronic*, where "prejudice" is presumed to exist. These questions were raised by the defendant in the Rule 61 Motion. (A31, *et seq.*).

Scope of Review

This Court will conduct *de novo* review concerning a claim of violation of a defendant's federal constitutional rights. See, *Cooke v. State*, 977 A.2d 803, 840 n.26 (Del. 2009).

Argument

The Defendant's Constitutional Right to Choose Between Having a Trial and Entering a Guilty Plea

In this case, it cannot be disputed that a real conflict existed between the defendant and his attorney as to how best to present a defense to the charges. It is also clear that the existence of this conflict was brought to the trial court's attention by defense counsel after the defendant had elected to waive a jury trial and just prior to the start of the trial itself. Until recently, the effect of such a conflict on the obligations of defense counsel was unclear. That uncertainty, however was resolved by this Court in *Cooke v. State*.¹⁵

In *Cooke*, the Court began its analysis by noting, "When a defendant is represented by counsel, the authority to manage the day-to-day conduct of the defense rests with the attorney." *Id.*, at 840. The Court also acknowledged that even though defense counsel is afforded considerable discretion to make "tactical decisions," it is also true "from counsel's function as assistant to the defendant derive[s] the overarching duty to advocate the defendant's cause and more particular duties to consult with the defendant on important decisions." *Id.*, at 841 and n.33 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)):

The defense attorney's duty to consult with the defendant regarding "important decisions" does not require counsel to obtain the defendant's consent

¹⁵ The trial court did not have the benefit of this Court's holdings in *Cooke* at the time of the trial in this case. This case, however, does not present any issue whether *Cooke* should be applied "retroactively" despite the fact that *Cooke* was decided after Sahin's trial was concluded. Even if viewed as a "new rule," *Cooke* is controlling because this case was pending on direct appeal when *Cooke* was decided. See, *Griffith v. Kentucky*, 479 U.S. 314, 324-326 (1987) ("the failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication ... after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply the rule to all similar cases pending on direct review").

to "every tactical decision." However, certain decisions regarding the exercise or waiver of basic trial and appellate rights are so personal to the defendant "that they cannot be made for the defendant by a surrogate.

Id., at 841 (quoting *Florida v. Nixon*, 543 U.S. 175, 187 (2004)).

The Court then explained that a criminal defendant has "ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Id.*, at 841 (quoting *Jones v. Barnes*, 463 U.S. 745, 751 (1983)):

Therefore, as to these decisions on the objectives of the representation, a lawyer "must both consult with the defendant **and** obtain consent to the recommended course of action." These rights cannot be waived by counsel without the defendant's fully-informed and publicly-acknowledged consent.

Id., at 842 (quoting *Nixon*, 543 U.S. at 187) (emphasis in original).

Finally, the Court acknowledged that a criminal defendant's "autonomy" to make these basic decisions is not diminished by the attorney's personal belief that the client is making a "bad" decision:

[Such choices] are indeed strategic choices that counsel might be better able to make, [but] because the consequences of them are the defendant's alone, they are too important to be made by anyone else. **Moreover, counsel cannot undermine the defendant's right to make these personal and fundamental decisions by ignoring the defendant's choice and arguing affirmatively against the defendant's chosen objective.**

Id., at 842 (emphasis added).

Application of Cooke to This Case

(1) The Existence of a Conflict Between the Defendant and His Attorney

In this case, as noted above, a real conflict existed between the defendant and his attorney as to how best to proceed with the case. The defendant insisted that he was "not guilty" and wanted to proceed to

trial. Defense counsel strongly believed that the evidence against the defendant was "overwhelming" and that the defendant should accept the State's plea offer. (Evidentiary Hearing, p. 8) (A47). The Defendant acknowledges that the mere existence of a conflict between himself and defense counsel, as described above, does not amount to a denial of the right to counsel or the deprivation of the right to a fair trial. However, as Cooke demonstrates, a constitutional violation will be found to exist when the conduct of defense counsel actually "undermines" the defendant's choice to plead "not guilty" and have a trial. In this case, as discussed in detail below, the trial record is replete with statements and remarks by trial counsel that served to undermine the defendant's objective to secure a "not guilty" verdict.

**(2) Defense Counsel Undermined the Defendant's
Choice to Have a Trial and Secure a "Not Guilty" Verdict**

Before the trial even started, defense counsel advised the trial judge that Sahin was offered a plea by the State which he declined to accept and that proceeding to trial instead of taking the plea was against counsel's judgment. (Office Conference, 5/19/09, pp. 20-22) (A21-A22).¹⁶ However, according to defense counsel, the defendant would not answer any questions about the case and was generally uncooperative. Defense counsel also told the court that the defendant had consistently refused to discuss how he would respond to questions that would surely be asked by the prosecutor if he elected to testify at trial. (Office Conference, 5/19/09, pp. 2-4) (A19). Defense counsel also expressed his opinion that "I don't think he was going to fare too well in front of a jury...he doesn't portray a person which may endear himself to jurors...He may say something, blurt something out if he doesn't like

¹⁶ Defense counsel did not disclose the details of the State's plea offer to the court.

what is said. He may criticize them out loud." (Office Conference, 5/19/09, pp. 4-5) (A19).

At the same time, defense counsel also informed the trial court of the possibility that the defendant would waive his right to a jury trial and have the case heard by the judge. After considerable discussion with counsel and the defendant, which primarily concerned the need for an interpreter, the defendant told the court that he wanted to waive his right to a jury trial. (Office Conference, 5/19/09, pp. 14-15) (A20).¹⁷

Near the conclusion of the office conference, defense counsel, *sponte*, also disclosed to the court his personal opinions concerning the merits of the charges against the defendant:

I just wanted the record - in front of him and his family, as well as the Court - to understand that we have spent a great deal of time reviewing the evidence in this case...[which led to] my recommendation to my client to consider the benefit of having this matter resolved short of a trial by entering a plea.

* * * *

I also told him, however, that it was his choice and that I would support him either way, but I said that the offer that has been extended by the State in this case, I thought was a benevolent offer, relative to what I saw in the evidence that would be produced in this case...We talked about this many times, and I reiterate the same thing that I said to him to his family when I had occasion to speak with them.

I talked with his dad as late as last night in my office at some length, and obviously. It is my client's choice as to what he wants to do. He has indicated that he wants to resolve this by way of making the State prove their case. I told him that was against my judgment under the circumstances. The danger of him being convicted was such that he was - it was a risk, and we - when you compare that with what the State's offer was, I think that he

¹⁷ The defendant's decision to waive a jury trial was repeated, through an interpreter, on May 21, 2009, just prior to the start of the trial itself. (Trial, 5/21/09, pp. 7-8) (A23).

certainly understands the plea offer, he understands the potential consequences, and it was his choice...to go forward with trial, contrary to my advice to him to do - consider otherwise.

I will support him in this, and I will defend him to the best of my ability...but the record should reflect that it is not in his best interest to go forward...

(Office Conference, 5/19/09, pp. 18-21) (A21).

Defense counsel's frustration with the defendant's refusal to accept the State's plea offer is further evidenced by his statements in the evidentiary hearing on the Rule 61 Motion:

I would also point out the reason we had a bench trial in the case was this. The evidence in this case, in my opinion, was overwhelming. That was also true of prior counsel.¹⁸ And I think that he had to be made aware of that...

(Evidentiary Hearing, 2/12/12, p. 8) (A47).

When it became apparent that he was going on his own and he wouldn't tell me, basically, what his responses would be and how he was going to react, in an office conference I made some comment that I was - I don't know exactly what the word was, but my recollection was I made a comment that I was sorry we were in trial. He should have kept the plea offer that had been intended (sic). And I'm guilty of that. I did it. It was out of frustration...he was probably the most difficult person I ever represented, most difficult.

(Evidentiary Hearing, 2/12/12, pp. 11-12) (A50-A51).

Defense counsel also undermined the character and credibility of the defendant in his statements to the court in response to the defendant's assertion that he needed an interpreter to assist him in the trial. Whenever the issue of the need for an interpreter came up, defense counsel repeatedly expressed his opinion that the defendant did not need

¹⁸ The same type of conflict apparently caused the court below to allow Sahin's former trial attorney to withdraw from the case on the ground that the attorney-client relationship was "irretrievably broken." (A7, Docket #29).

the assistance of an interpreter. See, *Rule 61 Decision*, *47-*55. In one especially noteworthy exchange, it is submitted that trial counsel "crossed the line" between the mere expression of an opinion about the need for an interpreter, to affirmatively undermine his client's credibility. In discussing the need for an interpreter to review the content of the defendant's taped statements to the police, defense counsel stated:

My impression is that I don't know. I don't think that he has solicited the help of an interpreter necessarily for his father. I **think he does it because he seeks-- he seeks refuge in the fact that he is not particularly fluent in English, and he then can decide if he doesn't want to answer me, or he doesn't want to answer the Court, he can play dumb.**

I don't know that. That's my opinion from dealing with him, and I talked to him a lot...¹⁹

* * * *

[Whenever] I or my office people met with him in prison, we had no interpreter. **The only thing that was an impediment to the conversation was his attitude,** because he didn't want to...²⁰

Lastly, the defendant's objective to secure a "not guilty" verdict was also undermined by defense counsel's closing argument. At trial, the principal evidence presented by the defense to rebut the State's case-in-chief was the testimony of the defendant himself.²¹ In his direct testimony, the defendant admitted that he had been truthful when he told the police that he had sex with numerous women, whom he believed to be prostitutes, along the C & D Canal banks. The defendant denied however,

¹⁹ (Trial, 5/21/09, p. 127) (A25) (emphasis added).

²⁰ (Trial, 5/21/09, p. 130) (A25) (emphasis added).

²¹ The only other witness called by the defense was a fingerprint expert who testified that none of the latent fingerprints recovered from the defendant's vehicle was a match to the known prints of the alleged victims.

that he ever engaged in sex with any of the women who testified at the trial. (Trial, 6/1/09, pp. 18-22) (A27-A28). In other words, the defendant admitted that he would frequently pick up prostitutes, take them to the C & D canal banks, have sex with them (sometimes forcibly at knifepoint), and leave them stranded there, but that those things happened to other women - not to the women who testified against him at the trial.²²

In the closing argument, however, defense counsel did not directly attack the credibility of the State's complaining witnesses. Rather, defense counsel argued that the acts of the defendant, as alleged by the State, could be explained in terms of a "cultural difference."²³ As argued by defense counsel:

It is no defense to a criminal case if someone is ignorant of the law, we all understand that, but my client in this case, has not only, from the witness stand, but I could suggest that he has discussed this with me, although it is not part of the testimony here, at no time was anyone hurt physically, or cut, or stabbed, or abused, or beaten, which I would submit to the court, in a serial rape context probably is the exception rather than the rule.

(Trial, 6/1/09, pp. 64-65) (A29-A30).

At that point, defense counsel's closing was interrupted by the court, who asked, "Why is that relevant given the elements of the alleged crimes?" (Trial, 6/1/09, pp. 65) (A30).

Defense counsel responded:

²² It is likely that defense counsel did not know what the defendant was going to say when he called the defendant to the witness stand. In his Affidavit, defense counsel stated that "Sahin did not want to discuss trial strategy and would not disclose to me what he intended to say on the witness stand." (A45).

²³ Defense counsel had also referred to a "cultural component" in his opening statement. (5/21, pp. 11-12).

It is not. This is in the context of why I say that there is a cultural difference for, I think, for him. There is a difference for him because he had mentioned that almost sua sponte from the stand, he has taken that position at the outset. It is not a defense to the crimes charged, and in that sense, it is not relevant other than by way of explanation, relevance is what I said at the beginning with respect to a culture difference, to some degree, which was just announced by defense counsel, there was representation by me at the outset there was a cultural difference.

(Trial, 6/1/09, p. 65) (A30).

Although no doubt made in good faith, defense counsel's closing argument all but conceded his guilt, albeit with an explanation based upon "cultural difference." Clearly, the closing argument substantially undermined the defendant's objective to obtain a "not guilty" verdict.

Is This Case Controlled By *Strickland* or by *Cronic*?

As noted in the Statement of Facts above, in Sahin's direct appeal, this Court concluded that the effect of any "deficient performance" by defense counsel at trial should be judged under the "prejudice" standard established in *Strickland*:

Sahin argues that this case falls within the *Cronic* exceptions to the *Strickland* prejudice test. We have concluded that none of the three circumstances listed in *Cronic* is directly applicable to the facts of Sahin's case. Nevertheless, the comments by Sahin's attorney are very troubling and give rise to great concern, because Sahin elected to have a bench trial.

Sahin I, at 452.

Accordingly, in the Rule 61 proceeding, the court below rejected the defendant's claim that *Cronic* was controlling, applied *Strickland*'s "prejudice" test to the errors made by defense counsel, and concluded that the defendant was not entitled to post-conviction relief. *Rule 61 Decision*, *59-*63. Unlike the Court below, this Court is not constrained to follow the conclusion, reached in the direct appeal, that Sahin's

Sixth Amendment claims are controlled by *Strickland*. Rather, it is respectfully suggested that the Court should revisit this question *ab initio*, for the same reasons that the Court declined to address the merits of Sahin's Sixth Amendment claim in the direct appeal- the record was not fully developed.

In *Cooke*, a 3-2 decision, the majority opinion and the dissenting opinion presented sharply divergent views as to whether *Strickland* or *Cronic* should be applied to what happened in *Cooke's* trial. At the outset of its discussion, the majority explained the fundamental principle that the Sixth Amendment's right to counsel was designed to effectuate:

The United States Supreme Court has long held that 'the right to counsel is the right to the effective assistance of counsel.' The purpose of this right is to 'ensure a fair trial' and 'ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.' Accordingly, **'[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'**

Id., 977 A.2d at 840 (internal citations omitted) (emphasis added).

The majority in *Cooke* also endorsed *Cronic's* explanation of the Sixth Amendment's guarantee that defense counsel expose the State's case to "meaningful adversarial testing":

The adversarial process protected by the *Sixth Amendment* requires that the accused have 'counsel acting in the role of an advocate.' The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted...the kind of testing envisioned by the *Sixth Amendment* has occurred. **But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.**

Id., 849 (internal citations omitted) (emphasis added).

Citing to *Bell v. Cone*,²⁴ the majority in *Cooke* explained the difference between *Strickland*-type errors and *Cronic*-type errors:

[I]n 'distinguishing between the rule of *Strickland* and that of *Cronic*, **[the] difference is not of degree but of kind,' and that this distinction hinges on whether the petitioner alleges a defect in the 'proceeding as a whole' or 'at specific points' of the trial.**

Id., at 849 (internal citations omitted) (emphasis added).²⁵

Applying the above principles to the attorneys' errors alleged by *Cooke*, the majority concluded that the errors made by defense counsel created a "structural defect" that infected the entire trial:

Cooke's overarching strategy was to obtain a verdict of not guilty by presenting evidence that he was factually innocent. Defense counsel had an independent and inconsistent strategy: to obtain a verdict of guilty but mentally ill by conceding *Cooke's* guilt and introducing evidence of his mental illness during the guilt/innocence phase of the trial. **Counsel's override negated *Cooke's* decisions regarding his constitutional rights, and created a structural defect in the proceedings as a whole.**

Unlike the specific allegations at issue in *Cone*, the record in this case demonstrates to us a two-fold breakdown in the adversarial system of justice that pervaded *Cooke's* entire proceeding. First, *Cooke's* attorneys did not 'assist' *Cooke* with his trial objective of obtaining a not guilty verdict. Second, [defense counsel]...undermined the due process requirement that the State prove *Cooke's* guilt--and his eligibility for the death penalty--beyond a reasonable doubt. **The defense attorneys introduced *Cooke's* confession to Dr. Turner, argued to the jury that *Cooke's* testimony was not**

²⁴ 535 U.S. 685 (2002).

²⁵ In *Cone* itself, the Court noted that the defendant had alleged only that his counsel failed to introduce certain evidence and waived a closing argument and held that "these challenges were 'plainly of the same ilk as other specific attorney errors we have held subject to *Strickland's* performance and prejudice components.'" *Id.*, 535 U.S. at 697-698.

credible, and told the sentencing judge and the jury that Cooke committed the crimes....

Id., at 849-850 (internal citations omitted) (emphasis added).

The majority thus concluded that the "conduct of Cooke's defense attorneys was inherently prejudicial and does not require a separate showing of prejudice...Although done in good faith, defense counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Accordingly, we find no other alternative except to grant Cooke a new trial." *Id.*, at 850.

The dissenters in *Cooke* argued that *Strickland* rather than *Cronic* should apply because "*Cronic* applies only where counsel does **nothing or next to nothing** to discharge his duty to present a vigorous defense"²⁶...The majority errs by focusing on counsel's obligation to acquiesce in Cooke's objective, rather than on whether Cooke received a fair trial with reasonably effective assistance of counsel that produced a 'just result.'²⁷ Nowhere does the Majority even suggest that a new trial where counsel blindly follows Cooke's irrational position would produce a more 'just' outcome. Therefore, we respectfully dissent."²⁸

²⁶ *Id.*, at 860 (Steele, C.J. and Jacobs, J., dissenting).

²⁷ The dissent emphasized that "Cooke's counsel actively engaged in the pretrial and trial proceedings. They were never absent at any stage of the trial. Cooke not only had access to counsel but also had the discretion to make key decisions at critical stages of the trial. To reiterate: Cooke pleaded not guilty, testified, his counsel cross examined witnesses against him where advantageous..." *Id.*, at 862. In this case, the court below chose to adopt the same rationale for applying *Strickland* that had been rejected by the majority in *Cooke*. See, *Rule 61 Decision*, at *60 ("Defense counsel made appropriate motions, objections, contested facts where he could and fully participated in all aspects of the trial").

²⁸ *Id.*, at 866 (Steele, C.J. and Jacobs, J., dissenting).

The majority, however, squarely rejected the dissenters' argument that the outcome was "just," given the "overwhelming" evidence that Cooke was guilty - a result that could not have been avoided even in the absence of the "structural defects" in the trial, as found by the majority:

We also disagree with the Dissent's public policy argument. The short answer to the 'detrimental public policy considerations' enumerated by the Dissent is that the fundamental rights we have explained are personal to the defendant and are not subject to these considerations. Every defendant, including Cooke, is entitled to a fair trial with the assistance of counsel necessary to justify reliance on the outcome. The Dissent describes the evidence as "overwhelming" but '[w]hether a man is innocent cannot be determined from a trial in which ...denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented.' Given the failure of the adversarial process in this case, there is no other alternative except to grant a new trial.

Id., at 853.

Application of Cooke To This Case

The clear teaching of *Cooke* is that the choice to plead guilty or have a trial belongs exclusively to the defendant. Furthermore, if the defendant chooses to have a trial and pursue a "not guilty" verdict, defense counsel is required to "assist" the defendant, within the bounds of the law, to attempt to achieve that result. *Cooke* also teaches that a corollary to defense counsel's obligation to provide assistance to the defendant is the obligation to refrain from doing anything that would undermine the defendant's chosen objective. The fact that defense counsel may sincerely and in good faith believe that the defendant is making a foolish, if not irrational, decision does not matter.²⁹

²⁹ See, *Cooke*, 977 A.2d at 864, n. 184 ("Here, counsel did not abandon Cooke's defense; they simply did not pursue Cooke's irrational and unreasonable strategy to pursue innocence").

The parallels between this case and *Cooke* are striking. In both cases, the evidence of guilt could be described as "overwhelming." In both cases, the defendant insisted on a strategy that defense counsel strongly disagreed with and the resulting impasse was clearly communicated to the court. Most importantly, in both cases, defense counsel engaged in conduct that effectively impeded, if not nullified, the objective that the client sought to achieve.

In *Cooke*, defense counsel "introduced Cooke's confession to Dr. Turner, argued to the jury that Cooke's testimony was not credible, and told the sentencing judge and the jury that Cooke committed the crimes." *Id.*, at 850. In this case, as this Court has already noted in the direct appeal, "[defense counsel] advised the trial judge on several occasions that Sahin was not credible when he said he needed an interpreter, [even though] Sahin's entire defense...was related to his credibility as a witness." *Sahin I*, at 453.

In *Cooke*, defense counsel told the jury that the defendant was "guilty, but mentally ill" even though the defendant had repeatedly told counsel that he wanted to pursue a defense that he did not commit the charged crimes. In this case, after the defendant had testified that he did not sexually assault any of the eight women who testified at trial, defense counsel all but conceded, in the closing argument, that Sahin was guilty, but that his guilt was somehow mitigated by "cultural differences." (Trial, 6/1/09, pp. 64-65) (A29-A30). See, *Cooke*, 977 A.2d at 850, n.84 (quoting *State v. Carter*, 14 P.3d 1138, 1146 (Kan. 2000)) (concluding that "we must reverse because counsel's abandonment of his client's defense [by conceding the only disputed facts in closing argument] caused a breakdown in our adversarial system of justice").

In sum, the errors of defense counsel in this case, while no doubt made out of frustration and in good faith, created a "structural defect" in the trial process itself that does not require a separate showing of prejudice. See, *Cooke*, 977 A. 2d at 850 ("The conduct of Cooke's defense attorneys was inherently prejudicial and does not require a separate showing of prejudice, because Cooke's counsel negated his basic trial rights and "failed to function in any meaningful sense as the [prosecution's] adversary"). The same result should obtain in this case.

**II. DEFENSE COUNSEL'S STATEMENTS TO THE COURT
CONCERNING THE DEFENDANT'S CREDIBILITY CREATED
AN OBJECTIVE APPEARANCE OF BIAS AGAINST THE
DEFENDANT**

Question Presented

Did the statements made by defense counsel concerning the credibility of the defendant create an "objective appearance of bias" which prevented the trial court from fairly weighing the defendant's credibility at trial? This question was raised by the Court in Sahin's direct appeal³⁰ and by the defendant in his Rule 61 motion. (A31, *et seq.*).

Scope of Review

This Court will review *de novo* the question whether the impartiality of a trial judge might be questioned under an "objective" test. See, *Stevenson v. State*, 782 A.2d 249, 255 (Del. 2001).

Factual Background

In *Sahin I*, this Court noted that "throughout the trial, every time the issue of an interpreter was raised, Sahin's credibility was undermined by his attorney." *Id.*, at 453. This Court also raised the question whether, under those circumstances, defense counsel's remarks "created an objective 'stigma surrounding the appearance of an inability to assess credibility fairly.'" *Id.* (quoting *Watson v. State*, 934 A.2d 901, 907 (Del. 2007)). This issue was raised by the defendant in the Rule 61 proceeding, but was rejected by the court below:

Be that as it may, the overwhelming evidence and Sahin's testimony overshadowed any effect trial counsel's comments had on the outcome of the case. The risk of prejudice from trial counsel's comments was minimized by the one-sidedness of the case. Sahin had not identified any promising line of

³⁰ See, *Sahin I*, at 453-454.

defense or constructed a plausible scenario that might have given a fact-finder pause.³¹

* * * *

Because there was overwhelming evidence of Defendant's guilt, there is no basis for concluding that counsel's remarks seriously affected the fairness, integrity, or public reputation of the proceedings.³²

Argument

Overview of the Law

The Due Process Clause of the Fourteenth Amendment incorporates a litigant's Fifth Amendment right to have a "neutral and detached judge" preside over judicial proceedings. *Ward v. Village of Monroe*, 409 U.S. 57, 58 (1972). In this regard, the Supreme Court has observed:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias. But our system of law has always endeavored to prevent even the probability of unfairness ... such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice."

In re Murchison, 349 U.S. 133, 136 (1955) (internal citations omitted); *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("[T]he appearance of even-handed justice...is at the core of due process"); *Stevenson*, 782 A.2d at 258 ("But we are not required to find that the trial judge was [actually] influenced by bias, only that his conduct created the unacceptable risk that a reasonable observer would so conclude").

³¹ *Rule 61 Decision*, at *74.

³² *Rule 61 Decision*, at *74-*75.

The test for recusal based on an "appearance of impropriety" standard was established by the United States Supreme Court in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). In *Liljeberg*, the Supreme Court examined the appearance of partiality standard in construing the provisions of 28 U.S.C. §455, the statutory standard for the disqualification of federal judges. These norms, adopted by Congress in 1974, require disqualification of a judge "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a). The Court held that a violation of §455(a) "does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." *Id.* 486 U.S. at 860. As the Court explained:

Like the Court of Appeals, we accept the District Court's finding that while the case was actually being tried Judge Collins did not have actual knowledge of Loyola's interest in the dispute over the ownership of St. Jude and its precious certificate of need. When a busy federal judge concentrates his or her full attention on a pending case, personal concerns are easily forgotten. The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See S. Rep. No. 93-419, at 5; H. R. Rep. No. 93-1453, at 5. Thus, it is critically important in a case of this kind to identify the facts that might reasonably cause an objective observer to question Judge Collins' impartiality.

Id. 486 U.S. at 864-865. Also see, *Liteky v. United States*, 510 U.S. 540, 547-548 (1994) (issues relating to recusal under 28 U.S.C. §455(a) are to be "evaluated on an **objective** basis, so that what matters is not the reality of bias or prejudice, but its appearance") (emphasis in original).

The "objective" test for recusal based on the "appearance of impropriety" standard established by the United States Supreme Court in *Liteky/Liljeberg* was adopted by this Court in *Stevenson*:

The appearance of impropriety is conceptually distinct from the subjective approach of a judge facing a possible disqualification challenge and does not depend on the judge's belief that he or she is acting properly. See *Liteky v. United States*, 510 U.S. 540, 553 n.2 (1994) ("The judge does not have to be *subjectively* biased or prejudiced, so long as he *appears* to be so.") (emphasis in original). Indeed, in certain circumstances, the appearance of impropriety may arise where the judge is acting in utmost good faith.

* * * *

More recently, the Supreme Court examined the appearance of partiality standard in construing the provisions of 28 U.S.C. §455, the statutory standard for the disqualification of federal judges. These norms, adopted by Congress in 1974 to conform with the earlier version of Canon 3C require disqualification of a judge "in any proceeding in which his impartiality might reasonably be questioned." In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859(1988), the Court noted that § 455(a) may be violated even if the judge is ignorant of the basis for disqualification, if those facts create an appearance of impropriety.

Stevenson, 782 A.2d at 256³³; see also, *Fritzing v. State*, 10 A. 3d 603, 613 (Del. 2010) ("we must assess whether an objective observer would view all the circumstances and conclude that a fair or impartial hearing was unlikely. That requires us to assess the circumstances objectively to determine whether there is an appearance of bias sufficient to cause doubt about judicial impartiality").

³³ This Court also acknowledged that the *Liteky/Liljeberg* standard was "cast ... in due process terms." *Stevenson*, 782 A.2d at 256.

Application of the Law to This Case

Even though the reasoning employed by the court below is subject to *de novo* review, it is instructive to note that its decision did not turn on the "appearance of bias" inquiry suggested by this Court in *Sahin I*. In the Rule 61 Decision, the court below concluded that the trial judge could not possibly have been influenced by defense counsel's remarks concerning the defendant's credibility:

From a full and thorough review of the record in this case, there is not even a hint of bias or prejudice by the trial judge created by defense counsel's comments. There is no indication of any kind whatsoever that the comments made by defense counsel impacted any decision by the court. As a practical matter, the trial judge would have developed her own opinion as to Sahin's needs for an interpreter once she viewed the interview tapes for herself.³⁴

The court below also concluded that the outcome of this case, unlike *Baker*³⁵ and *Watson*,³⁶ did not turn on the factfinders' assessment of the defendant's credibility:

While *Baker* and *Watson* are examples of "he said/she said" cases only weakly supported by the record,... The subject action should properly be couched as a "he said/his DNA and the other overwhelming corroborative evidence established dispositively otherwise" type of case.³⁷

In the court's view, Sahin's credibility was not an issue because the "overwhelming" evidence amassed by the State negated any possibility that the trial judge was prejudicially influenced by defense counsel's comments concerning Sahin's credibility:

³⁴ *Id.*, at *56.

³⁵ *Baker v. State*, 906 A.2d 139 (Del. 2006).

³⁶ *Watson v. State*, 934 A. 2d 901 (Del. 2007).

³⁷ *Id.*, at *66.

[T]his case did not turn on Sahin's credibility at trial. Sahin is an admitted rapist. His only defense was that he never had any contact with any of the complaining witnesses at trial. Sahin's DNA and the overwhelming corroborative evidence established dispositively that Sahin did, in fact, sexually assault the complaining witnesses.³⁸

* * * *

Be that as it may, the overwhelming evidence and Sahin's [inconsistent] testimony overshadowed any effect trial counsel's comments had on the outcome of the case. The risk of prejudice from trial counsel's comments was minimized by the one-sidedness of the case.³⁹

The focus of the court below on the "one-sidedness" of the case ignored the correct inquiry adopted by this Court in *Stevenson* and its progeny. The actual ability of the trial judge to be fair and avoid being influenced by defense counsel's statements is not an issue. See, *Sahin I*, at 453 ("We have no doubt that the trial judge did her best to give Sahin a fair trial"). What counts is the "risk" that a reasonable outside observer would believe that the verdict was influenced by any bias against the defendant:

It is noteworthy that the Supreme Court uses the term "risk" in evaluating the effects of appearance of impropriety violations. It is, of course, difficult to quantify the extent to which the appearance factor results in injustice in a particular case where the judge appears to have acted in an even-handed fashion and, where, as here, the trial results have been subject to a searching review on appeal. **But we are not required to find that the trial judge was influenced by bias, only that his conduct created the unacceptable risk that a reasonable observer would so conclude.**

Stevenson, 782 A.2d at 258 (emphasis added).

³⁸ *Id.*, at *71.

³⁹ *Id.*, at *74.

In this case, it is submitted that the only conclusion that could be drawn by a reasonable observer, on being exposed to defense counsel's remarks concerning Sahin's credibility, was that defense counsel did not believe that Sahin was a credible witness. As noted above, the holding in *Stevenson* is grounded upon the "risk" of improper influence and the "appearance" of bias. No matter how one-sided the evidence may have been, the possibility of a "not guilty" verdict hinged entirely on the credibility of Sahin's own testimony. Regrettably, the reliability of the trial court's verdict is tainted by the risk that an outside observer would conclude that Sahin's credibility was compromised by defense counsel's comments. The Court should therefore vacate the defendant's convictions and grant a new trial.

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
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Dated: January 3, 2013