



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

**APPELLANT' JOSHUA MIRABAL'S REPLY BRIEF**

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**I. The facts and circumstances of *Lewis v. State* are materially similar to the facts and circumstances of the present case. As such, *Lewis v. State* is controlling in this case, and warrants a reversal of Mr. Mirabal's convictions.**

The State's first argument contends that Mr. Mirabal's ineffectiveness claim is not ripe for appeal. (Answering Br. 6-7). However, the argument mainly asserts that the facts in *Lewis v. State* and the present case are not substantially similar. (Answering Br. 7-8). In support, the State points to the fact that Ms. Stafford's case was in the Court of Common Pleas and Mr. Mirabal's case was in the Superior Court. (Answering Br. 7-8). The State also points to the fact that "after the imposition of sentence, the public defender's representation of Stafford was concluded. (Answering Br. 8).

The Defense acknowledges that unlike *Lewis*, Mr. Mirabal and Ms. Stafford were not co-defendant's in the same proceeding.<sup>1</sup> *Lewis v. State*, 757 A.2d 709, 719 (Del. 2000). However, identical to *Lewis*, Mr. Mirabal suffered prejudice as a result of what his Trial Counsel could not do on his behalf due to a conflict of interest. *See Id.* at 720. Similar to *Lewis*, Trial Counsel was unable to exploit weaknesses in the State's evidence against Mr. Mirabal as a result of the duty of loyalty owed to Ms. Stafford. *See Id.* at 719. As a result of the conflict of interest and the loyalty owed

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<sup>1</sup> Ex. B1-B5 of Opening Br; A4, Docket Entry 31.

to Ms. Stafford, Mr. Mirabal's Trial Counsel's trial strategy, decision making, and ability to present evidence pursuant to hearsay exceptions were detrimentally limited. (A17, A19, A21, A22, A23). Specifically, Mr. Mirabal's Trial Counsel was unable to pursue the exculpatory testimony of Ms. Stafford, to properly cross examine Ms. Stafford, and to admit her out of court statements pursuant to the hearsay exceptions under Del. R. Evid. 804 and Del. R. Evid. 807. (A17, A19, A21, A23). As such, the facts and circumstances of *Lewis v. State* are materially similar to those in the present case. Therefore *Lewis v. State* is controlling in this matter and warrants a reversal of Mr. Mirabal's convictions.

**II. Trial Counsel’s strategic decisions at trial were dictated by his divided loyalties. Therefore Trial Counsel operated under a impermissible conflict of interest.**

The State asserts that the Defense’s claim that Trial Counsel was operating under a conflict of interest is unsupported by the record. (Answering Br. 8. 9). In support, the State asserts no conflict interest arose because “[n]either Mirabal nor the State called Stafford as a witness.” (Answering Br. 11). Contrary to these assertions, the record clearly demonstrates that Mr. Mirabal’s Trial Counsel operated under a impermissible conflict of interest.

Trial Counsel indicated that his “office previously represented Ms. Stafford.”<sup>2</sup> (A17). Trial Counsel also acknowledged that if Ms. Stafford was called to testify, he would not be able to cross examine her, and that a mistrial would be required due to his inability to treat her as an adverse witness. (A17, A19). Additionally, Trial Counsel made the decision to not pursue the testimony of Ms. Stafford. (A17, A34-35). Furthermore, Trial Counsel did not call Ms. Stafford to see if she would assert her Fifth Amendment rights, nor did he attempt to admit her prior statements. (A23, A34-35). Thus, Trial Counsel’s strategic decisions to not pursue the testimony of Ms. Stafford, in any way, was made with the understanding that Trial Counsel owed a duty of loyalty to Ms. Stafford as well as Mr. Mirabal. It should be noted that the

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<sup>2</sup> Ex. B1-B5 of Opening Br.

State concedes that a conflict of interest would arise if Ms. Stafford were to testify at trial. (Answering Br. 10). This means that Trial Counsel, prior to and during the trial, needed to be making strategic decisions in relation to Mr. Mirabal's trial while still trying to balance his duty of loyalty to Ms. Stafford.

Although, Mr. Mirabal repeatedly declined to waive the conflict of interest, Mr. Mirabal was essentially forced, by the trial court's failure to declare a mistrial, to continue on with his trial. (A17, A18, A19, A21). A trial in which his attorney's decisions were dictated by his divided loyalties to Ms. Stafford and Mr. Mirabal. It is Trial Counsel's consideration of his duty of loyalty to Ms. Stafford, when making trial decisions on behalf of Mr. Mirabal, that gives rise to a conflict of interest in this case. As such, there was a clear conflict of interest, in violation of Delaware Rules of Prof'l Conduct R. 1.7, that should have resulted in a mistrial.

Additionally, the fact that Mr. Mirabal had previously retained private counsel is in no way is relevant to this Court's analysis. (Answering Br. 9). Regardless of this fact, the record is clear that Trial Counsel weighed his duty to Ms. Stafford and his duty to Mr. Mirabal when making strategic decisions at Mr. Mirabal's trial. Therefore, Trial Counsel clearly operated under a conflict of interest.

### **III. Trial Counsel was unable to effectively represent Mr. Mirabal at trial as a result of Trial Counsel's divided loyalties.**

The State asserts that the Defense cannot substantiate a claim of ineffective assistance of counsel. (Answering Br. 11-14). Specifically, the State contends that the Defense “offers nothing other than speculation to support his claim that the public defender’s office’s brief prior representation of Stafford created divided loyalties that prohibited effective representation.” (Answering Br. 13). Contrary to the State’s assertions, it is apparent that Trial Counsel’s divided loyalties prevented the effective representation of Mr. Mirabal at trial.

Trial Counsel’s strategic decisions at trial were dictated by his knowledge and understanding that he owed a duty of loyalty to Ms. Stafford and Mr. Mirabal. Trial Counsel informed the Court that Mr. Mirabal desired to call Ms. Stafford to testify, a witness that he did not intend to call to testify. Trial Counsel advised Mr. Mirabal that if Ms. Stafford testified, there would be a conflict of interest. Trial Counsel would not be able to treat her as an adverse witness due to her prior representation by the Office of the Public Defender. (A17). Trial Counsel also admitted that if Ms. Stafford testified that he would be unable to effectively cross examine her due to the conflict of interest. (A19). Furthermore, Trial Counsel believed that under Rule 1.7 and Rule 1.9 there was a conflict of interest. (A21). It is also important to note that

Trial Counsel spoke with his superiors at the Office of the Public Defender, throughout his representation of Mr. Mirabal, and they also believed that there was a conflict of interest. (A22).

It is apparent that Trial Counsel was well aware of the limitations imposed upon him as a result of actively representing the conflicting interests of Ms. Stafford and Mr. Mirabal. As a result of the duty of loyalty owed to Ms. Stafford, Trial Counsel could not effectively cross examine Ms. Stafford, nor treat her as an adverse witness. With this knowledge, Trial Counsel employed a trial strategy that would not impact the duty of loyalty owed to Ms. Stafford, while still advocating for Mr. Mirabal. A trial strategy that involved making the strategic decision to not pursue the exculpatory testimony of Ms. Stafford in any way. (A17, A19, A21, A 23). As such, it is readily apparent that when making strategic decisions at Mr. Mirabal's trial, Trial Counsel's decision making was dictated and compromised by his divided loyalties. Therefore, Trial Counsel was unable to effectively represent Mr. Mirabal in violation of the Sixth Amendment of the United States Constitution and Art. 1 § 7 of the Delaware Constitution.

## CONCLUSION

For the reasons set forth within the Appellant's Reply Brief and Opening Brief, it is respectfully submitted that this Court overturn all counts of conviction.

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