IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	CRIMINAL ACTION NUMBERS
	)	
v.	)	IN-05-06-1529 thru IN-05-06-1533 and
	)	IN-05-06-2390 thru IN-05-06-2394
JAMES E. COOKE	)	
	)	ID No. 0506005981
Defendant	)	

Submitted: April 15, 2010
Decided: August 19, 2010

MEMORANDUM OPINION

Upon Motion by Defendant for Recusal - ***DENIED***

Steve P. Wood, Esquire, State Prosecutor, and Diane C. Walsh, Deputy Attorney General, Department of Justice, for State of Delaware

Jennifer-Kate Aaronson, Esquire, and Patrick J. Collins, Esquire, of Aaronson Collins & Jennings, Wilmington, Delaware, attorneys for the Defendant

HERLIHY, Judge

James Cooke was convicted of first degree murder and sentenced to death. That conviction was reversed.[1] His re-trial is scheduled to start with jury selection on February 22, 2011.

Cooke has moved to have this judge recuse himself from presiding over that re-trial. The State is not taking a position. Cooke offers several basic grounds for his motion: (1) due process and the right to a fair trial and the judicial canons concerning disqualifications; (2) the fact that this judge sentenced Cooke to death and that there is a *per se* recusal rule in effect for retrials of capital cases; (3) the possibility of unwitting bias; and (4) the circumstances of the exchanges at trial between Cooke and this judge.

In reversing Cooke's convictions and sentences, the Supreme Court held Cooke had received ineffective assistance of counsel because he wanted to plead not guilty, but they pursued, over his objections, a defense of guilty, but mentally ill. The Supreme Court also held that this Court had not protected Cooke's rights when it permitted his counsel to pursue that defense over his objection and by not resolving at trial the differences between Cooke and counsel.

History

Before addressing the recusal issues, it is instructive to consider the background of the defense of guilty, but mentally ill in capital cases. To a large extent, this background puts context to some of the key issues in this case.

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[1] *Cooke v. State*, 977 A.2d 803 (Del. 2009).

The seminal Delaware case on guilty but mentally ill in capital cases is *Sanders v. State*.[2] Significantly, in *Sanders* the Supreme Court said:

> Following a guilty but mentally ill verdict or plea in a non-capital case, a sentencing judge would be required to base his sentence on the implicit findings of both criminal responsibility and mental illness. *Daniels v. State*, 528 A.2d at 1108. Any such sentence would include the benefit of treatment as part of the punishment mode. Here, however, a sentencing jury was not given the benefit of the guilty but mentally ill rationale for sentencing nor given any insight into its fundamental purpose. The defendant facing the death penalty after a guilty but mentally ill verdict before an uninformed jury is thus afforded fewer protections than those available to a non-death penalty defendant awaiting sentencing by a judge after the same verdict. The failure to afford a defendant the same benefits when the jury fixes the penalty as would occur when the court imposes sentence would render the guilty but mentally ill verdict as a basis for the arbitrary infliction of death in violation of the Eight Amendment of the Federal Constitution and the Delaware constitutional provision against unusual punishment. Moreover, the imposition of the death penalty following a guilty but mentally ill verdict where the jury is not instructed concerning the significance of its verdict would run afoul of the requirement of proportionality… Unless the jury is required to focus upon the significance of its modified finding of guilt there is an unacceptable risk that a defendant such as Sanders would receive the same punishment as that imposed on a defendant after an ordinary verdict of guilty. Such a result, in effect, blurs the clear statutory distinction between a guilty but mentally ill verdict under 11 *Del. C.* § 401(b) and the ordinary guilty verdict which sanctions the imposition of the death under 11 *Del. C.* § 4209.
>
> Sanders' condition unquestionably distinguishes his degree of culpability from that of the defendant who purposefully decides to take another life. Sanders' mind was touched by a disease of which slowly dragged him into the depths of irrationality, transforming him from a well-adjusted teenager into a brooding and troubled young adult. It made him engage in strange, compulsive behavior and it distorted his perception of reality. It tormented him with hallucinations and bizarre fantasies. In the end, it drove him to

[2] 585 A.2d 117 (Del. 1990).

> commit a tragic and senseless crime of violence. As the psychiatric experts testified and as the jury found, Sanders' ability to choose whether or not he would commit that crime was significantly altered by his illness. The culpability of mentally ill defendants may vary widely, but it is certainly at a low ebb when a defendant kills only because he is mentally ill. Nor is this conclusion affected by our inability to calibrate the exact extent of Sanders' volitional impairment. The fact that Sanders might, in theory, have resisted his pathological impulses provides a justification for punishment. The fact that his perceptions and actions were affected by such impulses may greatly weaken the justification for capital punishment, however.[3]

The Court held that the jury had to be instructed, therefore, that a finding of guilty, but mentally ill establishes a mitigating factor as a matter of law.[4] This would be the same, the Court said, as an instruction that certain verdicts in the guilt phase established an aggravating factor as a matter of law.[5]

That *Sanders* instruction is precisely what this judge gave to the jury in *State v. Cohen*:[6]

> In this case, the defendant has been found by the Court to be "guilty, but mentally ill" as to both counts of murder in the first degree, in that, at the time of the offenses, he suffered from a psychiatric disorder which substantially disturbed his thinking, feeling or behavior, and such psychiatric disorder left the defendant with insufficient willpower to choose whether he would do the act or refrain from doing it, although physically capable.

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[3] *Id.* at 133-34.

[4] *Id.* at 134.

[5] *Id.*

[6] In *Cohen*, the defendant killed two people. He pled to killing both which established a statutory aggravator as a matter of law. 11 *Del. C.* § 4209(e)(1)k.

> A finding of "guilty, but mentally ill" establishes mitigation as a matter of law. Delaware statutes reflect a legislative judgment that an individual found "guilty, but mentally ill" should receive both treatment and punishment, although such consideration does not preclude the imposition of the death penalty if the aggravating circumstances determined to exist outweigh the mitigating effect of the defendant's mental illness and of any other mitigating circumstances determined to exist. Because a finding of "guilty, but mentally ill" establishes mitigation as a matter of law, you will be provided a specific interrogatory on which to indicate your finding as to the existence of that mitigating circumstance, and you should mark that interrogatory in the affirmative.[7]

As the *Sanders* opinion said, since Cohen had pled guilty, but mentally ill to killing two persons, that statutory aggravator had already been established. As to the mitigator, the jury did as instructed and all 12 found it existed as a mitigating circumstance. The jury, by a vote of 8 to 4, recommended a life sentence. This judge imposed a life sentence.

There have not been too many capital cases in the last forty years or so with some kind of mental illness defense. One, however, is of particular note and has great relevance to the context of this case. The case is *State v. Flagg*. Of particular note is Judge Barron's exhaustive sentencing decision.[8] Flagg was charged with the murder of Anthony Puglisi, the kidnapping of his wife Debra Puglisi and seven counts of rape (then unlawful sexual intercourse first degree) of Debra Puglisi. Mr. Puglisi surprised Flagg who was already inside the Puglisi home. Flagg shot him in the face, killing him. Mrs. Puglisi was

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[7] *State v. Cohen*, Cr.A. Nos. IN-90-02-074-0477, at 4-5 (Del. Super. Apr. 30, 2005).

[8] 1999 WL 743458 (Del. Super., June 11, 1999).

outside gardening when this happened. Later, she came inside and soon, thereafter, Flagg hit her in the face knocking her to the floor and then he tied her wrists and ankles. He dragged Mrs. Puglisi to her basement where he raped her.

Flagg took her back upstairs, retrieved a comforter and wrapped her in it. So wrapped, he threw her in the back of his car, having earlier threatened her with a knife when she whimpered. He took her to his house and eventually to his bedroom where her raped her anally and then vaginally. There also was digital penetration during the time of her captivity.

After these two rapes, he bound her more and tighter, and he also blindfolded her. He threw her on the floor of his bathroom. Later, he told her that he was using crack cocaine. The next day she heard from his radio or TV that her husband had been shot. Some time later before he left the house, while she was still hogtied, he raped her vaginally.

He was out of his house overnight. When he returned he seemed changed. He allowed her to bathe; he fed her and applied medicine on her wrists for the sores that had developed from the bindings. He allowed her to brush her teeth. After all of this, however, he raped her again. He tightly tied her up on a bed. He left for the night and returned the next day. He loosened her ties but again raped her. Her allowed her to bathe.

The next day, because of her wrists worsening, Flagg suggested handcuffs. He went out to buy them, did, returned and "cuffed" her. He left but she managed to free herself and call 911. She was rescued.

Judge Baron summarized the trial in this fashion before addressing the defense case:

> The State's case-in-chief conclusively answered the questions of who, what, when, where and how. The facts were conceded, in main part, by the defense. The remainder of the trial, both the defense case and the State's rebuttal, focused on answering the question why.[9]

The "why" comment derived from Flagg's plea of not guilty by reason of mental illness. His primary witness for that defense was Dr. Carol Tavani who first met Flagg about ten days after his arrest. She normally worked at the women's prison but she had been referred to him. He mentioned seeing a psychiatrist several years before. That doctor had prescribed medicine for depression which Flagg reported went back to childhood. He also described hearing voices and some paranoia which he said pre-dated his substance abuse.

Flagg's parents were deceased. His father was alcoholic and died when Flagg was young. He beat his wife and children. His mother was a very severe paranoid schizophrenic as was his uncle. His mother was hospitalized twenty times. She threw knives at her kids; she would urinate on the kitchen floor. Flagg, when nine or ten, was molested and raped on a number occasions by a male cousin.

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[9] *Id*. at *7.

Dr. Tavani said Flagg suffered from paranoid schizophrenia; elements of which come from genetics and part from the environment. She found him unable to appreciate the wrongfulness of his conduct. He also abused cocaine and alcohol.

The State, of course, vigorously disputed the defense of mental illness. Dr. Antonio Sacre who examined Flagg in 1994, but only that one time, tentatively diagnosed him with drug addiction and sociopathic tendencies. The State had Flagg examined by Dr. Robert Sadoff. His final psychiatric diagnosis was schizotypical psychiatric disorder which can be aggravated by substance abuse. Dr. Sadoff, however, found this psychiatric disorder, though it existed on all the dates of these events, did not substantially disturb Flagg's thinking, feeling or behavior. He said Flagg wanted to rape Mrs. Puglisi.[10]

In the penalty hearing, the State also introduced a lot of evidence dealing with a prior rape which Flagg had committed.

Judge Barron instructed the jury about four potential verdicts: guilty as charged; not guilty by reason of insanity; guilty, but mentally ill; and not guilty. The jury found Flagg guilty as charged. The penalty hearing evidence was primarily that which had been introduced at trial. There was some additional defense psychiatric testimony from Dr. Oliver Turner. He diagnosed Flagg as schizoaffective disorder and post traumatic stress disorder (arising from his early childhood rapes).

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[10] *Id*. at *17.

The jury by a vote of 7 to 5 recommended a life sentence for Mr. Puglisi's murder. Judge Barron indicated he might have reached a different result on the sentence.[11]

Even though Flagg's defense was not guilty by reason of mental illness and was not the defense of guilty, but mentally ill as in Cooke's first trial, the Court has discussed Flagg for several important reasons.

One reason is that Flagg's defense (obviously done with his consent unlike Cooke's) enabled counsel to introduce significant mitigating evidence in the *guilt* phase. The overwhelming amount of that evidence came in the guilt phase and not in the penalty phase. While the jury rejected the defense as to the guilt phase, it was clearly pre-conditioned to the extensive mitigating evidence.

This judge was aware of much of this having read Judge Barron's sentencing decision long prior to Lindsey Bonistall's murder.

There are three additional purposes for the detailed recitation of this evidence. One, Flagg's lead counsel was J. Brendan O'Neill, Esquire, who was Cooke's lead counsel. It does not take rocket science to realize that he would believe the strategy used to save Flagg's life might work for Cooke.

That strategy involves the second and third reasons for reciting Flagg in such detail.

The second reason involves the State's evidence of which this judge was aware *prior* to the trial. All of that knowledge derived from the public record, either from hearings

[11] *Id*. at *25.

or through pretrial motions. This judge held a "proof positive"[12] hearing on October 28, 2005. Significant evidence linking Cooke to the rape and murder of Lindsey Bonistall came out during that hearing, including DNA evidence.[13] The Court conducted a suppression hearing in February, 2006.[14]

In addition, this judge rendered several pre-trial rulings which, of course, touched on what the State's evidence might be at trial: (1) a motion to suppress;[15] (2) a motion to change venue;[16] (3) a motion for relief from prejudicial joinder;[17] (4) a motion to declare the death penalty statute unconstitutional;[18] (5) a motion *in limine* to exclude certain evidence.[19]

Defense counsel were, of course, most familiar with the amount of evidence linking their client to the murder. They applied several times in the pre-trial period for subpoena for out-of-state witnesses and records. In those applications they had to demonstrate to this

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[12] 11 *Del. C.* § 21.

[13] During his trial testimony, Cooke told the jury this judge had already found him guilty. His reference was to the proof positive hearing.

[14] This Court's decision not to suppress the evidence was affirmed on appeal. *State v. Cooke*, 977 A.2d at 857.

[15] *State v. Cooke*, 2006 WL 2620533 (Del. Super.).

[16] *State v. Cooke*, 910 A.2d 279 (Del. Super. 2006).

[17] *State v. Cooke*, 909 A.2d 596 (Del. Super. 2006).

[18] *State v. Cooke*,, Cr. A. IN-05-06-1529, et al., (Del. Super. Dec. 20, 2006).

[19] *State v. Cooke*, 914 A.2d 1078 (Del. Super. 2007).

judge the materiality of the witnesses, and/or records for which the applications were being made. To so demonstrate, defense counsel stated:

> THE RELEVANT FACTUAL BACKGROUND
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> On August 8, 2005 the Grand Jury for New Castle County Delaware returned an eleven count indictment against James Cooke. The indictment alleges three set of crimes against three separate victims on April 27, 2005, April 30, 2005, and May 1, 2005 respectively. The main charges are the Murder First Degree charges stemming from the May 1, 2005 homicide of Lindsay Bonistall, a 20 year old University of Delaware student. The State of Delaware is seeking a death sentence for Mr. Cooke for his alleged murder of Ms. Bonistall.
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> The State has assembled a great deal of evidence to try to prove its case against Mr. Cooke. The most damning evidence is the opinion of an FBI DNA expert. The expert is expected to testify that the statistical odds are 676 quintillion to 1 that the DNA found in the sperm in Ms. Bonistall's vagina, and the DNA found in the scrapings from beneath her fingernails, came from a source other than Mr. Cooke. According to testimony during pretrial hearings, a quintillion means 676 followed by 18 zeroes. In layman's terms, the State has a DNA match to Mr. Cooke.
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> The State intends to present additional direct and circumstantial evidence to attempt to prove the cases against Mr. Cooke. Included are incriminating recorded phone calls allegedly made to the police in the days immediately following the murder supplemented by testimony from Mr. Cooke's girlfriend identifying his voice as the caller on those calls. In addition, the State will present the circumstances of Mr. Cooke's leaving his job without notice, immediately after a "WANTED" poster with his picture appeared in the shoe store where he worked. The State has substantial additional evidence to attempt to link Mr. Cooke to the charged crimes, far too much to summarize here.
>
> Mr. Cooke denies committing any of the crimes. He has told psychiatric/psychological professionals who have evaluated him that he had consensual sex with Ms. Bonistall and that someone else must have killed her after he left her apartment. Defense counsel and Mr. Cooke disagree about

what evidence to present at trial. Mr. Cooke has repeatedly stated his intention to testify that he did nothing wrong and that he has been wrongfully set up by the police because he is Black and the victims are White. Defense counsel have advised Mr. Cooke that his best chance for the best result possible is to pursue a claim of guilty, but mentally ill.

In either circumstance, a defense on the insanity issue, or a claim of guilty but mentally ill, counsel must anticipate and prepare for a penalty hearing. Based on extensive work by mitigation specialists, defense counsel believe there is substantial mitigation evidence to present for Mr. Cooke if and when he faces a death penalty hearing. Included are document incidents of neglect, abuse and trauma inflicted upon Mr. Cooke from infancy through adolescence, repeatedly being uprooted from one residence to another throughout his childhood and enduring a series of his mother's live-in boyfriends throughout his formative years. In addition, Mr. Cooke underwent multiple evaluations by treatment providers, schools and social service agencies, including New Jersey's Division of Family Services. Practically all of the important events re Mr. Cooke's life took place in Salem County, New Jersey. Many of the social service agency reports and records concerning Mr. Cooke are stored in Trenton, New Jersey. Records of his treatment at the Children's Hospital of Philadelphia are stored in Philadelphia, Pennsylvania.

WHY THESE WITNESSES ARE MATERIAL

Simply put, Mr. Cooke's defense counsel intend to tell his life story in the mitigation portion of the penalty hearing. In defense counsel's view, the details of the sad and gruesome experiences of Mr. Cooke's developmental years are his only chance to put his crimes in perspective. By presenting Mr. Cooke's entire life story to the jury, defense counsel aim to persuade the jury that the aggravating factors of his crime do not outweigh the mitigating factors. Therefore, the jury must vote against a death sentence.

In light of the above, defense counsel submits that the people who knew Mr. Cooke growing up in Salem County, New Jersey, as well as the designated records custodians in Trenton, New Jersey and Philadelphia, Pennsylvania

are material and necessary to his defense.[20]

On March 22, 2006 Mr. O'Neill submitted an "Ex Parte Application made Under Seal for an Order for the Release of New Jersey Division of Youth and Family Services Records and Protective Order." Mr. O'Neill offered that the records were necessary to prepare Cooke's defense. This judge granted the application on March 29, 2006:

> The matter having been presented to the Court by J. Brendan O'Neill, counsel for Defendant, and the Court having found that access to certain information within the records of the New Jersey Division of Youth and Family Services may be necessary for determination of issues before the Court, and or other good cause shown;
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> IT IS ON THIS 29the day of March, 2006;
>
> ORDERED that a copy of the New Jersey Division of Youth and Family Services records concerning James Cooke shall be submitted to the Court for its *in camera* review and determination regarding release to counsel; and it is further
>
> ORDERED that should the Court determine release of said records is proper, information contained therein shall be used only in the pending matter and shall not be used in any other matter in the absence of further Order of the Court; and it is further
>
> ORDERED that information contained in or derived from said records shall not be disclosed to any other person for any other reasons nor disseminated or made public by any means, direct or indirect, and it is further
>
> See *Rompilla v. Beard*, 125 S. Ct. 2456 (2005).*
>
> *This judge handwrote this on the order.

[20] Application to Subpoena New Jersey Witnesses.

As can be seen from the order, this judge was required to examine records to enable their release to the defense. The records examined were voluminous and the lengthy *ex parte* examination clearly showed their importance to the defense. While the New Jersey Family Service records so reviewed were not all of the records defense counsel obtained as a result of this judge's order, the New Jersey Youth Division records contained materials from other sources, too. In January 2006, counsel applied *ex parte* to obtain New Jersey Parole Board records. The records sought were:

1. CONF1 Admission Evaluation dated 2/10/93.
2. CONF2 Addendum to Psychological Report dated 3/29/93.
3. CONF3-CONF4 Psychological Evaluation dated 3/2/94.
4. CONF5-CONF6 Psychological Evaluation dated 6/7/02.
5. CONF7 Parole Board risk assessment dated 8/15/02.
6. CONF8-CONF31 Adult Presentence Report, 92-04-184-I and 92-04-0186-I.
7. CONF32-CONF49 Adult Presentence Report, 97-11-2685-D.
8. CONF8-CONF31 Adult Presentence Report, 97-12-456-I.

This application, however, did not require an *ex parte* examination but the types of records sought were a tip-off. They were introduced during the guilt phase or otherwise referred to through testimony.

There were several thousands of exhibits introduced during the guilt phase to support the defense of guilty, but mentally ill; most this judge had reviewed prior to trial

because of the defense motions. They were reviewed long prior to learning just days before jury selection started when this judge first learned of the disagreement between Cooke and his lawyers. There were other records, of course, which were unknown to this judge until they were introduced at trial. Specifically, in reviewing the mitigators in the sentencing, the Court noted the New Jersey Division of Youth and Family Service records, which included records from other entities such as the Children's Hospital of Pennsylvania ("CHOP").

Examples of what these voluminous records showed include:

1. Significant physical insults and injuries suffered by James Cooke during his early childhood including but not limited to:

a. Born three months premature with a birth weight of three pounds, thirteen ounces.

This fact appears in Defendant's exhibit 5. Cooke's experts explained a premature birth and low weight can have an impact because the brain is not yet as fully developed as if he had gone to term.

b. Diagnosed with malnutrition at age four months.

This, too, is well documented. It has an impact on physical development (size, etc.) and on brain development. It is but one, and an early one, example of Paula Turner's profound neglect of Cooke.[21]

c. Severe burn injuries to feet and lower legs at age twenty-five months inflicted by mother's boyfriend.

This incident is particularly striking and upsetting. It is documented by pictures, DYFS records, and by CHOP records. This incident has had a

[21] Paula Turner is Cooke's mother.

major influence, decidedly negative, impact on his upbringing and continues to have an adverse influence. It would be grossly understating a cliche to say it "scarred" him for life. And it is no cliche because the physical scars are real and exist now.

His mother did not seek immediate medical treatment. Eventually, Cooke did get care at CHOP. There he had frequent surgeries to repair the skin and some other damage, but 100% restoration did not occur. The injuries are permanent and this is a significant mitigating circumstance because of that. It has a troublesome side, though. The physical and emotional scars are permanent and explain, in part, Cooke's propensity for violence.

* * * * *

2. James Cooke was raised in an environment characterized by poverty and physical neglect during childhood and accordingly:

a. James Cooke frequently went hungry.

This mitigating circumstance is amply established in the DYFS and Juvenile Probation records. Cooke stole to get food, he frequently showed up at school hungry. His undernourished status is even noted in the CHOP records. Some of this has been discussed earlier when reviewing his history considered by the three mental health experts.

There is no question of the poverty in which he and his siblings were raised, and the neglect by his mother and her various boyfriends which compounded that destitute situation.

b. James Cooke's clothing was frequently filthy.

This circumstance is also well documented in the DYFS records.

This second circumstance can be amply summarized from a report when Cooke was about thirteen and half:

On the whole James seems to be the product of a socially, culturally and materialistically deprived environment. He is essentially undersocialized, selfish, egocentric and very angry.

* * * * *

d. James Cooke had a childhood history of trauma and victimization without the benefit of treatment.

While Cooke received extensive treatment for his burn injuries, it was unquestionably traumatic. The DYFS records depict some of the injuries. Other injuries are documented in those records and received no treatment. He was sexually abused at thirteen and half when in a juvenile facility. This circumstance is thoroughly documented. It is part of the larger picture of the "horrible" childhood he endured.

5. Despite multiple interventions by the Division of Youth and Family Services, Public Health Nursing, as well as foster placements, James Cooke was never removed from this abusive environment promptly or for long enough to escape the emotional and physical disarray that resulted.

Defendant's exhibit 6, the DYFS records of over a thousand pages clearly establish this circumstance. If anything, these records show Cooke is a "poster child" for official neglect and mismanagement. In fairness, some of the problems were at an age before he was "in the system."

6. James Cooke was diagnosed with learning disabilities, including ADD and Learning Disorder by Dr. Stephen Mechanick.

Dr. Mechanick's testimony and the DYFS records established this mitigating circumstance.

* * * * *

8. Inconsistent, inappropriate and often violent discipline by James Cooke's mother and her boyfriends, including, but not limited to, beatings with hoses, extension ends, belt buckles and switches.

Most of this has been already covered. The DYFS records, including photographs, the testimony of Ricky Patillo, Jr., and Eleisa Cooke detailed this mitigating circumstance. The accumulation of all this has had a profound influence on Cooke, and not a good one.

* * * * *

11. Notwithstanding some inconsistency in his relationships with his family members, James Cooke is loved by his mother, to the best of her ability, and siblings, and they would suffer great loss were the State to execute him.

> Cooke's mother did not testify during any phase of this proceeding. Two siblings and one cousin testified: Ricky Patillo, Jr., Eleisa Cooke, and Karlen Sorrell; all of whom testified during the guilt phase. All had, as previously discussed, spoke of Cooke's trouble-plagued youth and had witnessed the unequal discipline or verbal abuse meted out to Cooke by their mother, her boyfriends, and his school mates. While inappropriate to have said so during the guilt phase, there was some apparent attachment or affection implicitly manifested by all toward Cooke. Eleisa Cooke, as the DYFS records documented, was subjected to much of the abuse Cooke was and which was out of proportion to their siblings.
>
> Without more, however, and considering Turner's years of abuse of Cooke and her absence from the witness stand, this circumstance as it involves her is due little weight.[22]

As the Court said in its sentencing decision, the records from New Jersey detailed "significant mitigating circumstances."[23] The Court described some of the mitigators as "compelling."[24] And the State itself, which is noted in the same decision, referred to Cooke's childhood as "horrific."[25] It is that childhood which was exhaustively laid out in the New Jersey DYFS records the Court examined pre-trial. To be clear all of those records were introduced along with many others during the guilty phase or during the penalty phase. To be "perfectly clear," the Court saw nothing *in camera* which did not become a matter of evidence before the jury at any phase of the trial.

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[22] *State v. Cooke*, 2007 WL 2129018, at *36-40 (Del. Super. June 6, 2007)(sentencing decision)(citations and footnotes omitted).

[23] *Id*. at *36.

[24] *Id*. at *43.

[25] *Id*. at *36.

It was apparent that Cooke's counsel were very concerned with the strength of the State's case. Their concern would be the circumstances of Lindsey Bonistall's beating, rape, and murder and the quality and quantity of evidence of Cooke's potential guilt - much of which was known to the Court through the various hearings prior to trial as described. A major part of their concern would be the jury would hear only that evidence during the guilt phase and none of the mitigating evidence before the penalty phase. Arguably, this would make their duty, if there were a penalty phase, of getting a life sentence recommendation that much harder. Based on the evidence they knew and the concerns they expressed in their pre-trial filings with the Court,[26] the likelihood of getting to the penalty phase was extremely high.

Prior to trial, defense counsel never explicitly expressed these concerns to the Court - nor during the trial until they sought an *in camera* discussion of their duties as they saw them under *Shockley v. State*.[27] But any experienced capital case lawyer could readily appreciate trial counsel's dilemma.[28]

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[26] *Supra* at 18-21.

[27] 565 A.2d 1373 (Del. 1989).

[28] One of Cooke's attorneys on the direct appeal was Joseph Gabay. He argued trial counsel erred in not following Cooke's wishes. During the trial, however, he is quoted in the newspaper as saying: While Cooke's absence from the courtroom may speed up the trial, Cooke's outbursts - four of them in front of jurors - may damage the 36-year-old-man's case, said attorney Joseph A. Gabay, a longtime criminal defense lawyer who practices in Delaware. "It is not a help to him. It is not a help to the lawyers. It's not a help to the court," said Gabay. "If I'm [prosecutor] Steve Wood, I'd get the most comfortable chair I can find and let him sit at my (continued…)

The Court had some appreciation of these issues before defense counsel brought to the Court's attention on January 19, 2007, for the first time, that there was a potential conflict over the defense to be pled. The conflict, of course, was that they wanted to plead guilty, but mentally ill but Cooke wanted to plead not guilty.

Mr. O'Neill raised the subject of the conflict this way:

> Mr. O'Neill: Well, we should bring in it, it may come to a head it may not. Mr. Cooke has one idea about how to defend this case; his counsel has a different idea.
>
> And in counsel's view, Mr. Cooke's intended course of defense has little chance for success and will likely increase his chances for conviction and likely a death sentence.
>
> We have talked at length, counsel and Mr. Cooke, about that and to date we have essentially agreed to disagree; and I have written him at length and explained to him that in counsel's view, based on the case law in Delaware, it is his lawyer's discretion whether to present a particular defense - - well, I should start again:
>
> I have explained, and I'll submit at some point what I have - - or at least a summary of what I have written to Mr. Cooke

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[28](…continued)
table."

* * * * *

Courtroom outbursts cans have several outcomes - usually not in the defendant's favor.

They can highlight strong evidence being presented by the prosecution and detract from defense attorneys' presentations.

Gabay said Cooke's behavior has been confrontational and defiant, not irrational or showing lack of lucidity.

"It just changes the focus of the case from the evidence to the defendant," Gabay said. And in death penalty cases, the jury sees a person's character and propensities, which they have to take into consideration. "He is giving them Exhibit A before they even to that point." *The News Journal* dated February 20, 2007.

> explaining that if the decision is the purpose of the litigation then the decision rests with Mr. Cooke about that the do.
>
> However, if the decision pertains to trial tactics and strategy, it is his counsel's decision what to do. That's with respect to the first phase of the case.
>
> Assuming we're facing then the second phase of a case, a penalty phase, I have written to Mr. Cooke and given him my opinion that based on the Ashley[29] opinion by Judge Carpenter that the presentation of a mitigation case is in the discretion of th trial counsel.
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> * * * * *
>
> Mr. O'Connell and I have the view that we can't present a claim of guilty, but mentally ill without having to renounce innocence; that Mr. Cooke can maintain his innocence, as he may do as he chooses to testify, yet we will be able to present, on his behalf, a claim of guilty, but mentally ill.
>
> And so there is going to be, I think, at some point probably before we begin the evidence and make opening statements where we are going to need to go on the record and hash this out on the record, and go forward from there.[30]

The State then offered its views also explaining how it had learned of counsel's dilemma:

> Mr. Wood: Your Honor, so the record is clear on something, understanding that the record will be read years later by people whose name we don't know, Mr. O'Connell and Mr. O'Neill are not breaching any attorney/client privilege with raising this matter with the State present, because you have not yet seen the reports of the psychiatric and psychological experts, but the - - Mr. Cooke discussed this issue at great length in those reports and that's how we're aware of it.

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[29] *State v. Ashley*, 1999 WL 463708 (Del. Super.).

[30] Transcript of January 19, 2007, at 64-66.

> The reason I'm grateful for counsel raising this is that when I discussed this with out appellate counsel was befuddlement (sic) and here's the issue:
>
> It's clearly true that a defendant doesn't control the tactics in the courtroom that is the responsibility of counsel, but as you raised in another context at the beginning of the office conference guilty but mentally is sort of a funny hybrid.
>
> And the question, if the defendant maintains his factual innocence, can counsel, nonetheless, argue that he is guilty of the charged defense but mentally ill? I raise the question without presuming to know the answer. We honor and respect the real dilemma that counsel is in with this, it's just a funny issue. It's not like choosing different tactics that are designed on one level - - on one level a dispute over tactics between counsel and defense when either tact is design essentially to produce the same or similar result.[31]

The discussion between the Court and counsel continued:

> Mr. O'Neill: And so Mr. Cooke is certainly entitled under the law to testify in way he deems appropriate. His counsel believes that however he testifies - - and for purposes of discussion assume that he testifies that he had consensual sex with Lindsey Bonistall, he left and after that she must have been murdered by somebody else. I know nothing about it.
>
> That's the State's problem in his counsel's view, it is - - that does not preclude counsel from pursuing a claim of guilty but mentally ill.
>
> Mr. Wood: And, again, for the purposes of the record, the little factual recitation that Mr. O'Neill just provided is precisely what the defendant said to Dr. Mechanick, the State's expert. So again we're not hearing tales out-of-school.

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[31] *Id.* at 66-68.

> The other interesting issue in it all is that according to Dr. Turner's report the defendant admitted murdering Ms. Bonistall and then denying it.
>
> What he told Dr. Mechanick is that he never told Dr. Turner that he killed Lindsey Bonistall - - I'm paraphrasing it now - - but this mentally ill stuff is all garbage and he's sane. So that's the extent of the conundrum, which is that counsel is free to argue factual innocence, that's not my client.[32]

The Court and counsel in that January 19, 2007, office conference discussed a possible colloquy between the Court and Cooke and when to do it. One possible time was before openings and before jury selection. Mr. Wood, the lead prosecutor, made this comment to which Mr. O'Neill responded:

> Mr. Wood: Judge, the other way - - this is something that's not my place to know, perhaps I'm raising this as an issue without suggesting counsel to respond, but just from hanging around the courthouse back in the day sometimes significant disputes between client an counsel, client at the last moment try to fire counsel that might be something that Your Honor might want to be prepared to deal with if it happened at some point.
>
> Mr. O'Neill: I don't anticipate that but . . . I don't see that coming.
>
> Court: Okay.
>
> Mr. Wood: Good.
>
> Mr. O'Neill: But I suppose anything is possible, but I don't see that one coming.[33]

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[32] *Id*. at 68-69.

[33] *Id*. at 73-74.

The conflict between Cooke and his attorneys was revisited at the next office conference on January 22, 2007. After reviewing the proposed *voir dire*, Mr. O'Neill raised the issue of the conflict and this discussion ensued:

> Mr. O'Neill: Judge I - - prepared something sometime ago, and I sort of looked at it over the weekend after our discussions Friday about Mr. Cooke's differences with his counsel about what evidence, if any evidence, to present in a defense case, both in the trial phase and a penalty phase, and I prepared this. I've given a copy to the State, and really what it is, it's a memorandum that I had given to Mr. Cooke in October, and it's really the defense position that - - and we advised Mr. Cooke of this - - that it is his counsel's position that counsel can present both the - - a defense in the guilt, not guilt phase of the trial, and mitigation evidence in the penalty phase, should there be a penalty phase, and this is an effort to outline the defense position on why we should be able to do that, notwithstanding his desire otherwise.
>
> Court: Okay.
>
> I frankly have not researched this since I got into the issue, and I'll have to be careful about it because it's pending different places, but particularly regarding Mr. Steven Shelton, and various law review articles that took opposing views on the role of counsel in penalty hearings to abide by the defendant's request to do nothing, or an independent obligation, almost, to do, you know, everything that counsel believed was necessary to present a mitigation case, and it just was very compelling arguments on both sides.
>
> Mr. O'Neill: We relied on - -
>
> Court: And I'm just saying, I mean, I haven't researched the issue in about 14 years, so - -
>
> Mr. O'Neill: We relied upon language in Judge Carpenter's decision in the *Ashley* case that says defense counsel have the discretion

whether to present a mitigation case. The wrinkle in that case was he was pro se, but he says, in no uncertain terms, it's defense counsel's discretion whether to present mitigation evidence.

Having said that, and having cited actually in this memorandum, I also know that in circumstances, that a court has honored a defendant's wish not to present any mitigation evidence if certain protocols are observed.

Mr. Wood: The little research the State has done has highlighted the problem, rather than resolved it, Your Honor.

We see the problem as this. There's no question - - well, it seems that the best argument is that counsel can present mitigation evidence. The problem in this case is that if the mitigation evidence comes in the guilt phase and consists, in part, of evidence that would undercut the client's preferred plea, if you will, of not guilty, then the - - the matter is - - is quite ambiguous, and I don't know. It's not our place to try to interpose ourselves - -

Court: Well, I think, in part, that's why they asked me on Friday to have a little - - it may not be too little - - a colloquy with Mr. Cooke before we start presentation of the evidence.

Mr. O'Neill: Well, it's going to color our opening statements.

Court: Sure, certainly.

Mr. O'Neill: One thing that compounds this already difficult area is we believe Mr. Cooke has mental illness.

Court: Uh-huh.

Mr. O'Neill: And with that belief, any waiver is inherently suspect, in our view. Any waiver by him or presenting a defense has to be very carefully scrutinized, and I think to the extent that we, in good faith, believe he has mental illness, and we do have

that good faith belief, we, quite frankly, don't think he could make a waiver that'll ever withstand initial scrutiny or subsequent scrutiny.

Mr. Wood: Except that I think - - I'm not sure Dr. Bernstein spoke to this point, but both Dr. Turner - - one of the defense experts - - Dr. Mechanick, State's expert, were unequivocal that the defendant is competent to stand trial, in other words, can make decisions, legal decisions. He's - - this a guilty-but-mentally-ill case.

So, the problem is, as I said, Your Honor, is that whether the defense, against the defendant's wishes, can introduce evidence that suggests that his preferred defense, that of not guilty, is not a valid one, and it would get particularly knotty, I suppose, if the defendant were to testify and say, "I did not kill Lindsey Bonistall,' and then defense were to then present psychiatric - - or psychological testimony from Dr. Turner, which among other things, includes the defendant's admission that he did kill Lindsey Bonistall.

Court: Okay.

Mr. Wood: So, I'm happy to put that ball in your court, Your Honor.

Court: Well, it's not entirely there yet. I think it's still in the hands of these two, who are getting ready to pass it.

Mr. O'Neill: We're juggling at the moment, Your Honor. The hot potato is in our hand at the moment.

Court: Yes.

Mr. Wood: When did Your Honor propose to have the colloquy with the defendant?

Court: After we select the jury and before start of evidence is the request I got on Friday.

Mr. Wood: Right. Hopefully, with sufficient time that we will be able to re-calibrate our opening statements, in other words, not the morning of.

Court: Depending on when we finish jury selection. Let's suppose we finish midday, suppose, that might be the time after, after a recess or whatever to do it; okay?

I'm not gonna do it and then say, "Okay. Come back in 10 minutes. I'll give preliminary instructions and you give your openings." I won't do that. I think this is serious enough.[34]

As is well-known, the Court did not resolve that conflict which has been held to be error. Both sides were equally forceful in their views that the Court should intervene or that it has no right to intervene between Cooke and his lawyers. On one hand, of course, was Cooke's choice to plead not guilty.

On the other hand there were very potential and very significant claims of ineffective assistance of counsel. Those claims would arise out of the assessment that trial counsel were focusing on what they believed, in their best professional judgment, stood to be the best chance of saving Cooke's life. After all, trial counsel were most experienced and had defended other capital cases, in addition to Mr. O'Neill defending Flagg. They were and are anything but neophytes in defending capital cases.[35]

In addition to this strongly competing factors, the law in this area at the time was murky.

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[34] Trial Transcript of January 22, 2007, at 17-22.

[35] Mr. O'Neill defended James Crowe before this judge and his outstanding job resulted in his client getting a life sentence. There was no mental status issue in that case.

In an effort to "cut the Gordian knot," the State sought a *writ of mandamus* in the Supreme Court. This writ sought to have this judge directed to do what Cooke wanted - enter a not guilty plea - and not what his trial counsel wanted. In denying that writ the Supreme Court said:

> The State asks this Court to adopt a *per se* rule that a defense attorney is prohibited from advancing a mental illness defense in the guilt phase if the defendant is opposed to that approach. Neither the State, nor the attorneys for Cooke, nor the trial judge's attorneys were able to find a prior case for any jurisdiction deciding that exact issue.[36]

Thus the Supreme Court *then* recognized the lack of precedent and murkiness of law in the area. But it acknowledged the dilemma again in several ways. First, it said:

> A criminal defendant has authority over 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." (*Jones v. Barnes*, 463 U.S. 745, 751m 103 S. Ct. . 3308, 77 L. Ed. 2d 987 (1983)). Counsel, however, bears principal responsibility for the conduct of the defense. *(Id*. at 753 n. 6, 103 S. Ct. . 3308; *New York v. Hill*, 528 U.S. 110, 114-15, 120 S. Ct. . 659, 145 L. Ed. 2d 560 (2000)). In particular, counsel has the responsibility for determining "what arguments to pursue," (*Hill*, 528 U.S. at 115, 120 S. Ct. . 659 (citing *Jones*, 463 U.S. at 751, 103 S. Ct. . 3308)) and " what defenses to develop." *(Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1, 97 S. Ct. . 2497, 53 L. Ed. 2d 594 (1977) (Burger, C.J., concurring)).
>
> According to the State, its petition presents one question" in the event of an irreconcilable disagreement between defense counsel and the defendant about a decision to seek a verdict of guilty but mentally ill, do the defendant's wishes prevail? The State is asking this Court to place the decision to pursue a mental illness defense in the category of issues upon which only the defendant can decide. Although the State has been unable to find any controlling precedent that is exactly on point, it makes an argument based

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[36]*In re State for Writ of Mandamus*, 918 A.2d 1151, 1153 (Del. 2007).

upon Delaware Professional Conduct Rule 1.2, Scope of Representation, which states the following:

> (a) [A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Thus, Rule 1.2 expressly provides that the client is the ultimate decision maker as to whether to enter a plea, waive a jury trial or testify at trial. (The request to expand the category of issues upon which only the defendant can decide is not without precedent. In *Red Dog v. State*, 625 A.2d 245, 247 (Del. 1993), this Court expanded the list of situations where the defendant, rather than the attorney, is the ultimate decision maker to include the decision whether to forego further appeals and to accept the death penalty).

The State argues that pursuit of a GMBI verdict is the "functional equivalent of a plea of guilt with a request for mitigation of the nature of his sentence (death) or the manner it is to be served (partially in a mental facility. . .)." In response to that argument, Cooke's attorneys assert the United States Supreme Court held in *Florida v. Nixon*, that a concession of guilt is *not* the functional equivalent of a guilty plea. (*Florida v. Nixon*, 543 U.S. 175, 188, 125 S. Ct. . 551, 160 L. Ed. 2d 565 (2004)). In *Nixon*, the Supreme Court, distinguished a concession of guilt from a guilty plea as follows:

> Despite [defense counsel's] concession, Nixon retained the rights accorded a defendant in a criminal trial. *CF. Boykin*, 395 U.S. [238] at 242-243 and n. 4, 89 S. Ct. . 1709 [, 23 L. Ed. 2d 274] (a guilty plea is "more than a confession which admits that the accused did various acts," it is a "stipulation that no proof by the prosecution need be advanced"). The State was obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes with which Nixon was charged . . . . Further, the defense reserved the right to cross-examine witnesses for the prosecution and could endeavor, as [defense counsel] did, to exclude prejudicial evidence. See *supra*, at 558. In addition, in the event of errors in the trial or jury instructions, a concession of guilt would not hinder the defendant's right to appeal. (*Id.*).

In Nixon, the defense attorney conceded guilty and then presented evidence of mental illness during the penalty phase with the goal of avoiding a death

sentence. He consulted several times with his client but never obtained explicit consent to conduct the defense in this manner. (*Id*. at 189, 125 S. Ct. . 551). Because the prosecution was still required to prove its case beyond a reasonable doubt, the United States Supreme Court held that conceding guilt during the guilt phase of a capital murder trial was not the functional equivalent of a guilty plea. (*Id*. at 188-89, 125 S. Ct. . 551). Cooke's defense counsel submit their position is strengthened by the Supreme Court's ruling in *Nixon* because, unlike the attorney in that case, they will not concede that Cooke is guilty. Moreover, Cooke's attorneys assert that a GBMI verdict is an alternative that will only be reached a by the jury if they are persuaded that the State has met its burden of proof.

"*Waynwright v. Sykes*, the United States Supreme Court held that the attorney possesses the right to decide certain strategic and tactical decisions, including what witnesses to call, whether and how to conduct cross-examination, what trial motions should be made, and what evidence should be introduced." (Phillips, Jean K. Gilles, and Joshua Allen, *Who Decides: The Allocation of Powers Between the Lawyer and the Client in a Criminal Case?*, 71-Oct. J. Kan. B.A. 28 (2002)(citing *Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1, 97 S. Ct. . 2497, 53 L. Ed. 2d 594 (1977) (Burger, C.J., concurring)); *see also Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S. Ct. . 2052, 80 L.Ed2d 674 (1984). Based on *Waingwright*, Cooke's counsel assert that the decision to present evidence of mental illness at Cooke's trial is a tactical one solely within their province. Cooke's defense counsel argue that the principle that the attorney is the one who chooses whether to pursue a mental health defense was solidified by the United States Supreme Court in *Florida v. Nixon*. *See Nixon*, 543 U.S. at 190-91, 125 S. Ct. . 551 (citing Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. Rev. 299, 329 (1983); *Performance of Defense Counsel in Death Penalty Cases* § 10.9.1, Commentary (rev. 3d 2003), Reprinted in 31 Hofstra L. Rev. 913, 1040 (2003)).[37]

Second and fundamentally, the Supreme Court refused to issue a writ of a mandamus saying:

[37] *Id*. at 1154-56.

> The State has not demonstrated that it has a clear legal right to require the trial judge to preclude Cooke's defense attorneys from presenting evidence that would support a GBMI verdict. Accordingly, the State's petition for a writ of mandamus must be denied.[38]

In so many words, since it was not clear that this judge had a duty or even authority to intercede, there was no clear duty the Supreme Court held it could enforce by mandamus. That result, of course, under-scored, at the time, this judge's dilemma and in 2007 lack of authority to act - specifically to force trial counsel to enter a plea of not guilty. The 2009 reversal, or course, established that duty and authority.

With utmost respect, even when the Supreme Court reversed and held this Court should have addressed Cooke's dispute with counsel, it did not say how it should be done, what it should have done and by what authority.[39] In reversing the convictions, the Supreme Court said:

> When defense counsel decides to concede not only guilt, but also eligibility for the death penalty over the defendant's express objection, the trial judge has an obligation to inquire into the propriety of counsel's representation. A strategy that Cooke was guilty but mentally ill is incompatible with factual innocence. In this instance, the trial judge's obligation to ensure that the defendant receives a fair trial required the trial judge to instruct counsel not to pursue a verdict of guilty but mentally ill against Cooke's wishes. The

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[38] *Id*. at 1157. It is arguable the above statement means the State has no clear legal right to require the trial judge to intervene or, that in 2007, there was no clear legal right or duty for the judge to intervene. If, of course, there were a conviction, the State would have to "defend" it, including any rulings a trial judge made. This case is a clear example where the State had a direct interest in the issue of intervention because of its duties on appeal and the decisions of trial counsel and this judge which it had to support in order to sustain the conviction.

[39] *Cooke*, 977 A.2d at 852. But left unsaid was by what authority this Court had the right to interpose itself between Cooke and his lawyers?

> trial court's failure to provide this remedy denied Cooke his right to a fair trial.[40]

That "requirement" raises several issues and not just this case. But the Court will address them as it relates to this case.

First, it was only days before jury selection that Cooke's counsel first brought to the Court's attention that they and Cooke disagreed over the "plea." The mandamus proceeding was argued on February 15, 2007 and decided the next day.[41] At one point, after learning for the first time of the possible disagreement between Cooke and his lawyers, Mr. O'Neill expressed some confidence that Cooke may change his mind and agree to counsel's approach.

The Supreme Court's subsequent admonition and finding of Court error quoted just above touches upon a very important - perhaps unappreciated until this opinion - issue. Simply put, while judges sentence in all cases, as the ultimate sentencing authority in a capital case, the judge is in a delicate and unique position. That judge is in an extraordinarily difficult position about what he or she can do or say to a defendant if the judge has to intervene, which (1) would or could be grounds for an appeal and/or (2) create in the mind of the defendant that the judge is not fair.

To accomplish the Court's role as above stated when it becomes necessary, and to

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[40] *Id*.

[41] *In Re State for Writ of Mandamus*, 918 A.2d at 1153. Jury selection had started January 23rd and testimony on February 2nd.

ensure a defendant makes a knowing and intelligent choice in a capital case, and that his due process rights have been met, the Court would have to engage in a thorough colloquy with a defendant not unlike it often does in non-capital cases where a defendant seeks to proceed *pro se* or even enter a guilty plea.[42] In such cases, the Court must review a number of issues with the defendant, particularly the charges, the penalties that could be imposed, possible defenses and circumstances in mitigation.[43] In addition, part of the colloquy in such cases has to include how the effectiveness of the defense would or could be lessened by acting as counsel and being the accused.[44]

Here, the colloquy would have been to inform Cooke of his right to choose what plea he wanted to enter. But to "address"[45] Cooke's conflict with his counsel would have obligated this Court to review for and with Cooke the State's evidence against him, perhaps even the words his counsel used in their pre-trial motions to subpoena out-of-state witnesses:

> The State has assembled a great deal of evidence to try to prove its case against Mr. Cooke.
>
> * * * * *
>
> The State has substantial additional evidence to attempt to link Mr. Cooke

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[42] *Somerville v. State*, 703 A.2d 629 (Del. 1997); *Briscoe v. State*, 606 A.2d 103 (Del. 1992).

[43] *State v. Smith*, – A.2d –, 2010 WL 2164516 (Del.) at *4.

[44] *Id*.

[45] *Cooke*, 977 A.2d at 851.

to the charged crimes, far too much to summarize here.[46]

The Court would have to be conscious that, under these kind of unique circumstances to insure Cooke appreciated what he was doing, (1) in that he had full knowledge of the pros and cons of his choice, (2) he was aware of the evidence against him, (3) his counsel's assessment of his chances of conviction, and (4) their best professional judgment that the best approach or objective in case was saving his life, but, they believed he would be convicted.

In addition to the above, the Court believed that it would have to review the penalties he faced, primarily the most significant: life imprisonment or death. The Court's concern that such a colloquy with Cooke, reviewing the penalties for first degree murder, could be misinterpreted are not ill-founded. The Court held its long discussion with him on Friday, February 2nd. As noted in the recitation of that discussion, the Court reviewed in a broad way the two-step process in a capital murder case.[47] Cooke's first in-court "outburst" was at the end of the day on February 5th. Before trial resumed on the 6th and before the jury came in, the Court held a colloquy about the events of the day before and courtroom conduct. Part of that colloquy illustrates the misinterpretation feared:

> Cooke: But, you not running your courtroom right; this is not right. I mean, you got, you got the authority to run your courtroom.

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[46] Defendant's Motion for Out of State Witness (New Jersey), 3-4.

[47] *Infra* at 39.

Court: I'm running the courtroom, Mr. Cooke, and I'm running it right now. Either answer, yes, or, nor, to my question.

Cooke: You threatening me, I mean, you allow the State to tamper the evidence.

Court: Mr. Cooke, my question - -

Cooke: Friday, did you not threaten me Friday.

Court: I did not threaten you Friday.

Cooke: You threatened me Friday.

Court: Mr. Cooke, are you going to be quiet while the jury is in the courtroom?

Cooke: You threatened me Friday. You said I have the right, you said you got the right either give me life or death. That's what you said.

Court: That is not a threat, Mr. Cooke.

Cooke: You told me to be careful what you say to me. That's what you said out your own mouth. I told, you ain't breaking my rights, my 6th Amendment, my 13th, my 14th, my 15th and my 19th. I told you that, I mean, you said on October 28th - -

Court: Mr. Cooke, stop.

Cooke: You said out your own mouth. You said, Mr. Cooke, you will be convicted - -

Court: Mr. Cooke, Mr. Cooke, please. It's not in your interest to get yourself into this frame of mind, sir. There was no threat. I'm just describing to you the risk - -

Cooke: It was a threat what you said to me. I told you they wasn't even representing me right. You still allowed that to go, you still allowed the prosecutor to tamper with video evidence.

Court: Mr. Cooke, I am not, there was no threat. I am not aware of any tampering - - Mr. Cooke, Mr. Cooke, you had your say.

Cooke: You saying they found in this young woman --[48]

During the colloquy needed to ensure a knowing and intelligent understanding of his choice to plead not guilty over his counsel's wishes, the Court would also have to review possible defenses such as he did not commit the crime or the intercourse was consensual and that he left after it and someone else killed Bonistall. It could have been a dereliction of the Court's duty not to indicate where those defenses could be problematical, which, of course, goes back to a review of the State's evidence to the extent the Court knew it before trial.

The Court, as noted earlier, was aware of a number of circumstances in potential mitigation. These would have been reviewed with him, too. But to stop there in the colloquy would likewise have been deficient in light of the State's evidence and the quality of the mitigating circumstances. The point is, trial counsel believed that the best chance of a life sentence was to front load the mitigating circumstances even if a guilty verdict resulted.[49] To be complete, the Court would had to have discussed all of this with Cooke to accomplish what has now been held to be its duty in this case.

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[48] Trial Transcript of February 6, 2007, at 7-9.

[49] *Supra* at 9-10.

To not conduct such an exhaustive colloquy in a capital case would be a worse abrogation of this Court's duty and role than the lack of addressing counsel/client conflict. And, it would be naive to think that failure to take such detailed care in the colloquy would not itself be reversible error: the failure to adequately advise.

But to review the State's evidence in the colloquy exposes the ultimate sentencing authority in a capital case to accusations of bias and prejudgment.[50] In this case, as will be demonstrated in later discussion, such a possibility is not unrealistic.

Yet despite the swirling conflicting concerns noted earlier, the Court conducted a colloquy with Cooke before any evidence was introduced. That was done on February 2nd after jury selection. After the State's opening, defense counsel alerted the Court that Cooke had passed them a note and that he wanted to speak to this judge. They reported he was agitated. The colloquy was conducted in a different courtroom out of concern by all that something could be said, reported in the media and jeopardize the trial. The following discussion ensued, first just with counsel (but outside the jury's presence):

> Mr. O'Neill: Your Honor, during Mr. Wood's opening remarks, Mr. Cooke handed to Mr. O'Connell and me a note that indicates he would like to talk to the Judge, please. And based on some conversations before we began this morning, it may be that he wants to tell the Court of an intention that he may want to enter a plea. And I thought it appropriate to bring this to the Court's attention before I went to my opening statement and to make this known to the Court outside of the presence of the gallery.

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[50] *See supra* at 30.

Mr. O'Connell and I know very little more than what we've just - - what I've just communicated to you about this for various reasons, potential change of his intentions, and I don't know that - - I'm not exactly sure that's what he wants to do.

Court: Well, shouldn't you find out before I talk to him?

Mr. O'Connell: Yes.

Mr. O'Neill: Yes.

Mr. Wood: And, your Honor, we would ask that regardless of what counsel report back, that because he's talking about one of his fundamental right there, that you ask him in some place where no one else can hear it if it is his intent to enter a plea of guilty. I think that ought to happen. I know it's a logistical nightmare. I'm not suggesting whether it should happen.

* * * * *

Mr. O'Connell: Can we meet with him in the conference room there?

Court: Yes. Sure. Take about 15 minutes.

* * * * *

Mr. O'Neill: Thank you for giving us the chance to speak with Mr. Cooke at this juncture.

Mr. Cooke - - Mr. O'Connell and I spoke to Mr. Cooke at the break and we can report this, that Mr. Cooke has indicated he does not want to enter a plea of guilty, however, he does want to address the Court.

And notwithstanding counsel's advice otherwise, he believes very strongly that he does have the right to address the Court even though he's in trial presently represented by counsel and is either unable or unwilling to understand that in that context legally speaking, he can address the Court through counsel and only through counsel.

And perhaps Mr. O'Connell can fill in the rest.

Mr. O'Connell: I think that what he has expressed to us is his desire, and I will emphasize again what Mr. O'Neill said is correct, he does not wish to enter a guilty plea. That's not what he's expressing a desire to speak to you about. It is again on the theme of wanting the whole videotapes heard by the jury, that he feels that his constitutional rights have been deprived, that he feels that the prosecution of this has racial motivation, that he feels that the Court isn't following the rules that it's supposed to follow of the Constitution.

We've indicated to him that we will continue to protect his rights under the Constitution and the laws of this state and ensure that he has a fair trial.

Nevertheless, I can't say with any degree of certainty that I think he's going to act out in the courtroom, but his level of agitation is rising, and so I think that if the Court wishes to address him about any of these matters, and we're not asking you to, that it be done outside the presence of the 8B courtroom only because of the media presence and the like and I think that that has a possibility of making it into the paper and possibly tampering with the jury's judgment of this gentleman a this state of the trial.

* * * * *

Court: In other words, I'm not so sure I can lock the doors if we moved into 8A or 8C or something else like that. That's an issue because of the State Constitution.

And, secondly, or, B, I should say, whatever, I think I am probably obligated to let him say something to me and it might be best if I did so sooner rather than later to let some of the steam off because we do let defendants in other cases say things, you know, they're not satisfied with their lawyers, they want this, they want that. I don't know what he might be saying. It might be exactly along the lines that we discussed on Tuesday afternoon on the videotapes. It may be other things. It may be these other things as far as what he

perceives to be the State's motives, but I am probably obligated to give him that opportunity to speak, okay, and under those circumstances and I would prefer, frankly, to do it after - - who's speaking, you?

Mr. O'Neill: Yes.

Court: After Brendan said something so that he has that in his head, too can hear what it being said to a jury in an open courtroom in a public setting, okay, and can factor that in.

* * * * *

Mr. O'Neill: I think the Court's suggestion to do this after my opening statement makes sense, but might I ask if we're going to do that, can we indicate even in open court before I begin, explain to him that he will get a chance? He's - -

Court: No, I would like you to do that to him. I would like you to explain to him, please.

Mr. O'Neill: All right.

Court: Either or both of you.

Mr. O'Neill: All right.

Court: That, A, he will be given that chance; that I will do it in a courtroom, everybody will be present, you know, all the lawyers will be present, that kind of thing.

Mr. O'Neill: All right.

Court: And he will be given a chance to say whatever he wants to say, but that I said - - you can tell him that I wanted him to hear what you had to say first before he spoke to me.

* * * * *

Mr. O'Neill: I think so. I can't say for sure. You know, he's made a lot of grumblings throughout the thing, but, overall, he's been a pretty well-behaved defendant.

Now he seems to be, you know, percolated a little more heatedly at the moment, but so far his track record indicates that he essentially tows the line with maybe a couple of minor exceptions.

And I have indicated to him that his family supports what I'm intending to do and that may dissuade him to some extent, but I can't guarantee.

* * * * *

Mr. Wood: May I ask if counsel gets the sense he's not going to be able to get through his opening, he'll report it back to your Honor?

Mr. O'Connell: Absolutely. We're not anxious to see anything happen that is going to cause problems for us persuading the jury.[51]

Mr. O'Neill made his openings statement to the jury. His emphasis, of course, was on Cooke's significant history of multi-faceted abuse and prior psychological evaluations. There were no interruptions by anyone.

Following Mr. O'Neill's opening the Court conducted the colloquy with Cooke outside of the jury's persence:

Court: Mr. Cooke, your attorneys have indicated to me that there's some things that you would like to talk to me about and mention to me.

We've set aside this time in this courtroom - -

Ms. Walsh: Sorry, your Honor.

Court: - - for you to do just that. Okay?

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[51] Trial Transcript of February 2, 2007, at 62-72.

Now there is one caution which I want to give you before we start and before you say anything.

I have no idea what the outcome of this proceeding, the trial, will be and if you are found guilty of first degree murder, of course, there would be a penalty hearing. At the penalty hearing, evidence is introduced in addition to what the jury heard during the trial. Evidence - - additional evidence is introduced. And I, as you know, make the final determination of what your sentence is. This assumes the jury finds you guilty of first degree murder. I don't know whether it will or won't and , therefore, that assumes with a guilty verdict of that charge, it assumes there's a penalty hearing. The jury makes a recommendation. I consider only what the jury's heard. I cannot consider and would not consider anything the jury will not hear, okay?

So while you are free to say whatever you want to say, I want you to be careful and keep that in mind as you talk to me, okay?

Cooke: Yes, sir.

Court: All right.

Mr. O'Connell: Do you want him to stand, your Honor, or do you want him to sit?

Court: Sitting's fine.

Mr. O'Connell: Do you want the microphone in front of him or not in front of him?

Court: You can move it over, yes.

Cooke: I just want to ask, do I have to talk now or can I wait until the jury comes in?

Court: Mr. Cooke, I'm not sure what you're saying.

Are you saying you want to say this in the presence of the jury?

Cooke: Yes, I mean I would rather for the jury to hear. I mean what's to hide to them? That's the point. I mean - -

Court: Well, let's take this one step at a time.

Why don't you tell me what it is you might want to say in front of a jury.

Cooke: I mean that's like persuading me to talk to nobody by you saying it.

Court: What?

Cooke: That's like persuading me to talk what you want me to hear. If you let me talk - -

Court: Mr. Cooke, the only time you would have - - there are two - - you would have one opportunity to speak to the jury, okay, during the guilt phase if you chose to take the stand. You have a right to take the witness stand and testify during the guilt phase or not testify. That choice is your alone.

If we go to a penalty hearing, you also have the chance to either take the stand and testify or not take the stand. If you do not take the stand, you, in the penalty phase, have the right to get up and address the jury if you wish.

Do you understand, sir?

Cooke: Yes, sir.

Court: So you will have an opportunity, at least one, and that's all I'm going to assume at this point because we're talking only about the guilt phase, to take the witness stand and testify, whatever, and I'm sure your lawyers have explained what goes on with that.

But in terms of now addressing the jury, the only way you can

address the jury is through your attorneys, okay?

Cooke: So you're saying that the only way I can get to talk in court, right, is going through my attorneys, right?

Court: Yes, sir.

Cooke: Okay.

Court: Unless you're on the witness stand and talking about the guilt phase only.

Cooke: Right. Right. I understand.

Let's say if I had some - - some questions that need to be answered and I went through my counsel and if they didn't do it, as I, you know, proceed to write it down like I supposed to, then what should I do about that?

Court: Are you saying that if there's - - I just want to make sure I - -

Cooke: Yea, that there's a witness up there, you know - -

Court: Yes.

Cooke: - - talking and I'm disputing with it, that's not right what they saying, and I write down, you know, questions and hand it to them and they don't, you know, proceed to push it like the way I've got it on the paper, not being ignorant, but being in the manner in the way that they can understand it - -

Court: Okay. Now, I have to be careful here because there's only so much and so far I can go in answering your questions without overstepping my bounds and stepping onto the role of your lawyers in the case.

I would say 99 percent or more, maybe even 100 percent, of the time whether a question or questions are going to be asked, it's for your lawyers to determine. That is a tactical decision for

counsel to make during the course of the trial. They may see the question and may decide that the potential answer to that question could be damaging to you in one way or another or damaging to your case. They have to make that decision. They are given the right under out rules and law to make that decision on your behalf.

Cooke: Right

Court: You may disagree with it. That's your right to disagree with it, too.

It's also your right and duty if you think a question should be asked to let them know what it is because it may be something they missed or didn't think of or whatever, and whatever, but they, in the end, have that decision - making power about 99 percent of the time.

I cannot give you an example of where they might not because none comes to mind right away, okay?

Cooke: But - -

Court: What else, sir?

Cooke: If the State pushes so much lies, I mean I have, you know, some papers, too, to back it up, you know, that they are lying. I mean I believe my questions should be answered, too, you know, because that be like contradicted if they on the witness stand and got something already written on documents.

Court: Well, I really can't get into that because I don't - - that's a general question and I don't know whether that issue will ever come up during the course of this trial and I can't assume it will.

I would think if your lawyers believed that what a witness was saying contradicted an earlier statement or something else in writing, they might ask that person about that contradiction.

Cooke: Right.

Court: Whether they do or don't may depend on other circumstances, other evidence, other witness testimony, something else like that.

Cooke: All right.

Court: I think that is about as far I should go with that.

Cooke: Um - -

Court: I'm not here as your lawyer. I'm not anybody's lawyer, okay? I'm just trying to help out and find out if there's some problem that's really bothering you that I can address.

Cooke: Yeah. Sure. I'm full of matters. I've got a lot of problems, I mean, with my counselors. They went beyond, you know, the reasons that - - with this mental ill defense. I never agreed to none of that stuff and I've got the papers, you know, that prove I never agreed to that stuff and that's like going over my head, taking my right from me, you know.

Court: I'm not so sure I want to get into advice between you and your lawyers on that issue, Mr. Cooke. It's not really my function.

Cooke: Yeah, but that's like pushing - - that's like putting me in the position where, you know, that's like they running over because they got the legal license to do it. It's like they could be barred for what they doing because I mean as a professional as they supposed to be under the law, the lawyer conduct, they aren't supposed to be doing that.

Court: I understand what you are saying. I'm really not in a position to respond to it, sir.

Cooke: I mean not even with that, even what the State doing, tampering with evidence, he can be barred for that. And I'm quite sure if he's doing it to me, they've done it over years. Yes. This is being done.

Court: Well, at a minimum, sir, where you think a witness is lying - -

Cooke: No, I'm saying - -

Court: No. No. Let me finish.

Cooke: All right.

Court: Where you think, where you believe a witness may be lying or some evidence has been tampered with, you must inform your lawyers.

Cooke: I have done that, sir.

Court: Okay. All right. I'm just - - I'm just going to leave it at that.

Again, I can't give you legal advise because those are the persons to give you legal advice, sir, Mr. O'Connell and Mr. O'Neill.

Cooke: Right, but I mean I've got some proof, you know. I wrote the disciplinary hearing, I wrote the ACLU, I wrote the NAWCP, I wrote Superior Court. I mean it is in Supreme Court, you know, and somehow, some reason, for some reason, you know, I know what it is, that these letters have been pushed back by some through different people, you know, telling them about this matter and I hope to get some response quick, you know, because this is being done and they know I brought this to their attention plenty of times because they're going behind my back, you know, siding with the prosecutor. He's tampered with evidence, you know. If all this evidence supposed to come against me, let it do so then. You know, if they're going to kill me for the truth, let it begin. That's where I stand. I didn't stand for none of this mentally ill defense, you know. And this stuff is getting done. I mean they know and I know it and I'm not hiding nothing from them.

Court: I don't mean to suggest that you are hiding anything from them, okay?

There's not a lot that I am in a position as a judge in this case and possibly, possibly, the ultimate sentencing authority that I can say-

Cooke: Right.

Court: - - all right, at this stage.

Cooke: But I'm just saying, I mean it's like a big front, like a, you know, perpetrating in front of the media, in front of the, you know, the jury and the crowed that's in the background, you know, not giving them the truth, you know. It's like that the lies are overdrawing the truth, period, and it's making me looking like that's that person.

Court: Well, what the truth is is for those jurors to determine.

Cooke: True, but if the jury, let's say - - I'm not saying, you know, that it is, but I'm just saying let's say if the jury is set up, then what? Does it matter what you tell the jury?

Court: Well, I can't answer that question, and I can assure you after having talked to 227 people in the jury selection process, this jury is not set up.

Cooke: Right, but it's known through process that prosecutors do use their peremptories to force blacks off. It's known for a fact that if you look at it, if you looked at the jury, there's only one black on there, but then you've got one that's sitting, you've got nine whites, you've got one Asian and one Hispanic. I mean that is a big difference right there. That's part of - - like if it's bias or racial, that still means the same to me. But I'm just saying, as the judge, you are the overseer. I believe you can order the prosecutor to get them tapes fully and not delete nothing, not take nothing out of it and being played in its form, fashion, way that it was brought in that way.

Court: Well, let me say something to you about the tapes which we sort of went into Tuesday.

Cooke: Yes, sir.

Court: I have ruled that the evidence regarding voice identification cannot come in, cannot even be mentioned that a voice identification comparison was sought. I ruled that.

Cooke: Right.

Court: Your attorneys asked me to exclude that evidence and I agreed with them and I excluded that evidence.

Cooke: Right.

Court: Any tape regarding the voice identification sessions or the sessions to get voice exemplars from you would also, therefore, be totally inadmissable.

Cooke: Right.

Court: Okay?

Cooke: Right.

Court: Now, the State has the - - has at this moment, indicated that it's not going to introduce the taped statement of Rochelle Campbell. Nothing can force them to.

Cooke: Right.

Court: And you know she will testify live as far as we know.

Also, the point is that they can select various portions of other tapes to play and if your lawyers think that additional portions should be played and I determine those additional portions should be played out in fairness, that that can happen. That's another thing. I don't know. We're not at that - - we haven't crossed that bridge yet.

Cooke: Right, but he told me himself he was going to allow that to be played like that portions, you know, taking pieces out.

Court: Again, basically, that is a decision for your attorneys to make on your own behalf.

Cooke: Right, but I have to talk to them.

Court: That is a tactical decision.

Cooke: That's their tactic. That's not my strategy. That's their tactic and their strategy. If I'm telling you right now that I have talked to them about that and we disagree on that, they going to still override me and it's going to make it look like I'm pushing that issue. I'm not pushing that issue that way. They're using their own strategies. You know, their strategy, they want those pieced to be seen to make it look like I'm this mentally ill person, you know. That's wrong.

Court: Well, I'm not going to ask what their intentions or motives - -

Cooke: I mean - -

Court: let me finish - - what their intentions or motives are in connection with why they - - what their decisions are in connection with playing of any of these tapes that can be played at all, okay? The don't have to explain that to me and that's a decision for them to make.

Cooke: Right.

Court: I'm not allowed to ask them that decision or the reasons why.

Cooke: Right. Right.

Court: Okay.

Cooke: And I'm just saying for the young woman's tape to be played, because it's normal, you know, plenty of lies that she lied about even when she took the - - you know, at the suppression hearing, she lied about a lot of things. As far with Detective Rubin, he done the same thing, you know. They didn't never meet up with

each other's story and that tape proves that. That tape proves a lot of things, how, you know, the search warrant was really invalid.

Court: All right, I've already ruled on the search warrant, okay?

Cooke: Right. Yes. I mean you denied all my motions.

Court: No, I have not denied all your motions.

Cooke: As far as I know you have, I mean, what I got. As far as I know what I got. What I've been - - you know, what I got from the public defenders. I don't know if it's all true, but I'm just telling you, you know.

Court: Well, I have granted some of their motions in connection with some of the proposed evidence.

Cooke: Well, they haven't told me. The only thing I got is denied.

I'm just saying that tape plays a big role in this case.

Court: Well, you know, you understand that if a witness testifies, if any witness testifies contrary to what that witness said on prior occasion, any potential inconsistency can be brought out on questioning.

Cooke: Right, but if there's only certain amount of papers that was submitted into evidence, right, into the vault, who's saying they're going to go past that? Who said these questions are, you know, going to be, you know, answered?

Court: Mr. Cooke, that's a question that's a little bit too vague for me to answer.

Cooke: Right, but this is what the video proves, though, so if you - - if the young woman get on the stand today and you've got the stack of papers, what she had, which is - - as a matter of fact, which is transcript by the FBIs and I believe my interrogation of the tape should be transcript by FBI because that would be more - - more valid for me. That would be more efficient.

Court: The best evidence of you what you said is what is on the tape, not what the transcript is.

Cooke: Yeah, but that's the State doing it. The State - -

Court: No, no, the best evidence of what you said is what was on the tape, not the transcript.

Cooke: Right, but it delete even on the transcript the things that they were saying to me to start the conversation off. I mean with their cursing, with they're calling me scum, you know, point the fingers in my face and stuff like that. I mean that right there proves, you know, how these cops are. That proves where I stand. That proves that this is a racial case. This is not a high profile case, but it is a racial profile case, that it could be indicted that a lot of people's part of this just by the way things are running, and if the media don't see that, you know, all they see is what the people's feeding them. They're not - - you know, why have a jury that will only get half of the story and not the whole story? The jury can't see that.

Court: Mr. Cooke, probably, you know this conversation is some ways it too early because we don't know what is going to happen at the trial or what witnesses might say or not say or what evidence is going to be introduced or not introduced, things like that. So it's very - - we just haven't had any evidence yet. All we've had is the statements by the lawyers and that's not even evidence itself.

Cooke: Right, but the foundation was already laid. If the foundation already laid, how ya going to stop it?

Court: What was presented is not evidence, first of all, and it's a summary of things.

Cooke: Yes, but it was lies that was presented, too.

Court: Well, I don't know that.

Cooke: I do, because it's happening to me.

Court: I understand you might feel that way, but I, you know, I don't know that and we'll just have to wait to see what unfolds at the trial, sir.

Cooke: I'm just saying that, you know, one minute, you know, on Tuesday, the young woman, the prosecutor, she stood up and she told you herself that Mr. Wood stood up and said, We have the papers, the transcripts of Mr. Cooke's interrogation, but she said herself it's four hours long, the tape. But they'd rather play a four-hour long tape with stuff they're going to delete? That's what they told you.

Court: Well, based on what I've heard about some of the things that are in that tape, I would have to delete them based on Delaware Supreme Court rulings.

Cooke: Right.

Court: Things that the police said to you and some other things would have to come out in any event.

Cooke: So I mean that still is wrong because if I say if something is not admissible, you shouldn't play nothing, period.

Court: Well, because part is admissible and another part may not be admissible, it doesn't - - because parts are inadmissible doesn't mean other parts couldn't be admissible.

Cooke: I mean what I believe on the part where what - - where I say, you know, I don't understand, I can't comprehend or to the part where I says I need my lawyer right now present, where's my lawyer while they question me, that's the part that going to get deleted out?

Court: Mr. Cooke, I don't know anything about that.

Cooke: I mean because I'm just saying if I'm getting judged - - if I'm getting judged by a jury, I would allow the jury to decide that. That's the 12. That's what you picked the 12 for. The 12 is for them to judge you because if you let - -

Court: They can judge you only on what is admissible evidence.

They can't judge you on inadmissible evidence.

Cooke: Right. Right, but if I allow the State to play what they want to play, they're going to try to make it look like, you know, that he said that, he said that, and that's all the jury is looking at because the jury - -

Court: Mr. Cooke, it may be - -

Cooke: The jury said itself - - the jury said itself, We're going to go by evidence. They said it out of their own mouth. So that is evidence towards me to help me.

Court: Mr. Cooke, I don't know what is going to be played as far as anything that you said to the Newark police when they arrested you. I have no idea. It's very difficult.

Cooke: To me, I don't have nothing to hide. I haven't really said anything, you now, but I'm just saying for the benefit of me, this would benefit me. I mean humiliation before honor and right now I'm being humiliated through this whole process so I believe honor will come out at the end. I mean I'm getting advertised through the whole newspaper, through the media, you know, I'm like a bi-word for the people.

Court: What? I'm sorry?

Cooke: Bi-word.

Court: Bi-word for what?

Cooke: What the people using me as, their favorite song or tune.

Court: Well, again, I think some of what you're asking me, one of the reasons I can't answer your question, it is because I haven't heard the evidence in this trial.

I start out with this proceeding with a clean slate in connection with any of the hearings in terms of what I heard at any of the prior hearings in this case and any decision I make in this case, if it gets to me, is based only on what happens in the trial, nothing that happened up until start of today.

Cooke: I'm just saying if they pulling - - you know, if they pulling the wool over your eyes because of your age or whatever.

Court: Mr. Cooke, I've been here 18 - -

Cooke: I know that, sir. I know that, sir, but it can happen because - -

Court: Well, I don't deny it couldn't happen, but I'll tell you it's not likely.

Cooke: Right. But I'm just saying, if they are, you know - -

Court: That's why they have two sides in every case.

Cooke: Right. And this case is still going.

Court: Well, anything else, sir?

Cooke: No, sir. Thank you.

Court: Sure.

Mr. Wood: Your Honor, just so the factual record is clear, all of the video and/or audiotapes that the defendant is discussing where provided in their entirety to the defense a long, long time ago and I guess you can sort of pick that up from what the defendant is saying since he knows what's on them.

Court: Well, not only that. It's one of the thing we talked about in the office conference whether, as has happened in two cases that I'm aware of, defense counsel in this case have listened to the entire tape rather than just rely upon the transcript.

Mr. O'Neill: With Mr. Cooke.

Court: Yes.

It also should be noted on the record that this proceeding is in Courtroom 6E and the door is open.

Okay. Anything Else?

Mr. O'Connell: Not from the defense, your Honor.

Court: All right. Then we can move to 8B.

Mr. Wood: Thank you, your Honor.

Mr. O'Connell: Thank you very much, your Honor.

Court: Thank you.[52]

The record, of course, is that there were times when Cooke spoke up, sometimes in the jury's presence and sometimes not; none later on February 5th. The first was on February 6th. The record is equally clear that the Court did not intervene in the issue of which plea was to be entered. The same record shows Cooke repeated some of the same accusations of racial motivation, witnesses lying, and evidence tampering as he did in the first colloquy before the evidence started. The same record shows those accusations are/were inextricably intertwined with his position that he wanted a not guilty plea entered and his defense to proceed consistent with that.

[52] Trial Transcript of February 2, 2007, at 64-100

The Supreme Court's mandamus opinion, the lack of clear authority as of 2007 for the Court to "intervene" in this conflict, and the dilemma and their probable objective of trying to save Cooke's life, made this Court very wary of whether or how to intervene in the Cooke/counsel plea conflict. All of this was a recurring concern at any time Cooke spoke during the trial. Lack of intervention has now been found reversible. Nevertheless, the likelihood magnitude of a non-reversible intervention is probably underappreciated, particularly in this case.

New counsel have been appointed. They are following Cooke's directive to enter a plea of not guilty and that is the posture of this case since it came back for retrial. The Court will now address, the specifics of Cooke's motion for this judge's recusal.

Discussion

Cooke's motion for recusal is premised on several grounds. One is that the United States and Delaware Constitutions mandate that the defendant in a capital case is constitutionally receives a fair trial. That right, of course, is beyond dispute.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires and absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.[53]

Cooke's next ground derives from the Delaware Code of Judicial Conduct which states:

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[53] *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 2d 942, 946 (1955).

Rule 2.11. Disqualification.

(A) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
  (1) The judge has a personal bias or prejudice concerning a party; or personal knowledge of disputed evidentiary facts concerning the proceeding.

To start, this judge had knowledge of many of disputed facts prior to the first trial. Those facts, however, came to the Court's attention during pre-trial hearings, motions and other filings which were all matters of public records prior to the trial. With one exception those public items were the sources of this judge's pre-trial knowledge. The one exception were the New Jersey DYFS records *in camera* reviewed pre-trial mentioned earlier.[54] Any record reviewed prior to trial became public record at trial. No one, of course, suggests any of that meant this judge had to recuse himself from the first trial.

One such hearing was the "proof positive" hearing.[55] The Delaware Supreme Court has held that because the trial judge (then Judge Christie) had presided over a pre-trial hearing, a "proof positive" hearing, and decided other motions adverse to the defendant did not mean that judge had to recuse himself from the trial.[56]

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[54] *See supra* at 9-11.

[55] Del. Const. art. I, § 12

[56] *Steigler v. State*, 277 A.2d 662, 668 (Del. 1971), *judgment vacated in part on other grounds*, 408 U.S. 939, 92 S. Ct. 2872, 33 L. Ed. 2d 760 (1972).

Most of the above is not really the basis for Cooke's motion to recuse this judge from presiding over the upcoming second trial. In sum, his motion raises two specific reasons for recusal. One, this judge sentenced him to death. Because this case remains a capital case, that fact should weigh heavily in favor of recusal. His other specific reason revolves around the exchanges which occurred during the first trial between him and this judge.

In *Los v. Los*,[57] the Supreme Court stated this when a judge faces a motion recuse:

> The requirement that judges be impartial is a fundamental principle of the administration of justice. To that end, rules of disqualification have evolved to ensure that no judge shall preside in a case in which he is not disinterested and impartial. As a matter of due process, a litigant is entitled to neutrality on the part of the presiding judge but the standards governing disqualification also require the appearance of impartiality.[58]

The Supreme Court further held that when faced with a claim of personal bias under 2.11(A)(1), the judge is required to engage in a two-part analysis:

> First, he must, as a matter of subjective belief, be satisfied that he can proceed to hear the cause free of bias or prejudice concerning that party. Second, even if the judge believes that he has no bias, situations may arise where, actual bias aside, there is the appearance of bias sufficient to cause doubt as the judge's impartiality.[59]

Based on that analytical approach, this judge must first determine if he can proceed

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[57] 595 A.2d 381 (Del. 1991).

[58] *Id*. at 383. (Citations omitted).

[59] *Id*. at 384-85. (Citations omitted).

to preside over the case, not only the trial but any possible pre-trial hearings, the trial, and other matters free of bias or prejudice to Cooke.

Cooke argues it is that first test which is all that is needed. For that argument he relies upon *Flonnory v. State*.[60] *Flonnory* was a capital case. The Supreme Court found that the trial judge's handling of a juror who had learned of highly prejudicial information about Flonnory, during the trial phase, but was not excused, required a reversal. What that juror learned, in the Court's view, established actual prejudice of the juror who should have been excused during the trial, and perhaps no penalty hearing held.[61] When it reversed the conviction, it said this:

> Thankfully, this and other similarly egregious circumstances that result in compromising a jury's impartiality are rare. When they do occur, however, the integrity of the judicial process must be preserved by affording a defendant, like Flonnory, the right to a new fair trial before an impartial jury. The judgments of the Superior Court are reversed. This matter is remanded for a new trial before a different judge.[62]

It is the last sentence upon which Cooke relies to argue there is a *per se* disqualification of the first judge when the conviction and death sentence are reversed.

The limited precedent since Flonnory would appear to indicate there is no *per se* rule.

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[60] 778 A.2d 1044 (Del. 1991).

[61] *Id*. at 1056-57.

[62] *Id*. at 1058.

One case is *State v. Charbonneau*. The conviction and death sentence in *Charbonneau* were reversed.[63] When remanded for retrial, the Supreme Court did not direct that a different judge preside over the case for retrial. Curiously, in remanding the case for retrial, the Supreme Court said in language with a ring familiar to this case:

> …but believe the trial judge's rulings unfairly thwarted the defendant's constitutional right to present her case in the way she and her counsel believe to be most effective.[64]

On remand Charbonneau moved to recuse the same judge from presiding over the retrial. That judge in a thoughtful opinion denied the recusal motion.[65] He certified two questions, as a result of his opinion, to the Supreme Court. In an *en banc* order from that Court, the following was stated:

> (1) The Superior Court of the State of Delaware certified two questions to this Court in accordance with the Delaware Constitution, art. IV § 11(9) and Delaware Supreme Court Rule 41. Specifically, by order dated June 2, 2006, the following questions have been certified:
>
> a. Notwithstanding the trial judge's subjective belief that he is free of bias or prejudice, is there an objective appearance of bias a matter of law sufficient to cause doubt his impartiality?
>
> b. If there is not an objective appearance of bias sufficient to cause doubt about his impartiality, are there unusual circumstances in this case which would warrant reassignment to another judge as a matter of judicial administration?

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[63] *Charbonneau v. State*, 904 A.2d 295 (Del. 2006).

[64] *Id*. at 321.

[65] *State v. Charbonneau*, 2006 WL 2588151 (Del. Super.).

(2) Supreme Court Rule 41 provides, in part, that certification will be accepted by this Court only if there are "important and urgent reasons for an immediate determination by this Court of the questions certified."

(3) The Court has considered the questions certified and the particular circumstances of this case and has determined that important and urgent reasons do not exist to justify deviating from the ordinary appellate process available to the parties in this case.

NOW, THEREFORE, IT IS ORDERED that the questions of law certified by the Superior Court of the State of Delaware are hereby REFUSED.[66]

One has to be careful when reading tea leaves. If there were an opportunity for the Supreme Court to announce a *per se* recusal rule, however, as Cooke argues, that was it, but it did not.

Instructive also are *State v. Manley*, *State v. Stevenson* who are/were co-defendants. Their convictions for first degree murder were affirmed but their death sentences were reversed. The Supreme Court said that the original judge's asking to have the murder case assigned to him tainted the process. The original judge had presided over a suppression hearing in an unrelated case where Stevenson was the defendant The State's witness in the at case who testified at the suppression hearing was the victim of a later murder.[67] Because of that and the judge's asking the murder case be assigned to him, the matter was remanded for a new penalty hearing to be conducted by a different judge. However, as

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[66] 2006 WL 1699518 (Del.).

[67] *Stevenson v. State*, 782 A.2d 249, 253-60 (Del. 2001).

part of the remand, there were also issues raised in post conviction relief motions filed by both defendants which that new judge had to first consider. This judge and that judge are the same.

This Court ruled on Manley and Stevenson's motions for post conviction relief. Each defendant raised a number of issues. To deal with them, the Court had to recite the facts of the case - murder - which had been developed at the first trial. Their motions were denied.[68] The Supreme Court affirmed that denial.[69]

This Court's denial of the defendants' postconviction motions prompted them to file a motion to recuse. Their grounds were:

> The defendants premise their recusal motions on four discrete portions from this judge's opinion denying their motions for postconviction relief and holding the penalty hearing would proceed, citing these passages:
>
> 1. In fact, the *Swan* Court distinguished that case from *Chance* by noting that there was "no credible argument, as in *Chance*, that Warren's death was unintended consequence of either Swan's or (co-defendant) Norcross' actions. The same can be said about the evidence in this case.
>
> 2. The evidence conclusively showed a planned and intentional killing in which two persons, these defendants, participated. *Chance*, therefore, is inapplicable to the facts of this case.
>
> 3. The evidence was overwhelming.
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> 4. There is a key element of the record in this case which both defendants ignore or have chosen not to address. Whatever infirmities the Supreme

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[68] *State v. Manley, State v. Stevenson*, 2003 WL 23511875 (Del. Super.).

[69] *Stevenson v. State*, 2004 WL 771657 (Del. 2004).

> Court found with the original trial judge's penalty decision, the fact remains that before this sentencing decision was made, the jury unanimously found beyond a reasonable doubt that four statutory aggravating factors existed. Fn Quotations are from this Court's decision but the four points of contention are from the defendants' Motion to Recuse (docket #209).[70]

The Court denied the recusal motion reviewing the Canon and *Los v. Los* factors.[71] The defendants did not seek an interlocutory appeal or certification of any questions to the Supreme Court. After the new penalty hearing was held and new death sentences imposed, the defendants appealed. The recusal issue was not raised on appeal and the sentences were affirmed.[72]

There are obvious distinctions between this case and the *Manley*/*Stevenson* cases. First, this judge did not impose the death sentences which were originally imposed. Second, the recusal issue was not raised on appeal even though an issue in this Court. Third, unlike the original judge in *Manley* and *Stevenson* this judge had no contact with Lindsey Bonistall at any time. The only "contact" was through the evidence presented in the guilt and penalty phases. Fourth, this judge did not ask to be assigned to the Cooke case unlike the original judge in *Manley* and *Stevenson*. Fifth, of course, this judge had no contact with wither defendant in the first trial.

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[70] *State v. Manley*, *State v. Stevenson*, 2004 WL 2419138, at *3 (Del. Super.).

[71] *Manley v. State*, 918 A.2d 321 (Del 2007); *cert. denied* 550 U.S. 971, 127 S. Ct. . 2885, 167 L. Ed. 2d 1157 (2007).

[72] *Id*.

But one point is particularly important. This judge had to familiarize himself from the full record of the first trial Manley and Stevenson and was fully aware, of course, that the prior judge had determined that the death penalty was the appropriate sentence. The second jury, of course, was not aware of the earlier death sentence as the jury in Cooke's retrial would not be.

The final point for their *per se* argument Cooke advances is this case itself. The Supreme Court reversed his conviction and death sentence on the ground he received ineffective assistance of counsel for their failure to plead him not guilty and conduct his defense accordingly. It also held this Court had erred for not intervening in his dispute with his trial counsel. As part of its opinion, the Supreme Court recited various instances of Cooke's outbursts in court and the exchanges between him and the Court.[73] Yet with all of that, there was no directive for a different judge to conduct the new trial. The issue of counsel's role and/or duty in a case of this kind was difficult and one without much precedent. The constitutional issue of whether and how this Court should intervene in Cooke's disagreement with counsel was also difficult. These difficulties are reflected in this Court's struggles, now mistaken, before and during the trial. These difficulties are also manifest by Supreme Court's three to two vote.

While no trial judge likes to be reversed, the reversal is understandable and well reasoned.

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[73] *Cooke v. State*, 977 A.2d at 824-25.

This judge is free of bias and prejudice against Cooke. But that is only part of the first of the two tests. Because despite this judge's subjective views, there has to be a determination of whether there is an objective appearance of bias as a matter of law sufficient to cause doubt about my impartiality?

As noted, the Delaware Supreme Court does not appear to have said there is a *per se* rule that when a capital case is to be retried, it must always be done by a different judge. Cooke cites only one other case other than *Flonnory* to support his argument of an objective appearance. That case seems to suggest a *per se* rule in Arizona. The case is *State v. Vickers*,[74] which held:

> In a death penalty case, however, which is treated differently from non-death penalty cases, [citations omitted] we believe that there is an appearance of impropriety when a judge who has sentenced the defendant to death in a prior case, also tries the same defendant for another potential death penalty offense.[75]

That has to be read carefully. It says the same judge cannot try the same defendant for subsequent murder when that judge has already sentenced that defendant to death in an unrelated, earlier case. That is not this case. And frankly it has been the practice in this Court for as long as this judge knows that, where a judge has tried a defendant for murder,

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[74] 675 P.2d 712 (Ariz. 1983).

[75] *Id.* at 712.

he or she does not get that defendant in a separate trial on a later murder charge.[76]

The Montana Supreme Court disagreed with *Vickers*:

> We conclude that it does not create a per se appearance of impropriety for a trial judge to preside over a potential capital case involving the same defendant the judge had previously sentenced to death in an unrelated case.[77]

There is a fundamental factor to be kept in mind. Cooke's plea in the upcoming trial is not guilty. This, of course, means he is presumed innocent. Necessarily, this means many issues no raised or questions asked at his first trial will be raised and asked at his second trial. Some may be pre-trial, some will be during the trial.

Prior to the first trial, this judge made various rulings,[78] some in his favor, some not.[79]

This judge operates with a clean slate. The new jury will have to hear the evidence and decide if he is guilty or not guilty. If he if found guilty of first degree murder, that jury will hear the mitigating and aggravating evidence and make its sentencing recommendation based on the evidence it heard and, as is the law in Delaware, this judge

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[76] Louis Cabrera and Louis Reyes, for example. One judge tried them for capital murder, though a life sentence resulted for Cabrera and Reyes pled to lesser offense. This judge presided over their trial for unrelated murders.

[77] *State v. Langford*, 882 P.2d 490, 496 (Mont. 1994).

[78] *See infra* at 78-79.

[79] One not in his favor was on his motion to suppress evidence form his residence. This Court's denial of that motion has been affirmed. *Cooke v. State*, 977 A.2d at 857.

will give it appropriate weight.[80] Here, too, Delaware case law on a life sentence recommendation is noteworthy. If upon re-trial and if convicted, the penalty hearing results in a life sentence recommendation in the trial judge may override such a recommendation "*…only if the facts supporting the death sentence are so clear and convincing that no reasonable person could differ.*"[81]

This judge finds there is not an objective appearance of bias or prejudice. That means the analysis turns to the second *Los* test: where there is no objective appearance of bias to cause doubt on impartiality, are there unusual circumstances or an appearance of bias which would warrant reassignment?[82]

Cooke's argument here is several-fold. One part is an overlap from the objective appearance of bias. The second part picks up where the first part left off. In the first part, Cooke cites to several United States Supreme Court cases wherein the due process right to a fair trial is referenced each time. But beyond or behind a each case are specific and distinct fact patterns which render them factually inapposite. These are discussed next. The Court has included other cases.

In re Murchison[83] involved a judge who found a grand jury witness in contempt then presided over the witness' contempt hearing. The Supreme Court said the judge was like

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[80] "Appropriate Weight," *Starling v. State*, 882 A.2d 747, 759-60 (Del. 2005); high standard for overriding life sentence recommendation, *Garden v. State*, 844 A.2d 311 (Del. 2004).

[81] *Garden v. State*, 844 A.2d at 315.

[82] *Jones v. State*, 940 A.2d 1, 18 (Del. 2007).

[83] 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 2d 942 (1993).

a one person grand jury - the accuser, and the judge, therefore cannot be disinterested. This judge has never been Cooke's accuser. The State of Delaware has been.

Coperton v. Massey Coal Co.[84] This case involved the question of whether a West Virginia Supreme Court justice who was one of three in a three-two decision and who had received massive financial support in his election campaign for the Supreme Court directly or indirectly from Massey should have recused himself. The Supreme Court held he should have. There is no issue of political influence in this case.

Turner v. Ohio.[85] The Supreme Court found that disqualification of a judge was required where he was the village mayor and fines he imposed paid part of his judge's salary and part went into the village general fund. There is no factual similarity to the case.

Gardner v. Florida.[86] In this death penalty case, the sentencing judge had access to information through a pre-sentence report which had not been made known to the jury, or to counsel. They jury recommended a life sentence, but based on that private information, the judge imposed a death sentence. The Supreme Court found this to be error, saying, "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear, to be based on reason rather than

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[84] --- U.S. ---- , 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009).

[85] 273 U.S. 510, 523 47 S. Ct. 437, 71 L. Ed. 2d 749 (1927).

[86] 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

caprice or emotion."[87]

There was no attack nor direct appeal in this case that the jury's 12-0 recommendation for a death sentence of this judge's sentence was based on caprice or emotion. Nor do current new counsel so argue in this recusal motion. Here is where *Manley* and *Stevenson* is instructive. In denying their recusal motion, this Court pointed out that any sentence imposed at the new penalty hearing would be based on the evidence at that hearing, not what happened before, and on the second jury's sentencing recommendation, not the first jury's sentence recommendation.[88] In addition, the death sentence imposed here came from a jury's unanimous recommendation for it and on the same evidence it heard, nothing more, nothing less, unlike *Gardner*.

Ungar v. Sarafite.[89] In this case, an attorney-witness became quite contemptuous toward the trial judge.[90] He was admonished outside the jury's presence to answer questions as asked and so admonished in the jury's presence. The difference between *Ungar* and this case is obvious. First, it was not a capital case, and second, the person acting out-of-line was a witness and not the defendant. Nevertheless, the Supreme Court said this (albeit *dicta*):

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[87] *Gardner*, 430 U.S. at 358, 97 S. Ct. At 1205, 51 L. Ed. 2d at 402.

[88] *State v. Manley, Stevenson*, 2004 WL 2419132, at *24.

[89] 376 U.S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964).

[90] The many exchanges are set out in the Supreme Court's opinion.

> Petitioner, Ungar, claims his constitutional right to a fair hearing were violated because his contemptuous remarks were a personal attack on the judge which necessarily, and without more, biased the judge and disqualified him from presiding at the post-trial contempt hearing.
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> * * * * *
>
> But we are unwilling to bottom a constitutional rule of disqualification solely upon such disobedience to court orders and criticism of its ruling during the course of a trial.[91]

Liteky v. United States.[92] Unlike *Ungar*, this case involved issues between the judge and the defendant. It was not a capital case. The best way to understand the recusal issue is to quote what was involved:

> In the 1983 bench trial, Bourgeois, a Catholic priest of the Maryknoll order, had been tried and convicted of various misdemeanors committed during a protest action, also on the federal enclave of Fort Benning. Petitioners claimed that recusal was required in the present case because the judge had displayed "impatience, disregard for the defense and animosity" toward Bourgeois, Bourgeois co-defendants, and their beliefs. The alleged evidence of that included the following words and acts by the judge: stating at the outset of the trial that its purpose was to try a criminal case and not to provide a political forum; observing after Bourgeois' opening statement (which described the purpose of his protest) that the statement ought to have been directed toward the anticipated evidentiary showing; limiting defense counsel's cross-examination; questioning witnesses; periodically cautioning defense counsel to confine his questions to issues material to trial; similarly admonishing witnesses to keep answers responsive to actual questions directed to material issues; admonishing Bourgeois that closing argument was not a time for "making a speech" in a "political forum"; and giving Bourgeois what petitioners considered to be an excessive sentence. The final asserted ground for disqualification - and the one the counsel for petitioners described at oral argument as the most serious - was the judge's interruption of the closing argument of one of Bourgeois' co-defendants, instructing him

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[91] *Ungar v. Sarafite*, 510 U.S. 540, 114 S. Ct., 1147, 127 L. Ed. 2d 474 (1994).

[92] 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

> to cease the introduction of new facts, and to restrict himself to discussion of evidence already presented.[93]

At issue as far as the majority (all nine justices agreed on the result that recusal was not warranted but used different approaches to that result) was concerned was what was "extrajudicial source." That source in *Liteky* was what happened at the first trial. Cooke's point here is what happened at the first trial which is in line with the claim of "extrajudicial source" which the *Liteky* Court said is "extrajudicial source" does not mean.

The Supreme Court went on to say:

> The Judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like interest innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (CA2 1943). Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.[94]
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> * * * * *
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> They apply *whenever* bias or prejudice exists, and not merely when it derives from an extrajudicial source. As we may have described, the latter argument is invalid because the pejorative connotation of the terms "bias" and "prejudice" demands that they be applied only to judicial predispositions that

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[93] *Liteky v. United States*, 510 U.S. at 542-43, 114 S. Ct. at 1151, 127 L. Ed. 2d 482-483.

[94] *Id.*, 510 U.S. at 550-51, 114 S. Ct. at 1155, 127 L. Ed. 2d. at 488

go beyond what is normal and acceptable. We think there is an equivalent pejorative connotation with equivalent consequences, to the term "partiality." See American Heritage Dictionary 1319 (3d ed. 1992) ("partiality" defined as "[f]avorable prejudice or bias"). A prospective juror in an insurance-claim case may be stricken as partial if he always votes for insurance companies; but not if he always votes for the party whom the terms of the contract support. "Partiality" does not refer to all favoritism, but only to such as is, for some reason, wrongful or inappropriate. Impartiality is not gullibility.[95]

More specifically, the Supreme Court said:

Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism of antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

* * * * *

Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration - even a stern and short tempered judges's ordinary efforts at courtroom administration - remain immune.[96]

And finally in finding that no recusal was needed, the Court said:

All of these grounds are inadequate under the principles we have described above: They consist of judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses. All occurred in the course of judicial proceedings, and neither, (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal antagonism that would render fair

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[95] *Id*. at 510 U.S. at 552, 114 S. Ct. at 1155-56, 127 L. Ed. 2d. at 489.

[96] *Id*. at 555-56, 114 S. Ct. at 1157, 127 L. Ed. 2d. at 491.

judgment impossible.[97]

It is important to note that the Supreme Court's ruling in *Liteky* revolved around a federal disqualification statute which reads identically to our Canon; except for a phrase as noted:

> "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned.
>
> "(b) He shall also disqualify himself in the following circumstances:
>
> "(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceed - ing.[98]

Illinois v. Allen.[99] This case was not a capital case. It involved the defendant's conduct toward the trial judge and, the jury, and the failure to adhere to judicial admonitions and generally disruptive behavior.

> 'After his indictment and during the pretrial state, the petitioner (Allen) refused court-appointed counsel and indicated to the trial court on several occasions that he wished to conduct his own defense. After considerable argument by the petitioner, the trial judge told him, 'I'll let you be your own lawyer, but I'll ask Mr. Kelly (court-appointed counsel) (to) sit in an protect the record for your, insofar as possible.'

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[97] *Id*. at 556, 114 S. Ct. at 1158, L. Ed. 2d. at 491-492.

[98] 28, U.S.C § 455(a)(b)(1). The phrase found in the Delaware Canon but not in the federal law is "including but limited to instances where." That is found at the end of 2.11(A) of the Delaware Cannon but not at the end of § 455(a).

[99] 397 U.S. 377, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

'The trial began on September 9, 1957. After the State's Attorney had accepted the first four jurors following their voir dire examination, the petitioner began examining the first juror and continued at great length. Finally, the trial judge interrupted the petitioner, requesting him to confine his questions solely to matters relating to the prospective juror's qualifications. At that point, the petitioner started to argue with the judge in a most abusive and disrespectful manner. At last, and seemingly in desperation, the judge asked appointed counsel to proceed with examination of the jurors. The petitioner continued to talk, proclaiming that the appointed attorney was not going to act as his layer. He terminated his remarks by saying, 'When I go out for lunchtime, you're (the judge) going to be a corpse here.' At that point he tore the file which his attorney had and threw papers on the floor. The trial judge thereupon stated to the petitioner, 'One more outbreak of that sort and I'll remove you from the courtroom.' This warning had no effect on the petitioner. He continued to talk back to the judge, saying, 'There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial.' After more abusive remarks by the petitioner, the trial judge ordered the trial to proceed in the petitioner's absence. The petitioner was removed from the courtroom. The voir dire examination then continued and the jury was selected in the absence of the petitioner.

'After a noon recess and before the jury was brought into the courtroom, the petitioner, appearing before the judge, complained about the fairness of the trial and his appointed attorney. He also said he wanted to be present in the court during the trial. In reply, the judge said that the petitioner would be permitted to remain in the courtroom if he 'behaved (himself) and (did) not interfere with the introduction of the case.' The jury was brought in and seated. Counsel for the petitioner then moved to exclude the witnesses from the courtroom. The (petitioner) protested this effort on the part of his attorney, saying: 'There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me.' The trial judge thereupon ordered the petitioner removed from the courtroom.[100]

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[100] *U.S. ex rel Allen v. Illinois*, 413 F.2d 232, 233-34 (7th Cir. 1969).

The Supreme Court added this description:

> After his second removal, Allen remained out of the courtroom during the presentation of the State's case-in-chief, except that he was brought in on several occasions for purposes of identification. During one of these latter appearances, Allen responded to one of the judge's questions with vile and abusive language. After the prosecution's case had been presented, the trial judge reiterated his promise to Allen that he could return to the courtroom whenever he agreed to conduct himself properly. Allen gave some assurances of proper conduct and was permitted to be present through the remainder of the trial, principally his defense, which was conducted by his appointed counsel.[101]

Allen did not involve judicial disqualification. The decision involved Allen's due process right to be present during the trial. In upholding the trial judge's banishment of Allen after being warned several times following disruptive behavior, the Supreme Court said:

> The trial court in this case decided under the circumstances to remove the defendant from the courtroom and to continue his trial in his absence until and unless he promised to conduct himself in a manner befitting an American courtroom. As we said earlier, we find nothing unconstitutional about this procedure. Allen's behavior was clearly of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint. Prior to his removal he was repeatedly warned by the trial judge that he would be removed from the courtroom if he persisted in his unruly conduct, and, as Judge Hastings observed his dissenting opinion, the record demonstrates that Allen would not have been at all dissuaded by the trial judge's use of his criminal contempt powers. Allen was constantly informed that he could return to trial when he would agree to conduct himself in an orderly manner. Under these circumstances we hold that Allen lost his right guaranteed by the Sixth and Fourteenth Amendment to present throughout the his trial.
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[101] *Illinois v. Allen*, 397 U.S. at 341, 90 S. Ct. at 1059-60, 25 L. Ed. 2d. at 357-358.

> It is not pleasant to hold that the respondent Allen was properly banished from the court for a part of his own trial. But our courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. Nor an the accused be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him. It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes. As guardians of the public welfare, our state and federal judicial systems strive to administer equal justice to the rich and the poor, the good and the bad, the native and foreign born of every race, nationality, and religion. Being manned by humans, the courts are not perfect and are bound to make some errors. But, if courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case.[102]

Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman.[103] This case was not a capital case and did not involve exchanges between a party and the judge. It involved an attorney's conduct toward a judge. Counsel, of course, are held to a higher standard of conduct than what may be expected of litigants. Nevertheless, these comments are instructive:

> Yagman's criticism of Judge Keller was harsh and intemperate, and in no way to be condoned. It has long been established, however, that a party cannot force a judge to recuse himself by engaging in personal attacks on the judge: "Nor can that artifice prevail, which insinuates that the decision of this court will be the effect of personal resentment; for, if it could, every man could evade the punishment due to his offences, by first pouring a torrent of abuse upon his judges, and then asserting that they act from

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[102] *Id.* at 345-47, at 90 S. Ct. at 1062, at 25 L. Ed. 2d at 360-61.

[103] 55 F.3rd 1430 (9th Cir. 1995).

passion. . . ."[104]

In the end, the Circuit Court found the remarks did not warrant discipline or for that matter recusal.

Johnson v. Carroll.[105] The issue here was narrow. A judge of this Court had an *ex parte* conversation with an attorney about an upcoming sentence of Johnson. That attorney, not representing anyone in the proceedings, made negative, *ex parte* remarks about Johnson, who had been involved with that attorney in a case years before. There was no due process violation in the judge sentencing Johnson, after he had disclosed to counsel in the case the *ex parte* remarks. One key point is that all of the information this Court has comes from the prior proceeding and nothing *ex parte* or extrajudicial other than the first round of proceedings.

Capano v. State.[106] *Capano*, of course, at the time of the Supreme Court's first opinion was a capital case. One of the issues in that case involved the trial judge's limitation on Capano's right of allocution and admonitions to Capano in the jury's presence when he deviated from the limitations. Those limitations had been passed on to him by his lawyers and the judge addressed them directly with Capano. Some of his comments

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[104] *Id*. at 1443-44. (Citations omitted).

[105] 369 F.3rd 253 (3rd Cir. 2004).

[106] 781 A.2d 556 (Del. 2001) *cert denied* 536 U.S. 958, 122 S. Ct. . 2260, 153 L. Ed. 2d 835 (June 28, 2002).

bear repeating as found in the Supreme Court's opinion:

> Capano began his allocution by saying, "I'm not allowed to talk about the evidence, and the next think I was going to say was about the evidence, so I won't." Again, at a later point in his testimony, he said the reference to a matter concerning his daughters, "I'm not allowed to talk about that evidence . . . ." Finally, at the end of allocution, he said, "There are a couple of other things but better check and make sure they don't violate any rules. Maybe just one other."
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> *Capano* gave a lengthy allocution covering a number of subjects. He alluded to his accident defense, saying, for example, that his actions on the night of June 27 were those of a "panicked man," and were a result of "very cowardly decisions which I think when I was on the stand before I basically already said that much.[107]

The Supreme Court went on to mention more of his comments and the trial judge's initial direction to remove him from the courtroom:

> Capano raises on this appeal for the first time for plain error review not only trial judge's limits on discussion the evidence but also the trial court's reaction when Capano entered into a discussion of certain evidence. For example, Capano was discussing his pride in his daughters, and then veered into a discussion of what he viewed as harassment of his daughters, presumably by State officials. He told the jury that "my kids were harassed. They were lied to and . . . ." At this point, the trial judge interrupted Capano as follows:
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> Court: We're done. Please take Mr. Capano out of the courtroom.
> Defendant: Can I take it back, Your Honor?
> Court: No.
>
> The trial judge immediately relented, however, stating in the presence of the jury:
>
> I will let him continue. Sort of blown my rules apart here and I'll instruct the jury on that, but the next time you make such a blatant attack on the rules that you're forced operate under I will remove you. There won't be taking back anything. You will not be present for the rest of

[107] *Capano*, 781 A.2d at 657.

the trial.

Later, when Capano began discussing his relationship with Fahey, the trial court interrupted, saying:

> Mr. Capano, if you have any remarks that deal with expressions of remorse, pleas for leniency, plans or hopes for the future, or statements about your own good person, some of which you have already made, please make them now. I will not tolerate any deviance from these conditions.[108]

Capano raised the issue that the trial judge's rebukes of him substantially prejudiced him and that they conveyed to the jury a personal animus toward him.[109] The Supreme Court noted that the trial judge in his sentencing decision specifically noted Capano's courtroom conduct but the trial judge did so as part of presenting a broader picture of the type of person Capano was.[110] In this Court's sentencing decision, it did not mention Cooke's courtroom conduct at all, nor, of course, was it influenced by it.

The Supreme Court noted Capano was a lawyer versed in the system not an untrained defendant. In this Court's sentencing decision, Cooke's age of 36 and extensive criminal history were noted, in short, he was not a neophyte in the criminal justice system.

Gattis v. State.[111] In this case, Gattis' attorney moved to disqualify the judge who was considering a motion for post-conviction relief. *Gattis* was/is a capital case. The

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[108] *Id*. at 657-58.

[109] *Id*. at 665.

[110] *Id*. at 667.

[111] 955 A.2d 1276 (Del. 2008).

basis for the recusal motion was a claim of personal bias by that judge against that attorney arising out of a harsh criticism by counsel of that judge in a prior murder case.[112] That prior case, of course, would be an "extrajudicial source" in the *Gattis* case. The Court in *Gattis* found that the judge's reference in *Gattis* to what happened in *Jones* did not rise to the level where the judge should have granted the recusal motion.[113]

The review of these cases was intended to evolve from those cases Cooke cited, such as *Coperton*, where the distinct facts make them inapplicable or of limited application to this case, to other cases more applicable. The evolution was to those cases where there had been, basically, an issue between the trial judge and either one of the attorneys or to one of the parties. Those latter cases were discussed to address the second *Los* factor that of an appearance of bias sufficient to prompt recusal. They were also meant to be a segue to the specific claims he makes which he argues rise to the level of an appearance of bias sufficient to obtain recusal.

Cooke leads into these examples by repeating two words from the Supreme Court's opinion reversing his convictions and death sentence: "extraordinary circumstances."[114] A careful reading of the context of that phrase shows it refers (modifies) the brief recitation of counsel's choice of a defense as opposed to Cooke's desire to plead not guilty.

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[112] *Jones v. State*, 940 A.2d 1, 17-19 (Del. 2007).

[113] *Gattis*, 955 A.2d at 1286.

[114] *Cooke*, 977 A.2d at 809.

The Court believes it unnecessary to serially address each instance cited in the recusal motion. First each instance cited occurred. Many of the cited instances are noted in the Supreme Court's opinion as his motion sets out. But they appear in the Supreme Court's opinion not because that it believed they prejudiced the jury by the fact they occurred but because they illustrated this Court's failure to address his desire to plead not guilty.

His desire to plead not guilty has to be examined in the light of his own comments, those he said in the jury's presence and outside of it and while testifying. His comments and testimony during the trial were presaged by what he said to the Court in the proceeding after openings on February 2nd. His comments in that proceeding show that he believes the police are lying, have fabricated evidence, that evidence was being suppressed, the prosecutors have tampered with the evidence, and that the whole process is racially motivated:

> Cooke: Right, but it's known through process that prosecutors do use their peremptories to force blacks off. It's known for a fact that if you look at it, if you looked at the jury, there's only one black on there, but then you've got one that's sitting, you've got nine whites, you've got one Asian and one Hispanic. I mean that is a big difference right there. That's part of – like if it's bias or racial, that still means the same to me. But I'm just saying, as the judge, you are the overseer. I believe you can order the prosecutor to get them tapes fully and not delete nothing, not take nothing out of it and being played in its form, fashion, way that it was brought in that way.
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> * * * * *
>
> Cooke: And I'm just saying for the young woman's tape to be played,

because it's normal, you know, plenty of lies that she lied about even when she took the – you know, at the suppression hearing, she lied about a lot of things. As far with Detective Rubin, he done the same thing, you know. They didn't never meet up with each other's story and that tape proves that. That tape proves a lot of things, how, you know, the search warrant was really invalid.

* * * * *

Cooke: Right, but it delete even on the transcript the things that they were saying to me to start the conversation off. I mean with their cursing, with they're calling me scum, you know, pointing the fingers in my face and stuff like that. I mean that there proves, you know, how these cops are. That proves where I stand. That proves that this is a racial case. This is not a high profile case, but it is a racial profile case, that it could be indicated that a lot of people's part of this just by the way things are running, and if the media don't see that, you know, all they see is what the people's feeding them. They're not - - you know, why have a jury that will only get half of the story and not the whole story? The jury can't see that.[115]

During the trial, Cooke made these remarks:

Cooke: You're talking about my 6th Amendment Right; what about my 13th, my 14th, my 15th, my 19th, what about them Constitutional Rights? What about that? Don't I get an equal? I'm no equal? What about my Fifth Amendment? I keep passing the documents to him, he's not representing me right, that's misrepresenting me. What about the video you now allowing them to see? What about that? What about the evidence that Detective Rubin is hiding? What about the pipe he found? Huh? What about the boots at 208 Murray Road? He seized my boots on that, not no homicide. What about the hair that was found on Lindsey Bonistall's left hand that was Caucasian? What about the two DNA documents I got, three DNAs found in that young woman, European, native American and African. What about that? Tell the people about that. Yeah.

* * * * *

Court: Mr. Cooke, just so the record is clear, obviously, you're now back in the courtroom and have chosen to return to the courtroom and

[115] Trial Transcript of February 2, 2007, at 93-94.

that means that there will be no further outbursts, disruptions, or anything like that, by you. Do you understand, sir? It's just a yes-or-no answer. That's all I want.

Cooke: I'm not even getting represented right. Why you give me public defenders, and they misrepresent me? One already told me that he was racist, prejudiced, Mr. Kevin. You gave me a racist public defender.

Court: I've known Mr. O'Connell a long time, and that is –

Cooke: That's what he told me.

Court: I think it's highly unlikely that he told you that.

Cooke: No, it ain't. No, it's not. They're not representing me. Then, if he's not racist, why didn't he bring up the hair situation? They had hair found in the bathroom, hair in the left hand, hair in her bed sheets, hair in the carpet. I get these documents; but the media, you know, they don't write about that, though. They write about things – they try to be negative about Mr. Cooke. I read about that, you know? I read about how the fingerprints didn't come back as mines, how the glove prints didn't come back as mines, how the boot prints didn't come back as mine, phones calls. You didn't want it in evidence. The DNA, you know, three types of DNA that came from Florida. That was signed by Thomas- Detective Thomas, you know?

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Cooke: I believe the State is very skittish, skittish of what I have to say and what the documents they try to hide. I mean, that is a big case. It's about publicity, to me. You know, this ain't a high-profile case. This is a racial case. You know, the media don't talk about that, though. I don't see them talking about nothing like that, though. You know, I guess you're going to have the doctor come in, try to say that the drugs that was found in her system, she couldn't detect it. How that can be? I got the papers from 2006 where Mr. Wood himself signed the paper acting like he didn't know what it was in

her system. You know, Detective Rubin found a weed pipe.[116]

* * * * *

Court: Just a minute, sir, I have reviewed, as you know, the entire tape taken of the session that you had with Miss Carter.

Cooke: I'm not talking about Miss Carter.

Court: I understand. Hold on. I'm not finished yet. Let me finish please.

I viewed the entire session you had with Miss Carter where she was getting handwriting exemplars from you. I needed to see that in connection with the pretrial ruling I made with regarding admissibility or inadmissibility of some of what happened. I have not seen any tape or any version, transcription or whatever, of the session that you had with the Newark Police, the one that lasted about four hours or so, is being told to me. I don't know actually how long it lasted. I'm just being told how long the whole thing did take. Now, I don't know anything about name-calling or anything else like that. I just don't know because I've never seen it.

Cooke: They cut pieced out, though. They cut pieced out of the tape. It's tampering with evidence.[117]

The record, post-remand, is blank whether Cooke still entertains all these views. It is unknown, obviously, if he does , how much current counsel's decisions are or will be affected by his views.

The trial record is that, pursuant *Shockley v. State*,[118] trial counsel sought an *in camera* meeting with this judge to determine their obligations regarding Cooke's upcoming

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[116] Trial transcript of February 13, 2007, at 23-24

[117] Trial transcript of February 15, 2007, at 68-69.

[118] 565 A.2d 1373 (Del. 1989).

testimony. Cooke refers to that meeting in his recusal motion as a basis for claiming bias or the appearance of bias.[119] Cooke cites a remark this judge made about the evidence being "pretty overwhelming."[120] Again, however, these words have to be taken in the context of the discussion with counsel:

> Mr. O'Neill: I'll add that in my opinion right now at this moment in time, Mr. Cooke subjectively believes he did not kill Lindsey Bonistall. And that's his belief, notwithstanding the avalanche of evidence to the contrary.
>
> And although this is in some way like *Shockley*, it's different in that we cannot say, given our opinion of his subjective belief, that he did not kill Lindsey. In that sense it would not be perjury. But a related but sort of different basis, we're charged with representing him and we're trying to keep him from getting a death sentence. And in our view, as his lawyers, participating in the direct-examination with him would assist him not at all, it would hurt his chances to avoid a death sentence.
>
> And we've been consistent with that since the start of the case in pursuing the claim of guilty but mentally ill. And for us to be now questioning him in front of the jury would, in our view, undermine our credibility before the jury, and we think that's ultimately unfair to Mr. Cooke. And it's a – it's ironic that ultimately the judgments that your Honor has to make are to make sure that Mr. Cooke's rights are protected and he is not treated unfairly.
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> And, you know, in my opinion and Kevin's opinion, you've been bending over backwards to that and have succeeded. And in this instance we think if we're called upon, even to

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[119] Cooke's Motion for Recusal at p 17.

[120] *Id*.

introduce him and say he's going to testify to you, to the extent we have any credibility with this jury, we're going to undermine that. And that's the least– the least thing we can afford to do.[121]

* * * * *

Court: I'm just looking a little bit further at Shockley here, that's why I'm quiet.

The other thing too, despite whatever argument we had earlier – argument, I'm talking about the legal issue sense. The jury's heard from Dr. Turner that he confessed to killing her and what you're telling me, the indication is very strongly that he's going to say something to the opposite. And you have evidence, not the least of which is the DNA, the two DNAs, which is for these purposes, I'll say pretty overwhelming.

Mr. O'Neill: We agree. You're not–

Court: I'm trying to choose my words carefully for obvious reasons.

Mr. O'Neill: Understood. I think I already referred to it as an avalanche of evidence.

Court: You did.[122]

He argues the communication from counsel and this judge's responses creates a probability of bias against him.[123] One lesson from *Shockley* itself is that what the judge learned from defense counsel did not warrant a reversal of the conviction.

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[121] *Ex parte* Conference with Counsel Transcript of February 22, 2007, at 6-7

[122] *Id.* at 8.

[123] Motion to Recuse at 18.

Cooke wants it both ways. He does not want defense counsel to be able to meet with the trial judge under circumstances such as counsel in *Shockley* and his case present or require. On the other hand, the Supreme Court has said under these circumstances, trial counsel have an ethical obligation to seek guidance from the trial judge. The trial judge, of course, is in the unique position to assess the evidence of guilt which was admitted at trial. Such an assessment weighs on what the judge and trial counsel work out. This judge's remarks made in that meeting with defense counsel were a necessary part of the process and betray no bias of any kind.

In a sense, Cooke's argument about defense counsel's meeting with this judge is akin to the recusal argument made in *Manley/Stevenson* that reference to the evidence betrayed a bias.[124] The remand trial is on a clean slate.

Cooke's testimony following counsel's "*Shockley*" meeting with the Court provides further insight into the issues he personally raised during the first trial:

> Cooke: Okay, he said to move to another case. All right. Well, actually they brought six doctors to me: Dr. Griffin, Dr. Bernstein, Dr. Alvin Turner, Dr. Stevens, Dr. Barowski, a professor named James Walsh. You know, and soon after I had trouble with one doctor, Dr. Alvin Turner. Even Dr. Bernstein that I told constantly that he was trying to actually use psychology on me saying that I believe that what you say, what you say you say that you believe what you was telling me. And I said, please don't do that to me. So he was basing his own opinion by what the public defender already pushed to him, persuaded him.

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[124] *Supra* at 59-61

So as time go on, I get to talk to other doctors. They told me out of their own mouth that they was told by the public defenders that I was already guilty. So they prejudged me through this whole thing. So that's why you heard what they said.

So as the outbursts as you heard me say I'm not guilty, I never took this mentally ill defense. You seen his presentation. His presentation was Mr. Cooke is guilty but he's mentally ill. You seen every witness that came up there that he never– he never even tried to fight, period.

As he got the documents, which I have the documents. Not one time he did that for me. So he has misrepresented me and I'm quite sure you seen that as well. He know I didn't do this.

You know it. And the State knows it, too. You know you ain't even present all the evidence. All the hair that as found at that scene, in the young woman's bed, on the floor, the envelopes in her left hand, in the bathroom. Nobody brought that to their attention, huh?

The marijuana pipe found in the room, they ain't bring to evidence; right? Nobody will admit to nothing. Nobody take responsibility. But you see me, because I got a criminal record – which I mainly got a drug record. I might have did charges somewhere else, I don't dispute that, but you blame me because you have one else to point at.

There's video y'all haven't see, and I don't believe y'all seen them, period, about the young woman testament (Sic), how she got on, Ms. Campbell. FBI documents, there was transcripts that Detective Rubin tampered with. You didn't tell the jury about that . How she said constantly that it resembles Mr. Cooke but it's not Mr. Cooke.

Same thing with Ms. Amalia Cuadra, forged documents. She never said it was me, but when all of a sudden she come here she says it's me by making me a figure, meaning – making an image as she claims she saw me. This woman never seen me. That was a photo phony point out that y'all did.

Forged documents. She said the person was husky built, husky, deep face, dark skin, 180. 180. They made a sketch. Her sketch was from a one to ten. That sketch that you seen on the enhanced thing, she said it was a ten. Then she said it was a nine. That's in the documents. On that sketch you don't see nothing on there saying the person had a pudgy face, supposed to have some type of freckles on his face and he had – his face was shaved where they seen bumps. You seen none of that , but all of a sudden these witnesses come, everybody says him.

And you got Payless people. They can say that for money, financial problems. You seen that at the end of their testimony. They – they was hoping to get the money, that's what they said. They said, well, I hope so.

These counsel have misrepresented me so bad. They have railroaded me through this whole thing. Not even that, the media had dragged my name through this whole process, since day one, since I've been locked up until now.

The judge himself has threatened me. On February the 2nd, on a Friday, when I talked to him about these counselors.

Not event that, he even advertising in the newspaper as well by making this statement as of October 28th, 2005 on a Friday at the proof positive hearing, you said most likelihood Mr. Cooke will be convicted of first degree murder. As a judge conduct rules, you're not supposed to broadcast nothing like that.[125] That means that

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[125] Cooke's reference is to "proof positive" hearing on October 28, 2005. Such hearings are open to the public. As part of its introductory remarks when announcing its findings, this Court said: "Under Article I, Section XII of the Delaware Constitution of 1997 says, quote, all prisoners shall be bailable by sufficient surety unless for capital offenses when the proof is positive or presumption great. That is the standard which the State has to meet and since Steigler, these hearings have been made part of our jurisprudence. The issue is whether the State has met that burden, and the State has recited a number of things in evidence which it contends establish that it has met the burden of showing proof positive, presumption great to hold the defendant without bail, because of a likelihood of being convicted of First Degree Murder and a situation where the (continued…)

you're favoritism (sic) the family. That was in 2005, in the transcripts and even in the newspaper. Yes, you said that. And now you expect me to hold my tongue back. I mean, you expect me to abide by your rules. Like I'm supposed to fear you.

The only person I fear is God. And if I die, like I said, I die for the truth. This woman wasn't who se – who they say she was. She had friends on Madison Drive, on Lincoln Drive. Roommate came in and lied. Three DNAs found in this one woman. Three DNAs. They sent the one-document paper – it was a paper they got sent to Florida, came back and had three DNAs found in this young woman. Then they claiming – claiming there's three personalities in one person. That personality, huh? Three personalities.

That's their personality for three nationalities (sic) as they use the mentally ill defense to railroad me. They want to make you believe that I'm crazy.

Sure, I went to the infirmary when I was in the institution over there, but you can imagine why I went to the infirmary. A person like me coming in with a serious charge like that. Not even that, a young woman that had my childrens (sic) agreed with these, you know, public defenders and agreed with the prosecutor to work against me for no reason, because he was threatened.

But if they would have showed y'all the video, you would have seen all this. The interrogation, how they threatened her, she's crying, nine months at the time. She got four childrens, so imagine how she was feeling. Threatening to take her to jail, take her government assistance away from her. Not even that, I got letters and documents to prove that. None of this was mentioned though, nothing. Everything is point the finger my way.

I been got rid of these public defenders. I fired them a long time ago. The judge allowed me to keep them.

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[125](…continued)
likelihood of the presence of statutory aggravating circumstances mean that he could be eligible for the death penalty. Proof positive hearing transcript October 28, 2005.

The judge. He took all my human rights away from me, my 5th one, my 6th, 13th, 14th, and 15th. Denied all motions, every last one of them. You expect me to be quiet, setting me up because I had sex with the young woman.

This is a racial case. It ain't got nothing to do with no fair trial. I never had a fair trial. FBI reports come back negative. Phone calls come back negative. They didn't even show you them, did they? But they got the young woman to get on the stand that says all three of those calls is mine.

Mr. Woods is the one that signed for it. You the one signed for it. I took the phone example. You the one signed for it. And then he says admissible (sic), would not allow it in Court. Came back negative. Fingerprints come back negative. Hair, come back negative. Glove prints that they took from my job, negative, don't match no prints. Footprint, not even that, negative.

Actually was a footprint found at the scene of that homicide. A footprint, no boot print. Yes, I got the documents. It was a footprint. They seized my brand new boots. Those boots y'all seen as brand new for a 208 Merry Road break-in that that a boot print was found on toilet paper. Remember when Mr. Smith got on, the FBI agent, they stopped at the toilet paper because that's what the boots was seized for. No boot print was ever found at no homicide scene.

Then you have different detective claiming they seized my boots while they was – I was incarcerated at their facility. Different detectives. How many detective are going to seize a pair of boots, each one claiming.

This man called me nigger underneath of his tongue, cursing at me, call me scum. Detective Rubin, the on that jumped on me, you know, actually supposed to help when the incident – when I talked out of order. He was anxious to do that. He was always anxious to do anything to me. If you see – if you seen the interview tape, you should have seen how he was acting. And they talk about me. But just – just picture a person who they came to and already

blaming you. So how a person supposed to react?

They came to me intentionally. They was already blaming me. If you seen the interrogation tape, it was four-and-a-half hours long. Four-and-a-half hours long interrogation. You expect me to be quiet, hmm?

My thing is, I ain't never do that. I don't know what happened to this young woman. And I knew her but I had no intention of killing nobody. Not me. I did crimes, sure, I admit to my faults, but I know I ain't never killed nobody in my life.

For one thing, I got too many childrens to worry about to worry about that, to waste my life for something like that. The thing is, they don't want to believe this woman was like that, that's the whole thing. Because she went to college, they don't believe that college people, students, period, is supposed to be mingle with black people.

If anybody went to college in here, we know the college creed; right? The college creed is this, go to college, go away from your home, the college becomes your guardians. It's not the parents no more.

One thing, they like to have sex, we know that. They like to get drunk, we know that. They definitely like to do drugs, we know that. They turn away from their religion, we know that. And they have the most STD's, we know that. Don't let these suits fool you, what they got on , because they real shysty (sic) in this courtroom, scams. Every time you go in, they got a scam for me. Right now I got shackles on me.

Yes, I'm not scared. Believe that? I'm not afraid. Far from that. I've been isolated ever since I've been incarcerated. Those rooms is enough to make a person go crazy, you know?

I'm not mentally ill. They know I'm not mentally ill. I'm quite sure the prosecutor know I'm not mentally ill. And the judge even know I'm not mentally ill.

How can something that don't even come back to me, but all of a sudden I'm mentally ill. They never wanted to fight the case, period. My own public defender told me when I first met him, he says, I'm not here to say you innocent, I'm only here to get the death penalty off you. He says if Johnny Cochran was alive you would beat the case.

Mr. O'Neill. That supposed to be a professional? Lawyer? That's not professional. That means to tell me that everybody nearly – a person that's black mainly is going to be convicted from his conduct.

And not only that, Mr. O'Connell told me he's racial. How does that sound? Yes. Did you not? Right.

Not only that, I got a juror that's Number 9, his son was part of this homicide –

Mr. Wood: Objection.

Court: Hold on. Mr. Cooke, please, that's not part of this proceeding.

Cooke: But that's railroading me.

Court: Mr. Cooke.

Cooke: That is railroading.

Court: – please move on to another subject matter.

Cooke: Okay. I know a young man, about 52, his son got incarcerated for something very seriously and the sided with the – what we call the prosecutor. Sided with the prosecutor to convict a person to get his son out of trouble. Number 9. Number 9.

Mr. Wood: Objection, Your Honor.

Court: Mr. Cooke, I asked you please to move on to another subject area. The jury will disregard that last comment.

Cooke: If I was a juror I would go back and really understand how this – how this whole situation – how this case is really running. Before you convict an innocent man for not doing nothing, just for having sex for – with a young woman that the parents really don't want to accept. They don't really want to accept her behavior, how she really was. You expect me to sit her and explain myself?

Everybody in here, I'm quite sure, had one night stands, period. And if you didn't, I mean, you're sitting back lying.

Not even that. I had my sons with me when I met Miss Bonistall, my two sons. They was never even called for a witness on by behalf. Why? Because the State threatened Ms. Campbell so bad that they don't even want them to testify. Only for them, but not for me. That's how bad they threatened her.

Not only that, they've been going out there for like months – months – making sure she's all right, making sure nobody's threaten her. Not even that, my public defender was part of it. He even took my childrens to the mall. Look how agreeable that is. Yes, look how agreeable that is.

And you said they was working for me? They never was working for me. In reality, this is a mistrial. This is a mistrial represented bad with a scam. The man that's seated as Number 9 son part of this crime.[126]

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Court: Okay. I understand what you're saying, but I need an answer to my question. Are you going to make any references to any jurors, anything else you're going to say after I bring them back in?

Cooke: I mean, you actually want me to be railroad by a jury that was forced. It was 163 white people on the jury. You had 4 blacks. You excluded all of them except for two. And you said that this is

[126] Trial Transcript of February 22, 2007, at 138-48.

a fair trial? 163 whites, 12 made it.[127]

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Cooke: It was plenty of stuff they didn't even introduce. As a matter of fact, come to find out they know this young woman was never raped.

She was intentionally killed by someone. How could you be raped with all your clothes on, get tied up, beat up so bad like that, then thrown in the tub with your favorite guitar?[128]

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Court: Mr. Cooke, please remember that I did instruct you to refer to things which are in evidence.

Cooke: This is evidence. The young woman spoke about –

Court: Mr. Cooke.

Cooke: The young woman that got on the stand spoke about saying all three of those calls was mines. How can I defend myself when the public defender's not doing it. He had these documents. He even helped to sign – put admissible on it.[129]

When cross-examined he said this:

Mr. Wood: And today you've told the jury, while under oath, that you had consensual sex with her.

Cooke: Yes, I did.[130]

There was no question that, as Mr. O'Neill said, Cooke believes he is innocent. New counsel will adhere to his not guilty plea and work with the evidence presented at the

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[127] *Id*. at 187.

[128] *Id*. at 150.

[129] *Id*. at 189-90.

[130] *Id*. at 196.

second trial. One issue may well be a concern Cooke raised about his original trial counsel; that they were not asking the questions he wanted. There would be other issues between his counsel and himself which this judge might have to resolve.

In light of the record spread throughout this opinion, this judge is fully confident the issues before and during the new trial can be handled without bias or the appearance of bias. The Supreme Court held this judge committed error in not addressing or resolving Cooke's disagreement with his counsel. That is and was an issue of constitutional dimension and not of this judge's interaction on a personal level with Cooke. By personal, that means, there was no finding of bias or finding of apparent bias.

An objective view is that there is not an appearance of bias sufficient to prompt this judge to recuse himself.

Conclusion

For the reasons stated herein, defendant James Cooke's motion to recuse is **DENIED**.

IT IS SO ORDERED.

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J.