

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cr. ID. No. 9605001774
	)	
GARY GIBBS,	)	
(a.k.a Bobby Miller)	)	
	)	
Defendant.	)	
	)	

Decided: November 12, 2014

**COMMISSIONER’S REPORT AND RECOMMENDATION**

**DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF (SECOND)  
SHOULD BE DENIED  
AND  
COUNSEL’S MOTION TO WITHDRAW SHOULD BE GRANTED.**

Martin B. O’Connor, Esquire, Deputy Attorney General, Department of Justice,  
Wilmington, Delaware, Attorney for the State.

Patrick J. Collins Esquire and Albert J. Roop, V., Esquire, 8 East 13<sup>th</sup> Street, Wilmington,  
Delaware 19801, Attorneys for Defendant Otto Gibbs.

MANNING, Commissioner

This 12<sup>th</sup> day of November, 2014, upon consideration of Defendant's Motion for Postconviction Relief and Defendant's Rule 61 Counsel's Motion to Withdraw, it appears to the Court that:

### **BACKGROUND AND PROCEDURAL HISTORY**

Following a three day trial, on September 8, 1997, Defendant Gary Gibbs was found guilty by a Superior Court jury of Unlawful Sexual Intercourse Second Degree. He was sentenced on October 31, 1997, to 20 years in jail suspended after 15 years, followed by probation. Defendant was arrested under the name Garry Gibbs, but it was later discovered that his real name is Bobby Miller. Defendant was represented at trial by Scott M. Davis, Esquire, of New York, who was admitted *pro hac vice* for the case on November 18, 1996.

After sentencing, Defendant timely appealed his conviction to the Delaware Supreme Court. The conviction was affirmed on November 19, 1998.<sup>1</sup> The Mandate from the Supreme Court was filed with the Superior Court on December 9, 1998.

Defendant filed his first Motion for Postconviction Relief September 26, 2001. At that time, Defendant made the following claims: (1) that he was denied due process because the State failed to turn over an FBI DNA report that he claimed was exculpatory, (2) ineffective assistance of counsel for trial counsel "failing to recognize the obvious exculpatory potential of semen in a sexual assault case," (3) trial counsel "abandoned" the agreed upon defense strategy, (4) trial counsel failed to object to "pictures of blood" and related police testimony<sup>2</sup>, (5) trial counsel failed to request a missing evidence instruction, (6) trial counsel improperly referred to the young woman as "the victim," and

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<sup>1</sup> *Gibbs v. State*, 723 A.2d 396 (Del. 1998) (Table), 1998 WL 977116.

<sup>2</sup> Defendant's 2001 Motion for Postconviction Relief, p. 37.

(7) trial counsel did not understand the Delaware Court rules, in particular the rape shield law. All of these claims were denied by the Superior Court on January 7, 2002. Undeterred, Defendant appealed this decision to the Delaware Supreme Court, which affirmed the ruling against him on August 28, 2002.<sup>3</sup>

Defendant is now again before the Superior Court having filed a Second Motion for Postconviction Relief (the “Motion”) on March 8, 2013.

### **FACTS**

The facts in this case, as taken from the Delaware Supreme Court Opinion in 1998, are as follows:

The evidence [at trial] proved that Gibbs engaged in sexual intercourse with a sixteen-year-old girl on April 28, 1996. On that date, Gibbs and his friends brought two girls they had met on the street back to his motel room for some drinks. Inside the motel room, Gibbs told the victim that he wanted to talk to her in private and he invited her into the bathroom. In the bathroom, Gibbs stated, “I’m not going to hurt you,” and then pushed the victim to the floor, covered her mouth, and began raping her. The victim managed to escape the motel room when Gibbs noticed her bleeding and ran from the bathroom. She immediately reported the rape to the police and an ambulance took her to the hospital.<sup>4</sup>

Defendant was positively identified during trial by both the victim and her friend. It is also worth noting that the police took photographs of what appeared to be blood on the floor of the bathroom where the victim claimed to have been raped and that she was observed to be bleeding from the vaginal area immediately after the rape.<sup>5</sup> Medical examination at the hospital revealed traces of dried blood and evidence of various injuries

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<sup>3</sup> *Gibbs v. State*, 804 A.2d 1066 (Del. 2002).

<sup>4</sup> *Id.*

<sup>5</sup> Testimony of Brandi Stocks, trial transcript, Volume I, p. 93.

to the victim's vaginal area.<sup>6</sup> Finally, semen was recovered from the victim's vagina that later analysis showed to be highly consistent with the Defendant's DNA.<sup>7</sup>

### **RULE 61 MOTION AND COUNSEL'S MOTION TO WITHDRAW**

Defendant filed this Motion on March, 8 2013. The Court appointed counsel on May 7, 2013. Appointed counsel filed a comprehensive Motion to Withdraw as Counsel pursuant to Rule 61(e)(2) on April 28, 2014.

Superior Court Criminal Rule 61(e)(2) provides that:

If counsel considers the movant's claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, counsel may move to withdraw. The motion shall explain the factual and legal basis for counsel's opinion and shall give notice that the movant may file a response to the motion within 30 days of service of the motion upon the movant.

In the Motion to Withdraw as Counsel, Defendant's Rule 61 counsel represented that, after undertaking a thorough analysis of the Defendant's claims, counsel has determined that the claims are so lacking in merit that counsel cannot ethically advocate any of them. Counsel further represented that, following a thorough review of the record, counsel was not aware of any other substantial claim for relief available to Defendant. Defendant's Rule 61 counsel represented to the court that there are no potential meritorious grounds on which to base a Rule 61 motion and has therefore sought to withdraw as counsel.

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<sup>6</sup> Testimony of Dr. Reed, trial transcript, Volume II, p. 77 – 87.

<sup>7</sup> Affidavit of trial counsel, p. 4. According to the FBI DNA report, the probability of an unrelated individual from the Black population having the same profile as Defendant would be 1 in 3.9 billion people. *Id.*

As of this date, Defendant has not filed a response to Rule 61 counsel's Motion to Withdraw as Counsel.

In order to evaluate Defendant's Motion, and to determine whether the Motion to Withdraw as Counsel should be granted, the Court must be satisfied that Rule 61 counsel made a conscientious examination of the record and the law for claims that could arguably support Defendant's Motion. In addition, the Court must conduct its own review of the record in order to determine whether Defendant's Motion is devoid of any, at least, arguable postconviction claims.<sup>8</sup>

### **DEFENDANT'S RULE 61 CLAIMS**

In the Motion, Defendant raises two claims of ineffective assistance of counsel. First, Defendant claims that his trial counsel was ineffective for failing to challenge the testimony of a police officer regarding photographs of what appeared to be blood on the floor of the bathroom where the rape occurred. Second, Defendant claims that he should have been appointed counsel for his first Rule 61 Motion for Postconviction Relief in 2001, pursuant to the United States Supreme Court's holding in *Martinez v. Ryan*.<sup>9</sup>

Before undertaking a consideration of Defendant's claims, the Court must determine whether there are any procedural bars to Defendant's Motion.<sup>10</sup> Under Rule 61(i)(4), any ground for relief that was formerly adjudicated in the proceedings leading to conviction, postconviction proceedings, or a habeas corpus proceeding "is thereafter

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<sup>8</sup> See, for example, *Roth v. State of Delaware*, 2013 WL 5918509, at \*1 (Del. 2013)(discussing standard to be employed when deciding counsel's motion to withdraw on a defendant's direct appeal).

<sup>9</sup> *Ryan v. Martinez*, 132 S.Ct. 1309 (2012).

<sup>10</sup> *Stone v. State*, 690 A.2d 924, 925 (Del. 1996).

barred unless reconsideration of the claim is warranted in the interest of justice.”<sup>11</sup> The phrase “interest of justice” under this Rule 61(i)(4) has been narrowly defined to require that the Defendant “show that the trial court lacked authority to convict or punish him.”<sup>12</sup>

Defendant’s first claim is procedurally barred by Superior Court Rule 61(i)(4), and the second is without merit. Each claim will be addressed below.

In the Motion, Defendant first claims that his trial counsel failed to:

“object to improper police testimony: that pictures admitted into evidence were pictures of blood; at alleged crime scene and by inference victim’s blood, for failure to authenticate and provide underlying data supporting opinion and inference, and for failure to object to improper police testimony as lay witness to issue that that required special knowledge, and for failure to request improper testimony be struck and request the curative jury instruction of missing evidence.”<sup>13</sup>

Defendant’s claim is an almost verbatim quote of the exact same claim he raised in his 2001 motion.<sup>14</sup> This argument was subsequently rejected by the Superior Court in an Order dated January 7, 2002, by the Honorable Haile L. Alford, who was also the presiding trial judge. Therefore, this argument is procedurally barred under Rule 61(i)(4) because the exact same argument was raised, and rejected, in a prior proceeding. Furthermore, Defendant makes no argument that the Court should reconsider his claim in the “interest of justice.”<sup>15</sup>

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<sup>11</sup> Del. Super. Crim. R. 61(i)(4).

<sup>12</sup> *State v. Wright*, 653 A.2d 288, 298 (Del. Super. Ct. 1994).

<sup>13</sup> Defendant’s 2013 Motion for Postconviction Relief, p. 5.

<sup>14</sup> Defendant’s 2001 Motion for Postconviction Relief, p. 37.

<sup>15</sup> Even if Defendant had, the Court can see no merit in such an argument based on the facts of the case.

For his second claim, Defendant argues that in light of the holding in *Martinez v. Ryan*, he was improperly denied the assistance of counsel for his first Rule 61 Motion in 2001. At the time of filing of Defendant's Motion, March 8, 2013, Rule 61(e) only provided for the appointment of counsel for indigent defendants "in the exercise of discretion and for good cause shown, but not otherwise." Rule 61(e) was not amended in light of the *Martinez* decision until May 6, 2013. In any event, the *Martinez* opinion addressed the issue of inadequate assistance of counsel during initial Postconviction proceedings, and how a lack of representation *may* establish cause for a defendant's procedural default of a claim of ineffective assistance of counsel at trial in pursuing *federal habeas corpus relief*.<sup>16</sup> This matter is being decided under State court rules and law, not a federal habeas claim. Moreover, the Delaware Supreme Court held that the ruling in *Martinez* is not retroactive to Delaware state court Rule 61 claims.<sup>17</sup> Therefore, Defendant was not, and is not, legally entitled to counsel for a Motion for Postconviction Relief under Rule 61. As such, Defendant's claim is without merit.

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<sup>16</sup> 132 S.Ct. 1309 (2012).

<sup>17</sup> *Rotten v. State*, 80 A.3d 961 (Del. 2013) (Table), 2013 WL 5808236 (affirming that Rule 61(e), adopted May 6, 2013, is *not* retroactive and that there is no right to counsel in first postconviction proceedings as a matter of Delaware constitutional law).

The Court has reviewed the record carefully and has concluded that Defendant's Motion is without merit and devoid of any other substantial claims for relief. The Court is also satisfied that Defendant's Rule 61 counsel made a conscientious effort to examine the record and the law and has properly determined that Defendant does not have a meritorious claim that can be raised.

For all of the foregoing reasons, Defendant's Motion should be DENIED and Defendant's Rule 61 counsel's Motion to Withdraw should be GRANTED.

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/s/  
Bradley V. Manning,  
Commissioner

cc: Prothonotary  
cc: Martin B. O'Connor, Esquire  
cc: Partick J. Collins, Esquire  
cc: Defendant