

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

**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cr. ID. No. 0912010604
	)	
CORNELL HESTER,	)	
	)	
Defendant.	)	

Submitted: August 22, 2012  
Decided: October 9, 2012

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT  
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF  
SHOULD BE DENIED.**

Phyllis Scully, Deputy Attorney General, Department of Justice, Wilmington, Delaware,  
Attorney for the State.

Cornell Hester, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 9th day of October, 2012, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. On June 3, 2010, a Superior Court jury convicted Defendant Cornell Hester on the charges of second degree burglary, second degree unlawful imprisonment, harassment, two counts of criminal mischief, and malicious interference with emergency communications. The jury acquitted Defendant Hester on the charge of aggravated menacing. The Superior Court sentenced Defendant on September 10, 2010 as a habitual offender to a total period of fourteen years and nine months at Level V, to be suspended after serving twelve years, for decreasing levels of probation.<sup>1</sup>

2. Defendant filed a direct appeal to the Delaware Supreme Court. On August 23, 2011, the Delaware Supreme Court affirmed the decision of the Superior Court.<sup>2</sup>

### **FACTS**

3. The facts giving rise to these charges, as set forth by the Delaware Supreme Court in its decision on Defendant's direct appeal<sup>3</sup>, are as follows: On December 16, 2009, Valerie Wilkins was home alone. At about 8:00 p.m., she heard a knock at the door and found Defendant Hester, her ex-boyfriend, on her doorstep. Hester asked her to open the door. Wilkins told Hester that if he did not leave, she would call the police. Wilkins then called her mother and told her that Hester was at the door. As she retreated upstairs, Hester kicked in the front door and chased her.<sup>4</sup>

4. Wilkins attempted to hide in her daughter's room. Hester broke through the bedroom door and grabbed Wilkins by the shirt, demanding her mobile phone, which she

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<sup>1</sup> See, *Hester v. State*, 2011 WL 3717051 (Del.).

<sup>2</sup> *Hester v. State*, 2011 WL 3717051 (Del.).

<sup>3</sup> *Hester*, 2011 WL 3717051, at \* 1 (Del.).

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

had dropped as she was fleeing upstairs. Hester took Wilkins room to room with him in search of the mobile phone, which was ringing. After finding the phone on the stairs, Wilkins pleaded with Hester to leave because her children would be returning home from church soon. Hester eventually allowed Wilkins to answer her mobile phone and speak with her daughter. Wilkins' mother and step-father arrived at her house a short while later along with Wilkins' three children. Hester fled.<sup>5</sup>

### **PROCEDURAL HISTORY**

5. In a different action, Criminal Action No. 1002002758, multiple criminal actions were consolidated against Hester, all of which stemmed from Defendant's actions and conduct towards the same ex-girlfriend, Valerie Wilkins.

6. In that action, on February 20, 2011, Defendant Hester pled guilty to the charge of Second Degree Assault. The other remaining charges of that indictment were dismissed. At the time of his plea, on February 20, 2011, Defendant was sentenced to eight years at Level V, suspended after five years, for decreasing levels of probation.

7. In that action, Defendant did not file a direct appeal. Defendant sought to challenge the legality of his guilty plea entered in that action in this action. The Delaware Supreme Court ruled that it had no jurisdiction to consider the claims raised by Defendant in that case, on his direct appeal in this case, because Defendant never filed an appeal from his guilty plea and sentence in that case.<sup>6</sup>

8. In that action, Defendant filed a motion for postconviction relief. The Superior Court Commissioner submitted a Report and Recommendation denying that motion.<sup>7</sup> On

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<sup>5</sup> *Id.*

<sup>6</sup> *Hester v. State*, 2011 WL 3717051, at \*1 (Del.).

<sup>7</sup> In Criminal Action No. 1002002758, Superior Court Docket No. 68.

August 21, 2012, the Superior Court accepted the Commissioner's Report and Recommendation and denied the motion in that action.<sup>8</sup>

9. Turning back to the subject action, on direct appeal the Delaware Supreme Court considered several issues. Among the issues considered by the Delaware Supreme Court was Defendant's argument that the evidence was insufficient to support his convictions. Defendant contended that the State's witnesses lied and that the State presented no physical evidence linking him to the crimes.<sup>9</sup>

10. The Delaware Supreme Court on Defendant's direct appeal concluded that the testimony of Valerie Wilkins and the other State witnesses were more than sufficient to prove Defendant's guilt beyond a reasonable doubt of all the crimes with which he was charged. The Delaware Supreme Court concluded that there was no evidence, and nothing in the record, to support Defendant's allegations that the State's witnesses committed perjury. The Delaware Supreme Court determined that Defendant's issues raised on appeal were without merit and affirmed the judgment of the Superior Court.<sup>10</sup>

11. On October 12, 2010 and October 29, 2010, Defendant filed motions to reduce/modify his sentence. In those motions, Defendant claimed, among other things, that the trial judge was prejudiced against him, that there was insufficient evidence presented at trial to support his convictions, that his double jeopardy rights were violated, and that his counsel was ineffective. By Order dated November 22, 2010, which was filed on November 29, 2010, the Superior Court denied these motions.<sup>11</sup> The Delaware

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<sup>8</sup> See, *State v. Hester*, 2012 WL 3608713 (Del.Super.).

<sup>9</sup> *Hester v. State*, 2011 WL 3717051 (Del.).

<sup>10</sup> *Hester v. State*, 2011 WL 3717051 (Del.).

<sup>11</sup> Superior Court Docket No. 43.

Supreme Court held that the claims were without merit and affirmed the denial of Defendant's motions on appeal.<sup>12</sup>

12. Defendant filed another motion for correction of sentence on April 23, 2012, which was denied by the Superior Court on May 18, 2012.<sup>13</sup> Defendant again filed a motion for correction of sentence on June 5, 2012, which was denied by the Superior Court on July 12, 2012.<sup>14</sup>

13. On August 15, 2012, Defendant filed yet another motion for correction of sentence. In that motion, Defendant claimed that his due process rights were violated, his double jeopardy rights were violated, that the indictment was defective and void as to his second degree burglary charge, that the judge was biased, and that his counsel was ineffective.<sup>15</sup> By Order dated September 4, 2012, the Superior Court denied Defendant's motion. The Superior Court noted that Defendant continued to rehash the same arguments he had already made and lost before. The Superior Court held that Defendant's claims were without merit and that Defendant's sentence was lawful and justified.<sup>16</sup>

#### **DEFENDANT'S RULE 61 MOTION**

14. On September 19, 2011, Defendant filed the subject motion for postconviction relief. Thereafter, he filed a number of amendments, supplements, and other submissions related to his motion. Essentially, Defendant contends that: 1) his double jeopardy rights were violated as a result of the "illegal indictment" on the lesser included offense of burglary in the second degree; 2) his counsel provided ineffective assistance for a variety

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<sup>12</sup> *Hester v. State*, 2011 WL 1167064 (Del.).

<sup>13</sup> Superior Court Docket Nos. 86 & 88.

<sup>14</sup> Superior Court Docket Nos. 89 & 92.

<sup>15</sup> Superior Court Docket No. 95.

<sup>16</sup> Superior Court Docket No. 98.

of reasons; 3) that the State's witnesses were not telling the truth; and 4) that the evidence was insufficient to support his convictions.

15. Before making a recommendation, the record was enlarged by directing Defendant's trial counsel to submit an Affidavit responding to Defendant's ineffective assistance of counsel claims. Thereafter the State filed a response to the motion and Defendant filed multiple replies and other responses thereto.<sup>17</sup>

16. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.<sup>18</sup> In order to protect the procedural integrity of Delaware's rules, the court will not consider the merits of a post conviction claim that fails any of Rule 61's procedural requirements.<sup>19</sup>

17. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;<sup>20</sup> (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights and cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, do not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the

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<sup>17</sup> Super.Ct.Crim.R. 61(g)(1) and (2).

<sup>18</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>19</sup> *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>20</sup> If a final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005).

proceedings leading to the judgment of conviction.<sup>21</sup> Moreover, the procedural bars of (2) and (4) may be overcome if “reconsideration of the claim is warranted in the interest of justice.”<sup>22</sup>

18. In this case, Defendant’s claims are procedurally barred. Defendant’s claims relating to the defective indictment, due process violations, trial court bias and errors and insufficiency of the evidence are procedurally barred. These claims were either already raised on direct appeal and are procedurally barred by Rule 61(i)(4) as previously adjudicated, or Defendant failed to raise them on direct appeal and they are procedurally barred by Rule 61(i)(2) and Rule 61(i)(3), for Defendant’s failure to do so. Moreover, all of the claims that Defendant raises in his Rule 61 motion were already previously raised in his motions for reduction/modification/correction of sentence. These claims were already considered and denied by the court.

19. All of the claims that Defendant raises in his Rule 61 motion are procedurally barred pursuant to Rule 61(i)(4) since they have already been previously adjudicated on direct appeal and/or in his motions for reduction/modification/correction of sentence. The court is not required to re-examine claims that already received substantive resolution on direct appeal or in other postconviction motions simply because the claim has now been refined and restated and recouched as an ineffective assistance of counsel claim or refined and restated in some other fashion.<sup>23</sup>

20. Moreover, even if Defendant’s claims were not procedurally barred, they are also without merit.

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<sup>21</sup> Super.Ct.Crim.R. 61(i)(5).

<sup>22</sup> Super.Ct.Crim.R. 61(i)(4).

<sup>23</sup> *Johnson v. State*, 1992 WL 183069, at \*1 (Del.); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

21. The Delaware Supreme Court has already held that there was no support for Defendant's claims that the State's witnesses committed perjury, that the trial court was biased, that Defendant's double jeopardy rights were violated, or that the evidence was insufficient to support his convictions. These claims, raised again herein, are procedurally barred and without merit.

22. It is emphasized that Defendant was not "illegally indicted" and his due process double jeopardy rights were not violated, when the indictment was amended at trial from Burglary First Degree to the lesser included offense of Burglary in the Second Degree. Superior Court Criminal Rule 7(e) permits the amendment of an indictment at any time before verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. In this case, the indictment was amended from Burglary First Degree to the lesser included charge of Burglary in the Second Degree. The court properly exercised its discretion in permitting the State to amend the indictment to charge Defendant Hester with a less serious lesser-included offense of its original charge.<sup>24</sup> No additional or different offense was charged and the substantial rights of Defendant Hester were not prejudiced.<sup>25</sup>

23. In the subject motion, Defendant claims that his counsel was ineffective for a variety of reasons. In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness" and that, (2) the deficient performance prejudiced the defense.<sup>26</sup> The first prong requires the defendant to

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<sup>24</sup> See, *Rogers v. State*, 2003 WL 22957024, at \*1 (Del.); *Shockley v. State*, 2004 WL 1790198, at \*2 (Del.).

<sup>25</sup> *Id.*

<sup>26</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).



show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel's unprofessional errors, the outcome of the proceedings would have been different.<sup>27</sup>

24. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>28</sup> Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.<sup>29</sup> Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.<sup>30</sup>

25. The United States Supreme Court recently reiterated the high bar that must be surmounted in establishing an ineffective assistance of counsel claim. In *Harrington v. Richter*,<sup>31</sup> the United States Supreme Court explained that representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.<sup>32</sup> The challenger's burden on an ineffective assistance of counsel claim is to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial.<sup>33</sup>

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<sup>27</sup> *Id.* at 687-88, 694.

<sup>28</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>29</sup> *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at \*1 (Del. 2008).

<sup>30</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

<sup>31</sup> *Harrington v. Richter*, 131 S.Ct. 770 (2011).

<sup>32</sup> *Id.*, at \*791.

<sup>33</sup> *Id.*

26. The United States Supreme Court reasoned that it is difficult to establish an ineffective assistance claim when counsel's overall performance indicates active and capable advocacy.<sup>34</sup> Counsel's representation must be judged by the most deferential of standards. The United States Supreme Court cautioned that reviewing courts must be mindful of the fact that unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with his client, with opposing counsel, and with the judge.<sup>35</sup>

27. Turning now to the subject case, whether or not defense counsel was a flawless strategist, it is clear from a review of the record that defense counsel provided active and capable advocacy. When reviewing the entire proceeding, the record reflects counsel's overall performance as being active, thorough and capable advocacy. Indeed, Defendant was acquitted on the felony charge of aggravated menacing which, in and of itself, suggests that defense counsel provided able and capable advocacy.

28. Defendant contends that his counsel failed to provide effective representation. Defendant was dissatisfied with counsel's overall representation. Defendant complains that his counsel failed to file motions, failed to build a defense for trial, failed to investigate the case, failed to subpoena crucial witnesses, failed to move for an acquittal based on the insufficiency of the evidence, failed to present evidence that there were other individuals in the house and that the State's witnesses were not telling the truth, failed to file bail reductions, failed to argue that the trial judge was biased and abusing her discretion, failed to submit newly discovered evidence and failed to file other favorable motions.

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<sup>34</sup> *Id.* at 791.

<sup>35</sup> *Id.* at 787-88.

29. Defendant has failed to show that defense counsel's representation was deficient in any regard. Defendant has not overcome the strong presumption that defense counsel's conduct constituted sound trial strategy. Furthermore, Defendant has not established that but for his counsel's alleged deficient conduct in any specific regard the outcome of the proceeding would have been different.

30. Defense counsel, in his Affidavit, in response to Defendant's Rule 61 motion contends that he was unable to locate any witness that would have been favorable to the Defendant at trial.<sup>36</sup> Defense counsel was unaware of the existence of any exculpatory evidence or witness.<sup>37</sup> Defense counsel was unaware of any other evidence which would support Defendant's claim that another individual was present during the crime.<sup>38</sup> Similarly, the State, based on its own investigations, was likewise unaware of any evidence that another individual was present at the time of the incident.<sup>39</sup> This allegation was unsupported by any evidence or investigation conducted by either of the parties. Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.<sup>40</sup>

31. Counsel never sought to obtain the victim's cell phone records to show that she was having a relationship with another man because counsel did not believe there was any good faith basis to believe such evidence was relevant.<sup>41</sup> Counsel was also unaware of the existence of any "newly discovered evidence,"<sup>42</sup> and Defendant fails to provide

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<sup>36</sup> Affidavit of Defense Counsel in response to Rule 61 Motion, Superior Court Docket No. 81.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> State's Response to Rule 61 Motion, Superior Court Docket No. 74.

<sup>40</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, \*2 (Del. Super. 2004)(conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).

<sup>41</sup> Affidavit of Defense Counsel in response to Rule 61 Motion, Superior Court Docket No. 81.

<sup>42</sup> *Id.*

any specifics regarding this conclusory, broad, unsupported allegation. Again, conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.<sup>43</sup>

32. In addition, Defendant has not identified which witness or witnesses that were not called, should have been called, and thereafter to establish how that witness(es) testimony would have resulted in a different outcome of his trial. Defendant does not provide concrete allegations as to how any unidentified witness or additional evidence would have helped his defense. Defendant does not make any concrete factual allegations, let alone concrete allegations of actual prejudice.

33. The decision as to whether or not to call a witness, and how to examine and/or cross-examine witnesses who are called are tactical decisions.<sup>44</sup> Great weight and deference are given to tactical decisions by the trial attorney. There is a strong presumption that defense counsel's conduct constituted sound trial strategy.<sup>45</sup> Defendant has failed to overcome this strong presumption and his ineffectiveness claim must fail.

34. Defense counsel did argue at trial that the evidence was insufficient to support a conviction, that the State had not proved its case beyond a reasonable doubt, and that the Defendant should be acquitted.<sup>46</sup> The Defendant was, in fact, acquitted on the aggravated menacing charge but convicted on the other charges.

35. Defendant represented that he did not believe he had a meritorious basis (either legal or factual) to file the litany of motions that Defendant contends should have been

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<sup>43</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, \*2 (Del. Super. 2004) (conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).

<sup>44</sup> *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

<sup>45</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Harrington v. Richter*, 131 S.Ct. 770 (2011).

<sup>46</sup> June 3, 2010 Trial Transcript, pgs. 12-20.

filed. Specifically, defense counsel did not believe he had a good faith basis to file a motion to “demand an acquittal because the prosecutor committed perjury”, to seek an acquittal because the court committed double jeopardy, or to argue that the court was biased or otherwise abusing its discretion by acting on personal feelings.<sup>47</sup> Defense counsel did not believe he had a good faith basis to file any other “favorable” motion that had not been filed for the Defendant.<sup>48</sup> Defendant’s claims as to ineffectiveness of counsel for failing to file motions are conclusory, unsubstantiated and unsupported. Defense counsel cannot be deemed ineffective for failing to raise unspecified issue(s) and/or motions that have no apparent legal or factual basis. Defense counsel does not have to file meritless motions; in fact, counsel has an obligation not to do so. Defense counsel cannot be deemed ineffective for failing to file motions that lack merit.

36. Defense counsel denies that he ever verbally threatened Defendant or that he told Defendant that he was in collusion with the prosecutor.<sup>49</sup> The State likewise denies the existence of any collusion between the State and defense counsel.<sup>50</sup> Aside from Defendant’s bald assertions, Defendant has offered no evidence, and there is nothing in the record, to support such serious allegations. Indeed, to the contrary, the record reflects that defense counsel actively and capably advocated in Defendant’s best interests, and was even successful in obtaining an acquittal on Defendant’s behalf on a serious charge of aggravated menacing.

37. Defendant contends that his counsel was ineffective for failing to “demand a mistrial because a member of the jury fell asleep.” The juror fell asleep while a witness

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<sup>47</sup> Affidavit of Defense Counsel in response to Rule 61 Motion, Superior Court Docket No. 81.

<sup>48</sup> Affidavit of Defense Counsel in response to Rule 61 Motion, Superior Court Docket No. 81.

<sup>49</sup> Affidavit of Defense Counsel in response to Rule 61 Motion, Superior Court Docket No. 81.

<sup>50</sup> State’s Response to Rule 61 Motion, Superior Court Docket No. 74.

was testifying in the State's case. As a result, the juror was promptly removed and replaced with an alternate juror.<sup>51</sup> Defense counsel did not move for a mistrial because he did not believe there was a good faith basis to do so.<sup>52</sup> The issue had been immediately addressed and remedied. Defendant has failed to meet his burden to establish that defense counsel's conduct was deficient nor has he established actual prejudice as a result from any alleged deficiency.

38. Defendant complains that his counsel was ineffective because he was forced to wear prison clothing at trial when he requested to wear street clothing. Defense counsel, in his Affidavit, represents that Defendant did not request to wear street clothing until the morning of the trial and by then it was too late because counsel had no available clothing to provide to Defendant.<sup>53</sup>

39. There is no duty of trial counsel to object to a defendant wearing prison clothes if defendant has not requested they be worn. Instead, the law is that a defendant cannot be forced to wear prison clothes if he makes an objection to the court to being tried in prison clothes.<sup>54</sup> Without the element of compulsion, there is no constitutional violation.<sup>55</sup> If the defendant does not object to appearing in prison clothes during the trial, then no compulsion shall be found.

40. The failure to make an objection to the court as to being tried in prison clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.<sup>56</sup> The United States Supreme Court recognized that

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<sup>51</sup> Trial Transcript of June 2, 2010, at pgs. 60-61.

<sup>52</sup> Affidavit of Defense Counsel in response to Rule 61 Motion, Superior Court Docket No. 81.

<sup>53</sup> Affidavit of Defense Counsel in response to Rule 61 Motion, Superior Court Docket No. 81.

<sup>54</sup> *Poteat v. State*, 2007 WL 2309983, \*2 (Del.).

<sup>55</sup> *Id.*

<sup>56</sup> *Poteat v. Phelps*, 2010 WL 2696787, at \*4 (D. Del.).

instances arise where a defendant prefers to stand trial in prison garments and that it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury.<sup>57</sup>

41. The record in this case does not reflect that Defendant Hester was compelled to appear at trial in prison clothing.<sup>58</sup> Defendant has not shown that he was forced to wear prison attire. He did not make arrangements to obtain street clothes, he did not request that he be permitted to wear street clothes until the day of trial, and most importantly, he was not forced to wear his prison attire.<sup>59</sup>

42. Moreover, even if counsel improperly “permitted” Defendant to appear in prison clothing, Defendant has failed to establish prejudice under *Strickland* because he has not demonstrated a reasonable likelihood of a more favorable outcome if he had been wearing street clothing.<sup>60</sup>

43. Finally, Defendant contends that he should of testified at trial. Defense counsel, in his Affidavit, represented that Defendant was advised of his right to testify or not testify. Defendant made the decision not to testify.<sup>61</sup> Indeed, the court engaged in a colloquy with Defendant at which time Defendant advised the court that he was exercising his right to remain silent and chose not to testify on his own behalf.<sup>62</sup> Although Defendant would like to change his decision, and is now second guessing his decision not to testify at trial, he is not entitled to another trial simply because he is

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<sup>57</sup> *Poteat v. Phelps*, 2010 WL 2696787, at \*4 (D. Del.), citing, *Estelle v. Williams*, 425 U.S. 501, 508 (1976).

<sup>58</sup> See, *Poteat v. State*, 2007 WL 2309983, at \*2 (Del).

<sup>59</sup> See, *McGlotten v. State*, 2011 WL 3074790, at \*4 (Del.).

<sup>60</sup> See, *Poteat v. State*, 2007 WL 2309983, at \*2 (Del); See also, *McGlotten v. State*, 2011 WL 3074790, at \*4 (Del.).

<sup>61</sup> Affidavit of Defense Counsel in response to Rule 61 Motion, Superior Court Docket No. 81.

<sup>62</sup> Trial Transcript of June 2, 2010, at pg. 104.

dissatisfied with the decision he made on the first trial and with the subsequent result thereof.

44. A defendant is entitled to a trial that is fundamentally fair and free of reversible error.<sup>63</sup> A defendant is entitled to a fair trial, but not a perfect one. For there are no perfect trials.<sup>64</sup> In this case, Defendant was accorded a fair trial and, therefore, a new trial under the facts of this case is not warranted.

45. From a full, thorough and detailed review of the record, it is apparent that defense counsel did the best he could with what he had to work with. Defendant has not pointed to anything in the record which demonstrates a lack of diligence on behalf of defense counsel. The record reflects that defense counsel diligently defended the charges against Defendant. Defendant's claims of ineffective assistance of counsel are without merit.

46. To the extent that any of the claims raised by Defendant were not specifically addressed herein, and as to any general contention made by Defendant that defense counsel's overall representation was deficient, Defendant has failed to make any concrete allegations of actual prejudice and substantiate them. Defendant has failed to meet his burden to establish that defense counsel's conduct was deficient in any regard nor has he established actual prejudice as a result of any alleged deficiency. Defendant's motion for postconviction relief must fail.

47. In this case, Defendant's claims are procedurally barred and Defendant has failed to overcome any of the procedural bars by showing a "colorable claim that there was a miscarriage of justice" or that "reconsideration of the claim is warranted in the interest of justice." The "miscarriage of justice" exception is a "narrow one and has been applied

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<sup>63</sup> *Lovett v. State*, 516 A.2d 455, 476-77 (Del. 1986).

<sup>64</sup> *Id.*



only in limited circumstances.<sup>65</sup> The defendant bears the burden of proving that he has been deprived of a “substantial constitutional right.”<sup>66</sup> The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. The Court does not find that the “interests of justice” require it to consider the otherwise procedurally barred claims for relief.<sup>67</sup>

48. Defendant filed a number of different motions related to his Rule 61 motion. Many of these motions were already addressed by the court.<sup>68</sup> To the extent there is any outstanding motion(s) related to this Rule 61 motion, such as a motion for the appointment of counsel, motion to compel documents, motion to expand the evidentiary record, motion for an evidentiary hearing, motion for some other type of court hearing, and/or any other motion, any such outstanding motion is hereby denied.

49. Rule 61(e) permits the court to appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown. The Delaware Supreme Court has consistently held that there is no constitutional right to counsel in a postconviction proceeding.<sup>69</sup> The United States Supreme Court’s decision in *Martinez v. Ryan*,<sup>70</sup> did not change Delaware’s longstanding rule that defendants have no constitutional right to counsel in a postconviction proceeding.<sup>71</sup> Indeed, the United States Supreme Court in *Martinez* made it clear that when, like the subject motion, a Rule 61 motion is

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<sup>65</sup> *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See, Superior Court Docket Nos. 82 & 90.

<sup>69</sup> *Garnett v. State*, 1998 WL 184489 (Del.); *Cropper v. State*, 2001 WL 1636542 (Del.).

<sup>70</sup> *Martinez v. Ryan*, 132 S.Ct. 1309 (2012).

<sup>71</sup> See, *Martinez*, 132 S.Ct. at 1315-1320.

insubstantial, wholly lacking in merit, and wholly without any factual support, a request for the appointment of counsel is properly denied.<sup>72</sup>

50. To the extent there is any other motion outstanding, the parties' submissions and the evidentiary record were carefully considered. Defendant's allegations were either reasonably discounted as not supported by the record, persuasively rebutted by counsel's Affidavit, or not material to a determination of Defendant's claims. There is no just reason to delay the issuance of this decision in order to expand the record or to otherwise hold any type of hearing.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied.

**IT IS SO RECOMMENDED.**

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Commissioner Lynne M. Parker

oc: Prothonotary  
cc: John S. Edinger, Jr., Esquire

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<sup>72</sup> See, *Martinez v. Ryan*, 132 S.Ct. 1309, 1319 (2012); Superior Court Criminal Rule 61(e).