SUPERIOR COURT
OF THE
STATE OF DELAWARE

CRAIG A. KARSNITZ,
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5263

October 30, 2023

Robert Cannon
SBI# 00249810
Sussex Correctional Institution
P.O. Box 500
Georgetown, DE 19947

Re: *State of Delaware v. Robert Cannon,* Def. ID Nos. 2210001689 and 2210000545
Motion for Postconviction/Change of Venue/Transfer (R-1)
Motion for Reduction Upon Completion

Dear Mr. Cannon:

On July 17, 2023, after a colloquy with me, you pled guilty to Rape Third Degree/Injury.[1] I sentenced you that same day to 25 years at Level 5 , suspended after 5 years for 5 years at Level 3.

On August 24, 2023, you filed two *pro se* motions with respect to the above-referenced cases, which are somewhat confusing in nomenclature and overlapping in substance. The first is a Motion for Postconviction/Change of Venue/Transfer

[1] The other charges were *nolle prossed*.

[sic] under Delaware Superior Court Criminal Rule 61 (the "Rule 61 Motion"). The Rule 61 Motion cites no grounds for postconviction relief, and then cites a string of cases, presumably for review by me. The second is a Motion for Sentence Reduction Upon Completion [sic] under Delaware Superior Court Criminal Rule 35 (the "Rule 35 Motion"), which states some of your grounds for postconviction relief under Rule 61 and also requests a reduction in your sentence. Since both motions were filed *pro se*, I will read the Rule 61 Motion and the Rule 35 Motion together in a light most favorable to you, to effectuate your intentions.

You state three grounds for Rule 61 relief: (1) ineffective assistance of your trial counsel ("Trial Counsel") for failure to submit evidence that you are a disabled veteran and should have been diverted to Veterans Court; (2) you have mental health issues that require review (you enclosed a release form for records from Sun Behavioral Health and others); and (3) the venue of your case should have been transferred to another county under Superior Court Criminal Rules 18, 19 and 20.

You state one request for Rule 35 sentence reduction: that upon successful completion of Level 5 sex offender treatment, the remaining Level 5 time be suspended at Level 3 GPS.

Your Rule 61 Motion did not request the appointment of postconviction counsel, nor am I obligated to appoint one.[2]

Rule 61 Motion

I first address the four procedural bars of Rule 61.[3] If a procedural bar exists, as a general rule I will not address the merits of the postconviction claim.[4] A Rule 61 Motion can be barred for time limitations, successive motions, failure to raise claims below, or former adjudication.[5]

First, a motion for postconviction relief exceeds time limitations if it is filed more than one year after the conviction becomes final.[6] In this case, your conviction became final for purposes of Rule 61 30 days after I imposed sentence; i.e., August 17, 2023.[7] You filed the Motion on August 24, 2023, well within this one-year deadline. Therefore, consideration of the Rule 61 Motion is not barred by the one-year limitation.

[2] Super. Ct. Crim. R. 61(e)(3).
[3] *Ayers v. State*, 802 A.2d 278, 281 (Del.2002) (citing *Younger v. State*, 580 A.2d 552, 554 (Del. 1990)).
[4] *Bradley v. State*, 135 A.3d 748 (Del 2016); *State v. Page*, 2009 WL 1141738, at*13 (Del. Super. April 28, 2009).
[5] Super. Ct. Crim. R. 61(i).
[6] Super. Ct. Crim. R. 61(i)(1).
[7] Super. Ct. Crim. R. 61(m)(1).

Second, second or subsequent motions for postconviction relief are not permitted unless certain conditions are satisfied.[8] Since this is your first motion for postconviction relief, consideration of the Motion is not barred by this provision.

Third, grounds for relief which could have been asserted but were "not asserted in the proceedings leading to the judgment of conviction" are barred, unless you can show (1) cause for relief from such procedural default, and (2) prejudice from a violation of your rights.[9] Your first ground for relief in your Rule 61 Motion is based on a claim of ineffective assistance of counsel. It is well-settled Delaware law that, as collateral claims, ineffective assistance of counsel claims are properly raised for the first time in postconviction proceedings.[10] Therefore, consideration of that ground is not barred by this provision, and I consider it below.

However, the second and third grounds in your Rule 61 Motion – your mental health issues and the venue of your case – could have been, but were not, asserted in the proceedings leading to the judgment of conviction. Nor have you shown (1) cause for relief from such procedural default, and (2) prejudice from a violation of your rights. Thus, these claims are barred now, and I will not consider them.

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[8] Super. Ct. Crim. R. 61(i)(2).
[9] Super. Ct. Crim. R. 61(i)(3)(A) and (B).
[10] *State v. Schofield*, 2019 WL 103862, at *2 (Del. Super. January 3, 2019); *Thelemarque v. State*, 2016 WL 556631, at *3 (Del. Feb. 11, 2016) ("[T]his Court will not review claims of ineffective assistance of counsel for the first time on direct appeal."); *Watson v. State*, 2013 WL 5745708, at *2 (Del. Oct. 21, 2013) ("It is well-settled that this Court will not consider a claim of ineffective assistance that is raised for the first time in a direct appeal.").

Fourth, grounds for relief formerly adjudicated in the case, including "proceedings leading to the judgment of conviction, in an appeal, in a post-conviction proceeding, or in a federal *habeas corpus* hearing" are barred.[11] Your Rule 61 Motion is not barred by this provision.

Finally, none of these four procedural bars apply either to a claim that a new, retroactively applied rule of constitutional law renders the conviction invalid.[12] You make no such arguments.

You assert that Trial Counsel failed to submit evidence that you are a disabled veteran and should have been diverted to Veterans Court, and that this failure constitutes ineffective assistance of counsel under the dual standards of *Strickland v. Washington*[13] as applied in Delaware.[14] Under *Strickland*, *you* must show that (1) Trial Counsel's representation "fell below an objective standard of reasonableness" (the "performance prong"); and (2) the "deficient performance prejudiced [your] defense." (the "prejudice prong").[15] In considering the performance prong, the United States Supreme Court was mindful that "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."[16] *Strickland* requires an objective analysis, making every effort

[11] Super. Ct. Crim. R. 61(i)(4).
[12] Super. Ct. Crim. R. 61(d)(2)(i) and (ii).
[13] 466 U.S. 668 (1984).
[14] *Albury v. State*, 551 A.2d 53 (Del. 1988).
[15] *Strickland* at 687.
[16] *Id*. at 690.

"to eliminate the distorting effects of hindsight" and to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[17] "[S]trategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based."[18]

As to the performance prong, you must demonstrate that Trial Counsel's failure to submit evidence that you are a disabled veteran, so that your case could be transferred to Veterans Court, was an unreasonable decision.

As to the prejudice prong, you must demonstrate that there exists a reasonable probability that, but for Trial Counsel's error, the outcome of the trial would have been different.[19] Even if Trial Counsel's performance was professionally unreasonable, it would not warrant setting aside the judgment of conviction if the error had no effect on the judgment.[20] A showing of prejudice "requires more than a showing of theoretical possibility that the outcome was affected."[21]

Strickland teaches that there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in a particular order, or even to address both prongs of the inquiry if the defendant makes an insufficient showing on one. In

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[17] *Id.* at 689.
[18] *Id.* at 681.
[19] *Id.* at 687; *Zebroski v. State,* 822 A.2d 1038, 1043 (Del. 2003); *Wright v. State,* 671 A.2d 1353, 1356 (Del. 1996).
[20] *Strickland* at 691.
[21] *Frey v. Fulcomer,* 974 F.2d 348, 358 (3d Cir. 1992).

particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant because of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.[22] In every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.[23]

In your case, neither prong is satisfied. Because of the serious nature of the felonies with which you were charged, you case is ineligible for diversion to Veterans Court. It follows *a fortiori* that Trial Counsel could not have been deficient in her performance. Even if she had presented evidence that you are a disabled veteran, it would not have changed your guilty plea, which was freely made, or the sentence I imposed (see below).

I deny your Rule 61 Motion.

Rule 35 Motion

Superior Court Criminal Rule 35 governs motions for modification of sentence. Under Rule 35(b), a motion for sentence reduction "must be filed within

[22] *Strickland* at 697.
[23] *Id*. at 696.

ninety days of sentencing, absent a showing of 'extraordinary circumstances.'"[24] Your Rule 35 Motion is timely filed.

However, you state no grounds for me to reevaluate the sentencing decision I made just a few months ago, and present no information to me whatsoever to cause me to so reevaluate. Nothing has changed since your July 17, 2023 sentencing order, and I decline to reduce your sentence.

I deny your Rule 35 Motion.

For the reasons discussed above, both your Rule 61 Motion and your Rule 35 Motion are **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Craig A. Karsnitz

cc: Prothonotary
Rebecca Anderson, Esquire, Deputy Attorney General
Melissa Lofland, Esquire, Office of Defense Services

[24] *Croll v. State*, 2020 WL 1909193, at *1 (Del. Apr. 17, 2020) (TABLE) (affirming the Superior Court's denial of a motion for modification of sentence where the motion was repetitive and filed beyond the 90-day limit); *see Hewett v. State*, 2014 WL 5020251, at *1 (Del. Oct. 7, 2014) ("When a motion for reduction of sentence is filed within ninety days of sentencing, the Superior Court has broad discretion to decide whether to alter its judgment.").