

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

T. HENLEY GRAVES  
*RESIDENT JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 THE CIRCLE, SUITE 2  
GEORGETOWN, DE 19947  
(302) 856-5257

November 13, 2013

N440 - State Mail  
Mr. James Waller  
SBI #00079  
James T. Vaughn Correctional Center  
1181 Paddock Road  
Smyrna, DE 19977  
bn

RE: **State vs. James Waller**  
**ID #0004013279 (R-1)**  
**(Formerly 7710059DI)**

Dear Mr. Waller:

On October 31, 2013, the Court received your first postconviction motion filed pursuant to Superior Court Criminal Rule 61 ("Rule 61"). In your motion you allege your trial attorneys were ineffective by not giving you good advice as to a plea offer and that they failed to request appropriate jury instructions. You claim you have the right to an attorney to pursue your ineffective assistance of counsel claims. For the reasons stated below, your postconviction motion is denied as being time barred.

**History**

In 1977, you were indicted for murder in the first degree, robbery in the first degree, and kidnapping in the first degree. In 1978, in a trial presided over by the Honorable William G. Bush, III, you were convicted of the above crimes. You received a mandatory life sentence. Your conviction was affirmed in September of 1981 and reissued in February of 1982. State v. Gray, 441 A.2d 209 (Del. 1982).

**Facts of the Case**

The victim in this case was drinking alcohol with you and others at a street corner in Laurel, Delaware, where it was common for people to gather, socialize and drink. The victim was 67 years old.

The victim was tricked into leaving with you and several other people under the guise of drinking and having sex with one of the above persons.

Ultimately, the victim was beaten, robbed, tied to a tree, and gagged in a remote, wooded area. His remains were discovered six weeks later.

### **Post Appeal History**

\_\_\_\_\_ Following your appeal, the handwritten docket evidences a motion for reduction of sentence in 1987, and another motion for reduction of sentence in September of 1994. Both motions were denied. From 1994 through 1998, there were communications between you and the Court as to obtaining copies of the docket, apparently for a pardon/commutation application. You also apparently complained about the Court not being helpful. In 2000, you filed another modification motion which was denied. In 2001, there is docketing in regard to the protocol concerning documenting the trial evidence and removing that evidence from the Prothonotary's evidence locker. In 2010, you informed the Court about a pardon application. Finally, on October 31, 2013, you filed your first motion for postconviction relief.

### **Discussion**

Rule 61 is the Court's present postconviction rule. It was adopted on September 17, 1987, with an effective date of January 1, 1988. The time limitation of Rule 61 of 3 years did not become effective until a year later, January, 1989. Boyer v. State, 562 A.2d 1186, 1188 (Del. 1989).

Prior to the adoption of Rule 61, postconviction relief was controlled by Rule 35, which did not have the detailed protocol of Rule 61 nor did it have procedural bars for stale and relitigated claims. Boyer, 562 A.2d at 1187; State v. Dickens, 602 A.2d 95, 94 (Del. Super. 1989, aff'd, 577 A.2d 752 (Del. 1990)).

In Bailey v. State, 588 A.2d 1121 (Del. 1991), the Supreme Court addressed the transition from Rule 35 to Rule 61. Defendants with final judgments were granted a period of 15 months to file their postconviction claims under Rule 35 and avoid any time bar. Your judgment became final in February 1982. You had the opportunity to file for postconviction relief under Rule 35. When the Supreme Court placed a time bar on Rule 35 postconviction filings, you had 15 months to file a postconviction claim. Nothing was filed to preserve your opportunity for review.

When the time bar of Rule 61 became effective on January 1, 1989, you did not seek any relief until your present motion was filed on October 31, 2013, which is over 24 years after Rule 61 became effective.

All of the above makes it abundantly clear that the present motion is time barred as you

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had years and years to pursue postconviction relief. Therefore, under Bailey, the Court must dismiss your case as time barred.

### **The Impact of Martinez vs. Ryan**

\_\_\_\_\_ In Martinez v. Ryan, -US-, 132, S.Ct. 1309, 182 L.Ed.2d 272 (2012), the United States Supreme Court held that if a defendant can establish inadequate assistance of counsel during his/her initial review in a state collateral proceeding; i.e., postconviction relief, then this may be a basis for avoiding a procedural default in the Federal courts when those courts review a federal habeas corpus application.

Likewise, if a defendant had no attorney representing him/her in their initial postconviction application, the holding of Martinez would apply; i.e., no Federal procedural default would exist.

Martinez did not create a right to counsel at all initial state collateral review proceedings, such as the review available under Rule 61. Roten v. State, Del Supr., No. 476, 2013 (Steele, J. October 28, 2013).

But, as a result of Martinez, the Superior Court amended Rule 61 this past year concerning appointment of counsel. Prior to the amendment, the appointment of counsel in non-capital cases was left to the Court's discretion "for good cause shown, but not otherwise". Rule 61(e)(1). The above language was changed to "The Court will appoint counsel for an indigent movant's first postconviction proceeding" [present Rule 61(e)(1).] This means counsel shall be appointed in a defendant's first postconviction motion, regardless of whether it comes years after the final judgment of conviction.

The unintended consequences of the aforementioned rule change has been a substantial increase in the number of old cases being reviewed wherein the claimant seeks his/her initial postconviction relief many years following his/her conviction or affirmation on appeal.

In this case, the Court has determined that our present Rule 61 does not give you another window of opportunity to seek postconviction relief. At the time of your trial verdict and final judgment, by way of the Supreme Court's decision, Rule 35 controlled postconviction relief. You had approximately 7 years to file for postconviction relief before Rule 35 no longer was the vehicle to file a postconviction motion.

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It also is noted that the appointment of counsel for a defendant's first postconviction motion, even if the motion is filed late, does not automatically remove the time bar of Rule 61(i)(1). It does allow counsel to assist the defendant in arguing why the time bar should not be implemented by way of Rule 61 (i)(5). The time since trial of 35 years raises the reasonable inference as to the practical impossibility to have any meaningful review of the ineffective counsel claims. I shall not go there.

I do not find that the rule change in 2013 as to the appointment of counsel under Rule 61(e)(1) gives you another opportunity to make a very stale Rule 35 claim, which became time barred decades ago. As discussed above, you had years to make your claim under Rule 35. Your motion is hereby dismissed.

IT IS SO ORDERED.

Very truly yours,

*/s/ T. Henley Graves*

T. Henley Graves

THG/ymp

pc: Prothonotary