IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, Plaintiff, v. TIMOTHY MARTIN, Defendant.	))))))))))))	Cr. ID. No. 1306002171

Submitted: February 29, 2016
Decided: May 25, 2016

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

Catrina Gatto, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Dana L. Reynolds, Esquire, 30C Trolley Square, Wilmington, Delaware, Attorney for Defendant Timothy Martin

PARKER, Commissioner

Defendant Timothy Martin, through counsel, filed a Rule 61 Motion for Postconviction Relief. In the motion, Martin raises ineffective assistance of counsel claims and a claim that his plea was not entered into knowingly and intelligently. In Martin's original Rule 61 motion, prior to the appointment of counsel, he also raised an additional claim relating to the misconduct of the Office of the Chief Medical Examiner ("OCME"). Defendant's appointed Rule 61 counsel determined that Martin's OCME claim was without merit. Martin's Rule 61 counsel continued to pursue Martin's first three claims and "withdrew" from pursuing Martin's OCME claim.

BACKGROUND AND PROCEDURAL HISTORY

Timothy Martin was indicted on August 19, 2013 on a number of charges, and re-indicted on December 9, 2013. He was indicted on a total of 27 charges. The charges included one count of Robbery First Degree, five counts of Burglary Second Degree, one count of Home Invasion, three counts of Possession of a Deadly Weapon During the Commission of a Felony, one count of Possession of a Firearm by a Person Prohibited, one count of Assault Second Degree, one count of Aggravated Menacing, three counts of Theft of a Firearm, three counts of Theft $1500 or greater, one count of Theft of a Motor Vehicle, three counts of Theft under $1500, three counts of Criminal Mischief, and one count of Malicious Interference with Emergency Communications. All the charges were consolidated into one case.[1]

These charges stem from five separate burglaries/robberies that were committed between February 2013 and June 2013. There were a total of ten victims in the case. Defendant went into five separate homes and took items from people. The property consisted of jewelry, money, weapons, and other items. Martin even stole a victim's

[1] Superior Court Docket No. 9.

truck when his own vehicle, a Jeep, broke down at the scene of the crime. Inside Martin's truck were items belonging to the victims. A shotgun belonging to one of the victim's was later tested and Defendant's DNA was found on it. The results of a cell-tower analysis performed in the case showed that the Martin was in the location of the burglaries/robbery at the time they were committed.[2]

In one of the home invasions, the burglary committed in June 2013, Defendant had entered the home of victim R F.[3] She was home at the time he burglarized her house. Martin had a knife and he took her money and her cell phone so she could not call the police. Within minutes of Martin fleeing, R.F.'s son-in-law, R.C., arrived and ended up chasing Martin. The chase ended in a physical fight in which Martin repeatedly punched R. C. in the face. R. C. is a senior citizen.[4]

The evidence against Martin was extremely strong and it was likely that he would have been convicted of most, if not all, of the offenses at trial and facing a minimum of over 30 years at Level V and up to over 200 years in prison.

On March 13, 2014, Martin accepted a plea that resolved all the pending charges. Martin pled guilty to three counts of Burglary in the Second Degree, one count of Possession of a Firearm by a Person Prohibited and one count of Assault in the Second Degree. The State agreed to dismiss the other pending 22 charges which included numerous felony charges including a charge of Robbery in the First Degree, additional burglary charges, and a number of weapons charges.

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[2] July 18, 2014 Sentencing Transcript, at pgs. 2-4; Affidavit of Probable Cause.
[3] The victims will be referred to using their initials only.
[4] July 18, 2014 Sentencing Transcript, at pgs. 3-4 Affidavit of Probable Cause.

The plea agreement provided that the State agreed "to recommend no more than 14 years at Level 5."[5] Sentencing was deferred. A Pre-Sentence Investigation was performed. Martin was sentenced on July 18, 2014 to 14 years of unsuspended Level V time, followed by decreasing levels of probation.

Defendant did not file a direct appeal to the Delaware Supreme Court.

On September 3, 2014, Defendant filed a motion for reduction of sentence.[6] The motion was denied by Order dated November 26, 2014.[7] Defendant filed a response to the court's denial of his motion for reduction of sentence, and by Order dated April 2, 2015, the court again denied Defendant's motion for reduction of sentence.[8]

On September 3, 2014, Defendant filed the subject motion for postconviction relief. Prior to this motion being assigned to the undersigned commissioner, the court had directed that counsel be appointed to represent Martin on his Rule 61 motion. After counsel was ordered to be appointed, the motion was assigned to the undersigned commissioner.

Martin's Rule 61 counsel filed a Supplemental Motion on September 1, 2015. In Martin's original motion he raised ineffective assistance of counsel claims, and an OCME misconduct claim. Martin's Rule 61 counsel filed a supplemental motion further developing Martin's claims: 1) that his trial counsel was ineffective by providing materially incorrect information regarding the minimum mandatory sentence he was facing as a result of accepting a plea, 2) that the plea was not entered into knowingly and intelligently; and 3) that Martin's trial counsel was ineffective for failing to obtain a

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[5] Plea Agreement dated March 13, 2014.
[6] Superior Court Docket No. 31.
[7] Superior Court Docket No. 34.
[8] Superior Court Docket No. 38.

mental health evaluation or investigate his mental history. Martin's counsel found his claim relating to the misconduct of the OCME to be without merit and chose not to further pursue that claim.

As an aside, although Martin's counsel sought leave to withdraw as counsel on the OCME claim, it does not appear that counsel needed to withdraw as to that one claim. Rule 61 counsel should seek leave to withdraw when there is *no* claim that can be ethically advocated, and counsel is not aware of any other substantial ground for relief available to movant.[9] In this case, Martin's Rule 61 counsel determined that some of Martin's claims were meritorious and continued to pursue those claims. The role of Rule 61 counsel is to pick and choose the claims that have merit and to pursue only those claims.

In any event, after the supplemental Rule 61 motion was submitted, the record was enlarged[10] and Defendant's trial counsel was directed 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 a reply thereto.

DEFENDANT'S RULE 61 MOTION

In the subject Rule 61 motion, Defendant claims that:

1) Defendant's trial counsel was ineffective for incorrectly advising him that his mandatory minimum sentence was 14 years, when it was 12 years;

2) Defendant's plea must be set aside because the plea was not entered into knowingly, voluntarily and intelligently;

[9] Superior Court Criminal Rule 61(e)(6).
[10] Super.Ct.Crim.R. 61(g)(1) and (2).

3) Defendant's trial counsel was ineffective for failing to investigate Defendant's mental health history or otherwise request a mental health evaluation for mitigation purposes at sentencing; and

4) The State failed to disclose the ongoing governmental misconduct in the State's crime laboratory (the "OCME") thereby undermining the reliability of his positive DNA match.

Each claim will be addressed in turn.

Claim One: Martin Claims that Trial Counsel Was Ineffective For Incorrectly Advising As To The Mandatory Minimum Sentence

Martin was facing 27 charges and if convicted of all, he was facing a minimum mandatory prison sentence of over 30 years and a maximum sentence of over 200 years. The evidence against Martin was extremely strong. Items from the burglaries/robbery were found in his vehicle, he got into a fight with one of the victim's during which Martin repeatedly punched the victim in the face, and the cell-tower analysis placed him at the location of each of the burglaries/robbery.

The plea agreement provided that Martin would plead guilty to three counts of burglary in the second degree, one count of Possession of a Firearm by a Person Prohibited ("PFBPP"), and one count of assault in the second degree. The State agreed to recommend a maximum of sentence of no more than 14 years at Level V. The State also agreed to dismiss the remaining 22 pending charges, including the robbery in the first degree charge, two burglary in the second degree charges, one count of home invasion,

all three counts of possession of a deadly weapon during the commission of a felony charges and additional theft related charges.

As part of the plea, Martin agreed to plead guilty to three counts of Burglary in the Second Degree. The minimum mandatory sentence for each of the three counts of Burglary in the Second Degree was three years at Level V,[11] for a total of nine years.

The plea agreement included a guilty plea to the charge of Assault in the Second Degree. There was no minimum mandatory sentence for the charge of Assault in the Second Degree.

It is the final charge of the plea agreement, the guilty plea to the charge of PFBPP, which gives rise to the subject claim. The minimum mandatory sentence for the PFBPP is dependent on the number of prior offenses.

At the time of the subject offense, March 1, 2013, the minimum mandatory penalty was: 1 year at Level V for a person previously convicted of a violent felony; 3 years at Level V if either the prior conviction or the date of termination of all periods of incarceration or confinement imposed pursuant to said conviction was within 10 years of the date of the offense for the new charge; and 5 years at Level V if the person had been convicted on 2 or more separate occasions of any violent felony.[12]

Although the penalties for a conviction of PFBPP had increased in 2013, the same year as Martin's charges, those changes became effective on July 18, 2013.[13] Since the increased penalties occurred after Martin's offense date of March 1, 2013, Martin's

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[11] See, 11 *Del. C.* § 825(b)(2)
[12] See, 11 *Del. C.* § 1448(e)(1).
[13] The penalties had been increased to 5 years minimum mandatory for one prior violent felony and 10 years minimum mandatory for 2 prior felonies effective July 18, 2013. 11 *Del. C.* § 1448 (e)(1).

counsel was aware that the increased penalties would not be applicable to this case.[14] The increased penalties to the statute played no role in this case.

In Martin's case, the prior violent felony convictions occurred in Maryland. Martin's trial counsel was provided with a copy of the National Crime Information Center ("NCIC") search conducted by the State. The search did not show any out-of-state convictions.[15] After the plea was entered, and a pre-sentence investigation performed, the investigator also noted that Martin's criminal record in Maryland was not recorded on the Delaware Justice Information System ("DELJIS").

Although the NCIC search did not show any convictions in Maryland, the State was aware that Maryland convictions existed. Indeed, the indictment on the PFBPP charge referenced a previous Maryland conviction for Burglary First Degree.[16]

At the time the plea was entered into, on March 13, 2014, the State believed that Martin had several Maryland convictions. Martin's trial counsel had at one time asked the State to look into whether any of Maryland convictions were juvenile adjudications. The State did not respond to counsel's inquiry and Martin's counsel did not want to press the issue because he did not want to call the State's attention to the fact that if there were two adult burglary convictions in Maryland, Martin could be eligible for sentencing as a habitual offender under 11 *Del. C.* § 4214(b) and facing a nondiscretionary life sentence.[17]

Martin, himself, told his trial counsel that he had multiple burglary convictions in Maryland. Martin advised counsel that he was sentenced in Maryland on multiple

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[14] Affidavit of Trial Counsel in response to Rule 61 motion, at pgs. 2-3.
[15] Affidavit of Trial Counsel in response to Rule 61 motion, at pg. 2.
[16] See, Superior Court Docket No. 9- Count 17 of the re-indictment on December 9, 2013.
[17] Affidavit of Trial Counsel in response to Rule 61 motion, at pg. 2.

burglaries together but that he may also have a separate burglary conviction as well. Martin believed that he was a juvenile at the time but that he may have been prosecuted as an adult.[18]

Martin's trial counsel reviewed the PFBPP statute with Martin and discussed the potential penalties he was facing. Martin's trial counsel discussed the minimum mandatory sentences for each of the charges. Martin understood that he was facing a 3 year minimum mandatory sentence for PFBPP if he had one prior violent felony conviction within 10 years and a 5 year minimum mandatory sentence if he had two prior felony convictions.[19]

Counsel discussed with Martin that the State believed that Martin had two prior violent felony convictions in Maryland and that it was the wrong time to challenge the State's belief. Counsel wanted Martin to accept the plea in order to lock the State into its 14 year sentence recommendation and figured that the better time to sort out the prior felony convictions would be after the plea but before sentencing. If there were two burglary convictions in Maryland, Martin could be eligible for sentencing as a habitual offender under 11 *Del. C.* § 4214(b) and could be facing a nondiscretionary life sentence. During their discussions, prior to entering into the plea, Martin was also of the belief that he may have two burglary convictions in Maryland.[20]

On March 12, 2014, counsel visited Martin in prison and discussed the State's final plea offer with him. They reviewed the evidence against him. They reviewed the potential maximum sentence he could receive if convicted at trial as well as the minimum mandatory penalties for each charge. Martin was made aware that if convicted of all the

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[18] Affidavit of Trial Counsel in response to Rule 61 motion, at pg. 2.
[19] Affidavit of Trial Counsel in response to Rule 61 motion, at pgs. 2-3.
[20] Affidavit of Trial Counsel in response to Rule 61 motion, at pgs. 2-3.

charges he could receive more than 200 years in prison. The total minimum mandatory time for all the charges he was facing was over 30 years. Martin was made aware that the State believed the minimum mandatory time for the firearm offense was 5 years. Martin understood that the State's offer was to a plea to five charges with a recommended sentence of 14 years.[21]

Counsel again met with Martin at the court on the day of the plea. Again, counsel reviewed the plea offer with Martin and discussed the potential sentences for each of the five offenses to which he agreed to plead guilty. Prior to entering the plea, Martin was aware that the minimum mandatory sentence for the PFBPP charge was at most 5 years but potentially only 3 years depending on his prior criminal record.[22]

On the Plea Agreement, the parties represented that: "The State agrees to recommend no more than 14 years at Level 5."[23] The Plea Agreement did not provide that the Defendant had to jointly recommend the 14 year sentence. This way, Martin's counsel was free to argue for a 12 year sentence, if the minimum mandatory sentence proved to be only 12 years (3 years for the PFBPP charge, rather than 5 years).[24]

On the Truth-in-Sentencing Guilty Plea form, Martin's counsel listed the total possible minimum mandatory time at 14 years at Level V- 3 years for each of the three counts for the burglary charges, and 5 years on the PFBPP charge.[25] Although the possibility existed that the minimum mandatory sentence could be 12 years, Martin's

[21] Affidavit of Trial Counsel in response to Rule 61 motion, at pgs. 2-3.
[22] Affidavit of Trial Counsel in response to Rule 61 motion, at pgs. 2-4.
[23] March 13, 2014 Plea Agreement- Superior Court Docket No. 24.
[24] Affidavit of Trial Counsel in response to Rule 61 motion, at pgs. 2-4.
[25] March 13, 2014 Truth-in-Sentencing Guilty Plea Form.

counsel determined that it was more prudent to indicate on the Truth-In-Sentencing Guilty Plea form the highest minimum mandatory sentence potentially possible.[26]

With that knowledge, Martin entered the guilty plea on March 13, 2014, which was accepted by the court.

Sentencing was deferred and a full Pre-Sentence Investigation ("PSI") was ordered. The PSI report noted that Martin's criminal history in Maryland was not contained in the Delaware Justice Information System ("DELJIS"). The PSI Investigator had learned of a number of convictions in Maryland. The PSI report revealed that there were two felony convictions for burglary first degree in Kent County, Maryland on March 12, 2005, a possession of marijuana conviction on February 25, 2005 in Centreville, Maryland; a possession of marijuana conviction in on February 1, 2008 in Kent County, Maryland; and a theft conviction on December 20, 2011 in Chestertown, Maryland. In addition, there were a number of theft and burglary charges that arose in 2004 in Kent County, Maryland which were *nolle prossed* perhaps as part of a global plea deal or for some other reason.

Martin was convicted in Maryland of the two burglary first degree felony charges on March 12, 2005. Since he was sentenced at the same time for the two burglaries, the two burglaries would count as only one prior felony conviction for the purposes of Delaware's PFBPP charge. Martin was also convicted in Chestertown, Maryland on December 20, 2011, but that theft conviction was listed as a misdemeanor. Martin was sentenced to 6 months imprisonment followed by 1 year and 6 months of probation for that theft conviction. Because the theft conviction was listed as a misdemeanor, that

[26] Affidavit of Trial Counsel in response to Rule 61 motion, at pgs. 4-5.

conviction would not count as a prior felony conviction for the purposes of Delaware's PFBPP charge.

After sorting through Martin's Maryland criminal history following the PSI, it became apparent that the minimum mandatory sentence Martin would be facing was 12 years (since there was only one prior felony conviction albeit involving two felony burglaries), rather than 14 years.

Martin was sentenced on July 18, 2014. At the time of sentencing, the court, the State, and Martin were all aware that the minimum mandatory sentence he was facing was 12 years. The plea agreement stated that the State would recommend no more than 14 years at Level V, but it did not prohibit Martin's counsel from arguing for a lesser sentence. At sentencing, Martin's counsel argued for the 12 year minimum mandatory sentence.[27] The State recommended 14 years of incarceration.

The State explained it was seeking 14 years at Level V, more than the minimum mandatory sentence, due to Martin's "very long criminal history." [28]

The court, aware that the minimum mandatory sentence was 12 years, chose not to sentence Martin to the minimum mandatory sentence and instead followed the State's recommendation of 14 years placing its reasons on the record.[29]

In the subject motion, Martin alleges that counsel was ineffective for failing to provide accurate information regarding his minimum mandatory sentence.

In order to prevail on an ineffective assistance of counsel claim after the entry of a guilty plea, 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)

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[27] July 18, 2014 Sentencing Transcript, at pg. 6-7.
[28] July 18, 2014 Sentencing Transcript, at pg. 5.
[29] July 18, 2014 Sentencing Transcript, at pgs. 12-15.

there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial, resulting in his acquittal.[30] A defendant must make concrete allegations of cause and actual prejudice to substantiate a claim of ineffective assistance of counsel.[31] Conclusory and unsupported claims of prejudice are insufficient to establish ineffective assistance; a defendant must make and substantiate concrete claims of actual prejudice.[32]

The United States Supreme Court reiterated the high bar that must be surmounted to prevail on an ineffective assistance of counsel claim.[33] The United States Supreme Court cautioned that in reviewing ineffective assistance of counsel claims in the context of a plea bargain, the court must be mindful of the fact that "[p]lea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks."[34]

At the time the plea was entered, Martin's counsel did not know whether Martin had one or two prior violent felony convictions. The State believed he had two and Martin, himself, did not know whether he had one or two. Had Martin told his counsel the exact nature of his convictions in Maryland, his counsel could have more precisely advised him at to the exact minimum mandatory sentence he was facing. In any event, Martin's counsel advised Martin at the time of the plea that he would facing either a 12 year minimum mandatory sentence or a 14 year minimum mandatory sentence depending on the number of his prior felony convictions in Maryland. The NCIC provided by the

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[30] *Ashley v. State,* 2013 WL 5310615, *1 (Del. 2013); *Strickland v. Washington,* 466 U.S. 668, 687-88, 694 (1984).
[31] *Id.*
[32] *Younger v. State,* 580 A.2d 552, 556 (Del. 1990).
[33] *Premo v Moore,* 131 S.Ct. 733, 739-744 (2011).
[34] *Id.*, at pg. 741.

State was not accurate because it did not show any prior out-of-state convictions yet both Martin and the State knew that at least one prior felony conviction, if not more, existed.

Defense counsel believed it was more prudent to indicate on the guilty plea form the higher minimum mandatory sentence based on the State's assertions that there were two prior convictions. Defense counsel made Martin aware that it was the State's obligation to prove the sentence enhancing prior convictions at the time of sentencing. If the State failed to do so, Martin's counsel would, and did, argue for a lesser sentence.[35]

At the time of sentencing, Martin's Maryland criminal history had been sorted out and everybody: the court, the State, and Martin were all aware that Martin was facing a 12 year minimum mandatory sentence rather than a 14 year minimum mandatory sentence. The State argued for the court to sentence Martin above the minimum mandatory sentence of 12 years given his long criminal history and to sentence Martin to 14 years at Level V. Martin's counsel argued for a sentence of the 12 year minimum mandatory. The court had the discretion to sentence Martin anywhere between 12 years and 40 years. The court chose to sentence Martin to 14 years of unsuspended Level V time, recognizing that the sentence was 2 years above the minimum mandatory sentence.

Martin has not established that his counsel was deficient in any regard nor has he established that he suffered any actual prejudice as a result thereof. Martin received a significant benefit by pleading guilty. His decision to accept the plea offer with the State recommending "not more than 14 years at Level 5" represented a rational choice given the pending charges, the evidence against him, and the potential sentences he was facing. Defendant has presented no support for his claim that he would not have pleaded guilty

[35] Affidavit of Trial Counsel in response to Rule 61 motion, at pg. 5.

but for an error on the part of his counsel. Indeed, he received a clear benefit when the State dismissed 22 charges, including the charge of robbery in the first degree, two additional burglary in the second degree charges, one count of home invasion, three counts of possession of a deadly weapon during the commission of a felony charges, and additional theft related charges.

In *Teagle v. State,* 2007 WL 1017354 (Del.), the defendant was incorrectly informed that he faced a minimum mandatory sentence of nine years imprisonment when, in fact, he faced eleven years minimum imprisonment. To correct this defect, the State dismissed one of the robbery charges, reducing Defendant's minimum plea term from eleven years to eight. Thus, the State reduced the minimum term to an amount less than the nine years to which the defendant agreed to under the plea agreement. [36]

In *Teagle,* the Delaware Supreme Court recognized that there was no prejudice to the defendant when the State dismissed one of the charges and reduced the minimum mandatory term the Defendant was facing to eight years, one year less than that to which he had agreed to under the plea agreement. [37]

Here to, under the facts and circumstances of this case, Martin suffered no prejudice when he agreed to a minimum maximum sentence that proved to be greater than the minimum mandatory sentence he was facing. In this case, there was no error in calculation. At the time of the plea, nobody knew for certain how the facts would be borne out. The possibility existed that Martin could have one prior felony conviction in Maryland and be subjected to a 12 year minimum mandatory sentence or have two prior felony convictions and be subjected to 14 years. Martin's counsel prudently used the

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[36] *Teagle v. State,* 2007 WL 1017354 (Del. 2007).
[37] *Teagle v. State,* 2007 WL 1017354 (Del. 2007).

higher potential minimum mandatory sentence rather than the lower potential minimum mandatory sentence to avoid any prejudice to Martin.

Under the facts and circumstances of this case, there were prudent reasons why Martin's counsel would want to wait until after the plea was accepted by the court before the determination was made as to the actual number of prior violent felony convictions in Maryland.

Even had Martin been advised at the plea colloquy that the minimum mandatory sentence was 12 years, under the terms of the plea agreement, the State still had the right to seek up to 14 years under the terms of the plea agreement, and the court had the right to sentence Martin up to 40 years in prison.

Martin did not receive the 14 year sentence because the court believed it was the minimum mandatory sentence. The court (as well as the State and Martin) knew at the time of sentencing that the minimum mandatory sentence was 12 years.

Defendant has not established that his counsel was deficient in any regard nor has he established that he suffered any actual prejudice as a result thereof. Even when all the parties became aware prior to sentencing that the minimum mandatory sentence was 12 years, the State recommended a 14 year sentence, 2 years above the minimum mandatory sentence given Martin's extensive criminal history. The court declined to sentence Martin to the minimum mandatory sentence of 12 years, and instead sentenced him to 14 years at Level V. It is clear that whether or not the minimum mandatory sentence was 12 years or 14 years, the court determined that the appropriate sentence was 14 years at Level V. Martin's claim of counsel ineffectiveness is without merit.

Claim Two: Martin Claims that His Plea Must be Set Aside Because It Was Not Entered Into Knowingly, Voluntarily and Intelligently.

Martin seeks to set aside his plea on the grounds that he did not enter into the plea knowingly, voluntarily and intelligently.

At the onset it is important to note that if the plea is set aside, it will be set aside in its entirety. All 22 charges which were dismissed as a result of the plea will be reinstated. Martin will again be facing 27 pending charges, and if convicted, facing a total minimum mandatory sentence of over 30 years, and a total maximum sentence of over 200 years.

If the plea was to be set aside, the State will be under no obligation to extend any plea offer or could offer a plea deal with less favorable terms. A defendant has no constitutional right or other legal entitlement to a plea offer.[38] The State could refuse to offer Martin any plea deal forcing him to go to trial on 27 charges or offer him a less favorable plea deal than the one previously offered and accepted.

For the reasons more particularly discussed below, this court finds that the plea should not be set aside. However, should a reviewing court disagree with this recommendation on appeal, Martin should be fully aware of the consequences should his plea be set aside.

In this case, Martin was advised prior to the entry of his plea that the minimum mandatory sentence would be 12 years if he had one prior felony conviction in Maryland and 14 years if he had two. The State was under the belief that he had two prior felony convictions, and he did not know whether he had one or two. Counsel put the higher

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[38] *Washington v. State,* 844 A.2d 293, 296 (Del.2004).

minimum mandatory sentence on the Truth-In-Sentencing Guilty Plea form so that Martin would not be prejudiced, if the higher sentence proved to be the accurate sentence.

In this case, nobody knew for certain what the actual minimum mandatory sentence was at the time of the plea, however everybody knew that uncertainties existed. Martin was aware at the time of the plea that he was facing a 12 year minimum mandatory sentence if there was one felony conviction in Maryland, and 14 years if there were two felony convictions in Maryland. Nevertheless, at the time of sentencing, everybody- the court, the State and Martin, were fully aware that Martin was facing a 12 year minimum mandatory sentence, and the court decided that Martin's appropriate sentence was 14 years, not the 12 year minimum mandatory.

As noted several times herein, the NCIS report did not indicate any criminal history in Maryland, yet both the State and Martin knew that a criminal history did exist.

Pleas can be a tool to avoid a more serious conviction[39], and in this case, many more serious convictions loomed. Martin was facing over 30 years of minimum mandatory time if convicted of all the indicted charges and a maximum sentence of over 200 years in a case in which the evidence against him was extremely strong. To lock the State into a maximum 14 year sentence recommendation by way of a plea deal was a prudent decision.

It is the maximum possible sentence provided by law for conviction of the offense charged that is the most important "consequence of the plea." The maximum possible sentence must be spelled out clearly and accurately upon the record by the court in order to insure that the waiver of important constitutional rights, which occurs when the

[39] *State v. Bonaparte,* 2012 WL 6945113, *2 (Del.Super. 2012).

defendant enters a guilty plea, is made knowingly and intelligently.[40] Here, the maximum possible sentence was correctly provided.

This Court is unaware of any Delaware case in which a plea was set aside after sentencing when the actual minimum mandatory period of incarceration was less than that the defendant acknowledged as part as the plea. In *Teagle*, the defendant was incorrectly informed that he faced eleven years minimum mandatory time when, in fact, he faced nine. To correct this defect, the State dismissed one of the charges, reducing defendant's minimum plea term from eleven years to eight. Since the minimum mandatory period of incarceration was less than that which the defendant acknowledged as part of the plea, the court held that any prejudice to the defendant was cured and did not set aside the plea agreement.[41]

This Court is also unaware of any Delaware case in which a plea was set aside when the defendant knew of the actual minimum mandatory sentence prior to sentencing.[42] In this case, Martin was aware that he was facing a 12 year minimum mandatory sentence if there was one felony conviction in Maryland and a 14 year minimum mandatory sentence if there were two felony convictions in Maryland.

It is only when the minimum mandatory sentence that defendant is actually facing is higher than that which he was advised of, and he did not know that he was advised of the incorrect minimum mandatory sentence, and the sentencing proceeded forward

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[40] *Wells v. State,* 396 A.2d 161, 162-63 (Del. 1978)
[41] *Teagle v. State,* 2007 WL 1017354 (Del. 2007).
[42] *Velasquez v. State,* 993 A.2d 1066 (Del. 2010)(it was immaterial that the minimum mandatory sentence was omitted in the truth-in-sentencing form when the defendant knew of the minimum mandatory sentence).

without the issue having been identified and resolved, that a Delaware court has set aside a plea.[43]

In *Newton,* the defendant was advised that he faced a minimum mandatory sentence of four years. In reality, he faced a six year minimum mandatory sentence. The sentence was heightened due to a prior robbery conviction of which the State, defense counsel and the court were all unaware.[44] As part of the plea deal, the State agreed to recommend a sentence cap of 5 years. Because the minimum mandatory sentence was 6 years, the State's recommendation was a legal impossibility.[45]

The *Newton* court noted that it was regrettable that the sentencing proceeded forward without the issue having been identified and possibly resolved at that time.[46] Because the actual minimum mandatory length of punishment was 2 years more than defendant was advised, and the issue was not identified and resolved prior to sentencing, the plea was set aside. All the charges in the indictment that were dismissed as a result of the plea were reinstated and all counts of the indictment restored.[47]

In this case, nobody knew for certain at the time of the plea what the actual minimum mandatory sentence Martin was facing, but they all knew it would not be more than 14 years. The 14 year minimum mandatory term was placed on the truth-in-sentencing guilty plea form. Had counsel put a 12 year minimum mandatory sentence on the truth-in-sentencing guilty plea form, and it turned out that there were 2 prior felony burglary convictions in Maryland with Martin facing a 14 year minimum mandatory

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[43] See, *State v. Newton,* 1998 WL 731570 (Del.Super.).
[44] *State v. Newton,* 1998 WL 731570, at *1-2 (Del.Super.).
[45] *State v. Newton,* 1998 WL 731570 , * 1-2 (Del.Super.).
[46] *State v. Newton,* 1998 WL 731570, *2 (Del.Super.).
[47] *State v. Newton,* 1998 WL 731570, *2 (Del.Super.).

sentence, Martin may have been prejudiced. It was more prudent, and less prejudicial, to indicate on the guilty plea form the highest potential minimum mandatory sentence.[48]

Despite what was put on the form, Martin's counsel advised Martin prior to entering the plea of the possible minimum mandatory sentences he could be facing depending on his criminal history in Maryland. And he further advised Martin that after the plea was entered and accepted, but prior to sentencing, everything would be sorted out and the minimum mandatory sentence Martin was facing would be definitively known.

Under the facts and circumstances of this case, any "defect" which may have existed at the time of the plea was cured prior to sentencing, and Martin was not prejudiced. The plea colloquy reflects that defendant expressly stated that it was in his best interest to enter the plea, that he had committed the crimes to which he was pleading guilty, and that he understood the consequences of pleading guilty. Defendant confirmed that no one had coerced him into accepting the guilty plea. In the absence of clear and convincing evidence to the contrary, Defendant is bound by those representations.[49]

Everybody was aware that Martin was facing a 12 year minimum mandatory sentence at the time of sentencing. The State argued for a 14 year sentence, Martin's counsel argued for the 12 year minimum mandatory sentence, and the court sentenced Martin to 14 years at Level V, the sentence the court felt was appropriate under all the circumstances.

[48] In retrospect, both possible minimum mandatory sentences could have been put on the Truth-In-Sentencing Guilty Plea form to address both of the possible contingencies.
[49] March 13, 2014 Plea Colloquy, at pgs. 4-7; *State v. Harden,* 1998 WL 735879, *5 (Del.Super.); *State v. Stuart,* 2008 WL 4868658, *3 (Del.Super. 2008).

Any "defect" which may have existed in this case was cured and resolved prior to sentencing. The plea was entered into knowingly, intelligently and voluntarily and will not be set aside.

Claim Three: <u>Martin Claims that Trial Counsel was Ineffective for Failing to Investigate His Mental Health History</u>

Martin claims that his trial counsel was ineffective for failing to investigate his mental health history or otherwise request a mental health evaluation for mitigation purposes at sentencing.

Since Defendant's plea was entered into voluntarily, intelligently and knowingly, Defendant waived his right to challenge any alleged errors, deficiencies or defects occurring prior to the entry of his plea, even those of constitutional proportions.[50] A properly entered plea of guilty constitutes a waiver of all errors or defects occurring before the plea, except lack of subject matter jurisdiction.[51] This is because a guilty plea breaks the chain of events in the criminal proceedings and constitutes a waiver of possible defenses.[52]

Martin's claim that counsel failed to investigate his mental health history is an allegation of an error or deficiency which existed at the time of the entry of the plea. This claim was waived when he knowingly, freely and intelligently entered his plea.[53]

In addition to having waived this claim, it is also without merit.

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[50] *Somerville v. State,* 703 A.2d 629, 632 (Del. 1997); *Modjica v. State,* 2009 WL 2426675 (Del. 2009); *Miller v. State,* 840 A.2d 1229, 1232 (Del. 2004).
[51] *Fullman v. State,* 1989 WL 27739, *1 (Del. Super. 1989).
[52] *Fullman v. State,* 1989 WL 27739, *1 (Del. Super. 1989).
[53] See, *Mills v. State,* 2016 WL 97494, at *3 (Del.)

When Martin's trial counsel met with him, counsel inquired about Martin's mental health and substance abuse issues. Martin acknowledged a substance abuse history but denied any mental health issues.[54]

Due to the serious nature of the charges and the substantial potential minimum mandatory time Martin was facing, counsel referred the case to a psycho-forensic evaluator, Michelle Michini. Ms. Michini met with Martin and advised that she did not see any potential mental health issues that could be helpful in his case.[55] It is Ms. Michini's policy to refer all incarcerated clients she interviews to the Department of Corrections Mental Health Unit if she believes that the client is suffering from a mental illness. She did not make such a referral after speaking with Martin.[56]

Ms. Michini's determination was consistent with Martin's own representation to counsel that he did not have any mental health issues. Martin represented on the Truth-in-Sentencing Guilty Plea Form that he had never been a patient in a mental hospital. Martin also denied any history of mental health treatment in his interview with the Presentence Investigating Officer and failed to mention any existence of mental health issues to the court at sentencing.[57] Indeed, Martin told the court at sentencing that he had a terrible drug problem but made no mention of any mental health issues.[58]

Although trial counsel remarked at sentencing that Martin may have a mental health issue,[59] counsel explains that he made that remark based on his experience with other clients who also abuse controlled substances. The remark did not stem from any

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[54] Affidavit of Trial Counsel in response to Rule 61 motion, at ¶ 7.
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[57] Affidavit of Trial Counsel in response to Rule 61 motion, at ¶ 7.
[58] July 18, 2014 Sentencing Transcript, at pgs. 9-10.
[59] See, July 18, 2014 Sentencing Transcript, at pgs. 5-6.

particular observation counsel made of Martin. In fact, during counsel's conversations with Martin, he showed no signs of significant mental illness.[60]

Martin has not provided any records or documentation to support his claim that a mental health evaluation was necessary or required, or that he suffered any prejudice as a result thereof. In fact, trial counsel actually did refer Martin to a psycho-forensic evaluator. She did not see any potential mental health issues that would assist Martin, and this was also confirmed by Martin's own statements to trial counsel, to the Pre-Sentence Investigator, and to the court.

Trial counsel's conduct was not deficient in any respect. There is no showing of deficient conduct or prejudice as a result thereof. Neither prong of the *Strickland* test has been met. This issue was waived and is also without merit.

Claim Four: <u>Martin Claims that the State's Failure to Disclose the OCME Misconduct Investigation Undermined the Reliability of His Positive DNA Match.</u>

Martin's final claim is that the State failed to disclose the ongoing governmental misconduct in the State's crime laboratory, the Office of the Chief Medical Examiner (the "OCME"), thereby undermining the reliability of his positive DNA match.

Martin's Rule 61 counsel found this claim to be without merit and elected not to further pursue it.

This issue, an allegation of misconduct, defect and deficiency, existed at the time of the entry of the plea and was waived when Martin entered his plea.[61] Martin, during

[60] Affidavit of Trial Counsel in response to Rule 61 motion, at ¶7.
[61] See, *Mills v. State,* 2016 WL 97494, at *3 (Del.)

the plea colloquy, admitted to committing the charges for which he pled guilty including the PFBPP charge.[62]

By pleading guilty a defendant gives up his right to trial and his right to learn of any impeachment evidence.[63] Martin's knowing, intelligent and voluntary guilty plea waived any right he had to test the strength of the State's evidence against him at trial.[64] Because Martin admitted in his plea colloquy that he possessed the gun at issue, the OCME investigation provides no logical or just basis to upset his conviction.[65]

When, as here, a defendant like Martin admits that he committed the crime of which he is accused in a valid plea colloquy, he is prevented from reopening his case to make claims that do not address his actual guilt.[66] The State's alleged failure to provide *Brady* material in the form of impeachment evidence has no bearing on the validity of Martin's guilty plea.

This issue was waived. It is also without merit.

In February 2014, the Delaware State Police and the Department of Justice began an investigation into criminal misconduct occurring in the Controlled Substances Unit of the OCME. The investigation revealed that some drug evidence sent to the OCME for testing had been stolen by OCME employees in some cases and unaccounted for in other cases. There was no evidence to suggest that OCME employees "planted" evidence to

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[62] September 30, 2013 Plea Colloquy, at pgs. 12-13.
[63] *Brown v. State,* 2015 WL 307389, at *1, 4-5 (Del. 2015); See also, *State v. Alston,* 2014 WL 7466536, at *4 (Del. 2014); and *State v. Absher,* 2014 WL 7010788 (Del. 2014).
[64] *Id.*
[65] See, March 13, 2014 Plea Colloquy, at pgs. 6-7.
[66] *Brown v. State,* 2015 WL 307389, at *1, 4-5 (Del. 2015); See also, *State v. Alston,* 2014 WL 7466536, at *4 (Del. 2014); and *State v. Absher,* 2014 WL 7010788 (Del. 2014).

wrongly obtain convictions. Nor was there evidence that the substances actually tested by the chemist were false.[67]

The drug unit, the Controlled Substances Unit, was at the focus of the investigation of criminal misconduct. That unit was not involved in any respect in the subject case. In the instant matter, it was the DNA Unit, not the Controlled Substances Unit, of the OCME that performed the DNA testing on the gun at issue. This case involved DNA testing on a gun not drugs. There has never been any allegation of misconduct of the OCME unit that performed DNA testing.[68]

The OCME unit involved in this case, the DNA Unit, was not the subject of any "problems" and was not the subject of any investigation into misconduct. Martin's claim that the OCME "problems could" have undermined the reliability of his positive DNA match does not have any factual foundation in this case.

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

IT IS SO RECOMMENDED.

_____________/s/_______________
Commissioner Lynne M. Parker

oc: Prothonotary
cc: Sean Motoyoshi, Esquire

[67] *Brown v. State,* 2015 WL 307389, *3 (Del.)
[68] *State v. Ringgold,* 2015 WL 3580742, *3 (Del.Super. 2015).