SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

February 18, 2010

Edward C. Gill, Esquire
P.O. Box 824
Georgetown, DE 19947

Adam D. Gelof, Esquire
Department of Justice
114 E. Market Street
Georgetown, DE 19947

RE: *Wilmer A. Jenkins v. State of Delaware*, Def. ID# 0701012400 (R-1)

DATE SUBMITTED: December 8, 2009

Dear Mr. Gill:

Pending before the Court is a motion for postconviction relief which defendant Wilmer A. Jenkins ("defendant") has filed pursuant to Superior Court Criminal Rule 61 ("Rule 61").[1] Although defendant raised several grounds to support his claim for relief, I do not address them all since one of the grounds requires the granting of a new trial. That ground is the one asserting ineffective assistance of counsel stemming from a *Miranda*[2] rights violation.

The Supreme Court set forth the facts in its decision on the appeal of this matter, *Jenkins*

[1]None of the procedural bars of Rule 61(i) apply to preclude consideration of this motion.

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

v. State, 962 A.2d 256, 2008 WL 4659805. **1-2 (Del. Oct. 22, 2008) (TABLE):

> (4) The evidence presented at trial indicated that on the morning of January 16, 2007, Jenkins, age sixty-five, forced his twenty-year old granddaughter, Ellen Gates, to perform oral sex on him.FN6 The sexual assault occurred in the living room of Gates' great-grandmother's apartment in Seaford, Delaware.FN7
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> > FN6. The Court has used a pseudonym to identify the victim. Del.Supr. Ct. R. 7(d).
> >
> > FN7. Gates had spent the preceding five months living with and taking care of her great-grandmother.
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> (5) On the day of the assault, Gates was alone in her great-grandmother's apartment. According to Gates, Jenkins telephoned her that morning and said that he was coming over. Gates tried to discourage Jenkins from visiting by telling him that she had to go to the store.
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> (6) According to Gates, Jenkins arrived at the apartment at approximately 8:00 a.m. Gates let him in. Once inside the apartment Jenkins exposed his penis to Gates and threatened to hurt her if she did not do what he said.
>
> (7) In the ensuing assault, Jenkins forced Gates to raise her shirt above her breasts and then forced his penis into her mouth while holding the back of her head by her hair. Jenkins ejaculated in Gates' mouth and on her breasts, hand, and shirt. He then left the apartment. Gates called her mother and then the police.
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> (8) Gates went to the hospital where she was examined by Terri Purse, a sexual assault nurse examiner. Gates arrived at the hospital wearing the same gray tee shirt that she had worn during the assault. The tee shirt had a wet stain on the right shoulder. Purse took the shirt from Gates for DNA testing. Purse also drew blood from Gates and took swabbings from her mouth, breasts, sternum and hand. Later, at the Seaford police station, Purse took a dried-secretion swabbing from Jenkins' penis.
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> (9) Seaford Police Detective Eric Chambers questioned Jenkins at the Seaford police station on the same day as the assault. Jenkins told Chambers that he visited Gates that morning at her request. According to Jenkins, after arriving at the apartment, he spoke briefly to Gates and then retreated alone to the bathroom where he masturbated and ejaculated into a gray tee shirt that he had found on the bathroom floor.
>
> (10) Amrita Lal-Paterson, a DNA analyst from the Office of the Chief Medical Examiner, was assigned to examine the forensic evidence collected by Purse. At

> trial, Lal-Paterson testified that each of the swabs taken from Gates, as well as the stain tested on the tee shirt, contained sperm cells that matched the DNA sample taken from Jenkins. Lal-Paterson also testified that the penile swab from Jenkins contained a mixture of cells attributable to Jenkins and Gates. Purse testified as to a "pattern injury" on the inside of Gates' mouth where it appeared prolonged pressure on the outside of Gates' mouth had forced her teeth to make an abrasive impression on her gums.
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> (11) At trial, Jenkins testified that Gates initiated their sexual encounter the morning of January16, 2007. According to Jenkins, Gates voluntarily performed oral sex on him.

Defendant raised a number of issues on appeal which the Supreme Court found meritless. Significantly, defendant argued that he was not given his *Miranda* rights before he told the detective that he had masturbated on the gray shirt. The Supreme Court noted that it had reviewed the videotape of the interview and it depicted the detective informing defendant of his rights before asking any questions. In this Rule 61 motion, defendant points out that although some of the *Miranda* rights were given, Detective Chambers failed to inform defendant that he had the right to have an attorney appointed to represent him if he could not afford one.[3] A review of the videotaped interview establishes that defendant is correct. Detective Chambers failed to

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[3]In *Miranda v. Arizona,* 384 U.S. at 473, the Supreme Court ruled as follows with regards to this right:

> In order to fully apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that convey to the indigent- the person most often subjected to interrogation- the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it. [Footnotes and citations omitted.]

inform defendant "that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona*, 384 A.2d at 479.

Once this Court determined that defendant was not informed of his right to the appointment of counsel, it requested that trial counsel address whether the decision not to move for a suppression of the videotaped interview was based on a tactical, strategic or other reason. Trial counsel responded:

> 6. ... The defendant met the police at the hospital and he agreed to voluntarily follow them to the police station. I recall the Defendant not being handcuffed or restrained by the police. My review of the Defendant's interview showed to me through the totality of the circumstances of the questioning and the fact that *Miranda's* essential message of his right to silence and his continuous opportunity to exercise that right was communicated and understood by the Defendant and he therefore knowingly consented to the interview.
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> ***
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> 15. The Defendant, from the outset, was going to tell his side of the story and take the stand. His interview with the police, according to Defendant, was an integral part of his not denying the accusation to anyone but that the conduct was consensual. Albeit, his statement to the police wasn't completely forthright but we addressed it tactically at the Defendant's trial examination and my closing.

Docket Entry No. 48.

In response to trial counsel's submission, the State, after implicitly conceding a *Miranda* violation, advances the following harmless error argument:

> Even without admission of the defendant's videotape statement, there was overwhelming evidence in support of the defendant's conviction. The victim immediately reported the crime and was examined by a SANE nurse. The defendant's DNA profile was found in seminal fluid on the victim's shirt, mouth and breast and her DNA profile was found on his penis. The victim testified that he raped her. Jenkins testified that the sex was consensual. The only issue was one of consent. If the videotape had not been admitted and Jenkins had not testified, there was overwhelming evidence against Jenkins. If Jenkins had testified and his statement had not been admitted, there was overwhelming evidence against

> Jenkins. It is difficult to believe that a jury would choose to believe Jenkins' testimony that his sex with his granddaughter was consensual given that she immediately reported the rape, there was bruising consistent with the use of force and she testified that it was not consensual. However, once Jenkins chose to testify, even if his statement had been suppressed initially, it would have been admissible on cross-examination as an admission and a prior inconsistent statement.

Docket Entry No. 51.

Defendant responded to both trial counsel and the State's positions. Docket Entry No. 52. He contends that trial counsel's position could be interpreted to suggest that defendant was not in "custody" for *Miranda* purposes. Defendant argues that it was inappropriate for trial counsel not to have explored the issue. He criticizes trial counsel's argument that the statement was voluntary in light of *Miranda*. Defendant argues that the State, in seemingly recognizing that it was error to allow the admission of the statement, advances a harmless error analysis and also argues that the statement would have been allowed in if he said anything inconsistent. He attacks this analysis, arguing:

> However, that belies the overall question as to whether defendant would have testified or not in the absence of this statement being introduced. That is a decision which is unique to each defendant and which this defendant lost any right to make due to counsel's ineffective assistance. The State also does not point out how the statement is inconsistent with the defendant's trial testimony.

I digress here for a moment to address defendant's puzzling statement that the State failed to point out how the statement to the detective is inconsistent with defendant's trial testimony. The State did not need to point out the inconsistency. Defendant pointed out the inconsistency himself when, during cross-examination, he categorized his statements to the detective as not being the truth (Transcript of November 14, 2007 Proceedings at B-76), and as being lies (*Id.* at B-91; B-93; B-102-03). In fact, the entire object of the State's cross-examination of defendant

was to point out how inconsistent defendant's trial testimony was from his statement to the detective. *Id.* at B-79-80; B-82-86; B-88-98; B-100-104. Defendant's testimony that he and his granddaughter had consensual sex is completely inconsistent with the statement to the detective that he had gone into the bathroom and masturbated into the gray shirt.

Defendant's statement to the police was, basically, that he did not have sex with his granddaughter. The physical evidence established that he did have oral sex with his granddaughter. Defendant had no option but to testify if the videotaped statement was admitted. The defense at trial was that he had sex with her, but it was consensual. He explained he was too embarrassed to tell the truth during the police interview.

Defendant's videotaped statement was a central part of the case. The State emphasized the videotaped interview throughout the trial. In its opening, the State references the interview and implores the jury to use its common sense in considering it. Transcript of November 13, 2007 Proceedings at A-32-3. Virtually the State's entire cross-examination consisted of impeaching defendant with his statements to the detective. Transcript of November 14, 2007 Proceedings at B-79-80; B-82-86; B-88-98; B-100-104. During its closing argument, the State referenced defendant's different versions of events. Transcript of November 15, 2007 Proceedings at C-17-18; C-21-22. Even defense counsel, in his closing, had to admit there were "lies" in the statement to the detective. *Id.* at C-30.

In making a claim for ineffective assistance of counsel, defendant has the burden of establishing (i) a deficient performance by his trial counsel (ii) which actually caused defendant prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984) ("*Strickland*"). Deficient performance means that the attorney's representation of defendant fell below an objective

standard of reasonableness. *Id.* at 688. In considering post-trial attacks on counsel, *Strickland* cautions judges to review trial counsel's performance from the defense counsel's perspective at the time decisions were being made. Second guessing or "Monday morning quarterbacking" should be avoided. *Id*. at 689.

A finding of counsel's deficient performance needs to be coupled with a showing of actual prejudice. I discuss this prong more in depth at a later point in this decision.

The Supreme Court's summary of its decision in *Miranda* follows:

> [W]e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning **that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.** Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. [Footnote omitted. Emphasis added.]

Miranda v. Arizona, 384 U.S. at 478-79.

Had defense counsel moved to suppress the videotape on the ground that the detective omitted the right to appointment of counsel, then the motion would have been granted. *See Harris v. New York*, 401 U.S. 222 (1971). If the defendant had not testified, then the State would not have been able to introduce the statement, whether considered exculpatory or inculpatory. *Miranda v. Arizona*, 384 U.S. at 444; *Weber v. State*, 457 A.2d 674, 687 (Del. 1983). Only if

defendant had testified would the State have been able to introduce the statement for the purpose of impeachment. *Harris v. New York*, *supra; Weber v. State, supra.*.

There is no need for a hearing in this matter. Trial counsel's affidavit establishes that his failure to move to suppress the statement was not based on a trial strategy. Failing to file a suppression motion removed the option that defendant not testify. That failure constituted ineffective assistance of counsel. *State v. Cintra*, 2005 WL 1077731 (Del. Super. April 21, 2005), *aff'd*, 889 A.2d 284, 2005 WL 3526321 (Del. Dec. 23, 2005) (TABLE).

I turn to the second prong of *Strickland*, whether there is a reasonable probability that the result of the trial would have been different but for counsel's failure to move to suppress. *State v. Cintra*, 889 A.2d at *3. I conclude that prong is met, also.

This second prong requires that actual prejudice be established. Actual prejudice is not potential or conceivable prejudice.

As the Supreme Court noted in *Strickland*,

> [T]he appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, *United States v. Agurs*, 427 U.S., at 104, 112-113.... The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. at 694.

The Court cautioned, that with regard to an ineffective assistance analysis:

> 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.

Id. at 696.

This Court, in considering a claim of ineffective assistance of counsel and a *Brady*[4] violation, noted that the prejudice prong is the same for both in that it requires materiality. *State v. Webb*, Del. Super., Def. ID# 9907021071, Stokes, J. (Oct. 23, 2000) at 13- 14; 17-18. Although the Court cannot speculate with certainty what the outcome would have been had the videotaped statement been suppressed, it does look at "'whether ... he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.' *Kyles v. Whitley*, U.S. 419, 434 (1995)." *State v. Webb*, *supra* at 14.

In this case, the suppression of the statement would have provided defendant with the option not to testify. He would not have been compelled to explain away his original version of events, which was that he did not have sex with his granddaughter. Without the suppression motion, there was no choice but to testify since the physical evidence established he had sex with his granddaughter. Had he not testified, then he could have attacked the victim's story without his inconsistent versions being such a significant part of the State's case. The avenues of attacking the victim's story appeared in the defense's closing argument. The victim said she struggled, yet the pictures of the scene did not show any signs of a struggle. Contrary to the State's position, the victim did not call the police immediately after the episode. Instead, she called someone else. The physical evidence supported a sexual encounter, but not necessarily a violent sexual encounter. The fact the videotaped statement was not suppressed so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result; i.e., the use of the videotaped statement at trial undermined the confidence of the jury's verdict.

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[4]*Brady v. Maryland*, 373 U.S. 83 (1963).

I conclude that both prongs of *Strickland* have been met. Consequently, the conviction is vacated and defendant's new trial shall be scheduled promptly.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
James E. Liguori, Esquire
Case Scheduling