

January 17, 2002

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Department of Justice  
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**RE: Otis Cornish v. State of Delaware**  
**Def. ID# 9810007587**  
**Motion for Postconviction Relief (R-1)**

Dear Counsel:

On July 19, 2001, Mr. Cornish, by way of his attorney, Ms. Ayers, filed a Motion for Post Conviction Relief pursuant to Rule 61. Because the Rule 61 petition was based on allegations of ineffective assistance of counsel, the Court utilized provisions of Rule 61(g) to obtain a response from the attorney against whom the allegations were made, as well as the affidavit and reply filed by Mr. Cornish. The Court also has a response from the State. On November 14, 2001, the Court received the last communication from Ms. Ayers. I have determined that there is no need for a evidentiary hearing in this case.

This is my decision denying the defendant's application for Rule 61 relief. I note that the defendant raised, in the alternative, a request for modification of sentence, and that is likewise denied.

The defendant was originally charged with Robbery in the 1<sup>st</sup> degree, two counts of Possession of a Firearm During the Commission of a Felony, Attempted Murder in the 1<sup>st</sup> degree, two counts of Aggravated Menacing, Reckless Endangering in the 1<sup>st</sup> degree, Wearing a Disguise during the Commission of a Felony, and Offensive Touching. On June 16, 1999, the defendant pled guilty to Robbery in the 1<sup>st</sup> degree, two counts of Possession of a Firearm during the Commission of a Felony, and Attempted Assault in the 1<sup>st</sup> Degree as a lesser included of Attempted Murder. Pursuant to Rule 11(e)(1)(c), the defendant received a period of 20 years of incarceration followed by probation. The entire Rule 61 application is based on ineffective assistance of counsel. The allegations are as follows:

- (a) That previous defense counsel was ineffective for failure to complete discovery and failure to inform the defendant that the State could not prove beyond a reasonable doubt that he had committed the crimes alleged.

- (b) That previous defense counsel failed to inform the defendant there was a conflict of interest and was otherwise ineffective in informing the defendant the consequences of this guilty plea.
- (c) That previous defense counsel coerced the defendant into pleading guilty by wrongly asserting that the defendant would spend the rest of his life in jail if he lost the trial.
- (d) That previous defense failed to adequately prepare for trial.

#### PROCEDURAL BARS

Since the defendant's entire attack on his convictions is based on ineffective assistance of counsel, and because this is his first Rule 61 application, the defendant's petition is not procedurally barred.

#### BACKGROUND

On June 14, 1999, trial began concerning the above-referenced charges. A jury was picked and the State presented ten witnesses in its case. The defendant called four witnesses and he testified. There were numerous exhibits, including photographs, a tape, and a handgun introduced, as well as articles of clothing. At the conclusion of all the evidence, prior to closing arguments, the defendant and the State entered into a plea, which was accepted by the Court. As stated before, the plea resulted in the defendant's incarceration for a period of twenty years.

#### TRANSCRIPT

The plea colloquy contains the following relevant communications between the Court and the defendant:

1. The Court read each of the charges to which the defendant pled guilty and asked whether the defendant was guilty of the offense, or whether the defendant had committed that offense. Each time the defendant responded "yes".
2. The Court: "Now, you are in a unique situation. Not many people come before the Court having had the State's full evidence in the trial and the case ready to go to the jury. So you had enough time to think about this and talk to your lawyer

about it?”

Defendant: “Yes”.

The Court: “Are there any complaints you have concerning Mr. Burke?”

Defendant: “Well, what little bit of - - with what little bit of time I had to talk to him, no, sir.”

The Court: “Is Mr. Burke or anyone at all forcing you to enter this plea?”

Defendant: “No, sir.”

The Court: “This is your decision?”

Defendant: “Yes, sir.”

3. The Court: “When you enter a guilty plea, because of the nature of the guilty plea, all that is basically waived, because you can’t complain about anything that has gone on in the trial. It is as if the trial has never taken place. You have had the benefit of the trial and hearing the State’s case, but you can’t come back and complain about anything later, and there is no appeal. Do you understand that?”  
Defendant: “Yes, sir.”  
The Court: “Is there anything you want to talk to me about concerning your attorney and being fully advised of your rights by your attorney and your satisfaction with your attorney concerning this matter? I’m going back to that last sentence.”  
Defendant: “No. Just that - - I guess I just didn’t have adequate time with him. So far that he represented me, he did a pretty good job.”  
The Court: “I’m going to go through some questions again. Have you freely and voluntarily decided to plead guilty to the charges listed in this plea agreement?”  
Defendant: “Yes.”  
The Court: “You haven’t been threatened or coerced or forced or beat on or anything of that nature?”  
Defendant: “No.”  
The Court: “This is Mr. Cornish stepping up to the plate and saying, “I did it. I’m accountable. I may not want to go to jail, but I understand that jail is part of the deal.”?  
Defendant: “Yes, sir.”

The defendant makes numerous allegations, some of which are bold and conclusory. I shall attempt to address each of these allegations, but in no particular order. The defendant alleges ineffective assistance of counsel. In order for the defendant to be successful he must show that his prior attorney’s representation fell below an objective standard of reasonableness. Basically, this means the attorney must have made errors or failed to prepare for the trial. The defendant must also prove that there is a reasonable probability, but for the attorney errors, that

the result of the proceedings would have been different. Strickland v. Washington 466 U.S. 668 (1984). If the defendant fails in either of these prongs the defendant is unsuccessful in his claim of ineffective assistance of counsel. If the defendant fails to prove either prong, the Court need not consider the other prong.

### DEFENDANT CLAIMS

1. A troublesome allegation concerns that made against another attorney who represented the defendant in the early stages of this case, but who had withdrawn. Thereafter, the defendant was represented by the Public Defender's Office. On February 18, 1999, his first attorney filed a motion to withdraw as counsel. That motion was granted on March 5, 1999. The case was set for trial and a jury selected on June 14, 1999. The defense specifically alleges that there is a pattern of misconduct on the part of his first attorney that warrants the defendant's relief under Rule 61 in the interest of justice. The defendant alleges that this attorney's prior problems with Disciplinary Counsel and the Supreme Court warrant relief. Later, defense counsel provided the Court a copy of a decision by U.S. District Court Gregory Slets, presumably for the argument that Judge Slets found this same attorney's performance lacking in that case. Since Judge Slets found the attorney's performance lacking in that case, he must therefore be lacking in Mr. Cornish's case. What is unfortunate about this whole argument is that Ms. Ayers makes no allegation as to what this attorney did wrong. This attorney was in the case for a brief period of time and was not the attorney who handled the case through discovery, case review, final case review and trial. Why was this raised? What was the point? Since there are no allegations of misconduct on the part of this attorney then it should have never been raised. I am disappointed with Ms. Ayers including this in her pleadings.

2. The defendant makes a series of allegations that his trial counsel was unprepared, didn't pursue specific discovery requests, or investigation requests, and in general was not prepared for trial. Trial counsel's Rule 61(g) affidavit specifically rebuts these allegations. Trial counsel reports that he received and reviewed discoverable information as well as the police reports. He also reports reviewing the in-store video of the robbery in progress. Trial counsel reports that he visited the crime scene, had his investigators explore the existence of an individual known as "Puff", and subpoenaed police records attempting to identify "Puff", as well as having the investigator make inquiries in the community as to the existence of the person known as "Puff". As to the allegation concerning telephone records, defense counsel reported that efforts were made to subpoena records to corroborate the defendant's position that calls were allegedly made on the night of the crime but defense counsel was informed that no record was kept of local calls. As to alibi witnesses, defense counsel reports that they were unable to account for the defendant's presence at the time of the crime. Efforts to contact Robin Fisher prior to trial were unsuccessful, but there was communication and she was one of the defendant's

trial witnesses. Trial counsel noted that he is certain that he advised Mr. Cornish that if the jury convicted him of Attempted Murder in the 1<sup>st</sup> degree he would face life in jail.

3. I am not satisfied that the defendant has met the burden showing that trial counsel inadequately prepared for trial. Furthermore, that has been no showing of prejudice. The defendant makes a series of allegations and complaints, but does not show or provide evidence as to what the result would have been had trial counsel met the defendant's present expectations.

4. There are allegations that the prosecutor engaged in illegal conduct and this conduct should not be procedurally barred. Unfortunately, this is all Ms. Ayers alleges. There is no substance to these claims and I don't know why these allegations were even made. There is nothing in the record to suggest any misconduct on the part of the prosecutor.

5. The defendant argues that he was misled and coerced into entering a guilty plea by his attorney. Strong allegations are made as to dishonesty, fraud and misrepresentation. I do not find that the defendant was misled or coerced in entering this guilty plea. I do not find that there is anything improper in defense counsel reporting to defendant his opinion as to the defendant's situation following three days of trial, in which the State's full case had been laid out in front of the jury and the defense. If the defendant was convicted of Attempted Murder in the 1<sup>st</sup> degree, the defendant did face life imprisonment. There was nothing wrong with defense counsel telling his client this.

My review of the transcript convinces me that the defendant entered into a knowing, voluntary, and intelligent plea. While he did express his opinion that he would have liked to have had more time with his defense counsel, when asked if there was anything he wanted to talk about with me concerning his attorney, he stated "No . . . so far that he represented me, he did a pretty good job." The defense forgets that this plea of guilty came on the third day of trial and came after the defendant had the full opportunity to hear and cross-examine the State's witnesses, see the State's evidence including the tape and the photographs, and present his own witnesses. Such an opportunity is rare, and the record and these events belie the defendant's present allegations that he was forced or threatened into taking this plea. I note that some of the allegations in defendant's pleadings are factually inaccurate and confusing. The defendant makes allegations that he took the plea prior to any trial. The defendant presents affidavits provided by other persons. They note they followed the burglary trial closely, but there have never been allegations of burglary. The bottom line is that the defendant has not proven either an error or mistake or coercion on the part of his attorney, or nor has he proven prejudice.

6. The defense alleges that a motion to suppress should have been filed in this case. This is a conclusory allegation in that the defense does not include specific allegations as to what should have been suppressed and why. The defendant failed to establish that trial counsel committed error failing to suppress evidence.

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CONCLUSION AS TO RULE 61

The allegations concerning three different attorneys involved in this case are numerous and at times difficult to follow. I have attempted to address all of these allegations. I find no prosecutorial misconduct, and I find no action or inaction on the part of either defense attorney on which a finding of ineffective assistance of counsel could be based. Specifically, I find that the allegations of misconduct by defense counsel to be conclusory or without foundation. As to those allegations in which there are different recollections concerning trial preparation and communications with the defendant, it is my conclusion that the defendant is mistaken or wrong in his recollection. The plea colloquy with the benefit of the trial support the conclusion that the defendant has not sustained his burden of proof in proving ineffective assistance of counsel.

MOTION FOR MODIFICATION

The defendant seeks to use the allegations of ineffective assistance of counsel to bootstrap an argument that the Court should relieve him from his Rule 11(e)(1)(c) plea agreement. Since I have not found trial counsel to be ineffective, there is no reason why the defendant should not be bound by the agreement he reached with his "eyes wide open".

SUMMARY

Defendant's Motion for Post Conviction Relief under Rule 61 is denied. Defendant's Motion for Modification of Sentence is denied.

SO ORDERED.

Very truly yours,

T. Henley Graves

THG/jfg

oc: Prothonotary  
cc: Merritt Burke III, Esquire  
Dennis Reardon, Esquire