July 16, 2001

Michael M. McGroerty, Esquire
110 Pine Street
Seaford, DE 19973

David Hume, IV, Esquire
Department of Justice
114 East Market Street
Georgetown, DE 19947

RE: *State of Delaware v. Virgil Morris*
ID #0010008090

Dear Counsel:

Mr. Morris was found guilty after jury trial on May 16, 2001. The defendant was scheduled for sentencing on June 22, 2001, for a fourth or subsequent offense of Driving Under the Influence (DUI). At that time, the defendant questioned whether prior DUI and Reckless Driving, Alcohol Related convictions, both in North Carolina and Delaware, occurred without counsel. Essentially, the defendant desired second offender treatment, as present counsel represented him before. Although the United States Supreme Court, in *Nichols v. U.S.,* permitted the use of uncounseled convictions to enhance sentences, the Court scheduled argument on the matter on Friday, July 6, 2001.[1]

On July 6, after unsuccessful discussions with the prosecutor, defense counsel argued prior uncounseled convictions could not be used. In addition to *Nichols*, the defense cited *Apprendi v. New Jersey*, to support this position.[2] The Court rejected the defendant's contentions.

Given the prior record, the sentence was treated as a Class E felony. The defendant received five (5) years imprisonment, suspended after completion of minimum mandatory time and the Level 5 Key Program, followed by residential treatment and probation. This sentence was within the authorized limit for a fourth or subsequent offense.[3]

Moreover, a request to stay the sentence was denied.[4] Neither an important question of substantive law nor a reasonable ground of error was demonstrated. The following points are made to amplify this holding.

Do the *Nichols* and *Apprendi* decisions preclude the use of uncounseled convictions? Without repetition, they do not. In *Nichols*, Chief Justice Rhenquist, writing for the majority, held that an uncounseled misdemeanor conviction, valid under the *Scott* decision, could be used under recidivist statutes to enhance punishment upon future conviction.[5]

Notwithstanding, defendant urged that the North Carolina 1980 and 1981 DUI convictions with a suspended 90 day sentence should not be used. However, the suspension makes the difference. Only actual imprisonment triggers a Sixth Amendment concern.[6]

In this regard, defendant was sentenced in 1986 to one (1) year's imprisonment, suspended after serving 90 days for driving under the influence. The terms of the Superior Court order suggest a penalty for a subsequent offense. Mr. Morris testified that he did not have counsel when the sentence was imposed. Given the testimony, the Court assumed the absence of counsel and did not count this conviction. It appears Mr. James Lally, Esquire, then a Public Defender, witnessed the guilty plea form, and is referenced in the sentence

worksheet and at page 2 of the criminal court docket. While the plea agreement and top part of the docket reflect the phrase "*pro se*," form does not control substance. Mr. Lally was either defendant's lawyer by participation, or Mr. Morris waived his right for legal representation. The docket reflects the plea was entered on a scheduled trial date. The 1986 conviction should have been used to determine the number of prior offenses.[7] The contrary defense posture is disingenuous at best.

Furthermore, defendant's position is not improved by the *Apprendi* decision. The instant sentence is within the maximum range for a Class E felony. The jury found defendant guilty beyond a reasonable doubt for the events of October 7, 2000, and he is being punished for that incident. Unlike *Apprendi*, the Court is not exceeding the maximum sentence by finding an aggravating fact of the incident post trial by a preponderance of the evidence. Certainly, elements of a crime must be determined by a jury and cannot be disguised in a sentencing scheme.[8] The defense argument that the jury must find the prior convictions beyond a reasonable doubt is not convincing, raises the specter of bad character evidence, and ignores well recognized sentencing procedures.

Concerning speedy trial, the trial occurred within eight months of the incident, and five months from the filing of the information. The time is reasonable. Judge Bradley denied the motion to dismiss, and the opinion is the law of the case. Although counsel mentioned a deceased witness, the trial evidence showed defendant to be slumped over the wheel of his vehicle at a donut store by reason of intoxication. The defense expert testimony about the effect of heart medication could be disregarded by the jury. The defendant's condition at the

store and time of arrest did not fit the testimony about the consequences of heart medication (if taken). The defense also offered testimony from a bar maid that was cumulative. As Stein Highway is adjacent to the shop, the jury could find the defendant drove on the road.[9] Under the totality of the circumstances, information from the missing witness is insignificant.

Defendant now complains about the jury charge. At trial, the defense selected a course of action concerning voluntary intoxication. The charge is an accurate statement of the law. The burden was on the prosecution to prove the elements of the offense beyond a reasonable doubt.

At trial, the indictment was amended. When the grand jury returned the indictment, it found probable cause to believe the defendant drove his vehicle while under the influence of alcohol. The definition of influence includes drugs and/or alcohol, and a jury would be so instructed. The amendment added the phrase "drugs, or a combination of both" after the word "alcohol." By statute, the charging document also incorporates the various subsections. The objection should be addressed to the General Assembly for a law change.[10] The defendant was not exposed to a "new" or "different" offense.[11]

The stay of sentence request remains denied.

IT IS SO ORDERED.

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Richard F. Stokes, Judge

Enclosures
(a) 4/3/86 sentence worksheet
(b) 4/3/86 DUI Guilty Plea Form
(c) Superior Court docket for April 3, 1986 sentencing
(d) Plea agreement of April 3, 1986

cc: Prothonotary

FOOTNOTES

1. *Nichols v. U.S.*, 511 U.S. 738, 128 L.Ed.2d 745, 754-5, 114 S.Ct. 1921 (1994). *Nichols* overruled *Baldasar v. Illinois*, 446 U.S. 222, 64 L.Ed.2d 169, 100 S.Ct. 1585 (1980). The defendant's criminal record was provided earlier in the case by the prosecution's response to discovery requests after the case was withdrawn from the Justice of the Peace Court given felony level jurisdiction in November of 2000. It was also available in the presentence report. Although the defendant's letter memorandum of July 3 referenced the Delaware convictions, two North Carolina convictions were discussed at the June 22, 2001 hearing and were part of the record made available to defendant before sentencing on July 6, 2001.

2. *Apprendi v. New Jersey*, _____ U.S. _____, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

3. 21 *Del. C.* § 4177(d)(4).

4. 11 *Del. C.* § 4502.

5. *Nichols* at 129. However, as reconfirmed in *Nichols*, an uncounseled conviction cannot be used where imprisonment was first imposed without a waiver of counsel under *Scott v. Illinois*, 440 U.S. 367, 59 L.Ed.2d 383, 99 S.Ct. 1158 (1979).

6. Nichols at 1925-7. Furthermore, the absence of attorney warnings does not have a constitutional dimension in the enhancement context. *Nichols* at 1928.

7. Enough is enough. Aside from the 1986 sentence, defendant's record shows the following dispositions: 1980 and 1981 DUI convictions, first and second offenses in Cumberland County, North Carolina; 1990 Reckless Driving Alcohol Related in the Court of Common Pleas in and for New Castle County; 1991 DUI First Offender's Program in the Court of Common Pleas in and for Sussex County; 1995 Reckless Driving Alcohol Related in Justice of the Peace Court No. 4 (represented by present counsel). With the present conviction, the defendant is a fourth or more subsequent offender and subject to penalties of a Class E felony. 21 *Del. C.* § 4177(d)(4). Certified copies of the record were provided in the State's presentation at sentencing and available to the defense in the presentence report. Reliance on guilty pleas is a traditional sentencing method. *Nichols* at 1927-8; *Apprendi* at 2362; *Weeks v. State*, Del. Supr., 761

A.2d 804 at 806 (2000).

8. In *Apprendi*, the court determined that the offense was motivated by hate at sentencing. The 12 year sentence exceeded the 10 year maximum for the initially charged offense. Delaware practice is to submit statutory enhancing elements of the charged incident to the jury for determination beyond a reasonable doubt. For example, a misdemeanor theft may carry a felony sentence where the victim is 60 years or older. 11 *Del. C.* § 841(c)(1). A judge could not, at sentencing, find that a victim was older by a preponderance of the evidence if the jury did not consider the matter. In that instance, the crime and punishment could not be increased from a Class A misdemeanor to a Class G felony.

9. A DUI offense may occur on private property or a highway. *State v. Hollobaugh*, Del. Super., 297 A.2d 395 (1972).

10. 21 *Del. C.* § 4177(c)(5); (b)(3).

11. Amendments are permitted before verdict if no additional or different offense is charged and if substantial rights of the defendant are unaffected. Superior Court Criminal Rule 7(e). The defendant was on notice of the driving under the influence charge, was prepared to defend it, and was not prejudiced in any way. Defendant introduced the dangerous combination of drugs with alcohol into the case.