THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID#: 0511009920A
	)	
CLEVELAND RICHARDSON,	)	
Defendant.	)	

Submitted: June 10, 2009
Decided: June 23, 2009

MEMORANDUM OPINION AND ORDER

Upon Defendant's Second Motion for Postconviction Relief – *DENIED*

Gregory E. Smith, Deputy Attorney General, Department of Justice, Wilmington, DE; Danielle J. Brennan, Deputy Attorney General, Department of Justice, Wilmington, DE, for the State

Jennifer-Kate Aaronson, Esquire, Aaronson & Collins, LLC, Wilmington, DE, for Defendant

SILVERMAN, J.

While Defendant appealed his first postconviction relief's denial, the Supreme Court, *en banc*, issued *Allen v. State*,[1] explicitly overruling, in part, its opinion affirming Defendant's convictions.[2] *Allen* reaffirmed *Johnson v. State*[3] and reconciled the courts' inconsistent application of Title 11, Section 274 of the Delaware Code.[4]

Allen held that Delaware's accomplice liability statutes must be applied *in pari materia* when a defendant is "found liable for a criminal offense under a theory of accomplice liability, and [] that offense is divided into degrees."[5] According to *Allen*, Section 274 specifically requires a jury to determine the degree of a defendant's offense based upon that defendant's "individual mental state and accountability for an aggravating fact or circumstance."[6] Before *Allen*, *Johnson*

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[1] 970 A.2d 203 (Del. 2009).

[2] *Richardson v. State*, 931 A.2d 437, n. 38, 2007 WL 2111092, (Del. 2007) (TABLE).

[3] 711 A.2d 18 (Del. 1998).

[4] 11 *Del. C.* § 274 reads:

> When, pursuant to [the accomplice liability statute], 2 or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that person's own culpable mental state and with that person's own accountability for an aggravating fact or circumstance.

[5] *Johnson*, 711 A.2d at 30.

[6] *Allen*, 970 A.2d at 214.

notwithstanding, the courts often focused on an alleged accomplice's mental state for the underlying offenses.[7]

After *Allen* was issued, but prior to filing his appeal brief, Defendant moved for, and was granted, remand in order to file a second postconviction relief motion in light of *Allen*'s "new" rule. The State did not oppose remand, yet it defends the convictions here. The court must now consider *Allen*'s retroactivity and its application to this case's facts.

I.

Three years ago, on June 22, 2006, a jury convicted Defendant of Attempted Murder First Degree, Robbery First Degree, Burglary First Degree, Conspiracy Second Degree, and four counts of Possession of a Firearm During the Commission of a Felony. The charges stemmed from a midnight burglary-turned home invasion, committed with an accomplice. The court previously detailed the facts leading to Defendant's convictions:

> At trial, Defendant all but admitted that he and an accomplice committed a nighttime, house burglary. The State's evidence overwhelmingly proved that in the middle of the night, Defendant and his co-conspirator broke into a home to take what they could find. The evidence also proved that during the burglary, Defendant went upstairs and entered the homeowner's bedroom.

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[7] *See e.g. Chance v. State*, 685 A.2d 351, 361 (Del. 1996); *State v. Bartley*, 2004 WL 2829111, *6-7 (Del. Super. Feb. 24, 2004), *aff'd*, 860 A.2d 809 (Del. 2004).

> As Defendant opened the bedroom door, he awakened the homeowner and his dog. The homeowner and the dog were surprised, but the homeowner was ready. He grabbed a revolver and chased Defendant downstairs.
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> When Defendant got downstairs, he could have turned a corner and left the house. Whether he did it intentionally or because he was confused and terrified, Defendant stayed. Instead of leaving, he ran into the dining room and joined his accomplice, who was armed and ready to take a stand. When the homeowner reached the bottom of the stairs, he and the accomplice exchanged gunfire. The accomplice fired at least one round past the homeowner's head as the homeowner shot him and Defendant.
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> The homeowner's bullets mortally wounded the accomplice and seriously wounded Defendant. While there was room to argue about the precise sequence of events surrounding the gunfire, the direct and circumstantial evidence about everything else was compelling. Both the fact that Defendant entered the upstairs bedroom and the fact that the accomplice fired a shot past the homeowner's head were proved.[8]

For present purposes, a few additional facts are necessary. First, although Defendant did not testify, defense counsel implied that Defendant believed he was breaking into an unoccupied house because all the lights were off, and a car was not in the driveway. Second, Defendant and his accomplice broke into the victim's home with a set of keys they stole from the victim's late wife's car, which was parked in the attached garage. The homeowner testified that the stolen car keys were a keepsake. Third, an officer testified that the car keys and an additional set of house keys, stolen

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[8] *State v. Richardson*, 2006 WL 3094164, *1 (Del. Super. Oct. 31, 2006).

from the homeowner's key rack, were found on Defendant after the break-in, the shooting, and his flight.

Defendant was sentenced as a habitual offender[9] on November 17, 2006, to life, plus 142 years. Defendant appealed.

Defendant's appeal asserted, among other things, that the trial court's accomplice liability instruction required, as a matter of law, an accompanying Section 274 instruction. Defendant claimed the trial court erred in refusing to instruct the jury about Section 274. In affirming, the Supreme Court held that "[f]irst degree robbery, second degree robbery, and attempted murder all require intentional conduct. Because the underlying offenses . . . all require the same *mens rea*, the requested instruction was properly denied."[10]

Following that decision, Defendant filed a motion for postconviction relief on July 28, 2008. That motion focused solely on ineffective assistance of counsel. This court denied that motion[11] and Defendant again appealed. As mentioned, before the briefs were due, the Supreme Court issued *Allen*. The court then granted Defendant's unopposed request for remand in order to file this second

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[9] 11 *Del. C.* § 4214(a).

[10] *Richardson*, 2007 WL 2111092, *2.

[11] *State v. Richardson*, 2009 WL 406796 (Del. Super. Jan. 28, 2009).

motion for postconviction relief. Defendant's appeal is stayed pending this decision.

Defendant filed this second motion for postconviction relief on May 13, 2009. On June 5, 2009, the State filed its response in opposition. Defendant replied on June 10, 2009.

II.

Defendant claims that under *Allen*, the court must grant a new trial. Defendant asserts that *Allen* "articulated a new substantive" rule on Section 274's applicability and must, therefore, be applied retroactively. Defendant contends that he was denied a fair trial because the jury was not instructed to find his individual intent and "culpability" for his accomplice's decision to carry and use a firearm during their agreed upon nighttime, house burglary. Defendant asserts there was no evidence that he knew his accomplice had a gun, much less that a gun battle would ensue during the burglary. Defendant emphasizes the facts supporting the inference that Defendant thought the house and victim's bedroom would be unoccupied when Defendant, directly and intentionally, entered them to steal what he could find. Additionally, Defendant argues that this claim is not barred by Superior Court Criminal Rule 61(i) because "reconsideration is warranted in the interest of justice."

The State concedes that Defendant's motion is not barred by Rule 61(i) under the "interest of justice" exception. The State argues, however, that *Allen* only

clarified and reaffirmed precedent and is not a "new rule" subject to retroactivity. The State further argues that even if *Allen* applies retroactively, Defendant's jury was instructed on lesser-included charges, thus satisfying *Allen*. Moreover, the State asserts that the jury's finding that Defendant knew or should have known that his accomplice had a weapon was enough to satisfy *Allen*'s Section 274 requirements.

III.

Before the court may consider a Rule 61 motion's merits, it must address Rule 61(i)'s procedural bars.[12] The court must refrain from reviewing a procedurally barred claim's merits.[13] Finality is fundamentally important to the criminal law's deterrent effect.[14]

Rule 61(i) enumerates four procedural bars: (1) the motion was not filed within one year following final conviction; (2) the grounds for relief were not asserted in a prior postconviction motion; (3) the grounds for relief were not presented in the proceedings leading to final conviction; and (4) the grounds for relief have been formerly adjudicated in a previous proceeding (or should have been).[15]

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[12] *See* Super. Ct. Crim. R. 61(i); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

[13] *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

[14] *See Id.*

[15] Super. Ct. Crim. R. 61(i)(1)-(4).

Under Rule 61(i)(5), Rule 61(i)(1)-(3)'s bars will not apply if the defendant presents "a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice." Also, the defendant may overcome the procedural bars of Rules 61(i)(2) and (4) if the defendant shows "reconsideration of the claims is warranted in the interest of justice." Rule 61(i)(4)'s "interest of justice" provision has been narrowly defined to require the defendant to show a new fact, or the court lacked authority to convict or punish him.[16]

Unless an available exception exists, Defendant is barred by Rule 61(i) because this motion is untimely, repetitive, and asserts a ground previously adjudicated. On direct appeal, Defendant argued that the trial court erred in not instructing the jury on Section 274. The Supreme Court outrightly rejected that argument, but reconsidered it in *Allen* while expressly overruling, in part, *Richardson v. State*.[17] Based on *Allen*, this case's procedural posture is highly unusual. In this instance, for once,[18] the State correctly conceded that these "unique

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[16] *State v. Wright*, 653 A.2d 288, 298 (Del. 1994) (citing *Flamer*, 585 A.2d at 746 (Del. 1990)).

[17] 931 A.2d 437, n. 38.

[18] *Cf. Webb v. State*, 888 A.2d 233 (Del. 2005) (TABLE) (ORDER) (Attorney General refuses to argue on appeal that violation of Rule 61(d)(1) harmless where motion filed seven years after conviction and Rule 61(i)(1) bar obviously applicable); *Floyd v. State*, 907 A.2d 145 (Del. 2006) (TABLE) (ORDER) (Attorney General refuses to argue on appeal that court may correct untimely appeal problem through Rule 61, notwithstanding *Middlebrook v. State*, 815 A.2d 739, 743 (Del. 2003)).

circumstances" suffice to trigger the "interest of justice" exception.[19] Therefore, the court will review this motion's merits on that basis. As explained below, while the "interests of justice" support further review of Defendant's claim, they do not mandate *Allen*'s retroactive application to this case.

IV.

Allen's facts are interesting and pertinent. To summerize, Allen was the get-away driver in robberies completed with two other accomplices, McCray and Howard. The gang would chose their victim, a business, and arrive the night before the robbery. Each robber had a duty: McCray would climb to the building's roof, Howard would guard the back, and Allen would guard the front. The gangsters communicated by using walkie-talkies.

In Hollywood fashion, McCray, with Howard's help, would cut a hole in the business's roof. The men would then wait until the next morning when an employee would arrive. When the hapless victim appeared, one of the lookouts radioed to McCray that an employee was entering. At that moment, McCray, and occasionally Howard, would descend by rope and order the employee, at gun point, to open the safe or vault. After the robbers obtained the booty, they would climb the

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[19] *See State v. McKamey*, 2003 WL 22852614 (Del. Super. Nov. 26, 2003), *aff'd*, 847 A.2d 1121 (Del. 2004) (TABLE).

rope, escape in Allen's vehicle, and congregate at Allen's home to divide their spoils.

Apparently to his possible credit, Allen was not a "second-story man." He never went on a roof, never cut a hole, never descended a rope. Nor did he order an employee at gun point to empty a safe. Allen "merely" provided the transportation, acted as a look-out, contributed a central meeting place, and shared in the loot. Thus, *Allen* allowed the jury to doubt that Allen, as he waited hours for a victim to arrive, might not have foreseen that the men he repeatedly drove to the robberies were going to commit armed robbery once he alerted them to a victim's arrival and that the coast was clear.

It was under those facts that *Allen* reinterpreted Section 274. Before *Allen,* and even after *Johnson*, the courts applied Section 274 "when the underlying offenses can be divided into degrees with different mental states for each degree."[20] If the lesser-included offenses to the underlying charge consisted of the same *mens rea*, however, a Section 274 instruction was not given.

In reaffirming *Johnson*, *Allen* directs that Sections 271 and 274 must be considered *in pari materia*:

> Accordingly, Sections 271 and 274 require the jury to undertake a two-part analysis when the State proceeds on a theory of accomplice liability.

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[20] *See e.g., Richardson*, 931 A.2d 437, 2007 WL 2111092 at *2.

> First, the jury must decide whether the State has established that the defendant was an accomplice to a criminal offense committed by another person . . . .
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> Second, if a defendant is found liable for a criminal offense under a theory of accomplice liability, and if that offense is divided into degrees, then the jury must determine what degree of the offense the defendant committed. That conclusion must be based on an *individualized* determination of the defendant's mental state *and culpability for any aggravating factor* or circumstances.[21]

Allen holds that Section 274 "contemplates the possibility that an accomplice, who was wholly unaware of another participant's intent to use a gun in a robbery, could not be convicted of Robbery in the First Degree."[22]

V.

There are two standards to determine retroactivity.[23] Because the issue now before the court is on collateral review, it is initially subject to the "general rule of non-retroactivity" dictated by *Flamer v. State*.[24] *Flamer* formally adopted the *Teague v. Lane*[25] standard that "new constitutional rules of criminal procedure

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[21] *Allen*, 970 A.2d at 213 (reaffirming and quoting *Johnson v. State*, 711 A.2d at 29-30 (emphasis in original)).

[22] *Id*.

[23] *State v. Chao*, 2006 WL 2788180, *8 (Del. Super. Sept. 25, 2006), *aff'd*, 931 A.2d 1000 (Del. 2007).

[24] 585 A.2d at 749.

[25] 489 U.S. 288, 310 (1989).

will *not* be applicable to those cases which have become final before the new rules are announced, unless the rules fall within one of two exceptions."[26]

The State contends that *Allen* did not set forth a "new rule," rather, by its terms, it reaffirmed a previous holding.[27] The court cannot say for certain whether or not *Allen* sets forth a "new" rule under *Teague*'s standard. It is clear enough, however, that *Allen* reinterprets Section 274, which is substantive, not procedural, law. That being so, *Allen* is not subject to *Teague*'s rule of non-retroactivity on collateral review.

That is reinforced by *Teague*'s holding that "retroactivity is . . . a threshold question [to be considered when] a new rule is applied to the defendant in the case announcing the rule."[28] And so, if *Allen* had concerned criminal procedure, it would not be retroactive for purposes of this collateral matter. By the same token, *Teague* clearly instructs that "[the issue of] whether a decision announcing a new rule should be given prospective or retroactive effect should be faced at the time of that decision."[29] *Allen*'s silence about retroactivity speaks loudly in light of *Teague*'s

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[26] *Flamer*, 585 A.2d at 749 (emphasis in original).

[27] *Allen*, 970 A.2d at 213.

[28] *Teague*, 489 U.S. at 300.

[29] *Id*. (quoting Mishkin, Foreward: the High Court, the Great Wit, and the Due Process of Time and Law, 79 Harv.L.Rev. 56, 64 (1965)).

admonition to appellate courts that upon a new rule's announcement, the appellate court should speak to retroactivity.

The alternate standard for allowing retroactive application during collateral review is set forth in *Davis v. United States*,[30] adopted here in *State v. Chao*.[31] *Davis* held that "the fact that a contention is grounded not in the Constitution, but in the 'laws of the Unites States' would not preclude its assertion in" a collateral proceeding.[32] Davis sought collateral relief due to a change in the substantive law that decriminalized Davis's original conduct. *Davis* held "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'presents exceptional circumstances that justify collateral relief."[33] Following *Davis*'s reasoning, *State v. Chao* declares that "if holding a new decision non-retroactive would clearly result in an egregious injustice, then retroactivity is appropriate."[34]

Davis is helpful here because it articulates the "miscarriage of justice" standard adopted in *Chao*. *Davis*, however, is readily distinguishable from this case.

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[30] 417 U.S. 333 (1974).

[31] 2006 WL 2788180.

[32] *Id*. at 346.

[33] *Id*.

[34] 2006 WL 2788180, *8.

Here, the crimes for which Defendant was convicted are unchanged by *Allen*, which simply focuses on proper jury instruction. As explained next, the court does not find that "egregious injustice" would "clearly" flow from refusing to apply *Allen* retroactively under this case's undisputable facts.[35]

Attempted Murder First Degree[36]

Defendant's attempted first degree murder conviction is not touched by *Allen*. While homicides are divided into degrees, attempted murder is not. Attempt, by itself, requires intent.[37] For an act to be "intentional," it must be that person's "conscious object to engage in conduct of that nature."[38] In contrast, manslaughter, murder second, and criminally negligent homicide each require recklessness or criminal negligence. That being said, one cannot "attempt" to act recklessly.[39] Therefore, as to this charge, Section 274 is inapplicable. Defendant was either guilty

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[35] *See, e.g., United State v. Young*, 470 U.S. 1, 16 (1985) ("plain error" appellate review is used in "circumstances in which a miscarriage of justice would otherwise result," inherently requiring a case-by-case review); *accord*, *Kent v. Johnson*, 821 F.2d 1220, 1223 (6th Cir. 1987) ("The interests of justice must be weighed on a case by case basis."); *United States v. Graham*, 758 F.2d 879, 883 (3d. Cir. 1985) (whether a resulting miscarriage of justice occurred must be determined on a "case-by-case basis, upon review of the entire record").

[36] 11 *Del. C.* §§531, 636.

[37] 11 *Del. C.* § 531.

[38] 11 *Del. C.* § 231(b)(1).

[39] *See Rambo v. State*, 919 A.2d 1275, 1281 (Del. 2007) ("Attempt requires intent and as the Criminal Code Commentary succinctly points out, 'one cannot be convicted of an attempt to commit a crime which may only be committed recklessly.'").

as charged, following the *Chance v. State*[40] and *Claudio v. State*[41] instruction, or he was not guilty.[42]

First Degree Burglary[43]

Allen also does not apply to Defendant's first degree burglary conviction. A person is guilty of first degree burglary where:

> . . . the person knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or when in the dwelling or in immediate flight therefrom, the person **or another participant in the crime** [is armed with a deadly weapon].[44]

The statute explicitly allows a burglary participant to be found guilty of first degree burglary where a fellow participant has a gun. That is so with or without accomplice liability because the statute, itself, only requires the intent to enter a home, intent to commit a felony therein, and a participant with a deadly weapon.

To be guilty as a principal, the statute does not require Defendant's possession or knowledge of the deadly weapon. If the court erred here, it was for even allowing the possibility of Defendant's being found not guilty because he was

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[40] 685 A.2d 351 (Del. 1996).

[41] 585 A.2d 1278 (Del. 1991).

[42] *See Richardson*, 2006 WL 3094164 at *3.

[43] 11 *Del. C.* § 826.

[44] 11 *Del. C.* § 826(a) (emphasis added); *cf.* 11 *Del. C.* § 832(a).

not an accomplice to the armed burglary. The indisputable evidence proved Defendant guilty of Burglary in the First Degree as a principle.

The evidence was overwhelming as to Defendant's own "individualized" intent to commit a burglary here. Defendant stole keys from the victim's late wife's car and entered the victim's home to commit theft. And, he personally entered the victim's bedroom, also with the intent to steal. As evidenced by the gun battle in the homeowner's dining room, Defendant's accomplice obviously possessed a gun. Because the accomplice's gun possession, regardless of whether Defendant knew, is enough to trigger Defendant's conviction for first degree burglary, Defendant's "accountability" for that gun is unnecessary to determine. As to the possession of a deadly weapon element of Burglary in the First Degree, Defendant's knowledge is beside the point.

Even if a Section 274 instruction would have been required, its omission does not result in an injustice. If the jury should have been instructed on Section 274, which it should not have been, the omission was harmless beyond a reasonable doubt. Defendant undeniably left the house with stolen property after the shooting started, as mentioned above and discussed next. Thus, even if Defendant did not know his confederate was armed when Defendant entered the house to commit theft, he undeniably knew about the firearm as he fled with stolen property.

First Degree Robbery[45]

Defendant's first degree robbery conviction is also safe. Robbery is divided into degrees, with acts of intimidation elevating the levels. In a different case, failing to provide a Section 274 instruction would be fatal. But, taking the evidence into consideration here, failing to charge on Section 274 was harmless beyond a reasonable doubt.

At this point, it is beyond dispute that Defendant agreed with his accomplice to commit a residential burglary in the middle of the night. During that burglary, Defendant took two sets of keys, one of which was a "keepsake." That property was found on Defendant after he witnessed the gun battle in the homeowner's dining room. The gun battle left no doubt that Defendant's accomplice was armed and using force against the homeowner victim. Accordingly, this court cannot conceive any way a rational juror, taking Section 274 into account, could possibly have found Defendant guilty of any lesser-included robbery offense. Defendant stole the victim's property after he knew that his confederate used a deadly weapon to stop the victim's resistence and to aid in the accomplices' escape.

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[45] 11 *Del. C.* § 832.

Second Degree Conspiracy[46]

By the same toke, Defendant's second degree conspiracy is also safe. Considering the above, Defendant's responsibility for the burglary and attempted murder is unassailable. No rational juror could have found Defendant not guilty of conspiracy second degree.

VI.

In closing, Defendant is not James Allen. Defendant not only entered his victim's home in the middle of the night with the intent to steal, he also entered his victim's bedroom. While there is room to argue that it was not apparent anyone was home as Defendant cased the house, that does not negate the fact that Defendant knew there was a vehicle in the garage. Moreover, once Defendant was apprehended, the police recovered the key from Defendant's pants.

In this case, Defendant was an active participant in the armed home invasion. Defendant was the one who startled the victim as he entered the victim's bedroom. Defendant took the victim's property and fled after he undeniably knew that his accomplice had produced and used a firearm against the victim. Even after realizing someone was home, Defendant did not leave the house directly. He and his accomplice tried briefly to stand their ground, or to thwart the homeowner's hot

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[46] 11 *Del. C.* § 512.

pursuit. At the least, it cannot be denied that Defendant tried to flee with stolen property under his accomplice's covering fire. That justifies Defendant's robbery conviction.

VII.

For the foregoing reasons, and for the reasons presented in the decision before remand, Defendant's second motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary