

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

STATE OF DELAWARE	)	
	)	
v.	)	ID No. 0506007270
	)	
CARLOS LOPEZ,	)	
	)	
Defendant.	)	

Submitted: March 27, 2013  
Decided: June 27, 2013

**On Defendant's Third Motion for Postconviction Relief – DENIED**

**ORDER**

Josette Manning, Esquire, Department of Justice, 820 N. French Street,  
Wilmington, DE 19801. Counsel for State of Delaware.

Carlos Lopez, James T. Vaughn Correctional Center, 1181 Paddock Road,  
Smyrna, DE 19977. *Pro Se* Defendant.

**CARPENTER, J.**

On this 27<sup>th</sup> day of June 2013, upon consideration of Defendant's *Pro Se* Motion for Postconviction Relief, it appears to the Court that:

1. On February 27, 2013, Carlos Lopez ("Lopez") filed a *Pro Se* Motion for Postconviction Relief, his third, pursuant to Superior Court Criminal Rule 61 ("Rule 61"). In his Motion, Lopez raises the following grounds for relief:

1) ineffective assistance of counsel; and 2) newly discovered material evidence.

For the reasons set forth below, Defendant's Third Motion for Postconviction Relief is **DENIED**.

2. Following a jury trial, Lopez was found guilty on February 6, 2006 of Rape Second Degree. On April 21, 2006, Lopez was declared a habitual criminal offender and, therefore, was sentenced to life imprisonment pursuant to 11 *Del. C.* § 4214(b). Lopez's conviction and sentence were affirmed on appeal to the Supreme Court in December 2006. The Court will not recite the facts of the case as they are set forth in the Delaware Supreme Court's order, dated December 22, 2006.<sup>1</sup>

3. Initially, Lopez filed a *Pro Se* Motion for Postconviction Relief on August 3, 2007. Lopez's first Motion for Postconviction Relief was denied by this Court on February 29, 2008. Additionally, this Court denied Lopez's Motion for

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<sup>1</sup> See *Lopez v. State*, 918 A.2d 338 (Del. 2006).

Reduction of Sentence on February 29, 2008. On September 16, 2008, Lopez filed a *Pro Se* Motion for Correction of Illegal Sentence, which this Court denied on January 1, 2009. On July 30, 2009, Lopez filed his second Motion for Postconviction Relief, which this Court summarily dismissed on August 25, 2009. On September 9, 2009, Lopez filed an appeal to the Delaware Supreme Court. On February 24, 2010, the Delaware Supreme Court affirmed this Court's decision.

4. On February 27, 2013, Lopez filed the motion presently before the Court. However, prior to addressing the merits of any postconviction claim, the Court must determine whether the procedural requirements of Rule 61 have been met.<sup>2</sup> Specifically, any ground for relief raised by the Defendant that was not raised at trial or on direct appeal is procedurally barred, unless the Defendant shows both cause for relief and prejudice from a violation of his rights.<sup>3</sup> Additionally, any grounds for relief previously adjudicated, including those adjudicated in “the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding,” are barred unless “reconsideration of the claim is warranted in the interest of justice.”<sup>4</sup>

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<sup>2</sup> See e.g., *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).

<sup>3</sup> See Super. Ct. Crim. R. 61(i)(3).

<sup>4</sup> Super. Ct. Crim. R. 61(i)(4).

***A. Newly Discovered Material Evidence***

5. Lopez first claims that he is entitled to relief due to newly discovered material evidence. Specifically, Lopez argues that his counsel’s failure to contact certain alibi witnesses was a due process violation. Lopez contends that he can now supply the Court with notarized affidavits from these alibi witnesses and/or provide the Court with the necessary contact information, which would allow the Court to verify their statements under oath or during an evidentiary hearing.

6. The Court finds that this is not “newly discovered evidence” but is, instead, “rediscovered” evidence as the witnesses and the testimony they would likely proffer have been addressed in prior proceedings. Further, claims of newly discovered evidence are viewed cautiously, and Lopez does not explain how this newly discovered information only recently came to his attention.<sup>5</sup> Moreover, even assuming Lopez’s claim constitutes newly discovered evidence, the Court finds that, when viewed in the case’s context, it neither amounts to cause nor invokes Rule 61’s interest of justice exception.<sup>6</sup> The Court reiterates that a Rule 61 motion is intended to correct errors in the trial process—not to allow defendants unlimited opportunities to relitigate their convictions. As such, the Court finds that Lopez’s contention is merely an unsupported and conclusory

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<sup>5</sup> See *State v. Newton*, 2012 WL 1415811, at \*1 (Del. Super. Jan. 31, 2012).

<sup>6</sup> See *id.*

claim of newly discovered evidence, which essentially serves as a pretext to recast his ineffective assistance of counsel claim and file another Rule 61 petition.<sup>7</sup>

***B. Ineffective Assistance of Counsel***

7. Citing *People v. LaBree*<sup>8</sup>, *People v. Donovan*<sup>9</sup>, and *Martinez v. Ryan*<sup>10</sup>, Lopez next claims that he is entitled to relief due to the ineffective assistance of counsel. Specifically, Lopez contends that his counsel, David J. Facciolo, failed to investigate witnesses that could have provided Lopez with an alibi and would corroborate his claim that he was not in the area when the rape occurred. Therefore, Lopez reasons that Facciolo provided ineffective assistance because he failed to introduce evidence at trial that would have established his innocence.

8. *LaBree* and *Donovan* are simply other ineffective assistance cases from New York that have no effect on the status of the law in Delaware. *Martinez*, cited by Lopez, concerns the standard of review in federal *habeas corpus* proceedings.<sup>11</sup> Specifically, *Martinez* allows a federal *habeas* court to hear substantial claims of ineffective assistance of counsel at trial if, in the initial-

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<sup>7</sup> See *State v. Gee*, 2011 WL 880851, at \*3 (Del. Super. Feb. 23, 2011).

<sup>8</sup> 34 N.E.2d 257 (1974).

<sup>9</sup> 585 N.Y.S.2d 70 (1992).

<sup>10</sup> 566 U.S. at —, 132 S.Ct. 1309 (2012).

<sup>11</sup> See *id.* at \*1311 (“Where under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal *habeas* court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.”).

review collateral proceeding in the state court, there was no counsel or counsel in that proceeding was ineffective.<sup>12</sup> Although *Martinez* does not apply to state court proceedings, even if it did, it would have no application beyond the initial Rule 61 petition.

9. This Court recently amended Rule 61 of its Rules of Criminal Procedure to provide that it “will, [effective May 6, 2013 and onward], appoint counsel for an indigent movant’s first postconviction proceeding.”<sup>13</sup> However, even if the amended Rule were applicable, the Court would reach the same result. First, the Court notes that Lopez previously raised claims of ineffective assistance counsel, which were denied. Further, this Court’s denial of those claims was affirmed on appeal by the Delaware Supreme Court. Moreover, the Court finds that Lopez “has failed to show the procedural bars are inapplicable pursuant to Rule 61(i)(5), as he has not advanced any colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.”<sup>14</sup> So even if *Martinez* had some application to this case, which it does not, the Court finds it would have no effect on the outcome of this petition.

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<sup>12</sup> See *id.*

<sup>13</sup> See *id.*; accord, *State v. Smith*, 2012 WL557827, at \*1 (Del. Super. June 14, 2013), *aff’d*, 53 A.3d 303 (Del. 2012)

<sup>14</sup> *State v. Jones*, 2012 WL 2152198, at \*3 (Del. Super. May 20, 2013).

For the foregoing reasons, the Defendant's Third Motion for Postconviction Relief is hereby **DENIED**.

**IT IS SO ORDERED.**

/s/ William C. Carpenter, Jr.

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Judge William C. Carpenter, Jr.