IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cr. ID No. 9701006047
	)	
TERRENCE L. JONES,	)	
	)	
Defendant.	)	

Submitted: September 11, 2013
Decided: September 24, 2013

COMMISSIONER'S REPORT AND RECOMMENDATION THAT DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF SHOULD BE DENIED.

Elizabeth R. McFarlan, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Terrence L. Jones, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 24th day of September 2013, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. In November 1997, Defendant Terrence L. Jones was tried before a Superior Court jury on multiple criminal charges arising from the robbery of a Dollar Express store in Stanton, Delaware. The jury found Defendant guilty of Second Degree Conspiracy but was unable to reach a unanimous verdict as to the remaining counts.

2. A second trial was held in July 1998. Jones was found guilty of First Degree Robbery, two counts of Attempted First Degree Robbery, Second Degree Assault, Second Degree Burglary, Wearing a Disguise During the Commission of a Felony, and five counts of Possession of a Firearm During the Commission of a Felony.

3. Prior to Defendant's September 1998 sentencing, the State moved to declare Jones a habitual criminal offender pursuant to 11 *Del. C.* § 4214(a). The State's application was premised on Jones' two prior robbery convictions in California, a felony escape charge from Delaware, and a prior second degree robbery conviction that occurred in Delaware.[1] The Superior Court granted the State's motion to declare Jones a habitual offender for each of the ten violent felony convictions.[2]

4. On September 4, 1998, Defendant was sentenced to a total of 176 years of imprisonment, followed by probation.

5. There was a criminal action pending against Defendant Jones arising from unrelated burglary and theft charges. Following Defendant's sentencing on September 4,

[1] Sentencing Transcript of September 4, 1998, at pgs. 2-10.
[2] *Id.*

1998 in this action to 176 years of incarceration, the State dismissed all of the charges which were pending in the other unrelated action.[3]

6. On May 21, 1999, on direct appeal, the Delaware Supreme Court affirmed the judgment of the Superior Court.[4]

7. On June 5, 2002, Defendant filed a Motion for Postconviction Relief. In Defendant's motion for postconviction relief he raised various ineffective assistance of counsel claims. By Order dated September 10, 2002, the Superior Court denied Defendant's motion.[5]

8. On January 4, 2012, Defendant filed a motion for correction of sentence pursuant to Superior Court Criminal Rule 35(a). By Order dated February 13, 2012, the Superior Court denied the motion.[6] On appeal, the Delaware Supreme Court affirmed the denial of Defendant's motion.[7]

9. On January 28, 2013, Defendant filed the subject motion for postconviction relief. In the subject motion Defendant contends: 1) that he was denied his right to counsel on his first motion for postconviction relief; and 2) that his counsel was ineffective for failing to convey the plea offered by the Attorney General. Defendant contends that the failure of his counsel to convey the plea offer offered before the re-trial of his case resulted in the imposition of a more severe sentence.

10. Defendant also appears to contend that his counsel failed to convey a plea offer made by the State in the unrelated burglary and theft action, but those charges were

[3] See, Criminal Action No. 9702006610- Docket No. 17; Sentencing Transcript of September 4, 1998 in Criminal Action No. 9701006047, at pg. 15.
[4] *Jones v. State,* 1999 WL 591452 (Del. 1999).
[5] *State v. Jones,* 2002 WL 31028584 (Del.Super. 2002).
[6] See, Superior Court Docket No. 78.
[7] *Jones v. State,* 2012 WL 5178002 (Del. 2012).

dismissed by the State in their entirety. Since Defendant was never convicted of any of those charges, he could not have received any better result by accepting a plea offer. Consequently, this contention is moot.

11. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.[8] If a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.[9] Moreover, if it plainly appears from the motion for postconviction relief that the movant is not entitled to relief, the Court may enter an order for its summary dismissal and cause the movant to be notified.[10]

12. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within three years of a final order of conviction;[11] (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights or cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, do not apply to a claim that the court lacked jurisdiction or to a 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.[12] Moreover, the procedural bars of

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[8] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[9] *Id.*
[10] Super.Ct.Crim.R. 61(d)(4).
[11] Since the final order of conviction occurred before July 1, 2005, the motion must be filed within three years. If the final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005).
[12] Super.Ct.Crim.R. 61(i)(5).

(2) and (4) may be overcome if "reconsideration of the claim is warranted in the interest of justice."[13]

13. The claims that Defendant raises in the subject motion are untimely, procedurally barred and without merit.

14. Turning first to Defendant's claim that he had a constitutional right to counsel on his first motion for postconviction relief, this claim is untimely, procedurally barred and without merit. Initially, it is noted that Defendant filed his first motion for postconviction relief in June 2002 and it was decided by the Superior Court in September 2002. Defendant never requested that counsel be appointed at any time during the pendency of the first motion. Defendant cannot complain that he was denied counsel on his first motion for postconviction relief when he never made the request for counsel to be appointed. Defendant's first motion for postconviction relief was considered and decided in 2002. At this point in time, Defendant's first motion for postconviction relief has been concluded for over 11 years. Any request pertaining to that motion is, at this point, untimely.

15. Defendant's first motion for postconviction relief was found by the Superior Court to be wholly lacking in merit and without any factual support. At no time during the pendency of Defendant's motion did he ever request the appointment of counsel or an evidentiary hearing. If Defendant believed his constitutional rights were violated, or that the Superior Court did not correctly decide his motion, Defendant was required to appeal the Superior Court's decision to the Delaware Supreme Court. He elected not to do so.

16. The problem with waiting 11 years, and then filing a second motion for postconviction relief, complaining of errors with the first motion, is that the ability to

[13] Super.Ct.Crim.R. 61(i)(4).

address those complaints is now severely hampered. The prosecutor that handled this case at the Attorney General's Office has left the office. The public defender that represented Defendant has retired and left the Public Defender's Office. The Public Defender's Office no longer has the trial file for this case which it destroyed in accordance with the its file retention and destruction policy.[14] The information, documents and material that would have been readily available in 2002, are now gone 11 years later.

17. Defendant contends that under *Martinez v. Ryan*,[15] he is constitutionally entitled to the appointment of counsel to pursue his claims of ineffective assistance of counsel with respect to his trial counsel. Defendant's reliance on *Martinez* is misplaced. *Martinez* permits a federal court to review a "substantial" ineffective assistance of counsel claim on federal habeas review.[16] Indeed, in *Martinez,* the United States Supreme Court stated that its decision did not establish a constitutional right to counsel in state postconviction proceedings.[17]

18. Although *Martinez* does not apply to state court proceedings, Delaware Superior Court Criminal Rule 61 was recently amended to provide that, effective May 6, 2013 and onward, the court will appoint counsel for an indigent movant's first postconviction proceeding.

19. This is, however, Defendant's second motion for postconviction relief. *Martinez* and the recently amended Rule 61 have no effect after one's initial Rule 61 petition.[18]

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[14] See, Superior Court Docket No. 90- Public Defender's Office Response to Defendant's Rule 61 Motion; Superior Court Docket No. 87- State's Response to Defendant's Rule 61 Motion.

[15] *Martinez v. Ryan,* 132 S.Ct. 1309 (2012).

[16] *Martinez,* 132 S.Ct. at 1311, 1318-19.

[17] *Martinez v. Ryan,* 132 S.Ct. 1309, 1315 (2012).

[18] *State v. Miller,* 2013 WL 4135019, at * 2 (Del.Super. 2013); *Morrisey v. State,* 2013 WL 2722142, at *2 (Del. 2013).

There is no legal or factual basis for Defendant's claim of a constitutional entitlement to the appointment of counsel to assist him in prosecuting ineffective assistance claims against his trial counsel in connection with his second postconviction motion.[19] This claim is untimely, procedurally barred, and without merit.

20. Turning to Defendant's second claim, that his counsel was ineffective for failing to convey the plea offered by the Attorney General, this claim is also procedurally barred and without merit. Rule 61(i)(1) applies because Defendant filed this motion more than three years after his final order of conviction. Defendant's final order of conviction was in 1999, and this motion filed in January 2013, was filed over 13 years later, clearly outside the applicable three year limit.

21. In addition to being time-barred, Rules 61(i) (2) and (3) would prevent this Court from considering this claim which was not previously raised. Defendant had time and opportunity to raise any issue in his prior, timely filed, postconviction motion and either did so, or neglected to do so. Having already been provided with a full and fair opportunity to present any issues desired to be raised, any attempt at this late juncture to raise a new claim is barred.

22. Even if Defendant's claim was not procedurally barred, it is without merit. It is Defendant's burden to demonstrate that his counsel rendered ineffective assistance in connection with the plea bargaining process.[20] Defendant relies on the United States Supreme Court decisions in *Missouri v. Frye*[21] and *Lafler v. Cooper*[22] as the basis for this claim.

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[19] See, *Marvel v. State.* 2013 WL 4542708, at *1 (Del. 2013).
[20] *Smith v. State,* 2013 WL 1857543, at *1 (Del. 2013).
[21] *Missouri v. Frye,* 132 S.Ct. 1399 (2012).
[22] *Lafler v. Cooper,* 132 S.Ct. 1376 (2012).

23. Defendant cannot sustain his burden to demonstrate that his counsel rendered ineffective assistance in connection with the plea bargaining process. Defendant contends that in 2005, he learned about an alleged plea offer from one of his family member's who asked him why did not accept a 20 year plea (11 years mandatory and 9 years non-mandatory). Defendant further contends that a friend asked him the same thing some years later. [23]

24. If Defendant genuinely believed that a plea offer had been made by the State which was not conveyed to him by his counsel when his family member raised the issue with him in 2005, he was required to have raised the issue with the court at that time. Defendant cannot sit on allegedly discovered "new information" for 8 years and then seek to raise it with the court. As an aside, it is suspect that Defendant's family and friend would allegedly be aware of a plea offer made by the State to Defendant, where Defendant would not have been in the know. In any event, any attempt to raise this issue at this late juncture is now time barred.

25. Defendant further contends that because he was facing the probability of being sentenced as a habitual offender if convicted, it is "highly likely" he would have accepted any plea offer made by the State.[24]

26. The trial transcript, however, belies this contention. The trial transcript reflects that a plea offer was made to Defendant prior to the re-trial of his case and that he rejected the offer and elected instead to go to trial.

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[23] June 2, 2013 letter from Terrence Jones to the court, at *3; Superior Court Docket No. 91- a supplemental submission to Defendant's Rule 61 motion.

[24] Superior Court Docket No. 83- Defendant's Memorandum of Law in support of his Rule 61 motion, at pg. 2.

27. Specifically, on the first day of the retrial, on June 30, 1998, the trial transcript reflects the following:

> THE COURT: . . . [W]e're going to have to call up the jury and proceed with the trial. It's time to, you know.
>
> DEFENSE COUNSEL: Your Honor, thank you for the opportunity. It's been a long, drawn-out process, but thank you for the opportunity. **Mr. Jones has opted to go to trial.** [25]

28. The logical inference to be drawn from this dialogue is that Defendant had the option of accepting a plea offer or rejecting the plea offer and going to trial. After a long, drawn-out process, Defendant made the election to reject the plea offer and go to trial. Afterall, the only "option" a defendant has is to accept a plea offer or go to trial. Obviously, a defendant does not have the option to dismiss the charges pending him.

29. At the time Defendant filed the subject motion in January 2013, the judgment of his conviction had been final for over 13 years, and his first postconviction motion had been decided over 11 years before.

30. In light of the length of time that elapsed, the prosecutor that tried the case against Defendant is no longer with the Attorney General's Office. Defendant's trial counsel has retired from the Public Defender's Office. Neither the Attorney General's Office of the Public Defender's Office can offer any further information about the specifics of the plea. The Attorney General's records reflect only that an offer had been made but not the specifics of the offer.[26] The Public Defender's Office no longer has its file and has no information regarding any plea negotiations that occurred in this case. The Public

[25] June 30, 1998 Trial Transcript, at pg. 2 (emphasis added).
[26] Superior Court Docket No. 87- State's Response to Defendant's Rule 61 Motion, at pg. 8.

Defender's Office trial file for this case was destroyed in accordance with the Public Defender's Office file retention and destruction policy.[27]

31. Defendant has not sustained his burden of demonstrating that his counsel rendered ineffective assistance in connection with the plea bargaining process. Despite his representation to the contrary, the record reflects that a plea offer was made to Defendant, that he rejected it and proceeded to trial. Defendant offers no reliable factual support for his claim of ineffectiveness in connection with the plea offer, only unsubstantiated assertions made 13 years after the fact.

32. Since Defendant's claims are procedurally barred, Defendant must meet one of the exceptions to overcome the bars to relief. In this case, Defendant has failed to overcome any of the procedural bars by showing a "colorable claim that there was a miscarriage of justice" or that "reconsideration of the claim is warranted in the interest of justice." The "miscarriage of justice" exception is a "narrow one and has been applied only in limited circumstances."[28] The Defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."[29] The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. It is clear from Defendant's motion that Defendant's claim does not meet the high standard that the fundamental fairness exception requires. The Court does not find that the interests of justice require it to consider these otherwise procedurally barred claims for relief.

33. To the extent that Defendant requested an evidentiary hearing, the request is denied. Having carefully considered Defendant's motion and the evidentiary record,

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[27] Superior Court Docket No. 90- Public Defender's Office Response to Defendant's Rule 61 Motion.
[28] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).
[29] *Id.*

Defendant's allegations were either reasonably discounted as not supported by the record or not material to a determination of Defendant's claims. An evidentiary hearing is not needed and any such request to hold a hearing is hereby denied.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.

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Commissioner Lynne M. Parker

oc: Prothonotary
cc: Todd E. Conner, Esquire