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

STATE OF DELAWARE)	
)	
)	ID No. 0611011396
V.)	
)	
)	
KEINO CHRICHLOW,)	
Defendant.)	

Submitted: December 26, 2012 Decided: March 28, 2013

ORDER

Upon Defendant's Second Motion for Postconviction Relief - DENIED.

- 1. On October 23, 2012, Defendant filed this, his second motion for postconviction relief. The motion was properly referred and after preliminary review, the court determined that all the claims were procedurally barred, with one reservation: Defendant makes a claim under the recently decided *Martinez v. Ryan*.¹
- 2. Accordingly, the court ordered the State to respond to the *Martinez* issue, which the State submitted on November 26, 2012. Defendant did not reply in the allotted time. Thus, the matter was on submission effective December 26, 2012.

¹ 566 U.S. —, 132 S.Ct. 1309 (2012).

- 3. In the end, the court agrees with the State that this is simply one of the scores of cases filed in reliance on *Martinez* where *Martinez* does not apply. There is, however, a procedural twist to this case that bears mention.
- 4. As explained in the first postconviction relief motion's decision, by the time Defendant's direct appeal was due, the State had already filed its appeal from the post-trial decision reducing several convictions from robbery first degree to aggravated menacing.² Although Defendant had court-appointed appellate counsel who successfully resisted the State's appeal,³ Defendant's appellate counsel did not file a direct appeal on his behalf.
- 5. As also explained in the first motion for postconviction relief decision, Defendant had one potentially viable ground for appeal. That stemmed from trial counsel's failure to pursue an *Allen v. State*⁴ claim concerning his culpability as an accomplice.
- 6. To assist in the first postconviction relief matter, the court obtained appellate counsel's *Horne*⁵ affidavit. Appellate counsel explained that he did

² State v. Chrichlow, 2011 WL 7063684 (Del. Super. Dec. 28, 2011) (Silverman, J.).

³ State v. Bridgers, 970 A.2d 257 (Del. 2009) (TABLE).

⁴ 970 A.2.d 203 (Del. 2009).

⁵ Horne v. State, 887 A.2d 973 (Del. 2005).

not believe Defendant's *Allen* argument was meritorious and, accordingly, he did not pursue it. He also, however, did not file a Supreme Court Rule 26(c) motion.

- 7. Taking what happened during the direct appeal into account, the court used the first motion for postconviction relief as a vehicle to give Defendant his opportunity to present the claim he would have made on direct appeal. In other words, the court determined that the claim was not procedurally barred and the court addressed the claim consistent with *Middlebrook v. State*. The court considered the claim substantively and rejected it. Defendant took an appeal and the first motion for postconviction relief's denial was affirmed.
- 8. In summary so far, although Defendant's direct appeal was procedurally irregular, as a practical matter he now stands in the position of a convicted defendant whose direct appeal was presented under Supreme Court Rule 26 (c). That means, in effect, he had counsel for appellate purposes, but he did not have counsel's assistance to pursue his ineffective assistance of counsel claim through a postconviction relief proceeding. Hence, his *Martinez* claim now.

⁶ 918 A.2d 1170 (Del. 2007) (TABLE).

⁷ Chrichlow v. State, 49 A.3d 1192 (Del. 2012) (TABLE).

- 9. The court agrees with the State's argument that *Martinez v. Ryan* is inapplicable. *Martinez* merely allows a federal *habeas* court to hear substantial claims of ineffective assistance of counsel at trial if, in the initial-review collateral proceeding in the state court, there was no counsel or counsel in that proceeding was ineffective.⁸
- 10. *Martinez* does not apply to state courts. So, it does not require, in circular fashion, that Delaware must automatically underwrite the cost of hiring a new lawyer in every case to overcome the strong presumption that a convicted defendant's trial and appellate attorneys were effective.⁹
- 11. Moreover, *Martinez* speaks directly about whether it is applies retro-actively. Qualifying its decision as an "equitable ruling" rather than a "constitutional ruling," *Martinez* holds:

A constitutional ruling would provide defendants a freestanding constitutional claim to raise . . . and it would require a reversal in all state collateral cases on direct review

⁸ Martinez, 566 U.S. at —, 132 S.Ct.at 1320. ("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.").

⁹ See State v. Finn, 2012 WL 2905101, at *2 (Del. Super. July 17, 2012) (Parkins, J.) ("Martinez did not change Delaware's longstanding rule that defendants are not entitled postconviction relief counsel."); State v. Rodgers, 2012 WL 3834908, *2 (Del. Super. Aug. 30, 2012) (Parkins, J.)

from state courts if the State's system of appointing counsel did not conform to the constitutional rule. An equitable ruling, by contrast, permits States a variety of systems for appointing counsel in initial-review collateral proceedings. And it permits a State to elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceeding. In addition, state collateral cases on direct review from state courts are unaffected by the ruling in this case.¹⁰

That provides a second reason why *Martinez* does not undermine the first motion for postconviction relief, at least not here.

12. Finally, the initial finding that Defendant's other claims are procedurally barred includes the conclusion their re-review is not warranted under Rule 61's interest of justice exception.

For the foregoing reasons, Defendant's second motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

oc: Prothonotary, (Criminal Division)

pc: Josette D. Manning, Deputy Attorney General

Keino S. Chrichlow, Defendant

¹⁰ *Id.* at 1319-20.