IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	CRIMINAL ACTION NUMBERS
v.	)	
	)	IN-91-09-0956-R4 IN-91-09-0958-R4
JOE L. TRAVIS	)	
	)	
Defendant	)	ID NO. 30109075DI
	)	
AND	)	
	)	
STATE OF DELAWARE	)	
	)	CRIMINAL ACTION NUMBER
v.	)	
	)	IN-91-09-0956-R3
LESTER F. ANDERSON	)	
	)	ID NO. 30109009DI
Defendant	)	

Submitted: February 22, 2013
Decided: March 25, 2013

MEMORANDUM OPINION

Upon Motion of Defendants Joe Travis and Lester Anderson for Postconviction Relief - ***DENIED***

HERLIHY, Judge

The defendants, Joe L. Travis and Lester F. Anderson, were convicted of (non-capital) first degree murder in 1992 and the mandates affirming their convictions were issued in 1993. Travis claims his trial counsel was ineffective, and Anderson claims counsel who represented him in 1996 on his first motion for postconviction relief was ineffective.

Each defendant invokes *Martinez v. Ryan*[1] as creating a "new right" which, they argue, provides a means of relief from the one year time bar of Superior Court Criminal Rule 61(i)(1). The Court holds *Martinez* did not create a new constitutional right and does not provide a basis for a relief from the applicable time bar; nor does *Martinez* provide a means of relief from any of the other applicable procedural bars. Their motions are **DENIED**.

Discussion

Before undertaking a consideration of their claims, the Court must determine whether there are any procedural bars to doing so.[2] By invoking *Martinez*, the defendants seek to take advantage of the means of relief from the one year time bar in Superior Court Criminal Rule 61(i)(1), which states:

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[1] __U.S.__, S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

[2] *Stone v. State*, 690 A.2d 924, 925 (Del. 1996).

> Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

When the defendants were convicted and when the mandates were issued, the time limit was three years from when the convictions were final (date of issuance of mandate). Subsequently, however, Rule 61(i)(1) was amended to require a postconviction motion to be filed within one year after the conviction became final. This now means in the case of the establishment of a "new right," a defendant whose action is otherwise time barred has one year to file the motion form the date the new right was established.[3] Since *Martinez v. Ryan* was issued on March 20, 2012, the defendants' motions (Travis, February 27th; Anderson, February 27, 2013) were filed timely.

Rule 61(i)(1) uses the phrase a "retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the…United States Supreme Court." Therein lies the rub. The Supreme Court in *Martinez* said this about the "right" it created:

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[3] *State v. Travis*, 2009 WL 5928077, *rev'd on other grounds*, 2 A.3d 75, 2010 WL 2854133 (Del. 2010)(TABLE).

These rules reflect an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default.[4]

* * * * *

The holding here ought not to put a significant strain on state resources. When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.

This is but one of the differences between a constitutional ruling and the equitable ruling of this case. A constitutional ruling would provide defendants a freestanding constitutional claim to raise; it would require the appointment of counsel in initial-review collateral proceedings; it would impose the same system of appointing counsel in every State; and it would require a reversal in all state collateral cases on direct review from state courts if the States' 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 proceedings. In addition, state collateral cases on direct review from state courts are unaffected by the ruling in this case.[5]

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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

[4] 132 S. Ct. at 1318.

[5] *Id.* at 1319-20.

proceeding, there was no counsel or counsel in that proceeding was ineffective.[6]

While no Delaware court has interpreted what kind of "rights" are encompassed within the word "right" in Rule 61(i)(1), common sense dictates that it be a *constitutional right*.[7]

As the quotes from *Martinez* make abundantly clear, the United States Supreme Court very openly and deliberately made the point that a new constitutional right was not being established.[8] Further, the context of *Martinez's* holding is important. The issue was whether in federal habeas actions, defendants would be able to avoid procedural default in federal court due to what happened in the earlier state postconviction actions. The Supreme Court said in a limited way they could.[9] Its

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[6] *Id.* at 1320.

[7] The Court notes that in *Chao v. State*, 931 A.2d 1000 (Del. 2007), *rev'd on other grounds*, *Claudio v. State*, 958 A.2d 846 (Del. 2008), the Supreme Court did not first indicate that before consideration of a motion for postconviction relief is to be undertaken, any applicable bars to relief must first be examined. It did not address or cite Rule 61(i)(1) either as a bar or how there is a means of relief from that bar. It plucked the phrase "interest of justice" from Rule 61(i)(2), which it neither cited or quoted, as a means of allowing Chao to present her claim which was otherwise procedurally barred. The retroactive application to an otherwise procedurally barred claim did not involve a "new right" but the application of a statutory re-interpretation which had reversed years of precedent. *Williams v. State*, 818 A.2d 906 (Del. 2003).

[8] Justice Scalia candidly disagrees in dissent and sees the majority's ruling for what it is, establishing a constitutional right. *Martinez*, 132 S. Ct. at 1321.

[9] *Martinez*, 132 S. Ct. at 1320.

holding, therefore, is limited only to that narrow procedural situation under federal law concerning *habeas corpus*. This cannot qualify as a "new right" under Rule 61(i)(1).

In *State v. Smith*,[10] this Court held that *Martinez* did not create a new constitutional right to have effective counsel at the initial postconviction proceedings in order to raise claims of ineffective assistance of counsel claims against trial counsel. The Court in *Smith* recognized that *Martinez* removes a procedural bar in federal habeas proceedings. That decision was affirmed on appeal.[11]

The Ninth Circuit has ruled that, "*Martinez* cannot form the basis for an application for a second or successive motion because it did not announce a new rule of constitutional law."[9½][12] In *Adams v. Thaler*, the Fifth Circuit said *Martinez*' rule was narrow and an equitable exception and hardly extraordinary.[13]

In sum, therefore, at this point it is unanimous, to this Court's knowledge, that *Martinez* did not create a new right such as to qualify as means of relief from the procedural bar of Rule 61(i)(1). Further, since *Martinez* did not establish a new

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[10] 2012 WL 5577827 (Del. Super. June 14, 2012).

[11] *State v. Smith*, 53 A.3d 303, 2012 WL 3870567 (Del. 2012)(Table).

[12] *Buenrostro v. U.S.*, 697 F.3d 1137, 1139 (9th Cir. 2012); *accord Gamboa-Victoria v. U.S.*, 2012 WL 5449999 (M.D.Fla. Nov. 7, 2012); *Vogt v. Coleman*, 2012 WL 2930871 (W.D.Pa. July 18, 2012); *Brown v. Kerestes*, 2012 WL 7007794 (E.D.Pa. Dec, 28, 2012).

[13] 679 F.3d 312, 320 (5th Cir. 2012).

constitutional right, it cannot be applied retroactively. "There is no indication in *Martinez* that it was to be applied retroactively."[14] The concepts of retroactive application and "new right" are linked under Rule 61(i)(1). Retroactive application is permissible under the Rule only if the right is new.

Additionally, *Martinez* does not provide relief from the repetitive motion bar of Rule 61(i)(2). The defendants' motions are clearly repetitive and barred. The first means of relief from that bar is where reconsideration is warranted in the "interest of justice."[15] Both defendants state they have claims of ineffective assistance. Travis complains about trial counsel and Anderson complains about counsel who represented him on his first motion for postconviction relief. But no specifics are offered by either defendant, and they have had between 17 and 20 years to develop something, if there were anything to develop. Whatever broad brushed complaints there are come nowhere near hinting at a need to reconsider in the "interest of justice."

There is yet another procedural bar to the defendants' motions and that Rule 61(i)(3) - procedural default, failure to previously raise a known claim. That rule has a means of relief if the defendant can show cause and prejudice.[16] Arguably, the

[14] *Lebron v. Terrell*, 2013 WL 443598, at *5 (D.R.I. Feb. 5, 2013); *accord Brown v. Kerestes*, 2013 WL 444672 (E.D. Pa. Feb. 6, 2013).

[15] Super. Ct. Crim. R. 61(i)(2).

[16] Super. Ct. Crim. R. 61(i)(3)(A)-(B).

defendants' "cause" is showing that *Martinez* affords them a new right. There is no need for the Court to restate the non-retroactivity of *Martinez* as it relates to cause. Therefore, they cannot meet the "cause" element.

There is another key aspect to *Martinez* applicable to this case. Neither defendant offers any specifics of where or how each counsel was ineffective. Furthermore, can neither defendant meet the prejudice requirement to obtain relief from this procedural bar. In *Martinez*, the Supreme Court said this:

> To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.[17]
>
> * * * * *
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> When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.[18]

Under Rule 61(i)(3), therefore, each of their motions is barred.

Another means of relief from these three procedural bars is found in Rule 61(i)(5) where there was a miscarriage of justice because of a constitutional violation.

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[17] 132 S. Ct. at 1318.

[18] *Id.* at 1319.

First, neither defendant presents an argument of a constitutional violation. Second, the record in this case where there have been successive motions shows nothing of a constitutional violation or anything remotely close to it for either defendant.

For these reasons, each of their motions is procedurally barred.

Conclusion

For the reasons stated herein, the motions for postconviction relief of Joe Travis and Lester Anderson are **DENIED**.

IT IS SO ORDERED.

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J.