IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 0101010653
	)	
RALPH DUONNOLO	)	
Defendant.	)	
	)	

ORDER

In 1977 Defendant was convicted of murder in the first degree for the slaying of Rochelle Annette van Kellenburg. He stabbed the victim six times on the right side of her chest, six times on the left side of her chest, three times in her back and inflicted multiple contusions on the victim's head, neck, jaw and left forearm. After a trial by jury Defendant was found guilty of murder in the first degree as well as possession of a deadly weapon during the commission of a felony, and was sentenced to life in prison. The Supreme Court affirmed Duonnolo's conviction on his direct appeal.

Thirty years after his conviction Duonnolo has filed the instant motion seeking production of transcripts of his suppression hearing, trial and sentencing. He also seeks unidentified "material documents as to

Del. Crim. R. (16).” In his application for production of these materials Defendant outlined the five arguments he intends to make in a Rule 61 motion. They are (using Defendant’s words):

1. Jury and handcuffs
2. Lie Detector
3. Illegal Search and Seizure
4. Perjury – obstruction of justice
5. Ineffective assistance of counsel.

These claims are described at some length in Defendant’s application for the transcripts, so the Court will treat his application as a Rule 61 motion.

An application for the production of transcripts is addressed to the sound discretion of this Court.[1] The Constitution does not “require that an indigent be furnished every possible legal tool, no matter how speculative its value, and no matter how devoid of assistance it may be.”[2] Thus it is not an abuse of discretion to deny a request for transcripts where the transcripts are sought for the preparation of a Rule 61 motion for post conviction relief and it appears that the Rule 61 motion would be procedurally barred.[3] Upon review of Dunnolo’s application the Court concluded that the time and effort to locate the requested materials (if indeed they still exist) was not warranted since it appeared that

[1] *Robinson v. State*, 2003 WL 1869909 (Del. April 10, 2003).
[2] *United States v. Maccollom*, 426 U.S. 317, 330 (1976).
[3] *Robinson v. State*, 2006 Del. LEXIS 464 (Del., Sept. 7, 2006).

Defendant's proposed Rule 61 motion is procedurally barred. The Court gave Duonnolo the opportunity to explain why his proposed Rule 61 arguments are not procedurally barred, and Defendant timely responded.

Duonnolo's explanation why his claims are not procedurally barred are largely a repetition of the substance of those claims. Little, if any, of the response is directed to the procedural bars found in Rule 61. Because Defendant is appearing *pro se*, the Court has conducted an independent review of his proposed post conviction arguments, and it concludes they are barred by Rule 61.[4]

1. All of Defendant's claims are time-barred.

The overarching purpose of the procedural bars in Rule 61 is protection of the public's strong interest in the finality of criminal judgments.[5] To that end, the rule imposes a time limitation on the filing of motions for post conviction relief. Not surprisingly, given that the convictions here took place more then thirty years ago, each of Duonnolo's claims is time-barred. Rule 61 (i)(1), which was made effective on January 1, 1988, required when that any motion for post conviction relief be brought within three years[6] of the date the defendant's conviction became final. Defendant's conviction was already final when Rule 61 was promulgated, meaning that he was obligated to

[4] This Court must first determine whether the claims in a motion for post conviction relief are barred by Rule 61 before considering the merits of those claims. *Younger v. State*,580 A.2d 552, 554 (Del. 1990)

[5] In considering the scope of motions for post conviction relief, the Supreme Court observed that "[i]t is a matter of fundamental import that there be a definitive end to the litigable aspect of the criminal process." *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990).

[6] Rule 61(i)(1) was later modified to reduce this period to one year.

file any motion for post conviction relief on or before January 1, 1991. As a consequence of his failure to do so, all of his claims are bared by Rule 61(i)(1).

2. Three of Defendant's claims are also barred because they were previously rejected by the Delaware Supreme Court

Claims 1 through 3 ("Jury and handcuffs", "Lie Detector", and "Illegal Search and Seizure") are barred for an additional reason. Rule 61 (i)(4) prohibits consideration of any "ground for relief that was formerly adjudicated … unless reconsideration of the claim is warranted in the interest of justice." Defendant presented his "Jury and handcuffs", "Lie Detector", and "Illegal Search and Seizure" claims to the Delaware Supreme Court on his direct appeal.[7] Rule 61 (i)(4) therefore precludes this Court from considering them.

Rule 61(i)(4) contains an exception to its bar when consideration of the otherwise barred claims would be "in the interest of justice." Duonnolo has not brought anything to the attention of this Court which would bring his claims within that exception. The interest of justice exception is a narrow one and requires the defendant to show that "subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him."[8] Duonnolo has not referred the

[7] *Duonnolo v. State*, 397 A.2d 1, 26 (Del. 1978).
[8] *Flamer v. State*, 585 A.2d 736, 745. (Del. 1990)

Court to any subsequent legal developments which would require the Court re-examine the earlier rulings in his case.[9]

3. One of Defendant's claims is also barred because he failed to present it on his direct appeal.

Defendant's fourth claim--"Perjury – Obstruction of Justice"—is also barred by Rule 61 (i)(3) which precludes this Court from considering claims which were not raised, but could have been raised, in earlier proceedings. The rule provides an exception for defendants who can show both (1) cause for failing to timely present the claim, and (2) actual prejudice resulting from the alleged error. Duonnolo does not even attempt to show cause for his failure to timely raise his "Perjury—Obstruction of Justice" claim, and therefore it is barred.

4. The "miscarriage of justice" exception to the procedural bars is not applicable here.

There is a narrow exception to some of the procedural bars for defendants who can show a colorable claim of a miscarriage of justice because of a "constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings …."[10] In such instances Rule 61(i)(5) permits the court to consider constitutional claims which might otherwise be barred. This so-called "miscarriage of justice"

[9] Defendant mentions a ruling allegedly made by another Judge of this Court in which that Judge purportedly ordered a mistrial after the jury saw the defendant in handcuffs. This ruling, if it exists, would not represent a change in the law but instead would be the application of existing law to the facts then before that Judge.

[10] Superior Court Criminal Rule 61 (i)(5).

exception found in Rule 61(i)(5) by its own terms does not apply to the bar found in Rule 61 (i)(4). Therefore even if Defendant could make the showing required by Rule 61 (i)(5), the Court could not consider his "Jury and Handcuffs", "Lie Detector" and "illegal search and seizure" claims because those are barred by Rule 61(i)(4).

Defendant has not shown that the Rule 61 (i)(5) exception applies to his remaining claims. His ineffective assistance of counsel claim is nothing more than an expression of dissatisfaction with the persuasiveness (or lack thereof) of his counsel's arguments. Such allegations do not suffice to invoke the miscarriage of justice exception.[11]

Defendants fourth claim—"Perjury Obstruction of Justice" falls far short of showing a "miscarriage of justice" cause by a constitutional violation which "undermined the fundamental legality, reliability, integrity or fairness" of his trial. Defendant's claim in premised on the testimony of a witness who claimed to have overheard a conversation involving Defendant taking place over one hundred feet away. According to Defendant, during the trial the witness asked the prosecutor to speak up which, in the Defendant's mind, establishes that the witness committed perjury when he testified about overhearing Defendant's conversation. Although the State's knowing use of false testimony can amount to a violation of a defendant's right to due process,[12] the

[11] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990)(conclusory statements of ineffective assistance of counsel are insufficient under Rule 61(i)(5).)
[12] *Napue v. Illinois*, 360 U.S. 264 (1959).

testimony described by Defendant, even if that description is accurate, falls far short of showing the knowing use of perjured testimony by the State.

In sum, the Court concludes that all of the arguments in Defendant's proposed Rule 61 motion are barred by Rule 61. Therefore, in the exercise of its discretion, the Court **DENIES** Duonnolo's request for transcripts and other requested material. Further, treating Duonnolo's filing as a Rule 61 motion, his motion is **DENIED**.

So **ORDERED** this 4th day of November, 2009.

John A. Parkins, Jr.
Superior Court Judge

oc: Prothonotary
cc: Defendant
DAG, Department of Justice