

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

<b>STATE OF DELAWARE</b>	)	
	)	
<b>V.</b>	)	<b>ID # 88001884DI</b>
	)	
<b>VICKY CHAO</b>	)	
	)	
<b>Defendant.</b>	)	

**ORDER**

On this 13th day of June, 2014 and upon consideration of the Defendant’s Motion for Post-conviction Relief, it appears to the Court that:

1. On December 31, 2013, Defendant Vicky Chao (“Defendant”) filed this *pro se* Motion for Post-conviction relief. For the reasons set forth below, Defendant’s motion is **DENIED**.
2. On March 9, 1988, three members of William Chen’s family were killed in a fire in his home.<sup>1</sup> The State charged Defendant and her codefendant, Tze Poong Liu, with multiple counts of arson and murder. Trial took place in the summer of 1989. Defendant testified that her codefendant abducted her by forcing her to accompany him to Mr. Chen’s house and, in doing so, he bruised her left leg with his fist. The State presented expert medical testimony to refute Defendant’s assertion that she was bruised by her

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<sup>1</sup> *Chao v. State*, 780 A.2d 1060, 1063 (Del. 2001).

codefendant. The State's expert reviewed a photograph of the bruise taken after Defendant's arrest and testified that the bruise was not consistent with blows from a human fist.

3. After the close of trial, the jury found Defendant guilty of six counts of murder in the first degree, one count of attempted murder in the first degree, one count of arson in the first degree, one count of burglary in the first degree and three conspiracy charges.<sup>2</sup> On May 25, 1990, Appellant was sentenced to seven consecutive life imprisonment sentences without probation or parole and fifteen years of imprisonment. Defendant appealed and, on January 29, 1992, the Delaware Supreme Court affirmed her convictions.<sup>3</sup>

4. In July 1992, Defendant's husband retained private counsel for her. Defendant filed a motion for post-conviction relief for the ineffective assistance of counsel and moved for a new trial based on the perjured trial testimony of her codefendant. On February 17, 1995, this Court granted Defendant's motion for a new trial, but declined to address the effectiveness of her trial counsel due to its decision to grant a new trial.<sup>4</sup>

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<sup>2</sup> *Chao v. State*, 604 A.2d 1351, 1352 (Del. 1992).

<sup>3</sup> *Id.*

<sup>4</sup> *State v. Chao*, 1995 WL 412364 (Del. Super. Feb. 17, 1995).

5. On October 25, 1995, less than a week before Defendant's second trial, defense counsel requested the disbursement of public funds to retain a medical expert to testify regarding the bruise.<sup>5</sup> The Court gave Defendant until October 27, 1995 to obtain an expert, but denied her request for public funds.<sup>6</sup> Defendant was unable to obtain an expert who would appear without compensation by that deadline.
6. At the second trial, the State's medical expert testified and, after cross-examination, defense counsel tried again to find a medical expert. Defense counsel located an expert, but the Court denied the defense's request for permission to call the expert because it was after the October 27, 1995 deadline. Defendant was convicted of three counts of first-degree felony murder and other offenses.
7. Defendant appealed her convictions, arguing that the Court erred by not reaching the ineffective assistance of counsel claim and denying her requests for public funds to hire a medical expert and to call an expert mid-trial. The Supreme Court remanded the case to allow this Court to consider the claim for ineffective assistance of counsel. On remand, this Court found that Defendant's ineffective assistance claim was without merit and the Supreme

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<sup>5</sup>*Chao v. State*, 780 A.2d 1060, 1064 (Del. 2001).

<sup>6</sup> *Id.*

Court affirmed.<sup>7</sup> After Defendant's new appellant counsel discovered that the Supreme Court did not rule on two issues that Defendant raised in the second direct appeal, the Court recalled its mandate.

8. On September 20, 2001, the Supreme Court affirmed Defendant's convictions, holding that this Court was not constitutionally required to provide public funding for the defense to obtain a medical expert and that it did not abuse its discretion when it denied Defendant's mid-trial request to call an expert. The Supreme Court issued its mandate on October 11, 2001.
9. On May 22, 2002, Defendant filed her first *pro se* motion for post-conviction relief, which was denied on August 22, 2002.<sup>8</sup> On September 16, 2004, Defendant filed another motion for post-conviction relief, which was denied on September 16, 2004.<sup>9</sup> Defendant appealed and, on November 3, 2005, also filed her third motion for post-conviction relief. The Supreme Court remanded and this Court appointed counsel to represent Defendant on May 18, 2006. On September 25, 2006, this Court found that, based on a Supreme Court decision in a different case, it was required to reconsider Defendant's felony murder convictions.<sup>10</sup> The State appealed and the Supreme Court remanded and vacated Defendant's felony murder

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<sup>7</sup> *Chao v. State*, 707 A.2d 765 (Del. 1998).

<sup>8</sup> *State v. Chao*, 2002 WL 31007908 (Del. Super. Aug. 22, 2002).

<sup>9</sup> *State v. Chao*, 2004 WL 2153698 (Del. Super. 24,2004).

<sup>10</sup> *State v. Chao*, 2006 WL 2788180 (Del. Super. Sept. 25, 2006).

convictions.<sup>11</sup> On June 20, 2008, the Court entered convictions for three counts of manslaughter in place of the three felony murder convictions. On September 22, 2008, the Court resentenced Defendant and, on April 23, 2009, the Supreme Court affirmed.<sup>12</sup> On December 7, 2009, the Court entered a modified sentence order to provide Defendant with credit for time served. On March 27, 2010, Defendant filed her fourth motion for post-conviction relief. The Court adopted the Commissioner's report and denied Defendant's motion. That denial was affirmed.<sup>13</sup> On March 18, 2013, the District Court denied Defendant's petition for writ of habeas corpus.<sup>14</sup>

10. On December 31, 2013, Defendant filed the instant motion for post-conviction relief. On March 14, 2014, the State opposed Defendant's motion. On April 11, 2014, Defendant filed a handwritten letter and additional documents.<sup>15</sup> Defendant moves for post-conviction relief on two grounds. First, Defendant argues that the Court discriminated against her during the second trial by not allowing her to call an expert witness in order

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<sup>11</sup> *Chao v. State*, 931 A.2d 1000, 1003 (Del. 2007).

<sup>12</sup> *Chao v. State*, 2009 WL 1090371, 972 A.2d 311 (Del. 2009)(TABLE).

<sup>13</sup> *Chao v. State*, 2010 WL 3719936, 5 A.3d 629 (Del. 2010)(TABLE).

<sup>14</sup> *Chao v. Caple*, 931 F. Supp. 2d 585 (D. Del. 2013).

<sup>15</sup> In the handwritten letter, defendant described facts relating to her innocence. The additional documents include a "Summary of the Evidence" dated March 1, 2013, a page relating to a request for a translator dated September 18, 2011, a letter from prosecutor, Steven P. Wood, Esq., concerning a letter by Defendant's codefendant dated May 17, 2000, and the State's Motion to Dismiss the petition for writ of habeas corpus. On April 21, 2014, Defendant submitted a typewritten copy of her handwritten letter and additional copies of these documents.

to challenge the State’s medical expert’s testimony. Second, Defendant asserts a claim for ineffective assistance of counsel based on her counsel’s failure to identify an expert witness by the deadline and to cross-examine the State’s medical witness.

11. Upon a motion for post-conviction relief, the Court must first determine if any of four procedural bars<sup>16</sup> to relief apply under Del. Super. Ct. Crim. Rule 61(i) before it can consider the merits of the underlying claim.<sup>17</sup> The current version of Rule 61(i)(1), which governs the procedural bar regarding time limitations, states, “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.”<sup>18</sup> However, before Rule 61(i)(1) was amended, it allowed defendants to file motions for up to *three* years in cases in which the judgment of conviction became final after July 1, 2005.<sup>19</sup> “A judgment of conviction is final...[i]f

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<sup>16</sup> The four procedural bars are: the time limitations under Rule 61(i)(1), repetitive motions under Rule 61(i)(2), procedural default under Rule 61(i)(3), and formerly adjudicated grounds under Rule 61(i)(4).

<sup>17</sup> *Panuski v. State*, 41 A.3d 416, 419 (Del. 2012), *reargument denied* (Apr. 19, 2012); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>18</sup> Rule 61(i)(1).

<sup>19</sup> *State v. Nave*, 2005 WL 1953079, at \*1, n.2 (Del. Super. July 29, 2005) *aff’d*, 888 A.2d 232 (Del. 2005).

the defendant files a direct appeal or there is an automatic statutory review of a death penalty, when the Supreme Court issues a mandate or order finally determining the case on direct review”.<sup>20</sup>

12. According to Rule 61(i)(5), the Court may still consider an untimely motion when the defendant asserts “a claim that the court lacked jurisdiction or [] 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.”<sup>21</sup> However, this exception, known as the “fundamental fairness exception,” “is a narrow one and has been applied only in limited circumstances, such as when the right relied upon has been recognized for the first time after the direct appeal.”<sup>22</sup>

13. Rule 61(i)(4), bars relief for those grounds which have been formerly adjudicated or decided upon, “whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.”<sup>23</sup> In order for

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<sup>20</sup> Rule 61(m)(2); *Guy v. State*, 82 A.3d 710, 715 (Del. 2013), *reh'g denied* (Dec. 20, 2013).

<sup>21</sup> Rule 61(i)(5).

<sup>22</sup> *Younger*, 580 A.2d at 555.

<sup>23</sup> Rule 61(i)(4).

“reconsideration” to be “warranted in the interest of justice,” “a movant must show that subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him.”<sup>24</sup>

14. Defendant’s motion is procedurally barred under Rule 61(i)(1) for untimeliness. The judgment of conviction became final on the date of the Supreme Court’s mandate, October 11, 2001. Under the pre-amendment version of Rule 61(i)(1), Defendant had until October 11, 2004 to file this motion; however, she filed the motion on December 31, 2013. Defendant asserts no retroactively applicable newly recognized right. Moreover, Defendant has not asserted “a colorable claim that there was a miscarriage of justice.”<sup>25</sup>

15. Each of Defendant’s grounds set forth in her motion is also barred by Rule 61(i)(4) because each was formerly adjudicated before the Supreme Court during Defendant’s direct appeal after her second trial. In this motion, Defendant argues that the Court unfairly denied her the opportunity to call her expert witness in order to refute the State’s medical witness’s testimony. She also argues that her trial counsel was ineffective due to the failure to call an expert witness prior to the deadline. In its September 20, 2011 decision, the Supreme Court found that this Court did not abuse its discretion when it denied

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<sup>24</sup> *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990).

<sup>25</sup> *See* Rule 61(i)(5).

Defendant's requests for public funds to obtain an expert witness or to call her expert witness. After considering the probable value of the proposed expert testimony, the Court concluded that "the trial court's decision to refuse Chao's requests was not an abuse of discretion and did not deny Chao an opportunity to present an adequate defense or otherwise infringe her constitutional rights to due process and effective assistance of counsel."<sup>26</sup> The Court explained that, "[a]lthough Chao's proposed expert testimony may have further impeached [the State's medical witness's] testimony and supported Chao's defense...the absence of the testimony did not significantly prejudice the defense or increase the risk that the jury would convict her erroneously."<sup>27</sup> The Court also explained that "[t]he additional detail or nuances that a defense expert might have added would have been helpful to Chao, but only marginally."<sup>28</sup>

16. The above conclusions by the Supreme Court demonstrate that the grounds argued by Defendant have already been argued by Defendant and decided upon by the Supreme Court. As for Defendant's first argument, the Supreme Court decided that Defendant was not prejudiced by the Court's denial to allow her to introduce expert testimony. It also appears that the Supreme Court essentially decided upon Defendant's current claim that her counsel was ineffective for

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<sup>26</sup> *Chao v. State*, 780 A.2d 1060, 1070 (Del. 2001).

<sup>27</sup> *Id.* at 1069.

<sup>28</sup> *Id.* at 1070.

failure to identify the expert witness when it stated that any expert testimony would've helped only "marginally" and that that the trial court's denial of her requests regarding the expert did not affect her right to assistance of counsel. In addition, while Defendant claims that her counsel did not cross-examine the State's expert, the Supreme Court noted that defense counsel "thoroughly cross-examined the State's expert."<sup>29</sup> The Court also finds that Defendant has not shown that the interests of justice require reconsideration of these previously adjudicated grounds.

17. Based upon the forgoing analysis, Defendant's claims are procedurally barred under Rule 61(i)(1) and (i)(4); thus, Defendant's Motion for Post-conviction Relief is **DENIED**.

**IT IS SO ORDERD.**

*/s/Calvin L. Scott*  
**Judge Calvin L. Scott, Jr.**

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<sup>29</sup> *Id.* at 1069.