SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947
TELEPHONE (302) 856-5264

October 20, 2015

Hayward M. Evans
SBI #004
Sussex Correctional Institution
Rt. 3, Box 500
Georgetown, DE 19947

RE: *State of Delaware v. Hayward M. Evans*, Def. ID# 0111010136

DATE SUBMITTED: October 9, 2015

Dear Mr. Evans,

Pending before the Court is the motion for postconviction relief which defendant Hayward M. Evans ("defendant") has filed pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The applicable version of Rule 61 is that effective June 4, 2014, as amended by an order of this Court dated May 29, 2015.[1]

On March 14, 2003, a jury found defendant guilty of one count of First Degree Murder, three counts of Possession of a Firearm During Commission of a

[1]A copy of that version, including the amendment effective June 1, 2015, is enclosed herein.

Felony, and two counts of Attempted First Degree Murder. Two weeks after the trial concluded, a witness who failed to appear at trial was returned on a material witness *capias.* Defendant filed a Motion for a New Trial, which this Court denied. Defendant appealed the conviction and the denial of the motion.

In its decision, the Supreme Court reviewed the evidence leading to the convictions as follows:

> (2) Late on November 10, 2001, Evans and two friends attended a party where Evans fought with Philip Brewer, a youth who was from Laurel, Delaware. Afterwards, Evans, Tehron West, and Darnell Gibbs drove with West's girlfriend, Dominique Harmon, and Dominique's mother, Valerie Johnson, to search for Brewer. The car in which they were riding belonged to Valerie Johnson, but was driven by West. At some point, they encountered a car driven by the victim, Brian Owens. West flashed his headlights, and apparently in response, Owens pulled over. West pulled his car alongside, and Evans got out and fired at least seven shots from his handgun into Owens' car at close range. Four bullets struck Owens in the back, two bullets struck Parker, and one struck Cannon. The two wounded youths, Parker and Cannon, pulled Owens into the back seat of his car. Cannon then drove to the home of Owens' girlfriend in Laurel, where a bystander called for an ambulance at 12:25 a.m. Owens later died.
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> (3) After firing the seven shots, Evans re-entered Johnson's car and the five returned to Seaford. Johnson (who by then was driving her car) dropped Gibbs off at his house and left Evans and West at the street corner where she had picked them up. One witness at the trial testified that she had heard Evans say, "I thought I hit one of [them]" and that she heard West tell Evans to be quiet.

(4) Cannon's mother drove her wounded son to Beebe Medical Center, where police interviewed him at 4:25 a.m. on November 11, 2001. In that interview, Cannon identified Kinyock Matthews as the shooter. Cannon was then helicoptered to Christiana Medical Center in Wilmington for further treatment. After his admission to Christiana, police officers interviewed Cannon again at 9:40 a.m. that same day. The second interview was recorded on audiotape. Thereafter on November 12, 14, and 21, 2001, the police conducted three additional interviews of Cannon. In all three interviews, Cannon maintained that Kinyock Matthews was the shooter. Cannon also disclosed that he was afraid of Matthews.

(5) Based on Cannon's identification, Matthews was arrested. On November 15, 2001, however, Johnson and Harmon came forward and reported that they had been in the car with Evans and that Evans admitted to them that he committed the shooting. Evans was later arrested and indicted on murder and other charges.

(6) At trial, Cannon did not appear to testify, despite the earlier issuance of a subpoena and a material witness *capias*, and even though the trial had been continued for four months. Cannon's first two statements to the police (implicating Kinyock Matthews as the shooter) were admitted into evidence, nonetheless, under the excited utterance exception to the hearsay rule. The trial court excluded Cannon's other three statements from evidence, ruling that they were not excited utterances (and, therefore, were hearsay), and that they also were cumulative. Evans claims that the trial court's refusal to admit Cannon's remaining three statements to the police (wherein he implicated Matthews) was error.

(7) At trial, Evans relied upon an alibi defense. Evans and two of his female friends all testified that on November 10, 2001, Evans had been with them in an apartment from 9:30 p.m. until the following morning.

> (8) Matthews also testified that he was not at the scene of the crime. His testimony was that on the evening of November 10, he was at the Marathon Inn with his son and former girlfriend from 9:30 p.m. until the following morning. Matthews' alibi was corroborated by the hotel manager and by security tapes, which showed Matthews entering his hotel room and not leaving until the following morning.
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> (9) The jury found Evans guilty of Murder in the First Degree and all the remaining counts, on March 14, 2003. [Footnote and citation omitted.][2]

With this background, the Supreme Court affirmed the judgment of the Superior Court. The date of the mandate, which is the date when the judgment of conviction became final, is August 19, 2004.[3]

In affirming, the Supreme Court held that: (i) Cannon's immediate and initial identification of Matthews as the shooter was admissible under the excited-utterance exception to the hearsay rule, (ii) Cannon's three other statements about Matthews were cumulative and came in time too late to qualify as excited utterances, and (iii) the trial court did not abuse its discretion when it ruled the defendant was not entitled to a new trial based on Cannon's availability to testify when he was returned on a *capias* after trial.[4]

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[2]*Evans v. State*, 854 A.2d 1158, **1-2 (Del. 2004)(TABLE).

[3]Docket Entry No. 95.

[4]*Evans*, *supra*, at *2-3.

Concerning Evans' new trial motion, the Supreme Court ruled this new evidence (Cannon's live testimony) would not likely change the result of the trial. Cannon was unsure of the identity of the shooter and had been questioned on the subject when the *capias* was returned. Cannon was biased against Matthews. Matthews' alibi evidence that he was in a hotel at the time of the crimes was corroborated by the hotel's surveillance system and the manager. Consequently, the Supreme Court found Cannon's proposed testimony was weak against overwhelming incriminating evidence against Evans, including two of his friends providing eyewitness testimony against him.

On December 5, 2006, defendant filed a second Motion for a New Trial. Evans contended that there was newly discovered evidence of juror misconduct. The Superior Court denied the motion on January 25, 2007. Defendant appealed. The Delaware Supreme Court affirmed the Superior Court's ruling finding the evidence was not newly discovered, noting that the trial court had made several on-the-record inquiries at the 2003 trial.[5] The Supreme Court found no error in that aspect. The Supreme Court also noted that the motion was not timely as it was made after the two year limitation period after final judgment under Superior Court Criminal Rule 33.

[5] *Evans v. State*, 950 A.2d 658 (Del. 2008)(TABLE).

Thereafter, defendant filed an amended application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, in the United States District Court for the District of Delaware. In the amended application, Evans claimed in the past that a prospective juror had a predetermined opinion and should have been struck, and another juror engaged in "loose talk" mid-trial. On February 28, 2011, the District Court denied defendant's application because it was time-barred under the requirements of The Antiterrorism and Effective Death Penalty Act of 1996.[6]

Under Rule 61 (i)(1), a motion for postconviction relief must be filed within a year after the judgment of conviction is final. The date of the mandate, which is the date when the judgment of conviction became final, is August 19, 2004.[7] Over eleven years later, on October 9, 2015, defendant filed his first postconviction motion, which is untimely. In that motion, three grounds of ineffective assistance of counsel are asserted:

Counsel did not object and demand a new trial after the discovery of juror-misconduct, "exposure to news media loose talk", and "forming an opinion before the verdict".

Counsel failed to challenge the admission of witness testimony (out-of-

[6]*Evans v. Phelps*, 2011 WL 781040, at *4 (D. Del. Feb. 28, 2011).

[7]Docket Entry No. 95.

court) statements.

Counsel failed to call or subpoena witnesses to testify at trial.

Defendant also requests counsel be appointed to represent him on the motion.

Again, the motion was not timely filed within a year of when judgment of conviction was final, and thus, it is time-barred.[8] To avoid that bar, defendant either must have:

> (i) [pled] ... with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted; or
> (ii) [pled] ... with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme Court, applies to the movant's case and renders the conviction or death sentence invalid.[9]

Defendant has failed to make this showing. In the alternative, these allegations are conclusory, are unsubstantiated, and are nothing more than mere conjecture that have never justified relief.[10]

[8]Rule 61(i)(1).

[9]Rule 61(i)(5); Rule 61(d)(2).

[10]*State v. Owens*, 2002 WL 234739, at *1 (Del. Super. Jan. 11, 2002); *State v. Ruiz*, 2002 WL 1265533, at *3 (Del. Super. June 4, 2002).

For the foregoing reasons, defendant's motion is DISMISSED.[11]

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothonotary's Office
Peggy Marshall, Esquire
Melanie Withers, Esquire
E. Stephen Callaway, Esquire
Robert H. Robinson, Jr., Esquire

[11]Because the motion is not timely, defendant is not entitled to the appointment of counsel. Rule 61(e).