IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Cr. ID. No. 85000061DI
	)	
	)	
COY E. BAILEY,	)	
	)	
Defendant.	)	
	)	

Submitted: November 20, 2015
Decided: January 7, 2016

COMMISSIONER'S REPORT AND RECOMMENDATION THAT DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF SHOULD BE DENIED.

Andrew J. Vella, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Natalie S. Woloshin, Esquire, 3200 Concord Pike, Wilmington, Delaware, Attorney for Defendant Coy E. Bailey, counsel for one issue- the ballistics expert issue.

Coy E. Bailey, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*, on all claims except the ballistics expert issue.

PARKER, Commissioner

OVERVIEW

On June 10, 1978, Frank Dukes was shot to death at a makeshift firing range. There were two others present at the time of the shooting: Defendant, Coy E. Bailey, Jr., and Michael Sponaugle. Defendant Bailey was arrested and charged with murder in the first degree and a related weapons charge as a result of the shooting death of Frank Dukes. Michael Sponaugle was the State's chief witness. Mr. Sponaugle testified that Defendant Bailey was the shooter. Defendant Bailey's defense was that Mr. Sponaugle, not he, was the shooter.

This case was tried four times. Defendant was represented by different counsel at each of the trials. The first trial was held in Kent County in 1980. Following the first trial, Defendant was convicted of first degree murder and the related weapons charge on July 15, 1980. The Delaware Supreme Court reversed the conviction and remanded for a new trial.[1] The second trial was also held in Kent County. The trial was held in October 1983 and ended in a mistrial when several of the State's witnesses made references to Defendant's first trial.

The third trial was held in Kent County and began on September 10, 1984. The jury was unable to reach a unanimous verdict at the conclusion of the evidence and a mistrial was declared.

The case was then moved to New Castle County, following a change of venue motion, which was granted. Defendant's fourth trial began on April 1, 1985. On or about April 12, 1985, the jury convicted Defendant of murder in the first degree and the associated weapons offense. Defendant was sentenced to life imprisonment on the murder conviction and a consecutive fifteen year prison term for the weapons offense.

[1] *Bailey v. State*, 440 A.2d 997 (Del. 1982).

The Delaware Supreme Court affirmed the judgment of the Superior Court on direct appeal.[2] In 1994, Defendant's Rule 61 motion was denied[3], and that denial was affirmed by the Delaware Supreme Court on appeal.[4] In 1996, Defendant's petition for federal habeas corpus relief was denied.[5]

On March 15, 2013, Defendant filed the subject motion for postconviction relief. The subject motion was filed 26 years after the final judgment of conviction. The motion raised a number of issues, mostly re-raising claims previously raised, in some fashion or other, on direct appeal or in previous postconviction motions. With one exception, all of the issues raised and materials relied upon in support of those issues, were known to Defendant at trial (1985) or during the pendency of the direct appeal which was decided in 1987. It was clear that the issues raised in the subject motion were untimely, previously adjudicated or otherwise procedurally barred at this late date, with one exception.

One issue raised by Defendant in the subject motion warranted further attention. Defendant provided in his Rule 61 submission a letter/report from Dr. William J. Bruchey, a ballistics expert, dated November 26, 1999, in which Dr. Bruchey stated that in his opinion, the ballistics evidence supported Defendant Bailey's version of the shooting and discredited Mr. Sponaugle's version.[6] Dr. Bruchey further stated that he held the opinion expressed in the 1999 letter/report at the time of trial, in 1985, and that

[2] *Bailey v. State*, 521 A.2d 1069 (Del. 1987).
[3] *State v. Bailey*, 1994 WL 762666 (Del.Super.).
[4] *Bailey v. State*, 1995 WL 218604 (Del.).
[5] *Bailey v. Snyder*, 1996 WL 434932 (D.Del. 1996).
[6] See, Defendant's Evidentiary Hearing Exhibit 1, Tab 22, admitted at the Evidentiary Hearing held on November 20, 2015.

he had been retained by Defendant's counsel, but he was not called by Defendant's counsel to testify at trial.[7]

This November 1999 letter was written 14 years after the fourth trial (in 1985) and then was not presented to the court until March 2013, (the filing of the subject motion), 14 years after it was written. Consequently, 28 years after the fourth and final trial in 1985, a letter/report was produced from a ballistics expert retained by Defendant's counsel supporting Defendant's theory of the case and discrediting the State's chief witness's theory.

In this case, the two people (Defendant and Sponaugle) who were at the scene of the crime at the time of the murder have accused each other of committing the murder. Defendant's ballistics expert's opinion claiming that the ballistics evidence supported Defendant's account of the murder and not Sponaugle's goes to the very heart of the case.

Given the significance of Dr. Bruchey's alleged opinion at the time of trial, and the fact that he was retained by the defense but not called to testify at trial, Defendant's contention that his trial counsel was ineffective for not calling Dr. Bruchey to testify at trial was not ripe for summary dismissal like the rest of the claims but required more detailed attention.

Defendant was appointed counsel to assist him on this one issue -- the ballistics expert issue. Counsel was denied as to all other remaining issues raised by Defendant in the subject motion. The record was expanded on this issue and briefing was conducted.

In response to Defendant's claim that his counsel was ineffective for failing to call Dr. Bruchey at the time of trial in 1985, Defendant's trial counsel explained that the

[7] See, Defendant's Evidentiary Hearing Exhibit 1, Tab 22 and Tab 4, admitted at the Evidentiary Hearing held on November 20, 2015.

opinions Dr. Bruchey expressed in his 1999 letter/report were not the opinions he expressed at the time of trial in 1985. Defendant's trial counsel stated that if Dr. Bruchey had expressed the opinions set forth in his 1999 letter/report "it is inconceivable" that counsel would not have called Dr. Bruchey to testify at Defendant's trial. Defendant's trial counsel further represented that at the time of trial in 1985, following Dr. Bruchey's investigation and analysis, Dr. Bruchey advised counsel that he would not be able to be of assistance to Defendant.[8]

Following briefing on this issue, an evidentiary hearing was held on November 20, 2015. At the evidentiary hearing, Dr. Bruchey produced his contemporaneous notes of his crime scene analysis and opinions held at the time of the 1985 trial.[9] Dr. Bruchey's contemporaneous notes revealed that at the time of trial in 1985, Dr. Bruchey's "ultimate conclusion [was that he had] no conclusion . . ." [10] His contemporaneous notes further revealed that at the time of trial in 1985, Dr. Bruchey had concluded that although the ballistics evidence did not contradict Defendant's version of the shooting it was too ambiguous to support Defendant's version. [11] Consequently, contrary to Dr. Bruchey's representations in his 1999 letter, in fact, Dr. Bruchey did not hold the opinions expressed in his 1999 report at the time of trial in 1985.

Defendant's trial counsel was not ineffective for failing to call Dr. Bruchey at trial in April 1985 because Dr. Bruchey's opinion at the time of trial would not have been particularly helpful to Defendant. Defendant was not prejudiced in any respect by the failure of his counsel to call Dr. Bruchey at trial in 1985 when, at that time, Dr. Bruchey

[8] Superior Court Docket No. 214, Response of Anthony Figliola, Esquire to Defendant's Amended Rule 61 motion.
[9] See, Defendant's Evidentiary Hearing Exhibit 3 admitted at the November 20, 2015 evidentiary hearing.
[10] See, Defendant's Evidentiary Hearing Exhibit 3 admitted at the November 20, 2015 evidentiary hearing.
[11] See, Defendant's Evidentiary Hearing Exhibit 3 admitted at the November 20, 2015 evidentiary hearing.

held the opinion that the ballistics evidence could neither contradict nor support Defendant's version of the murder.

Defendant's Rule 61 motion should be denied in its entirety.

FACTS

As mainly set forth by the Delaware Supreme Court in its opinion on Defendant's direct appeal, the facts giving rise to the subject action are as follows:

Defendant was convicted of intentionally shooting Frank Dukes to death on June 10, 1978 at a makeshift firing range. Present with Defendant Bailey at the scene of the shooting was Michael Sponaugle, the State's chief witness.[12]

According to Sponaugle, he, Defendant Bailey and the victim were engaged in shooting empty glass bottles off of a log behind the residence of Sponaugle's parents. Sponaugle asserted that as Dukes was setting up additional bottles on the log, Defendant Bailey intentionally shot Dukes with a .44 revolver. Immediately following the incident, Sponaugle claimed that he returned to his parents' house and heard a second shot emanating from the shooting scene.[13]

Sponaugle's testimony was hotly disputed by Defendant Bailey, who presented a dramatically different version of the events. According to Defendant Bailey, it was Sponaugle who shot the victim twice, once from some distance and again in the back of the head as he lay wounded near the log. Similarly, there was disagreement as to what transpired after the shooting.[14]

[12] *Bailey v. State*, 521 A.2d 1069, 1072 (Del. 1987).
[13] *Bailey v. State*, 521 A.2d 1069, 1072 (Del. 1987).
[14] *Bailey v. State*, 521 A.2d 1069, 1072 (Del. 1987).

At trial, Defendant Bailey's defense was that Sponaugle was the shooter.[15]

BACKGROUND AND PROCEDURAL HISTORY

This case was tried four times. At the first trial, held in Kent County, Defendant was represented by Joseph A. Hurley, Esquire. On July 15, 1980, Defendant was convicted of murder in the first degree and possession of a deadly weapon during the commission of a felony. The jury was unable to reach a unanimous verdict on the imposition of the death penalty for the murder conviction. Therefore, Defendant was sentenced to life imprisonment without benefit of probation or parole for first degree murder plus an additional thirty years for the weapons offense.

On appeal, the Delaware Supreme Court reversed the convictions and remanded for a new trial on the ground, *inter alia,* that "the prosecution employed improper, unprofessional and prejudicial trial tactics in reserving the bulk of its concluding comments for rebuttal."[16]

Defendant's second trial, in October 1983, once again took place in Kent County. At this trial, Defendant was represented by Arlen Mekler, Esquire and E. Martin Knepper, Esquire. During the second trial, three of the State's witnesses made references to Defendant's first trial. The third witness also referred to Defendant's conviction. Following the third reference to Defendant's first trial and the resulting conviction, the Superior Court judge declared a mistrial *sua sponte.*

Defendant's third trial in Kent County began on September 10, 1984. Defendant was represented by J. Dallas Winslow, Jr., Esquire at his third trial. The 1984 jury was

[15] *Bailey,* 521 A.2d at 1093.
[16] *Bailey v. State,* 440 A.2d 997, 998 (Del. 1982).

unable to reach a unanimous verdict at the conclusion of the presentation of the evidence. A mistrial was declared once again.

On October 18, 1984, Defendant's motion for a change of venue was granted and the case was moved to New Castle County.

Defendant's fourth trial began on April 1, 1985 in New Castle County Superior Court. Defendant was represented by Anthony A. Figliola, Jr., Esquire, as chief counsel, and James A. Rambo, Esquire, as support counsel.[17] Following the trial, on or about April 12, 1985, Defendant was convicted of murder in the first degree and an associated weapons offense. Defendant was sentenced to life imprisonment without the benefit of probation or parole for murder and also received a consecutive fifteen year prison term for the weapons offense.[18]

At the direction of Defendant Bailey, his trial counsel filed a motion to withdraw as counsel so as to allow Defendant to represent himself on direct appeal.[19] The Delaware Supreme Court denied the motion. Trial counsel was not permitted to withdraw and continued to represent Defendant on direct appeal.[20]

Defendant's direct appeal was denied by the Delaware Supreme Court. On March 3, 1987, the Delaware Supreme Court affirmed the convictions of the Superior Court.[21]

On October 6, 1994, Defendant filed a motion for postconviction relief. It does not appear that Defendant ever requested the appointment of counsel at any time during the pendency of that motion. The Superior Court denied Defendant's Rule 61 motion as

[17] Superior Court Docket No. 93.
[18] See, Superior Court Docket No. 126.
[19] *Bailey v. State*, 1986 WL 16801 (Del. 1986).
[20] *Bailey v. State*, 1986 WL 16801 (Del. 1986).
[21] *Bailey v. State*, 521 A.2d 1069 (Del. 1987).

procedurally barred.[22] The Delaware Supreme Court affirmed the denial of Defendant's Rule 61 motion.[23]

On January 10, 1996, Defendant filed a petition for federal habeas corpus relief. The Delaware District Court found Defendant's application for habeas corpus relief to be without merit and denied the application.[24]

In 2001, Defendant filed another motion for postconviction relief.[25] That motion was rejected by the court and returned to Defendant for non-compliance with Superior Court Rule 61.[26] Even though the court's Order advised Defendant Bailey of the specific defects in his motion, Defendant chose not to re-file the motion.

Eight years later, in December 2009, Defendant Bailey filed an application for transcripts and documents, which the Superior Court denied on December 15, 2009.[27]

On March 15, 2013, 26 years after the final judgment of conviction, Defendant filed the subject motion for postconviction relief.[28]

DEFENDANT'S RULE 61 MOTION

On March 15, 2013, Defendant filed the subject motion for postconviction relief. Defendant also requested the appointment of counsel to assist with the subject Rule 61 motion.[29]

In the subject motion, Defendant raised a number of claims, mostly rehashing and re-raising claims previously raised, in some fashion or other, on direct appeal or in

[22] *State v. Bailey*, 1994 WL 762666 (Del.Super.).
[23] *Bailey v. State*, 1995 WL 218604 (Del.).
[24] *Bailey v. Snyder*, 1996 WL 434932 (D.Del. 1996).
[25] See, Superior Court Docket No. 178.
[26] See, Superior Court Docket No. 178.
[27] See, Superior Court Docket Nos. 182 & 183.
[28] See, Superior Court Docket Nos. 185 & 186.
[29] See, March 30, 2013 Motion for Appointment of Counsel.

previous postconviction motions. The issues raised pertained to alleged pre-trial, trial, and direct appeal errors, irregularities, and deficiencies. The last trial was held in 1985, and the direct appeal was decided in 1987. In fact, the first postconviction relief motion was filed in 1994, decided by the Superior Court in 1994 and affirmed by the Delaware Supreme Court in 1995. Defendant's petition for federal habeas corpus relief was denied in 1996.

Now, 28 years after the fourth and final trial, 26 years after final judgment, 19 years after filing the first postconviction motion, and 17 years after the petition for federal habeas corpus relief was decided, Defendant filed the subject Rule 61 motion. With one exception, all the issues raised and the materials/documents relied upon in support of those issues, were known to Defendant at trial or during the pendency of the direct appeal. Defendant raised or relied on nothing new or recently discovered. With one exception, all the claims raised herein were ripe for summary dismissal on the basis that they were untimely, previously adjudicated, or otherwise procedurally barred.

The one exception is the claim raised by Defendant regarding Defendant's trial counsel's failure to call the ballistics expert, Dr. Bruchey, at the 1985 trial. Dr. Bruchey wrote a letter/report dated November 26, 1999, in which he opined that the ballistics evidence supported Defendant Bailey's version of the shooting and discredited Mr. Sponaugle's version.[30] In that letter/report, Dr. Bruchey further stated that he held the opinion expressed in the letter at the time of trial, in 1985, but was not called by Defendant's counsel to testify.[31]

[30] See, Defendant's Evidentiary Hearing Exhibit 1, Tab 22, admitted at the Evidentiary Hearing held on November 20, 2015.
[31] See, Defendant's Evidentiary Hearing Exhibit 1, Tab 22 and Tab 4, admitted at the Evidentiary Hearing held on November 20, 2015.

Defendant's Rule 61 motion was initially referred to Superior Court Judge Parkins. On June 18, 2013, Superior Court Judge Parkins issued a detailed decision denying all of Defendant's claims, with the exception of the ballistics expert issue, as untimely, previously adjudicated, and otherwise procedurally barred.[32] As to the ballistics expert issue, the court concluded that further exploration of that claim was warranted and that counsel would be appointed to represent Defendant Bailey in connection with that claim.[33]

Judge Parkins found that good cause existed for the appointment of counsel only on the ballistics expert issue. Judge Parkins recognized that all the other claims were untimely, previously adjudicated and otherwise barred.

Following the June 18, 2013 decision, the State filed a motion seeking Judge Parkins' recusal from this case, which was granted. In granting the State's recusal motion, Judge Parkins reinstated all of the dismissed claims, so that another jurist would decide the dismissed claims anew, but left in place the appointment of counsel on the ballistics expert issue.[34]

After Judge Parkins recused himself, the State sought to have the June 18, 2013 Order vacated in its entirety, including the appointment of counsel on the ballistics expert issue.[35] The dismissed claims were reinstated but the appointment of counsel on the ballistics expert issue was left in place. Essentially, the State wanted Defendant's Rule 61 motion to be considered anew by another Superior Court jurist with a clean slate.

[32] See, Superior Court Docket No. 189.
[33] Superior Court Docket No. 189, at pg. 9.
[34] September 27, 2013 Recusal Motion Hearing Transcript, at pg. 18.
[35] Superior Court Docket No. 200, February 20, 2014 letter to the court

By letter of June 18, 2014, then-President Judge James T. Vaughn, Jr. (now Justice Vaughn) ruled on the State's request to have the June 18, 2013 Order vacated in its entirety. The court held that Judge Parkins' ruling on the State's recusal motion would remain in place.[36] The dismissed claims would remain reinstated and the appointment of counsel would also not be disturbed. The court stated that it saw "no reason to disturb Judge Parkins' ruling that counsel be appointed to represent the Defendant." The court "agree[d] with Judge Parkins that good cause exist[ed] for the Defendant to have counsel."[37] Then-President Judge Vaughn stated that he saw no reason to disturb Judge Parkins' rulings and left those rulings in place.[38]

Rule 61 counsel was appointed to assist Defendant on the ballistics expert issue.

Defendant's Rule 61 counsel on the ballistics expert issue sought to expand her role and to be appointed on all the issues raised by Defendant in his Rule 61 motion. Rule 61 counsel relied on language in President Judge Vaughn's order that "all of the defendant's [postconviction] claims can be pursued before a new judge to be assigned" to express an intention to expand appointed counsel's role to encompass all of Defendant's claims raised in subject motion, not just the ballistics' expert issue.[39]

The issue as to whether to expand the role of the appointment of counsel to cover all the claims, or just the ballistics expert claim, was never before President Judge Vaughn and was not the subject of his June 18, 2014 ruling. The issue before President Judge Vaughn was whether the entire Order of Judge Parkins' should be vacated, or whether the appointment of counsel on the ballistics issue should be left in place. Indeed,

[36] See, Superior Court Docket No. 202.
[37] Superior Court Docket No. 202.
[38] *Id.*
[39] See, letter of October 1, 2014 to the court.

President Judge Vaughn's letter of June 18, 2014 provides: "This is in response to the State's motion requesting that all of Judge Parkins' orders be vacated. . ." President Judge Vaughn goes on to state that he was not disturbing Judge Parkins' ruling that the dismissal of claims will be vacated, and that the appointment of counsel (which was only ordered on the issue of the ballistics expert) would also proceed.[40]

The motion was thereafter reassigned to the undersigned commissioner.[41] This court, after a thorough, full, and complete evaluation of Defendant's Rule 61 motion, determined that all of Defendant's claims, with the exception of ballistics expert issue, were untimely, previously adjudicated, and otherwise procedurally barred. This court, following a comprehensive review of the record, determined that no expansion of the scope of the representation of counsel was warranted. This court notified the parties that counsel will remain appointed only on the ballistics expert issue and that the appointment will not be expanded to cover any other issue.[42] A briefing schedule was entered on August 27, 2014 so that the ballistics expert issue could be fleshed out and more fully explored.[43]

Defendant was also given the opportunity to file an amended Rule 61 motion on his own behalf as to any of the other issues in his pending motion. To this end, Defendant requested the court to provide him with certain materials/documents/submissions. The court complied with Defendant's request for the production of certain materials.[44]

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[40] Superior Court Docket No. 202.
[41] Superior Court Docket No. 204, July 24, 2014 Order of Reference referring the Rule 61 Motion to Commissioner Parker.
[42] See, Superior Court Docket Nos. 206, 207, 208, 210, 211, 212.
[43] Super.Ct.Crim.R. 61(g)(1) and (2).
[44] Superior Court Docket No. 213, court letter of March 4, 2015 enclosing materials requested by Defendant.

After the court provided Defendant with the materials he requested, Defendant advised the court that he was not satisfied with the materials provided and that he was still awaiting the receipt of additional materials.[45]

By letter dated April 14, 2015, the court advised Defendant that it had already provided the copies of the materials requested and that to the extent Defendant contended that the production was somehow incomplete, no further documents would be forthcoming.[46] The court further advised Defendant that any outstanding request to amend his Rule 61 motion was granted and that any amended motion must be filed no later than May 8, 2015, after which, the court would consider Defendant's submission to be complete.[47]

On April 23, 2015, Defendant submitted an amendment to his Rule 61 motion.[48] This submission, as well as all other submissions by Defendant, have been considered as amendments to his Rule 61 motion.

To recap, as it stands, Defendant is representing himself on all the claims raised herein with the exception of the ballistics expert issue. Counsel has been appointed and represented Defendant on the ballistics expert issue.

The court will first address Defendant's ballistics expert issue and then will address the other claims raised herein.

[45] Superior Court Docket Nos. 215 & 216.
[46] Superior Court Docket No. 217, court letter of April 14, 2015.
[47] Superior Court Docket No. 217, court letter of April 14, 2015.
[48] Superior Court Docket No. 218.

Ballistics Expert Issue

This case was tried four times. A ballistics expert was not called by the defense in any of those trials.

Before the first trial, Defendant's trial counsel filed a motion to employ a ballistics expert to assist in the preparation of the defense.[49] Defendant's trial counsel consulted Dr. Bruchey, a ballistics expert. It appears that Dr. Bruchey was not able to be of assistance to the defense and therefore was never called to testify at that trial.[50]

The second trial ended in a mistrial during the State's case in chief. It does not appear that the defense had a favorable ballistics expert report and it does not appear that a ballistics expert would have been called by the defense had the trial proceeded.

It appears that a ballistics expert had been consulted by defense counsel in the third trial but was not called at trial because he would not have been of assistance to the defense.[51]

In December 1984, Anthony A. Figliola, Jr., Esquire, was appointed as chief counsel, and James A. Rambo, Esquire, as support counsel, to represent Defendant at his

[49] Superior Court Docket No. 13.

[50] See, Defendant's Evidentiary Hearing Exhibit 1, Tab 7- Letter dated June 27, 1980 to Dr. William Bruchey from defense counsel admitted at the Evidentiary Hearing on November 20, 2015; Defendant's Evidentiary Hearing Exhibit 1, Tab 30- letter from Defendant Bailey to Joseph Hurley admitted at the Evidentiary Hearing on November 20, 2015 ("I read the copy of the letter you wrote to Dr. William Bruchey, of Port Deposit, MD on June 27, 1980. Joe, you explained the things that took place wrong to him. Maybe that was my fault that you didn't comprehend what I told you, about the way Mike shot and killed Frank Dukes. **I presume that is why Dr. Bruchey couldn't help us before trial in 1980!")**(emphasis added); Defendant's Evidentiary Hearing Exhibit 1, Tab 8- letter dated October 17, 1984 to William Bruchey from Defendant Bailey admitted at the Evidentiary Hearing on November 20, 2015(". . . after reading the letter my attorney wrote to you at the time, I see why you were unable to help me, as the attorney explained things to you completely wrong!").

[51] Superior Court Docket No. 90- letter dated November 28, 1984 from Attorney J. Dallas Winslow in response to Defendant Bailey's complaints that a ballistics expert had not been called to testify at his third trial. Attorney Winslow advised: "I have told you repeatedly that I don't see any basis for having a ballistics expert testify or to have a pathologist testify. . ."; Attorney Anthony Figliola, Jr. testified at the evidentiary hearing held on November 20, 2015 that Attorney Winslow had retained a Mr. West as a ballistics expert and was not called at trial because he could not be of assistance to Defendant Bailey.

fourth trial.[52] On March 12, 1985, Defendant's trial counsel filed a motion seeking authorization to retain Dr. Bruchey, a ballistics expert.[53] The defense motion to retain Dr. Bruchey as a ballistic expert was approved by the court.[54] A private investigator, John Slagowski, was also retained by Defendant's trial counsel to assist in the defense.

On March 21, 1985, Defendant's trial counsel filed a motion requesting that the court permit the supervised accompaniment of Defendant Bailey to the crime scene, with his attorneys, during the week of March 25, 1985.[55] The court approved this request.[56]

Both Defendant's trial counsel and the private investigator retained by the defense recall a crime scene visit the week of March 25, 1985. Specifically, it appears that on Thursday, March 28, 1985, the crime scene site visit was conducted.[57]

Both Defendant's trial counsel and the private investigator recall visiting the crime scene with Dr. Bruchey, which took place on March 28, 1985. Also present at that crime scene visit were Defendant Bailey, co-counsel James Rambo, Esquire, the prosecutor (then-Deputy Attorney General Jane Brady now Judge Brady) and Dover Police Officers. Both trial counsel and the private investigator recall a State helicopter(s) flying overhead as the site visit was conducted.

The purpose of the crime scene visit was to allow Defendant Bailey to demonstrate to Dr. Bruchey how, in fact, the shooting of Mr. Dukes by Mr. Sponaugle took place.[58]

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[52] Superior Court Docket No. 93.
[53] Superior Court Docket No. 110.
[54] Superior Court Docket No. 110.
[55] Superior Court Docket No. 111.
[56] Superior Court Docket No. 111.
[57] See, John Slagowski's invoice of March 28, 1985 referencing the crime scene site visit, submitted and approved by the court for payment at Superior Court Docket Nos. 118 and 121.

The private investigator's invoice for services rendered reflected this crime site visit of March 28, 1985, as well as a follow up, return visit with just Dr. Bruchey on April 3, 1985.[59] Now 30 years later, the private investigator recalls the crime scene visit of March 28, 1985, with the helicopter flying overhead, but does not recall the return visit to the crime scene on April 3, 1985 with Dr. Bruchey.

Dr. Bruchey, on the other hand, does not recall the March 28, 1985 crime scene visit and does not recall the helicopter(s) flying overhead, but does recall the crime scene visit on April 3, 1985. At the evidentiary hearing, Dr. Bruchey explained that serving as an expert witness was a part time job for him at the time he was retained in this case and that he was not that concerned with capturing all of his time served for services rendered.[60] In the invoice Dr. Bruchey submitted for services rendered in this case, he sought payment for only the April 3, 1985 crime scene visit. He did not bill for, and does not recollect, having gone to the crime scene visit on March 28, 1985.[61]

On Monday, April 1, 1985, the trial began.

On April 3, 1985, following the crime scene site visit, Dr. Bruchey billed two hours of time for "case review and trial preparation."[62] Dr. Bruchey's contemporaneous notes from that crime scene site visit and analysis included: "Ultimate conclusion is no

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[58] Superior Court Docket No. 214- Affidavit of Anthony Figliola, Esquire in response to Defendant's Amended Rule 61 motion; testimony of John Slagowski at the Evidentiary Hearing held on November 20, 2015; testimony of Anthony Figliola, Esquire at the Evidentiary Hearing held on November 20, 2015.
[59] See, Superior Court Docket Nos. 118 and 121 .
[60] Testimony of Dr. Bruchey at the Evidentiary Hearing held on November 20, 2015.
[61] Superior Court Docket No. 118 and 121; Testimony of Dr. Bruchey at the Evidentiary Hearing held on November 20, 2015.
[62] Superior Court Docket No. 121.

conclusion. . .”[63] The notes also state: “Data does not contradict but is to ambiguous to support Bailey story.”[64]

Dr. Bruchey’s contemporaneous notes of April 3, 1985 would have been the subject of the case review and trial preparation discussion that took place that same day, April 3, 1985.[65] Because Dr. Bruchey’s opinions and conclusions were not particularly helpful to Defendant Bailey, Defendant’s trial counsel elected not to call Dr. Bruchey to testify at trial.

Defendant’s private investigator, Mr. Slagowski, specifically recalls the discussion with Dr. Bruchey at the time of trial as to Dr. Bruchey’s opinions and conclusions because it was the first time in his long career as a private investigator that an expert witness had ever advised that he could not be of assistance.[66]

It is important to emphasize that the trial began on April 1, 1985, and was ongoing on April 3, 1985, at the time Defendant’s trial counsel conversed with Dr. Bruchey as to his opinions and conclusions. Defendant’s trial counsel’s decision not to call Dr. Bruchey at trial could not have been an oversight, they were speaking as the trial was ongoing, and the defense needed to decide what witnesses to call on Defendant’s behalf. The decision not to call Dr. Bruchey as a ballistics expert at trial was an intentional decision by Defendant’s trial counsel and was based on Dr. Bruchey’s representations that he could not be of assistance to the defense.[67]

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[63] Defendant’s Exhibit 3 admitted at the Evidentiary Hearing held on November 20, 2015.
[64] Defendant’s Exhibit 3 admitted at the Evidentiary Hearing held on November 20, 2015.
[65] Testimony of Dr. Bruchey at the Evidentiary Hearing on November 20, 2015.
[66] Testimony of Mr. Slagowski at the Evidentiary Hearing on November 20, 2015.
[67] Superior Court Docket No. 214- Affidavit of Anthony Figliola, Esquire in response to Defendant’s Amended Rule 61 motion; testimony of Anthony Figliola, Esquire at the Evidentiary Hearing held on November 20, 2015.

It appears that in 1999, 14 years after the fourth trial, Dr. Bruchey prepared a letter/report in which he opined that the ballistics evidence supported Defendant Bailey's version of the shooting and discredited Mr. Sponaugle's version.[68] In that letter, Dr. Bruchey further stated that he held the opinion expressed in the letter at the time of trial, in 1985, but was not called by Defendant's counsel to testify.[69] At the evidentiary hearing, Dr. Bruchey recognized that the statement in his 1999 letter as to the opinions he held at the time of trial in 1985 was not accurate.[70]

Defendant, in his Rule 61 motion, contends his counsel was ineffective for not calling Dr. Bruchey to testify at trial. In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness" and that, (2) the deficient performance prejudiced the defense.[71] The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel's unprofessional errors, the outcome of the proceedings would have been different.[72]

Because Dr. Bruchey's testimony would not have been helpful to the defense at the time of trial in 1985, Defendant's trial counsel was not ineffective for not calling him to testify at trial. Defendant has not met either prong of the *Strickland* test since he has

[68] See, Defendant's Evidentiary Hearing Exhibit 1, Tab 22, admitted at the Evidentiary Hearing held on November 20, 2015.
[69] See, Defendant's Evidentiary Hearing Exhibit 1, Tab 22 and Tab 4, admitted at the Evidentiary Hearing held on November 20, 2015.
[70] Defendant's Evidentiary Hearing Exhibit 3 admitted at the Evidentiary Hearing held on November 20, 2015; Testimony of Dr. Bruchey at the Evidentiary Hearing on November 20, 2015
[71] *Strickland v. Washington,* 466 U.S. 668, 687-88, 694 (1984).
[72] *Id.*

not shown that defense counsel's decision not to call Dr. Bruchey at trial was unreasonable or that he was prejudiced in any respect.

All Other Claims

We turn now to the remainder of Defendant's claims raised in the subject Rule 61 motion. Defendant claims that he was denied his right to effective assistance of counsel before his trial, during his trial, on his direct appeal, and on his first motion for postconviction relief. All of these claims raised by Defendant in the subject Rule 61 motion are untimely, most (if not all) have been previously adjudicated, and all are otherwise procedurally barred.

Defendant's direct appeal was decided in 1987. This motion was filed in March 2013, 26 years after the final judgment of conviction. The claims stem from alleged deficiencies, errors, and misconduct before trial (prior to 1985), during trial (1985), on direct appeal (1987), and on his first motion for postconviction relief filed in 1994 (which was filed over 19 years ago).

Defendant was represented by counsel on his direct appeal. Defendant's counsel raised a number of issues on direct appeal. Defendant was also permitted to supplement his counsel's opening brief and raise additional appeal issues *pro se.*[73] Defendant did, in fact, raise a number of additional issues on direct appeal.[74] The Delaware Supreme Court on Defendant's direct appeal considered all issues that were properly raised by Defendant and by his attorney.[75]

[73] *Bailey v. State*, 521 A.2d 1069, 1072-73 (Del. 1987).
[74] *Bailey v. State*, 521 A.2d 1069, 1072-73 (Del. 1987).
[75] *Bailey v. State*, 521 A.2d 1069, 1073 (Del. 1987).

Defendant also filed a motion for postconviction relief in 1994. It does not appear that Defendant ever requested the assistance of counsel on his postconviction motion. Defendant raised a number of claims in that motion that he again seeks to re-raise in this motion. In that motion, the Superior Court held[76], and the Delaware Supreme Court affirmed[77], that the motion was procedurally barred as untimely.

Defendant also filed a petition for federal habeas corpus relief in 1996. In that petition Defendant re-raised the same claims raised in his first Rule 61 postconviction motion.[78] The Delaware District Court held that the claims presented were either previously adjudicated or procedurally barred and that Defendant failed to overcome the procedural bars by establishing cause and prejudice.[79]

Defendant now comes before this court and seeks to re-raise the claims which were previously adjudicated and/or to raise additional arguments or claims known to him for decades but not previously raised.

Prior to addressing the substantive merits of any claim for postconviction relief, the court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.[80] If a procedural bar exists, then the claim is barred, and the court should not consider the merits of the postconviction claim.[81]

Rule 61, as it existed at the time Defendant filed his motion, imposed four procedural imperatives. Rule 61(i) required that: (1) the motion must be filed within

[76] *Bailey v. State*, 1994 WL 762666 (Del.Super.),
[77] *Bailey v. State*, 1995 WL 218604 (Del.).
[78] *Bailey v. Snyder*, 1996 WL 434932 (D.Del. 1996).
[79] *Bailey v. Snyder*, 1996 WL 434932 (D.Del. 1996).
[80] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[81] *Id.*

three years of a final order of conviction;[82] (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights or cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, do not apply to a claim that the court lacked jurisdiction or to 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.[83] Moreover, the procedural bars of (2) and (4) may be overcome if "reconsideration of the claim is warranted in the interest of justice."[84]

In this case, Defendant's final order of conviction was in 1987 and he filed the subject Rule 61 motion in 2013, over 26 years later. Rule 61(i)(1) applies because Defendant filed this motion more than three years after his final order of conviction. Defendant raises nothing new or recently discovered. All of Defendant's claims at this late date are time-barred.

In addition to being time-barred, Rule 61(i)(4) also precludes the court's consideration of Defendant's claims presented herein. Most, if not all, of the claims presented herein were already raised and adjudicated in some fashion on Defendant's direct appeal and/or in Defendant's prior postconviction relief motions and are now procedurally barred as previously adjudicated.

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[82] Since the final order of conviction occurred before July 1, 2005, the motion must be filed within three years. If the final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005).
[83] Super.Ct.Crim.R. 61(i)(5).
[84] Super.Ct.Crim.R. 61(i)(4).

In the subject motion, Defendant re-raises, re-states, and re-couches claims previously raised as ineffective assistance of counsel claims even though the claims were already considered. The court is not required to re-examine claims that already received substantive resolution simply because the claim has now been refined, restated, and recouched as an ineffective assistance of counsel claim and/or otherwise restated.[85] Any and all such claims are now procedurally barred.

To the extent that Defendant did not previously raise, or fully raise, any of the claims raised herein, Rules 61(i) (2) and (3) would prevent this court from considering any additional arguments or claims not previously raised. Defendant had time and opportunity to raise any issue in his direct appeal, in a timely filed postconviction motion, and/or in his prior postconviction proceedings and either did so or neglected to do so.

Defendant was aware of, had time to, and the opportunity to raise any of the claims raised herein in a timely filed motion. Having already been provided with a full and fair opportunity to present any issues desired to be raised, any attempt at this late juncture to raise, re-raise, or re-couch a claim is procedurally barred.

The specific claims raised by Defendant will be more fully discussed below.

Double Jeopardy

In the subject motion, Defendant claims that jeopardy attached during his second trial and his retrial in 1985 was barred by double jeopardy provisions of the United States and Delaware Constitutions. This claim was already raised by Defendant, with the

[85] *Johnson v. State,* 1992 WL 183069, at *1 (Del.); *Duhadaway v. State,* 877 A.2d 52 (Del. 2005).

assistance of counsel, on direct appeal.[86] The claim was thereafter raised again in his first Rule 61 motion and in his federal habeas corpus petition.[87]

The Delaware Supreme Court on Defendant's direct appeal held that the trial court's *sua sponte* declaration of mistrial, after three witnesses made references to Defendant's first trial and the third witness also referred to Defendant's conviction was appropriate and manifestly necessary. The Delaware Supreme Court held that since the prosecutor did not intentionally provoke the declaration of a mistrial, neither constitutional double jeopardy clauses nor statute barred retrial.[88]

The Delaware Supreme Court already held on Defendant's prior Rule 61 motion that this claim was previously adjudicated and that reconsideration was not warranted in the interest of justice.[89] The Delaware District Court agreed when deciding Defendant's petition for federal habeas corpus relief.[90]

Defendant also raised a second double jeopardy claim in his first Rule 61 motion and again in his petition for federal habeas corpus relief. Defendant's additional double jeopardy claim was that the State should have been prohibited from retrying him because of prosecutorial misconduct that occurred in his 1980 trial.[91] The Delaware Supreme Court already held that Defendant was procedurally barred from raising this claim pursuant to Rule 61(i)(3) for his failure to raise this claim on direct appeal.[92] The Delaware District Court agreed on Defendant's petition for federal habeas corpus relief.[93]

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[86] *Bailey v. State*, 521 A.2d 1069, 1072-73 (Del. 1987).
[87] *Bailey v. Snyder*, 1996 WL 434932 (D.Del. 1996).
[88] *Bailey v. State*, 521 A.2d 1069, 1073-1079 (Del. 1987).
[89] *Bailey v. State*, 1995 WL 218604 (Del.).
[90] *Bailey v. Snyder*, 1996 WL 434932 (D.Del. 1996).
[91] *Bailey v. State*, 1995 WL 218604, at *2 (Del.).
[92] *Bailey v. State*, 1995 WL 218604, at *2 (Del.).
[93] *Bailey v. Snyder*, 1996 WL 434932 (D.Del. 1996).

Lesser-Included Charge

In the subject motion, Defendant claims that his counsel was ineffective for not requesting a lesser-included charge of second degree murder. Even though this claim is now couched as an ineffective assistance of counsel claim, the substance of this claim was already raised and considered in Defendant's direct appeal,[94] addressed in Defendant's prior Rule 61 motion[95], and then raised again in Defendant's federal habeas corpus relief petition.[96] This claim has already been found to be without merit.

Specifically, this claim was already considered and rejected by the Delaware Supreme Court in Defendant's direct appeal:

> The contentions of the parties in this case have remained consistent. The State contends that Bailey intentionally shot and killed Dukes. Bailey's defense was not that he shot Dukes recklessly or unintentionally but that he did not shoot Dukes at all-Sponaugle did. Bailey's defense put the identity of the murderer at issue not Bailey's state of mind.
>
> Delaware law provides that "the Court is not obligated to charge the jury with respect to a lesser included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." 11 *Del. C.* § 206(c). We find no "rational basis" in the record for the Superior Court to have charged the jury with the lesser-included offense of murder in the second degree. There is nothing in the record which would support a jury finding under the particular instruction that Bailey sought.[97]

Lack of Appointment of Counsel at First Post Conviction Proceeding

Defendant never filed a timely postconviction relief motion. Defendant filed a Rule 61 motion in 1994, seven years after the final order of conviction and long after the

[94] See, *Bailey v. State*, 521 A.2d 1069, 1093-94 (Del. 1987).
[95] *State v. Bailey*, 1994 WL 762666 (Del.Super.), *aff'd*, 1995 WL 218604 (Del.).
[96] See, *Bailey v. Snyder*, 1996 WL 434932, at *6 (D.Del. 1996).
[97] *Bailey v. State*, 521 A.2d 1969, 1093 (Del. 1987).

three year period for the filing of a postconviction motion had expired. It does not appear that Defendant ever requested the assistance of counsel in connection with that postconviction motion. Defendant cannot now complain that he was deprived of the assistance of counsel in his first untimely filed postconviction relief motion when he never requested that counsel be appointed in the first place.

Moreover, Defendant's claim that he is constitutionally entitled to the appointment of counsel in his first untimely filed postconviction motion under *Martinez v. Ryan*[98] is misplaced. *Martinez* permits a *federal* court to review a "substantial" ineffective assistance of counsel claim on federal habeas review.[99] Indeed, in *Martinez*, the United States Supreme Court stated that its decision did not establish a constitutional right to counsel in state postconviction proceedings.[100]

Defendant filed a petition for federal habeas corpus relief in 1996. The federal court did not find any substantial ineffective assistance of counsel claim that warranted the appointment of counsel. It does not appear that Defendant even requested the appointment of counsel at any time during the pendency of his federal habeas corpus petition. The Delaware District Court held that Defendant's petition for federal habeas corpus relief was without merit and denied the application.[101]

Rule 61(e), as it existed at the time of the filing of Defendant's Rule 61 motion, permitted the court to appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown. Although *Martinez* does not apply to state court proceedings, Delaware Superior Court Criminal Rule 61 was amended after the filing of

[98] *Martinez v. Ryan*, 132 S.Ct. 1309 (2012).
[99] *Martinez*, 132 S.Ct. at 1311, 1318-19.
[100] *Martinez v. Ryan*, 132 S.Ct. 1309, 1315 (2012).
[101] *Bailey v. Snyder*, 1996 WL 434932 (D.Del. 1996).

the subject motion (March 15, 2013) to provide that, effective May 6, 2013 and onward until June 4, 2014[102], the court will appoint counsel for an indigent movant's first timely filed postconviction proceeding.

This is, however, Defendant's (at least) second motion for postconviction relief.[103] There is no legal or factual basis for Defendant's claim of a constitutional entitlement to the appointment of counsel to assist him in prosecuting ineffective assistance claims against his trial counsel in connection with his second or subsequent postconviction motion.[104] This claim is untimely, procedurally barred, and without merit.

Failure to Preserve Evidence

Defendant claims that the State's failure to preserve evidence violated Defendant's state and federal rights to due process. This claim was already raised by Defendant, with the assistance of counsel, on direct appeal.[105]

At trial, defense counsel moved for a judgment of acquittal on several grounds, one of which was the State's failure to preserve certain evidence. Defendant contended that he was denied a fair trial by the State's failure to preserve the paper bag in which the gun was found. In addition, at trial, Defendant contended that the State also failed to preserve a Pepsi can and a metal bucket.[106]

This claim was already raised on direct appeal and found to be without merit.[107] The Delaware Supreme Court held that after a full and complete review of the arguments by the respective attorneys concerning the missing evidence, the Superior Court denied

[102] The rule was amended effective June 4, 2014 and limited the appointment of counsel to only certain first filed motions.
[103] Defendant had filed a second motion in 2001, which was rejected, and never refiled.
[104] See, *Marvel v. State*. 2013 WL 4542708, at *1 (Del. 2013).
[105] *Bailey v. State,* 521 A.2d 1069, 1089-1093 (Del. 1987).
[106] *Bailey v. State,* 521 A.2d 1069, 1089-1090 (Del. 1987).
[107] *Bailey v. State,* 521 A.2d 1069, 1089-1093 (Del. 1987).

Defendant's motion in a manner that was entirely consistent with the applicable balancing test. The record supported the ruling of the trial judge that the State was not negligent or delinquent in gathering or preserving evidence. The trial court's finding of non-materiality was also supported by the record.[108] The Delaware Supreme Court concluded that Defendant failed to demonstrate any prejudice to the fairness of his trial by the manner in which the State gathered and presented evidence and held that the claim was without merit.[109]

Defendant now seeks to raise this allegation as a trial court error. It is an attempt to seek the reversal of the trial court's ruling indirectly when Defendant was not successful in doing so directly on direct appeal. This claim is procedurally barred as previously adjudicated, untimely, and without merit.

Juror No. 4 issue

Defendant raised this issue and attached the same May 1, 1985 letter from Attorney Rambo in his first motion for postconviction relief, filed in 1994, which he resubmits and re-raises herein.[110] Defendant's first motion for postconviction relief was considered and denied by the court. Defendant did not raise anything new or recently discovered that would warrant a reconsideration of this untimely claim.

Any Other Claim Not Specifically Addressed

As to any other claim not specifically addressed, any such claim is untimely, procedurally barred by Rule 61(i)(4) as previously adjudicated, or procedurally barred by Rules 61(i) (2) and (3) for Defendant's failure to timely raise the issue.

[108] *Bailey v. State,* 521 A.2d 1069, 1089-1093 (Del. 1987).
[109] *Bailey v. State,* 521 A.2d 1069, 1089-1093 (Del. 1987).
[110] See, Defendant's Motion for Postconviction Relief filed April 9, 1994, Exhibit A-1.

Defendant was aware of, had time to, and the opportunity to raise all of the claims presented herein in a timely filed motion. Defendant does not raise anything new or recently discovered. All of the documents he relies on in support of his claims are decades old. Having already been provided with a full and fair opportunity to present any issue desired to be raised, any attempt at this late juncture to raise, re-raise or re-couch a claim is procedurally barred. If Defendant genuinely believed he had a meritorious claim, he was required to raise it on direct appeal or in a timely filed Rule 61 motion. There is no just reason for Defendant's decades delay in doing so.

Since Defendant's claims are procedurally barred, Defendant must meet one of the exceptions to overcome the bars to relief. In this case, Defendant has failed to overcome any of the procedural bars by showing a "colorable claim that there was a miscarriage of justice" or that "reconsideration of the claim is warranted in the interest of justice."[111] The "miscarriage of justice" exception is a "narrow one and has been applied only in limited circumstances."[112] The defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."[113]

Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. It is clear from Defendant's motion that Defendant's claims do not meet the high standard that the fundamental fairness exception requires. The court does not find that the interests of justice require it to consider these otherwise procedurally barred claims for relief.

[111] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).
[112] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).
[113] *Id.*

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.

/s/
Commissioner Lynne M. Parker

oc: Prothonotary
cc: Anthony Figliola, Esquire