

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

<b>STATE OF DELAWARE</b>	)	In and for Kent County
	)	ID. No. 92K01112DI
v.	)	
	)	RK92-03-0356-01
<b>CHARLES L. SCOTT,</b>	)	Murder 1 <sup>st</sup> (F)
	)	RK92-03-0357-01
Defendant.	)	PDWDCF (F)

Stephen R. Welch, Jr., Esquire, Department of Justice, for the State of Delaware.

Alexander W. Funk, Esquire, Curley, Dodge & Funk, LLC, Dover, Delaware for Defendant.

**COMMISSIONER'S REPORT AND RECOMMENDATIONS**

Upon Consideration of Defendant's Motion for Postconviction Relief  
Pursuant to Superior Court Criminal Rule 61

**FREUD, Commissioner**  
October 30, 2017

The Defendant, Charles L. Scott ("Scott"), was found guilty on November 17, 1992, by a jury, of one count of Murder in the First Degree, 11 *Del. C.* § 636, and one count of Possession of a Deadly Weapon During the Commission of a Felony, 11 *Del. C.* § 1447. The companion charge of Burglary in the Second Degree and a second count of Possession of a Deadly Weapon During the Commission of a Felony were *nolle prossed* by the State. The case had originally been a capital murder case but

prior to trial the State indicated to the Court and defense that it was not intending to seek the Death Penalty. A presentence investigation was ordered and on January 8, 1993 Scott was sentenced to mandatory life in prison on the Murder in the First Degree charge and an additional five years on the Possession of a Deadly Weapon During the Commission of a Felony charge.

A timely Notice of Appeal to the Delaware Supreme Court was filed. Scott's counsel filed a brief and Motion to Withdraw pursuant to Supreme Court Rule 26(c). In the motion, counsel represented that he conducted a conscientious review of the record and concluded that no meritorious issues existed. By letter, counsel informed Scott of the provisions of Rule 26(c) and attached a copy of the Motion to Withdraw and accompanying brief. Scott was informed of his right to supplement his attorney's presentation. Scott did not raise any issues for the Supreme Court to consider.

The Supreme Court granted the State's Motion to Affirm and affirmed Scott's conviction on February 3, 1994, finding the appeal "wholly without merit and devoid of any arguably appealable issue."<sup>1</sup> The mandate issued on February 23, 1994. On May 22, 2013, Scott filed a *pro se* motion for postconviction relief pursuant to Superior Court Criminal Rule 61. In his *pro se* motion, Scott raised five grounds for relief, in part, alleging ineffective assistance of counsel.

On April 26, 2013 the Court appointed Alexander W. Funk, Esquire ("Appointed Counsel") to represent Scott in his motion. After numerous extensions of time to file the amended motion for postconviction relief it was filed on February

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<sup>1</sup> *Scott v. State*, 1994 WL 35412 (Del. Supr.).

8, 2016. In the amended motion only one ground for relief was raised.

### **SCOTT'S CONTENTIONS**

In his initial *pro se* postconviction motion Scott raised the following grounds for relief:

- Ground one: Ineffective Assistance of Counsel at Critical Pretrial Stages.
- Ground two: Bias Jury Selection Process.
- Ground three: Fair Trial Denied.
- Ground four: Ineffective Assistance - Plea Negotiation Process.
- Ground five: Ineffective Assistance - Appellate Process.

In the amended motion filed by Appointed Counsel only one ground for relief is raised and none of Scott's original claims are discussed. The only claim raised is as follows:

- Ground one: Mr. Scott's Defense at Trial of Extreme Emotional Distress; His Conviction For Murder First Degree; and His Sentence of Life in Prison Were Constitutionally Deficient, As they Failed to Consider Mr. Scott's Status As An 18 Year Old Adolescent, With Immature Brain Development In the Areas of Impulse Control, Decision-Making, and Foresight of consequences; As Such, Mr. Scott's Rights Under the Delaware Constitution and the United States

Constitution Were Violated.

### **PROCEDURAL CONSIDERATIONS**

Under Delaware law, the Court must first determine whether Scott has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of the postconviction relief claims.<sup>2</sup> Under Rule 61 at the time of Scott's conviction, postconviction claims for relief must have been brought within three years of the conviction becoming final.<sup>3</sup> Scott's original *pro se* motion was filed more than nineteen years after Scott's conviction became final. Thus, pursuant to Rule 61(i)(1), Scott's motion is time barred unless he successfully "asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final."<sup>4</sup>

In his original *pro se* motion Scott does not raise any retroactive newly recognized right. In the amended motion, however, Appointed Counsel claims:

Mr. Scott's motion asserted that the recent United States Supreme Court case of *Miller v. Alabama*, 567 U.S. \_\_\_\_ (2012), which held that mandatory life sentences without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on 'cruel and unusual punishments,' should apply to Mr. Scott's conviction and sentence.

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<sup>2</sup> *Bailey v. State*, 588 A.2d 1121 (Del. 1991).

<sup>3</sup> Super. Ct. Crim. R. 61(i)(1). Scott's conviction became final the date the mandate was issued on February 24, 1994. Rule 61 was amended effective July 1, 2005 to provide that postconviction motions must be filed within one year.

<sup>4</sup> *Cobb v. State*, 1996 WL 21057, at \*2 (Del. Jan. 10, 1996); *State v. Mills*, 1996 WL 280893, at \*2 (Del. Super. Mar. 27, 1996); Super. Ct. Crim. R. 61(i)(1).

I have read Scott's original motion multiple times and can find no mention of *Miller* in the motion. The closest reference is as follows:

There is an arguably appealable issue in the **Death in Prison** sentence. Movant being an adult for only 52 days, the *Natural Life* sentence in this case is cruel and excessive punishment.

This claim is raised in the context of Scott's *pro se* claim that his trial counsel was ineffective for not raising his age vis-a-vis his life sentence on direct appeal.<sup>5</sup> Even assuming arguendo that Scott's original motion somehow can be determined to have raised *Miller* in an attempt to avoid the time bar of Superior Court Criminal Rule 61(i)(1), the attempt is futile. *Miller* only applies to juveniles and Scott was an adult at the time he murdered his victim. As such *Miller* does not apply to Scott. The Delaware Supreme Court recently made that clear in *Flonnory v. State*,<sup>6</sup> where the court clearly held that "the application of juvenile sentencing standards" do not apply to "crimes committed as an adult."<sup>7</sup> Consequently, *Miller* does not apply to Scott and he has therefore not alleged any retroactive right to avoid the time bar.

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<sup>5</sup> I note that this claim was available to Scott to raise in his direct appeal and he chose not to raise it despite being given an opportunity to do so after the filing of counsel's motion to withdraw.

<sup>6</sup> Del. Supr. No. 216, 2017, Vaughn, J. (Aug. 23, 2017).

<sup>7</sup> *Id.* at 4. See also *State v. Reyes*, 155 A.3d 331, 357 (Del. 2017) where the Court stated that "The Superior Court *shall* impose on each of the murder convictions a sentence of imprisonment for the remainder of Reyes' natural where life without benefit of probation or parole or any other reduction." Reyes was 18 at the time of the offense. Clearly our Supreme Court draws a bright line at age 18.

Scott can only avoid the time bar of Superior Court Rule 61(i)(1) if he proves, under Rule 61(i)(5) that the Court lacked jurisdiction or shows 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>8</sup> Scott is mistaken in his assumption that merely asserting a claim of either lack of jurisdiction or a constitutional violation is sufficient to warrant relief under Rule 61(i)(5). The claim must also have merit.<sup>9</sup> Furthermore, the burden of proving the constitutional violation is on the movant.<sup>10</sup> “The fundamental fairness exception...is a narrow one and has been applied only in limited circumstance...”<sup>11</sup>

In an attempt to show a constitutional claim, Appointed Counsel attempts to argue that the Trial Counsel was ineffective because they did not raise the evidence of brain science concerning a juvenile brain’s development. Appointed Counsel goes to great lengths to discuss all the advances and theories in this area that have occurred subsequent to Scott’s trial. However, as the State correctly points out, Trial Counsel can hardly have been ineffective during a 1992 trial by not presenting scientific

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<sup>8</sup> Super. Crim. R. 61(i)(5). The rule was amended between the time Scott filed his *pro se* motion and his amended motion. I am applying the rule as it stood at the time Scott’s original motion was filed.

<sup>9</sup> *State v. Mills*, 1996 WL 280893 at \*2 (Del. Super. Mar. 27, 1996).

<sup>10</sup> *Bailey v. State*, 588 A.2d at 1130.

<sup>11</sup> *Younger v. State*, 580 A.2d 552, 555 (Del. 1990) (citing *Teague v. Lane*, 489 U.S. 288, 297-299 (1989)).

evidence and testing which did not yet exist. Additionally a postconviction relief court need apply only the constitutional standards that prevailed at the time the original proceeding took place.<sup>12</sup> Appointed Counsel appears to claim that the defense of extreme emotional distress may have succeeded had the jury heard the recent scientific evidence. This is merely speculative. Mere speculation that a different result might have occurred does not satisfy the requirements of proving a “colorable claim” of injustice.<sup>13</sup> Consequently, Scott has failed to avoid the time bar of Superior Court Criminal Rule 61(i)(1) because he cannot demonstrate a colorable claim of a constitutional violation. I find the allegation raised by Appointed Counsel in the amended motion is time barred and meritless.

Turning to the claims raised in Scott’s original *pro se* motion since they were not addressed by Appointed Counsel they should be considered waived. However for the sake of argument I shall briefly review the claims because it is not entirely clear to me if they were intended to be waived.

Scott’s first, second, fourth and fifth claims are based, to some extent, on an allegation of ineffective assistance of counsel. Scott’s third claim “Fair Trial Denied” fails to give any basis to find a constitutional violation as there is no accompanying argument. It is clearly time barred. Each of Scott’s claims could have been raised by him within the time limit to file his postconviction motion yet he chose not to submit them to the Court until 19 years later. For this reason, his claims of ineffective

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<sup>12</sup> *Flamer v. State*, 585 A.2d 736 (Del. 1990).

<sup>13</sup> *State v. Condon*, 2003 WL 1364619 (Del. Super. March 13, 2003).

counsel fall short since he was given an opportunity to raise them and chose not to.

Scott's claims also fail because he does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are distinct, albeit similar, standards.<sup>14</sup> The United States Supreme Court has held that:

[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance.' Ineffective assistance of counsel, then, is cause for a procedural default.<sup>15</sup>

A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a movant must engage in the two-part analysis enunciated in *Strickland v. Washington*<sup>16</sup> and adopted by the Delaware Supreme Court in *Albury v. State*.<sup>17</sup>

The *Strickland* test requires the movant to show that counsel's errors were so

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<sup>14</sup> See *State v. Gattis*, 1995 WL 790961, at \*3 (Del. Super. Dec. 28, 1995), *aff'd*, 697 A.2d 1174 (Del. 1997).

<sup>15</sup> *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (second alteration in original) (citation omitted).

<sup>16</sup> 466 U.S. 668 (1984).

<sup>17</sup> 551 A.2d 53, 58 (Del. 1988).



grievous that his performance fell below an objective standard of reasonableness.<sup>18</sup> Second, under *Strickland*, the movant “must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,” that is, actual prejudice.<sup>19</sup> In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.<sup>20</sup>

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established.<sup>21</sup> However, the showing of prejudice is so central to this claim that the *Strickland* court stated “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”<sup>22</sup> “In other words, if the Court finds that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representation were true, the Court may dispose of the claim on this basis alone.”<sup>23</sup> “Furthermore, the defendant must rebut a ‘strong presumption’ that trial counsel’s representation fell within the ‘wide range of reasonable professional

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<sup>18</sup> *Strickland*, 466 U.S. at 687-88; *see also Dawson*, 673 A.2d 1186, 1190 (Del. 1996).

<sup>19</sup> *Strickland*, 466 U.S. at 694; *see also Dawson*, 673 A.2d at 1190.

<sup>20</sup> *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

<sup>21</sup> *Strickland*, 466 U.S. at 687.

<sup>22</sup> *Id.* at 697.

<sup>23</sup> *Gattis*, 1995 WL 790961, at \*4.

assistance,’ and this Court must eliminate from its consideration the ‘distorting effects of hindsight when viewing that representation.’”<sup>24</sup>

In the case at bar, Scott raises four claims of ineffective assistance of counsel. Each claim was available to him on his earlier appeal and within the time period to file his initial postconviction relief motion yet he failed to raise them. Nor has Scott alleged any colorable claims of constitutional violation in any of his *pro se* pleadings. I have reviewed the case file and conclude that his counsel represented him effectively and that he received a fair trial. Furthermore I conclude he suffered no prejudice as a result of Trial Counsel’s representation.

### CONCLUSION

After reviewing the record in this case, it is clear that Scott has failed to avoid the procedural bars of Superior Court Criminal Rule 61(i). Consequently, I recommend that Scott’s postconviction motion be ***denied*** as procedurally barred by Rule 61(i)(1) as time barred and for failing to show 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 under Superior Court Criminal Rule 61(i)(5).

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/s/ Andrea M. Freud

Commissioner

AMF/dsc

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<sup>24</sup> *Id.* (quoting *Strickland*, 466 U.S. at 689).