IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
	)	Def. I.D. # 1507011730
v.	)	
	)	
	)	
VALORIE S. HANDY,	)	
	)	
Petitioner/Defendant.	)	

Motion for Postconviction Relief Submitted: May 7, 2018
Motion to Withdraw as Counsel for Petitioner Submitted: April 22, 2019

Motions Simultaneously Decided: August 20, 2019

Upon Petitioner's Motion for Postconviction Relief (R-1)

DISMISSED

Upon Postconviction Counsel's Motion to Withdraw as Counsel for Petitioner

DISMISSED AS MOOT

MEMORANDUM OPINION AND ORDERS

Valorie S. Handy, 28194 Layton Davis Road, Millsboro, DE 19966; Petitioner/Defendant.

Patrick J. Collins, Esquire, Collins & Associates, 716 North Tatnall Street, Suite 300, Wilmington, DE 19801; Attorney for Petitioner/Defendant Valorie Handy.

Melanie Withers, Esquire, Deputy Attorney General, Department of Justice, 114 East Market Street, Georgetown, DE 19947; Attorney for State of Delaware.

KARSNITZ, J.

MOTION FOR POSTCONVICTION RELIEF

I. INTRODUCTION

Petitioner and defendant Valorie S. Handy ("Petitioner," "Defendant" or "Handy") was represented at her 2016 trial by Gary F. Traynor, Esquire as lead counsel[1] and Daniel A. Strumpf, Esquire (collectively, "Trial Counsel"). On May 7, 2018, Petitioner filed a timely *pro se* Motion for Postconviction Relief (the "Rule 61 Motion") under Superior Court Rule of Criminal Procedure 61 ("Rule 61") on

[1] Prior to the beginning of appellate litigation in the Supreme Court, Mr. Traynor was appointed an Associate Justice of the Supreme Court. Associate Justice Traynor filed a memorandum of disqualification, removing himself from the appellate proceedings.

the basis that she was denied effective assistance of counsel at her trial.[2] The Court then appointed Patrick J. Collins, Esquire ("Postconviction Counsel") to represent Handy[3], and on April 22, 2019, Postconviction Counsel filed a Motion to Withdraw as Counsel for Petitioner Valerie Handy (the "Motion to Withdraw').[4] On May 20, 2019, Petitioner filed her Response to the Motion to Withdraw.[5] On July 26, 2019, Trial Counsel filed an Affidavit regarding statements made by Petitioner in her Response to the Motion to Withdraw.[6]

Petitioner states seven grounds for relief in her Rule 61 Motion. In his Motion to Withdraw, Postconviction Counsel sets forth these seven claims *verbatim* from Petitioner's Rule 61 Motion[7]; I summarize them as follows:

(1) Trial Counsel failed to create reasonable doubt in the minds of the jurors by failing to focus on the culpability of the victim's mother and by sympathizing with adverse witnesses;

(2) Trial Counsel failed to object to the lead prosecutor's unsuccessful prosecution of Petitioner in an earlier matter and thus her bias against Petitioner;

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[2] D.I. 165. "D.I." refers to docket items in Superior Court Case Def. I.D. #1507011730. Petitioner asserts no claims of ineffective representation by her appellate counsel.
[3] D.I. 170.
[4] D.I. 175.
[5] D.I. 181.
[6] D.I. 182.
[7] Superior Court Rule 61 governs the procedure "... on application by a person ***in custody*** ..." (emphasis supplied). Ms. Handy was in custody when her Rule 61 Motion was filed, but is no longer incarcerated. For purposes of her Motion, I will not treat that fact as a disqualification.

(3) Trial Counsel failed to move to suppress certain evidence illegally and untimely seized from Petitioner's home pursuant to an illegal search warrant;

(4) Trial Counsel failed to challenge State's expert witnesses and to hire rebuttal expert witnesses for Petitioner;

(5) Trial Counsel failed to properly advise Petitioner of her right to testify on her own behalf;

(6) Trial Counsel failed to object to reference in State's closing argument that victim's mother provided applesauce, which prejudiced jurors against Petitioner; and,

(7) Trial Counsel failed to obtain a full transcript of the *Lolly/Deberry*[8] jury instruction discussions regarding missing evidence for the Supreme Court to review on appeal.

After a full review of the record and the pleadings, I find that Petitioner has failed to satisfy either the performance part or the prejudice part of the two-part test set forth in *Strickland v. Washington*[9] ("*Strickland*"), as adopted in Delaware and as discussed more fully below, as to her allegation of ineffective assistance of Trial Counsel.

I further find from the Rule 61 Motion itself, and from the record of the pretrial, trial and appellate proceedings in this case, Petitioner is not entitled to relief and the Rule 61 Motion must be summarily dismissed.[10] Thus, the record need not

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[8] *Lolly v. State*, 611 A.2d 956 (Del. 1992); *Deberry v. State*, 457 A.2d 744 (Del. 1983), with respect to State's duty to preserve evidence.

[9] 466 U.S. 668 (1984).

[10] Super. Ct. Crim. R. 61(d)(5).

be expanded, no response need be made by the Attorney General,[11] and no evidentiary hearing need be held.[12]

The Rule 61 Motion is summarily **DISMISSED.**

II. BACKGROUND

A. PROCEDURAL HISTORY

On July 27, 2015, a grand jury indicted Petitioner on one count of Murder by Abuse or Neglect in the First Degree.[13] On July 29, 2015, Petitioner was arrested on a Rule 9 warrant.[14] For the next year plus, there was extensive pretrial litigation with respect to expert opinion testimony, expert testimony, testing of evidence, suppression of evidence seized pursuant to a search warrant, and failure by the State to preserve evidence. The matter proceeded to a jury trial beginning on November 16, 2016 that lasted nine trial days. The jury received an instruction on three lesser included offenses: Manslaughter, Murder by Abuse or Neglect in the Second Degree, and Criminally Negligent Homicide, as well as a *Lolly/Deberry*

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[11] Super. Ct. Crim. R. 61(f).
[12] Super. Ct. Crim. R. 61(h).
[13] D.I. 2.
[14] D.I. 6.

instruction.[15] On December 2, 2016, the jury found Petitioner guilty of Criminally Negligent Homicide.[16]

On January 27, 2017, this Court sentenced Petitioner to eight years at Level 5, suspended after serving two years and six months, for six months of home confinement, followed by five years of Level 3 probation.[17] A Notice of Supreme Court Appeal was filed on June 30, 2017.[18] The Delaware Supreme Court affirmed the conviction on March 22, 2018.[19]

B. STATEMENT OF FACTS

Petitioner operated a daycare facility in Millsboro, Delaware attached to her residence. On January 28, 2015, Petitioner called 911 to report that a ten-month old child was not breathing.[20] Paramedics took the child to Beebe Hospital where he was pronounced dead.[21] The police obtained audio and video statements from Petitioner, including a statement that she had fed the child applesauce,[22] and seized evidence pursuant to a search warrant.[23] There was also a subsequent seizure of

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[15] A2709; A2787-88. "A" refers to Postconviction Counsel's five-volume Appendix to Motion to Withdraw.
[16] A2910.
[17] D.I. 134.
[18] D.I. 156.
[19] *State v. Handy*, 2018 WL 1445801 (Del. Mar. 22, 2018).
[20] A907-921.
[21] A1299-1300.
[22] A811-826; A961-967; A1340.
[23] A37; the first search warrant is at A31-37.

additional evidence pursuant to a search warrant.[24] Much of the expert testimony revolved around the presence of diphenhydramine ("DPH"), the active ingredient in Benadryl, in the child's body and hair.[25] The State argued that Petitioner had placed Benadryl in the applesauce fed to the child and that the cause of death was acute DPH intoxication. As stated above, during both pretrial and trial, Trial Counsel made numerous motions, some of which were granted, to exclude or suppress expert opinions, expert testimony, test results, and items of evidence seized pursuant to two search warrants,[26] and objected to the State's failure to preserve certain evidence.[27]

III. DISCUSSION

A. PROCEDURAL BARS UNDER RULE 61(i).

Before addressing the merits of a defendant's motion for postconviction relief, I must first apply the procedural bars of Superior Court Criminal Rule 61(i).[28] If a procedural bar exists, as a general rule I will not address the merits of the

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[24] A1602; the second search warrant is at A898-904.
[25] A895; A937; A1421; A1429.
[26] A25-37; A293-326; A1138-39; A1852.
[27] A778-835; Trial Counsel also objected to the final form of the *Lolly/Deberry* jury instruction as given, at A2750-51.
[28] *Ayers v. State*, 802 A.2d 278, 281 (Del.2002) (citing *Younger v. State,* 580 A.2d 552, 554 (Del. 1990). All references to Rule 61 are to the rule as it existed when Handy filed his pro se motion for postconviction relief See *Bradley v. State*, 135 A.3d 748, 757 n. 24 (Del 2016).

postconviction claim.[29] Under Delaware Superior Court Rules of Criminal Procedure, a motion for post-conviction relief can be barred for time limitations, successive motions, procedural default, or former adjudication.[30]

A motion for postconviction relief exceeds time limitations if it is filed more than one year after the conviction becomes 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 was first recognized by the Supreme Court of Delaware or the United States Supreme Court.[31] In this case, Petitioner's conviction became final for purposes of Rule 61 at the conclusion of direct review when the Delaware Supreme Court issued its mandate on April 12, 2018.[32] Petitioner filed her *pro se* first motion for postconviction relief on May 7, 2018. Therefore, consideration of that first motion is not barred by the one-year limitation of Rule 61(i)(1).

Grounds for relief "not asserted in the proceedings leading to the judgment of conviction" are barred as procedurally defaulted unless the movant can show "cause for relief" and "prejudice from [the] violation."[33] Grounds for relief formerly adjudicated in the case, including "proceedings leading to the judgment of conviction,

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[29] *Id.*; *State v. Page*, 2009 WL 1141738, at*13 (Del. Super. April 28, 2009).
[30] Super. Ct. Crim. R. 61(i).
[31] Super. Ct. Crim. R. 61(i)(1).
[32] D.I. 163.
[33] Super. Ct. Crim. R. 61(i)(3).

in an appeal, in a post-conviction proceeding, or in a federal habeas corpus hearing" are barred.[34] None of these bars apply in this case.

The bars to relief do not apply either to a claim that the Court lacked jurisdiction or to a claim that pleads with particularity that new evidence exists that creates a strong inference of actual innocence,[35] or that a new retroactively applied rule of constitutional law renders the conviction invalid.[36] None of these claims applies in this case.

Defendant's motion is based on claims of ineffective assistance of counsel, which can only be raised in a motion for postconviction relief.[37] The issues presented in this motion were not formerly adjudicated because ineffective assistance of counsel claims are not addressed by the Delaware Supreme Court on direct appeal.[38] Therefore, the claims made in Defendant's postconviction motion are not procedurally barred.

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[34] Super. Ct. Crim. R. 61(i)(4).
[35] Super. Ct. Crim. R. 61(i)(5).
[36] Super. Ct. Crim. R. 61(d)(2)(i) and (ii).
[37] *Id.* at 61(i)(3).
[38] *Id.* at 61(i)(4).

B. Petitioner Has Failed To Demonstrate That Her Representation By Trial Counsel Was Ineffective.

Petitioner brings seven claims against her Trial Counsel of ineffective assistance, which are assessed under the two-part standard established in *Strickland v. Washington,*[39] as applied in Delaware.[40] Under *Strickland*, Defendant must show that (1) Trial Counsel's representation "fell below an objective standard of reasonableness" (the "performance part"); and (2) the "deficient performance prejudiced [her] defense." (the "prejudice part").[41] In considering the performance part, the United States Supreme Court was mindful that "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."[42] *Strickland* requires an objective analysis, making every effort "to eliminate the distorting effects of hindsight" and to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[43] And, "strategic choices about which lines of defense to

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[39] 466 U.S. 668 (1984).
[40] *Albury v. State*, 551 A.2d 53 (Del. 1988).
[41] *Id.* at 687.
[42] *Id.* at 690.
[43] *Id.* at 689.

pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based."[44]

As to the performance part, Petitioner must demonstrate that Trial Counsel's decisions as to which evidence to admit,[45] which expert witnesses to challenge or call, whether Handy should testify, and the scope of the *Lolly/Deberry* jury instructions, were not reasonable strategic decisions. In my view, Trial Counsel's decisions were reasonable strategic decisions under the performance part of the *Strickland* test.

As to the prejudice part, Petitioner must demonstrate that there exists a reasonable probability that, but for Trial Counsel's unprofessional errors, the outcome of the trial would have been different.[46] Even if Trial Counsel's performance was professionally unreasonable, it would not warrant setting aside the judgment of conviction if the error had no effect on the judgment.[47] A showing of prejudice "requires more than a showing of theoretical possibility that the outcome was affected."[48]

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[44] *Id.* at 681.

[45] For example, Trial Counsel chose to have a sample of the victim's hair admitted because it helped Petitioner's case, even though that meant admitting unhelpful evidence that might otherwise have been excluded.

[46] *Albury,* at 687; *Zebroski v. State,* 822 A.2d 1038, 1043 (Del. 2003); *Wright v. State,* 671 A.2d 1353, 1356 (Del. 1996).

[47] *Strickland,* at 691.

[48] *Frey v. Fulcomer,* 974 F.2d 348, 358 (3d Cir. 1992).

Strickland teaches that there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in a particular order, or even to address both parts of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant because of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.[49] In every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.[50]

In this case, Petitioner has not demonstrated that there exists a reasonable probability that, but for Trial Counsel's alleged errors, the outcome of the trial would have been different. Indeed, the opposite appears to be true: but for Trial Counsel's effective defense, the jury might have convicted Petitioner of Murder by Abuse in the First Degree, Manslaughter, or Murder by Abuse or Neglect in the Second Degree. Instead, the jury only convicted Petitioner of the lowest lesser included offense, Criminally Negligent Homicide.

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[49] *Strickland,* at 697.
[50] *Id.* at 696.

IV. CONCLUSION

Rule 61 provides in pertinent part:

> "If it plainly appears from the motion for postconviction relief and the record of the prior proceedings in the case that the movant is not entitled to relief, the judge may enter an order for its summary dismissal and cause the movant to be notified."[51]

In my view, and for the reasons discussed herein, it plainly appears from both the Rule 61 Motion itself, from the record of the pretrial, trial and appellate proceedings in this case, and from applicable law, that Petitioner is not entitled to relief.

Therefore, Petitioner Valorie S. Handy's Motion for Postconviction Relief is summarily **DISMISSED** simultaneously with my granting Postconviction Counsel's Motion to Withdraw. I am entering this Opinion as my **ORDER**. The Prothonotary shall cause Petitioner, Postconviction Counsel and the Deputy Attorney General to be so notified.

Because the Rule 61 Motion is summarily dismissed, the record need not be expanded, the Attorney General need make no response,[52] and no evidentiary hearing need be held.[53]

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[51] Super. Ct. Crim. R. 61(d)(5).
[52] Super. Ct. Crim. R. 61(f).
[53] Super. Ct. Crim. R. 61(h).

MOTION TO WITHDRAW AS COUNSEL FOR PETITIONER

Rule 61(e) provides in pertinent part:

> "If counsel's motion [to withdraw] is granted simultaneously with a denial of the movant's motion for postconviction relief – counsel's continuing duty is limited to: (A) notifying the movant in writing of the court's ruling; and (B) advising the movant in writing of the right to appeal, the rules for filing a timely notice of appeal, and that it is the movant's burden to file a notice of appeal if desired."[54]

Postconviction Counsel gave Petitioner notice that she could file a Response to his Motion to Withdraw within 30 days of service of the Motion to Withdraw on Petitioner. He also offered to file that response for her. Petitioner filed her Response with the Court on May 20, 2019.

Because I am summarily denying Petitioner's Motion for Postconviction Relief, and Postconviction Counsel will no longer represent her, Postconviction Counsel's Motion to Withdraw as Counsel for Petitioner is moot.

Postconviction Counsel Patrick J. Collins, Esquire's Motion to Withdraw as Counsel for Petitioner Valorie S. Handy is **DENIED AS MOOT** simultaneously with the summary dismissal of Petitioner's Rule 61 Motion. I am entering this Opinion as my **ORDER**. Postconviction Counsel shall notify Petitioner in writing of my ruling and advise her in writing (1) of her right to appeal, (2) the rules for filing a timely notice of appeal, and (3) that it is her burden to file a notice of appeal

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[54] Super. Ct. Crim. R. 61(e)(7)(ii).

if desired. The Prothonotary shall cause Postconviction Counsel and the Deputy Attorney General to receive a copy of this Order.