

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

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|--------------------|---|----------------|
| STATE OF DELAWARE, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | ID# 0309013375 |
| |) | |
| LARRY E. JOHNSON, |) | |
| |) | |
| Defendant. |) | |
| |) | |

ORDER

Defendant, Larry E. Johnson, was found guilty by a jury of Burglary first degree, Conspiracy second degree, two counts of murder first degree, and three counts of Possession of a Deadly Weapon in Commission of a Felony. Defendant was sentenced on September 2, 2004, and the convictions were affirmed on direct appeal on July 1, 2005. Defendant then filed his first motion for post conviction relief, which was denied by this court. That denial was affirmed by the Supreme Court in May 2008. Defendant filed a motion for a writ of habeas corpus in July 2008, which was denied.

Defendant now comes forward with a second motion for post conviction relief filed on February 20, 2012. He claims "Counsel was ineffective in failing to file a motion to vacate the felony

murder conviction in violation of defendants [sic] sixth Amendment Rights under the US Constitution and Article I §§4, 7 and 9 of the Delaware Constitution.”¹ Defendant argues the jury instruction on felony murder in his trial violated *Williams v. State*².

In considering a Rule 61 motion, the court must first look to procedural requirements of the rule.³ Defendant’s motion is barred under two procedural bars and does not meet the exceptions.

Defendant’s motion is untimely. A motion for post conviction relief must be filed within one year after a conviction becomes final or, in the case of newly recognized rights, within one year of the right first being recognized by the Delaware Supreme Court or United States Supreme Court.⁴ The motion in this case was filed more than a year after the conviction became final. To the extend Defendant argues the one year should begin from the date the right was recognized, it has also been over a year. The Delaware Supreme Court decided in *Chao v. State*⁵ (“*Chao II*”) that *Williams* applies retroactively. The one year limitation “for filing Rule 61 motions began when *Williams*—not *Chao II*—was decided.”⁶ Regardless of whether the decision in *Williams* or *Chao II* begins

¹ Defendant’s Opening Brief to Rule 61 Post Conviction Relief, at 17.

² 818 A.2d 906 (Del. 2002).

³ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁴ Superior Court Rule of Criminal Procedure 61(i)(1).

⁵ 931 A.2d 1000 (Del. 2007).

⁶ *Wright v. State*, ID No. 91004136DI, at 56, ___ A.3d ___ (Del. Super.), *appeal filed*, No. 10, 2012 (Del.) (citing *Massey v. State*, 2009 WL 2415294 (Del.)).

the time limitation, more than a year elapsed before Defendant filed the motion at hand.

Repetitive post conviction relief motions are barred unless consideration “is warranted in the interest of justice.”⁷ The pending motion is Defendant’s second motion for post conviction relief. After reviewing the motion, the court finds consideration is not warranted in the interest of justice.

Defendant seeks to invoke an exception to the procedural bars. He argues there is “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.”⁸ This exception does not apply because the exception only applies in instances of a constitutional violation.⁹ “Here there is no constitutional violation alleged; the purported error turns upon the interpretation of state statute.”¹⁰ Therefore, this exception to the procedural bars does not apply.

The court will not consider Defendant’s motion as it is procedurally barred.

DENIED.

⁷ Superior Court Criminal Rule of Procedure 61(i)(2).

⁸ Superior Court Criminal Rule of Procedure 61(i)(5)

⁹ While the court is not ruling on the merits of the issue, it also appears to the court that there was no miscarriage of justice because the instruction in question appears valid; therefore this exception does not apply.

¹⁰ *Wright*, at 57, ___ A.3d ___ (citing *Irrahim v. United States*, 661 F.3d 1141, 1143-44 (D.C. Cir. 2011)).

IT IS SO ORDERED.

Dated: March 1, 2012

Judge John A. Parkins, Jr.