

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID. No. 0811000883
)	
LAZAAR CHATTIN,)	
)	
Defendant.)	

Submitted: December 22, 2011
Decided: January 6, 2012

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

Caterina Gatto, Deputy Attorney General, Department of Justice, Wilmington, Delaware,
Attorney for the State.

Lazaar Chattin, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 6th day of January, 2012, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. On December 8, 2008, the New Castle County grand jury indicted Defendant Lazaar Chattin on multiple charges stemming from the theft of a firearm and shooting of Shaun Holt in November 2008.

2. In July 2009, a jury trial was held but a mistrial was declared on the third day of trial after it was determined that one of the jurors did not speak English. Thereafter, a second trial was held on April 13, 2010. The trial concluded on April 15, 2010. Defendant was convicted of Attempted Murder First Degree, two counts of Possession of a Firearm During the Commission of a Felony, two counts of Possession of a Deadly Weapon by a Person Prohibited, one count of Reckless Endangering First Degree and one count of Possession of Ammunition by a Person Prohibited. Defendant was found not guilty of one count of Aggravated Menacing and one count of Possession of a Firearm During the Commission of a Felony.

3. On July 23, 2010, Defendant was sentenced, after a presentence investigation, to a total of forty-four years at Level V suspended after twenty-five years mandatory for eight years at Level IV suspended after one year for probation.

4. Defendant filed a direct appeal to the Delaware Supreme Court. On March 21, 2011, the Delaware Supreme Court affirmed the decision of the Superior Court.¹

FACTS

5. The facts giving rise to these charges, as set forth by the Delaware Supreme Court in its decision on Defendant's direct appeal², are as follows: The criminal charges

¹ *Chattin v. State*, 2011 WL 987752 (Del.)

² *Chattin*, , 2011 WL 987752, at * 1-2.

against Chattin arose from two incidents that took place in Newark, Delaware, about a week apart in the fall of 2008. Both incidents involved acquaintances of Chattin- Tyrell Wilson and Shaun Holt.

6. On October 24, 2008, Wilson and Holt were hanging out at Wilson's house when Chattin came by at about 10:00 p.m. Shortly after Chattin arrived, Wilson noticed that the gun he kept in the bedroom was missing. Wilson suspected that Chattin had taken the gun.³ Later that evening, Wilson confronted Chattin about taking the gun. Chattin denied it, but when Wilson threatened to pat him down Chattin drew the gun, pointed it at Wilson, and threatened to kill him if he did not leave. As he left, Wilson heard a single gunshot.⁴

7. Wilson reported the gun as stolen to the police. A few days later, Wilson identified Chattin as the suspect from a six-photograph photo lineup, and a warrant issued for Chattin's arrest.⁵

8. In the second incident, Wilson and Holt were hanging out at Holt's house on November 8, 2008 when, shortly before 2 a.m., they saw Chattin and several other men hanging around Wilson's car, which was parked in front of the house. Holt went outside to smoke a cigarette and spoke briefly to Chattin. Chattin asked Holt where Wilson was, and became irritated at Holt when he would not answer. As he turned to leave, Holt heard a gun firing, looked back, and saw that Chattin was shooting at him. Holt was struck once in the leg as he fled up the steps and into the front door of his house.⁶

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

9. Shortly after 2:00 a.m. on November 8, 2008, New Castle County Police received a 911 call of shots fired at Holt's house. When officers arrived, they found Holt in his bedroom with a gunshot wound to his right leg. Holt told the police that Chattin had shot him.⁷

10. The police found six bullet holes in the front door of Holt's house and a box of ammunition approximately fifty yards away. From the ammunition box, the police recovered a latent fingerprint that was matched to Chattin. At the hospital, police showed Holt a single photograph of Chattin. From the photo, Holt identified Chattin as the shooter.⁸

DEFENDANT'S RULE 61 MOTION

11. On June 21, 2011, Defendant filed this motion for postconviction relief. In the subject motion, Defendant raises various grounds for relief. Defendant contends that his counsel provided ineffective assistance for a variety of reasons. Defendant also contends that the Superior Court committed several errors at trial and that the evidence was insufficient to support his convictions on several charges.

12. Before making a recommendation, the record was enlarged by directing Defendant's trial and appellate counsel to submit Affidavits responding to Defendant's ineffective assistance of counsel claims. Thereafter the State filed a response to the motion and Defendant filed a reply thereto.⁹

13. 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

⁷ *Id.*

⁸ *Id.*

⁹ Super.Ct.Crim.R. 61(g)(1) and (2).

of Superior Court Criminal Rule 61.¹⁰ In order to protect the procedural integrity of Delaware's rules, the court will not consider the merits of a post conviction claim that fails any of Rule 61's procedural requirements.¹¹

14. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;¹² (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 and 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.¹³ Moreover, the procedural bars of (2) and (4) may be overcome if "reconsideration of the claim is warranted in the interest of justice."¹⁴

15. In this case, several of Defendant's claims are procedurally barred. Defendant's claims relating to trial court errors and insufficiency of the evidence are procedurally barred. These claims were either already raised on direct appeal and are procedurally barred by Rule 61(i)(4) as previously adjudicated, or Defendant failed to raise them on direct appeal and they are procedurally barred by Rule 61(i)(2) and Rule 61(i)(3), for his

¹⁰ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹¹ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹² If a 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).

¹³ Super.Ct.Crim.R. 61(i)(5).

¹⁴ Super.Ct.Crim.R. 61(i)(4).

failure to do so. Moreover, Defendant has recouched and restated some of the issues he raised on direct appeal and has now couched those issues as ineffective assistance of counsel claims. Those issues are also procedurally barred pursuant to Rule 61(i)(4) since they have already been previously adjudicated on direct appeal. The court is not required to re-examine claims that already received substantive resolution on direct appeal simply because the claim has now been refined and restated and recouched as an ineffective assistance of counsel claim.¹⁵

16. In addition to some of Defendant's claims being procedurally barred, all of Defendant's claims are without merit.

17. In the subject motion, Defendant claims that his counsel was ineffective for a variety of reasons. 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.¹⁶ 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.¹⁷

18. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.¹⁸ Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong

¹⁵ *Johnson v. State*, 1992 WL 183069, at *1 (Del.); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

¹⁶ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

¹⁷ *Id.* at 687-88, 694.

¹⁸ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

presumption that counsel's conduct fell within a wide range of reasonable professional assistance.¹⁹ Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.²⁰

19. The United States Supreme Court recently reiterated the high bar that must be surmounted in establishing an ineffective assistance of counsel claim. In *Harrington v. Richter*,²¹ the United States Supreme Court explained that representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.²² The challenger's burden on an ineffective assistance of counsel claim is to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial.²³

20. The United States Supreme Court explained that a defendant is not guaranteed perfect representation, only a reasonably competent attorney. There is no expectation that competent counsel will be a flawless strategist or tactician. A defense attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.²⁴

21. The United States Supreme Court reasoned that it is difficult to establish an ineffective assistance claim when counsel's overall performance indicates active and

¹⁹ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

²⁰ *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

²¹ *Harrington v. Richter*, 131 S.Ct. 770 (2011).

²² *Id.*, at *791.

²³ *Id.*

²⁴ *Id.*, at *787-792

capable advocacy.²⁵ Counsel’s representation must be judged by the most deferential of standards. The United States Supreme Court cautioned that reviewing courts must be mindful of the fact that unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with his client, with opposing counsel, and with the judge.²⁶

22. Turning now to the subject case, whether or not defense counsel was a flawless strategist, it is clear from a review of the record that defense counsel provided active and capable advocacy. When reviewing the entire proceeding, the record reflects counsel’s overall performance as being active, thorough and capable advocacy.

23. Defendant first contends that his counsel “was Constitutionally ineffective at critical stages of proceedings in failing to object or to raise issues on appeal or during trial denying petitioner corrective review and the right to appeal and fair trial.” This claim is too conclusory and lacking in detail to establish a claim of ineffectiveness. Defendant has failed to state what specific issue or issues counsel should have raised but did not. Defendant has also failed to establish how he suffered any actual prejudice by the failure to raise the unspecified issue(s). Defense counsel cannot be deemed ineffective for failing to raise unspecified issue(s) that have no apparent legal or factual basis. Defendant’s ineffective assistance of counsel claim on this ground fails to meet either prong of the *Strickland* standard and is denied.

24. In Ground Two, Defendant claims that his attorney was ineffective for failing to renew a motion to suppress the victim’s testimony and for not objecting or pressing the State to produce forensic and ballistics, “gun powder residue”, or pursue a DNA analysis

²⁵ *Id.* at 791.

²⁶ *Id.* at 787-88.

or to file a “Boyer” motion.” Defense counsel, in his Affidavit in response to Defendant’s Rule 61 motion, advises that he did not file a motion to suppress the victim’s testimony because there was no legal basis to do so.²⁷ Moreover, Defendant has failed to set forth any legal or factual basis to support a meritorious suppression motion. Trial counsel does not have to file meritless motions; in fact, counsel has an obligation not to do so.

25. Defense counsel further advises that because a gun was never recovered in this case, there was no need for ballistic testing, forensics, or DNA analysis.²⁸ Defense counsel did address the issue of gun powder residue during his cross-examination of Detective DiNardo.²⁹ A box of ammunition was found near the scene of the shooting which had the Defendant’s fingerprint on it. In addition, the shell casings from the shooting matched the ammunition found in the box at the scene of the shooting.³⁰ Defendant has failed to show that defense counsel’s representation was deficient in any regard. Defendant has not overcome the strong presumption that defense counsel’s conduct constituted sound trial strategy. Furthermore, Defendant has not established that but for his counsel’s alleged deficient conduct in any specific regard the outcome of the proceeding would have been different.

26. In Ground Three, Defendant alleges that the Superior Court erred in evaluating the nature and extent of the victim’s injuries and improperly determined that it was serious physical injury. This claim relates solely to a decision of the trial court. To the extent that this claim was raised on direct appeal, it is procedurally barred by Rule 61(i)(4), as having been already adjudicated. On direct appeal, the Delaware Supreme

²⁷ Affidavit of Dade D. Werb in response to Defendant’s Rule 61 motion, at pgs. 4-5.

²⁸ Affidavit of Dade D. Werb in response to Defendant’s Rule 61 motion, at pgs. 4-5.

²⁹ April 14, 2010 Trial Transcript, at pgs. 223-228.

³⁰ Affidavit of Dade D. Werb in response to Defendant’s Rule 61 motion, at pgs. 3-5.

Court held that Defendant's contention that his attempted murder conviction must be reversed because the State failed to prove that he intended to kill Holt was without merit. The Delaware Supreme Court held that the record reflected that Defendant fired a gun six times directly at Holt who, at the time, was fleeing for his life. Under these facts, the Delaware Supreme Court concluded that there was no doubt that a rational trier of fact could have found beyond a reasonable doubt that Defendant intended to kill Holt.³¹

27. To the extent that Defendant has refined, restated or recouched this claim, the Superior Court is not required to re-examine any claim that received "substantive resolution" on direct appeal.³² Moreover, to the extent that Defendant failed to fully raise this claim on direct appeal, Rules 61(i)(2) and (3) would prevent this court from considering any additional arguments or claims not previously raised on direct appeal. Defendant could have included anything he so desired on direct appeal. Indeed, Defendant personally submitted eight claims for the Delaware Supreme's consideration on direct appeal.³³ There was nothing preventing Defendant from raising this claim asserted herein on direct appeal, to the extent he failed to do so. This claim is now procedurally barred.

28. In Ground Four, Defendant claims that his counsel was ineffective for failing to make a motion for judgment of acquittal at the conclusion of the State's case. Defense counsel, in his Affidavit in response to Defendant's Rule 61 motion, advises that he did not file a motion for judgment of acquittal because he did not believe that the motion would be successful based upon the evidence that had been presented.³⁴ Defense counsel

³¹ *Chattin v. State*, 2011 WL 987752, at *2 (Del.).

³² *Johnson v. State*, 1992 WL 183 069, at *1 (Del.Supr.); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

³³ *Chattin v. State*, 2011 WL 987752, at *1-2 (Del.).

³⁴ Affidavit of Dade D. Werb in response to Defendant's Rule 61 motion, at pg. 6.

recognized that the issues up to that point at trial were factual and that fact issues rested solely with the jury.³⁵ Defense counsel cannot be deemed ineffective for failing to raise a motion that lacks merit.

29. In Ground Five, Defendant claims that his counsel was ineffective for failing to object, pursue or challenge the discretion of the trial judge on not issuing a state of mind instruction. This claim, although now couched as an ineffective assistance of counsel claim, was already adjudicated on direct appeal. It is procedurally barred pursuant to Rule 61(i)(4). On direct appeal, Defendant claimed that the Superior Court erred when deciding not to give the jury a permissive inference instruction as to Defendant's state of mind.³⁶ Defendant argued on direct appeal that if the Superior Court had given the permissive inference instruction, the jury would have found him not guilty of attempted murder.³⁷ The Delaware Supreme Court found Defendant's claim to be without merit. The Delaware Supreme Court reasoned that Delaware law provides that a defendant is not entitled to any particular instruction, only a correct statement of the substance of the law.³⁸ The Delaware Supreme Court held that in the subject case the record reflected that the Superior Court properly instructed the jury on the intentional state of mind required for both Attempted Murder in the First Degree and the lesser-included offense of Assault in the First Degree as well as the reckless or intentional state of mind required for Assault in the Second Degree.³⁹ This claim is procedurally barred as previously adjudicated.

³⁵ *Id.*

³⁶ *Chattin v. State*, 2011 WL 987752, at *2 (Del.).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

The Superior Court is not required to re-examine this claim simply because it has now been refined, restated and recouched as an ineffective assistance of counsel claim.⁴⁰

30. In Ground Six, Defendant claims that his counsel was ineffective for failing to inform him of the time bar limitations in filing a motion for modification of sentence. Defense counsel does not recall any conversation with Defendant regarding motions for sentence modification.⁴¹ In any event, Defendant has not demonstrated that there was any basis for a motion for sentence modification. Defendant's sentence was within the statutory limits prescribed by the legislature. Defendant has not presented any evidence to support any assertion that any good faith basis existed to support a motion for modification of sentence. Defendant has failed to meet his burden to establish that that defense counsel's conduct was deficient nor has he established actual prejudice as a result from any alleged deficiency.

31. In Ground Seven, Defendant alleges that the Superior Court failed to preserve evidentiary rulings and key parts of the record. This claim is procedurally barred by Rule 61(i)(4) since it has already been previously adjudicated. On direct appeal, Defendant claimed that the Superior Court failed to preserve key portions of the record. The Delaware Supreme Court held that Defendant's claim appeared to arise from an unreported side-bar conference. The Delaware Supreme Court ruled that having reviewed the record, it was satisfied that the omission of the side-bar conference did not result in prejudice to Defendant's rights.⁴²

32. In Ground Eight, Defendant claims that his counsel was ineffective for failing to object to the admission of the victim's pre-trial identification. This claim, although now

⁴⁰ *Johnson v. State*, 1992 WL 183 069, at *1 (Del.Sup.); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

⁴¹ Affidavit of Dade D. Werb in response to Defendant's Rule 61 motion, at pg. 8.

⁴² *Chattin v. State*, 2011 WL 987752, at *3 (Del.).

couched as an ineffective assistance of counsel claim, was already adjudicated on direct appeal. On direct appeal, Defendant claimed that the identification procedure using a single photograph was unduly suggestive. The Delaware Supreme Court already held on direct appeal that this claim is without merit. The Delaware Supreme Court reasoned that Holt was an eyewitness to the November 8, 2008 shooting. Holt identified Defendant three times: in his initial statement to the police, at the hospital when shown the photograph, and when testifying at trial. The Delaware Supreme Court ruled that the record reflected little likelihood that the single photograph photo identification led to a misidentification.⁴³ Defendant's ineffective assistance of counsel contention arising from this claim is without merit.

33. In Ground Nine, Defendant claims that he was denied the right to confront witnesses. Defendant simply states that his right to confront witnesses was violated since certain people were not called to testify at trial. The decision as to whether or not to call a witness and how to examine and/or cross-examine witnesses who are called are tactical decisions.⁴⁴ Great weight and deference are given to tactical decisions by the trial attorney. There is a strong presumption that defense counsel's conduct constituted sound trial strategy.⁴⁵ Defendant has failed to overcome this strong presumption. Defendant has not established which witness or witnesses that were not called, should have been called, and thereafter to establish how that witness(es) testimony would have resulted in a different outcome of his trial. Defendant merely lists the names of various individuals who were not called to testify at trial. Defendant does not provide concrete allegations as to how any of those individuals would have helped his defense. Defendant does not

⁴³ *Id.*

⁴⁴ *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

⁴⁵ *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Harrington v. Richter*, 131 S.Ct. 770 (2011).

make any concrete factual allegations, let alone concrete allegations of actual prejudice. Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.⁴⁶

34. In Ground Ten, Defendant alleges that counsel was ineffective in denying his speedy trial rights. Defendant was arrested in November 2008. His first trial was held nine months later, on July 23, 2009. This trial ended in a mistrial after it was determined that a juror could not deliberate since she could not speak English. The mistrial was not attributed to any misconduct by the State or the defense. Defendant's second trial was held on April 13-15, 2010, less than nine months after the mistrial. Defendant has failed to demonstrate how his speedy trial rights were denied, how his attorney was deficient in any regard, or how he has been prejudiced. Defendant was brought to trial within reasonable time limits. Defendant's claim is without merit.

35. In Grounds Eleven and Twelve, Defendant claims that there was insufficient evidence to support his conviction on theft of a firearm (Ground Eleven) and reckless endangering first degree (Ground Twelve). Defendant was required to raise these issues on direct appeal and having failed to do so they are now procedurally barred pursuant to Rule 61(i)(2) and Rule 61(i)(3). On direct appeal, Defendant alleged that there was insufficient evidence to support his attempted murder conviction. There was nothing preventing Defendant from raising on direct appeal the alleged insufficiency of the evidence as to his other convictions as well. Defendant offers no explanation as to his failure to raise these other issues on direct appeal if he genuinely believed these issues had any merit. Moreover, under the facts of this case as set forth above, there was

⁴⁶ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, *2 (Del. Super. 2004)(conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).

sufficient evidence that a rational trier of fact could have convicted Defendant on the charges of theft of a firearm and reckless endangering first degree.

36. Finally, Defendant also appears to raise the issue that it was error for the theft of the handgun charge to be tried with the attempted murder and related charges. First, to the extent defendant has not alleged an ineffective assistance of counsel contention, this claim is procedurally barred by Rule 61(i)(2) and Rule 61(i)(3) for failure to raise this issue on direct appeal. If Defendant is raising an ineffective assistance of counsel contention, this claim would not be procedurally barred.⁴⁷ Whether or not this claim is procedurally barred, it is without merit.

37. As set forth above, the facts giving rise to the criminal charges arose from two incidents which occurred about a week apart. Both incidents involved the same two acquaintances. The theft of the handgun from Wilson was intertwined with and related to the events that occurred a week later when Defendant came looking for Wilson and shot at Holt when Holt would not disclose Wilson's whereabouts.

38. Under Superior Court Criminal Rule 8(a), a defendant may be tried simultaneously for two or more offenses if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Rule 8 must be read in conjunction with Superior Court Criminal Rule 14 which provides, in pertinent part, that if it appears that a defendant is prejudiced by a joinder of offenses, the court may elect to order separate trials of counts. The decision to grant or deny a

⁴⁷ *Malin v. State*, 2009 WL 537060, at *5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994)(the procedural requirement that a claim be raised on direct appeal to be preserved is not applicable to ineffective assistance of counsel claims).

severance of the offenses rests within the sound discretion of the trial court.⁴⁸ Defendant must demonstrate that there was a reasonable probability that “substantial injustice” would result from the joinder of offenses.⁴⁹ Defendant bears the burden of demonstrating such prejudice.⁵⁰

39. In the subject case, Defendant has not shown that any prejudice resulted from the joinder of the charges. Mere hypothetical prejudice is not sufficient.⁵¹ Moreover, where evidence concerning one crime would be admissible in the trial of another crime, as was the situation in the instant case, there is no prejudicial effect in having a joint trial.⁵² Indeed, when criminal incidents occurred within one week of each other and involved the same people in the same neighborhood being threatened or shot by the same person, there is no prejudice to the defendant from the joinder of the charges.⁵³ Here, Defendant’s claims of prejudice are unsubstantiated. Substantial injustice has not been demonstrated that would warrant a severance of these charges. Whether or not counsel was deficient for failing to move for a separate trial of the charges, Defendant cannot show that even had the motion been made, it would have been granted. Defendant cannot establish that a substantial injustice has resulted and, therefore, cannot establish prejudice as a result of counsel’s failure to make a motion for a separate trial of the charges.

40. In this case, for those claims that are procedurally barred, 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

⁴⁸ *Younger v. State*, 496 A.2d 546, 549-50 (1985).

⁴⁹ *State v. Hammons*, 2001 WL 1729119, at 2-3 (Del.Super.); *Bates v. State*, 386 A.2d 1139, 1141-42 (Del. 1978).

⁵⁰ *Id.*

⁵¹ *Bates*, 386 A.2d at 1142.

⁵² *Id.*

⁵³ *Dupree v. State*, 2004 WL 2154288 (Del.).

justice.” The “miscarriage of justice” exception is a “narrow one and has been applied only in limited circumstances.⁵⁴ The defendant bears the burden of proving that he has been deprived of a “substantial constitutional right.”⁵⁵ The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. The Court does not find that the “interests of justice” require it to consider the otherwise procedurally barred claims for relief.⁵⁶

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

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc: Prothonotary
cc: Dade D. Werb, Esquire
Santino Ceccotti, Esquire

⁵⁴ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

⁵⁵ *Id.*

⁵⁶ *Id.*