IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	I.D. No. 9905011124
v.	)	
	)	Cr. A. Nos. IN99-05-1368
GREGORY A. DENSTON,	)	IN99-05-1369R1
Defendant.	)	IN99-06-0603R1
	)	

Date Submitted: July 3, 2003
Date Decided: October 2, 2003

Upon Defendant's Pro Se Motion for Postconviction Relief: ***DENIED***.

ORDER

This 2nd day of October, 2003, upon consideration of the defendant's Motion for Postconviction Relief pursuant to Superior Court Criminal Procedure Rule 61, it appears to this Court that:

1. On January 5, 1998, the movant, Gregory A. Denston ("Defendant"), was indicted by a Grand Jury and charged with Attempted Murder First Degree and Possession of a Deadly Weapon During the Commission of a Felony (I.D. No. 9711014977). On November 29, 1997, he beat his wife in the head with a baseball bat while she was sleeping, nearly killing her and inflicting severe and permanent injuries. On the eve of trial, Defendant entered a guilty plea to both indicted

charges, but subsequently filed a motion to withdraw his plea. This Court denied his motion on November 4, 1998. On January 8, 1999, Defendant was sentenced to thirty years imprisonment. The Court denied his Motion for Modification of Sentence on June 3, 1999. Additionally, Defendant filed a Motion for Postconviction Relief on March 14, 2001, which was denied on February 28, 2002.

2. On May 19, 1999, Defendant was arrested and subsequently indicted by a Grand Jury on June 7, 1999, for one count of Attempted Murder First Degree in violation of Title 11, § 531 of the Delaware Code and for two counts of Criminal Solicitation First Degree in violation of Title 11, § 503 of the Delaware Code. These charges originated from several attempts, between November 1, 1998 and May 10, 1999, by the Defendant to hire someone to kill his wife, the same victim of his prior Attempted Murder First Degree conviction.

The evidence presented by the State indicated that, while serving his thirty-year term of incarceration, Defendant made contact with at least one inmate, James Trump, whom Defendant solicited to assist him in a plan to murder his wife. Defendant supplied Mr. Trump with detailed, written information about his wife, including a physical description, her address, social security number, place of employment, and type of vehicle she owned, and offered to pay $1,000 for the murder. After Mr. Trump reported Defendant's solicitation to prison officials, the

police arranged for Mr. Trump to provide the number of an undercover police officer to the Defendant.

On May 10, 1999, Defendant called the number of the undercover police officer twice and the conversations lasted for approximately ten minutes. Posing as a "hitman," the police officer was instructed by the Defendant to shoot his wife. He was also given directions to her place of employment, and informed as to terms of payment. Defendant's telephone call from prison was fully recorded, and while he conversed on the phone, he was observed by guards intentionally placed in the area by prison officials.

3. Defendant was scheduled to go to trial on these latest charges on January 6, 2000. The trial date was rescheduled to March 9, 2000, March 21, 2000, and September 19, 2000, and was continued each time, without objection by the Defendant, because the dates were incompatible for either the parties, or for the Court. Defendant filed a *pro se* motion on November 17, 2000 to disqualify counsel. On January 17, 2001, all parties appeared before the Court for trial. Because of the Rule 61 Motion for Postconviction Relief filed by Defendant in his prior case, he claimed a conflict with his Public Defender and requested a continuance. On January 25, 2001, the Court granted Defendant's motion to disqualify counsel and appointed Jerome M. Capone, Esquire.

Defendant appeared for trial on September 5, 2001, and in exchange for the charge of Attempted Murder First Degree against him being *nolle prossed*, he entered a guilty plea to the two counts of Criminal Solicitation First Degree. Pursuant to 11 *Del. C*. § 4204(k), Defendant was sentenced to ten years mandatory incarceration at Level V.

4. Defendant filed this *pro se* motion for postconviction relief on March 27, 2003, seeking to set aside a judgment of criminal conviction based on violations of his constitutional rights under the United States Constitution and the Delaware Constitution. Defendant asserts four grounds for relief in support of his contention that his rights have been violated. Defendant claims ineffective assistance of counsel as ground one, arguing that his plea was not knowingly, voluntarily and intelligently entered due to his representation.[1] As ground two, Defendant alleges that his trial counsel failed to investigate and interview witnesses.[2] Next, Defendant submits that his right to self-incrimination was violated because his trial counsel failed to file a motion to suppress statements made to the police.[3] Finally, as his fourth ground for relief, Defendant asserts that his constitutional right to a speedy trial was violated. [4]

[1] Defendant's Motion for Rule 61 Postconviction Relief, at 2 (hereinafter "Def. Mot. at ___.").
[2] Def. Mot. at 2.
[3] Def. Mot. at 4.
[4] Def. Mot. at 5.

5. By Order, dated April 2, 2003, the Court requested that: 1) Mr. Capone file an affidavit responding to Defendant's factual allegations of ineffective assistance of counsel pursuant to Rule 61 (g)(2) on or before May 2, 2003; 2) the Department of Justice file a legal memorandum in response to Defendant's instant motion, taking into account both Defendant's factual assertions in his motion and trial counsel's affidavit, pursuant to Rule 61 (f) on or before June 2, 2003; and 3) the Defendant file his reply to trial counsel's affidavit and to the State's response by July 2, 2003. All parties timely filed their requested responses.

6. Under Delaware law, when considering a motion for postconviction relief, this Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of defendant's postconviction relief claim.[5] To protect the integrity of the procedural rules, the Court should not consider the merits of a postconviction claim where a procedural bar exists.[6]

7. Upon initial review of Defendant's motion for postconviction relief, the Court finds that because Defendant's postconviction motion was filed within

[5] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. Super. Ct. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).
[6] *State v. Gattis*, 1995 WL 790961, at *3 (Del. Super. Ct.) (citing *Younger*, 580 A.2d at 554).

three years after the judgment of conviction became final,[7] he is not procedurally barred from relief under Rule 61 (i)(1). The time bar of Super. Ct. Crim. R. 61(i)(1) provides:

> A motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.[8]

Also, as this is Defendant's initial motion for postconviction relief for Cr. A. Nos. IN99-05-1368, IN99-05-1369R1, and IN99-06-0603R1, the bar of Rule 61(i)(2), which precludes consideration of any claim not previously asserted in a postconviction motion, does not apply either.

Rule 61(i)(4) provides that "[a]ny ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred unless consideration of the claim is warranted in the interest of justice." The "interest of justice exception of Rule 61 (i)(4) has

[7] Within the purview of Rule 61(i)(1), a conviction becomes final for purposes of postconviction review:
(a) for a defendant who takes a direct appeal of the conviction, when the direct appeal process is complete (the date of the issuance of the mandate under Supreme Court Rule 19); or
(b) for a defendant who does not take a direct appeal, when the time for direct appeal has expired (30 days after sentencing); or
(c) if the United States Supreme Court grants certiorari to a defendant from a decision of this Court, when that Court's mandate issues. *Jackson v. State*, 654 A.2d 829, 833 (Del. 1995).

[8] Super. Ct. Crim. R. 61(i)(1).

'been narrowly defined to require the movant to show that the trial Court lacked the authority to convict or punish [the movant].'"[9] The four grounds for relief contained in Defendant's postconviction motion were not formerly adjudicated. Therefore, Rule 61(i)(4) is also inapplicable as a bar to Defendant's claim for relief.

Rule 61(i)(3) contains another bar, by providing that "any ground for relief that was not asserted in the proceedings leading to the judgment of conviction…is thereafter barred, unless the movant shows (A) [c]ause for relief from the procedural default, and (B) [p]rejudice from violation of the movant's rights." Defendant's claims were not raised at the plea, sentencing, or on a direct appeal, and are therefore barred by Rule 61(i)(3), absent a demonstration of cause for relief from the default and prejudice. The Court notes that, despite the manner in which the Defendant has asserted four individual grounds in his motion, he has inextricably, and somewhat confusingly, intertwined the allegation of ineffective assistance of counsel claim to each of the four grounds.

In consideration of Defendant's grounds for relief, an allegation of ineffective assistance of counsel is a type of claim not subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal unless the claim was adequately

[9] *State v. Wright*, 653 A.2d 288, 298 (Del. Super. Ct. 1994) (citing *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990)).

raised in the lower court.[10] Therefore, whether it was an intentional, or an inadvertent attempt on the part of the Defendant to circumvent the procedural requirements of Rule 61(i)(3), the Court will consider Defendant's claims in the light most favorable to Defendant by addressing the applicability of each ground under the rubric of "ineffective assistance of counsel." In so liberally construing the requirements of Rule 61(i)(3), the Court acknowledges for the purposes of complying with the constructs of Rule 61(i)(3), that Defendant has alleged "cause" under the Rule for his failure to have raised these issues earlier. As such, Rule 61(i)(3) does not bar relief to these claims at this juncture should the Defendant demonstrate that his counsel was ineffective and that he was prejudiced by counsel's actions.

Lastly, the procedural bars of Rule 61 may potentially be overcome by Rule 61(i)(5), which provides that "[t]he bars to relief in paragraphs (1), (2), and (3) shall not apply to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction." This "fundamental fairness" exception contained in Rule 61(i)(5) is "a narrow one and has been applied only in limited circumstances, such as when the right relied

[10] *See* Supr. Ct. R. 8; *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986); *Harris v. State*, 293 A.2d 291, 293 (Del. 1972).

upon has been recognized for the first time after a direct appeal."[11] Defendant has not asserted a colorable claim of a miscarriage of justice in his motion. Therefore, Rule 61(i)(5) is not applicable.

8. As stated earlier, in consideration of Defendant's grounds for relief, an allegation of ineffective assistance of counsel is a type of claim not subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal unless the claim was adequately raised in the lower court.[12] To prevail on his claim of ineffective assistance of counsel, the Defendant must fulfill the two-prong test of *Strickland v. Washington*.[13]

First, a criminal defendant who raises an allegation of ineffective assistance of counsel must show that counsel's representation fell below an objective standard of reasonableness.[14] The defendant must demonstrate that counsel's performance was deficient.[15] This entails demonstrating that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[16] Further, it is the defendant's burden to show, under the

[11] *Younger*, 580 A.2d at 555.
[12] *See* Supr. Ct. R. 8; *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986); *Harris v. State*, 293 A.2d 291, 293 (Del. 1972).
[13] *Strickland v. Washington*, 466 U.S. 668 (1984); *accord Larson v. State*, 1995 WL 389718, at *1 (Del.); *Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992); *Albury v. State*, 551 A.2d 53, 58 (Del. 1988).
[14] *Strickland*, 466 U.S. at 688.
[15] *Id*. at 687.
[16] *Id*.

totality of the circumstances, that "counsel was so incompetent that the accused was not afforded genuine and effective legal representation."[17]

Second, under *Strickland*, a defendant must show that there is a reasonable degree of probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different; that is, he must show actual prejudice.[18] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[19] The defendant must illustrate that the deficient performance prejudiced the defense.[20] Stated another way, a defendant alleging prejudice must be able to show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[21] 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.[22]

A defendant's burden to establish a claim of ineffective assistance of counsel is difficult since there is a strong presumption that the attorney's conduct was professionally reasonable.[23] This standard is highly demanding.[24] In fairly assessing an attorney's performance, the standards enumerated in *Strickland*

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[17] *Renai v. State*, 450 A.2d 382, 384 (Del. 1982) (citations omitted).
[18] *Strickland*, 466 U.S. at 694.
[19] *Id*. at 687.
[20] *Id*.
[21] *Id*.
[22] *Righter v. State*, 704 A.2d 262, 264 (Del. 1997); *Younger*, 580 A.2d at 556; *Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989).
[23] *Albury*, 551 A.2d at 59 (citing *Strickland*, 466 U.S. at 689); *see also Larson*, 1995 WL 389718, at *1; *Flamer v. State,* 585 A.2d 736, 753 (Del. 1990).
[24] *Flamer*, 585 A.2d at 754.

require that "every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[25] Defendant must also "[o]vercome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."[26] Therefore, under *Strickland*, the Court's analysis must be comprised of two components: 1) whether defense counsel's performance was deficient; and if so, 2) whether the deficient performance resulted in prejudice that "so upset the adversarial balance between the defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."[27]

In this case, Defendant's ineffective assistance of counsel contention amounts to nothing more than conclusory claims and unfounded accusations. As to Defendant's claim that his guilty plea was not entered into knowingly, voluntarily, and intelligently, the Court has reviewed the plea agreement, the transcript of the plea and sentencing hearing, as well as the Truth In Sentencing Guilty Plea Form, and finds that Defendant's contentions are unsupported by the record in this case.

[25] *Strickland*, 466 U.S. at 689.
[26] *Id*.
[27] *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (quoting *Nix v. Whiteside*, 475 U.S. 157, 175 (1986)).

The basis for the entry of a guilty plea must appear on the record to permit appellate review.[28] In considering the proper procedures that are a condition precedent for the Court to accept a guilty plea, this Court has held that a "rigid, formalistic approach to compliance" is not necessary.[29] Numerous safeguards are afforded to the defendant offering a guilty plea. Prior to accepting a guilty plea, the trial judge must address the defendant in open court.[30] The judge must determine that the defendant understands the nature of the charges and the penalties provided for each of the offenses.[31] The record must reflect that the defendant understands that the guilty plea constitutes a waiver of a trial on the charges and a waiver of the constitutional rights to which he would have been entitled to exercise at trial.[32] The trial judge must also determine that a guilty plea is not the result of force, threats, or promises apart from the plea agreement, i.e., that it is voluntary.[33]

In this case, the record reflects that the Defendant indicated on the Truth-In-Sentencing Guilty Plea Form that he understood that the statutory penalty for Criminal Solicitation was up to five years incarceration and that the T.I.S. guideline was fifteen months at Level 5. Additionally, Defendant was informed

[28] *Sullivan v. State*, 636 A.2d 931, 937 (Del. 1994).
[29] *Patterson v. State*, 684 A.2d 1234, 1237 (Del. 1996).
[30] *Sullivan*, 636 A.2d at 937.
[31] *Id*.
[32] *Id*. (citing Super. Ct. Crim. R. 11(c)).
[33] *Id*. (citing Super. Ct. Crim. R. 11(d)); *Howard v. State*, 458 A.2d 1180, 1184-85 (Del. 1983).

on the plea agreement that, pursuant to 11 *Del. C*. § 4204(k), and in light of his prior conviction for attempting to murder his wife, the State recommended a mandatory five-year term of incarceration at Level V for each of the Criminal Solicitation First Degree convictions. Further, on the Truth-In-Sentencing Guilty Plea Form, Defendant indicated that he was satisfied with his counsel's representation in his criminal case, that his counsel had fully advised him of his rights, and that he was aware of the outcome of his guilty plea. During the guilty plea colloquy, the Defendant acknowledged to the Court that he had read and understood the Truth-In-Sentencing Guilty Plea Form, discussed the matter fully with his attorney, and was satisfied with his attorney's representation. The Defendant further denied that anyone had threatened or forced him to plead guilty nor was he promised anything to induce his guilty plea. With or without the witness oath, a defendant's statements to the Court during the guilty plea colloquy are presumed to be truthful.[34] Those contemporaneous representations by a defendant pose a "formidable barrier in any subsequent collateral proceedings."[35] In the absence of clear and convincing evidence to the contrary, Defendant is

[34] *Bramlett v. A.L. Lockhart*, 876 F.2d 644, 648 (8th Cir. 1989); *Davis v. State*, Del. Supr., No. 157, 1992, Walsh, J. (Dec. 7, 1992)(ORDER).
[35] *Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985)(quoting *Blackledge v. Allison*, 431 U.S. 63, 73 (1977)).

bound by his answers on the Truth-In-Sentencing Guilty Plea Form and by his sworn testimony prior to the acceptance of the guilty plea.[36]

What is more, Defendant had entered into a guilty plea to similar charges less than three years prior to the instant plea, while at the same time he had a motion for postconviction relief pending with the Court. Clearly, Defendant was familiar with his rights and waived them knowingly, voluntarily, and intelligently.

9. In a further attempt to impugn the effectiveness of his counsel's representation, Defendant argues that his counsel failed to investigate and to interview witnesses. Review of trial counsel's affidavit reflects that the Defendant and his counsel discussed tracking down so-called witnesses to support Defendant's contention of an entrapment defense. Trial counsel rationally advised Defendant that it would be most unlikely the Defendant would succeed in arguing that he was "not otherwise disposed" to have solicited to have his wife killed, since he was serving a thirty year sentence for having tried to kill her previously. Also, counsel recommended that invoking such a defense would be highly detrimental because it would open the door for the jury to learn of his first conviction for attempting to murder his wife. Defendant concurred with his counsel that the best trial strategy was to argue mere solicitation instead of actual attempted murder. Defendant also agreed with his counsel that he would take a plea to criminal

[36] *Fullman v. State*, Del. Supr., No. 268, 1988, Christie, C.J. (Feb. 2, 1988)(ORDER). *See Little v. Allsbrook*, 731 F.2d 238, 239-40, n.2 (4th Cir. 1984); *cf*. *Patterson v. State*, 684 A.2d 1234, 1238 (Del. 1996).

solicitation if offered to him since it would be advantageous. Contrary to Defendant's contentions, and as evidenced by the record, Defendant's claim that his counsel failed to investigate and interview witnesses is without merit.

10. In his third ground for relief, Defendant argues that his counsel failed to file motions to suppress statements that Defendant purportedly made to Mr. Trump, Detective Watson, and the police in violation of his right against self-incrimination. Based on the record in this case, trial counsel's affidavit, and the State's response, it is evident that there were no statements to suppress. Defendant's claim once again proves conclusory and unsupported by the facts. Suppression was not an issue in this case because the State had a tape recording of Defendant's telephone call from prison in which he blatantly, and voluntarily, solicited an undercover police officer to kill his wife. In addition, there was a correctional officer witness who observed the Defendant conducting the soliciting telephone call. The State was unaware of the existence of any admissions or statements made by the Defendant, did not disclose any such statements to the defense, and therefore, could not produce such non-existent statements at trial. Also, any statements Defendant may have made to Mr. Trump were not the outcome of a custodial interrogation. Therefore, Defendant's Miranda rights are not at issue and any purported motion to suppress would have failed. Moreover, because the case was resolved via a guilty plea, no statements were ever offered.

Hence, trial counsel's decision not to pursue frivolous motions to suppress non-existent statements is supporting evidence of his effective and diligent representation of the Defendant.

11. Defendant claims in his fourth ground for relief that he was denied his right to a speedy trial and that his counsel was ineffective because he failed to file a motion to dismiss for lack of a speedy trial. Specifically, Defendant alleges that the twenty-eight month delay between his arrest and his trial violated his constitutional right to a speedy trial. In determining if a defendant's right to a speedy trial has been abridged, this Court utilizes the four-factor test set forth by the United States Supreme Court in *Barker* ("*Barker* test") [37] and adopted by the Delaware Supreme Court in *Middlebrook*.[38] The *Middlebrook* Court held that, courts should consider four factors in determining if a defendant's right to a speedy trial have been violated: 1) the length of delay; 2) the reason for the delay; 3) the defendant's assertion of the right to a speedy trial; and 4) prejudice to the defendant. "None of the four factors is 'either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.' Rather, they 'are related factors and must be considered together with such other circumstances as may be relevant.'"[39]

[37] *Barker v. Wingo*, 407 U.S. 514 (1972).
[38] *Middlebrook v. State*, 802 A.2d 268, 273 (Del. 2002) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).
[39] *Middlebrook*, 802 A.2d at 273 (quoting *Barker*, 407 A.2d at 533). *See also Key v. State*, 463 A.2d 633, 637 (Del. 1983).

The State concedes that the length of delay in this case between the time the defendant was indicted and his trial date was substantial. Thus, an attenuated delay, according to the *Middlebrook* standard, raises the presumption of prejudice to the Defendant.[40] The State submits that eight months of the twenty-eight month period is attributable to Defendant's conduct. That being said, in each instance where a denial of the right to speedy trial is alleged, such an allegation must be evaluated in the milieu of the particular facts of the case.[41]

Turning to the reason for the delay, different weights are assigned to different reasons for the delay.[42] "Thus, a 'deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the [State],' while a 'more neutral reason such as negligence or overcrowded courts should be weighed less heavily' against the State."[43] In this case, the State asserts that there was initial difficulty in finding a suitable trial date that was convenient for both the parties and the Court. The first confirmed trial date that appears on the Court's docket is January 17, 2001, eighteen months after Defendant was indicted. The State attributes part of this delay to the overburdened court system. There is no indication or evidence of an intentional attempt by the State to prolong the

[40] *Middlebrook*, 802 A.2d at 274.
[41] *See Gattis v. State*, 697 A.2d 1174, 1181 (Del. 1997) (holding that under the facts of the case, a twenty eight month delay, although substantial, did not deny the defendant the right to speedy trial and that, delays not attributable to the State, should be subtracted from the time period in question).
[42] *Middlebrook*, 802 A.2d at 274 (citing *Barker*, 407 U.S. at 531).
[43] *Id*. at 274 (quoting *Barker*, 407 U.S. at 531).

proceedings. Further, on the above date, Defendant requested a continuance and fired his Public Defender. Defendant bears the burden of responsibility for a portion of the delay. Although negligence attributable to an overcrowded court system falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal trial, it is obviously to be weighed more lightly than a deliberate intent to damage the accused's defense.[44]

In the case at bar, the State and the Court's combined roles in contributing to a portion of the total delay of twenty eight months do not rise to the level of egregious neglect that existed in *Middlebrook*, i.e., six and one half months to rule on a motion to suppress and three continuances to allow defense counsel to take vacations, resulting in nine and one half months of delay. Weighing the factors that contributed to the delay attributable to the Court, the State, and the parties, this Court finds that all the participants are responsible to a degree, one no more heavily disproportionate than the other. The level of delay was neither outlandish nor unconscionable, nor can one party be held more responsible than the other.

Considering the third factor, "[i]f and when a defendant asserts his rights are factors of considerable significance in determining whether there has been a speedy trial violation."[45] Additionally, the "failure to assert the right will make it

[44] *Id*. (quoting *Doggett v. United States*, 505 U.S. 647 (1992)).
[45] *Bailey v. State*, 521 A.2d 1069, 1082 (Del. 1987).

difficult for a defendant to prove that he was denied a speedy trial."[46] On May 1, 2000, Defendant filed a *pro se* motion for speedy trial which was denied on the grounds that Defendant was represented by counsel and serving another sentence. He attempted to file another motion for speedy trial on March 23, 2001. This transpired two months after the trial had been continued at Defendant's request. His trial counsel received a copy of Defendant's request but did not file a motion for speedy trial.

It appears that Defendant attempted to assert his right to speedy trial in a timely fashion. Yet, in many cases, as a tactical measure, trial delay is to a defendant's advantage. His trial counsel's failure to file a motion for speedy trial is probable evidence of his counsel effecting a sound trial strategy in furtherance of the best interests of his client. In many situations where clients face extended prison terms and their defense is strained, defense attorneys, as a strategic ploy, do not pursue speedy trial motions. Memories often fade and witnesses are lost or disappear – elements beneficial to a defendant with a weak defense and facing incriminating evidence.

Defendant's counsel was most likely exercising prudent trial strategy in not pushing the speedy trial issue to the forefront of Defendant's case. It is significant to note that Defendant made no other protestations during the twenty-eight month

[46] *Barker*, 407 U.S. at 532.

period to assert his speedy trial rights, especially at the time he entered his guilty plea. Thus, the Court finds that Defendant's assertion of his right to a speedy trial, though asserted by Defendant twice, does not weigh in his favor because, in actuality, it may have worked to his advantage as a positive trial strategy.

Finally, in considering the fourth factor of potential prejudice to the Defendant, the prejudice prong should be considered in light of three of Defendant's interests that the speedy trial right was designed to protect: 1) preventing oppressive pretrial incarceration; 2) minimizing the anxiety and concern of the accused; and 3) limiting the possibility that the defense will be impaired.[47]

The first interest is not applicable to Defendant because he was already serving a thirty-year term of incarceration and would have been incarcerated apart from the speedy trial disposition of the instant case. Defendant's brief does not raise the issue of the second interest – anxiety and concern of the accused – but the Court shall address this issue as well.[48] The record does not reflect any evidence that Defendant suffered anxiety or concern from the delay of his trial. There are no indicia of Defendant having been presumptively prejudiced by "living under a cloud of anxiety."[49]

[47] *Middlebrook*, 802 A.2d at 276; *Barker*, 407 U.S. at 532.
[48] *Bailey*, 521 A.2d at 1082 ("The defendant did not raise any arguments under the first two interests [, but w]e shall address all three.").
[49] *Middlebrook*, 802 A.2d 276-77.

The final interest – impairment of Defendant's defense – has been recognized by the Delaware Supreme Court as "[t]he most serious . . . because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."[50] Further, "[n]ot only is impairment of a defendant's defense the most serious type of prejudice, but it is also 'the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'"'"[51] As such, Defendant is unable to indicate, with any justifiable particularity, that he has suffered harm, or present any evidence to demonstrate that his defense was "impaired." Defendant maintains in a conclusory manner that he was hampered in securing witnesses on his behalf due to the delay. This allegation is in direct contradiction to the facts surrounding his case.

The Court is bemused by Defendant's contention that he "had a right to secure and present witnesses on his behalf and to present a defense at trial."[52] Such a constitutional right is unmistakably guaranteed, but given the facts of the crime, any witnesses (Peter Brown) Defendant may have had at the time his crime was committed, would have been incarcerated, or at best, on probation at a later date, making them accessible. In addition, trial counsel's affidavit indicates that Defendant agreed with his counsel's reasoning to enter a plea to two counts of

[50] *Id*. at 277 (quoting *Barker*, 407 U.S. at 532).
[51] *Id*. (quoting *Doggett*, 505 U.S. at 655).
[52] Def. Mot. at 5.

Criminal Solicitation First Degree if it was offered by the State. Therefore, locating Peter Brown for the trial date was not an issue as the State *nolle prossed* the charge of Attempted Murder First Degree against him in exchange for his guilty plea to two counts of Criminal Solicitation First Degree.

While witnessed by correctional officers, Defendant was tape-recorded making a voluntary solicitation to arrange the murder of his wife. Based on these immutable facts alone, there is not much any witness could have contributed to mitigate the strength and impact of the State's evidence. Thus, Defendant has not succeeded in manifesting any specific prejudice or that his defense was presumptively impaired.

"What constitutes a speedy trial varies depending upon the facts of the individual case."[53] To determine whether a speedy trial violation has transpired, a court must utilize a balancing test in which the conduct of both the prosecution and defendant are weighed.[54] After performing the requisite balancing test and examining the facts of the case, the Court finds that none of the four factors of the *Barker* test weigh in favor of the Defendant. Defendant's right to a speedy trial guaranteed by both the Sixth Amendment of the United States Constitution and Article 1, § 7 of the Delaware Constitution has therefore not been violated.

[53] *Barker*, 407 U.S. at 530.
[54] *Id*.

Defendant has failed to substantiate a basis for relief with regard to the effectiveness of his trial counsel's representation in general, or concerning any specific allegations comprising the four grounds in his motion for postconviction relief. Having concluded that defense counsel's behavior was not below the objective standard of reasonableness, the Court need not consider the second-prong of actual prejudice under *Strickland* (reasonable degree of probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different).[55] Moreover, the Court will not address claims for relief and prejudice that are conclusory and unsubstantiated.[56] In essence, Defendant's claim of ineffective assistance of counsel is without merit and there was no denial of Defendant's fundamental constitutional rights.

12. In conclusion, within the parameters of Rule 61 (i)(3), Defendant's motion is procedurally barred because he has failed to demonstrate "(A) [c]ause for relief from the procedural default, and (B) [p]rejudice from violation of the movant's rights." Additionally, under *Strickland*, Defendant has failed to prove that his counsel's representation was anything less than effective. Thus, the motion must be denied on procedural and substantive grounds.

[55] *Strickland*, 466 U.S. at 694.
[56] *Zimmerman v. State*, 1991 WL 190298, at *1 (Del. Super. Ct.) (citing *State v. Conlow*, 1990 WL 161241, at *3 (Del. Super. Ct.)).

For all the foregoing reasons, Defendant's Motion for Postconviction Relief Pursuant to Superior Court Rule 61 is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Gregory A. Denston
Caroline Lee Cross, Esquire
Jerome M. Capone, Esquire
Presentence
Prothonotary