

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN  
AND FOR THE NEW CASTLE COUNTY**

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|--------------------|---|----------------------------------|
| STATE OF DELAWARE, | ) | CR.A.NOS.: IN04-12-1429R1; IN04- |
|                    | ) | 12-1430R1; IN04-12-1431R1; IN04- |
| v.                 | ) | 12-1432R1; IN04-12-1433R1; IN04- |
|                    | ) | 12-1435R1; IN04-12-1436R1.       |
| ALBERTO M. LAW,    | ) |                                  |
|                    | ) | DEF. I.D.: 0412009863            |
| Defendant.         | ) |                                  |

Date Submitted: July 3, 2008  
Date Decided: August 7, 2008

*Upon Consideration of  
Defendant's Pro Se Motion for Postconviction Relief.*

**DENIED.**

**ORDER.**

This 7<sup>th</sup> day of August, 2008, upon consideration of the Motion for Post-Conviction Relief brought by Alberto M. Law (“Defendant”), it appears to the Court that:

1. On December 13, 2005, following a jury trial, Defendant was found guilty of Felony Murder First Degree, Murder Second Degree, three counts Possession of a Firearm During Commission of a Felony, Attempted Robbery First Degree, and Conspiracy Second Degree. On February 17, 2006, Defendant was

sentenced to life in prison plus twenty-seven (27) years.<sup>1</sup>

2. On direct appeal, Defendant challenged the sufficiency of the evidence used to convict him. He argued, specifically, that his convictions should be overturned because they were based on the uncorroborated testimony of his accomplice. Defendant also argued that the trial court committed plain error when it instructed the jury on accomplice liability. On April 25, 2007, the Delaware Supreme Court issued an order that rejected Defendant's arguments and affirmed his convictions and sentence.<sup>2</sup>

4. Defendant filed this *pro se* motion for postconviction relief on April 16, 2008. He raises several grounds for relief, two of which are based on ineffective assistance of counsel.<sup>3</sup> He contends that he is entitled to relief because: (1) there was not sufficient evidence to enable the jury to convict him on the felony murder count; (2) his counsel failed to file a suppression motion; (3) his counsel did not sufficiently investigate the case or subpoena witnesses to testify on his behalf; and (4) his counsel

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<sup>1</sup> D.I. 23 at 15-17.

<sup>2</sup> D.I. 28 at 4.

<sup>3</sup> D.I. 39 at 3. Defendant's motion consists primarily of conclusory statements and accusations. He offers no explanation, authority, or facts to support his claims. Defendant has left to the Court the work of attempting to discern what facts and legal basis might give rise to a claim. Given the very serious nature of the charges of which Defendant was convicted, the Court will address the claims on the merits even though summary dismissal would be appropriate under the circumstances.

failed to correspond with the Defendant “about the grounds raised on direct appeal.”<sup>4</sup>

5. Rule 61(g)(2) permits the Court to direct counsel to supplement the record in response to a defendant’s claims of ineffective assistance of counsel. In light of Defendant’s claims here, the Court requested Defendant’s counsel (“Counsel”) to supply an affidavit as contemplated by Rule 61(g)(2). Counsel submitted his affidavit on July 3, 2008.

**A. Standard of Review**

6. Before addressing the merits of any postconviction relief motion, the Court must first determine whether the claims pass through the procedural filters of Superior Court Criminal Rule 61 (“Rule 61”). To protect the integrity of the procedural rules, the Court will not address the substantive aspects of the claims if Defendant’s claims are procedurally barred.<sup>5</sup> Rule 61 imposes four procedural imperatives on Defendant’s motion: (1) the motion must be filed within one year of

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<sup>4</sup> Defendant also attempts to raise a constitutional claim, complaining that his right to protection from “double jeopardy” was violated because he was convicted of both First Degree Felony Murder and Second Degree Murder. This issue does not warrant discussion because it is clear Defendant has not raised a legitimate “double jeopardy” issue. *See Abney v. United States*, 431 U.S. 651, 660-61 (1977) (explaining that “the Double Jeopardy Clause protects an individual against being twice convicted for the same crime . . . . It is a guarantee against being twice put to trial for the same offense . . . [not] from being twice punished . . . .”); *Johnson v. State*, 709 A.2d 1158 (Del. 1998)(no double jeopardy violation for conviction of predicate felony and felony murder).

<sup>5</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990)(“It is well-settled that the Superior Court and this Court must address the procedural requirements of Rule 61 before considering the merits of this motion”).

a final order of conviction;<sup>6</sup> (2) any basis for relief must have been asserted previously in any prior postconviction proceedings; (3) any basis for relief not asserted in the proceedings below as requires by the court rules is subsequently barred unless defendant can show cause and prejudice; and (4) any ground for relief must not have been formerly adjudicated in any proceeding unless warranted in the interest of justice. Under Rule 61(i)(5), a defendant may avoid the first three procedural imperatives if the claim is jurisdictional or is “a colorable claim that there was a miscarriage of justice because of a constitutional violation.”<sup>7</sup>

7. Defendant’s argument claiming there was insufficient evidence to convict him of Felony Murder is procedurally barred under Rule 61(i)(4). In its decision affirming Defendant’s convictions, the Supreme Court stated “[a]pplying . . . settled law, we conclude that there was sufficient evidence to support [the Defendant’s] convictions.”<sup>8</sup> Because the Supreme Court formerly adjudicated this

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<sup>6</sup> Superior Court Criminal Rule 61(m) states that judgment of conviction is final for the purposes of postconviction review under the following circumstances:

(1) if the defendant does not file a direct appeal, 30 days after the Superior Court imposes sentence; (2) if the defendant files a direct appeal or there is an automatic statutory review of a death penalty, when the Supreme Court issues a mandate or order finally determining the case on direct review; or (iii) if the defendant files a petition for certiorari seeking review of the Supreme Court’s mandate or order, when the U.S. Supreme Court issues a mandate or order finally disposing of the case on direct review.

<sup>7</sup> SUPER. CT. CRIM. R. 61(i)(5).

<sup>8</sup> D.I. 28 at 4.

claim, this Court is procedurally barred from considering it.<sup>9</sup>

8. The additional claims raised by Defendant in his motion are not procedurally barred and can be decided on their merits.<sup>10</sup> The motion is timely because the Supreme Court issued its “final order of conviction” on May 11, 2007 and Defendant filed this motion on April 16, 2008. This is Defendant’s first motion for postconviction relief.

**B. Ineffective Assistance of Counsel**

9. The Court’s analysis of an ineffective assistance of counsel claim is governed by the two part test set forth in *Strickland v. Washington*.<sup>11</sup> Defendant “must show that his counsel’s representation fell below an objective standard of reasonableness, and that but for his counsel’s errors, the outcome of the trial would have been different.”<sup>12</sup> “[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant *affirmatively prove prejudice*.”<sup>13</sup> The court need not address both prongs if the

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<sup>9</sup>SUPER. CT. CRIM. R. 61(i)(4).

<sup>10</sup>*Cook v. State*, 758 A.2d 933 (Del. 2000)(claims of ineffective assistance of counsel may constitute “cause” under Rule 61(i)(3)).

<sup>11</sup>466 U.S. 668 (1984)

<sup>12</sup>*Guinn v. State*, 882 A.2d 178, 181 (Del.2005)(citing *Strickland*, 466 U.S. at 688, 694).

<sup>13</sup>*Albury v. State*, 551 A.2d 53, 60 (Del.1988)(quoting *Strickland*, 466 U.S. at 693)(emphasis supplied in original)).

defendant makes an insufficient showing on one.<sup>14</sup>

10. Defendant's motion does not establish a legitimate claim of ineffective assistance of counsel because the first requirement of the *Strickland* test is not satisfied by any of the claims procedurally allowed by Rule 61. As to the first ineffective assistance claim, Defendant has failed to indicate the specific evidence that his counsel should have sought to suppress. In his affidavit, Counsel states that "[t]here was no motion to suppress evidence filed since there was no evidence to suppress, physical or otherwise."<sup>15</sup> He explains that the State's case against the Defendant consisted primarily of eyewitness testimony. According to counsel, Defendant was convicted because the jury evidently believed the testimony of his accomplice, which was supported by an eyewitness, over the testimony of the Defendant.<sup>16</sup> The murder weapon was never found and no other physical evidence was presented at trial. Moreover, no motion to suppress testimonial evidence was warranted because "Defendant's statement of 12/13/2004 was voluntarily given after his *Miranda* warnings and in the presence of his mother, Rosa Glover."<sup>17</sup> The

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<sup>14</sup>*Strickland*, 466 U.S. at 697(explaining that a court may address either the performance prong or the prejudice prong first).

<sup>15</sup> D.I. 33 at 10.

<sup>16</sup> *Id.* at 9-10.

<sup>17</sup> *Id.*

eyewitness testimony was not in any way coerced or otherwise illegally obtained. Defendant has failed to show that Counsel's decision not to file a motion to suppress evidence was "below an objective standard of reasonableness."

11. In addition, the accusation that Counsel failed to "investigate" the case also fails to establish a claim of ineffective assistance of counsel. First, the Court notes that such broad claims of ineffective assistance of counsel have regularly been rejected as conclusory and unsubstantiated.<sup>18</sup> Moreover, Counsel states that when Defendant was held at the New Castle County Correction Center he visited the Defendant and describes those visits as "open, often, and lengthy."<sup>19</sup> When Defendant was transferred to Gander Hill Prison, Counsel stated that he visited him "numerous times" to discuss the case and defense strategy.<sup>20</sup> Counsel states that both the Defendant and his mother were kept abreast of the progress of the case.<sup>21</sup> Counsel provided a detailed list (almost three pages in length) of the discovery provided to him by the State, and said that "[t]hey provided defense counsel with non-

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<sup>18</sup>See e.g. *State v. Jordan*, 1994 WL 637299, at \*3 (Del.Super.Ct. June 23, 1994)("This Court need not address Postconviction Relief claims that are conclusory and unsubstantiated.")(citations omitted).

<sup>19</sup>D.I. 33 at 8.

<sup>20</sup>*Id.* at 9.

<sup>21</sup>*Id.*

discoverable items well in advance of trial for his review.”<sup>22</sup> He “[submits] that [he] had ample discovery well in excess of that required by Superior Court Rule 16.”<sup>23</sup> As an explanation for why he did not call more witnesses, Counsel states:

[When he was arrested, Defendant told three different stories to the police, the] final version . . . was that they confronted the deceased, followed him, and James McDougal had the gun, and shot him twice. Thus, at the time of his arrest, [Defendant] chose his own defense. That defense was not alibi, mistaken identity, extreme emotional distress, or not-guilty by reason of mental illness . . . . This crime was a “whodunit” . . . . This case involved two of the three witnesses of the shooting. Each testified that the other Defendant did the shooting that they both witnessed.<sup>24</sup>

12. The facts, provided by Counsel and uncontradicted by Defendant, illustrate that Counsel’s investigation and preparation for trial did not fall below an objective standard of reasonableness and cannot give rise to a claim of ineffective assistance of counsel.

13. Finally, Defendant’s claim based on the declaration that Counsel did not correspond with him concerning the direct appeal is not supported by the record and, in fact, contradicts it. Counsel mailed a copy of a draft of the opening brief to

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<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 9.



Defendant, but Defendant refused to accept the mail.<sup>25</sup> As a consequence, the brief was mailed back to counsel without any input from Defendant.<sup>26</sup> Given Defendant's refusal to communicate with his attorney, any claim of ineffective assistance of counsel necessarily must fail.

14. Based on the forgoing, Defendant's motion for postconviction relief is **DENIED.**

**IT IS SO ORDERED.**

**/s/ Joseph R. Slights, III**  
Judge Joseph R. Slights, III

Original to Prothonotary

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<sup>25</sup> *Id.*, Ex. A (Counsel provided a copy of the envelope containing the brief in which the words "Return to Sender" were stamped because it was "Refused").

<sup>26</sup> *Id.*