IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	I.D. No. 93003649DI
v.	)	
	)	Cr.A.#ID PN93-04-0454;
ARTURO LABOY,	)	IN93-04-0454R1,
Defendant.	)	0455R1, 0457R1,
	)	0458R1, 0459R1,
	)	0460R1
	)	

Date Submitted: April 30, 2003
Date Decided: July 1, 2003

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

ORDER

This 1st day of July, 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 April 12, 1993, the movant, Arturo Laboy ("Defendant"), was indicted by a Grand Jury and charged with Attempted Murder First Degree in violation of Title 11, § 531 of the Delaware Code, Assault Second Degree in violation of Title 11, § 612 of the Delaware Code, Burglary Second Degree in violation of Title 11, § 825 of the Delaware Code, two counts of Possession of a

Deadly Weapon During the Commission of a Felony in violation of Title 11, § 1447 of the Delaware Code, Stalking in violation of Title 11, § 1312 of the Delaware Code, and Terroristic Threatening in violation of Title 11, § 621 of the Delaware Code.

2. Before his trial date, the State offered the Defendant a plea bargain agreement whereby, if the Defendant plead guilty to attempted murder first degree, the State would recommend to the Court that Defendant receive a minimum mandatory sentence of twenty five years. The Defendant rejected the plea bargain agreement.

3. After a three-day jury trial, the Defendant was convicted of all of the above offenses except the burglary second degree and the attempted murder first degree charges. In addition, the jury found the Defendant guilty of assault first degree, a lesser included offense of attempted murder second degree. Upon the State's recommendation of fifty years incarceration at Level V, this Court sentenced the Defendant to a total of forty one and one half years at Level V (twenty five of which were mandatory under Title 11 § 1447), one year at Level III, and one and one half years at Level II.

4. Defendant filed a Motion for Reduction of Sentence on August 4, 1994. This Court denied the motion on August 9, 1994. On June 23, 1995, upon Defendant's direct appeal of his sentence to the Delaware Supreme Court, the

Court affirmed, finding no error of law or abuse of discretion in the trial court's sentencing.[1] The Court noted, and the Defendant conceded, "[t]hat his sentence was under the statutory maximum (62 years), although his 41½ - year sentence at Level V exceeded guidelines established by the Delaware Sentencing Accountability Commission ("SENTAC")."[2] The Court based its holding on the determination that the sentence was within the statutory limits prescribed by the legislature even though it exceeded SENTAC guidelines, and, therefore, Defendant had no constitutional right of appeal.[3] The Court further stated that, '[t]his Court will not find error of law or abuse of discretion unless it is clear from the record below that a sentence was imposed on the basis of demonstrably [impermissible factors.].'[4] Despite Defendant's contention that the prosecutor's remarks at the sentencing proceeding resulted in a sentence imposed in violation of the Due Process Clauses of the United States and Delaware Constitutions, the Court pointed out that the trial judge relied on a clear delineation of factors in imposing Defendant's sentence, i.e., extreme cruelty, the need for correctional treatment, undue depreciation of the offense, prior abuse of the victim, and vulnerability of the victim.[5]

[1] *Laboy v. State*, 663 A.2d 487 (Del. 1995).
[2] *Id*.
[3] *Id*. (citing *Gaines v. State*, 571 A.2d 756, 767 (Del. 1990)).
[4] *Id*. (quoting *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992)); *Ward v. State*, 567 A.2d 1296, 1297 (Del. 1989).
[5] *Id*.

5. On February 26, 2001, some six and one half years later, Defendant filed his second Motion for Reduction of Sentence on the ground that the sentence was excessive because it was eighteen years greater than the twenty five year plea offered by the State. The Office of the Prothonotary inadvertently forwarded a courtesy copy of Defendant's motion to Judge Norman A. Barron for judicial review. Judge Barron, within days of retiring from the Court at that time, was the judge who had presided over Defendant's original trial. He also sentenced the Defendant and had been the assigned judge handling all of Defendant's post trial proceedings, motions and requests. By Order dated February 27, 2001, Judge Barron granted the motion in part, reducing the sentence imposed in Cr.A. No. IN93-04-0458 (PDWDCF) from twenty years at Level V to five years at Level V.

6. The original of Defendant's motion was properly forwarded to the new judge assigned to Defendant's matter, Judge Peggy L. Ableman, on March 5, 2001. Judge Ableman had been reassigned by the Court to the case. At that time, Judge Ableman considered the Defendant's same Motion for Reduction of Sentence and denied the motion because it was filed 90 days after the imposition of the sentence and was, therefore, time-barred. The Court also found a lack of extraordinary circumstances in support of ameliorating the time-bar requirement.

7. In the ensuing State's Motion to Vacate Order, dated March 20, 2001, the State requested that, in the absence of extraordinary circumstances, and in

consideration of the Court's order dated March 5 and February 27, the Court should vacate the February 27, 2001 Order.

8. Accordingly, on March 21, 2001, the Court vacated the February 27, 2001 Order that granted the Defendant's motion in part as to Cr.A. No. IN93-04-0458. The Court ordered that the original sentencing order, dated May 13, 1994, was still in effect and that it was consistent with the Court's March 2, 2001 Order as the original of the motion was forwarded to the Court.

9. On October 17, 2002, Defendant filed *pro se* a Writ of Habeas Corpus. Upon consideration of Defendant's history, the record in the case, and the motion, this Court denied Defendant's petition for relief because he had failed to state a claim upon which such a writ may be issued. Further, it ruled that the relief requested is not properly granted through a writ of habeas corpus.

10. Defendant has filed this *pro se* motion for postconviction relief on April 30, 2003, wherein he seeks 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 sets forth "error of law" as his sole ground for relief. He contends that this Court did not have the authority to vacate its February 27, 2001 order that granted, in part, Defendant's Rule 35(b) motion, reducing his sentence with respect to Cr.A. No. IN93-04-0458 from twenty years to five years. Defendant bases this contention on "new controlling case law" as set

forth in *State v. Lewis*, [6] and invokes Super. Ct. Crim. R. 61(i)(5) as the mechanism "which in fact opens the door" for his argument as to an error of law.

11. 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.[7] To protect the integrity of the procedural rules, the Court should not consider the merits of a postconviction claim where a procedural bar exists.[8]

12. Upon initial review of Defendant's motion for postconviction relief, the Court finds that Defendant has failed to successfully overcome the procedural hurdles imposed by Rule 61. First, because this postconviction motion was filed more than seven years after the judgment of conviction became final, he is 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

[6] *State v. Lewis*, 797 A.2d 1198 (Del. 2002).
[7] *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)).
[8] *State v. Gattis*, 1995 WL 790961, at *2 (citing *Younger*, 580 A.2d at 554).

> after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.[9]

Since the instant motion was filed more than three years after his conviction became final [10] and Defendant has not asserted a new retroactive rule under any circumstance, his motion is procedurally barred under Rule 61(i)(1).

13. The Rule 61 time bar is not an *absolute* prohibition to post-conviction relief petitions filed three years after conviction.[11] Rule 61(i) (5) may potentially overcome the procedural bars of Rule 61. Rule 61(i)(5) "[i]s a general default provision, and permits a petitioner to seek relief if he or she was otherwise procedurally barred under Rules 61(i)(1)-(3)."[12] Rule 61(i)(5) provides:

> The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall 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]

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

[10] 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).

[11] *Bailey*, 588 A.2d at 1125 (citing *Boyer v. State*, 562 A.2d 1186, 1188 (Del. 1989)).

[12] *Bailey*, 588 A.2d at 1129.

[13] Super. Ct. Crim. R. 61(i)(5).

The "miscarriage of justice" or "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 upon has been recognized for the first time after a direct appeal."[14] This exception may also apply to a claim that there has been a mistaken waiver of fundamental constitutional rights, such as a mistaken waiver of rights to trial, counsel, confrontation, the opportunity to present evidence, protection from self-incrimination and appeal.[15] Accordingly, when a petitioner puts forth a colorable claim of mistaken waiver of important constitutional rights, Rule 61(i)(5) is available to him.[16]

14. Since the Defendant is procedurally barred under Rule 61(i)(1), his only alternative means of relief is to proceed under Rule 61(i)(5).[17] As such, "[i]n a postconviction proceeding, *the petitioner has the burden of proof* and must show that he has been deprived of a substantial constitutional right before he is entitled to any relief."[18] In other words, '[t]he petitioner bears the burden of establishing a 'colorable claim' of injustice. (citation omitted). While 'colorable claim' does not necessarily require a conclusive showing of trial error, mere 'speculation' that a

[14] *Younger*, 580 A.2d at 555 (citing *Teague v. Lane*, 489 U.S. 288, 297-99 (1989))(emphasis added).
[15] *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992).
[16] *Id*. (citing comparatively *Younger v. State*, 580 A.2d 552, 555 (Del. 1990)) (denoting that fundamental fairness exception of Rule 61(i)(5) applies where petitioner shows he was deprived of a substantial constitutional right).
[17] Defendant is procedurally barred under Rule 61(i)(2) as his ground for relief was not asserted in a prior postconviction proceeding and consideration of his claim is not warranted in the interest of justice. Defendant is procedurally barred under Rule 61(i)(3) because his claim is not related to the proceedings leading to the judgment of conviction. Finally, Defendant is procedurally barred under Rule 61(i)(4) because his ground for relief was not formerly adjudicated in any pre or post conviction proceeding.
[18] *Bailey*, 588 A.2d at 1130 (citing *Younger v. State*, 580 A.2d 552, 555 (Del. 1990)) (emphasis added).

different result might have [sic] obtained certainly does not satisfy the requirement."[19] Defendant has made no claim that the court lacked jurisdiction. He therefore has the burden of presenting 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.

If a movant presents a genuine "colorable claim," it will be sufficient to avoid dismissal of the claim and will require the Court to examine the evidentiary issues. Once a movant makes a showing that he is entitled to relief, thereby avoiding summary dismissal of his motion,[20] an evidentiary hearing is not necessarily required.[21] The Court may instead elect to examine the evidentiary issues presented in the submissions of the party and in the record without a hearing. Also, whether the movant has presented a "colorable claim" may be determined on the basis of the postconviction motion itself, prior to any responses being filed. Finally, the question of whether a movant has presented a "colorable

[19] *State v. Getz*, 1994 WL 465543, at *11 (Del. Super. Ct.).
[20] Super. Ct. Crim. R. 61(d)(4) states:
Summary dismissal. If it plainly appears from the motion for postconviction relief and the record of 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.
[21] Super. Ct. Crim. R. 61(h) states in part:
Evidentiary hearing. (1) Determination by court. After considering the motion for postconviction relief, the state's response, the movant's reply, if any, the record of prior proceedings in the case, and any added materials, the judge shall determine whether an evidentiary hearing is desirable… (3) Summary Disposition. If it appears that an evidentiary hearing is not desirable, the judge shall make such disposition of the motion as justice dictates.

claim" is a question of law that is reviewed by the Delaware Supreme Court *de novo*.[22]

15. Turning to the substantive claim of Defendant's motion, in essence the Defendant states that, based on the *Lewis* court's interpretation of the "extraordinary circumstances" exception contained in Superior Court Criminal Rule 35(b), this Court committed an error of law by vacating an order that reduced his sentence in part, and reinstating his original sentence. The Court vacated its order, thereby denying Defendant's motion for reduction of sentence and reinstating his original sentence, because Defendant's Rule 35(b) motion was filed after the 90-day time bar. Rule 35(b) provides, in pertinent part, "[t]he court may reduce a sentence of imprisonment on a motion made within 90 days after the sentence is imposed . . . . The court will consider an application made more than 90 days after the imposition of sentence only in extraordinary circumstances or pursuant to 11 *Del. C*. § 4217."[23] In fact, after Defendant's timely-filed, first motion for reduction of sentence was denied in 1994, and after his direct appeal of his sentence was affirmed by the Supreme Court, he waited seven years to file another motion for reduction of sentence.

Upon examining the record, the Court finds that Defendant's contention is lacking in both substance and merit for two reasons. First, Defendant's reliance on

[22] *Webster*, 604 A.2d at 1366.
[23] Super. Ct. Crim. R. 35(b).

Lewis is misplaced. Roy Lewis sought to modify his sentence for second degree assault *after* the terms of his sentence had expired so that he would not be subject to federal deportation laws. The Delaware Supreme Court affirmed this Court's granting of Lewis' motion for modification of his sentence because the potential for deportation and subsequent hardships on Lewis' family constituted "extraordinary circumstances" within the meaning of Rule 35(b).[24] In *Lewis*, this Court had identified certain tangible, weighty factors that it viewed as promulgating "extraordinary circumstances" that prompted the Court to exercise its discretion in granting the modification of Lewis' sentence. They included: 1) the nature of the original sentence; 2) the time defendant spent actually incarcerated; 3) possible deportation of defendant; and 4) the hardship on innocent persons that would result from defendant's deportation, viewed collectively.[25]

Unlike Roy Lewis, Defendant is still incarcerated and serving out the terms of his sentence. Additionally, and more significantly, within the last nine years Defendant has not manifested, nor has he presented to this Court, any indicia of "extraordinary circumstances" as enumerated in the context of Rule 35(b) that would galvanize the Court to consider a reduction of sentence and to discount the 90-day time bar. Lewis faced potential deportation. Defendant has failed to substantiate any circumstances of equal or even lesser hardship.

[24] *Lewis*, 797 A.2d at 1202.
[25] *State v. Lewis*, 2000 WL 33113932, at *3 (Del. Super. Ct.).

Secondly, it is well established that Rule 35(b) affords the Court a wide spectrum of discretionary jurisprudence in determining whether a reduction of sentence is warranted on a case by case analysis. For example, in *Lewis*, the Supreme Court recognized that, "[w]hile Rule 61 may provide relief comparable to a writ of *habeas corpus* or *coram noblis*, Rule 35(b), as it exists subsequent to the promulgation of Rule 61, appears on its face to permit a reduction of sentence at the discretion of the sentencing court."[26] In furtherance of the recognition of the expansive discretionary power at the Court's disposal, the Supreme Court pointed out that, "[t]he Delaware rule [Rule 35(b)], which clearly allows defendants to move for a reduction of their sentence, obviously grants trial judges broader discretion than its federal counterpart [Fed. R. Crim. Pro. 35(b)]."[27]

Hence, notwithstanding any inadvertence on the part of the Court in issuing the February 27, 2001 order that reduced Defendant's sentence in part, it is well within the discretionary purview of this Court to vacate the same order when there is no evidence presented to substantiate the statutory "extraordinary circumstances" exception in Rule 35(b) invoked in conjunction with the 90-day time bar.[28] Moreover, that Order reducing Defendant's sentence was entered by a

[26] *Lewis*, 797 A.2d at 1201.
[27] *Id*. at 1202.
[28] *See generally Defoe v. State*, 750 A.2d 1200 (Del. 2000) (holding that claims to correct a sentence that were submitted more than ninety days after the imposition of the sentence were time barred where defendant made no showing of extraordinary circumstances to overcome the filing requirement); *Webster v. State*, 795 A.2d 668 (Del. 2002) (affirming denial of guilty pleading defendant's third motion for modification of judgment of sentence since defendant's motion was repetitive and late with no showing of extraordinary circumstances for being late).

retiring judge, after reassignment to a new judge, and was entered on a form of Order erroneously sent by the defense as a courtesy copy. The motion was not assigned to Judge Barron. Just as the Court possesses broad discretion to reduce a sentence upon request from a defendant, it also has discretion to impose an order that prohibits a reduction of sentence when no justifiable circumstances exist to demand such a reduction.

Moreover, in denying Defendant's appeal of his sentence, the Supreme Court found that, although his sentence exceeded the recommended SENTAC guidelines, it was within the statutory limits prescribed by the legislature.[29] The Court found no error of law or any indication of abuse of discretion by this Court regarding Defendant's sentencing. Furthermore, Defendant was offered a plea bargain, which he rejected. Although he was sentenced to eighteen more years than he would have received had he accepted the plea bargain, Defendant cannot continue to file repetitive motions, whether it be in the form of a Rule 61 or Rule 35 motion, because he is discontent with the outcome of his decision to exercise his Sixth Amendment right to a trial by jury rather than to accept a plea offer.

16. In conclusion, the motion was filed more than three years after the judgment of conviction was finalized [30] and Defendant has failed to demonstrate the existence of a constitutional violation pursuant to Rule 61(i)(5) resulting in a

[29] *See supra* notes 2-5.
[30] Super. Ct. Crim. R. 61(i)(1).

"miscarriage of justice" or undermining the "fundamental fairness" of the proceedings.[31] Thus, the motion must be denied on procedural and substantive grounds.

For all the foregoing reasons, Defendant's Motion for Postconviction Relief Pursuant to Superior Court Rule 61 is procedurally barred under 61(i)(1) and 61(i)(5). Accordingly, the Motion for Postconviction Relief Pursuant to Superior Court Criminal Rule 61 is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Arturo Laboy
Presentence
Prothonotary

[31] Super. Ct. Crim. R. 61(i)(5).