IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
	)	
v.	)	ID # 0002019767
	)	
	)	
GERRON LINDSEY,	)	
	)	
	)	
Defendant.	)	

Submitted: August 4, 2008
Decided: October 23, 2008

Upon Defendant's Motion to Amend. **GRANTED.**
Upon Defendant's Motion for Postconviction Relief. **DENIED.**
Upon Defendant's Motion for Appointment of Counsel. **DENIED.**

MEMORANDUM OPINION

Gerron Lindsey, *Pro Se*

JOHNSTON, J.

In April 2000, Lindsey was arrested and charged with twelve counts including Murder in the First Degree, Felony Murder, and related robbery and weapons offenses. The charges arose from the robbery of a corner grocery store in Wilmington, Delaware. Lindsey was accused of shooting both of the store's owners. One of the owners died from his injuries. On April 9, 2002, as the jury for Lindsey's trial was being selected, he entered a plea of guilty but mentally ill to one count of Murder in the First Degree. In return for the plea, the State agreed not to seek the death penalty and to dismiss the remaining eleven charges.

On April 17, 2002, Lindsey requested that his plea be withdrawn. Lindsey asserted that the medication he took rendered him incapable of voluntarily entering a plea. On May 22, 2002, the Superior Court denied the motion. On June 27, 2002, the Court held an evidentiary hearing to determine the appropriateness of Lindsey's plea of guilty but mentally ill. The Superior Court subsequently accepted the plea and sentenced Lindsey to mandatory life imprisonment.

On August 1, 2002, Lindsey filed his first motion for postconviction relief. Lindsey again asserted that his plea was involuntary because of the medication he took. The Superior Court again denied his request for withdrawal of his plea.

Lindsey appealed, arguing: (1) his plea was involuntary; and (2) his counsel provided ineffective assistance by failing to share information about another suspect, Ed Rogers, with him prior to the entry of his plea and by failing to inform

the Superior Court that the suspect was being investigated by the police. By Order dated January 7, 2003, the Supreme Court affirmed the Superior Court's denial of postconviction relief. The Court found that Lindsey's first claim was refuted by the record; and that Lindsey's second claim was not raised below, and therefore, could not be considered on appeal. Additionally, the Court noted Lindsey was not prejudiced by his counsel's failure to share information or inform the Court about Ed Rogers because it was Lindsey himself who initially informed the police about Rogers.

On December 9, 2003, Lindsey filed his second motion for postconviction relief, asserting ineffective assistance of counsel. Lindsey claimed his motion had to be considered in the interest of justice. By order dated February 6, 2004, the Superior Court denied Lindsey's motion.

Lindsey appealed. On June 7, 2004, the Supreme Court affirmed. The Court noted that Lindsey "[did] not even attempt to establish the necessary element of prejudice" and that "[the Court] did not find that consideration of Lindsey's claims of ineffective assistance are warranted in the interest of justice or under the fundamental fairness exception of Rule 61(i)(5)."[1]

On February 22, 2005, Lindsey filed a federal habeas petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Delaware.

[1] *Lindsey v. State*, 2004 WL 1280468, at *1 (Del.).

Lindsey again asserted that his plea was involuntary and his counsel was ineffective. On March 24, 2006, the District Court denied Lindsey's petition, finding that it was time-barred under the applicable federal statute of limitations. Lindsey then sought review by the United States Court of Appeals. On October 12, 2006, the Third Circuit denied his motion.

On December 29, 2006, Lindsey filed his third motion for postconviction relief. This time, Lindsey sought to withdraw his guilty plea on the grounds of newly-discovered evidence. Lindsey claimed his trial counsel failed to locate and interview two potentially exculpatory witnesses, Greta Lewis and Christine Nicole Hines. Lindsey stated the witnesses would testify that he was across the street at the time of the shooting. Lindsey explained that he was unable to come forward with this information earlier because, until recently, he lacked the resources to hire his own investigators. The Superior Court summarily dismissed the motion after finding that the additional evidence provided by the two witnesses was merely cumulative.

By order dated January 8, 2008, the Supreme Court affirmed the Superior Court's denial of postconviction relief. The Court found the evidence to be cumulative, stating:

> The State produced evidence from Lindsey's trial counsel that he had met with [Christine Nicole Hines] on several occasions, but the witness never gave any indication that she had any information to help Lindsey at the guilt phase of his trial. Lindsey's counsel stated that

> this witness would have been called as a witness in the event of a penalty hearing. Regarding [Greta Lewis], trial counsel explained that Lindsey never provided him or his private investigators with her name. Even if he had, the evidence would have been cumulative to other testimony presented at trial. We find no abuse of discretion by the Superior Court in dismissing Lindsey's third motion for postconviction relief.[2]

On June 13, 2008, Lindsey filed his fourth Motion for Postconviction Relief. On July 10, 2008, Lindsey filed a Motion to Amend. Through the two motions, Lindsey seeks relief on the grounds of: (1) prosecutorial misconduct; and (2) newly-discovered evidence. Lindsey requests an evidentiary hearing, or in the alternative, revocation of his guilty plea and a new trial. Additionally, through a motion filed on August 4, 2008, Lindsey requests the appointment of counsel.

MOTION TO AMEND

Pursuant to Superior Court Rule 61(b)(6), a motion for postconviction relief "may be amended as a matter of course at any time before a response is filed or thereafter by leave of court, which shall be freely given when justice so requires."[3] Lindsey filed his motion for leave to amend his prior motion to include an additional ground for postconviction relief – newly-discovered evidence. The State had not filed a response in this matter, and thus, Lindsey was free to file an amendment. Lindsey's Motion to Amend is hereby **GRANTED**. Therefore, the

[2] *Lindsey v. State*, 2008 WL 187955, at*1 (Del.).
[3] Super. Ct. Crim. R. 61(b)(6).

Court will consider Lindsey's claim of newly-discovered evidence along with his claim of prosecutorial misconduct.

MOTION FOR POSTCONVICTION RELIEF

In evaluating a postconviction relief motion, the court must first ascertain if any procedural bars of Superior Court Criminal Rule 61(i) apply.[4] If a procedural bar is found to exist, the Court should refrain from considering the merits of the individual claims.[5] This Court will not address claims for postconviction relief that are conclusory and unsubstantiated.[6]

Pursuant to Rule 61(a), a motion for postconviction relief must be based on "a sufficient factual and legal basis." According to Rule 61(i)(1), a postconviction relief motion may not be filed more than a year after judgment of conviction is final or one year after a newly-discovered, retroactively-applicable right is recognized by the United States Supreme Court or the Delaware Supreme Court. Pursuant to Rule 61(b)(2): "the motion shall specify all the grounds for relief which are available to movant…, and shall set forth in summary form the facts supporting each of the grounds thus specified."

Any ground for relief not asserted in a prior postconviction relief motion is thereafter barred unless consideration of the claim is necessary in the interest of

[4] *See Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[5] *See id.*
[6] *See id.* at 555.

justice.[7] Grounds for relief not asserted in the proceedings leading to the judgment of conviction are thereafter barred, unless the movant demonstrates: (1) cause for the procedural default; and (2) prejudice from violation of movant's rights.[8] Any formerly adjudicated ground for relief, whether in a proceeding leading to the judgment of conviction, in an appeal, or in a postconviction proceeding, is thereafter barred, unless reconsideration is warranted in the interest of justice.[9]

Prosecutorial Misconduct

Lindsey claims the State committed prosecutorial misconduct in violation of his Fourteenth Amendment rights. Lindsey asserts that "[b]y improperly charging [him] with felony murder and robbery the State's prosecution deprived him of a defense of mitigation which would [have] made him eligible for a lesser charge." To support his position, Lindsey cites to the holding in *Williams v. State* that the statutory language "in furtherance of" within the definition of felony murder, requires not only that the defendant kill but also that the killing helps to move the felony forward.[10] Lindsey asserts that "felony murder cannot attach because the murder was not the consequence of a felony and the murder was not intended to

[7] Super. Ct. Crim. R. 61(i)(2).
[8] Super. Ct. Crim. R. 61(i)(3).
[9] Super. Ct. Crim. R. 61(i)(4).
[10] 818 A.2d 906 (Del. 2002).

help the felony progress." In June 2007, the Delaware Supreme Court held, in *Chao v. State*, that *Williams* applies retroactively.[11]

As a threshold matter, it must be determined whether Lindsey's fourth motion for postconviction relief claim of prosecutorial misconduct is barred. Lindsey asserts the Delaware Supreme Court's recent decision in *Chao* allows for consideration of his claim under the timing exceptions provided by Rule 61(i)(1). Because Lindsey's claim was filed within a year of *Chao*, this Court will consider the claim.

Lindsey's reliance upon the legal principles established in *Williams* and *Chao* is misplaced.[12] Lindsey pled guilty but mentally ill to Murder in the First Degree. He did not plead guilty to Felony Murder. All remaining charges, including the Felony Murder charge, were dismissed. The issue of whether a robbery was committed in furtherance of the murder is moot. Thus, *Williams* and *Chao* have no application to this case.

Further, Lindsey pled guilty. By pleading guilty, Lindsey voluntarily and knowingly waived his right to put on a defense. Both the Superior Court and the Supreme Court have upheld Lindsey's plea. Therefore, Lindsey's request for relief on the grounds of prosecutorial misconduct must be denied.

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[11] 931 A.2d 1000, 1000 (Del. 2007).
[12] *See State v. Anderson*, 2008 WL 1724257, at *3 (Del. Super.) (finding *Williams* and *Chao* inapplicable and the issue of whether a felony existed to support a felony murder charge moot where defendant was convicted of intentional murder and not felony murder).

Newly-Discovered Evidence

As in his third motion for post-conviction relief, Lindsey seeks withdrawal of his plea on the ground of newly-discovered evidence. Lindsey asserts that the newly-discovered evidence provided by Greta Lewis is powerful and exculpatory. Lindsey contends that his counsel failed to conduct any meaningful investigation and, until recently, he lacked the resources to hire someone to perform a proper investigation.

At the time Lindsey plead guilty, the State had accumulated several key pieces of evidence that would have been used against Lindsey at trial. The police had interviewed several eyewitnesses who placed a man matching Lindsey's physical description at the corner store at the time of the robbery and fleeing the scene immediately following the shooting. One of the eyewitnesses informed the police that just minutes prior to the shooting, the witness entered the store and was told by a man, matching Lindsey's description, that he was about to rob the store. At a lineup, several of the eyewitnesses positively identified Lindsey as the person responsible for the shooting. Additionally, the State obtained Lindsey's confession that he and another individual plotted the robbery and that after the victims were shot he took items from the store.

To support his claim of newly-discovered exculpatory evidence, Lindsey provided a letter from his private investigator, dated June 25, 2008. The letter

describes that during the investigator's second interview of Greta Lewis, held on June 30, 2006, Lewis gave the investigator a taped plastic package. The investigator's letter notes that radiographed pictures of the package revealed its contents to consist of twelve bullets embedded in soil. While the investigator's letter does not specifically detail the type of bullets found in the package, Lindsey states in his recitation of the investigator's letter that they were .38 caliber bullets.

The investigator's letter further details the explanation offered by Lewis. Apparently, Lewis informed the investigator that on the evening of the murder, a man named "Ed," whom she had met through her boyfriend on at least one prior occasion, paid her seventy dollars to hold onto a revolver and several bullets. Allegedly, "Ed" returned for the gun but not the bullets. Lewis allegedly placed the bullets in a plastic bag, covered them with dirt, wrapped the bag in tape, and hid the package in a plastic storage container with her clothes.

Lindsey asserts this newly-discovered evidence is substantive, consistent, exculpatory and not merely cumulative or impeaching. Lindsey explains that "the new evidence corroborates [his] initial claim that he was not involved and Ed Rogers was the shooter." Lindsey urges that:

> Taken together, all of these elements – no weapon, no eyewitnesses, conflicting identifications, no forensics and another credible suspect whom the State did not want to investigate – in the hands of competent counsel would have provided a strong defense for Mr. Lindsey. Add these elements to the recently discovered exculpatory evidence and he would have had a strong chance of an acquittal. At

> the very least, this evidence was more than sufficient to establish reasonable doubt for the jury.

Lindsey claims that had he known of this evidence at the time, he would not have pled guilty and the result "most probably" would have been different. As such, Lindsey asserts that there has been a miscarriage of justice that can only be remedied by withdrawal of his plea.

As a threshold matter, it must be determined whether Lindsey's claim is procedurally barred. This is Lindsey's fourth motion for postconviction relief nearly six years after his plea was accepted. Nevertheless, this Court has considered claims of newly-discovered evidence pursuant to Rule 61(i)(5) as a possible foundation for a colorable claim that there was a miscarriage of justice.[13] The Court will review his claim to determine whether a miscarriage of justice has occurred.

To warrant withdrawal of a guilty plea on the grounds of newly-discovered evidence, the defendant must show: (1) that the newly-discovered evidence will probably change the result of the proceedings if the plea is withdrawn; (2) that it has been found since the proceedings leading to the judgment, and could not have been found before by the exercise of due diligence; and (3) that it is not merely cumulative or impeaching.[14]

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[13] *See State v. Young*, 2003 WL 1847262, at *1 (Del. Super.); *State v.* Condon, 2003 WL 1364619, at *3-4 (Del. Super.); *State v. Travis*, 1997 WL 719342, at *1 (Del. Super.).
[14] *Young*, 2003 WL 1847262 at *2.

Lindsey has failed to prove that Lewis' story and the package given to the private investigator qualifies as newly-discovered evidence. Lindsey's claim – that had he known about Lewis' encounter with a man named "Ed," he would not have pled guilty – is highly speculative. Lindsey is the one who initially informed the police that there was another suspect, Ed Rogers, who should be investigated for the murder.[15] At the time of entering his plea, Lindsey was aware of Ed Rogers as a possible suspect. When considered together with other substantial evidence of Lindsey's guilty, the allegedly newly-discovered evidence is highly unlikely to change the result of the proceedings.

Further, Lindsey has been in possession of this "evidence" for nearly two years. Lindsey had the package and Lewis' statements at the time of his third motion for postconviction relief, but did not bring it to the Court's attention.[16] Lindsey's third motion for postconviction relief was on the grounds of newly-discovered evidence, other evidence provided by the very same Greta Lewis.

Evidence produced following incarceration should be viewed with great caution.[17] Lindsey cannot now, after the denial of his third motion for postconviction relief, come forth with evidence that is speculative at best, which he

[15] *See Lindsey v. State*, 2003 WL 98784 at *2 (Del.) (noting the record reflects that it was Lindsey who initially informed the police about the other suspect, Ed Rogers).
[16] It is interesting to note that Lindsey has criticized the work of his attorneys throughout his four motions for postconviction relief. However, in this motion, he does not even suggest appellate counsel for his third motion for postconviction relief was ineffective.
[17] *State v. Brathwaite*, 2003 WL 1410155, at *3 (Del. Super.).

has had in his possession for nearly two years, and claim that he has newly-discovered evidence.

Therefore, Defendant's Fourth Motion for Postconviction Relief is hereby **DENIED**.

MOTION FOR APPOINTMENT OF COUNSEL

Lindsey also asks the Court to appoint counsel to pursue the Rule 61 Motion. Rule 61(e)(1) provides: "The Court will appoint counsel…only in the exercise of discretion and for good cause shown, but not otherwise."[18] Considering the Court's substantive denial of Lindsey's prosecutorial misconduct and newly-discovered evidence claims, appointment of counsel is not warranted. Therefore, the Defendant's Motion for Appointment of Counsel is hereby **DENIED**.

CONCLUSION

Defendant's Motion to Amend is hereby **GRANTED**. Defendant's Motion for Postconviction Relief, based on prosecutorial misconduct and newly-discovered evidence, is hereby **DENIED**. Defendant's Motion for Appointment of Counsel is hereby **DENIED**.

IT IS SO ORDERED.

[18] Super. Ct. Crim. R. 61(e)(1).

The Honorable Mary M. Johnston