



## **PROCEDURAL CONTEXT**

Defendant Alem Lopez was indicted on November 29, 2004 for the shooting death of Jamie Romero Rojas. The indictment charged Lopez with Murder in the First Degree, two counts of Possession of a Firearm During the Commission of a Felony, Possession of a Deadly Weapon by a Person Prohibited and Attempted Murder First Degree.

On April 6, 2006, Lopez filed a motion to dismiss current counsel and for appointment of new counsel. In the motion, Lopez asserted, among other things, that his counsel had a conflict of interest. By order dated May 24, 2006, the Court denied Lopez's motion, finding it was without merit. Lopez appealed the denial to the Delaware Supreme Court. By order dated August 9, 2006, the Delaware Supreme Court dismissed Lopez's appeal for lack of jurisdiction.

Trial was scheduled to commence on September 12, 2006. On September 7, 2006, Lopez entered pleas of guilty to one count of Possession of a Firearm During the Commission of a Felony and to one count of Manslaughter. On October 11, 2006, Lopez wrote to the Court and his counsel requesting to withdraw his guilty plea. At the sentencing hearing on November 17, 2006, Lopez's request to withdraw his guilty plea was denied.

On November 28, 2006, Lopez, through counsel, filed a motion to reargue the Court's denial of his request to withdraw his guilty plea. By opinion dated

April 25, 2007, the Court denied Lopez's request to withdraw his guilty plea and/or for postconviction relief.

On October 29, 2007, Lopez filed a second motion for postconviction relief *pro se*. Lopez claimed: (i) ineffective assistance of counsel; (ii) the trial court committed reversible error by refusing to accept defendant's withdrawal of his guilty plea; (iii) the trial court's refusal to grant a continuance was prejudicial error; and (iv) counsel's conflict of interest with Lopez warranted an evidentiary hearing. By order dated May 8, 2008, the Court found Lopez's claims to be time-barred, but considered Lopez's ineffective assistance of counsel claim in the interest of justice. Ultimately, the Court found Lopez failed to demonstrate ineffective assistance of counsel.

On May 23, 2008, Lopez appealed the Court's denial of his motion for postconviction relief. By order dated October 22, 2008, the Delaware Supreme Court held that Lopez's claims were not time-barred. The Court remanded the matter for further consideration of all claims not previously addressed on the merits.

Presently before the Court are Lopez's claims that: (1) the trial court committed reversible error by refusing to accept defendant's withdrawal of his guilty plea; (2) the trial court's refusal to grant a continuance was prejudicial error; and (3) counsel's conflict of interest with Lopez warranted an evidentiary hearing.

Additionally before the Court is Lopez’s supplemental claim filed on November 24, 2008. In Lopez’s supplemental claim, he asserts that the Court committed error when it participated in plea discussions.

### **STANDARD OF REVIEW**

In evaluating a postconviction relief motion, the court must first ascertain if any procedural bars of Superior Court Criminal Rule 61(i) apply.<sup>1</sup> If a procedural bar is found to exist, the Court should refrain from considering the merits of the individual claims.<sup>2</sup> This Court will not address claims for postconviction relief that are conclusory and unsubstantiated.<sup>3</sup>

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

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<sup>1</sup> See *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.* at 555.

justice.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

## ANALYSIS

### *Failure to Permit Withdrawal of Guilty Plea*

Lopez claims that “in denying defendant’s motion to withdraw his guilty plea on the bases that the plea was knowing and voluntary, and that Mr. Lopez, under oath had admitted guilt to each of the charges, was in error.” In his present motion, Lopez again asserts that his plea was not knowingly or voluntarily entered. As evidence, Lopez cites to his plea and sentencing transcripts, stating that “although the Court in this case exercised a thorough direct examination of the defendant, it did not properly establish a factual basis to refuse defendant’s request for withdrawal of [the] plea agreement.” Lopez asserts that the Court’s previous decision denying his motion to withdraw his guilty plea was “reversible error.”

As a threshold matter, it must be determined whether Lopez’s claim is procedurally barred. This is Lopez’s second motion for post-conviction relief.

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<sup>4</sup> Super. Ct. Crim. R. 61(i)(2).

<sup>5</sup> Super. Ct. Crim. R. 61(i)(3).

<sup>6</sup> Super. Ct. Crim. R. 61(i)(4).

The sole issue raised in Lopez’s first motion was whether he could withdraw his guilty plea on the basis that it was not knowingly or voluntarily entered. By order dated April 25, 2007, this Court denied Lopez’s motion. Under Rule 61(i)(4), defendants are barred from re-asserting claims which have been formerly adjudicated unless consideration is warranted in the interest of justice.<sup>7</sup> Previously adjudicated issues “may not be reasserted in later proceedings except under exceptional circumstances.”<sup>8</sup> “Exceptional circumstances include a colorable claim of factual innocence, an intervening change in the law, or newly discovered evidence.”<sup>9</sup> Further, the Superior Court is not required to re-examine a claim that has received “substantive resolution” at an earlier time simply because that claim has been refined or restated.<sup>10</sup>

Lopez has failed to demonstrate any exceptional circumstances that would warrant a second review of his motion to withdraw his guilty plea. Lopez’s conclusory allegations of judicial error combined with his restatement and refinement of his claim are insufficient to warrant review in the interest of justice. Thus, the Court will not re-consider Lopez’s claim because it is procedurally barred. The Court previously considered defendant’s claim on the merits and

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<sup>7</sup> Super. Ct. Crim. R. 61(i)(4).

<sup>8</sup> *Fenton v. State*, 1989 WL 136962, at \*1 (Del.).

<sup>9</sup> *State v. Taylor*, 1991 WL 35788, at \*1 (Del. Super.), *aff’d*, 599 A.2d 414 (Del. 1991).

<sup>10</sup> *Johnson v. State*, 1992 WL 183069, at \*1 (Del.).

denied his motion to withdraw his guilty plea, finding that his plea was knowing, intelligent and voluntary.<sup>11</sup>

### ***Refusal to Grant a Continuance***

Lopez asserts that the Court's refusal to grant his continuance request<sup>12</sup> was prejudicial error. Specifically, Lopez asserts that the "Court's refusal to grant [his]

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<sup>11</sup> *State v. Lopez*, 2007 WL 1248515 (Del. Super.).

<sup>12</sup> Lopez's continuance "request" consists of the following dialogue, which occurred on September 7, 2006 during Lopez's plea colloquy:

THE COURT: If you take the plea, you could get five to 50. If you do not and you are found guilty, you will spend the rest of your life in prison. If you go to trial and you're found not guilty, then you will be released. And those are – that's the reality.

But I am not going to force you to take a plea. No one is going to force you to take a plea. You have to make that decision yourself. I am certain that Mr. Weiler has discussed with you what the nature of the State's evidence is. I don't know what that evidence is, so – even if I did, I couldn't advise you. You have to listen to your attorney and see whether you think you want to take the offered plea.

THE DEFENDANT: Well, is there anything else I could do, like – I mean, I have put in a motion to dismiss my counsel.

THE COURT: Well, if your counsel – your court-appointed counsel is dismissed, you will have to represent yourself. You are only entitled to one appointed counsel at the expense of the State. Now, you can hire private counsel. My suspicion is you do not have the financial resources to do so or else you would not be here. But you get one court-appointed counsel. If, for whatever reason that relationship doesn't work out, then you will have to represent yourself, which I strongly advise against under any circumstances. That I will advise you about, you should not represent yourself.

THE DEFENDANT: Okay. I did tell Mr. Weiler about a month ago that my family was down in Mexico and that I needed him to talk to you so that my Court could get postponed because they was thinking about getting me a lawyer but he told me that you would – that you wouldn't do that for me.

THE COURT: We will not postpone this case.

THE DEFENDANT: So then this is set for the 12<sup>th</sup>?

THE COURT: It's set for Tuesday. And the case is still on the calendar as of right now.

THE DEFENDANT: All right.

THE COURT: So we can go to trial Tuesday and I –and my suspicion – Mr. O'Connor, correct me if I'm wrong, and Ms. Volker, is if this plea is not accepted today it's off the table; is that correct?

request denied [him] a fair and reasonable opportunity to obtain not only a particular counselor but a conflict free counselor.” Further, Lopez asserts that the Court’s denial of his continuance request effectively denied him his right to due process and to counsel of his choosing.

Initially, it must be determined whether Lopez’s claim is procedurally barred. Lopez failed to raise this issue in his first motion seeking postconviction relief. Because review is not warranted in the interest of justice, Lopez’s claim is barred pursuant to Rule 61(i)(2). Moreover, Lopez fails to assert a colorable claim of a miscarriage of justice. A colorable claim of a “miscarriage of justice” occurs where there is a “constitutional violation that undermines that fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.”<sup>13</sup> The exception to the procedural bars is narrow and applicable only in very limited circumstances.<sup>14</sup> The defendant bears the burden of proving he has been deprived of a substantial constitutional right. Lopez has failed to set forth facts sufficient to establish a colorable claim that there has been a miscarriage of justice. As such, Lopez’s claim is barred.

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MR. O’CONNOR: Yes, Ma’am. Maybe the defendant could use some more time to think about that.

THE COURT: All right. Why don’t we go on with the rest of the calendar and I’ll see you at the end of the calendar.

(Plea stopped for Defendant to confer with counsel.)

<sup>13</sup> *State v. Morla*, 2007 WL 2566012, at \*2 (Del. Super.), *aff’d*, 2008 WL 2809156 (Del.).

<sup>14</sup> *Id.*

Even assuming Lopez's motion sufficiently alleged a constitutional violation, it is clear from the record that his claim is without merit. Lopez's statements to the Court regarding what he had discussed with his attorney and when the trial would go forth were insufficient to constitute a request for a continuance. Even if it were a sufficient request, continuances are left to the discretion of the trial judge, "whose ruling will not be disturbed on appeal unless that ruling is clearly unreasonable or capricious."<sup>15</sup> Lopez was indicted on November 29, 2004. He had more than ample time to retain private counsel -- his stated reason for desiring a continuance.

***Failure to Hold Evidentiary Hearing on Conflict of Interest***

Lopez claims that the Court erred when it failed to hold an evidentiary hearing prior to deciding his motion to dismiss current counsel. Lopez asserts that it was improper for the Court to rely solely upon the record and Counsel's responses in determining whether Lopez's counsel had a conflict of interest. Lopez argues that the "files and records of the case" did not conclusively show that defendant was not entitled to relief. Lopez contends that he "was entitled to an evidentiary hearing on his claim."

Prior to considering the merits, it must be determined whether Lopez's claim is procedurally barred. This issue was not raised in Lopez's previous motion for

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<sup>15</sup> *Lopez v. State*, 2006 WL 3759398, at \*2 (Del.) (quoting *Secrest v. State*, 679 A.2d 58, 64 (Del. 1996)).

postconviction relief. Additionally, review of Lopez’s claim is not warranted in the interest of justice. As such, Lopez’s claim is procedurally barred.<sup>16</sup>

Further, Lopez’s claim is without merit. Contrary to Lopez’s assertions, evidentiary hearings are held in the discretion of the trial court and not as a matter of entitlement.

Defendant’s conflict of interest argument consists in its entirety of the conclusory and unsubstantiated assertion that his attorney “have shown inconsistency of conflict of interest.” The record is devoid of any indication whatsoever that defense counsel was burdened by a conflict of interest. Moreover, a proper guilty plea constitutes a waiver of any alleged errors or defects occurring prior to the entry of the plea.<sup>17</sup> Therefore, Lopez’s claim, in addition to being procedurally barred, is without merit.<sup>18</sup>

### *Participation in Plea Discussions*

Lopez claims that the Court erred when it allegedly participated in plea discussions<sup>19</sup>. Specifically, Lopez asserts that “the trial judge abused his discretion and committed plain error when the Court participated in [the] plea discussion and unreasonably determined the facts involving the acceptance of the guilty plea

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<sup>16</sup> See *Jackson v. State*, 2003 WL 21241350, at \*1 (Del.) (finding defendant’s conflict of interest claim procedurally barred pursuant to Rule 61(i)(2) where defendant failed to raise the issue in his prior motions for postconviction relief and review was not warranted in the interest of justice; and, finding no abuse of discretion in Superior Court’s summary disposition of defendant’s conflict of interest claim without holding an evidentiary hearing).

<sup>17</sup> *Perkins v. State*, 2006 WL 3053271, at \*1 (Del.).

<sup>18</sup> See *id.* (finding defendant’s postconviction claim that the Court erred in failing to hold an evidentiary hearing on his claim that his attorney had a conflict of interest without merit where the defendant voluntarily pled guilty).

<sup>19</sup> The “discussions” Lopez appears to be referring to occurred during Lopez’s plea colloquy, on September 7, 2006.

which was involuntary and without effective assistance of counsel.” Lopez asserts his guilty plea was the product of the Court’s “psychological ploys and maneuvers” during his plea colloquy. Additionally, Lopez complains that the Court “practically interrogated” him during the plea colloquy.

Again, the Court must determine whether Lopez’s claim of improper plea discussions is procedurally barred. Lopez submitted this claim as a supplement to his second motion for postconviction relief, seven months after the original motion was submitted and after the matter was decided and then remanded to this Court. Lopez states that he “was unable to assert this claim in his initial postconviction [due to] lack of information to support his claim.” Lopez’s current “supporting information” consists of the plea colloquy transcript and his own memory of events.

Lopez’s claim of improper plea discussions is procedurally barred. Lopez failed to raise this issue in his first motion for postconviction relief and is barred from doing so pursuant to Rule 61(i)(2). At the time of filing his initial motion for postconviction relief, Lopez had full knowledge of the Court’s participation in his plea colloquy. Thus, review is not warranted in the interest of justice. Moreover, Lopez’s claim fails to set forth a colorable claim of a constitutional violation and therefore does not warrant review under Rule 61(i)(5).

Further, Lopez’s contention that trial judges are prohibited from engaging in extensive questioning of defendants offering guilty pleas is in direct contradiction to the purpose and directive of Superior Court Criminal Rule 11. The main purpose of the Rule 11 inquiry is to insure that a defendant entering a plea of guilty does so fully aware of the nature of the charges and the consequences of the plea and that a record exists demonstrating such awareness.<sup>20</sup> The Court’s “participation in plea discussions” was not only proper, but required before a plea could be accepted.

### CONCLUSION

Lopez has failed to demonstrate that any of his Rule 61 claims survive procedural bars, or have substantive merit. **THEREFORE**, Defendant’s Motion for Postconviction Relief is hereby **DENIED**.

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston

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<sup>20</sup> *State v. Quillen*, 1989 WL 31581, at \*8 (Del. Super.), *aff’d*, 567 A.2d 423 (Del. 1989) (explaining that “the heart of the Rule 11 inquiry is to thoroughly guarantee that when a defendant enters a plea of guilty he is fully apprised of the nature of the charges and the consequences of the plea. The inquiry insures that such understanding is demonstrated by the record so that a defendant, dissatisfied with his decision to enter a guilty plea, cannot easily ignore the importance of the decision and change his mind on the slightest whim.”). *See also State v. Brown*, 250 A.2d 503, 505 (Del. 1969) (stressing that the trial court needs to engage in “direct interrogation” of a defendant offering a guilty plea to ensure that a record exists for the factual basis of the plea).