SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

September 8, 2009

Michael Bartley
SBI#
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: *State v. Bartley*, Def. ID# 0005016436 (R-2)

DATE SUBMITTED: June 12, 2009

Dear Mr. Bartley:

Pending before the Court is the second motion of defendant Michael Bartley ("defendant") for postconviction relief filed pursuant to Superior Court Criminal Rule 61 ("Rule 61"). Defendant contends that he is entitled to relief based upon the ruling in *Allen v. State*, 970 A.2d 203 (Del. 2009) ("*Allen*") wherein the Delaware Supreme Court clarified the law regarding jury instructions for accomplice liability. Defendant asserts the ruling is retroactively applicable and consequently, no procedural bars preclude consideration of his motion. This is my decision ruling the *Allen* decision is not retroactively applicable and denying the motion.

PROCEDURAL HISTORY AND FACTS[1]

On December 12-14, 2000, defendant proceeded to a jury trial on charges of possession of a firearm during the commission of a felony; robbery in the first degree; burglary in the first degree; assault in the second degree; unlawful imprisonment; conspiracy in the second degree; resisting arrest; and criminal mischief. The theory of the State of Delaware ("the State") was that defendant was the *principal* defendant, but alternatively, he could be found guilty based upon *accomplice* liability.

The evidence, viewed in a light most favorable to the State,[2] showed the following.

In the late evening of May 18, 2000, defendant and a person named "Jay" drove from Wilmington, Delaware, to Georgetown, Delaware, and committed crimes against the victim. Although the victim denied defendant and Jay were there to collect a drug debt, defendant was adamant that was the reason for their trip. It is necessary, at this point, to address defendant's continued assertions in his postconviction motions that more than two people committed the crimes against the victim. The police who came upon the crime scene saw the victim and only two other people in the house. Defendant was one of those other people. The victim thought more than two people might have been at the scene. However, defendant clarified in an interview

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[1]In order to make this decision more understandable, I repeat much of my decision addressing defendant's first motion for postconviction relief. *State v. Bartley*, 2004 WL 2829111 (Del. Super. Feb. 24, 2004), *aff'd,* 860 A.2d 809, 2004 WL 2154304 (Del. Sept. 20, 2004) (TABLE).

[2]I do not employ defendant's version of the facts since they are presented in the light most favorable to him. Once there is a conviction, the evidence is viewed in a light most favorable to the State. *Word v. State*, 801 A.2d 927, 929 (Del. 2002)

with the State Police detective that only he and Jay were present.[3] That interview was a part of the evidence. Thus, defendant's continued post-trial assertions that more than two people were at the crime scene are ignored.

Defendant and Jay parked their vehicle a few buildings away from the victim's home. Defendant, brandishing a gun and demanding money, confronted the victim in his driveway. The victim attempted to get away, but could not get his car started. Defendant took from the victim cash, jewelry, and a book bag containing marijuana. Defendant severely beat the victim with a gun, knocking out some of the victim's teeth and leaving him with permanent scars on his head.

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[3]The colloquy set forth below took place between defendant and Detective Gallagher. It established defendant's position on the number of persons who participated in the crimes for which defendant was charged.

> Detective Gallagher: But you're telling me there was only two of you guys that came down here tonight?
>
> Defendant: Yeah.
>
> Detective Gallagher: 'Cause when, when we went and looked at the car it appeared like there might have been a third person in the back seat smoking cigarettes with a, there's some type of a soda cup in the back seat.
>
> Defendant: No third person.
>
> Detective Gallagher: No third person?
>
> Defendant: No.
>
> Detective Gallagher: 'kay.

State Exhibit No. 24, audiotape recording of interview of Michael Bartley by Detective Timothy Gallagher.

The victim was tied up and pulled into the house.[4] Defendant and Jay ransacked the victim's house, including pulling items out of the refrigerator, acts which evidenced an intent to steal.

Meanwhile, a neighbor who had heard screams coming from the victim's house called the police. Two Georgetown police officers arrived on the scene first. One of the officers saw two masked men in the victim's kitchen pulling out the contents of the refrigerator. The officers described one of the men as short and heavy, the other as slim. Defendant and Jay heard the officers and ran out the back door. After a chase, one of the officers caught defendant, who was dressed all in black and was short and heavy. Defendant struck the officer. The police never caught Jay. After the chase and capture of defendant, the officers located the gun and a dark book bag which contained marijuana. The State Police who arrived at the scene located the vehicle defendant and Jay used to drive to the area.

Defendant consented to a recorded interview with Detective Timothy Gallagher of the Delaware State Police. In this interview, the recording of which was played to the jury, defendant set forth his version of the facts.[5] Several details in his version varied as the interview progressed. It was clear that one detail was false; he said the car in which he arrived was light blue, when in actuality, it was black. The jury judged the credibility of defendant's story.

Defendant stated as follows. He and Jay came from Wilmington to collect money from the victim which the victim owed to a drug dealer. They drove down in Jay's car. Neither

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[4]Because defendant was convicted of burglary in the second degree rather than burglary in the first degree, as charged, the jury clearly concluded the victim was injured outside, rather than inside, the house.

[5]Defendant did not testify. Consequently, his version of the events and his defense were before the jury by way of this recorded interview.

defendant nor Jay had a gun; the victim had the gun and pulled it on them. Defendant had several versions of what happened with the gun. In all of his versions, the parties were outside the house. Defendant said in one version that he grabbed the gun from the victim. In another version, he said he tried to take the gun, but it dropped in a scuffle. He also said he gave the gun to Jay, and in another version, he said Jay grabbed the gun from him. Defendant maintained he beat the victim because the victim tried to shoot him. In another version, he talked about fighting with the victim outside after he got the gun away from the victim. However, defendant also maintained Jay was the aggressor and defendant told Jay to stop hitting the victim. Although defendant maintained he and Jay did not take anything from the victim, he did admit grabbing the back pack that contained marijuana. He tempered that statement by saying the victim told them that since he (the victim) did not have money to repay the debt, they could take the marijuana in exchange.

Based on defendant's interview, it is clear he or Jay held onto the gun while in the house because defendant said he picked up the gun after Jay dropped it as they were running out the back door.

Viewed in a light most favorable to the State, defendant's statement in and of itself establishes that he and Jay were engaged in an enterprise to strong-arm the victim into turning over money, and they robbed and assaulted the victim, using a gun in the commission of these crimes.

Defendant’s defense was that, viewing the evidence in a light most favorable to him, defendant’s statement places defendant at the scene of the crime only, without any intent to commit a crime. However, that slant on the facts is wrong. Defendant was seen pulling items out

of the victim's refrigerator; the victim, bound and taped, was present in the house while defendant and Jay ransacked the house; and defendant said that he picked up the gun, which defendant maintained belonged to the victim, after Jay dropped it as they were running out of the house.

The jury did not accept the defendant's arguments that he did not commit any crimes. It found defendant guilty of the charges of possession of a firearm during the commission of a felony;[6] robbery in the first degree;[7] burglary in the second degree[8] (a lesser-included offense of the charge of burglary in the first degree[9]); assault in the second degree;[10] unlawful imprisonment

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[6]In 11 *Del. C.* § 1447A(a), it is provided in pertinent part:

> A person who is in possession of a firearm during the commission of a felony is guilty of possession of a firearm during the commission of a felony.

[7]In 11 *Del. C.* § 832(a)(1), it is provided in pertinent part as follows:

> A person is guilty of robbery in the first degree when the person commits the crime of robbery in the second degree and when, in the course of the commission of the crime or of immediate flight therefrom, the person or another participant in the crime:
> (1) Causes physical injury to any person who is not a participant in the crime....

[8]In 11 *Del. C.* § 825, it is provided in pertinent part as follows:

> A person is guilty of burglary in the second degree when the person knowingly enters or remains unlawfully:
> (1) In a dwelling with intent to commit a crime therein....

[9]In 11 *Del. C.* § 826(2), it is provided in pertinent part as follows:

> A person is guilty of burglary in the first degree when the person knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or when in the dwelling or in immediate flight therefrom, the person or another participant in the crime:
> ***

in the first degree;[11] conspiracy in the second degree;[12] and resisting arrest. He was found not guilty on the charge of criminal mischief.[13] He was sentenced on March 16, 2001, to extensive periods of incarceration, some of which are mandatory, followed by periods of probation.

Defendant appealed to the Supreme Court. A different attorney represented him on appeal ("appellate counsel"). The only issue raised on appeal was the refusal of the trial court to delete Detective Gallagher's comments in the above-referenced interview regarding the crimes which he considered defendant to have committed. The Supreme Court affirmed the decision of the trial

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(2) Causes physical injury to any person who is not a participant in the crime.

[10]In 11 *Del. C.* § 612(a)(2), it is provided in pertinent part as follows:

(a) A person is guilty of assault in the second degree when:

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(2) The person recklessly or intentionally causes physical injury to another person by means of a deadly weapon....

[11]In 11 *Del. C.* § 782, it is provided in pertinent part as follows:

A person is guilty of unlawful imprisonment in the first degree when the person knowingly and unlawfully restrains another person under circumstances which expose that person to the risk of serious physical injury.

[12]In 11 *Del. C.* § 512(1), it is provided in pertinent part as follows:

A person is guilty of conspiracy in the second degree when, intending to promote or facilitate the commission of a felony, the person:

(1) Agrees with another person or persons that they or 1 or more of them will engage in conduct constituting the felony ....

[13]The criminal mischief charge was that defendant "did intentionally cause damage of less than $1000.00 to property consisting of a uniform shirt and shoes and a radio microphone clip, belonging to Georgetown Police Department, in violation of Title 11, § 811(a)(1) of the Delaware Code."

court. *Bartley v. State*, 788 A.2d 527, 2001 WL 1560692 (Del. Dec. 3, 2001) (TABLE). The mandate was issued December 19, 2001.

Defendant filed his first Rule 61 motion on December 8, 2003. In that motion, he raised several issues, one of which is pertinent to the pending motion: defendant argued that the trial court failed to properly instruct the jury on accomplice liability and alternatively, trial counsel was ineffective for failing to seek such an instruction. The Court ruled the argument that the trial court failed to properly instruct the jury on accomplice liability was procedurally barred since defendant failed to assert it in the proceedings leading to the judgment of conviction. *State v. Bartley*, 2004 WL 2829111, * 5 (Del. Super. Feb. 24, 2004), *aff'd,* 860 A.2d 809, 2004 WL 2154304, *1 (Del. Sept. 20, 2004) (TABLE).

The Court then addressed the argument within the context of the ineffective assistance of counsel argument. The Court recognized that, in general, jury instructions on accomplice liability should include the provisions of 11 *Del. C.* § 274[14] which require the jury to consider the defendant's individual mental culpability in determining his degree of guilt. *Chance v. State*, 685 A.2d 351 (Del. 1996). It reviewed the Superior Court's decision in *State v. Manley,* Del. Super., Def. ID# 9511007022, *et al.*, Herlihy, J. (Oct. 2, 2003), *aff'd*, Del. Supr., No. 519, 2003, Holland, J. (April 7, 2004), wherein the Superior Court stated at page 31 of its opinion:

> [U]nder *Chance*, the jury must first decide whether the State has established that the defendant was an accomplice to a criminal offense committed by another

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[14]In 11 Del. C. § 274, it is provided as follows:

> When, pursuant to § 271 of this title, 2 or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that person's own culpable mental state and with that person's own accountability for an aggravating fact or circumstance.

> person, pursuant to Section 271. Second, *Chance* holds if a defendant is found liable for a criminal offense under a theory of accomplice liability, and if that offense is divided into degrees, then the jury must determine which degree is applicable based on the mental State [sic] and culpability of each individual defendant.

At the time this court issued its decision on the first Rule 61 motion, the law as set forth in *Coleman v. State*, 765 A.2d 950, 2000 WL 1840511 (Del. 2000) (TABLE) ("*Coleman*"), provided that if different degrees of a crime required the same *mens rea*, then 11 *Del. C.* § 274 was inapplicable. *State v. Bartley*, 2004 WL 2829111, * 6. In accordance with that law, the Court concluded that defendant was not entitled to an instruction on the charges of robbery in the second degree,[15] burglary in the third degree,[16] or unlawful imprisonment in the second degree.[17] *Id.* at *7.

The Court also considered whether 11 Del. C. § 274 was implicated with regard to the

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[15]In 11 *Del. C.* § 831, it is provided in pertinent part:

> (a) A person is guilty of robbery in the second degree when, in the course of committing theft, the person uses or threatens the immediate use of force upon another person with intent to:
>
> (1) Prevent or overcome resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> (2) Compel the owner of the property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.

[16]In 11 *Del. C.* § 824, it is provided in pertinent part as follows:

> A person is guilty of burglary in the third degree when the person knowingly enters or remains unlawfully in a building with intent to commit a crime therein.

[17]In 11 *Del. C.* § 781, it is provided in pertinent part as follows:

> A person is guilty of unlawful imprisonment in the second degree when the person knowingly and unlawfully restrains another person.

assault and conspiracy charges. The Court held as follows:

> In *Johnson v. State*, 711 A.2d 18, 39 (Del. 1998), the Supreme Court held in the context of that case that it was mandatory to set out the degrees of assault. However, case law establishes that whether error existed in the failure to give a *Chance* instruction is dependent upon the facts of the case. *Swan v. State*, 820 A.2d 342 (Del. 2003), *cert. den*., - U.S. -, 124 S.Ct. 252 (2003) ("*Swan*"); *Harris v. State*, 695 A.2d 34 (Del. 1997); *Chance v. State*, 685 A.2d; *State v. Manley*, *supra*. In particular, a *Chance* instruction need not be given in the situation where two individuals jointly planned and carried out a crime and there exists the possibility that a *Chance* instruction might result in an inconsistent verdict for persons involved in the same crime. *Swan v. State*, 820 A.2d 342 (Del. 2003), *cert. den*., - U.S. -, 124 S.Ct. 252 (2003) ("*Swan*"); *State v. Manley*, *supra*. Even if the *Chance* instruction should have been given, the Court examines the facts of the case to determine if the prejudice prong of *Strickland* is met. *State v. Manley*, *supra* at 29-47.
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> In this case, there was a joint enterprise where the giving of a *Chance* instruction could have occasioned the mischief which the Supreme Court recognized in *Swan*. Not giving a *Chance* instruction in this situation was not erroneous. Even if it should have been given, defendant cannot show any prejudice from its omission. It is undisputed there was serious physical injury. It also is undisputed, and the jury found, that the victim was assaulted with a gun, a deadly weapon. Consequently, there was no basis for charging on assault in the third degree fn.16 which addresses the situation where there is physical injury, but not serious physical injury, *Swan v. State*, 820 A.2d at 35-6, or where there is evidence compatible with recklessness or criminal negligence. *Id.*
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> Fn. 16 In 11 Del. C. § 611, it is provided in pertinent part:
>
> > A person is guilty of assault in the third degree when:
> > (1) The person intentionally or recklessly causes physical injury to another person; or
> > (2) With criminal negligence the person causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

The same conclusions reached above apply to the conspiracy charge. Even if a *Chance* instruction was required, defendant cannot establish prejudice because there was no evidence compatible with an intent to promote or facilitate the commission of a misdemeanor. *Id.*

In light of the foregoing, defendant cannot show that if the *Chance* issue had been raised, he would have succeeded and the outcome of his case would have been something other than what it was. *See Manley, supra* at 45-47. Thus, this claim fails.

Id. at **7-8.

The Supreme Court affirmed this Court's decision "on the basis of and for the reasons set forth in its well-reasoned, 23-page decision dated February 24, 2004." *Bartley v. State*, 860 A.2d 809, 2004 WL 2154304, at *1 (Del. Sept. 20, 2004) (TABLE).

Subsequently, the Supreme Court repeatedly affirmed the ruling that 11 *Del. C.* § 274 does not apply if different degrees of a crime required the same *mens rea* in the cases of *Scott v. State*, 962 A.2d 257, 2008 WL 4717162, *1 (Del. Oct. 28, 2008) (TABLE) ("*Scott*"); *Johnson v. State*, 947 A.2d 1121, 2008 WL 1778241, *2 (Del. April 21, 2008) (TABLE) ("*Johnson*"); and *Richardson v. State*, 931 A.2d 437, 2007 WL 2111092, *2 (Del. July 24, 2007) (TABLE) ("*Richardson*"). However, this ruling was inconsistent with the Court's ruling in the earlier cases of *Herring v. State*, 805 A.2d 872 (Del. 2002) and *Johnson v. State*, 711 A.2d 18 (Del. 1998).

In the *Allen* case, the Supreme Court overruled its decisions in *Scott, Johnson, Richardson,* and *Coleman.* In *Allen*, the defendant was tried solely as an accomplice. He provided transportation to the robbery/burglary sites, acted as a look-out, informed the other co-defendants when a victim was on-site, contributed a central meeting place, and shared in the loot. He was not a "principal" in any of the three separate episodes of robberies/burglaries in that he did not do any of the following things which the "principals" did: cut a hole in any of the building roofs, wait for the victim employees, drop through the roof after being told of the victim's presence, hold the victims at gun point and force them to open the safe or vault, and crawl back up the rope to the roof and get in the get-away car. As the Superior Court previously has noted, "[The facts in] *Allen* allowed the jury to doubt that Allen, as he waited hours for a victim to arrive, might not have foreseen that the men he repeatedly drove to the robberies were

going to commit armed robbery once he alerted them to a victim's arrival and that the coast was clear." *State v. Richardson*, Del. Super., Def. ID# 0511009920A, Silverman, J. (June 23, 2009) at 10 ("*Richardson II"*) The main charges against defendant in *Allen* as an accomplice were divided into degrees: robbery in the first degree, burglary in the second degree, and aggravated menacing. The aggravating factor which increased the degree of each offense was the use of a gun. Defendant requested a section 274 instruction "so that the jury could make the statutorily required individualized determination regarding his 'own culpable mental state' and his 'own accountability for an aggravating fact or circumstance,' *i.e.,* the use of a gun." *Allen*, *supra* at 210. The trial court denied the request. The Supreme Court decided the *Allen* case *en Banc* in order to reconcile its prior inconsistent panel decisions noted above. The Supreme Court reviewed the trial court's refusal to give the requested instruction *de novo*. The Supreme Court ruled as follows:

> Delaware's statutory accomplice liability law has abandoned the common-law distinctions between principals and accessories and has established a two-step process for liability under companion statutes. First, title 11, section 271 provides generally, that a person is guilty of an offense committed by another person if an appropriate degree of complicity in the offense can be proved. Second, title 11, section 274 provides that, despite being criminally liable for an offense under section 271, the *degree* of the offense for which the co-defendants are guilty depends upon each codefendant's own respective "culpable mental state" and "accountability for an aggravating fact or circumstance." [Footnotes and citations omitted. Emphasis in original]

Allen, *supra* at 210. The Court further ruled:

> [I]n Delaware, there is no exception to the unambiguous language in section 274 that provides when an offense is divided into degrees, each participant is only guilty for the degree of a crime that is commensurate with their own mental culpability *and* their own accountability for an aggravating circumstance.
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> *** [T]he jury is required to make an individualized determination regarding

> *both* his mental state *and* his culpability for any aggravating fact or circumstance.
> ***
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> ***
>
> In Allen's case, the unambiguous language of section 274 mandated a lesser-included instruction to Allen's jury for the charges of Robbery in the First Degree, Burglary in the Second Degree and Aggravated Menacing. Each of those offenses is a crime that is divided into degrees. Assuming arguendo that Allen's mental state as an accomplice was the same as the principal perpetrator of each act of robbery, burglary and menacing, the difference in the degree of each offense depended on Allen's "own accountability for an aggravating fact or circumstance," i.e., the gun. Therefore, as to each of the charged offenses that is divided into degrees, we hold that the Superior Court's failure to comply with the unambiguous statutory mandate of section 274 to instruct the jury to determine Allen's individual "mental state" and "accountability for an aggravating fact or circumstance" constituted reversible error. To the extent our prior panel decisions are inconsistent with this holding, they are overruled. [Footnotes and citations omitted.]

Id. at 213-14.

The question currently before this Court in this Rule 61 motion is whether this ruling is retroactively applicable. If it is not, defendant's argument is procedurally barred by Rule 61(i)(1), (3) and (4).[18]

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[18]The version of Rule 61(i) applicable to defendant's case provided as follows:

> *Bars to relief.* (1) Time limitation. 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.
> (2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim in warranted in the interest of justice.
> (3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows
> (A) Cause for relief from the procedural default and

In *Richardson II*, the Superior Court considered this very issue after the Supreme Court overruled its previous decision in that case as explained above.

The facts of *Richardson II* are as follows. Defendant and his accomplice broke into a house during the night. Defendant did not testify, but his trial counsel indicated that defendant thought the house was unoccupied because the lights were off and there was no car in the driveway. Defendant and his accomplice entered the house by using keys which defendant took from a vehicle in the garage. Defendant entered the bedroom where the homeowner was sleeping. The homeowner awoke and came after the two intruders with a gun. Defendant joined his accomplice in the dining room; his accomplice and the homeowner exchanged gunfire; his accomplice ended up dead and defendant was wounded. Defendant was convicted of attempted murder in the first degree, robbery in the first degree, burglary in the first degree, conspiracy in the first degree, and four counts of possession of a firearm during the commission of a felony.

The Superior Court concluded that *Allen* was not retroactively applicable. The Court's analysis in *Richardson II* is set forth in full because it is precedent for this court in the pending motion.

> There are two standards to determine retroactivity. fn 23 Because the issue now

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> (B) Prejudice from violation of the movant's rights.
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> (4) Former adjudication. Any 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 reconsideration of the claim is warranted in the interest of justice.
>
> (5) Bars inapplicable. 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.

before the court is on collateral review, it is initially subject to the "general rule of non-retroactivity"" dictated by *Flamer v. State*. fn. 24 *Flamer* formally adopted the *Teague v. Lane* fn.25 standard that "new constitutional rules of criminal procedure will *not* be applicable to those cases which have become final before the new rules are announced, unless the rules fall within one of two exceptions." fn. 26

Fn. 23 *State v. Chao*, 2006 WL 27888180, *8 (Del. Super. Sept. 25, 2006), *aff'd*, 931 A.2d 1000 (Del. 2007).

Fn. 24 585 A.2d at 749.

Fn. 25 489 U.S. 288, 310 (1989).

Fn. 26 *Flamer*, 585 A.2d at 749 (emphasis in original).

The State contends that *Allen* did not set forth a "new rule," rather, by its terms, it reaffirmed a previous holding. fn 27 The court cannot say for certain whether or not *Allen* sets forth a "new" rule under *Teague's* standard. It is clear enough, however, that *Allen* reinterprets Section 274, which is substantive, not procedural, law. That being so, *Allen* is not subject to *Teague's* rule of non-retroactivity on collateral review.

Fn. 27 *Allen*, 970 A.2d at 213.

That is reinforced by *Teague's* holding that 'retroactivity is ... a threshold question [to be considered when] a new rule is applied to the defendant in the case announcing the rule." fn.28 And so, if *Allen* had concerned criminal procedure, it would not be retroactive for purposes of this collateral matter. By the same token, *Teague* clearly instructs that "[the issue of] whether a decision announcing a new rule should be given prospective or retroactive effect should be faced at the time of that decision." fn. 29 *Allen's* silence about retroactivity speaks loudly in light of *Teague's* admonition to appellate courts that upon a new rule's announcement, the appellate court should speak to retroactivity.

Fn. 28 *Teague*, 489 U.S. at 300.

Fn. 29 *Id.* (quoting Mishkin, Foreward: the High Court, the Great Wit , and the Due Process of Time and Law, 79 Harv. L.Rev. 56, 64 (1965)).

The alternate standard for allowing retroactive application during collateral review is set forth in *Davis v. United States*, fn. 30 adopted here in *State v. Chao*. Fn. 31 *Davis* held that "the fact that a contention is grounded not in the Constitution, but in the `laws of the Unites [sic] States' would not preclude its assertion in" a collateral proceeding. Fn. 32 Davis sought collateral relief due to a change in the substantive law that decriminalized Davis's original conduct. *Davis*

> held "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'presents exceptional circumstances that justify collateral relief." fn. 33 Following *Davis's* reasoning, *State v. Chao* declares that "if holding a new decision non-retroactive would clearly result in an egregious injustice, then retroactivity is appropriate." fn. 34
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> Fn. 30 417 U.S. 333 (1974).
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> Fn. 31 2006 WL 2788180.
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> Fn. 32 *Id.* at 346.
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> Fn. 33 *Id.*
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> Fn. 34 2006 WL 2788180, * 8.
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> *Davis* is helpful here because it articulates the "miscarriage of justice" standard adopted in *Chao*. *Davis*, however, is readily distinguishable from this case. Here, the crimes for which Defendant was convicted are unchanged by *Allen*, which simply focuses on proper jury instruction. As explained next, the court does not find that "egregious injustice" would "clearly" flow from refusing to apply *Allen* retroactively under this cases's undisputable facts. Fn. 35
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> Fn. 35 *See, e.g., United State [sic] v. Young*, 470 U.S. 1, 16 (1985) ("plain error" appellate review is used in "circumstances in which a miscarriage of justice would otherwise result," inherently requiring a case-by-case review); *accord, Kent v. Johnson*, 821 F.2d 1220, 1223 (6th Cir. 1987) ("The interests of justice must be weighed on a case by case basis."); *United States v. Graham*, 758 A.2d 879, 883 (3d Cir. 1985) (whether a resulting miscarriage of justice occurred must be determined on a case-by-case basis, upon review of the entire record.").

Richardson II, *supra* at 11-14.

The Court then analyzed the crimes for which defendant was convicted (attempted murder in the first degree, burglary in the first degree, robbery in the first degree, and conspiracy in the second degree) and ruled either that *Allen* did not apply to the specific crime, or the indisputable evidence proved defendant was guilty of the crime as a principal, or the omission of a Section 274 instruction did not result in an injustice. *Id.* at 14-18. Thus, the Court denied the motion for postconviction relief.

I now examine whether *Allen* is retroactively applicable to this case.

First, as noted in *Richardson II*, the Supreme Court did not speak to retroactivity in *Allen*. Since it was well aware that its ruling was contrary to a number of cases, its silence on the issue, as the *Richardson II* decision notes, speaks volumes. In other words, the Supreme Court's refusal to address the issue shows it did not desire for its decision to be retroactively applicable.

I now examine whether egregious injustice would clearly flow from refusing to apply *Allen* to this case's indisputable facts.

1) Robbery in the First Degree

In this case, defendant admitted he picked up the gun as he was running out. For the purposes of this motion only, I will deal with defendant's version of the facts: the gun belonged to the victim; Jay took the gun from the victim and then beat him with it; defendant and Jay were rifling through the victim's property in his house and Jay possessed the gun; defendant picked up the gun on the way out the door after the victim had been bound. Thus, the indisputable facts from defendant's version establish that defendant stole the victim's property (the gun) after his confederate used the gun to stop the victim's resistance. As was the situation in *Richardson II*, "this court cannot conceive any way a rational juror, taking Section 274 into account, could possibly have found Defendant guilty of any lesser-included robbery offense." *Id.* at 17.

2) Burglary in the Second Degree

In this case, the Court gave instructions on burglary in the first degree and burglary in the second degree. Defendant was found guilty of burglary in the second degree. It would have been

inappropriate to have given an instruction on burglary in the third degree[19] because the indisputable evidence was that defendant and Jay were in the victim's dwelling. Burglary in the third degree applies to a building which is not a dwelling. There was no prejudice at all in not giving the section 274 instruction.

3) Assault in the Second Degree

This Court addressed the prejudice aspect of not giving a section 274 instruction on assault in the third degree[20] in its first postconviction motion. I repeat what I stated in that motion. Even if a section 274 charge should have been given with regards to assault in the third degree, defendant cannot show any prejudice from its omission. It is undisputed that there was serious physical injury. It also is undisputed, and the jury found, that the victim was assaulted with a with a gun, a deadly weapon. Consequently, there was no basis for charging on assault in the third degree which addresses the situation where there is physical injury, but not serious physical injury, or where there is evidence compatible with recklessness or criminal negligence.

4) Unlawful Imprisonment in the First Degree

The undisputable evidence is that the victim was bound and gagged after being beaten.

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[19]In 11 *Del. C.* § 824, it is provided:

> A person is guilty of burglary in the third degree when the person knowingly enters or remains unlawfully in a building with intent to commit a crime therein.

[20]In 11 Del. C. § 611, it is provided in pertinent part:

> A person is guilty of assault in the third degree when:
> (1) The person intentionally or recklessly causes physical injury to another person; or
> (2) With criminal negligence the person causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Defendant never addressed that crime. The aggravating factor was that the victim was restrained "under circumstances which expose that person to the risk of serious physical injury." Binding and gagging this beaten and seriously injured victim undoubtedly exposed him to the risk of serious physical injury. The jury found defendant knowingly and unlawfully restrained the victim, which establishes unlawful imprisonment in the second degree. No rational juror could have found that defendant did not restrain the victim "under circumstances which expose that person to the risk of serious physical injury." There was no prejudice in not giving the section 274 instruction with regards to unlawful imprisonment in the second degree.

5) Conspiracy in the Second Degree

Since it is indisputable that defendant is responsible for the other crimes, I conclude that no rational juror could have found defendant not guilty of conspiracy in the second degree. I conclude, as I did in the first postconviction motion that defendant cannot establish prejudice because there was no evidence compatible with an intent to promote or facilitate the commission of a misdemeanor. *Id.* Thus, there was no prejudice in the section 274 instruction on conspiracy in the third degree.[21]

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[21]In 11 *Del. C.* § 511, it is provided in pertinent part:

> A person is guilty of conspiracy in the third degree when, intending to promote or facilitate commission of a misdemeanor, the person:
>
> (1) Agrees with another person or persons that they or 1 or more of them will engage in conduct constituting the misdemeanor or an attempt or solicitation to commit the misdemeanor; or
>
> (2) Agrees to aid another person or persons in the planning or commission of the misdemeanor or an attempt or solicitation to commit the misdemeanor, and the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy.

Based on the foregoing, the court does not find that "egregious injustice" would "clearly" flow from refusing to apply *Allen* retroactively under the indisputable facts of this case. Consequently, defendant's motion is procedurally barred and is denied.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Paula Ryan, Esquire
Edward C. Gill, Esquire
Bernard J. O'Donnell, Esquire