IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	DEF. ID# 9811012658
V.	)	
	)	IN98-12-1010 R2
CRAIG C. NELSON,	)	IN98-12-1012 R2
	)	IN99-01-1112 R2
	)	IN99-01-1113 R2
	)	IN99-01-1114 R2
Defendant.	)	IN99-01-1115 R2

ORDER

This 19th day of May, 2010, upon consideration of Defendant's Motion for Post-Conviction Relief, it appears that:

1. On February 9, 2000, following a jury trial, Defendant was found guilty of Attempted Murder, two counts of Possession of a Firearm During the Commission of a Felony, Conspiracy First Degree, Recklessly Endangering First Degree and Conspiracy Second Degree.[1] On March 24, 2000, the trial judge sentenced Defendant to a total of 30 years in jail followed by probation.[2] On direct appeal, Defendant challenged his conviction on two separate grounds: (1) that the trial court erred by

[1] Docket Item ("D.I.") 45 at 3.

[2] D.I. 53 at 1-8.

allowing evidence of prior bad acts under Delaware Rule of Evidence 404(b); and (2) that there was insufficient evidence to convict on all charges. On April 30, 2001, the Supreme Court of Delaware affirmed the convictions and sentences.[3]

2. On April 30, 2004, Defendant filed his first Motion for Postconviction Relief. In that Motion, he argued that the trial judge's denial of the jury's request to review transcripts of witness testimony was improper. Defendant argued that because the transcripts did not exist at the time of the request, the trial judge should have allowed the court reporter to read back the testimony. Since the Defendant failed to raise the issue on direct appeal, and had not demonstrated cause for relief or prejudice resulting from the violation that would overcome the procedural bar, his Motion was summarily dismissed under Superior Court Criminal Rule 61(i)(3) ("Rule 61").[4]

3. Defendant filed his current *pro se* Motion for Postconviction Relief on February 12, 2010. He argues that the trial court's failure to include a jury instruction on accomplice liability with respect to the Attempted Murder First Degree charge violated his State and Federal Due Process rights. In support of his argument, Defendant contends that *Allen v. State*[5] created a new rule that mandates a jury

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[3] D.I. 68 at 3-8.

[4] *State v. Nelson*, 2004 WL 1658495, at *1-2 (Del. Super. July 22, 2004).

[5] 970 A.2d 203 (Del. 2009).

instruction consistent with 11 *Del. C.* § 274 ("Section 274").[6] He argues that when guilt is based on accomplice liability, the jury must determine both a defendant's individual mental state and his degree of culpability for any aggravating facts or circumstances.[7] Defendant contends that he was denied a fair trial as a result of the trial judge's failure to give this instruction.

4. Under Delaware law, the Court must first determine whether post-conviction claims may pass through the procedural filters of Rule 61 prior to addressing the merits of a motion for postconviction relief.[8] The Court will not address the merits of any claims that are procedurally barred.[9] Rule 61 bars relief where: (1) the motion has been filed more than one year after a final order of

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[6] 11 *Del. C.* § 274 ("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.").

[7] D.I. 85 at 5-7.

[8] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

[9] *State v. Chao*, 2006 WL 2788180, at *5 (Del. Super. Sept. 25, 2006).

conviction[10] or more than one year after the recognition of a newly recognized, retroactively applicable right; (2) the motion raises a basis for relief not asserted in a prior postconviction proceeding; (3) the motion raises any basis for relief not raised in the proceedings leading to conviction, as required by the court rules; or (4) the motion raises a ground for relief formerly adjudicated in any proceeding.[11] The Rule 61procedural bars, however, are not absolute. Under Rule 61(i)(5), the first three bars to relief may be inapplicable if the Court lacked jurisdiction or the if the motion raises "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability or fairness of the proceedings leading to the judgment of conviction."[12]

5. Defendant's primary argument that the trial judge's failure to give a Section 274 accomplice liability jury instruction was reversible error is procedurally barred under Rule 61(i)(1). Defendant's conviction was final April 30, 2001, more than nine years ago. Therefore, his motion is time barred under the first prong of

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[10] Super. Ct. Crim. R. 61(m) (stating that judgement of conviction is final for purposes of postconviction review under the following circumstances: "(1) if the defendant does not file a direct appeal, 30 days after the Superior Court imposes sentence; (2) if the defendant files a direct appeal or there is an automatic statutory review of a death penalty, when the Supreme Court issues a mandate or order finally determining the case on direct review; or (3) if the defendant files a petition for certiorari seeking review of the Supreme Court's mandate or order finally disposing of the case on direct review").

[11] *Id.* at 61(i)(1)-(4).

[12] *Id.* at 61(i)(5).

Rule 61(i)(1).[13]

6. Defendant's claim may survive the time bar under the second prong if there has been a newly recognized, retroactively applicable right announced within the last year. Defendant argues that such a right was announced by the Delaware Supreme Court in *Allen v. State*. *Allen* was decided on February 17, 2009, and Defendant's Motion was filed on February 12, 2010. Therefore, Defendant's Motion would be timely if his characterization of *Allen* having created a new, retroactive rule was correct. *Allen* does not announce a newly recognized right, however, and even if it did, that right would not be retroactive. Therefore, Defendant's Motion is time barred under Rule 61(i)(1).

7. In *Allen*, the Court held that Sections 271 and 274 must be read *in pari materia* and "when an offense is divided into degrees, each participant is only guilty of committing the degree of a crime that is commensurate with his [or her] own mental culpability *and* his [or her] own accountability for an aggravating circumstance."[14] This is not a new interpretation of Section 274. Rather, as made clear in *Allen*, it is a reiteration of the rule announced in *Johnson v. State*.[15] In

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[13] D.I. 68 at 8.

[14] *Allen*, 970 A.2d at 213.

[15] 711 A.2d 18 (Del. 1998).

Johnson, the Court laid out the two part analysis for accomplice liability under Section 274, that was subsequently endorsed again by the Court in *Allen*:

> First, the jury must decide whether the State has established that the defendant was an accomplice to a criminal offense committed by another person.[...] Second, 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 that degree of the offense the defendant committed. That conclusion must be based on an *individualized* determination of the defendant's mental state *and culpability for any aggravating fact* or circumstances.[16]

8. In order to create a new rule, the Court must do more than merely "clarif[y a] previous decision"[17]or "appl[y] [a] principle that govern[ed] a prior case decided before a defendant's trial took place."[18] The *Allen* Court did not expand the analysis laid out in *Johnson*; rather, it clarified its application.[19] Since *Allen* was merely a clarification and application of a previous decision, no new rule was announced, and Defendant's claim is procedurally barred under Rule 61(i)(1).

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[16] *Allen*, 970 A.2d at 213 (quoting *Johnson*, 711 A.2d at 29-30).

[17] *Bailey*, 588 A.2d at 1128 (citing *Younger*, 580 A.2d at 554).

[18] *Id.* (citing *Flamer v. State*, 585 A.2d 736, 749 (Del. 1990)).

[19] *Allen*, 970 A.2d at 213-14 (reaffirming *Johnson* and overruling "prior panel decisions that are inconsistent with this holding," specifically those cases holding that a Section 274 jury instruction was required only if the offense was divided into degrees with differing mental states for each degree). The cases to which the Court pointed as being arguably inconsistent are *Johnson v. State*, 2008 WL 1778241 (Del. Apr. 21, 2008); *Richardson v. State*, 2007 WL 2111092 (Del. July 24, 2007); and *Coleman v. State*, 2000 WL 1840511 (Del. Dec. 4, 2000).

9. Assuming, *arguendo*, that *Allen* did create a newly recognized right, Defendant's Motion still would be procedurally barred because the rule is not retroactively applicable. In the time since *Allen* was decided, this Court has had the opportunity to analyze whether that decision applies retroactively. In *State v. Richardson*, the Court examined *Allen* in the context of Rule 61 and determined that, while it was unsure whether a new rule was announced, it was convinced that the *Allen* decision was not retroactively applicable.[20] *Richardson* is persuasive authority. Moreover, the fact that *Allen* does not itself address the issue of retroactivity is probative of the Court's intent. Understanding the need for clarity on the question of retroactivity, the United States Supreme Court has instructed that a Court should address whether any new rule it creates should apply retroactively.[21] The fact that retroactivity was not mentioned in *Allen* suggests that the Court did not intend retroactive application of the decision.

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[20] *State v. Richardson*, 2009 WL 2854745, at *5 (Del. Super. June 23, 2009). *See also State v. Bartley*, 2009 WL 2883055, at *6-8 (Del. Super. Sept. 8, 2009) (reiterating and adopting the *Richardson* analysis in full).

[21] *Teague v. Lane*, 489 U.S. 288, 300 (1989) (decision formally endorsed in Delaware in *Flamer*, 585 A.2d at 749).

10. The *Richardson* Court discussed the two standards for retroactivity.[22] In order to preserve the finality of the Court's decisions in criminal cases, both standards make retroactivity the exception rather than the norm.[23] Where a decision affects substantive law, the new rule is retroactive only if an egregious injustice would clearly result from non-retroactive application.[24] In applying this standard to the facts before it, the *Richardson* Court found that "'egregious injustice' would not 'clearly' flow from refusing to apply *Allen* retroactively."[25] The Court reasoned that Attempted Murder was not divided into degrees, therefore *Allen* was inapplicable and a Section 274 jury instruction was not required.[26] *Richardson* is directly on point

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[22] *Richardson*, 2009 WL 2854745, at *4-5 ("'[N]ew 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.' . . . It is clear enough, however, that *Allen* reinterprets § 274, which is substantive, not procedural, law. That being so, *Allen* is not subject to [*Flamer's*] rule of non-retroactivity on collateral review." (quoting *Flamer*, 585 A.2d at 749)).

[23] *Chao*, 2006 WL 2788180, at *8.

[24] *Richardson*, 2009 WL 2854745, at *5 (citing *Chao*, 2006 WL 2788180, at *8). An example of when an egregious injustice would clearly result would be if the defendant's conduct was subsequently rendered non-criminal. *See Chao*, 2006 WL 2788180, at *8 (holding that a new rule applied retroactively where defendant was convicted of felony murder and an element of the offense was subsequently redefined, rendering defendant's conduct non-criminal).

[25] *Richardson*, 2009 WL 2854745, at *5.

[26] *Id.* ("Defendant's attempted first degree murder conviction is not touched by Allen. While homicides are divided into degrees, attempted murder is not. Attempt, by itself, requires intent. For an act to be 'intentional,' it must be that person's 'conscious object to engage in conduct of that nature.' . . . [O]ne cannot 'attempt' to act recklessly. Therefore, as to this charge, Section 274 is inapplicable.")(citing 11 *Del. C.* §§ 231(b)(1), 531); *Rambo v. State*, 919 A.2d 1275, 1281 (Del. 2007)).

here, as both defendants were convicted of Attempted Murder First Degree. Therefore, a Section 274 jury instruction was not required in the case *sub judice* and no "egregious injustice" would clearly result from refusing to apply *Allen* retroactively.

11. Since the *Allen* decision did not announce a new retroactively applicable right, Defendant's motion is time barred under Rule 61(i)(1) unless an exception under Rule 61(i) applies. Rule 61(i)(5), often referred to as the "fundamental fairness exception," states that the bars to relief under Rule 61(i)(1)-(3) do 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."[27] Defendant has the burden of proving there has been a substantial constitutional right violated and that the violation falls within the exception.[28] While Defendant is not required to prove that the trial judge committed an error, "mere speculation that a different result might have occurred does not satisfy the requirement."[29]

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

[28] *Bailey*, 588 A.2d at 1130.

[29] *State v. Tatem*, 2003 WL 22048227, at *3 (Del. Super. Aug. 27, 2003) (citing *State v Getz*, 1994 WL 465543, at *11 (Del. Super. July 15, 1994)).

12. The case law does not clearly define what constitutes a "colorable claim" that would trigger the "fundamental fairness exception."[30] It is clear, however, that the exception is to be construed narrowly.[31] As it relates to jury instructions, the "fundamental fairness exception" applies only "where there is a reasonable probability that a constitutionally defective jury instruction affects the outcome of the jury decision."[32]

13. After examining the instruction given to the jury at trial, the Court finds that the instruction was not so improper (if improper at all) as to affect the jury's

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[30] *See, e.g.*, *State v. Young*, 2009 WL 2219289, at *2 (Del. Super. July 23, 2009) (holding that "Defendant's claims do not meet the high standard that the 'fundamental fairness' exception requires," without defining the exception); *State v. Trump*, 2008 WL 4147584, at *2 (Del. Super. Aug. 25, 2008) (same); *State v. Walls*, 2007 WL 404765, at *1 (Del. Super. Jan. 30, 2007) (same); *State v. Mays*, 2006 WL 2560184, at *3 (Del. Super. Aug. 28, 2006) (same).

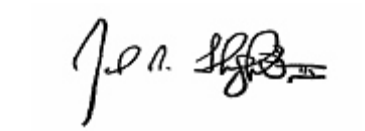
[31] *State v. Brown*, 1992 WL 240470, at *2 (Del. Super. Aug. 11, 1992) ("Rule 61(i)(5) has been construed as providing a narrow exception to the Rule 61 time bar with the burden of proof squarely on the petition[er] to show that he has been deprived of a substantial constitutional right."). *See also Younger*, 580 A.2d at 555 (citing *Teague*, 489 U.S. at 297-99) (determining while the exception is limited, it is applicable in circumstances where the right relied upon was recognized for the first time after a direct appeal); *Webster v. State*, 604 A.2d 1364, 1366-67 (Del. 1992) (applying the exception where there was a mistaken waiver of an important constitutional right, such as right to a jury trial, or to be represented by counsel).

[32] *State v. Rosa*, 1992 WL 302295, at *8 (Del. Super. Sept. 29, 1992) (finding the exception was triggered when there was a reasonable probability that the constitutionally defective jury instruction had affected the jury's verdict).

decision.[33] Taking the jury instructions as a whole, Defendant has not shown that there is a reasonable probability that the outcome would have been different had the jury been given the Section 274 accomplice liability instruction. Therefore, the fundamental fairness exception is inapplicable and Defendant's motion is procedurally barred under Rule 61(i)(1).

14. NOW THEREFORE, for the reasons stated above, Defendant's second Motion for Postconviction Relief is **DENIED** because it is procedurally barred.

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary

[33] D.I. 44. The jury was instructed that the two defendants were individuals, and the determination of guilt as to each count must be made "in the light of the evidence against each" and "separately and independently of the guilt of the other." *Id.* at 5. Additionally, a separate instruction on accomplice liability was given to the jury that included the language from Section 271. *Id.* at 45-46.