

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

John Williams, Esquire
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, Delaware 19904-6750
Attorney for the State

Jeffrey Fogg
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, Delaware 19977

Re: State of Delaware v. Jeffrey Fogg
I.D. No. 9504002666R

Submitted: July 7, 2010
Decided: July 22, 2010

On Defendant's Motion for Postconviction Relief.
DENIED.

Dear Mr. Williams and Mr. Fogg:

In 1996, Defendant and his codefendant, Daryl Andrus ("Andrus"), were convicted of non-capital Murder First Degree and Conspiracy Second Degree in connection with the murder of James Dilley.¹ Defendant was sentenced to life in prison without the possibility of probation or parole.²

Defendant appealed his convictions to the Delaware Supreme Court, and his convictions were affirmed in 1998.³ Subsequently, Defendant filed his first motion

¹ *Fogg v. State*, 1998 WL 736331 (Del. Supr.).

² *Id.* at * 4.

³ *Id.*

for postconviction relief alleging ineffective assistance of counsel and other claims.⁴

On August 1, 2000, this Court dismissed in part and denied in part Defendant's postconviction claims.⁵ Defendant appealed, and the Supreme Court remanded for a hearing on Defendant's ineffective assistance of counsel claims.⁶

Shortly after the order of remand, Andrus filed his own motion for postconviction relief alleging, among other claims, a *Brady* violation.⁷ Andrus's potential *Brady* violation arose from an alleged agreement between the State and one of its key trial witnesses, Robert Richmond ("Richmond").⁸ Allegedly, Richmond was promised leniency by the State in exchange for his favorable testimony. After Andrus's motion was filed, Defendant requested leave to adopt Andrus's *Brady* claim.⁹ Defendant's request was granted, without any finding that any such adoption was timely, and Defendant was permitted to participate in an evidentiary hearing related to the *Brady* issue and file briefing associated with the *Brady* issue.

In 2002, a hearing was held on Defendant's ineffective assistance of counsel claims, and Defendant's first motion for postconviction relief was eventually denied. The Court did not consider any *Brady* issues adopted by Defendant because Richmond was unavailable to testify. Any hearing on the potential *Brady* violation was postponed until Richmond was available to testify in Delaware.

The State eventually obtained custody of Richmond in 2009, and a hearing was held to establish the facts concerning the alleged *Brady* violation. Both Defendant and Andrus were present at the hearing, and both were permitted to file post hearing briefs in support of an alleged *Brady* violation. Andrus, through counsel, filed a brief in support of an alleged *Brady* violation.

After the conclusion of the hearing, Defendant's counsel filed a motion to withdraw, which was granted by this Court on June 28, 2010.¹⁰ In granting counsel's motion to withdraw, this Court stated that "[t]his Court will treat Defendant's submission in response to [counsel's] motion [to withdraw] as a motion for postconviction relief pursuant to Rule 61, although this Court has not

⁴ Defendant initially filed his first motion for postconviction relief *pro se*. Defendant was then able to obtain counsel, and an amended motion for postconviction relief was filed alleging ineffective assistance of counsel.

⁵ *Fogg v. State*, 2000 WL 1211510 (Del. Super.).

⁶ *Fogg v. State*, 2010 WL 2653328 (Del. Super.).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* The basis for the motion to withdraw was that counsel felt that Defendant's claims were without merit such that counsel could not ethically present those claims to the Court.

yet concluded that Defendant Fogg is entitled to have any motion for postconviction relief decided on the merits.”¹¹ Defendant did not file any other brief in support of a *Brady* violation.

In his motion, Defendant asserts multiple grounds for relief, none of which appear to address any potential *Brady* violation. Defendant argues that (1) he was not afforded the right to confront his accuser; and (2) the State violated his constitutional rights by introducing prejudicial *Bruton* evidence.¹² Defendant also requests an *ex parte* hearing to further develop his claims.¹³

In response, the State argues that Defendant has failed to raise any *Brady* issue. The State argues that Defendant’s motion fails to assert any meritorious grounds for relief.

The Court need not address the merits of Defendant’s pending claims because Defendant has failed to overcome the procedural requirements of Superior Court Criminal Rule 61.¹⁴ Rule 61(i)(1) provides that “[a] motion for postconviction relief may not be filed more than [three years] after the judgment of conviction is final . . .”¹⁵ Despite this requirement, the procedural bar of Rule 61(i)(1) may be overcome by Rule 61(i)(5), which states that:

[t]he bars to relief in paragraph (1) . . . 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 to the judgment of conviction.

“While [a] ‘colorable claim’ does not necessarily require a conclusive showing of trial error, mere ‘speculation’ that a different result might have obtained certainly does not satisfy the requirement.”¹⁶

Here, Defendant has failed to establish a colorable claim for relief. Defendant’s motion fails to address any *Brady* violation. To the extent that

¹¹ *Id.*

¹² Defendant has numerous sub-categories in support of his alleged *Bruton* violation. *See Op. Br.*

¹³ *Id.*

¹⁴ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991) (stating the court must first apply the procedural bar under Rule 61 before considering the merit of any claim); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (same).

¹⁵ Super. Ct. R. Crim. Pro. 61(i)(1). After Defendant’s conviction became final, Rule 61 was amended to make the three year timeframe for filing a motion for postconviction relief a one year time frame.

¹⁶ *State v. Getz*, 1994 WL 465543, at *11 (Del Super.) (finding no exception under Rule 61(i)(5) to the procedural bars of Rule 61).

Defendant does have a claim based on *Brady*, that claim was denied today by separate opinion in *State v. Andrus*.¹⁷

Defendant's other contentions alleging *Bruton* violations fail to establish a "colorable claim" for relief. This Court and the Delaware Supreme Court have previously addressed Defendant's *Bruton* allegations. The Delaware Supreme Court has previously held that "the error in admitting into evidence Andrus's statement incriminating Fogg was contrary to the holding of *Bruton* but was harmless beyond a reasonable doubt when it is considered in the context of the admissible evidence of Fogg's guilt."¹⁸ This Court will not rehash any conclusion made by the Supreme Court despite Defendant's apparent insistence on doing so. The Supreme Court has already determined that Defendant's *Bruton* claims are without merit, and a reargument of those claims fails to overcome the procedural bar established by Rule 61(i)(1).

Defendant's arguments alleging a *Bruton* violation are without merit and repetitive. This Court does not find any "colorable claim" for relief based on Defendant's arguments. Accordingly, Defendant's motion for postconviction relief is **DENIED**. Defendant's request for an *ex parte* hearing to further develop his claim is **DENIED AS MOOT**.

IT IS SO ORDERED.

Richard R. Cooch, J.

oc: Prothonotary
cc: Investigative Services
Bernard J. O'Donnell, Esquire
Peter N. Letang, Esquire
Colleen K. Norris, Esquire
Joseph A. Gabay, Esquire

¹⁷ *State v. Andrus*, I.D. No. 9504004126, July 22, 2010.

¹⁸ *Fogg v. State*, 1998 WL 736331 (Del. Supr.).