IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	
	)	I.D. No. 89001750DI
PAUL ERIC CONDON,	)	
Defendant.	)	Cr.A.#ID IN89-03-0278, 0279
	)	IN89-03-1647, 1648
	)	

Submitted: December 30, 2002
Decided: March 13, 2003

UPON DEFENDANT'S MOTION
FOR POSTCONVICTION RELIEF
DENIED.

ORDER

Paul Eric Condon, Wilmington, Delaware, *Pro Se*, Defendant.

Robert O'Neill, Esquire, Deputy Attorney General, Kent County, State of Delaware, Attorney for the State of Delaware.

ABLEMAN, JUDGE

Paul Eric Condon ("Defendant") has filed this *pro se* Motion for Postconviction Relief pursuant to Superior Court Criminal Procedure Rule 61, wherein he seeks to set aside a judgment of criminal conviction based on violations of his rights, including, but not limited to, violations of his constitutional rights under the United States Constitution and the Delaware Constitution. Defendant sets forth six grounds in his motion upon which he seeks postconviction relief. For the reasons stated below, Defendant's Motion is **DENIED**.

Statement of Facts

On December 11, 1989, following a jury trial the Defendant was convicted of four counts of Unlawful Sexual Intercourse in the First Degree. Pursuant to 11 *Del. C.* 4209A, Defendant was sentenced by the Court on February 2, 1990 to four consecutive life sentences, the first twenty years of each life sentence being a mandatory term of incarceration.[1]

Defendant timely filed a direct appeal of his conviction to the Delaware Supreme Court. The facts leading up to Defendant's conviction are set forth in detail in the Supreme Court's opinion affirming his conviction on September 26,

[1] Former § 4209A, concerning punishment for unlawful intercourse in the first degree, was repealed by 67 Del. Laws, c. 130, § 6, effective July 17, 1989 (known as the Truth in Sentencing Act of 1989). On November 18, 1997, Defendant filed a *pro se* Motion for Postconviction Relief under Super. Ct. Crim. R. 61 seeking a correction of his sentence. The Court treated the motion as a Motion for Correction of Sentence under Super. Ct. Crim. R. 35(a). The Truth in Sentencing Act of 1989 is effective only with regard to crimes committed as of 12:01 a.m., June 30, 1990. The crimes Defendant was convicted of occurred in 1987 and 1988. Therefore, the Court denied Defendant's motion because the Truth in Sentencing Act of 1989 had no applicability as his crimes were not committed on or after June 30, 1990.

1991.[2] In his appeal, Defendant raised four grounds concerning the conduct of his trial proceedings. Defendant claimed that: 1) the trial court erred in allowing the State to present expert testimony relating to characteristics of child sexual abuse victims; 2) the trial court erred by not presenting to the jury expanded instructions specific to expert testimony used in child sexual abuse cases; 3) the trial court abused its discretion by permitting two investigating officers to be present in the courtroom as well as to be seated at the prosecution table while other witnesses testified; and 4) the prosecutor posed improper questions and made erroneous statements resulting in unfair prejudice to Defendant necessitating reversal of his convictions.[3]

On March 28, 1994, Defendant's petition for writ of certiorari to the United States Supreme Court was denied.[4] Defendant's subsequent petition for rehearing was also denied.[5] Further, Defendant's motion for correction of sentence seeking relief under the Truth in Sentencing Act of 1989 was denied on December 15, 1997 on the basis that the Act was not applicable to Defendant's criminal conviction.[6]

Defendant's Contentions

Defendant filed the instant motion for postconviction relief on December 30, 2002, wherein he states the following grounds for relief: 1) newly discovered

[2] *See generally Condon v. State*, 529 A.2d 7 (Del. 1991).
[3] *Id*. at 8.
[4] *Condon v. Delaware*, 511 U.S. 1008 (1994).
[5] *Condon v. Delaware*, 511 U.S. 1079 (1994).

evidence pursuant to Superior Court Criminal Rule 61(i)(5); 2) ineffective assistance of counsel; 3) failure to call key witnesses; 4) failure to prepare; 5) abuse of discretion; and 6) defective indictment.[7] In addition to this motion, Defendant filed a Motion for Evidentiary Hearing Pursuant to Superior Court Criminal Rule 61(h) and a Motion for Appointment of Counsel Pursuant to Superior Court Criminal Rule 61(e). As the Court will further explain, because this motion was filed more than three years after the judgment of conviction was finalized[8] and because Defendant has failed to demonstrate the existence of a constitutional violation resulting in a "miscarriage of justice" or undermining the "fundamental fairness" of the proceedings[9], the motion must be denied on procedural and substantive grounds.

Procedural Bars

Under Delaware law, when considering a motion for postconviction relief, this Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of defendant's postconviction relief claim.[10] To protect the integrity of the

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[6] *See supra* note 1.
[7] Defendant's Memorandum in Support of Motion for Rule 61 Postconviction Relief, at 1, 5, 15, 19, 22 (hereinafter "Def. Mot. at ___.").
[8] Super. Ct. Crim. R. 61(i)(1).
[9] Super. Ct. Crim. R. 61(i)(5).
[10] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. Super. Ct. 1991) ; *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).

procedural rules, the Court should not consider the merits of a postconviction claim where a procedural bar exists.[11]

Upon initial examination of the procedural bars imposed by Rule 61(i), the Court finds that Defendant has failed to successfully overcome the first of two hurdles in his motion for postconviction relief, i.e., the time limitation bar to relief set forth in Rule 61(i)(1). Pursuant to this Rule, a postconviction motion that is filed more than three years after judgment of conviction is untimely, and thus procedurally barred. Super. Ct. Crim. R. 61(i)(1) more fully provides:

> 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.[12]

Defendant filed the instant motion approximately eleven and one half years after his conviction became final on September 26, 1991.[13] Additionally, in his claim for relief, Defendant does not assert a new retroactive rule under any circumstance. Thus, his motion is procedurally barred under Rule 61(i)(1).

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[11] *State v. Gattis*, 1995 WL 790961, at *2 (citing *Younger*, 580 A.2d at 554).
[12] Super. Ct. Crim. R. 61(i)(1).
[13] Within the purview of Rule 61(i)(1), a conviction becomes final for purposes of postconviction review:
(a) for a defendant who takes a direct appeal of the conviction, when the direct appeal process is complete (the date of the issuance of the mandate under Supreme Court Rule 19); or
(b) for a defendant who does not take a direct appeal, when the time for direct appeal has expired (30 days after sentencing); or
(c) if the United States Supreme Court grants certiorari to a defendant from a decision of this Court, when that Court's mandate issues. *Jackson v. State*, 654 A.2d 829, 833 (Del. 1995).

The Rule 61 time bar is not an *absolute* prohibition to post-conviction relief petitions filed three years after conviction.[14] Rule 61(i) (5) may potentially overcome the procedural bars of Rule 61. Rule 61(i)(5) "[i]s a general default provision, and permits a petitioner to seek relief if he or she was otherwise procedurally barred under Rules 61(i)(1)-(3)."[15] Rule 61(i)(5) provides:

> 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.[16]

The "miscarriage of justice" or "fundamental fairness" exception contained in Rule 61(i)(5) is "[a] *narrow one* and has been *applied only in limited circumstances*, such as when the right relied upon has been recognized for the first time after a direct appeal."[17] This exception may also apply to a claim that there has been a mistaken waiver of fundamental constitutional rights, such as a mistaken waiver of rights to trial, counsel, confrontation, the opportunity to present evidence, protection from self-incrimination and appeal.[18] Accordingly, when a

[14] *Bailey*, 588 A.2d at 1125 (citing *Boyer v. State*, 562 A.2d 1186, 1188 (Del. 1989)).
[15] *Bailey*, 588 A.2d at 1129.
[16] Super. Ct. Crim. R. 61(i)(5).
[17] *Younger*, 580 A.2d at 555 (citing *Teague v. Lane*, 489 U.S. 288, 297-99 (1989))(emphasis added).
[18] *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992).

petitioner puts forth a colorable claim of mistaken waiver of important constitutional rights, Rule 61(i)(5) is available to him.[19]

In his motion, Defendant states that, "Mr. Condon is filing his motion for post conviction [sic] under Rule 61(i)(5) for miscarriage of justice in which there is no time limitation and there was a "miscarriage of justice" [emphasis added] and if you can show a colorable claim, and a constitutional violation and in the 'interest of justice.'"[20] Before addressing the procedural bar of Rule 61(i)(5) as it applies to Defendant's claim, Defendant's interpretation of the constitutional safeguards provided under Rule 61(i)(4) and (5) must be clarified. Defendant's motion invokes the "interest of justice" exception of Rule 61(i)(4) within the parameters of the "miscarriage of justice" or "fundamental fairness" exception of Rule 61(i)(5). In *Bailey v. State*, the Delaware Supreme Court emphasized the importance of the difference between these exceptions holding that, "[w]e underscore that the terms 'interest of justice' and 'miscarriage of justice' have different and distinct meanings under Rule 61. The trial court committed error if it treated the two conterminously."[21]

Rule 61(i)(4) provides that "[a]ny ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in

[19] *Id*. (citing comparatively *Younger v. State*, 580 A.2d 552, 555 (Del. 1990) (fundamental fairness exception of Rule 61(i)(5) applies where petitioner shows he was deprived of a substantial constitutional right).
[20] Def. Mot. at 4.
[21] *Bailey*, 588 A.2d at 1127 n.6.

an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred unless consideration of the claim is warranted in the interest of justice."[22] The "interest of justice" exception of Rule 61 (i)(4) has "been narrowly defined to require the movant to show that the trial Court lacked the authority to convict or punish [the movant]."[23] Invoking the "interest of justice" provision of Rule 61(i)(4) to obtain relitigation of a previously resolved claim, the movant must show that subsequent legal developments have revealed that the trial court lacked the aforementioned authority to convict or punish.[24] Further, "[d]ifferent policy interests underlie Rules 61(i)(4) and (i)(5). While Rule 61(i)(4) allows for consideration of certain issues which have been previously litigated 'in the interest of justice,' Rule 61(i)(5) provides for postconviction consideration of issues which have not been previously litigated and may entail a 'miscarriage of justice.'"[25]

Since the Defendant is procedurally barred under Rule 61(i)(1), his only alternative means of relief is to proceed under Rule 61(i)(5). Defendant has made no claim that the court lacked jurisdiction. He therefore has the burden of presenting a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability,

[22] Super. Ct. Crim. R. 61(i)(4).
[23] *State v. Wright*, 653 A.2d 288, 298 (Del. Super. Ct. 1994) (citing *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990)).
[24] *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990) (citing comparatively *Davis v. United States*, 417 U.S. 333, 342 (1974)).

integrity or fairness of the proceedings leading to the judgment of conviction. If a movant presents a genuine "colorable claim," it will be sufficient to avoid dismissal of the claim and will require the Court to examine the evidentiary issues. It is worth noting however, that once a movant makes a showing that he is entitled to relief, thereby avoiding summary dismissal of his motion,[26] an evidentiary hearing is not necessarily required.[27] The Court may instead elect to examine the evidentiary issues presented in the submissions of the party and in the record without a hearing. Also, whether the movant has presented a "colorable claim" may be determined on the basis of the postconviction motion itself, prior to any responses being filed. Moreover, "[i]n a postconviction proceeding, *the petitioner has the burden of proof* and must show that he has been deprived of a substantial constitutional right before he is entitled to any relief."[28] In other words, '[t]he petitioner bears the burden of establishing a 'colorable claim' of injustice. (citation omitted). While 'colorable claim' does not necessarily require a conclusive showing of trial error, mere 'speculation' that a different result might have [sic]

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[25] *State v. Rosa*, 1992 WL 302295, at *7 (Del. Super.).
[26] Super. Ct. Crim. R. 61(d)(4) states:
Summary dismissal. If it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief, the judge may enter an order for its summary dismissal and cause the movant to be notified.
[27] Super. Ct. Crim. R. 61(h) states in part:
Evidentiary hearing. (1) Determination by court. After considering the motion for postconviction relief, the state's response, the movant's reply, if any, the record of prior proceedings in the case, and any added materials, the judge shall determine whether an evidentiary hearing is desirable… (3) Summary Disposition. If it appears that an evidentiary hearing is not desirable, the judge shall make such disposition of the motion as justice dictates.
[28] *Bailey*, 588 A.2d at 1130 (citing *Younger v. State*, 580 A.2d 552, 555 (Del. 1990)) (emphasis added).

obtained certainly does not satisfy the requirement."[29] Finally, the question of whether a movant has presented a "colorable claim" is a question of law that is reviewed by the Delaware Supreme Court *de novo*.[30]

Defendant's Claims

a) Newly Discovered Evidence

Turning to the substantive claims of Defendant's motion, he cites "newly discovered evidence" as ground one in his motion for relief. Upon examining Defendant's claim, the Court finds that it is lacking in both substance and merit. Defendant's motion fails to identify new evidence that would remotely suggest a review of a "colorable claim." In support of this contention, Defendant states:

> Surely, there is a "miscarriage of justice" when A Defense Counsel [sic] knows that defendant had voluntarily been tested for Gonorrhea (the crux of this case) which he tested negative. Defendant had informed Capone [Defendant's trial counsel] of this. Capone wrote a letter to counsel for co-defendant (Croswell) stating that he had knowledge of the fact that would clear both of these men. Capone then stated in his Motion In Limine (Court docket entry #14) and in the Office Conference [sic] with Judge Barron and Deputy Attorney General Robert O'Neill that defendant had refused testing. Capone never objected when medical records that were ordered by Judge Barron never showed up. Capone failed to tell his client of the aforementioned letter, or the office conference in question or to tell client of new information (spoken of in office conference transcripts) or any plea agreements offered by the state. Capone never interviewed the alleged victim in this case. Capone had alibi witnesses in the courtroom while jury was present; hence disqualifying

[29] *State v. Getz*, 1994 WL 465543, at *11 (Del. Super.).
[30] *Webster*, 604 A.2d at 1366.

> them from testimony at trial. Capone never attacked the representation of Condon's public defender at the preliminary hearing stage of the proceedings for failing to attack the elements of the charges against Condon. All of the aforementioned facts are constitutional violations that undermines [sic] the fundamental legality, reliability, integrity, or fairness of the proceeding leading to judgment of the conviction. Therefore, consideration of this claim is warranted under Rule 61(i)(4), (5).[31]

As explained above, consideration of this claim is not warranted under Rule 61(i)(4). It is both time barred under Rule 61(i)(1) and was not formerly adjudicated in any proceeding leading to the judgment of conviction pursuant to Rule 61(i)(4).[32] By making the argument that "newly discovered evidence" must result in recognition of a "miscarriage of justice," Defendant, in effect, moves for a new trial under Super. Ct. Crim. R. 33. Pursuant to this Rule, "[a] motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment…"[33] Defendant's conviction became final on September 26, 1991 and the instant motion was filed on December 30, 2002. Therefore, his motion is time barred for purposes of Rule 33.

This Court has previously considered claims of newly discovered evidence set forth in untimely postconviction relief motions pursuant to Rule 61(i)(5) as a possible foundation for substantiating "a colorable claim" that there was a

[31] Def. Mot. at 2-3.
[32] See supra nn. 1-6.
[33] Super. Ct. Crim. R. 33.

"miscarriage of justice."[34] In order to warrant granting a new trial predicated on the ground of newly discovered evidence, it must appear (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial, and could not have been discovered before by the exercise of due diligence; and (3) that it is not merely cumulative or impeaching."[35]

In this instance, Defendant's motion consists solely of conclusory allegations that were previously effectively addressed in Defendant's pretrial motions, at a pretrial office conference,[36] and/or during Defendant's trial. In addition to contradicting the record in this case, Defendant's assertions fail to satisfy the three-prong test for introduction of new evidence that would warrant a new trial as set forth in *Lloyd v. State* and *State v. Hamilton*.[37] Further, Defendant fails to invoke the narrow interpretation of the miscarriage of justice exception of Rule 61(i)(5) by asserting a right relied upon that was recognized for the first time after a direct appeal. Thus, Defendant's Rule 33 does not rise to the level of a "miscarriage of justice."

b) Ineffective Assistance of Counsel

In an attempt to prevail over the procedural time bar and invoke the fundamental fairness exception, Defendant alleges in his motion that he received

[34] *See*, *e.g.*, *State v. Travis*, 1997 WL 719342 (Del. Super.); *Marvel v. State*, 1996 WL 769629 (Del. Super.).
[35] *Lloyd v. State*, 534 A.2d 1262, 1267 (Del. 1987); *State v. Hamilton*, 406 A.2d 879, 880 (Del. Super. Ct. 1974).
[36] *See* Transcript of Office Conference, December 5th, 1989, at 13-31 (hereinafter "Tr. Off. Conf. at ___.").
[37] *See supra* note 35.

ineffective assistance of counsel in violation of his Sixth Amendment right. Specifically, Defendant states:

> Defendant claims that Defense Counsel [sic] Jerome Capone, failed to conduct an adequate investigation of the facts surrounding the charge against him, including possible defenses . . . Defense Counsel [sic] failed to adequately investigate, and to file a pretrial motion to dismiss the indictment . . . Defense Counsel [sic] failed to adequately consult with the Defendant and to fully inform him on important issues and decisions regarding his defense . . . Defendant claims that Defense Counsel [sic] Jerome Capone failed to conduct an adequate and thorough investigation of the facts surrounding the case at hand . . . In the case at hand, Capone never investigated the documents, which were readily available to him in order to fight effectively for his client's innocence . . . [h]e never interviewed the victim of this case.[38]

Ordinarily, an allegation of ineffective assistance of counsel is the type of claim not subject to the procedural default rule and is more aptly considered under the guidelines set forth in *Strickland v. Washington*,[39] in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal unless the claim was adequately raised in the lower court.[40] But, Defendant bears the burden of substantiating the existence of a constitutional violation under Rule 61(i)(5).[41] Also, the fundamental fairness exception in Rule 61(i)(5) is extremely narrow in scope and only applies to those limited

[38] Def. Mot. at 6-13.
[39] *See infra* note 44.
[40] *See* Supr. Ct. R. 8; *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986); *Harris v. State*, 293 A.2d 291, 293 (Del. 1972).

circumstances when a right relied upon has been recognized for the first time after direct appeal.[42] Accordingly, Defendant must demonstrate more than his ineffective assistance of counsel claim. He must also demonstrate that the ineffectiveness of his attorney prejudiced the fundamental fairness of the trial.[43] Upon review of the record in this case, Defendant's conclusory allegations do not support a showing of ineffective assistance of counsel pursuant to the requirements of Rule 61(i)(5) enumerated above and as set forth in *Younger* and it progeny.[44]

To prevail on his claim of ineffective assistance of counsel, Defendant must meet the two-prong test set forth in *Strickland v. Washington*.[45] First, a criminal defendant who raises an allegation of ineffective assistance of counsel must show that counsel's representation fell below an objective standard of reasonableness.[46] The defendant must demonstrate that counsel's performance was deficient.[47] This entails demonstrating that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[48] Further, it is the defendant's burden to show, under the totality of the

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[41] *See supra* note 29.
[42] *See supra* note 17.
[43] *State v. Laws*, 1995 WL 411710, at *2 (Del. Super.).
[44] *Younger v. State*, 580 A.2d 552 (Del. 1990).
[45] *Strickland v. Washington*, 466 U.S. 668 (1984); *Larson v. State*, 1995 WL 389718, at *2 (Del. Supr.); *Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992) *accord*; *Albury v. State*, 551 A.2d 53, 58 (Del. 1988) *accord*.
[46] *Strickland*, 466 U.S. at 688.
[47] *Id*. at 687.
[48] *Id*.

circumstances, that "counsel was so incompetent that the accused was not afforded genuine and effective legal representation."[49]

Second, under *Strickland*, a defendant must show that there is a reasonable degree of probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different; that is, defendant must show actual prejudice.[50] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[51] The defendant must illustrate that the deficient performance prejudiced the defense.[52] Stated another way, a defendant alleging prejudice must be able to show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[53] In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.[54]

A defendant's burden to establish a claim of ineffective assistance of counsel is difficult since there is a strong presumption that the attorney's conduct was professionally reasonable.[55] This standard is highly demanding.[56] In fairly assessing an attorney's performance, the standards enumerated in *Strickland*

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[49] *Renai v. State*, 450 A.2d 382, 384 (Del. 1982) (citations omitted).
[50] *Strickland*, 466 U.S. at 694.
[51] *Id*. at 687.
[52] *Id*.
[53] *Id*.
[54] *Righter v. State*, 704 A.2d 262, 264 (Del. 1997); *Younger*, 580 A.2d at 556; *Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989).
[55] *Albury*, 551 A.2d at 59 (citing *Strickland*, 466 U.S. at 689); *see also Larson*, *supra* note 45, at *4; *Flamer v. State,* 585 A.2d 736, 753 (Del. 1990).
[56] *Flamer*, 585 A.2d at 754.

require that "every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[57] Defendant must also "[o]vercome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."[58] Therefore, under *Strickland*, the Court's analysis must be comprised of two components: 1) whether defense counsel's performance was deficient; and 2) if so, whether the deficient performance resulted in prejudice that "so upset the adversarial balance between the defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."[59]

In this case, Defendant's ineffective assistance of counsel contention amounts to nothing more than unsubstantiated finger pointing and conclusory claims of ineptitude. Resolution of this case ultimately turned on issues of credibility and a jury convicted him. The Supreme Court affirmed the conviction. His motion fails to identify specific practices or instances where his counsel's conduct did not measure up to reasonable professional standards.

Having concluded that defense counsel's behavior was not below the objective standard of reasonableness, the Court need not consider the second-prong of actual prejudice under *Strickland* (reasonable degree of probability that, but for

[57] *Strickland*, 466 U.S. at 689.
[58] *Id*.

counsel's unprofessional errors, the outcome of the proceeding would have been different).[60] Moreover, the Court will not address claims for relief and prejudice that are conclusory and unsubstantiated.[61] In essence, Defendant's claim of ineffective assistance of counsel is without merit. Since he failed to establish a violation of his Sixth Amendment right he has also failed to authenticate a claim that there was a "miscarriage of justice" because of a constitutional violation pursuant to Rule 61(i)(5).

c & d) Failure to Call Key Witnesses and Failure to Prepare

Defendant asserts a "failure to call key witnesses" as ground three and a "failure to prepare" as ground four in his motion for relief.[62] The Court has already addressed these claims as they are embodied within the substantive allegation of ineffective assistance of counsel and cited as such by Defendant in his motion.[63] Thus, with respect to these two grounds, the Defendant has not fulfilled the applicable "fundamental fairness" or "miscarriage of justice" exception of Rule 61(i)(5).

e) Abuse of Discretion

In his fifth ground for relief, Defendant asserts an abuse of discretion exercised by the Court in the denial of his statutory right to review by 11 *Del. C.*

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[59] *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (quoting *Nix v. Whiteside*, 475 U.S. 157, 175 (1986)).
[60] *Strickland*, 466 U.S. at 694.
[61] *Zimmerman v. State*, 1991 WL 190298, at *1 (Del. Super. Ct.) (citing *State v. Conlow*, 1990 WL 161241, at *3 (Del. Super. Ct.)).

3508, claiming that this results in a violation of his state and federal constitutional rights.[64] In order to succeed on this claim, Defendant must prove that: 1) the Court abused its discretion by denying defense's § 3508 motion in which Defendant sought to proffer the prior sexual conduct of the complaining witness; and 2) that the abuse rose to the level of a "miscarriage of justice" as interpreted under Rule 61(i)(5).

Defendant filed a Motion Pursuant to 11 *Del. C.* § 3508 with the Court on November 16, 1989 in which he sought to have evidence admitted at the time of trial that would show that: 1) the complaining witness had not been credible in describing her molestation to the police; and 2) it was unlikely that any of her three alleged molesters could have infected her with gonorrhea. On December 4, 1989, Defendant filed an Affidavit of Deborah Clark in Support of 11 *Del. C.* § 3508 Motion. The affiant stated in the affidavit that, on one occasion while babysitting the eight-year-old complainant, she walked into a bedroom to see the complainant naked on the floor with an eight-year-old boy naked on top of her. According to the affiant, she could see that the boy's penis was inserted into the complainant's vagina.

It is well established that the confrontation clauses of the United States and Delaware Constitutions guarantee the accused in a criminal proceeding the right to

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[62] Def. Mot. at 15-21.
[63] *See* Def. Mot. at 7, 11.

be confronted with the witnesses against him[65] for the principal purpose of providing the defendant with the opportunity to cross-examine the witnesses against him.[66] Yet, the right to cross-examination is not an absolute entitlement and may be conditioned on reasonable limitations imposed by other trial conflicts and considerations.[67] In conclusion, the '[C]onfrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'[68]

Also known as the rape shield statute, 11 *Del. C.* § 3508,[69] "provides a meaningful opportunity to present a defense based on the complainant's credibility

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[64] Def. Mot. at 22-24.
[65] *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Weber v. State*, 457 A.2d 674, 682 (Del. 1983).
[66] *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974); *Wright*, 513 A.2d at 1314.
[67] *Wright*, 513 A.2d at 1314.
[68] *Wright*, 513 A.2d at 1314 (citing *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis in original).
[69] 11 *Del. C.* § 3508 Rape – Sufficiency of evidence; proceedings in camera.

(a) In any prosecution for the crime of any degree of rape, unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact; an attempt to commit any degree of rape, unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact, if such attempt conforms to § 531 of this title; solicitation for the crime of any degree of rape, unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact, if such offense conforms to § 502 of this title; or conspiracy to commit any degree of rape, unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact, if such offense conforms to § 512 of this title, if evidence of the sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness the following procedure shall be followed:
(1) The defendant shall make a written motion to the court and prosecutor stating that the defense has an offer of proof concerning the relevancy of evidence of the sexual conduct of the complaining witness which the defendant proposes to present, and the relevancy of such evidence in attacking the credibility of the complaining witness.
(2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.
(3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at such hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.
(4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant, and is not inadmissible, the court may issue an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(b) As used in this section, "complaining witness" shall mean the alleged victim of any degree of rape, unlawful sexual intercourse, unlawful sexual penetration or unlawful sexual contact, any degree of

while protecting the complainant from unnecessary humiliation and embarrassment at trial through marginally probative cross-examination. The statute thus serves a salutary societal interest in encouraging the cooperation of victims of sexual offenses."[70] The defendant does not possess a constitutional right to present irrelevant evidence at trial. Since the statute provides for an in camera hearing which affords a defendant a full and fair opportunity to confront his accuser, the rape shield statute is not facially unconstitutional.[71]

There is no requirement that the trial judge *must* allow cross-examination on topics of *marginal or minimal relevance* solely on the conjecture that bias or prejudice might be disclosed.[72] In furtherance of this standard, "[t]he trial court may require an offer of proof to determine whether the evidence to be introduced is sufficiently probative to justify its disparagement of the witness."[73] A court must perform "a balancing" as statutorily mandated under 11 *Del. C.* § 3508, by weighing the implications of introducing such evidence, i.e., balancing the evidence's relevancy and probative value against the deleterious effect on the witness.[74]

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attempted rape, attempted unlawful sexual intercourse, attempted unlawful sexual penetration or attempted unlawful sexual contact, conspiracy or assault.

[70] *Wright*, 513 A.2d at 1310.

[71] *Id*. at 1314; *See generally* Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980); Annotation., 1 A.L.R. 4th 283, 292 (1980).

[72] *Id*. at 1314 (citing *Weber*, 457 A.2d at 682) (emphasis added).

[73] *Id*. (citing *Weber*, 457 A.2d at 682).

[74] *Id*. (emphasis added).

Upon review of the record relating to the office conference held on the first day of trial, the Court finds that the Defendant was not prejudiced by the decision of the trial court not to accept Defendant's § 3508 proffer of evidence, discounting the viability of any of complainant's three alleged molesters infecting her with gonorrhea as well as showing complainant's prior sexual conduct, as a means to impeach her credibility. To begin, the Court ruled that any evidence that the Defendant had at some point in time, in 1987 or 1989, refused to be tested for gonorrhea, could not be used at trial.[75] To this end, the Court stated, "[b]ut the evidence that – the evidence that the contraction of gonorrhea through means of fellatio is an impossibility also comes in. So, therefore, the relevance of whether this man had or had not [sic] gonorrhea is totally superfluous."[76] In a further discussion among the Court, the prosecutor and defense counsel, both attorneys and the Court agreed that evidence of there having been multiple violators (three adults) of the victim would be allowed to be presented. Defense counsel stated that the reason he filed the motion was to permit this evidence [existence of two other alleged adult molesters] to be admitted at trial as well as to forestall any objections by the State on cross-examination as to prior sexual history. All parties agreed that

[75] Tr. Off. Conf. at 13.
[76] Tr. Off. Conf. at 14.

the evidence could be presented, that this concern was no longer an issue, and that the motion, therefore, did not apply to that part of the case.[77]

With respect to the Defendant's proffer of evidence pertaining to Deborah Clark's affidavit recounting the alleged incident between two boys, seven and eight years old, and the victim, the Court finds that the trial court's determination of insufficient probative value is commensurate with the factual circumstances surrounding the case. In consideration of Ms. Clark's affidavit, the arguments asserted by the prosecutor and defense counsel, and the Delaware Supreme Court's holding in *Wright v. State*,[78] the Court agrees with the trial court when it stated, "[I], having read that case, can't, for the life of me, find real probative value in two little kids, preteen kids almost, playing doctor, if you will. The other thing that gives me pause is the fact that the affiant was the – is the mother of the defendant's girl[friend]."[79] The Court went on to conclude that, "[I] believe that the evidence sought is of such marginal relevance that I'm not going to allow it."[80]

In accordance with the requirements of § 3508, "[i]f the defendant's offer of proof is insufficient the court is not required to conduct an in camera hearing."[81] It is evident from the record that the Court, cognizant of the importance of protecting the Defendant's constitutional rights, gave considerable thought to Defendant's §

[77] Tr. Off. Conf. at 26.
[78] *Wright v. State*, 513 A.2d 1310 (Del. 1986).
[79] Tr. Off. Conf. at 28.
[80] Tr. Off. Conf. at 30.

3508 motion as well as to his defense counsel's argument in support thereof. The Court appropriately determined that the proffer of evidence was sufficiently lacking in relevancy to successfully impeach the complainant's credibility and an in camera hearing was therefore not required. The proffer of evidence did not present a foundation upon which the Court could surmise that the eight-year-old complainant had manufactured lies about the Defendant in an attempt to cover up the alleged prior sexual conduct and molestation by the other two adult males.

The crux of the trial proceedings was whether the Defendant had compelled the complainant to perform four specified acts of fellatio over an approximate two-year period. Attempts to impeach the complainant's credibility by raising the issues of whether the Defendant ever tested positive for gonorrhea during the time of the purported criminal acts and whether the complainant performed the alleged behavior as specified in Ms. Clark's affidavit, were not germane to the real issue at Defendant's trial. As the Supreme Court stated in *Wright*, and as this Court holds equally applicable in this instance, "[a]s applied in this case, the rape shield statute did not abridge the defendant's federal or state constitutional rights."[82] In summary, the Court finds that the trial judge did not abuse his discretion by denying defense's § 3508 motion. Defendant's contention of a "miscarriage of justice" as interpreted under Rule 61(i)(5) is therefore misplaced.

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[81] *Wright*, 513 A.2d at 1314.
[82] *Id*. at 1315.

f) Defective Indictment

Finally, Defendant avers a defective indictment as his sixth ground for relief. He asserts that he was tried and convicted of Unlawful Sexual Intercourse First Degree without the State establishing any of the essential elements of Rape First Degree. In support of this contention, Defendant contends that: 1) at his preliminary hearing he was charged with two counts of Unlawful Sexual Intercourse First Degree but "at the time of trial, the case expanded to four charges;" 2) the State failed to establish all the elements for a prima facie case of Unlawful Sexual Intercourse First Degree (including failing to list the dates in the Indictment so that the Defendant could defend himself through alibi witnesses); and 3) in order "to establish the commission of Unlawful Sexual Intercourse in the First Degree the State must prove all the elements previously required to establish the commission of Rape in the First Degree. *Wicks v. State* (citation omitted)."[83]

Upon examination of the record, the Court finds Defendant's assertions factually incorrect and the case law upon which he relies distinctly unrelated to his case. Although Defendant's initial Charge Sheet, filed on March 3, 1989, one day after his Preliminary Hearing, recites two charges of Unlawful Sexual Intercourse First Degree that occurred at the complainant's New Castle residence (Manor Park Apartments) between September and December 1988, the attached Affidavit of

[83] Def. Mot. at 25-27.

Probable Cause also recites additional acts of Unlawful Sexual Intercourse First Degree perpetrated on the complainant at her Wilmington residence when she was in the first grade. Subsequent interviews with the complainant revealed these two additional incidences that occurred between August 1987 and February 1988. Defendant's Grand Jury Indictment, filed March 23, 1989, sets forth with specificity the time and place of each of the four alleged counts of Unlawful Sexual Intercourse as well as the statutory elements required to prove a prima facie case for such criminal acts.[84] Hence, Defendant was well aware of all four counts of Unlawful Sexual Intercourse First Degree charged against him and contained within his Indictment as well as the unambiguous factual circumstances surrounding each charge. Defendant's claim of not being "afforded the proper due process before the Grand Jury" is unfounded and the Indictment was not defective as to these elements.[85]

Lastly, Defendant cites *Wicks* in support of the proposition that, for the State to establish the commission of Unlawful Sexual Intercourse First Degree, it must prove all the elements previously required to establish the commission of Rape in

[84] Each of the four counts of Unlawful Sexual Intercourse First Degree listed in Defendant's Indictment reference the Defendant engaging in the act of sexual intercourse committed by the act of fellatio, that the victim was less than 16 years of age, and that the defendant was not the victim's voluntary social companion on the occasion of the crime. Pursuant to the former 11 *Del. C.* § 775, Unlawful Sexual Intercourse in the First Degree, under which the Defendant was convicted, "(a) A person is guilty of unlawful sexual intercourse in the first degree when he intentionally engages in sexual intercourse with another person and any of the following circumstances exist: … (4) The victim is less than 16 years of age and the defendant is not the victim's voluntary social companion on the occasion of the crime."

[85] Def. Mot. at 25.

the First Degree.[86] Defendant's reliance on *Wicks* is misplaced since *Wicks* dealt with a defendant who attempted advantageously to utilize amendments made to the laws governing sex offenses, in particular, 11 *Del.C*. § 4209A Punishment for First Degree Rape, at the time of his crimes and conviction in order to reduce two mandatory twenty-year sentences.

Briefly, in 1986, as part of an overall revision to sex offense laws, the Delaware General Assembly deleted the crime of Rape in the First Degree from the Code (11 Del. C. § 764) and replaced it with the crime known as Unlawful Sexual Intercourse First Degree (11 Del. C. § 775),[87] both being Class A felonies. Wicks contended that as part of these amendments, the General Assembly decided not to 'save similarly' the enhanced sentencing provisions of 11 *Del.C.* § 4209A (mandatory 20 year imprisonment without parole) as it applied to Rape in the First Degree.[88] The Supreme Court disagreed, opining that, "[t]he legislative history demonstrates an intent by the General Assembly that the provisions of § 4209 were to be applied when imposing sentence for both rape in the first degree and unlawful sexual intercourse in the first degree."[89]

Defendant's interpretation is untenable for two reasons. First, when the Supreme Court stated, "[t]o establish the commission of unlawful sexual

[86] *Wicks v. State*, 559 A.2d 1194, 1195 (Del. 1989).
[87] *See* 65 *Del. Laws* ch. 494, Section 1.
[88] *Wicks*, 559 A.2d at 1195.
[89] *Id*. at 1197.

intercourse in the first degree the State must prove all the elements previously required to establish the commission of rape in the first degree" it was with respect to Wicks' sentencing at the time the 1986 amendment to 11 *Del.C.* § 4209A were enacted, and to the specific factual circumstances surrounding Wicks' assertions regarding his mandatory sentencing. Second, and more importantly, *Wicks* is completely distinguishable from Defendant's case because the Defendant was not charged under the former statutory mandates of Rape in the First Degree (11 *Del. C*. § 764), but under the newly amended statutory requirements of Unlawful Sexual Intercourse First Degree (11 *Del. C*. § 775), almost three years after the amendments became effective. Accordingly, Defendant's assertions under his sixth ground for relief fall well below the required tenets embodied within the necessary showing of a "miscarriage of justice" pursuant to Rule 61(i)(5).

Conclusion

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief Pursuant to Superior Court Criminal Rule 61 is procedurally barred under 61(i)(1) and 61(i)(5). Thus, the Motion for Postconviction Relief Pursuant to Superior Court Criminal Rule 61, the Motion for Evidentiary Hearing Pursuant to

Superior Court Criminal Rule 61(h) and the Motion for Appointment of Counsel Pursuant to Superior Court Criminal Rule 61(e) are hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Paul Eric Condon
Robert O'Neill, Esquire
Presentence
Prothonotary