

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

v.

JOSEPH FOLKS,

Defendant

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I.D. No. 30103873DI

Submitted: March 25, 2013
Decided: June 19, 2013

MEMORANDUM OPINION

Upon Motion of Defendant Joseph Folks (aka Mr. Joe Louis Folks Jr.-Bey)
*for Postconviction Relief - **DENIED***

DAVIS, Judge

Defendant Joseph Folks (aka Mr. Joe Louis Folks Jr.-Bey) was convicted of two counts of unlawful sexual intercourse in 1993 and the mandate affirming the conviction was issued in 1994.

Since Mr. Folk’s conviction, Mr. Folks has filed five (5) motions for postconviction relief under Superior Court Criminal Rule 61 (“Rule 61”), the most recent of which was filed on December 19, 2012. In response to the December 19, 2012 motion for postconviction relief, Superior Court Commissioner Vavala issued, on January 3, 2013, a Commissioner’s Report and Recommendation that recommended denial of that motion. The Report also recommended that, based on Mr. Folk’s “abuse” of the Rule 61 procedure, the Court would no longer accept Rule 61

motions from Mr. Folks unless first approved by the Court. Mr. Folks filed an untimely response to the Report. This Court then undertook a *de novo* review of the record in this action. The Court also considered an untimely response to the Report submitted by Mr. Folks. The Court then reviewed the Report, Mr. Folks' untimely response and determined that the recommendations in the Report were not clearly erroneous, contrary to law or an abuse of discretion. Accordingly, the Court entered an Order on February, 1, 2013 (the "February 2013 Order") that (i) adopted the Report and (ii) denied Mr. Folk's December 19, 2012 motion for postconviction relief. Mr. Folks did not appeal the February 2013 Order.

On March 25, 2013, Mr. Folks filed the instant motion for postconviction relief (the "Current Motion") and accompanying brief. Prior to filing the Current Motion, Mr. Folks did not obtain approval from the Court to file any Rule 61 motion.

In the Current Motion, Mr. Folks contends ineffective assistance of counsel in both his 1993 trial and subsequent appeal. The Current Motion makes substantially similar, if not completely the same, arguments for postconviction relief under Rule 61 that were made in Mr. Folks previous Rule 61 motions – an observation shared by Superior Court Commissioner Vavala in the Report. Moreover, Mr. Folks now invokes *Martinez v. Ryan*¹ as creating a "new right" which, he argues, provides a means of relief from the one year time bar of Superior Court Criminal Rule 61(i)(1).

The Court holds *Martinez* did not create a new constitutional right and does not provide a basis for a relief from the applicable time bar; nor does *Martinez* provide a means of relief from any of the other applicable procedural bars. In addition, the Court denies the Current Motion

¹ __ U.S. __, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

because Mr. Folks did not obtain permission from the Court before filing the Current Motion as required under the Report, as adopted by this Court in the February 2013 Order. For these reasons, as set forth more fully below, the Current Motion is **DENIED**.

DISCUSSION

Before undertaking a consideration of Mr. Folks' claims, the Court must determine whether there are any procedural bars to doing so.² By invoking *Martinez*, Mr. Folks seeks to take advantage of the means of relief from the one year time bar in Superior Court Criminal Rule 61(i)(1), which states:

Time limitation. A motion for postconviction relief may not be filed more than one year 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 one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

When Mr. Folks was convicted and when the mandate was issued, the time limit was three years from when the convictions were final (date of issuance of mandate). Subsequently, however, Rule 61(i)(1) was amended to require a postconviction motion to be filed within one year after the conviction became final. This now means in the case of the establishment of a "new right," a defendant whose action is otherwise time barred has one year to file the motion from the date the new right was established.³ Since *Martinez v. Ryan* was issued on March 20, 2012, the Current Motion, filed on or about March 25, 2013, does not appear to be filed timely. Despite this, the Court will consider Mr. Folks' Current Motion as it relates to *Martinez*.

Rule 61(i)(1) uses the phrase a "retroactively applicable right that is newly recognized

² *Stone v. State*, 690 A.2d 924, 925 (Del. 1996).

³ *State v. Travis*, 2009 WL 5928077, *rev'd on other grounds*, 2 A.3d 75, 2010 WL 2854133 (Del. 2010)(TABLE).

after the judgment of conviction is final, more than one year after the right is first recognized by the...United States Supreme Court.” The Supreme Court in *Martinez* said this about the “right” it created:

These rules reflect an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State’s established procedures will a federal habeas court excuse the prisoner from the usual sanction of default.⁴

* * * * *

The holding here ought not to put a significant strain on state resources. When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.

This is but one of the differences between a constitutional ruling and the equitable ruling of this case. A constitutional ruling would provide defendants a freestanding constitutional claim to raise; it would require the appointment of counsel in initial-review collateral proceedings; it would impose the same system of appointing counsel in every State; and it would require a reversal in all state collateral cases on direct review from state courts if the States’ system of appointing counsel did not conform to the constitutional rule. An equitable ruling, by contrast, permits States a variety of systems for appointing counsel in initial-review collateral proceedings. And it permits a State to elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings. In addition, state collateral cases on direct review from state courts are unaffected by the ruling in this case.⁵

* * * * *

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.⁶

While no Delaware court has interpreted what kind of “rights” are encompassed within

⁴ 132 S. Ct. at 1318.

⁵ *Id.* at 1319-20.

⁶ *Id.* at 1320.

the word “right” in Rule 61(i)(1), common sense dictates that it be a *constitutional right*.⁷

As the quotes from *Martinez* make abundantly clear, the United States Supreme Court very openly and deliberately made the point that a new constitutional right was not being established.⁸ Further, the context of *Martinez*’s holding is important. The issue was whether in federal habeas actions, defendants would be able to avoid procedural default in federal court due to what happened in the earlier state postconviction actions. The Supreme Court said in a limited way they could.⁹ Its holding, therefore, is limited only to that narrow procedural situation under federal law concerning *habeas corpus*. This cannot qualify as a “new right” under Rule 61(i)(1).

In *State v. Smith*,¹⁰ this Court held that *Martinez* did not create a new constitutional right to have effective counsel at the initial postconviction proceedings in order to raise claims of ineffective assistance of counsel claims against trial counsel. The Court in *Smith* recognized that *Martinez* removes a procedural bar in federal habeas proceedings. That decision was affirmed on appeal.¹¹

⁷ The Court notes that in *Chao v. State*, 931 A.2d 1000 (Del. 2007), *rev’d on other grounds*, *Claudio v. State*, 958 A.2d 846 (Del. 2008), the Supreme Court did not first indicate that before consideration of a motion for postconviction relief is to be undertaken, any applicable bars to relief must first be examined. It did not address or cite Rule 61(i)(1) either as a bar or how there is a means of relief from that bar. It plucked the phrase “interest of justice” from Rule 61(i)(2), which it neither cited nor quoted, as a means of allowing Chao to present her claim which was otherwise procedurally barred. The retroactive application to an otherwise procedurally barred claim did not involve a “new right” but the application of a statutory re-interpretation which had reversed years of precedent. *Williams v. State*, 818 A.2d 906 (Del. 2003).

⁸ Justice Scalia disagrees in dissent and sees the majority’s ruling as establishing a constitutional right. *Martinez*, 132 S. Ct. at 1321.

⁹ *Martinez*, 132 S. Ct. at 1320.

¹⁰ 2012 WL 5577827 (Del. Super. June 14, 2012).

¹¹ *State v. Smith*, 53 A.3d 303, 2012 WL 3870567 (Del. 2012)(Table).

The Ninth Circuit has ruled that, “*Martinez* cannot form the basis for an application for a second or successive motion because it did not announce a new rule of constitutional law.”¹² In *Adams v. Thaler*, the Fifth Circuit said *Martinez*’ rule was narrow and an equitable exception and hardly extraordinary.¹³

To this Court’s knowledge, all courts that have addressed the issue have held that *Martinez* did not create a new right such as to qualify as means of relief from the procedural bar of Rule 61(i)(1). Further, since *Martinez* did not establish a new constitutional right, it cannot be applied retroactively. “There is no indication in *Martinez* that it was to be applied retroactively.”¹⁴ The concepts of retroactive application and “new right” are linked under Rule 61(i)(1). Retroactive application is permissible under the Rule only if the right is new.

Additionally, *Martinez* does not provide relief from the repetitive motion bar of Rule 61(i)(2). Mr. Folks’ Current Motion is clearly repetitive and barred. The first means of relief from that bar is where reconsideration is warranted in the “interest of justice.”¹⁵ Mr. Folks states he has claims of ineffective assistance. Mr. Folks makes the same complaints about trial and appellate counsel that he has made on numerous occasions in his prior postconviction motions. Whatever complaints Mr. Folks has, these complaints have been examined to such an extent that the Superior Court Commissioner not only denied the December 19, 2012 motion but also

¹² *Buenrostro v. U.S.*, 697 F.3d 1137, 1139 (9th Cir. 2012); accord *Gamboa-Victoria v. U.S.*, 2012 WL 5449999 (M.D.Fla. Nov. 7, 2012); *Vogt v. Coleman*, 2012 WL 2930871 (W.D.Pa. July 18, 2012); *Brown v. Kerestes*, 2012 WL 7007794 (E.D.Pa. Dec, 28, 2012).

¹³ 679 F.3d 312, 320 (5th Cir. 2012).

¹⁴ *Lebron v. Terrell*, 2013 WL 443598, at *5 (D.R.I. Feb. 5, 2013); accord *Brown v. Kerestes*, 2013 WL 444672 (E.D. Pa. Feb. 6, 2013).

¹⁵ Super. Ct. Crim. R. 61(i)(2).

required Mr. Folks to obtain leave of the Court before filing any additional motions. As such, there is nothing here that hints at a need to reconsider in the “interest of justice.”

There is yet another procedural bar to the Current Motion and that Rule 61(i)(3) - procedural default, failure to previously raise a known claim. That rule has a means of relief if the defendant can show cause and prejudice.¹⁶ Arguably, Mr. Folks’ “cause” is showing that *Martinez* affords him a new right. There is no need for the Court to restate the non-retroactivity of *Martinez* as it relates to cause. Therefore, he cannot meet the “cause” element.

There is another key aspect to *Martinez* applicable to this case. Mr. Folks does not offer any new basis that his oft repeated ineffective assistance of counsel claim is a substantial one. In order to succeed here, Mr. Folks must make such a demonstration. In *Martinez*, the Supreme Court said this:

To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.¹⁷

* * * * *

When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.¹⁸

Under Rule 61(i)(3), therefore, the Current Motion is barred.

Another means of relief from these three procedural bars is found in Rule 61(i)(5) where there was a miscarriage of justice because of a constitutional violation. First, Mr. Folks does not

¹⁶ Super. Ct. Crim. R. 61(i)(3)(A)-(B).

¹⁷ 132 S. Ct. at 1318.

¹⁸ *Id.* at 1319.

present an argument of a constitutional violation. Second, the record in this case where there have been successive motions shows nothing of a constitutional violation or anything remotely close to it for Mr. Folks.

The Court denies the Current Motion for an additional reason – Mr. Folks has not followed the procedure set forth in the Report as adopted by the Court in the February 2013 Order. The Report sets out a procedure for Mr. Folks in the event he chose to file any additional Rule 61 motions. In order to do so, Mr. Folks must first seek and obtain approval from the Court before filing a Rule 61 Motion. Superior Court Commissioner Vavala added this requirement (a requirement adopted by the Court) because it was found that Mr. Folks was abusing the Rule 61 process. While Mr. Folks did respond to the Report, Mr. Folks did not appeal the February 2013 Order. The Court has reviewed the docket in this action and notes that Mr. Folks did not obtain approval to file the Current Report. Mr. Folks failure to obtain such approval constitutes another ground for denying the relief requested in the Current Report.

For these reasons, the Current Motion is procedurally barred.

CONCLUSION

Mr. Folks has failed to show cause exists for the relief request and the Current Motion is therefore **DENIED**.

IT IS SO ORDERED.

/s/ Eric M. Davis
Eric M. Davis, Judge