

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

STATE OF DELAWARE)	
)	
v.)	I.D. No. 9612002650
)	
MARK ANTHONY KIRK,)	Cr.A.#ID IN96-12-0754R3,
Defendant.)	0755R3, 0556R3;
)	IN97-01-1773R3,
)	1774R3, 1775R3,
)	1776R3
)	

Submitted: November 15, 2003
Decided: February 26, 2004

UPON DEFENDANT'S MOTION
FOR POSTCONVICTION RELIEF
GRANTED.

ORDER

Mark Anthony Kirk, Wilmington, Delaware, *Pro Se*, Defendant.

James B. Ropp, Esquire, Donald R. Roberts, Esquire, Deputy Attorneys General,
New Castle County, State of Delaware, Attorneys for the State of Delaware.

ABLEMAN, JUDGE

Mark Anthony Kirk (“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 a violation of his constitutional right to due process under the United States Constitution and under the Delaware Constitution. In his motion, Defendant draws upon the “fundamental fairness” doctrine, based on a “colorable claim” that there was a miscarriage of justice, as the single ground for postconviction relief. For the reasons stated below, Defendant’s Motion is **GRANTED**.

Statement of Facts

The series of tragic events that lead up to the death of three innocent individuals began on the night of December 3, 1996 when Defendant, and his girlfriend, Darlene Hamby, both heavily intoxicated, returned to Darlene’s apartment. Defendant, Darlene, and several friends, had spent that day drinking heavily, and Darlene was observed flirting openly with other men in the group. After returning to Darlene’s apartment later that night, Defendant and Darlene began to argue vehemently about the day’s events. Darlene’s two sons, ages ten and sixteen, were in their bedrooms. At the height of the argument, Defendant decided that he was finished with their turbulent relationship, told Darlene that he was leaving her, and began to pack his belongings.

According to the evidence produced at trial, Defendant was so enraged and so inebriated, that he released his anger and frustration on one of his few valued possessions, a grandfather clock, which he then destroyed. Unfortunately, this fit of rage was not sufficient to allay the Defendant's ire. After grabbing a partially full bottle of Captain Morgan's Spiced Rum, he proceeded to the kitchen, turned on the right front burner of the stove to its highest position, and emptied the bottle onto the burner when it was on high. Defendant's eyebrows were singed and he sustained partial burns to his face as the alcohol burst into flames. While the fire began to spread to the pressed board cabinets above the stove, the Defendant remained undaunted. He made no effort to extinguish the fire, or to warn Darlene and her children that the kitchen was ablaze. Rather, he moved away from the kitchen and continued packing his clothes.

Within minutes, the smoke alarm activated, and Darlene and her older son became aware of the fire consuming their apartment. Chaos and pandemonium spread as the occupants of the apartment realized what was occurring. Due to the intoxicated conditions of both the Defendant and Darlene at this time, the testimonial evidence regarding the next several minutes is sketchy. It was later conclusively shown at trial that Darlene exited the apartment, while her older son grabbed her younger son and made an escape as well. The Defendant also escaped unscathed. Unfortunately, other tenants asleep in the building were not so

fortunate. Steven Rivera, and his two children, Frances and Robert Rivera, who resided in the apartment above Darlene's apartment, suffocated to death in the smoke caused by the fire. Additionally, several other residents, including Jeremy Rivera, Janice Gray, and Emily Miller, suffered extensive injuries as they jumped for their lives from the upper stories of the building.

Although the Defendant initially denied having started the fire, he eventually admitted to the police in recorded statements that he intentionally poured the accelerant containing alcohol on the hot burner for the purpose of starting a fire. At trial, his statements to the police were introduced against him. Additionally, evidence of the flammability factor of Captain Morgan's Spiced Rum and the pooling effect under the burner, which caused the vaporization and consequent ignition of the ethanol in the rum, were also admitted into evidence for the Court's consideration.

On October 23, 1997, after hearing all the evidence presented following a non-jury trial, the Court found, beyond a reasonable doubt, that the Defendant intentionally started the fire that ultimately caused the deaths of a father and his two children. The Defendant was convicted of three counts of Felony Murder in the First Degree, in violation of Title 11, § 636 (a)(2) of the Delaware Code, one count of the lesser included offense of Arson in the Third Degree, in violation of Title 11, § 801 of the Delaware Code, two counts of Assault First Degree, in

violation of Title 11, § 613 (a)(4) of the Delaware Code, and one count of the lesser included offense of Assault Third Degree, in violation of Title 11, § 611 of the Delaware Code.

Upon conviction, the State sought the death penalty. By a preponderance of the evidence, the Court found that the existing mitigating circumstances outweighed the existing aggravating circumstances. The Court sentenced the Defendant on December 3, 1997 to three mandatory consecutive life sentences in connection with the First Degree Felony Murder convictions, to ten years incarceration at Level V for each of the Assault First Degree convictions, to two years incarceration at Level V on the Arson Third Degree conviction, and to one year incarceration at Level V on the Assault Third Degree conviction.

Defendant timely filed a direct appeal of his conviction to the Delaware Supreme Court. Defendant's conviction was affirmed on April 29, 1999.¹ Shortly thereafter, Defendant filed a Rule 61 motion for postconviction relief.² On May 23, 2000, the Court denied Defendant's motion.³ The Delaware Supreme Court affirmed this Court's ruling on October 16, 2000.⁴

¹ *Kirk v. State*, 1999 WL 415802 (Del.).

² In his motion, Defendant alleged ineffective assistance of counsel, falsified evidence, and unconstitutional admission into evidence the statements that he had made to the police.

³ *State v. Kirk*, 2000 WL 1211214 (Del. Super. Ct.). Defendant's motion was denied on the grounds that his claims of ineffective assistance of counsel and falsified evidence had no basis in law or fact, and that his claim of an illegal obtained confession statement and detention by the police was procedurally barred pursuant to Rule 61(i)(4).

⁴ *Kirk v. State*, 2000 WL 1637418 (Del.).

In 2001, Defendant filed a second Rule 61 motion for postconviction relief.⁵ On June 25, 2001, the Court denied Defendant's motion for postconviction relief because his claims were barred by Rule 61(i)(2) and (5).⁶ On December 13, 2001, Defendant filed a notice of appeal from the Court's June 25 Order. The Delaware Supreme Court affirmed this Court's denial of Defendant's second Rule 61 motion for postconviction relief on February 12, 2002.⁷

Finally, having exhausted Delaware state-court appeals and postconviction remedies, Defendant filed a petition for writ of habeas corpus in the United States District Court for the District of Delaware on May 7, 2002. Defendant's petition was denied on January 30, 2003.⁸ Defendant filed a notice of appeal on March 1, 2003 and a Motion for Certificate of Appealability on March 19, 2003 with the United States Court of Appeals for the Third Circuit. Defendant's motion for certificate of appealability was denied on July 21, 2003.

⁵ Defendant raised two grounds for relief. Relying on a claim of violation of his due process rights, Defendant averred that "no rational trier of fact could have found the essential element[s] of arson beyond a reasonable doubt." Second, he alleged violations of his Fifth, Sixth and Fourteenth Amendment rights. Specifically, he argued that the indictment charging him with Arson First Degree did not correctly state the elements of the crime, and that a charge of Arson First Degree cannot support a conviction of Arson Third Degree (as a lesser included offense).

⁶ *State v. Kirk*, 2001 WL 755942 (Del. Super. Ct.).

⁷ *Kirk v. State*, 2002 WL 256741 (Del.).

⁸ *Kirk v. Carroll*, 243 F. Supp. 2d 125 (D. Del. 2003). The District Court held that: (1) petitioner did not make clear and unambiguous requests to police officers to cease the interview; (2) petitioner's confession that he poured rum on the burner which started the fire in the apartment building was voluntary under totality of the circumstances; (3) petitioner's claim that trial counsel rendered ineffective assistance of counsel was deemed exhausted; (4) petitioner's claim that trial counsel rendered ineffective assistance was procedurally defaulted; (5) trial counsel's refusal to move for recusal of trial judge did not constitute ineffective assistance; (6) conviction was supported by evidence; (7) petitioner had no constitutional right to counsel in habeas proceedings; and (8) petitioner was not entitled to a certificate of appealability.

While Defendant's appeal to the United States Court of Appeals for the Third Circuit was still pending, he filed his third motion for postconviction relief in the Superior Court on April 9, 2003. Defendant's Rule 61 motion alleged that some of his convictions should be vacated based on recent case law. The Court issued an Order, dated June 25, 2003, requesting that the Department of Justice file a legal memorandum in response to Defendant's motion, taking into account the factual assertions in Defendant's motion, pursuant to Rule 61(f)(1). The Court also ordered the Defendant to reply to the State's response pursuant to Rule 61 (f)(3).⁹

Defendant's Contentions

Defendant filed the instant motion for postconviction relief on April 9, 2003, wherein he states a single ground for relief based on the recent Delaware Supreme Court decision in *Williams v. State*, which redefined the phrase "in furtherance of" as interpreted in the State's felony First Degree Murder statute, 11 *Del. C.* § 636(a)(2).¹⁰ Specifically, invoking the "fundamental fairness" exception incorporated in Rule 61(i)(5), Defendant seeks to have his three felony Murder First Degree convictions, and his two Assault First Degree convictions vacated,

⁹ In a letter, dated September 11, 2003, from the Court to Defendant, the Court advised Defendant that the State had requested, and that the Court had granted, an extension of time for the State to file its response due to the fact that the Deputy Attorney General was involved in a five-week First Degree Murder trial. The State's response date was extended until September 15, 2003. On September 30, 2003, Defendant filed a Motion for Extension of Time requesting an extension of time in which to respond to the State's response, asserting that his Rule 61 claim involves complex issues that require proper development, and to enable him to obtain copies of certain case law, cited in the State's response, through the prison law library system. By Order, dated October 7, 2003, the Court granted Defendant's motion for extension of time, extending his reply date until November 15, 2003.

¹⁰ *Williams v. State*, 818 A.2d 906 (Del. 2003).

based on the newly defined interpretation of the “in furtherance of” language set forth in *Williams*.¹¹ Pursuant to *Williams*, felony murder cannot attach unless the murder is a consequence of the felony and is intended to help the felony progress.¹² As the Court will further explain, even though this motion was filed more than three years after the judgment of conviction was finalized,¹³ Defendant has succeeded in demonstrating the existence of a newly recognized right within the purview of the “fundamental fairness” doctrine indigenous to Rule 61(i)(5),¹⁴ such that his motion must be granted on substantive grounds. Finally, in his reply to the State’s response, Defendant further requests that the Court, in addition to vacating his three felony Murder First Degree convictions and his two Assault First Degree convictions, “enter judgments of acquittal, or in the alternative, grant the defendant a new trial.”

State’s Contentions

In its response brief, the State concedes that, based on the holding in *Williams*, the Court must now vacate the guilty verdicts related to the three counts of Murder in the First Degree and the two counts of Assault in the First Degree. The State, in applying the meaning of “in furtherance of” as redefined by the

¹¹ Defendant’s Memorandum in Support of Motion for Rule 61 Postconviction Relief, at 4-7 (hereinafter “Def. Mot. at ____.”).

¹² *Williams*, 818 A.2d at 912.

¹³ SUPER. CT. CRIM. R. 61(i)(1).

¹⁴ SUPER. CT. CRIM. R. 61(i)(5).

Delaware Supreme Court in *Williams*, acknowledges that pursuant to the “fundamental fairness” exception, the Defendant has a “colorable claim” and, therefore, “the bars to postconviction relief fall.”

It is the State’s further contention that, after Defendant’s convictions are vacated, the Court modify Defendant’s judgment and convict Defendant of the lesser included offenses of three counts of Manslaughter, pursuant to 11 *Del. C.* § 632, and two counts of Assault in the Second Degree, pursuant to 11 *Del. C.* § 612. The State bases its contention that the Defendant is guilty of these lesser-included offenses because the trial court has already found that the Defendant acted recklessly and that deaths and/or injuries have occurred. The State substantiates that, “[t]he *Williams*’ interpretation of the law holds that, at trial, the State did not prove the necessary element of ‘in the course of and furtherance of’ in order to sustain the offenses for which Kirk was found guilty.”

Accordingly, the State requests that, at the hearing to vacate the convictions, the Court modify them to Manslaughter and Assault in the Second Degree, and that the Court re-sentence the Defendant as follows:

IN96-12-0754	Manslaughter	Steven Rivera	10 years, Level V
IN96-12-0755	Manslaughter	Frances Rivera	10 years, Level V
IN97-01-1773	Manslaughter	Robert Rivera	10 years, Level V

IN97-01-1774	Assault Second Degree	Jeremy Rivera	8 years, Level V
IN97-01-1776	Assault Second Degree	Emily Miller	6 years, Level V, followed by 2 years of probation

Applicable 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.¹⁵ To protect the integrity of the procedural rules, the Court should not consider the merits of a postconviction claim where a procedural bar exists.¹⁶

Pursuant to Rule 61(i)(1), a postconviction motion that is filed more than three years after judgment of conviction is untimely, and thus procedurally barred.

The time bar of 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.¹⁷

¹⁵ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991) ; *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).

¹⁶ *State v. Gattis*, 1995 WL 790961, at *3 (citing *Younger*, 580 A.2d at 554).

¹⁷ SUPER. CT. CRIM. R. 61(i)(1).

The Rule 61 time bar is not an *absolute* prohibition to post-conviction relief petitions filed three years after conviction.¹⁸ 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).”¹⁹ 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.²⁰

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.”²¹ 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.²² Accordingly, when a

¹⁸ *Bailey*, 588 A.2d at 1125 (citing *Boyer v. State*, 562 A.2d 1186, 1188 (Del. 1989)).

¹⁹ *Bailey*, 588 A.2d at 1129.

²⁰ SUPER. CT. CRIM. R. 61(i)(5).

²¹ *Younger*, 580 A.2d at 555 (citing *Teague v. Lane*, 489 U.S. 288, 297-99 (1989))(emphasis added).

²² *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.²³

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,²⁴ an evidentiary hearing is not necessarily required.²⁵ 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.”²⁶ In other words, “[t]he petitioner bears the burden of establishing a ‘colorable claim’ of injustice. (citation omitted). While

²³ *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).

²⁴ 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.

²⁵ 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.

²⁶ *Bailey*, 588 A.2d at 1130 (citing *Younger v. State*, 580 A.2d 552, 555 (Del. 1990)) (emphasis added).

‘colorable claim’ does not necessarily require a conclusive showing of trial error, mere ‘speculation’ that a different result might have [sic] obtained certainly does not satisfy the requirement.”²⁷ 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*.²⁸

Discussion

Upon initial review of Defendant’s motion for postconviction relief, the Court finds that Defendant has failed to overcome the first of two applicable hurdles of the procedural bars imposed by Rule 61(i), i.e., the time limitation bar to relief set forth in Rule 61(i)(1). Since Defendant filed the instant motion approximately four years after the judgment of conviction became final on April 29, 1999,²⁹ and Defendant does not assert a new retroactive rule under any circumstance, his motion is procedurally barred under Rule 61(i)(1).

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

²⁷ *State v. Getz*, 1994 WL 465543, at *11 (Del. Super. Ct.).

²⁸ *Webster*, 604 A.2d at 1366.

²⁹ 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).

presenting 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.

The foundation for Defendant’s “colorable claim” for postconviction relief originates from the Delaware Supreme Court’s recent revisionary interpretation applied to the “in the course of” and “in furtherance of” text of 11 *Del. C.* § 636(a)(2) as delineated in *Williams*. Overturning longstanding and well-settled case law, the Court in *Williams*, sitting *en banc*, overruled *Chao*,³⁰ and its progeny, with respect to the meaning of the “in furtherance of” language of the statute.³¹ Some twelve years earlier in *Chao*, the Delaware Supreme Court had held that, in order “[f]or felony murder liability to attach, a killing need only accompany the commission of an underlying felony. Thus, if the ‘in furtherance’ language has any limiting effect, it is solely to require that the killing be done by the felon, him or himself.”³² The *Chao* Court cited *Weick*³³ for support, without overruling that portion of *Weick* requiring that death be a consequence of the felony and not a coincidence of it.

³⁰ See *Chao v. State*, 604 A.2d 1351 (Del. 1992).

³¹ *Williams*, 818 A.2d at 913.

³² *Williams*, 818 A.2d at 911 (quoting *Chao*, 604 A.2d at 1363).

³³ *Weick v. State*, 420 A.2d 159 (Del. 1980). In *Weick*, the Court emphasized the limitations placed on the scope of the felony murder rule, including the restriction that there be a causal connection between the felony and the murder. *Weick*, 420 A.2d at 162. An additional restriction was that the felon, or his accomplices, if any, performs an actual killing. *Id.* Accordingly, the fact of a causal connection and the fact of the identity of the performer were two separate restrictions. The defendant in *Chao* was arguing a restriction based on the former. Although the Court denied the defendant in *Chao* use of this restriction because she was the actual killer, the *Chao* Court did not expressly overturn the causal connection limitation mentioned in *Weick*.

In consideration of its prior holdings in *Chao* and *Weick*, the Court in *Williams* addressed the remaining question of “whether the felony murder rule still includes a restriction that there be a causal connection between the felony and the murder in that the murder must be not only “in the course of” but also “in furtherance of” the felony.”³⁴ Adopting the rules of statutory analysis set forth in *Industrial Rentals, Inc.* and in *Nationwide Insurance Co.*,³⁵ the Court analyzed the felony murder statute as a whole, giving full effect to all the words and pertinent statutory language to produce the most reliable, well-balanced outcome. In the Court’s opinion, the two phrases, “in the course of” and “in furtherance of,” separated by the conjunctive “and,” and construed together, “[g]ive the sense the statute requires both that the murder occur during the felony and that the murder occur to help move the felony forward.”³⁶ Therefore, the Court reasoned, “[f]elony murder cannot attach unless the murder is a consequence of the felony and is intended to help the felony progress.”³⁷ Adopting this line of reasoning, the Court concluded that:

[T]o the extent that the *Chao* opinion states that the ‘in furtherance of’ language of the statute addresses solely the identity of the person who is committing the actual killing, (footnote omitted) it is overruled. Accordingly, we adhere to the holding of *Weick* and hold that the felony murder language

³⁴ *Williams*, 818 A.2d at 912.

³⁵ See *Industrial Rentals, Inc. v. New Castle County Board of Adjustment*, 776 A.2d 528, 530 (Del. 2001); see also *Nationwide Insurance Co. v. Graham*, 451 A.2d 832, 834 (Del. 1982).

³⁶ *Williams*, 818 A.2d at 912.

³⁷ *Id.*

requires not only that the defendant, or his accomplices, if any, commit the killing [sic] but also that the murder helps to move the felony forward.³⁸

Applying the holding in *Williams* to the case at bar, it is evident that, while the three murders committed by the Defendant were committed during, and a direct consequence of, the underlying felony of arson, they did not occur to either help move, or progress, the felony forward. Simply put, the Defendant did not cause the deaths of the three members of the Rivera family in order to promote or further the fire that he started by pouring accelerant onto a hot burner.

Thus, based on the “new right” established in accordance with the redefining of the “in furtherance of” language contained in 11 *Del. C.* § 636(a)(2) as recognized for the first time in *Williams*, Defendant has met his burden of proof of establishing a “colorable claim” of injustice. Defendant’s claim qualifies under the narrow application of the “fundamental fairness” exception contained in Rule 61(i)(5).

Turning to Defendant’s two other convictions for Assault First Degree, in consideration of the Delaware Supreme Court’s applied reasoning in *Williams*, the Court can only deduce that the new meaning given to the “in the course of” and “in furtherance of” language contained in the first degree murder statute, also applies to the relevant statute governing Assault in the First Degree, 11 *Del. C.* §

³⁸ *Id.* at 913.

613(a)(4),³⁹ under which the Defendant was originally convicted. Extrapolating the *Williams* decision to 11 *Del. C.* § 613(a)(4), the Court concludes that Defendant cannot be found guilty of two counts of Assault in the First Degree because he did not cause the physical injuries to his victims in order to facilitate or further the fire he started. As a result, Defendant's claim with respect to the two assault convictions also qualifies under the narrow application of the "fundamental fairness" exception contained in Rule 61(i)(5).

Based on all of the foregoing, the Court holds that Defendant's three convictions for felony Murder in the First Degree, IN96-12-0754, IN-96-12-0755 and IN97-01-1773, respectively, and his two convictions for Assault in the First Degree, IN97-01-1774 and IN97-01-1776, respectively, are hereby **VACATED**.

Appropriate Relief

Having vacated the above convictions, the Court's next responsibility is to re-sentence the Defendant for these same convictions, while remaining cognizant of the Court's former findings of fact, conclusions of law, and the evidence admitted at trial. At the time the Court rendered its verdict, it found: 1) beyond a reasonable doubt, that the Defendant started the fire intentionally;⁴⁰ 2) the

³⁹ Section 613, Assault in the first degree, provides in part:

(a) A person is guilty of assault in the first degree when: . . . (4) In the course of or in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, the person intentionally or recklessly causes serious physical injury to another person; . . . DEL. CODE ANN. tit. 11, § 613 (a)(4) (2001 & Interim Supp. 2003).

⁴⁰ Transcript of Trial Record, October 23, 1997, at 1-6 (hereinafter "Tr. Trial R. at ____").

Defendant's conduct and/or *mens rea* with respect to all the indicted criminal offenses met the criteria of "recklessly" as defined in the Delaware Code;⁴¹ 3) the Defendant's conduct and/or *mens rea* with respect to all the indicted criminal offenses did not meet the criteria of "criminal negligence" as defined in the Delaware Code;⁴² and 4) the Defendant did not intentionally cause the deaths of his three victims.⁴³

In view of the applicable statutes contained within the Delaware Code concerning "acts causing death," the question the Court must consider is whether to modify the three felony Murder in the First Degree convictions to Murder in the Second Degree convictions or to Manslaughter convictions. The shocking nature of the crimes, and the manner in which the victims died, coupled with the wanton, reckless, disregard that the Defendant manifested for human life, are clearly determinative factors weighing heavily in favor of consideration of the "cruel, wicked and depraved indifference to human life" standard contained within the Murder in the Second Degree statute, 11 *Del. C.* § 635 (1).⁴⁴ In comparison, under the Manslaughter statute, 11 *Del. C.* § 632(1), the Defendant's appalling actions

⁴¹ Tr. Trial R. at 6.

⁴² Tr. Trial R. at 7.

⁴³ Tr. Trial R. at 9.

⁴⁴ § 635, Murder in the Second Degree, provides in part:

A person is guilty of murder in the second degree when: (1) The person recklessly causes the death of another person under circumstances which manifest a cruel, wicked and depraved indifference to human life; DEL. CODE ANN. tit. 11, § 635 (1) (2001 & Interim Supp. 2003).

would be ameliorated to the more subtle degree of behavior prescribed as “recklessly causing the death of another.”⁴⁵

In *Waters*, the Delaware Supreme Court provided a concise and well-defined interpretation of the meaning of “cruel, wicked and depraved indifference to human life” to be applied in the context of the State’s second-degree murder statute.⁴⁶ The defendant in *Waters* challenged the constitutionality of the second-degree murder statute, contending that these statutory words were vague. Because the language is not defined in Delaware’s Criminal Code, the Court held that these words are to be given their ‘commonly accepted meaning’ and that there was no vagueness problem.⁴⁷ Consulting the Commentary to the Delaware Criminal Code⁴⁸ for guidance in differentiating between the degrees of severity for second-degree murder versus manslaughter,⁴⁹ the Court noted:

[I]t will be a jury question in each case whether a killing is so serious in its circumstances to amount to second-degree murder, or is only manslaughter. The distinction is one of degree only. The decision turns on the actor’s conduct. The State will need to prove precisely what the defendant did which supports its contention that his attitude to human life was ‘cruel, wicked, and depraved.’ His own words would be relevant, as would his choice of a particular modus operandi or

⁴⁵ § 632, Manslaughter, provides in part:

A person is guilty of manslaughter when: (1) The person recklessly causes the death of another person; ... DEL. CODE ANN. tit. 11, § 632 (1) (2001 & Interim Supp. 2003).

⁴⁶ *Waters v. State*, 443 A.2d 500 (Del. 1982).

⁴⁷ *Waters*, 443 A.2d at 504-06.

⁴⁸ DEL. CRIM. CODE Commentary, 191 (1973).

⁴⁹ Earlier in its opinion, the Court began its discussion by noting that, “[t]he basic difference between Manslaughter and Murder in the Second Degree, under the governing Statutes, is that the latter requires a showing that the homicide was committed ‘under circumstances which manifest a cruel, wicked and depraved indifference to human life,’ while the former does not. Both offenses require a ‘reckless’ state of mind.” *Waters*, 443 A.2d at 502-03.

a particular weapon. The State must also prove that he was ‘reckless’ with regard to death. That is, he must have perceived and consciously disregarded a substantial and unjustifiable risk that death would be caused by his conduct – a risk that constitutes a ‘gross deviation’ from a reasonable standard of conduct, in the light of all the surrounding circumstances, including the purposes of his activity.⁵⁰

The Commentary to the Criminal Code, the Court suggests, makes clear that the drafters of the Code relied substantially on long-standing precedent in arriving at the wording of the Murder in the Second Degree statute.⁵¹ The Commentary borrows heavily from the case of *State v. Winsett*,⁵² wherein the Court, in instructing the jury, stated that, “[m]urder in the second degree is where the killing is done, not with express malice, but, rather, with implied or constructive malice, that is, where the malice is inferred from acts actually proved.”⁵³ “The law considers that he who commits a cruel act voluntarily, does it maliciously.”⁵⁴

According to the Court in *Winsett*:

[M]urder in the second degree, therefore, is where the killing is done without the premeditation or deliberate mind required to make the act murder in the first degree, but nevertheless is done without justification or excuse, and without adequate provocation, and with a wicked and depraved heart, or with a cruel and wicked indifference to human life.⁵⁵

⁵⁰ *Id.* at 505.

⁵¹ *Id.* at 504.

⁵² *State v. Winsett*, 205 A.2d 510 (Del. 1964).

⁵³ *Winsett*, 205 A.2d at 515-16.

⁵⁴ *Id.*

⁵⁵ *Id.*

In *Brinkley*, the Court ruled that “a cruel, wicked and depraved indifference to human life” could be found where the “intentional acts (of the defendant) were so fraught with danger...-so likely to cause death or great bodily harm...”⁵⁶

At the close of Defendant’s trial, this Court found that the Defendant “recklessly” started the fire, as defined in 11 *Del. C.* § 231(c), which ultimately resulted in three family members suffocating to death while they slept, and caused multiple injuries to others. It was the Court’s findings that:

[T]he defendant, by shaking and pouring an accelerant over a burner [sic] which he turned on to high, in an apartment building occupied by many people, was clearly aware of a substantial and unjustifiable risk that death would result from his conduct. The defendant consciously disregarded this risk. The risk was of such a nature and degree that disregard thereof constituted a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A reasonable person would not have simply disregarded such a risk.⁵⁷

The Defendant cannot rely on the fact that he was unduly intoxicated as a justification for his actions at the time of his criminal behavior. If the Defendant was not aware of the risk involved, his lack of knowledge would only have been a result of his inebriated state. It is well settled law that voluntary intoxication is not a defense to a criminal act in Delaware.⁵⁸ Moreover, the Court finds that

⁵⁶ *Waters*, 443 A.2d at 505 (quoting *Brinkley v. State*, 233 A.2d 56, 58 (Del. 1967)); accord *Hallowell v. State*, 298 A.2d 330 (Del. 1972).

⁵⁷ Tr. Trial R. at 9.

⁵⁸ DEL. CODE ANN. tit. 11, § 421 (2001 & Supp. 2002) ; *Wyant v. State*, 519 A.2d 649 (Del. 1986).

Defendant acted with an abundance of a “cruel, wicked and depraved indifference to human life” when, after starting the fire, he walked blithely from the kitchen and simply resumed his packing. As the fire accelerated and grew, Defendant did not shout for help, awake the children, call to Darlene for assistance, dial 911, or turn off the burner and attempt to douse the flames.⁵⁹ Instead, he walked away from the fire into the bathroom, and eventually ended up on the patio.⁶⁰

In short, if the Defendant committed the same odious crimes today, and appeared before this Court, the Court would most assuredly have found that the Defendant’s actions, as to the three victims who died, constituted Murder in the Second Degree.

In its response to Defendant’s Rule 61 motion, the State has elected to modify the judgment of conviction, with respect to the murders, to the lesser offense of Manslaughter. In recognition of the fact that Defendant did not request a jury to weigh the issue of the existence of the additional element of “cruel, wicked, and depraved indifference to human life” necessary for a second-degree murder conviction, and the fact that the State did not introduce or prove this additional element at trial, the Court adopts the State’s recommendation with respect to re-sentencing of the Defendant. The Court also acknowledges the fact that at the time of Defendant’s trial, the State was focused on pursuing a case-in-

⁵⁹ Tr. Trial R. at 5.

⁶⁰ Tr. Trial R. at 5.

chief predicated on the then-existent murder first-degree statute, believing that the murders were committed “in the course of” and “in furtherance of” the underlying felony, as interpreted by case law at that time.

In accord with the rationale underlying the holding in *Waters*, which recognized plain and reversible error in not charging the jury as to the commonly accepted meaning of “cruel, wicked, and depraved indifference to human life” as that language was used in the second-degree murder statute under which the defendant was convicted, this Court finds that the maximum benefit to the Defendant under the facts of this case would be reduction of his three Murder in the First Degree convictions to Manslaughter.

Hence, in accordance with the Delaware Supreme Court’s decision in *Williams*, a re-sentencing hearing shall be held at which time Defendant’s convictions, as enumerated above, will be vacated, a new verdict will be entered on the record, and Defendant will be re-sentenced on the following convictions:

IN96-12-0754	Manslaughter	Steven Rivera
IN96-12-0755	Manslaughter	Frances Rivera
IN97-01-1773	Manslaughter	Robert Rivera
IN97-01-1774	Assault Second Degree	Jeremy Rivera
IN97-01-1776	Assault Second Degree	Emily Miller

Double Jeopardy Not Implicated

Finally, the Court must examine any potential constitutional ramifications resulting from the re-sentencing of these convictions, which might adversely affect Defendant's right to be free from double jeopardy and/or a violation of his due process rights. The Double Jeopardy Clause, imbued in the Fifth Amendment and applicable to the States through the Fourteenth Amendment, provides that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."⁶¹ The language of the Delaware Constitution mirrors the language in the federal provision.⁶² In *United States v. DiFrancesco*, the United States Supreme Court defined the legal principles inherent in the Clause as engendering more than a safeguard mechanism protecting individuals from the perils of being twice convicted for an alleged offense.⁶³ The Court extended the purpose of the Clause such that the constitutional prohibition against double jeopardy applies also to punishments that would follow from a second conviction for the same offense.⁶⁴

⁶¹ U.S. CONST. amend. V.

⁶² "[N]o person shall be for the same offense twice put in jeopardy of life or limb . . ." DEL. CONST. art. I, § 8.

⁶³ "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.... The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *United States v. DiFrancesco*, 449 U.S. 117, 127-28 (1980) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)).

⁶⁴ *DiFrancesco*, 449 U.S. at 129.

Accordingly, the Clause protects against both multiple prosecutions and multiple punishments for the same offense.⁶⁵

Adopting the United States Supreme Court's holdings in two decisive cases that challenged double jeopardy violations in re-sentencing procedures,⁶⁶ the Delaware Supreme Court held in *White v. State* that double jeopardy is not implicated when a defendant has no legitimate expectation of finality in his original sentence.⁶⁷ To elaborate, "[a]fter a related sentence has been vacated on appeal, a trial judge may resentence a defendant up to the combined duration of the original sentences without violating the constitutional prohibition against double jeopardy."⁶⁸ Further, the Court emphasized that a defendant's due process rights are not infringed upon either.⁶⁹

The Court in *White* overruled the prevailing rule, which it had previously established in *Hunter v. State* ("*Hunter's*" rule)⁷⁰ regarding double jeopardy implications at re-sentencing, and returned to the limitation that it had previously abandoned in *Davis v. State*⁷¹ in favor of *Hunter's* rule. That is to say, the Court

⁶⁵ *Id.* at 129 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

⁶⁶ See *Pennsylvania v. Goldhammer*, 474 U.S. 28, 30 (1985) (per curiam); *United States v. DiFrancesco*, 449 U.S. 117, 136-37 (1980).

⁶⁷ *White v. State*, 576 A.2d 1322, 1323 (Del. 1990) (holding that the trial court's resentencing after a related charge was vacated on appeal, did not violate the constitutional prohibition against double jeopardy because the appellant had no legitimate expectation of finality in his sentence); accord *Deangelo v. State*, 2003 WL 21321719 (Del.).

⁶⁸ *White*, 576 A.2d at 1328.

⁶⁹ *Id.* at 1328-29.

⁷⁰ *Hunter v. State*, 420 A.2d 119, 132 (Del. 1980) (holding that a trial judge could not resentence a defendant to a term greater than the sentence originally imposed if the defendant had already begun to serve the sentence).

⁷¹ *Davis v. State*, 400 A.2d 292, 297 (Del. 1979) (holding that a trial judge was only limited in resentencing a defendant by the combined duration of the sentences imposed before appeal).

in *White* reinstated only that portion of *Davis* addressing the problem of double jeopardy in re-sentencing. “Specifically, *Davis* held that ‘[a]t resentencing, the trial judge will not be limited to the mandatory minimum sentence imposed initially for the attempted robbery conviction, but the sentence may not exceed the combined duration of the two terms imposed before the appeal.’”⁷²

As the similarity of circumstances will prove, the *Davis* rule, as reinstated in *White*, can be applied to the instant case. Just as the *White* Court determined that the defendant who challenged his robbery and weapons convictions on appeal based on double jeopardy grounds, had no legitimate expectation of finality in his original sentence, so this Court finds that the Defendant who challenged his three Murder in the First Degree convictions and two Assault First Degree convictions in his motion for postconviction relief, based on principles of stare decises, had no legitimate expectation of finality in his original sentence.

While the defendant in *White* appealed his convictions on double jeopardy grounds, whereas this Defendant seeks collateral relief to have the five convictions vacated and judgment of acquittal entered, or a new trial,⁷³ on due process grounds (a new right established by overturned law), rather than on double jeopardy

⁷² *White*, 576 A.2d at 1323 n.2 (quoting *Davis*, 400 A.2d at 297).

⁷³ In the Rule 61 motion for postconviction relief, Defendant concludes by requesting that “the convictions for felony murder and felony assault be reversed, and the sentences vacated. In the reply to the State’s response, Defendant submits that the Court “vacate the convictions for Murder 1st and Assault 1st, and enter judgments of acquittal or, in the alternative, grant the defendant a new trial.”

grounds, the Court has determined that Defendant's convictions duly implicate both double jeopardy and due process principles of constitutionality. Even though Defendant's sentence was not vacated on appeal, as in *White*, but rather reduced pursuant to a Rule 61 motion for postconviction relief, the Court finds that the circumstances are so similar that the *Davis* rule is appropriate in this case as well.

Applying the rule of law set forth in *White*, therefore, this Court may re-sentence the Defendant up to the combined duration of the original sentences without violating the constitutional prohibition against double jeopardy or infringement of due process rights. His original sentences were three life imprisonment terms and twenty years incarceration at Level V for the two Assault First Degree offenses. Upon re-sentencing, Defendant's original sentence may not increase, but, could actually decrease. This fact, the Court notes, is no conciliation to those remaining members of the Rivera family. Thus, any potential claim by the Defendant that his constitutional right to be free from double jeopardy has been violated, and/or that his due process rights have been infringed upon, must fail.

Conclusion

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief Pursuant to Superior Court Criminal Rule 61, though procedurally barred pursuant to 61(i)(1), is substantively successful under the "fundamental fairness" exception pursuant to 61(i)(5), and is hereby **GRANTED**.

In accordance with granting Defendant's motion, the Court will conduct a hearing, at which time the Court will re-sentence the Defendant.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Mark A. Kirk
James B. Ropp, Esquire
Donald R. Roberts, Esquire
Presentence
Prothonotary