IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	I.D. No. 9712014022
v.	)	
	)	Cr. A. No. IN98-01-1102-R2
KENNETH M. SMITH,	)	
Defendant.	)	
	)	

Date Submitted: May 12, 2004
Date Decided: June 28, 2004

UPON DEFENDANT'S MOTION
FOR POSTCONVICTION RELIEF
DENIED.

ORDER

Kenneth M. Smith, Wilmington, Delaware, *Pro Se*, Defendant.

Paul R. Wallace, Esquire, Deputy Attorney General, New Castle County, State of Delaware, Attorney for the State of Delaware.

ABLEMAN, JUDGE

Kenneth M. Smith ("Defendant") has filed this Motion for Postconviction Relief pursuant to Superior Court Criminal Procedure Rule 61, wherein he seeks to set aside a judgment of criminal conviction of Robbery First Degree. Defendant predicates his claim for relief on the Delaware Supreme Court's 2003 decision in *Walton v. State*,[1] which redefined the meaning of the "displays" requirement in Delaware's Robbery First Degree statute, 11 *Del. C.* § 832(a)(2). Additionally, Defendant also relies on the *Walton* decision for overruling the Delaware Supreme Court's holding, in part, in *McKamey v. State*,[2] as to the Court's interpretation of the word "displays" contained in 11 *Del. C.* § 832(a)(2). Notwithstanding the Court's opinion in *Walton*, and the resultant overturning of McKamey's conviction after it had been affirmed on appeal, the meaning of "displays what appears to be a deadly weapon" pursuant to 11 *Del. C.* § 832(a)(2) was subsequently amended by the General Assembly, in an effort to rehabilitate the inherent import of the statute to its original intent. Section 832(a)(2), as amended, provides a more expanded and inclusive interpretation of the "displays" requirement, to encompass not only a physical manifestation, but a representation by word or conduct of a deadly weapon. In light of the broader-based, implication and meaning now attached to the amended § 832(a)(2), and for the reasons stated below, Defendant's motion is **DENIED**.

[1] *Walton v. State*, 821 A.2d 871 (Del. 2003).
[2] *McKamey v. State*, 1997 WL 45060 (Del.).

Statement of Facts

Defendant was arrested for shoplifting from a Value City department store on the afternoon of December 22, 1997. On January 20, 1998, Defendant was indicted by a New Castle County Grand Jury and charged with one count of Robbery First Degree, in violation of Title 11, § 832(a)(2) of the Delaware Code.

On June 3, 1998, following a two-day jury trial, the Defendant was found guilty of Robbery First Degree. Pursuant to 11 *Del. C.* § 4214(a) and 4215(b), the State moved the Court to declare the Defendant to be an habitual offender and to impose the sentencing provisions of 11 *Del. C.* § 4214(a) as to the Robbery First Degree conviction.[3] On August 7, 1998, in connection with Criminal Action No. IN98-01-1102, Robbery First Degree, the Court sentenced the Defendant to be incarcerated at Level V for life.

Defendant timely filed a direct appeal of his conviction to the Delaware Supreme Court. In his appeal, Defendant raised two issues. First, he contended that the jury instructions were improper, and that the Superior Court failed to conduct a formal prayer conference, denying him due process. On September 7, 1999, the Delaware Supreme Court affirmed Defendant's conviction.[4] On June 14, 2000, Defendant filed a *pro se* motion for postconviction relief pursuant to

[3] Defendant was declared an habitual offender by reason of the following two prior convictions, in addition to the June 3, 1998 conviction for Robbery First Degree: 1) Possession with Intent to Deliver Marijuana (IN88-09-0053), convicted February 15, 1989; and 2) Robbery First Degree (IN94-07-0171), convicted March 14, 1995.
[4] *Smith v. State*, 1999 WL 734717 (Del.).

Superior Court Criminal Rule 61. The Court summarily dismissed Defendant's Rule 61 motion on July 14, 2000.[5] Defendant appealed this Court's judgment denying Defendant's Rule 61 motion on August 7, 2000. The Delaware Supreme Court affirmed the Court's judgment on December 20, 2000.[6] Three years later, Defendant filed a motion for modification of sentence on April 5, 2004. By Order, dated April 16, 2004, the Court denied Defendant's motion because: 1) the motion was filed more than ninety days after imposition of the sentence and was therefore, time-barred; 2) the Court did not find the existence of any extraordinary circumstances; and 3) the postconviction relief that the Defendant was seeking could not be granted by a motion to modify sentence.

On April 30, 2004, Defendant filed, *pro se*, the instant motion for postconviction relief pursuant to Superior Court Criminal Rule 61 based on the recent Delaware Supreme Court decision in *Walton*. In recognition of *Walton's* more restrictive interpretation of the term, "displays what appears to be a deadly weapon," the Delaware Supreme Court overruled, in part, its prior holding in Alvin McKamey's appeal from his conviction, because the evidence of McKamey's actions in the robbery conviction was no longer sufficient under Delaware law to

[5] In his Rule 61 motion for postconviction relief, Defendant raised seven grounds for relief: 1) violation of the Sixth Amendment right of confrontation; 2)abuse of discretion in denying his motion for acquittal based on insufficient evidence; 3) abuse of discretion in allowing the security videotape to be admitted without redacting portions which were allegedly inaccurate, irrelevant, and inflammatory; 4) prosecutorial misconduct; 5) numerous challenges to life sentence imposed based upon his status as an habitual offender; 6) direct challenges to his sentence and to the imposed, determined, status as a habitual offender; and 7) ineffective assistance of counsel.
[6] *Smith v. State*, 2000 WL 1887933 (Del.).

support a conviction for Robbery First Degree.[7] As a result of the Supreme Court's findings in *Walton*, this Court, in its November 26, 2003 Order, granted, in part, McKamey's Rule 61 motion for postconviction relief with respect to the reduction of his sentence from Robbery First Degree to Robbery Second Degree.[8]

Based on this procedural/substantive history, Defendant filed the instant motion for postconviction relief, relying on the precedent established in *Walton*, thereby asserting the same contention that, in recognition of the *Walton* Court's interpretation of the "displays" requirement of § 832(a)(2), the evidence does not establish that he displayed what appeared to be a deadly weapon, as required for a Robbery First Degree conviction. Defendant submits that the circumstances under which he was convicted of Robbery First Degree, i.e. failure to have openly displayed or physically manifested a weapon, demonstrate that he is similarly situated to Alvin McKamey. Unlike McKamey, Defendant does not request relief in the form of reduction of his sentence from first-degree robbery to second-degree robbery. Rather, Defendant requests that his conviction of Robbery First Degree be vacated, and a judgment of acquittal be entered.

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

[7] *Walton*, 821 A.2d at 875 n.14.
[8] *See State v. McKamey*, 2003 WL 22852614 (Del. Super. Ct.).

requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of defendant's postconviction relief claim.[9] To protect the integrity of the procedural rules, the Court should not consider the merits of a postconviction claim where a procedural bar exists.[10]

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.[11]

The Rule 61 time bar is not an *absolute* prohibition to post-conviction relief petitions filed three years after conviction.[12] 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)."[13] 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

[9] *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)).
[10] *State v. Gattis*, 1995 WL 790961, at *3 (Del. Super. Ct.) (citing *Younger*, 580 A.2d at 554).
[11] SUPER. CT. CRIM. R. 61(i)(1).
[12] *Bailey*, 588 A.2d at 1125 (citing *Boyer v. State*, 562 A.2d 1186, 1188 (Del. 1989)).
[13] *Bailey*, 588 A.2d at 1129.

> undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.[14]

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."[15] 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.[16] Accordingly, when a petitioner puts forth a colorable claim of mistaken waiver of important constitutional rights, Rule 61(i)(5) is available to him.[17]

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,[18] an

[14] SUPER. CT. CRIM. R. 61(i)(5).
[15] *Younger*, 580 A.2d at 555 (citing *Teague v. Lane*, 489 U.S. 288, 297-99 (1989))(emphasis added).
[16] *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992).
[17] *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).
[18] 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.

evidentiary hearing is not necessarily required.[19] 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."[20] 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] obtained certainly does not satisfy the requirement."[21] 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*.[22]

Discussion

Upon initial review of Defendant's motion for postconviction relief, the

[19] 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.
[20] *Bailey*, 588 A.2d at 1130 (citing *Younger v. State*, 580 A.2d 552, 555 (Del. 1990)) (emphasis added).
[21] *State v. Getz*, 1994 WL 465543, at *11 (Del. Super. Ct.).
[22] *Webster*, 604 A.2d at 1366.

Court finds that Defendant has failed to overcome the first, of two applicable obstacles, with respect to the procedural bars imposed by Rule 61(i), i.e., the time limitation bar to relief set forth in Rule 61(i)(1). Defendant filed the instant motion approximately four and one half years after the judgment of conviction became final on September 7, 1999.[23] Notwithstanding the fact that the Defendant does assert a new retroactive right under the auspices of *Walton*, his motion is procedurally time-barred under Rule 61(i)(1). The Court will forego addressing the assertion of a newly created retroactive right within the purview of the constraints imposed by Rule 61(i)(1). Rather, in deference to the Defendant, and in a light most favorable to the Defendant, the Court will address the nature, applicability, and diminution of this right, as it pertains to the Defendant's case, within the constructs of Rule 61(i)(5). As Rule 61(i)(1) and (5) both speak to an exception consisting of a newly recognized right, and since Rule 61(i)(5) acts as a general default provision, excluding discussion of the asserted right in an analysis of the applicability of Rule 61(i)(1) is not injurious to the Defendant's claim. Rule 61(i)(5) affords the Defendant the same, if not a more appropriate opportunity, by

[23] 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).

inclusion of a discussion and analysis of the right under the broader moniker of "miscarriage of justice" or "fundamental fairness."

Thus, 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, 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 2003 revisionary interpretation applied to the "displays" of "what appears to be a deadly weapon" text of 11 *Del. C.* § 832(a)(2) as delineated in *Walton*. In essence, Defendant alleges that his ground for relief originates from the "fundamental fairness" or "miscarriage of justice" exception indigenous to Rule 61(i)(5). Pursuant to the tenets of Rule 61(i)(5), Defendant requests that the Court affirm an alleged, relied-upon right, recognized for the first time after a direct appeal, that is, the conviction for Robbery First Degree should be vacated due to insufficiency of evidence under the Delaware Supreme Court's construction of 11 *Del. C.* § 832(a)(2) in *Walton*. Therefore, as a matter of recourse, the Court finds that consideration of

Defendant's claim can only be examined under the "colorable claim" exception of Rule 61(i)(5).[24]

Legal Analysis

Turning to the substantive claim of his motion, Defendant relies on the Delaware Supreme Court's decision in *Walton*, which overturned, in part, the Court's earlier affirmation of Alvin McKamey's direct appeal of his Robbery First Degree conviction. Defendant relies on these decisions as grounds, not for reducing his Robbery First Degree conviction to Robbery Second Degree, but for the Court to vacate his sentence and a judgment of acquittal to be entered.

In *Walton*, the Court reversed twenty-five years of legal precedent by redefining the "displays what appears to be a deadly weapon" requirement encompassed in 11 *Del. C*. § 832(a)(2).[25] Prior to *Walton*, Delaware courts had attributed the word "displays" under the statute to denote, not only the notion of

[24] The Delaware Supreme Court has noted that the "interest of justice" exception of Rule 61(i)(4) and the "miscarriage of justice" exception of Rule 61(i)(5) have distinct denotations under the Rule. 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. *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991). The trial court committed error if it treated the two conterminously." *Id*. at 1127 n.6. Further, "[w]hile 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.'" *State v. Rosa*, 1992 WL 302295, at *7 (Del. Super. Ct.). Accordingly, each subsection of the statute employs different criteria for both consideration and relief of postconviction claims. *Id*. In light of this distinction, and since Defendant's claim could not have been previously litigated at trial, on appeal, or in his first postconviction motion, because it did not come to fruition until the advent of *Walton*, Defendant's claim is properly considered under Rule 61(i)(5) only.

[25] § 832 provides, in part:
(a) A person is guilty of robbery in the first degree when the person commits the crime of robbery in the second degree and when, in the course of the commission of the crime or of immediate flight therefrom, the person or another participant in the crime: … (2) Displays what appears to be a deadly weapon[.] DEL. CODE ANN. tit. 11, § 832(a)(2) (2001 & Supp. 2002).

spreading before view or exhibiting to the sight, but also to represent that which is manifested to any of a victim's senses.[26] A weapon was "displayed" to a victim, for purposes of the statute, if the weapon was exhibited to the victim's mind through any of the victim's senses.[27] The "displays" requirement could be predicated only on the victim's belief that a defendant possessed a deadly weapon, and some objective manifestation of a weapon, even if the weapon was unseen.[28] In almost every case, the objective manifestation was in the form of a defendant alleging to have a weapon while concealing his or her hand under a piece of clothing.[29]

The first winds of change in the Court's reasoning occurred, quite unexpectedly, a year before *Walton* was decided. The Delaware Supreme Court held in *Word v. State* [30] that a bank teller's testimony that she thought the defendant

[26] *State v. Smallwood*, 346 A.2d 164, 166 (Del. 1975).
[27] *Smallwood*, 346 A.2d at 165.
[28] *Id*. at 166 (holding that one who is made to feel by the sense of touch the presence of an apparent gun may never see it but there is recognition, and the manifestation is just as effective, for the purpose of this section, as putting a gun in plain view); a*ccord Lawrence v. State*, 790 A.2d 476 (Del. 2002) (holding that "displays" includes a defendant's act of wrapping cloth around his hand so that it appears to hide a gun, where the victim reasonably apprehended that the defendant was armed); *Deshields v. State*, 544 A.2d 265 (Del. 1988) (defendant reached into his coat pocket as if he was reaching for a gun while threatening the victims); *Mercado v. State*, 515 A.2d 398 (Del. 1986) (defendant tapped a bulge in his waistline, which victim perceived to be a handgun, and made a verbal threat); *Williams v. State*, 494 A.2d 1237 (Del. 1985) (defendant had his hands clasped together pointed at the victim admonishing with a verbal threat); *Harrigan v. State*, 447 A.2d 1191 (Del. 1982) (defendant had one hand inside a coat and made a verbal threat to shoot one of the victims).
[29] In her dissent in *Walton*, Justice Berger took exception to the majority's abandonment of the basic tenets inherent in the Court's then-extant interpretation of "displays what appears to be a deadly weapon," as first defined in *Smallwood* some twenty-five years earlier. In support of her dissenting position, Justice Berger emphasized a litany of case law evidencing the Court's reliance over the years on the settled principles announced in *Smallwood*, i. e., the word "display" means to "exhibit to the sight or mind" and the "display" requirement is satisfied if the weapon is "manifested to any of a victim's senses," even if the manifestation was not obvious to the observer or consisted of a verbal threat. *Walton*, 821 A.2d at 879-81.
[30] *Word v. State*, 801 A.2d 927 (Del. 2002).

had a weapon, because his note stated, "I am armed," did not establish that defendant had displayed what appeared to be a deadly weapon, and was thus unaccompanied by a physical manifestation of a weapon, a required element of first-degree robbery.

The following year, in *Walton*, the defendant entered a bank and handed the bank teller a note that read, "I have a bomb. Give me all your money and no dye pack." The bank teller later testified that she did not see anything that appeared to be a weapon on the robber's person but that he did have his hand in his pocket, which scared her. Yet, there was no evidence that the hand in the pocket "appeared to be a deadly weapon."[31]

The *Walton* Court adopted a two-part analysis to examine the "displays" requirement in § 832(a)(2), focusing on its determinative value as one of the elements elevating a crime of Robbery Second Degree to Robbery First Degree. First, the victim must *subjectively* believe the defendant has a weapon.[32] Second, the defendant's threat must be accompanied by an *objective* manifestation of a weapon.[33] Relying on its decision in *Word*, the Court held that Walton's conduct could not be construed as "displays" because the Court, since *Smallwood*, had always accorded the word "displays" its plain meaning in interpreting § 832(a)(2),

[31] *Walton*, 821 A.2d at 873-74.
[32] *Id*. at 874 (citing *Smallwood*, 346 A.2d at 166, for the proposition that this requirement is consistent with an essential element of the offense).
[33] *Id*. at 874 (citing *DeShields*, 706 A.2d at 507).

i.e., "to spread before view," "exhibit to the sight or mind," "give evidence of."[34] Secondly, the Court opined that Walton's hand in the pocket "[c]annot lead to a permissible inference of an 'appearance' of a deadly weapon. The solitary reference to Walton's hand in the pocket is not an objective physical manifestation that Walton displayed what appeared to be a bomb."[35] Reaffirming its opinion that "displays" is "[t]he *conduct* establishing the additional, aggravating element that elevates second degree robbery to the more serious, first degree offense," the Court concluded by recognizing that, "[a] verbal threat cannot, itself, be a 'display' of what 'appears to be a deadly weapon.'" [36] If that were the case, the Court rationalized, then the sensitivity of each particular victim to a verbal threat would be the determining factor in whether the offense was elevated from second degree to first degree.[37]

In upholding Walton's contention that having his hand in his pocket, without any elaboration, cannot constitute an objective physical manifestation sufficient to support the requirement of an "objective physical manifestation" that he displayed what appeared to be a deadly weapon, the Court concurrently overruled Alvin McKamey's First Degree Robbery conviction, to the extent that it was inconsistent

[34] *Id*. at 876.
[35] *Id*. at 875-76.
[36] *Id*. at 877.
[37] *Id*.

with *Walton* and *Word*.[38] As was to be expected, McKamey filed a Rule 61 motion seeking relief from his conviction of first-degree robbery. At present, Alvin McKamey awaits resentencing.[39]

Walton was decided on April 25, 2003. In response to *Word, Walton,* and *McKamey*, and before any anticipated ramifications resulting from the revised meaning assigned to the phraseology "displays" of "what appears to be a deadly weapon" could materialize, § 832 (a)(2) was amended shortly thereafter, on June 30, 2003. In April 2003, the Delaware General Assembly had introduced House Bill No. 115, amending § 832 (a)(2) by striking the phrase "deadly weapon" and inserting the phrase "deadly weapon or represents by word or conduct that he or she is in possession or control of a deadly weapon."[40] On April 17, 2003, the Bill successfully passed in the House by a unanimous vote of 38-0.

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[38] "In *Word* we referred, among other cases, to a summary order of a panel of this Court in *McKamey v. State*, 1997 WL 45060 (Del. Supr.). *See Word*, 801 A.2d at 931. In *McKamey*, we upheld a first degree robbery conviction upon evidence showing only that the defendant robbed a cab driver where the defendant "sat behind the driver in a moving cab and told the driver that he had a gun." *Id*. (quoting *McKamey*, 1997 WL 45060 at *2). We said in *Word* that we did not "read our summary order in *McKamey* that was entered before our *DeShields* opinion as reliable precedent to permit a finding of 'displays what appears to be a deadly weapon' where the victim did not perceive any display or physical manifestation of a weapon." *Id*. We now conclude that the facts of *McKamey* cannot be substantially distinguished from the facts in *Word* or from the facts of the case before us. Therefore, in this en Banc case, we now overrule *McKamey* to the extent that it is inconsistent with the instant holding or the holding in *Word*." *Id*. at 875 n.14.

[39] Before this Court could resentence McKamey, he appealed that portion of the Court's November 26, 2003 Order denying, in part, his Rule 61 motion for postconviction relief. On May 3, 2004, the Delaware Supreme Court affirmed the Court's Order granting, in part, McKamey's Rule 61 motion for reduction of his sentence from Robbery First Degree to Robbery Second Degree and denying, in part, that portion of his motion that requested relief from habitual offender status. In accordance with the Court's decision in *Walton*, a resentencing hearing will be held in connection with McKamey's Robbery First Degree charge of the indictment, IN94-07-0222, at which time a new verdict will be entered on the record and the conviction for this charge will be reduced from Robbery First Degree to Robbery Second Degree pursuant to 11 *Del. C*. § 831.

[40] H.B. 115, § 1, 142nd Gen. Assem. (Del. 2003).

In focusing the Court's attention on an interpretation of the newly amended § 832(a)(2), it is well established that, when construing the language of a statute, Delaware courts attempt to ascertain and give effect to legislative intent,[41] i.e., the "objective of statutory construction is to 'ascertain and give effect to the intent of the legislature.'"[42] In the construction of a statute, the Delaware Supreme Court has established as its standard the search for legislative intent.[43] Further, '[w]here the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls.'[44] That is to say, if a statute contains unmistakable language, no interpretation is required and the plain meaning of the words control.[45]

Interpretation of legislative intent and statutory construction requires that a court first examine the text of the statute in its context to determine if it is ambiguous.[46] By and large, a statute is ambiguous if it is "reasonably susceptible of two interpretations" or to evoking different conclusions.[47] A statute may also contain ambiguity, "[i]f a literal interpretation of the words of the statute would

[41] *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000); *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994).
[42] *Dir. of Revenue v. CNA Holdings, Inc., f/k/a Hoechst Celanese Corp.*, 818 A.2d 953, 957 (Del. 2003) (quoting *Ingram*, 747 A.2d at 547).
[43] *Cephas*, 637 A.2d at 23; *Sandt v. Del. Solid Waste Auth*., 640 A.2d 1030, 1032 (Del. 1994).
[44] *Sandt*, 640 A.2d at 1032 (quoting *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989)); *see also Streett v. State*, 669 A.2d 9, 12 (Del. 1995); *Cephas*, 637 A.2d at 23.
[45] *Ingram*, 747 A.2d at 547; *accord Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999); *Cephas*, 637 A.2d at 23; *Spielberg*, 558 A.2d at 293.
[46] *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998); *State v. Reynolds*, 669 A.2d 90, 93 (Del. 1995).
[47] *CNA Holdings, Inc*., 818 A.2d at 957; *accord Newtowne Vill. Serv. Corp. v. Newtowne Rd. Dev. Co.,*772 A.2d 172, 175 (Del. 2001); *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd*., 492 A.2d 1242, 1246 (Del. 1985).

lead to a result so unreasonable or absurd that it could not have been intended by the legislature."[48] Therefore, in those instances where a statute's language lends itself to ambiguity, "[a] court must seek to resolve the ambiguity by ascertaining the legislative intent."[49] Concomitantly, in those instances when the language of a statute harbors no ambiguity and application of the literal meaning of its words would not be unreasonable, there is no basis for an interpretation of those words by the court.[50]

In construing § 832(a)(2), as amended, and in interpreting the General Assembly's intent, it is evident that, by amplifying and expanding, with unambiguous language, the conditions under which an individual may manifest a deadly weapon, the legislative effect was to shore up the gap created by *Walton*. "When a legislative body . . . amends its prior enactment by a material change of language, the rule of statutory construction presumes that a change in meaning was intended."[51] Further, courts have considered assorted external factors in seeking out legislative intent.[52] As such, "[t]he synopsis of a bill is a proper source from which to glean legislative intent."[53]

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[48] *CNA Holdings, Inc*., 818 A.2d at 957; *accord Newtowne Vill. Serv. Corp.*, 772 A.2d at 175; *Snyder*, 708 A.2d at 241; *DiStefano v. Watson*, 566 A.2d 1, 4 (Del. 1989).
[49] *Snyder*, 708 A.2d at 241; *Acierno v. Worthy Bros. Pipeline Corp*., 656 A.2d 1085, 1088 (Del. 1995).
[50] *Snyder*, 708 A.2d at 241; *DiStefano*, 566 A.2d at 4.
[51] *Daniel D. Rappa, Inc. v. Engelhardt*, 256 A.2d 744, 746 (Del. 1969) (citing 1 Sutherland, Statutory Construction (3rd. Ed.), § 1930).
[52] *Siegman v. Columbia Pictures Entertainment, Inc*., 576 A.2d 625, 634 (Del. Ch. 1989).
[53] *Carper v. New Castle County Bd. of Ed*., 432 A.2d 1202, 1205 (Del. 1981).

The synopsis accompanying the bill reveals an insightful explanation into the General Assembly's ultimate objective. The General Assembly put in plain words that:

> In 1975, the Delaware Supreme Court interpreted Delaware's Robbery First Degree statute as applying whenever a criminal intimidates a victim by manifesting the presence of a deadly weapon in such a way that it is perceived by any of the victim's senses. *State v. Smallwood*, 346 A.2d 164 (Del. 1975). In 1997, the Court followed the *Smallwood* case when it upheld the conviction of a robber in a case where the only manifestation to the victim of the presence of a deadly weapon was the defendant's verbal threat that he had a gun. *McKamey v. State*, 1997 WL 45060 (Del.). In 2002, the Court adopted a contrary interpretation of the robbery statute and reversed a bank robbery conviction in a case where the defendant demanded money from a bank teller after handing her a note that read[,] "[t]his is a holdup . . . I am armed," reasoning that such evidence was insufficient to meet the statutory requirement that the presence of a deadly weapon was made manifest to the victim.
>
> This Amendment clarifies that any person who represents by word or conduct that they are in possession or control of a deadly weapon is committing a more serious crime than if there were no such representations.
>
> This Act will clarify that it is the General Assembly's intent to ensure that the Robbery First Degree statute will apply whenever a criminal intends to intimidate a robbery victim by threatening the presence of a deadly weapon, regardless of whether the intimidation is accomplished by a physical display of what appears to be a deadly weapon[,] or a verbal threat[,] or other conduct that clearly implies that the criminal is so armed.[54]

[54] H.B. 115, 142nd Gen. Assem. (Del. 2003), Synopsis.

Defendant was appropriately convicted of Robbery First Degree in 1998 under the then-extant version of § 832(a)(2), as first defined in *Smallwood.* Under the *Smallwood* standard, Defendant was found guilty of intimidating his victim, Security Guard John Giordano, by manifesting the presence of a deadly weapon in such a way that his victim perceived, through his senses, the existence of a deadly weapon, even if Defendant did not actually possess a weapon. At trial, Mr. Giordano testified that he first saw the Defendant with his hand under his coat. When asked if he could discern what was under the Defendant's coat, Mr. Giordano answered that he could not see if anything was there. The relevant testimony substantiates and evidences, as such:

Q. When you said, "Excuse me," what did the defendant then do?
A. He turned around with his right arm – hand inside of his jacket as if he was going to get something (indicating).
Q. You're indicating – your right hand is tucked kind of – I guess the front opening?
A. Right . . . .
Q. Okay. Put your hand back. Do exactly what he did to you at that point.
A. He turned around – he turned around like this and said, "Back Off."
Q. Did he still have the coats in his left hand?
A. Yes. The coats were up under here (indicating), hand was in here, he said, "Back Off."
Q. Could you see what was under the coat?
A. No, I couldn't.
Q. Now, you just explained it. Did he use that same tone? Was he a matter of fact? Was he menacing? How did he say it to you?
A. He said it like he meant it. Like there actually was something underneath his coat.
Q. Okay. How did you feel at that point? What did you think?

A. Well, doing this for 18 years, I've come to know when something is wrong and when to walk away.
Q. Why did you walk away?
A. Because I was afraid I was going to get shot.[55]

Hence, Defendant was properly sentenced based on years of accepted, well-settled, principal requirements, initially established in *Smallwood*, wherein "displays" meant to "exhibit to the sight or mind" and the "displays" requirement was satisfied if the weapon was "manifested to any of a victim's senses," even if the manifestation was not obvious to the observer or consisted of a verbal threat.

Moving forward to Defendant's present contention that *Walton* has eroded these principles to require a substantiation of a physical or overt manifestation of a deadly weapon, the Court finds that Defendant's claim must fail for several reasons. Foremost in this conclusion, the Defendant's Rule 61 motion was filed almost one year after § 832(a)(2) was amended. Therefore, Defendant's motion for relief does not fall within that narrow ambit of time commencing with the holding in *Walton*, and terminating with the amendment of § 832(a)(2). He cannot claim the same relief from his Robbery First Degree conviction that Alvin McKamey fortuitously received in *Walton*. McKamey's Robbery First Degree conviction was overturned/reduced as a direct result of the Delaware Supreme Court's overruling of its earlier affirmation of his conviction. Two months later, §

[55] Tr. of Trial Proceedings, dated June 2, 1998, at 53-54.

832(a)(2) was amended to clear up any confusion or questionable debate over the requirement of a physical manifestation of a deadly weapon. Additionally, as a point of reference, the Court acknowledges the possibility that, part of the purposeful intent behind the General Assembly's swift and speedy enactment of the amended § 832(a)(2) might have been linked to the foreseeable need to forestall the anticipated plethora of postconviction relief motions, which would potentially be generated in the wake of *Walton*, by defendants who had already been convicted of Robbery First Degree under similar circumstances.

Thus, according to § 832(a)(2), as amended, mere representation by word or conduct that an individual is in possession or control of a deadly weapon is sufficient to find an individual guilty of Robbery First Degree. In consideration of the plain, unambiguous, meaning and legislative intent accorded to the recently amended version of § 832(a)(2), Defendant's conduct at the time of his criminal act falls squarely within these parameters. His action of concealing his hand under his jacket, coupled with his verbal threat to "Back Off," more than satisfies a finding under the currently enacted requirements of § 832(a)(2). Having found that Defendant's criminal conduct warrants a proper conviction of Robbery First Degree under the respective versions of § 832(a)(2), in effect in 1998, and at the time of his filing the instant Rule 61 motion, Defendant's motion is denied.

This fact being established, the Court deems it a prudent measure to address the issue of whether denial of Defendant's Rule 61 motion violates or infringes upon his constitutional rights protecting him from imposition of *ex post facto* laws. Since *Walton* nullified § 832(a)(2), in part, the subsequent enactment of its amended counterpart constitutes a "new law" only in the purest sense of the word. Consequently, a determination of whether application of amended § 832(a)(2), resulting in denial of Defendant's request for relief, would violate the *Ex Post Facto* Clause of the United States Constitution and the Delaware Constitution, is in order. Defendant committed the criminal offense prior to the effective date of the provisional amendment to § 832(a)(2). He was properly convicted under the prior version of § 832(a)(2), which prohibited the same conduct, as then interpreted by the Delaware courts, until the advent of *Walton*.

Article I, Section 10, of the United States Constitution provides that, "[N]o State shall . . . pass any . . . ex post fact Law . . ."[56] This exclusion of *ex post facto* laws applies only to retroactive penal statutes that disadvantage a defendant.[57] "It is equally well established that, '[e]ven though it may work to the disadvantage of a defendant, a procedural change [in the law] is not *ex post facto*.'"[58] Further, the

[56] U.S. CONST. art. I, § 10.
[57] *Collins v. Youngblood*, 497 U.S. 37, 41 (1990).
[58] *State v. Cohen*, 604 A.2d 846, 853 (Del. 1992) (quoting *Dobbert v. Florida*, 432 U.S. 282, 293 (1977)); *see also Hopt v. Utah*, 110 U.S. 574, 590 (1884) (holding that a change is procedural if it does "[n]ot increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.").

United States Supreme Court has held that only substantive, not procedural, changes in a penal statute would be *ex post facto*.[59] In addition, the party challenging a law as *ex post facto* bears the burden of demonstrating that the new law represents a substantive change.[60] In order to meet this burden, the challenging party must establish that: 1) the new law is retrospective – in other words, it applies to events occurring before its enactment; and 2) that the new law disadvantages the defendant.[61]

Upon review of the revised § 832(a)(2), the Court finds that its amended form cannot be characterized as either creating a substantive change, or working to the disadvantage of the Defendant. The newly amended provision, § 832(a)(2), is merely an extension of the prior provision, purely elaborating, clarifying, and augmenting the meaning attributable to manifesting a "deadly weapon." Broadening the scope of § 832(a)(2)'s terminology to include "representing by word or conduct" is indicative of a purely procedural change, that in no way increases or enlarges the degree or severity of the punishment involved with the offense. Hence, the newly configured law does not apply *retrospectively* to events occurring before its enactment, because the *same inherent form and substantive meaning* of the law was in effect at the time of Defendant's criminal act. This

[59] *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).
[60] *Cal. Dept. of Corrections v. Morales*, 514 U.S. 499, 510 (1995).
[61] *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

statutory provision was the controlling law under which he was sentenced. Only to the extent that § 832(a)(2) was temporarily modified by the *Walton* decision for a period of two months, was there an "interruption" in its interpreted meaning and intent. In essence, the amended § 832(a)(2) acted solely as the "white-out," applied to the prior version of § 832(a)(2), as modified by *Walton*, to alleviate any misinterpretation attributable to the *Walton* decision.

In conclusion, based on the findings set forth in *Walton,* and the overall legislative intent behind the clarification of the revised 832(a)(2), it is evident that the latest amendment to § 832(a)(2), does not serve to alter the fundamental objective or inherent import of Delaware's Robbery First Degree statute. The amendment, as applied, does not increase the quantum of punishment, but merely illuminates the warranted circumstances under which it is to be imposed. The newly enacted law simply clarifies the method and means by which finders of fact, and courts, determine Robbery First Degree. Section 832(a)(2) does not alter the substance or degree of punishment to be imposed on a defendant, nor inflict a greater punishment for an existing criminal offense. Nor does it produce a law resulting in evidentiary changes that require less proof in order to convict a defendant. Accordingly, the Court finds that the amendment to Section 832(a)(2) is procedural, not substantive in nature, and does not invoke the repercussions of an *ex post facto* law as envisioned in the United States and Delaware Constitutions.

As well, Defendant's "colorable claim" that he is entitled to a retroactive right, relied upon for the first time since his appeal, is erroneous. Any right that may have burgeoned from the *Walton* decision, was extinguished by the enactment of § 832(a)(2), as amended. His contention that he has suffered a "miscarriage of justice" because of a constitutional violation that undermined the fundamental fairness of his trial, is not supported either by the law or the factual circumstances surrounding his criminal conviction and sentencing. Defendant's claim falls 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 hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Kenneth M. Smith
Paul R. Wallace, Esquire
Presentence
Prothonotary