

counsel at trial and on appeal, and 2) Defendant claims that his sentence is unlawful.

2. Defendant was found guilty of non-capital murder in the first degree and Possession of a Firearm During the Commission of a Felony on May 30, 1996 after a seven day jury trial. Defendant was sentenced to Level V, life imprisonment without benefit of parole or probation pursuant to 11 *Del. C.* §4209(d)(2). Defendant filed a direct appeal to the Delaware Supreme Court on September 13, 1996. The Supreme Court denied Defendant's appeal and his conviction became final on November 3, 1997. Defendant filed this motion for postconviction relief on November 17, 2004, just over seven years after his conviction became final.

3. As to Defendant's claim of ineffective assistance of counsel, Defendant claims that 1) trial counsel impermissibly shifted the burden of proof onto Defendant to prove his innocence because counsel failed to pursue an "accidental" shooting death defense, 2) trial counsel failed to pursue the issue of Defendant's state of mind and to question Defendant's competency to stand trial, 3) trial counsel failed to request that the State provide Defendant with expert psychiatric assistance at trial and sentencing, 4) trial counsel failed to "disclose material facts or misrepresentation of material facts" to Defendant in the form of trial discovery and transcripts, 5)

trial counsel failed to object to the evidence of “bad acts” by Defendant, 6) trial counsel failed to object to “erroneous jury instructions by trial court before the jury was instructed concerning the admissibility of evidence of bad acts attributable to [Defendant],” 7) trial counsel failed to discuss with Defendant the state’s case, the charges pending and counsel failed to “effectively advise [Defendant] and . . . to interview witnesses favorable to [Defendant],” 8) trial counsel “was ineffective for denying [Defendant] due process rights to be present at the numerous pretrial conferences,” 9) trial counsel failed to “inform and disclose exculpatory and mitigating evidence to [Defendant]” through trial counsel’s “deliberate[] withh[olding] trial transcripts and all pretrial and trial discovery” from Defendant, 10) trial counsel “prepared a frivolous Brief on Direct Appeal, denied [Defendant] trial transcripts and pretrial hearing transcripts and prevented [Defendant] from submitting a supplemental Brief on Direct Appeal.”

4. On Defendant’s claim that his sentence is unlawful, Defendant claims that because the sentencing order states that “[a] [l]ife sentence is served without benefit of probation or parole OR ANY OTHER REDUCTION,” that the Court “has attempted to even prohibit [a] PARDON BOARD COMMUTATION/REDUCTION” in his sentence.¹

¹ Defendant’s Motion for Postconviction Relief.

5. Before addressing the merits of any claim raised in a motion seeking postconviction relief, the Court must first apply the rules governing the procedural requirements of Super. Ct. Crim. R. 61.² Rule 61(i)(1) provides that “[a] motion for postconviction relief may not be filed more than three years after the judgment of conviction is final 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.”³

However, the procedural bar of Rule 61(i)(1) may potentially be overcome by Rule 61(i)(5), which provides that “[t]he bars to relief in paragraph (1) . . . shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgement of conviction.” The “interest of justice” exception to this rule has been “narrowly defined to require the movant to show that the trial court lacked the authority to convict or punish him.”⁴

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

³ Super. Ct. Crim. R. 61(i)(1).

⁴ *State v. Wright*, 653 A.2d 288, 298 (Del. Super. Ct. 1994) (citing *Flamer v. State*, 585

6. Defendant's motion for postconviction relief fails to overcome the procedural hurdles imposed by Rule 61. First, Defendant's postconviction motion was filed seven years after the judgment of conviction became final, therefore, Defendant is procedurally barred from relief under Rule 61 (i)(1). Second, Defendant's postconviction motion was filed more than three years after his conviction became final and Defendant has not asserted a new retroactive right that is newly recognized, therefore, Defendant's motion is also procedurally barred under Rule 61(i)(1).

7. Because the Defendant is procedurally barred under Rule 61(i)(1), his only alternative means of relief is to proceed under Rule 61(i)(5). This Court has held that "[a]s such, 'in 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.'"⁵ The Court has explained that "[i]n other words, 'the 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

A.2d 736, 746 (Del. 1990).

⁵ *Bailey v. State*, 588 A.2d 1121, 1130 (Del. Super. Ct. 1991); (citing *Younger v. State*, 580 A.2d 552, 555 (Del. 1990)).

certainly does not satisfy the requirement."⁶ Defendant has not made a claim that the court lacked jurisdiction. Thus, Defendant 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.

8. In an attempt to prevail over the procedural bars of Rule 61(i)(1) and to invoke the fundamental fairness exception of Rule 61(i)(5), Defendant alleges in ground one of his postconviction motion that he received ineffective assistance of counsel thereby violating his Sixth Amendment right. In his second ground for relief, Defendant asserts that his sentence was unlawful.

9. To prevail on a claim of ineffective assistance of counsel, Defendant must meet the two-prong test set forth in *Strickland v. Washington*.⁷ Under *Strickland*, “a criminal defendant who raises an allegation of ineffective assistance of counsel must show that counsel's representation fell below an objective standard of reasonableness.”⁸ Defendant must demonstrate that

⁶ *State v. Getz*, 1994 Del. Super. LEXIS 388 at *11.

⁷ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁸ *State v. Mayfield*, 2003 Del. Super. LEXIS 214 at *14, citing *Strickland*, 466 U.S. at 688.

counsel's performance was deficient.⁹ This Court has held that "[t]his entails demonstrating that 'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'"¹⁰ This Court has also held that "it is the defendant's burden to show, under the totality of the circumstances, that 'counsel was so incompetent that the accused was not afforded genuine and effective legal representation.'"¹¹

Second, under *Strickland*, Defendant must show that there is a reasonable degree of probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.¹² This Court has held that

[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." [Citation omitted.] The defendant must illustrate that the deficient performance prejudiced the defense. [Citation omitted.] Stated another way, a defendant alleging prejudice must be able to show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."¹³

⁹ *Mayfield*, 2003 Del. Super. LEXIS 214 at *14, citing *Strickland*, 466 U.S. at 687.

¹⁰ *Mayfield*, 2003 Del. Super. LEXIS 214 at *14, citing *Strickland*, 466 U.S. at 688.

¹¹ *Mayfield*, 2003 Del. Super. LEXIS 214 at *14, citing *Renai v. State*, 450 A.2d 382, 384 (Del. 1982).

¹² *Mayfield*, 2003 Del. Super. LEXIS 214 at *14, citing *Strickland*, 466 U.S. at 694.

¹³ *Mayfield*, 2003 Del. Super. LEXIS 214 at *15, quoting *Strickland*, 466 U.S. at 687.

Additionally, “[i]n setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.”¹⁴

When the Court assesses a claim of ineffective assistance of counsel under *Strickland*, there is a strong presumption that the attorney's conduct was professionally reasonable and this standard is highly demanding.¹⁵ Further, "every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."¹⁶

Therefore, as this Court has held,

under *Strickland*, the Court's analysis must be comprised of two components: 1) whether defense counsel's performance was deficient; and 2) if so, whether the deficient performance resulted in prejudice that "so upset the adversarial balance between the defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."¹⁷

Defendant's claim of ineffective assistance of counsel does not meet the *Strickland* standard.

¹⁴ *Mayfield*, 2003 Del. Super. LEXIS 214 at *16, citing *Righter v. State*, 704 A.2d 262, 264 (Del. 1997).

¹⁵ *Mayfield*, 2003 Del. Super. LEXIS 214 at *16.

¹⁶ *Flamer v. State*, 585 A.2d 736, 754 (Del. 1990).

¹⁷ *Mayfield*, 2003 Del. Super. LEXIS 214 at *16, quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369, 122 L. Ed. 2d 180, 113 S. Ct. 838 (1993) (quoting *Nix v. Whiteside*, 475 U.S. 157, 175, 89 L. Ed. 2d 123, 106 S. Ct. 988 (1986)).

10. Defendant has made a claim of ineffective assistance that amounts to nothing more than conclusory claims and unfounded accusations. Defendant did not produced any evidence nor did he “make and substantiate concrete allegations of actual prejudice.”¹⁸ The affidavit of Defendant’s trial counsel directly counters several of Defendant’s claims (that “counsel failed to pursue an ‘accidental’ shooting death defense,” “trial counsel failed to pursue the issue of Defendant’s state of mind,” “trial counsel failed to request that the State provide Defendant with expert psychiatric assistance at trial and sentencing,” and “trial counsel failed to ‘disclose material facts or misrepresentation of material facts’ to Defendant in the form of trial discovery and transcripts”) as unsubstantiated. The claims by Defendant regarding the “bad act” evidence are not only also unsubstantiated but Defendant raised this issue on direct appeal.¹⁹ Defendant’s claim of ineffective assistance of counsel is without merit. Because Defendant has failed to establish a violation of his Sixth Amendment right, he has also failed to establish that there was a “miscarriage of justice” because of a constitutional violation pursuant to Rule 61(i)(5); therefore his motion for postconviction relief is summarily dismissed.

¹⁸ *Mayfield*, 2003 Del. Super. LEXIS 214 at *16.

¹⁹ *Sudler v. State*, 702 A.2d 927.

11. Defendant's second ground for postconviction relief (that his sentence is unlawful) is also without merit. This claim is also time-barred by Rule 61(i)(1) and should have been raised on direct appeal. Furthermore, as argued correctly by the State, this claim is a misstatement of the law. Defendant has not provided any case law or citations to support his claim that the language in the sentencing order stating that "[a] [l]ife sentence is served without benefit of probation or parole or any other reduction" is in any way unlawful or unconstitutional. Defendant's second ground for postconviction relief is also summarily dismissed.

For the foregoing reasons, Defendant's motion for postconviction relief is **SUMMARILY DISMISSED.**

IT IS SO ORDERED.

oc: Prothonotary
cc: Diane Coffey Walsh, Esquire
Benjamin Sudler
Raymond J. Otlowski, Esquire
Investigative Services
