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

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	I.D. No.: # 9604017809
	)	
CRAIG ZEBROSKI	)	
	)	
Defendant.	)	

Submitted: June 28, 2013[1]
Decided: September 30, 2013

Upon Defendant's Third Motion for Postconviction Relief –
SUMMARILY DISMISSED

This is a capital murder case stemming from a botched armed robbery committed by Defendant in 1996, when he was 18 years old. Following a 9-3 jury recommendation, Defendant was sentenced to death. The case's facts and the sentencing's reasoning were set-out in a 52-page opinion and several subsequent orders.[2] The conviction was affirmed on direct appeal, as were Defendant's first two motions for postconviction relief.[3] Somehow, Defendant aborted his federal *habeas corpus* proceeding so that he could file a third motion for postconviction

[1] Corrected Motion for Post-Conviction Relief Pursuant to Superior Court Criminal Rule 61, and Consolidated Points of Law submitted July 29, 2013.
[2] *State v. Zebroski*, 1997 WL 528287 (Del. Super. Aug.1, 1997) (Silverman, J.); *see also Zebroski v. State*, 715 A.2d 75 (Del.1998).
[3] *Zebroski*, 715 A.2d at 81; *Zebroski v. State*, 822 A.2d 1038, 1049 (Del. 2003); *Zebroski v. State*, 21 A.3d 598 (Del. 2011).

relief here. The motion was properly referred,[4] and after preliminary review, it is subject to summary dismissal.[5]

Defendant now makes seven claims:

- The presentence investigation report was not disclosed to defense counsel;
- The court weighed mitigating evidence as aggravating evidence;
- The State failed to disclose exculpatory evidence;
- Ineffective counsel at the guilt phase;
- Racial animus evidence was improperly admitted;
- Ineffective counsel at the penalty phase;
- Trial counsel had a conflict of interest.

Each claim is also asserted separately as ineffective assistance of counsel. As discussed below, some of the claims seem sensational. On closer examination, however, they are merely repetitive and speculative.

I.

Superior Court Criminal Rule 61, governing postconviction relief, includes four procedural bars that apply if: (1) the motion was untimely; (2) the grounds for relief were not properly asserted previously in a postconviction proceeding; (3) the grounds for relief were not presented in the proceedings leading to final conviction; or (4) the claim has been or should have been formerly adjudicated in a previous proceeding.[6] Most of Defendant's claims, accordingly,

[4] Super. Ct. Crim. R. 61(d)(1).
[5] Super. Ct. Crim. R. 61(d)(4).
[6] Super. Ct. Crim. R. 61(i)(1)-(4).

are procedurally barred as previously adjudicated or presented outside the three year[7] limitation.

Rule 61, however, also provides a mechanism for preventing the procedural bars from creating or tolerating injustice. Specifically, under Rule 61(i)(5), these procedural bars do not apply if the defendant presents "a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation." Not only that, defendant may overcome the procedural bars of Rules 61(i)(2) and (4) if defendant shows "reconsideration of the claims is warranted in the interest of justice." Accordingly, even where a claim is ultimately deemed procedurally barred, it must be reviewed when a colorable claim is presented, or review is in the interest of justice.

Because the "interest of justice" is implicated in every criminal case, the "interest of justice" exception to Rule 61's procedural bars has been narrowed so that it does not swallow the rule. Accordingly, the exception is not established by its mere invocation.[8] The exception requires a new fact, or showing that the court lacked authority to convict or punish the defendant.[9] And, as to untimely claims, Defendant must show cause for not raising those claims earlier.[10]

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[7] Super. Ct. Crim. R. 61(i)(1) was amended to require motions be filed within one year from the date of final conviction. Final convictions before July 1, 2005 are subject to a three year limitation.
[8] *See Travis v. State*, 69 A.3d 372 (Del. 2013) (Procedural dismissal proper where Defendant fails to support claims).
[9] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).
[10] *Id.*

Moreover, Defendant has the burden of proof in a postconviction proceeding.[11] And, counsel's effectiveness is presumed.[12]

II.

Defendant's motion reasserts several claims already adjudicated. For example, Defendant claims that allowing the prosecution to elicit testimony, over objection, that Defendant used a racial epithet to describe the victim on two occasions was highly prejudicial and lacked probative value. Yet, on direct appeal, the Supreme Court of Delaware specifically held: "the introduction into evidence of the racial epithet in the context of this case was proper."[13]

Similarly, Defendant's youth as a mitigating factor;[14] the admission of the non-testifying co-defendant, Sarro's, statement;[15] expert testimony regarding PCP's effects;[16] and the "florid and unremitting trauma" Defendant faced in childhood[17] have all been addressed at least once in earlier proceedings. A defendant is not entitled to have a claim re-examined "simply because the claim is refined or restated."[18]

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[11] *Id.*
[12] *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *State v. Albury*, 551 A.2d 53 (Del. 1988).
[13] *Zebroski,* 715 A.2d at 80.
[14] *State v. Zebroski*, 2010 WL 2224646, 11 (Del. Super. May 14, 2010) *aff'd*, 21 A.3d 598 (Del. 2011).
[15] *Zebroski*, 715 A.2d at 81.
[16] *Zebroski*, 822 A.2d at 1049.
[17] *Zebroski*, 2010 WL 2224646.
[18] *Skinner v. State,* 607 A.2d 1170, 1172 (Del. 1992) (citing *Riley v. State*, Del.Supr., 585 A.2d 719, 721 (1990)).

III.

Defendant alleges that this court improperly considered mitigation evidence as aggravating evidence. As mentioned above, this claim has already been heard and adjudicated. Specifically, in his Motion to Reopen Postconviction Relief Pursuant to Superior Court Criminal Rule 61 proceeding, Defendant argued: "At Zebroksi's penalty phase, trial counsel presented Zebroski's age only as a number, i.e. that Zebroski was eighteen (18) at the time of the offense. Trial counsel did not tell the jury that age could be considered as a mitigating factor." As to that, this court held, and the Delaware Supreme Court affirmed, that "*Roper*[19], however, does not hold that a young adult capital murder defendant's youth must, as a matter of law, be given special weight as a mitigating factor.... All of these things—actual age, developmental age and upbringing—are potentially powerful mitigators, but they are not legally dispositive."[20] Accordingly, that claim is procedurally barred here.

To be clear, in a typical capital sentencing situation, the jury and the court may view the evidence as to aggravators and mitigators as it sees fit. In this case, the court observed that some of the evidence introduced as mitigating, such as Defendant's youth, was "double-edged," and the court explained how that was

[19] *Roper v. Simmons*, 543 U.S. 551 (2005).
[20] *Zebroski*, 2010 WL 2224646.

so.[21] There is no legal prohibition on that sort of analysis. Here, the Delaware Supreme Court affirmed that analysis.[22]

The cases relied on by Defendant as to weighing of evidence relate to mitigation evidence offered to the jury and sentencer.[23] The law requires that the jury and judge "not be precluded from considering" categories of mitigating evidence.[24] No case holds that "mitigation" evidence must be weighed in a certain way. There is no claim in this case that the court was precluded from considering, as it saw fit, evidence offered by Defendant as mitigating.

IV.

As previously discussed, Defendant's claims are mostly repetitive and barred. To the limited extent they seem new, they are likewise barred. And, they are unsubstantiated. That means review is not justified now. For example, even if the claim were not barred, which it is, Defendant offers no evidence to support his assumption that the presentence investigation report was not supplied to trial counsel. Defendant has not supplied trial counsel's affidavit nor other evidence as to that. Meanwhile, the court takes notice that its rule is to make the report available to both parties.[25] Similarly, the barred claim that original counsel was

[21] *Zebroski*, 1997 WL 528287.
[22] *Zebroski*, 715 A.2d at 83.
[23] *See e.g. Roper v. Simmons*, 543 U.S. 551 (2005); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).
[24] *Skipper,* 476 U.S. at 4 (*citing Eddings,* 455 U.S. at 104); *See also Lockett v. Ohio*, 438 U.S. 586, 604 (1978).
[25] Super. Ct. Crim. R. 32(c)(3).

conflicted because a witness was "well represented" by another public defender at a capias return is unsupported by evidence, such as a transcript. Besides, as presented, the conflict of interest claim is trivial at the worst. It does not come close to proving that Defendant's conviction was, in fact, unjust.

The following barred claims, while seeming important, all suffer from lack of support:

- Presentence investigation report not provided to Supreme Court;
- Proceedings and circumstances surrounding Lawson's prosecution;
- Prosecution's involvement with Lisa Klenk;
- Wording of prosecution's closing arguments.

None of those claims, even if established, makes out a constitutional claim. Nor does any claim merit further review in the interest of justice. They are all barred.

V.

Superficially, one claim seems new and potentially impressive, meriting specific discussion. Defendant has submitted an affidavit from an apparently qualified firearms expert questioning the opinion of the ATF expert who testified at trial concerning the murder weapon's trigger pull. The trial expert concluded that the murder weapon's trigger pull "weighed 12-and-a-half pounds,"

which he characterized as "heavy." This testimony tended to establish that the fatal shooting was not accidental or unintended, a pivotal fact.

Obviously, the new expert's opinion is untimely. As explained previously, all grounds for relief must be raised on appeal or in the first motion for postconviction relief, within three years of final judgment. Any claim not raised when the opportunity first presents itself is deemed waived. And, any claim not raised within three years is untimely.[26] The trigger pull's significance was obvious to Defendant's first three sets of lawyers. Accordingly, Defendant was obligated to present his counter opinion evidence long before now, and certainly within the three years after the conviction became final. Having failed to do so, it is barred. Defendant offers no cause for his procedural default, other than to imply that his first three sets of lawyers were all incompetent. Moreover, Defendant has failed to show prejudice flowing from the procedural default.

The new expert alleges nothing more than potential failings in the trial expert's testing. Specifically, in pertinent part, the new expert observes that "it cannot be concluded to a reasonable degree of scientific certainty that the force required to pull the trigger of a gun without its recoil spring and recoil spring guide would be the same as required if those parts were present and operating properly." The expert also asserts that the anatomy of the human hand provides "mechanical

[26] *Younger*, 580 A.2d at 554.

advantages [that] make a direct analogy of force recorded on a spring gage to dead weight misleading." Lastly, the expert alleges that one federal case granting default judgment for the accidental discharge of this type of pistol demonstrates a design defect.

Notably, however, the new expert does not opine that the trial expert got it wrong. He does not say that the weapon just went off or even that it probably fired accidentally. The new expert does not opine that the murder weapon was, in fact, defective. He merely offers theoretical possibilities inviting speculation and conjecture. "Maybe" or "could be" are not the same as "probably" or "certainly," nor do they form a basis for reasonable doubt. And so, those mere possibilities do not justify a new trial, much less an acquittal. They do not even justify an evidentiary hearing in the interest of justice.

VI.

Defendant also alleges that this court improperly relied upon the presentence investigation report, which contained material not presented at the penalty hearing. Specifically, quotes from the sentencing order allegedly relying on this evidence include:

- "ominous signs as early as age five when [Petitioner] showed a fascination with fire";

- Following a 30-day hospital rehab stay, "Defendant regressed quickly. Despite outpatient treatment, he became more and more oppositional and defiant."
- "[B]y the time Defendant was thirteen and one half years old he had been arrested three times, suspended from school repeatedly, institutionalized twice and seriously threatened to kill his brother."
- Part of the problem with treating him "was you never had him for a long period of time without him being arrested for other charges."

Defendant also alleges that "the presentence investigator acted as a 13th juror, with more authority and influence than the other 12" and that the sentencing recommendation "has the imprimatur and authority of the court." Defendant further claims that this "process cannot withstand constitutional scrutiny."

This claim, like the firearms opinion and others, brings into specific relief the reasons for Rule 61's procedural bars. The court is being called on to answer questions that should have been raised in the 1990s. Yet, Defendant offers no reason for waiting so long to bring this claim. And now that the passage of time has undermined or destroyed the court's ability to precisely reconstruct the role of the presentence investigation, Defendant insists that he is entitled to every favorable inference.

The court knows the presentence investigation "process" used in this case was authorized under Rule 32(c). And, in confirming the importance of

presentence investigations, the United States Supreme Court holds that the sentencing court should consider the "fullest information possible concerning the defendant's life and characteristics"[27] as long as the information is disclosed to defense counsel.[28]

Furthermore, the court knows specifically that the reports reflected in the presentence report and the sentencing decision were mustered and relied on by Defendant's own witness, Dr. Much. Having introduced Dr. Much's opinion and the basis for it, Defendant, both then and now, has no principled reason to object to their having been used by the court. And that assumes, without holding, that there is some factual support for this time-barred, unexcused procedural default.

VII.

As to ineffective assistance of counsel, Defendant has alleged that at every step of the serial postconviction relief proceedings, with successive sets of lawyers finding reasons to fault their predecessors. The implication seems to be that couching a claim of error as an ineffective assistance of counsel claim is a way around Rule 61's procedural bars. That is incorrect.

Delaware's rules contemplate one trial, one direct appeal and one postconviction proceeding.[29] The United States Supreme Court holds that the Sixth

[27] *Williams v. People of State of N.Y.*, 337 U.S. 241, 247 (1949).
[28] *Gardner v. Florida*, 430 U.S. 349 (1977).
[29] Super. Ct. Crim. R. 61(l).

Amendment right to counsel does not extend, at the latest, beyond the first postconviction relief proceeding.[30] The right to effective assistance of counsel is dependent on the right to counsel itself.[31]

Accordingly, Defendant's challenges to subsequent postconviction counsel fail at the outset. If it can be said that ineffective assistance of counsel claims are not subject to Rule 61's procedural bars in the first instance, Delaware's procedural bars apply to subsequent motions for postconviction relief. Second, third, fourth, etc., motions for postconviction relief are not specially exempt from the bars that apply to other successive claims.

By the same token, Defendant's latest claims against his original counsel and the lawyers who represented him in his first motion for postconviction relief are now barred. Whatever those claims were or might have been, the time for raising those claims passed long ago. Defendant alleges dozens of trial counsel's failures, all of which have either been previously ruled on, are indisputably matters of trial strategy, or remain unsubstantiated as anything other than speculation, including:

- Consultation with firearms experts;
- Consultation with psychological experts;
- Treatment of Defendant's letter from prison;
- Prior bad act testimony;

[30] *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989).
[31] *Shipley v. State*, 570 A.2d 1159, 1166 (Del. 1990)

- Presentation of mitigation testimony regarding Defendant's upbringing, home life and abuse, and substance abuse.

Now, like Defendant's other successive claims, his ineffective assistance claims are inexcusably untimely, repetitive, and formerly adjudicated, and accordingly procedurally barred. And, they are no more subject to constitutional scrutiny or review in the interest of justice than are his other barred claims.

VIII.

In summary, Defendant has had every aspect of his trial and postconviction proceedings scrutinized over the course of three postconviction motions. In every case, this court has rejected the resulting claims. At this juncture, all of the claims offered here are procedurally barred as being repetitive or untimely. Further, a preliminary review reveals nothing more than unsubstantiated innuendo and groundless assertions, insufficient to satisfy Defendant's burden under Rule 61. No claim offered by Defendant would pass muster on a first Rule 61 motion, let alone in this third attempt; at the outset, Rule 61's procedural bars preclude considering these claims. Defendant's defaults are not excused. Defendant has not demonstrated that reconsideration of the claim is warranted in the interest of justice. Nor has Defendant presented a colorable claim

of a miscarriage of justice because of a constitutional violation to warrant application of the exception in Rule 61(i)(5).

IX.

For the foregoing reasons, Defendant's third Motion for Postconviction Relief is **SUMMARILY DISMISSED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Criminal Division)
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