SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

February 14, 2013

N440 State Mail
Walter Smith
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: ***State v. Walter Smith***
Defendant ID No. 0105019765
Motion for Post Conviction Relief (R-5)

Dear Mr. Smith:

On January 31, 2013, the Court received your fifth Motion for Postconviction relief filed pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The Motion is denied.

Background

Following a jury trial in March of 2002, you were convicted of attempted rape in the first degree, assault in the first degree, burglary in the first degree, and wearing a disguise during the commission of a felony. You are currently serving a thirty-six year sentence you received with the benefit of a presentence report.

The evidence of your guilt presented at trial was overwhelming. The victim was awoken in the middle of the night, severely beaten, and sexually assaulted. You left/lost your prescription glasses at the scene. They were unique and tied you to the crime. Your DNA was also found on those eye glasses.

You testified at trial and admitted you were in the victim's apartment to commit a burglary but contended you were with two other persons. The victim testified she saw only one person in her apartment that night. You testified you hit a person under a blanket (in the bedroom), but stopped when you realized the person was a woman.

On direct appeal, your conviction was affirmed. Your four previous Rule 61 Motions

were denied and those decisions were likewise affirmed.

Present Claim

You now allege that your trial attorney was ineffective because he did not do a better job explaining to you the consequences you faced if you proceeded to trial instead of accepting a plea offer. You do not allege that a plea offer was not delivered to you. You even acknowledge you and your attorney had direct conversations with the prosecutor with respect to the State's final offer, which you rejected. Rather, your claim is that your lawyer, Karl Haller, Esquire, did not explain to you that the jury could draw inferences from your sexual fondling of the victim and attempts to pull her legs apart and use those inferences to conclude that your intention was to try and rape the victim; i.e., the crime of attempted rape. Had your attorney given you better advice and been more persuasive, you allege you would have accepted the State's plea offer and received a sentence of twenty years instead of the thirty-six years you received following trial. You candidly acknowledge that the Court was not bound by the twenty year recommendation had you pled guilty.

Procedural Bars

Your present motion is procedurally barred because it is filed too late (Rule 61(i)(1), it is repetitive (Rule 61(i)(2)), and you could have raised this claim when you filed your fourth motion, but did not (Rule 61(i)(3)).

You argue that this motion is not time-barred because "it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final." Rule 61(i)(1). You rely upon the United States Supreme Court decisions of *Missouri v. Frye*[1] and *Lafler v. Cooper*[2] to establish your entitlement to have effective counsel explain fully the risk/benefit analysis necessary for you to make a meaningful decision as to whether to proceed to trial or to accept a plea offer.

Your problem is that *Frye* and *Lafler* did not create a newly recognized constitutional right.[3]

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[1] 132 S. Ct. 1399 (2012).

[2] 132 S. Ct. 1376 (2012).

[3] *In re Perez*, 682 F.3d 930, 932-33 (11th Cir. 2012) ("The Court has long recognized that *Strickland* [*v. Washington*]'s two-part standard applies to ineffective

Therefore, the escape clause contained in Rule 61(i)(1) does not apply.

Nor should this Court entertain a 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 your conviction. Your conviction was based on a jury verdict. The violation you allege does not undermine the legality, reliability, integrity or fairness of your trial; therefore Rule 61(i)(5) is not applicable by its own terms. What you want is to have the plea offer put back on the table and to force the State and the Court to reduce your sentence to twenty years per the terms of that offer. I do not find Rule 61(i)(5) requires the Court to consider this claim.

I also note the impracticality of considering a claim arising from cell block conversations with your attorney occurring eleven years ago at a time when there was no caselaw suggesting the lawyer should make a record of same in his file as to the plea communications and advice. The unfairness of asking an attorney to detail his oral communications with a client made many years ago, many trials ago, and many pleas ago is obvious to the Court.

Finally, your present claim is also repetitive in that it could have been presented when you filed your fourth Rule 61 motion on May 30, 2012. In that motion, you claimed, pursuant to *Martinez v. Ryan*,[4] that you had a retroactive constitutional right to counsel in your first Rule 61 motion. You were wrong.[5] Since *Frye* and *Lafler* were decided prior to the filing of your fourth motion on May 30, 2012, you could have but did not present the present claim. Therefore, the present claim is procedurally barred pursuant to Rule 61(i)(2) and (3).

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assistance of counsel claims arising out of the plea process. The Court has also said that *Strickland* itself clearly establishes Supreme Court precedent for evaluating ineffective assistance of counsel claims under AEDPA. Because we cannot say that either *Lafler* or *Frye* breaks new ground or imposes a new obligation on the State or Federal Government, they did not announce new rules. Put another way, *Lafler* and *Frye* are not new rules because they were dictated by *Strickland*.") (internal quotation marks and citations omitted). The *Perez* reasoning has also been adopted in the 5th Circuit (*In re King*, 697 F.3d 1189 (5th Cir. 2012)), 7th Circuit (*Hare v. U.S.*, 688 F.3d 878 (7th Cir. 2012)), 8th Circuit (*Williams v. U.S.*, 2013 WL 238877 (8th Cir.)), 9th Circuit (*Buenrostro v. U.S.*, 697 F.3d 1137 (9th Cir. 2012)), and 10th Circuit (*U.S. v. Lawton*, 2012 WL 6604576 (10th Cir.)).

[4] 132 S. Ct. 1309 (2012).

[5] *State v. Smith*, 2012 WL 5577827 (Del. Super.), *aff'd*, 2012 WL 3870567 (Del.).

Defendant's Motion for Postconviction Relief is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

oc: Prothonotary
cc: Department of Justice