**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

| | | |
|---|---|---|
| STATE OF DELAWARE | ) | |
| | ) | I.D. No. 91009844DI |
| v. | ) | |
| | ) | |
| CHRISTOPHER R. DESMOND | ) | |
| | ) | |
| Defendant | ) | |

Submitted: January 7, 2013
Decided: February 26, 2013

Upon Defendant's Ninth Motion for Postconviction Relief.
**DENIED.**

Upon Defendant's Motion for Appointment of Counsel.
**DENIED AS MOOT.**

## ORDER

Gregory E. Smith, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorneys for the State.

Christopher R. Desmond, Smyrna, Delaware, *pro se*.

COOCH, R.J.

This 26th day of February 2013, upon consideration of Defendant's ninth motion for postconviction relief, it appears to the Court that:

1. Defendant was convicted in November 1992 of Robbery First Degree and related crimes. The factual and procedural history of both the case and the plethora of subsequent postconviction actions are incorporated by reference from the Court's opinion issued January 5, 2011.[1] In that opinion, the Court procedurally

[1] *State v. Desmond*, 2011 WL 91984 (Del. Super. Jan. 5, 2011).

barred Defendant's seventh motion for postconviction relief by determining that Defendant's claims either were not asserted in prior proceedings, or were previously adjudicated.[2] Additionally, the Court found that Defendant was not owed additional rights from *Zebroski v. State*[3] or *Cooke v. State*.[4]

2. Subsequently, this Court summarily dismissed Defendant's eighth motion for postconviction relief on March 7, 2012, finding that Defendant's eighth motion was procedurally barred despite his reliance upon *Weeden v. State*[5] and *Watkins v. State*.[6] The Delaware Supreme Court affirmed that decision on August 9, 2012.[7]

3. In his present motion, which Defendant characterizes as a motion to re-open his first motion for postconviction relief, Defendant asserts that prior to his trial in October 2012, the State made a plea offer that carried a twenty year sentence recommendation, but that his trial counsel never communicated the plea offer to him. Defendant contends that by the time subsequent counsel represented him, the plea offer had expired. Defendant argues that because he went to trial, was convicted, and received a longer sentence than the offered but un-communicated plea, the Supreme Court's recent decision in *Missouri v. Frye*[8] provides Defendant with a basis for his present claim. Defendant contends that *Frye* applies retroactively to his case, and that therefore, he is entitled to postconviction relief.

4. Separately, Defendant argues that pursuant to *Martinez v. Ryan*,[9] he is entitled to appointment of counsel because counsel was not appointed for his first motion for postconviction relief. Defendant argues that *Martinez* provided that defendants have a constitutional right to counsel for their first collateral challenge of a conviction on ineffective counsel grounds when that defendant was not permitted to raise ineffective assistance on direct appeal.

---

[2] *Id.* at *14-17.
[3] 12 A.3d 1115 (Del. 2010).
[4] 977 A.2d 803, 842 (Del. 2009).
[5] 750 A.2d 521 (Del. 2000).
[6] 23 A.3d 151 (Del. 2011).
[7] *Desmond v. State*, 49 A.3d 1192, 2012 WL 3252923 (Del. Aug. 9, 2012).
[8] 132 S.Ct. 1399 (2012).
[9] 132 S.Ct. 130 (2012).

5. In response, the State contends that even if the court assumes, however dubious,[10] that Defendant's representations about the timing and plea offer are accurate, his claim remains procedurally barred as neither *Frye* nor *Martinez* allows Defendant to overcome Superior Court Criminal Rule 61's procedural bars. The State asserts that Defendant only had until December 1997 to file a timely postconviction motion pursuant to Superior Court Criminal Rule 61(i)(1). The State argues that the only exception allowed in Rule 61(i)(1) is where a claim applies a "new retroactively applicable right"[11] and that Defendant's assertions do not involve such rights. Moreover, the State contends that Defendant's ninth motion is procedurally barred for being repetitive pursuant to Rule 61(i)(2). Last, the State asserts that Defendant's claim does not qualify for the "miscarriage of justice" exception in Rule 61(i)(5). The State argues that if the Court does not procedurally bar Defendant's motion, the motion still fails because *Frye* is not retroactive and because *Martinez* only applies in federal *habeas* actions.

6. This Court finds that Defendant's motion is procedurally barred according to the theories relied upon by the State; Defendant's motion is untimely pursuant to Rule 61(i)(1), repetitive pursuant to Rule 61(i)(2) and and does not qualify for the miscarriage of justice exception in Rule 61(i)(5). Even assuming, *arguendo* that Defendant's motion was not procedurally barred, this Court finds that Defendant's Motion fails substantively as well.

7. In *Flamer v. State*,[12] this Court adopted a general rule of non-retroactivity for cases on collateral review as employed by the United States Supreme Court in *Teague v. Lane*.[13] The rule essentially provides that courts should apply new constitutional rules retroactively only when two exceptions compel retroactive application.[14] The first exception to non-retroactivity is where the previously criminal conduct has been since held to be constitutionally protected activity.[15]

---

[10] The State points out that Defendant's representations regarding the supposed plea offer are suspicious considering Defendant's trial testimony in which Defendant argued he was wholly innocent and was framed by the police and prosecutor. Defendant does not appear to have alleged in his most recent filings that he would have accepted the purported plea offer.
[11] *Bailey v. State*, 588 A. 2d 1121, 1127 (Del. 1991) (quotations omitted).
[12] 585 A.2d 736, 749 (Del. 1990).
[13] 489 U.S. 288 (1989).
[14] *Flamer*, 585 A.2d at 749.
[15] *Id.*

The second section to non-retroactivity is where the new rule involves a "watershed" criminal procedural development.[16]

8. Despite Defendant's contention otherwise, *Frye* does not constitute a new rule at all and therefore it cannot be given retroactive applicability. In *Frye*, the United States Supreme Court relied upon *Hill v. Lockhart*,[17] as a basis for the establishment of the right to effective assistance of counsel during plea negotiations.[18] Therefore, *Frye* does not constitute a "new rule," and it does not invoke the first exception to non-retroactivity because it does not hold previously criminal conduct to be now constitutionally protected.

9. Neither does *Frye* compel the second exception as a "watershed" rule to non-retroactivity, which excludes from non-retroactivity "the observance of procedures implicit in the context of ordered liberty."[19] To qualify as a "watershed" rule of criminal procedure, the rule must improve the accuracy of criminal prosecutions, and must also alter the understanding of a bedrock procedural element essential to fairness.[20] Only one case, *Gideon v. Wainwright*,[21] has ever qualified as a "watershed" rule.[22] The Fifth, Seventh, and Eleventh Circuit Courts of Appeal have each held that *Frye* does not constitute a "watershed" rule, and it is not retroactively applicable.[23] This Court finds no reason to hold otherwise.

10. Defendant's reliance upon *Martinez v. Ryan* does not alter the Court's conclusions. In *Martinez*, the United States Supreme Court held that "[t]his

---

[16] *Teague,* 489 U.S. 288, 311 (1989).
[17] 474 U.S. 52 (1985).
[18] *Frye*, 132 S.Ct. at 1405.
[19] *Teague*, 489 U.S. at 313 (quoting *Mackey,* 401 U.S. at 693 (internal citations omitted).
[20] *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (holding that *Crawford v. Washington*, 541 U.S. 36 (2004), was not retroactive despite overruling a prior confrontation clause United States Supreme Court case.).
[21] 372 U.S. 335 (1963).
[22] *Whorton*, 549 U.S. at 419.
[23] *In re King*, 697 F.3d 1189 (5th Cir. Aug 14, 2012) (*Frye* "merely applied the Sixth Amendment right to counsel to a specific factual context."); *Hare v. United States*, 688 F.3d 878, 879 (7th Cir. 2012) (Supreme Court does not retroactively apply new rules to proceedings on collateral review in contradiction of *Teague*.); *In re Perez*, 682 F.3d 930, 932-33 (11th Cir. 2012) (*Frye* not a new rule because it was dictated by *Strickland* and *Hill*).

opinion qualifies *Coleman* [*v. Thompson*][24] by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."[25] More specifically, the Court reasoned that,

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal *habeas* court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.[26]

11. *Martinez* does not stand for the proposition that a defendant has a right to effective assistance of postconviction counsel, but rather, that a procedural default cannot occur in a federal *habeas* action unless the state provided the defendant with adequate postconviction counsel if the defendant was precluded from raising an ineffective assistance claim on direct review.[27] The United States Supreme Court found that because its holding only impacted a state's ability to assert a procedural default in a federal *habeas* action, states could rationally appoint counsel in initial review collateral proceedings, or alternatively not assert procedural default and allow defendant to file an ineffective assistance claim on the merits in federal court.[28]

12. While Superior Court Criminal Rule 61(e)(1) provides this Court with authority to appoint counsel to a defendant who has moved for postconviction relief, *Martinez* has not mandated that this Court's discretionary authority is a constitutional right.

13. Defendant's ninth motion for postconviction relief is untimely, repetitive, and thus procedurally barred by Superior Court Criminal Rules 61(i)(1) and (2).

---

[24] 501 U.S. 722 (1991).
[25] 132 S.Ct. at 1315.
[26] *Id*. at 1320.
[27] *Id*. at 1319-20.
[28] *Id*. at 1320.

Even assuming Defendant's motion was not procedurally barred, *Frye* did not produce a retroactively applicable right and *Martinez* is inapposite.

Therefore, for the reasons stated above, Defendant's ninth motion for postconviction relief is **DENIED.**

**IT IS SO ORDERED.**

_____
Richard R. Cooch, R.J.

oc: Prothonotary
cc: Investigative Services