IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR THE NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	
	)	DEF. I.D.: 7307000002
RASHAD SERFUDDIN EL,	)	CR.A.NOS.: N70061343R1
a/k/a Luther Jones,	)	
	)	
Petitioner.	)	

Date Submitted: October 21, 2008
Date Decided: January 7, 2009

Upon Consideration of
Petitioner's Pro Se Motion for Postconviction Relief.
DENIED.

O R D E R

This 7th day of January, 2009, upon consideration of the Motion for Postconviction Relief brought by Rashad Serfuddin El a/k/a Luther Jones ("Petitioner"), it appears to the Court that:

1. In June of 1970 Petitioner was indicted for first degree murder. Petitioner pleaded guilty to second degree murder on July 29, 1971, and was sentenced thereafter to imprisonment for the rest of his natural life.

2. Petitioner filed this *pro se* Motion for Postconviction Relief on September 9, 2008.[1] Petitioner makes two discernible claims for relief. First, he claims that upon entering his plea he was sentenced to a term of 45 years imprisonment and told that after serving 12 years he would be eligible to apply for parole.[2] He alleges that at some point thereafter his sentence was unlawfully changed to imprisonment for the rest of his natural life, therefore making him ineligible for release unless he is granted parole.[3] Next, Petitioner claims that the Department of Corrections has improperly denied him work release and furloughs.[4]

A. Petitioner's First Claim Is Properly Considered Under Delaware Superior Court Criminal Rule 35

3. Petitioner brings this motion pursuant to Delaware Superior Court Criminal Rule 61, which governs the procedure for collaterally attacking a criminal conviction.[5] After reviewing the Petition, however, it is clear that Petitioner is not

[1] D. I. 6 (Petitioner's Motion for Postconviction Relief, August 12, 2008).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Childress v. State*, 1999 WL 971087 at *1 (Del. 1999); DEL. SUPER. CT. CRIM. R. 61(a)(1).

attacking his conviction.[6] Instead, he is attacking the legality of his sentence (as allegedly amended). Thus, Petitioner's motion is properly considered under Delaware Superior Court Criminal Rule 35 ("Rule 35").[7]

4. Rule 35(a) provides that "the court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence." Rule 35 provides no time bar for challenging an "illegal sentence,"[8] but does impose a time bar of 90 days, in the absence of "extraordinary circumstance,"[9] for challenging a "sentence imposed in an illegal manner." This distinction is critical for Petitioner because his motion was

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[6] Petitioner is not collaterally attacking his conviction, for instance, by alleging that his plea agreement was not entered knowingly, intelligently, and voluntarily. Rather, he states that upon pleading guilty to murder in the second degree, he was sentenced to a total of forty-five years imprisonment which sentence was then inexplicably changed to a life sentence. D.I. 6 (Petitioner's Motion for Postconviction Relief, August 12, 2008). As discussed below, however, the sentencing order signed by Judge Quillen on September 24, 1971, clearly states that Petitioner was sentenced to a term of imprisonment for the duration of "the rest of his natural life." Additionally, in previous letters and motions filed with the court, Petitioner has acknowledged that the sentence he received upon pleading guilty was life imprisonment. *See e.g.* D.I. 2 (Petitioner's Motion for Writ of Mandamus, October 1, 2007).

[7] *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1999) (noting that "'the narrow function of Rule 35 is to permit correction of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence.'") (*quoting Hill v. United States,* 368 U.S. 424, 430 (1962)).

[8] DEL. SUPER. CT. CRIM. R. 35(a).

[9] DEL. SUPER. CT. CRIM. R. 35(b); *Walley v. State*, 2007 WL 135615 at *1 (Del.) (holding that a claim that the trial court improperly failed to hold a separate hearing to determine habitual offender status was equivalent to a claim that the sentence was imposed in an illegal manner and, therefore, was required to be asserted within 90 days of sentencing.).

filed 37 years after his sentence was originally imposed. The Delaware Supreme Court has held that a sentence is illegal:

> when the sentence imposed exceeds the statutorily authorized limits, violates the Double Jeopardy Clause, is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment of conviction did not authorize.[10]

5. In this case, Petitioner alleges either that his sentence was not definitive at the time it was imposed or, in the alternative, that his sentence has been changed to a sentence unauthorized by his judgement of conviction. Because Petitioner is arguing that his sentence is an illegal sentence, there is no applicable time bar under Rule 35(a). Therefore, the Court may consider Petitioner's motion on its merits.

6. Petitioner alleges that after pleading guilty to second degree murder he was sentenced to a term of 45 years and would become eligible for parole after serving 12 years of that sentence. Petitioner is incorrect as a matter of fact and as a matter of law.

7. Petitioner pleaded guilty to second degree murder and, on September 24, 1971, was immediately sentenced to "imprisonment for the rest of his natural life" by

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[10] *Wilson v. State*, 2006 WL 1291369 at *3 (Del. 2006) (quoting *Brittingham v. State,* 705 A.2d 577, 578 (Del.1998)).

then Judge William J. Quillen of the Delaware Superior Court.[11] Petitioner's assertion that he was sentenced to imprisonment for 45 years is factually incorrect.[12] Moreover, in 1971, second degree murder was punishable only by life in prison.[13] Petitioner is, therefore, also incorrect as a matter of law.

8. Petitioner's confusion about the duration of his sentence may stem from the Parole Eligibility statute, which states, in part, that "[f]or all purposes of this section, a person sentenced to imprisonment for life shall be considered as having been sentenced to a fixed term of 45 years."[14] The designation of a life sentence as a fixed term of 45 years was necessary prior to Truth in Sentencing to allow for calculation of parole eligibility.[15] Section 4346, however, did not and does not affect the actual duration of a life sentence.[16] Therefore, Petitioner's life sentence as imposed was lawful, and his claim must fail under Rule 35.

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[11] D.I. 7, Sentencing Order (September 24, 1971) (Quillen, J.).

[12] *Id.*

[13] 11 *Del. C.* § 572 (1953) ("Whoever commits the crime of murder, other than murder in the first degree, ... shall be imprisoned for life...").

[14] 11 *Del. C.* § 4346(c).

[15] The decision to release an inmate on parole is, however, within the discretion of the Parole Board. *Evans v. State*, 872 A.2d 539, 554 (Del. 2005). Indeed, "[a] prisoner has no legally enforceable right to be paroled and a prisoner who is denied parole has no claim of a due process violation." *Beebe v. Carroll*, 2004 WL 1195449 at *1 (Del.).

[16] *Evans*, 872 A.2d at 558 ("For purposes of *parole eligibility only*, [Appellant's] life sentence was computed as a term of forty-five years.") (emphasis in original).

B. Petitioner's Second Claim Improperly Asks the Court To Issue A Writ of Mandamus To Compel the Department of Corrections To Grant Him Work Release or Furlough.

10. Petitioner's second argument is that because felonies were not classified when he was sentenced, the Department of Corrections may not deny work release and furloughs based upon his conviction for what is now considered a Class A felony. This argument is without merit.

11. By his motion, Petitioner seeks an order of this Court compelling the Department of Corrections to grant him work release or furlough. Once again, he has incorrectly styled his motion as a motion for postconviction relief. He does not mount any collateral attack on the order of conviction. Instead, he asks this Court to compel the Department of Corrections to perform a function that he believes is mandated by law. In essence, then, he seeks a writ of mandamus.[17] Such writs, however, are extraordinary and "if the right is doubtful, or the duty discretionary . . . the writ will not in general be allowed."[18] As explained below, Petitioner has not met his burden to establish entitlement to mandamus relief.

12. Petitioner was convicted of second degree murder as that crime was defined before the substantial revisions to the criminal code came into effect on July

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[17] *See* 2WOLLEY, DELAWARE PRACTICE IN CIVIL ACTIONS, §1653 (1906).

[18] *Id*. at §1655.

1, 1973. Prior to that date, sentences under the former Delaware criminal code varied widely and were separately attached to individual crimes. The 1973 revisions to the criminal code included the classification of offenses as a means to make sentencing more uniform.[19] All felony offenses were divided into five categories, and those categories defined the range of potential punishment for an offense.[20] Second degree murder was and continues to be classified as a Class A felony.[21] Until June 30, 1990, the mandatory punishment for Class A felonies was life imprisonment.[22] After June 30, 1990, the statutory punishment for Class A felonies was changed to a term of imprisonment ranging from not less than 15 years to life.[23]

13. It is true that when Petitioner pleaded guilty in 1971, the second degree murder statute was worded differently than its counterpart in the 1973 revised criminal code. Under the 1953 version of the statute, a person who "commits the crime of murder, other than murder in the first degree, is guilty of murder in the second degree..."[24] Comparatively, under the 1973 version, "[a] person is guilty of murder in

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[19] Delaware Criminal Code with Commentary, § 4201 (1973).

[20] *Id.*

[21] 11 *Del. C.* § 635 (1973).

[22] 11 *Del. C.* § 4205 (1988).

[23] 11 *Del. C.* § 4205.

[24] 11 *Del. C.* § 572 (1953).

the second degree when...[h]e recklessly causes the death of another person under circumstances which manifest a cruel, wicked, and depraved indifference to human life..."[25]

14. Notwithstanding the obvious differences in wording, the 1953 and 1973 statutes, in application, are the same. While it is unstated in the text of the 1953 statute, Delaware courts had long held that second degree murder required a showing of "implied malice," because "without malice there could be no murder."[26] Implied malice was shown by the character and circumstances of the criminal act,[27] "as where an act which showed a cruel and reckless indifference to human life was done voluntarily."[28] Delaware cases prior to the revision of the criminal code contain alternative descriptions of implied malice. For example, one court described the mental state as one "where the circumstances surrounding the case show that the killing was committed under the influence of a wicked and depraved heart, or with a cruel and wicked indifference to human life;"[29] another court held that one acts with

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[25] 11 *Del. C.* § 635(1) (1973).

[26] Delaware Criminal Code with Commentary, § 635 at 189 (1973), (quoting *State v. Winsett*, 205 A.2d 510, 515 (Del. Super. 1964)).

[27] *Id.*

[28] Delaware Criminal Code with Commentary, § 635 at 190 (1973), (quoting *Winsett*, 205 A.2d at 516).

[29] *State v. Cephus*, 67 A. 150, 151 (Del. 1906).

implied malice when he acts "under the influence of a wicked and depraved heart, and with a cruel and reckless indifference to human life."[30] These notions of implied malice were codified when the criminal code, including the second degree murder statute, was revised in 1973.[31] The differences in the 1953 and 1973 codified definitions of second degree murder are of no practical consequence here and offer Petitioner no basis for relief. Under either version of the statute, there was a factual basis for Petitioner to plead guilty to and be convicted of murder second degree. And, under either version of the statute, Petitioner's conviction must be treated as a Class A felony.

15. The Delaware General Assembly has given the Department of Corrections discretion to decide, in most circumstances, who is eligible for work release and furloughs and who is not. In most instances, the Department of Corrections is authorized by statute to adopt rules and regulations governing the outside employment of inmates[32] and to promulgate strict rules and regulations regarding inmate furloughs.[33] The Department of Corrections is forbidden, however, from permitting

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[30] *State v. Harmon*, 60 A. 866, 868 (Del. 1902).

[31] 11 *Del. C.* § 635 (1) (1973); Delaware Criminal Code with Commentary, § 635 at 191 (1973).

[32] 11 *Del. C.* § 6533(a).

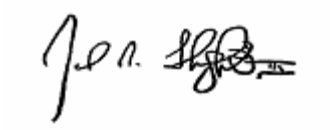
[33] 11 *Del. C.* § 6538(a).

work release[34] or furloughs[35] for inmates serving a sentence imposed for a Class A felony.[36]

16. Petitioner is currently serving a sentence imposed for second degree murder, a Class A felony. Consequently, by statute, Petitioner is not entitled to work release or furlough. Petitioner's claim that the Department of Corrections has improperly denied him work release or furlough must, therefore, fail.

17. Based on the foregoing, Petitioner's Motion for Postconviction relief is **DENIED.**

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary

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[34] 11 *Del. C.* § 6533(d)(1).

[35] 11 *Del. C.* § 6538(e).

[36] *See* Del. Op. Atty. Gen. 86-I017 (1986) (holding that Delaware law clearly and unequivocally prohibits the Commissioner of Correction from unilaterally allowing Class A felons out of prison for any reason, except family emergencies...").