

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

STATE OF DELAWARE,	)	
	)	
v.	)	
	)	I.D. No. 0409003152
EMMANUEL L. RODGERS,	)	
	)	
Defendant.	)	
	)	

**ORDER**

This is a Rule 61 motion in which the defendant alleges, for the second time, that his counsel was ineffective at trial. His claims are procedurally barred.

Defendant was indicted on multiple counts of Rape in the Second Degree and Rape in the Fourth Degree on September 20, 2004. At some time, the State entered a *nolle prosequi* on several counts alleged in the indictment. After a trial a jury convicted Rodgers of Rape in the Second Degree on May 12, 2005. Thereafter the State, with the consent of Defendant's counsel, moved to modify the verdict to find Defendant guilty of three counts of Rape in the Fourth Degree. On August 2, 2005 the court declared Defendant a habitual defendant and sentenced him to the mandatory minimum 15 years at level 5 for each the Rape 4th convictions to be served consecutively. Defendant appealed, and the Supreme Court dismissed his appeal because of his failure to prosecute his appeal.

More than a year after his conviction was affirmed Defendant filed a motion for postconviction relief. Commissioner Freud of this court recommended that the motion be summarily dismissed because it was procedurally barred. This court adopted that recommendation, and on appeal the Supreme Court affirmed that dismissal.

Defendant's current motion is heavily laden with generalities about the Sixth Amendment and procedural bars. It is difficult to tease out Defendant's claims from this verbiage, but the court has done its best to decipher what Defendant is trying to argue. It appears that he asserts the following:

1. His counsel was ineffective because he was "illegally charged" with eight counts in the indictment.<sup>1</sup>
2. His counsel was ineffective because the maximum sentence for Rape Fourth Degree is ten years at Supervision Level 5 and he was sentenced to fifteen years.<sup>2</sup>
3. His counsel failed to take certain unspecified actions and, as a result, "the prosecution's case was [not subjected] to a meaningful adversarial testing."<sup>3</sup>

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<sup>1</sup> Defendant's Brief, at 9.

<sup>2</sup> *Id.* at 16.

<sup>3</sup> *Id.* at 18.

4. His counsel was defective because “the amendment of the charges from second degree rape to fourth degree rape after the jury verdict are [sic] illegal.”<sup>4</sup>

In considering a Rule 61 motion, the court must first look to procedural requirements of the rule.<sup>5</sup> Defendant presented his fourth theory in his last Rule 61 motion, and the Commissioner recommended that it be dismissed because it was procedurally barred. This court adopted that recommendation and the Supreme Court affirmed. Criminal Rule 61(i)(4) prevents this court from considering this a second time. Defendant relies heavily on the exception found in Rule 61 (i)(5), but by its terms that exception does not apply to claims barred by (i)(4). Therefore this claim is procedurally barred.

Defendant’s remaining claims are procedurally barred for two reasons. First, Defendant’s motion is untimely. A motion for postconviction relief must be filed within one year after a conviction becomes final or, in the case of newly recognized rights, within one year of the right first being recognized by the Delaware Supreme Court or United States Supreme Court.<sup>6</sup> The motion in this case was filed more than six years after the conviction became final and Defendant does not argue a newly recognized right applies to his claims. Second, his Rule 61

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<sup>4</sup> *Id.* at 21.

<sup>5</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>6</sup> Superior Court Rule of Criminal Procedure 61(i)(1).

motion, which is his second, is barred because it is repetitive.<sup>7</sup> This court may consider repetitive Rule 61 motions if consideration “is warranted in the interest of justice.”<sup>8</sup> After reviewing the motion, the court finds consideration is not warranted in the interest of justice.

Defendant seeks to invoke an exception to the procedural bars. He claims there is “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.”<sup>9</sup> Defendant finds no safe harbor here because he does not raise a colorable claim.

His first claim is that his counsel was ineffective because he was illegally charged with eight counts in the indictment. He argues the indictment violates the double jeopardy clause of the Fifth Amendment to the United State Constitution because he was charged with multiple counts. Defendant was properly indicted by a grand jury. Double jeopardy does not prohibit a grand jury from indicting a defendant on multiple counts. Therefore, this argument is without merit and does not raise a colorable claim to bypass the procedural bars.

Defendant next claims his counsel was ineffective because he was sentenced to more time than the Fourth Degree Rape statute permits. He argues the statute only allows him to be sentenced to 10 years at

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<sup>7</sup> Superior Court Rule of Criminal Procedure 61(i)(2).

<sup>8</sup> *Id.*

<sup>9</sup> Superior Court Rule Criminal of Procedure 61(i)(5) (emphasis added).

Level 5. Fourth Degree Rape is a Class C felony punishable by up to 15 years at Level 5.<sup>10</sup> The habitual offender statute requires a defendant “shall receive a minimum sentence which shall not be less than the statutory maximum penalty provided elsewhere in this title for the 4th or subsequent felony which forms the basis of the State’s petition to have the person declared to be an [sic] habitual criminal.”<sup>11</sup> The maximum sentence for Defendant’s convictions was 15 years and under the habitual offender statute that becomes the minimum with life in prison the new maximum. Defendant was sentenced to the minimum for each of his three counts. This argument therefore does not raise a colorable claim to bypass the procedural bars.

Finally Defendant claims his trial counsel did not subject the State’s case to meaningful adversarial testing. He does not offer any specific allegations to support his claim, but only states, “trial counsel’s lack of actions unduly tainted strategy and infringed upon defendant’s personal and fundamental constitutional rights.”<sup>12</sup> Defendant’s argument appears to consist of further complaints that he is prejudiced by the lengthy albeit mandatory sentence imposed. Defendant offers no support for his claim and therefore is not a colorable claim. Accordingly is procedurally barred.

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<sup>10</sup> 11 *Del. C.* § 4205(b)(3).

<sup>11</sup> 11 *Del. C.* § 4214(a).

<sup>12</sup> Defendant’s Brief, at 18.

After considering Defendant's brief and the record in the case, the court finds Defendant's claims are procedurally barred and therefore his motion is **DISMISSED**.

Defendant also moved for the appointment of counsel for his motion for postconviction relief. In *Martinez v. Ryan*<sup>13</sup> the United States Supreme Court recently held that under certain circumstances a defendant seeking post conviction relief is entitled to counsel.<sup>14</sup> However, the *Martinez* Court specifically stated it was not addressing whether an exception exists to the constitutional rule that there is no right to counsel in collateral proceedings when that collateral proceeding is an initial review.<sup>15</sup> "Thus, the Court directed that its decision did not establish a constitutional right to counsel in postconviction collateral proceedings."<sup>16</sup>

Delaware's postconviction relief rule permits the court to "appoint counsel for an indigent movant *only* in the exercise of discretion and for *good cause shown, but not otherwise*."<sup>17</sup> The Delaware Supreme Court has consistently held that "[t]here is no constitutional right to counsel in a postconviction proceeding."<sup>18</sup> "*Martinez* does not change Delaware's longstanding rule that defendants are not entitled postconviction relief

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<sup>13</sup> 566 U.S. \_\_\_, 132 S.Ct. 1309 (2012).

<sup>14</sup> *Id.* at 1320.

<sup>15</sup> *Id.* at 1315 (stating that "[t]his is not the case . . . to resolve whether that exception exists as a constitutional matter").

<sup>16</sup> *State v. Finn*, 2012 WL \_\_\_, ID# 0801037592, at 4 (Del. Super. July 17, 2012) (ORDER) (Parkins, J).

<sup>17</sup> Del. Super. Ct. Crim. R. 61(e)(1) (emphasis added).

<sup>18</sup> *Garnett v. State*, 1998 WL 184489 (Del. Supr.) (ORDER) (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)); *see also Cropper v. State*, 2001 WL 1636542 (Del. Supr.) (ORDER) ("[T]here is no right to court-appointed counsel in postconviction proceedings.").

counsel.”<sup>19</sup> Neither the United States or Delaware Supreme Court have ruled that defendants are entitled to postconviction relief counsel under the United States or Delaware Constitutions, unless that occurs, the court will continue to apply the statutory good cause standard. The court finds that Defendant has not shown good cause for the appointment of counsel and, therefore, the motion for appointment of postconviction relief counsel is **DENIED**.

Dated: August 30, 2012

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John A. Parkins, Jr.  
Superior Court Judge

oc: Prothonotary  
cc: Emmanuel L. Rodgers, JTVCC  
Martin B. O'Connor, Esquire, Department of Justice

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<sup>19</sup> *Finn*, ID# 0801037592 at 5.