

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID. No. 0903001739
)	
DAVID A. MERRITT,)	
)	
Defendant.)	

Submitted: September 20, 2012

Decided: November 20, 2012

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT
DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE DENIED.**

Diane M. Coffey, Chief Prosecutor, Department of Justice, Wilmington, Delaware,
Attorney for the State.

David A. Merritt, James T. Vaughn Correctional Center, Smyrna, Delaware, *pro se*.

PARKER, Commissioner

This 20th day of November, 2012, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. Following a Superior Court jury trial held on February 23, 2010, February 24, 2010, and March 1, 2010, Defendant was found guilty of eight counts of Rape in the First Degree and one count of Continuous Sexual Abuse of a Child by a Person of Trust. On May 14, 2010, Defendant was sentenced to 127 years at Level V.
2. Defendant filed a direct appeal to the Delaware Supreme Court. On January 27, 2011, the Delaware Supreme Court affirmed the judgment of the Superior Court.¹
3. In addition to Defendant's direct appeal, he also filed a federal action pursuant to 42 *U.S.C.* § 1983. The federal action was dismissed (as frivolous) by the District Court of Delaware.²

FACTS

4. The facts giving rise to these charges, as set forth by the Delaware Supreme Court in its decision on Defendant's direct appeal³, are as follows: In 2006, Defendant and his wife, Michelle, divorced after thirteen years of marriage. Michelle moved out of the couple's home. The couple entered into a child custody agreement whereby their two daughters, then eleven year old Anne and seven year old Denise⁴, would reside with their father every Friday evening to Tuesday afternoon.⁵
5. After Michelle moved out of the couple's home, Defendant allegedly began sexually abusing Anne. The abuse continued until January 2009, when Anne revealed the abuse to her mother. Michelle reported the abuse to the police and initiated

¹ *Merritt v. State*, 2011 WL 285097 (Del. 2011).

² *Merritt v. Edinger, et al.*, 2011 WL 2442660, at *2 (D.Del. 2011).

³ *Merritt*, 2011 WL 285097, at *1 (Del. 2011).

⁴ This court adopted the same pseudonyms used by the Delaware Supreme Court.

⁵ *Merritt*, 2011 WL 285097, at *1 (Del. 2011).

proceedings to obtain full custody of Anne and Denise. Defendant was arrested on March 5, 2009⁶ and indicted on July 6, 2009.⁷

DEFENDANT’S RULE 61 MOTION

6. On December 13, 2011, Defendant filed this motion for postconviction relief. Thereafter, Defendant amended his motion to include several supplemental claims. In the subject motion, Defendant raises a number of different grounds for relief. First, Defendant contends that his counsel provided ineffective assistance at trial and on appeal. Second, Defendant contends that the trial transcripts were not timely and properly transcribed. Third, Defendant contends that the prosecutor engaged in misconduct. Fourth, Defendant alleges that the trial judge failed to properly give a curative instruction or strike the offending questions of the prosecutor. Fifth, Defendant contends that there was insufficient evidence to support the convictions of rape in the first degree. Sixth, Defendant contends that the indictment was fatally flawed and improperly amended. Seventh, Defendant contends that the trial judge had an improper ex parte communication with the jury.

7. Before making a recommendation, the record was enlarged by directing Defendant’s trial and appellate counsel to submit Affidavit(s) responding to Defendant’s ineffective assistance of counsel claims. Thereafter the State filed a response to the motion and Defendant filed a reply thereto.⁸

8. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements

⁶ *Id.*

⁷ See, Superior Court Docket No. 6.

⁸ Super.Ct.Crim.R. 61(g)(1) and (2).

of Superior Court Criminal Rule 61.⁹ In order to protect the procedural integrity of Delaware's rules, the court will not consider the merits of a post conviction claim that fails any of Rule 61's procedural requirements.¹⁰

9. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;¹¹ (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights and cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, do not apply to a claim that the court lacked jurisdiction or to 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.¹² Moreover, the procedural bars of (2) and (4) may be overcome if "reconsideration of the claim is warranted in the interest of justice."¹³

10. In this case, Defendant's claims, with the exception of his ineffective assistance of counsel claims, are procedurally barred.¹⁴ Defendant's ineffective assistance of counsel claims are not procedurally barred because a Rule 61 motion is the appropriate vehicle for an ineffective assistance of counsel claim.¹⁵ As to all of Defendant's other claims,

⁹ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹⁰ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹¹ If a final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005).

¹² Super.Ct.Crim.R. 61(i)(5).

¹³ Super.Ct.Crim.R. 61(i)(4).

¹⁴ *Malin v. State*, 2009 WL 537060, at *5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

¹⁵ *Id.*

Rules 61(i)(2) and Rule 61(i)(3) require Defendant to have raised these claims at trial, at sentencing, or on direct appeal to be procedurally preserved. Having failed to previously raise these claims, they are now procedurally barred.

11. In addition to being procedurally barred, all of Defendant's claims are without merit.

12. Turning first to Defendant's claim that the trial transcripts were not timely and properly transcribed, this claim is not supported by the record. Defendant's trial and appellate counsel filed a joint Affidavit in response to Defendant's Rule 61 motion in which they represented that Defendant requested that they raise this issue on direct appeal.¹⁶ After a careful review of the record, defense counsel concluded that there was no good faith basis to raise this issue on direct appeal. Defense counsel represented that although this issue was considered as a possible appeal issue at Defendant's request, it was ultimately not raised, because there was no merit to it.¹⁷

13. Specifically, defense counsel evaluated Defendant's contention that the trial transcripts inaccurately reflected what occurred during the Superior Court proceedings and concluded that there was not good faith basis to believe this to be the case.¹⁸ Defense counsel did not agree with Defendant's contention that there was any evidence of transcript omissions and/or tampering.¹⁹ Defense counsel did not agree with Defendant's contention that there was any "failure to comply with court procedures" in the issuance of the transcripts.²⁰

¹⁶ Superior Court Docket No. 83, ¶¶ 13, 16, 24, 25, 27, 28, 30, 31, 32.

¹⁷ *Id.*

¹⁸ Superior Court Docket No. 83, ¶ 13.

¹⁹ Superior Court Docket No. 83, ¶ 16, 27, 30.

²⁰ Superior Court Docket No. 83, ¶ 25, 27, 30.

14. Defendant's claim of any impropriety with regard to the trial transcripts appears to be unfounded. Conclusory, unsupported and unsubstantiated allegations are insufficient to support a motion for postconviction relief.²¹

15. Next, Defendant contends that the prosecutor used improper questions and hand gestures to simulate Defendant's penis penetrating his daughter's vagina labia lips and that as a result thereof his conviction should be reversed. Defendant contends that the prosecutor's alleged misconduct constitutes plain error. In addition to this claim being procedurally barred, it is also without merit.

16. This issue was raised at trial and the court ruled that there was nothing improper in either the questioning of the witness or in any accompanying hand gestures by the witness, in repeating those hand gestures by the prosecutor, or in the fact that the hand gestures were conveyed by word properly for the record.²² Defendant requested that defense counsel raise this issue on direct appeal, but after careful consideration of Defendant's request, both trial counsel and appellate determined that this issue lacked merit and both concluded that there was no good faith basis to pursue this issue on direct appeal.²³ This claim is without merit.

17. Defendant next contends in his Rule 61 motion that the trial judge failed to properly give a curative instruction or strike the "offending questions and subsequent collaborative hand gesture or sustaining the defense counsel's objection at the bench in the jury's presence." Because the prosecutor did not engage in any misconduct, the trial judge did not err in failing to cure the misconduct committed by the prosecutor. Again,

²¹ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *State v. Brown*, 2004 WL 74506, *2 (Del. Super. 2004)(conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).

²² February 24, 2010 Trial Transcript, pgs. 83-96; March 1, 2010 Trial Transcript, pgs. 11-12.

²³ Superior Court Docket No. 83, ¶¶ 16, 17, 18, 19, 24, 25, 27, 30 & 31.

Defendant had requested that defense counsel raise this issue on direct appeal, but defense counsel declined to do so after determining that the issue lacked merit.²⁴ This claim is without merit.

18. Defendant challenges the sufficiency of the evidence to support his convictions of Rape First Degree. Specifically, Defendant contends that there was insufficient evidence to establish the “penetration element” of Rape First Degree. First, this issue is procedurally barred because it was not raised on direct appeal. Second, both trial counsel and appellate counsel agreed that this issue lacked merit and both concluded that there was no good faith basis to raise this issue on direct appeal.²⁵ Third, the evidence on the penetration element was sufficient to support a conviction on Rape First Degree.

19. When reviewing a challenge to the sufficiency of the evidence to support a conviction, the standard to be employed is whether a rational trier of fact, considering the evidence most favorable to the prosecution, could find the essential elements of the offense beyond a reasonable doubt.²⁶ The definition of first degree rape contained in the statute consists, in part, of engaging in “sexual intercourse” without the consent of the victim.²⁷ “Sexual intercourse” is defined as “[a]ny act of physical union of the genitalia or anus of 1 person with the mouth, anus or genitalia of another person. It occurs upon any penetration, however slight. Ejaculation is not required.”²⁸

20. It appears that the victim, a minor, had an understanding of the definition of “penetration” which differed from the legal definition.²⁹ The legal definition of sexual

²⁴ Superior Court Docket No. 83, ¶¶ 16, 17, 18, 19, 24, 25, 27, 30 & 31.

²⁵ Superior Court Docket No. 83, ¶¶ 16, 19, 24, 25, 27, 30 & 31.

²⁶ *Hoyle v. State*, 2008 WL 361139, at *1 (Del.).

²⁷ 11 *Del. C.* § 773.

²⁸ 11 *Del. C.* § 761(g).

²⁹ February 24, 2010 Trial Transcript, pg. 84-91.

penetration includes the unlawful placement of one's penis, or any other part of one's body, inside the vagina of another person.³⁰ The "penetration" element of First Degree Rape is met when there is any penetration of the vagina by the unlawful placement of a defendant's penis or mouth, however slight.

21. In this case, there was evidence presented at trial that on some occasions Defendant rubbed his penis and on other occasions he put his tongue inside the labia lips of his daughter's vagina.³¹ Specifically, the victim testified:

Q: Okay. And just so we're clear, I'm not putting words in your mouth, your telling this jury that he would rub his penis inside your lips but not in the hole?

A: Yes.³²

Q: Did it happen at least nine different times?

A: Yes.

Q: And during those nine different times, at least, would he either put his tongue between your lips or his penis between the lips of your private part?

A: Yes.³³

22. Irrespective of whether or not the victim understood the legal definition of penetration, a rational juror could have found based on the evidence at trial that the legal definition of penetration was met, and that the penetration element was satisfied.³⁴ In

³⁰ See, 11 *Del. C.* § 761 (i)(1); 11 *Del. C.* § 761 (d).

³¹ February 24, 2010 Trial Transcript, pgs. 83-95, 106-107, 116-117, 118-119.

³² February 24, 2010 Trial Transcript, pg. 95; See also, February 24, 2010 Trial Transcript, pg. 106-107, 116-117.

³³ February 24, 2010 Trial Transcript, pg. 119.

³⁴ See, for example, *Rivera v. State*, 2011 WL 3074930, at *1-2 (Del.) (even though victim testified at trial that defendant's penis did not penetrate her vagina, where victim had given a prior statement to police in

this case, a rational juror could have found Defendant guilty of rape in the first degree based on the evidence presented at trial. Defendant's contention that the State failed to satisfy the "penetration" element of Rape First Degree is procedurally barred and without merit.

23. Defendant contends that the indictment was fatally flawed and improperly amended by the trial court. This claim is procedurally barred for failing to raise the issue at trial or on direct appeal and is also without merit. First, under Superior Court Criminal Rules 12(b)(2) and 12(f), a defense or objection based on a defect in an indictment is waived unless it is raised before the trial. Defendant having failed to raise any defect in the indictment at trial, or for that matter, on direct appeal has waived his right to do so at this late juncture.

24. Second, even if Defendant's claim is not waived, the court is satisfied that the indictment contains no fatal defects. To the contrary, the indictment is a plain, concise and definite written statement of the essential facts constituting the offenses charged.³⁵ The indictment charged Defendant, *inter alia*, with eight counts of Rape First Degree for having engaged in "sexual intercourse" with his daughter, a child who had not yet reached the age of 16. As previously discussed, the legal definition of "sexual intercourse" is the unlawful penetration of one's penis or tongue with another's genitalia, however slight.³⁶ Defendant was on notice of what he was being called upon to defend.

25. In addition to the indictment, the specifics of the charges against Defendant were more fully provided by the State through several pre-trial documents including the arrest

which she stated that she felt the tip of defendant's penis on her vagina, the evidence was sufficient to support a conviction of rape in the first degree.)

³⁵ Super.Ct.Crim.R. 7 (c).

³⁶ 11 *Del. C.* § 761(g).

warrant and other items of discovery.³⁷ It appears that Defendant was on notice of each charged offense and that there were no surprises at the time of trial.³⁸

26. Moreover, to the extent that the indictment was amended in any way at trial, Superior Court Criminal Rule 7(e) permits the amendment of an indictment at any time before verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. In this case, it does not appear that any additional or different offense was charged nor does it appear that the substantial rights of Defendant were prejudiced in any way. This claim is procedurally barred, waived and without merit.

27. Defendant contends that the trial judge had an improper ex parte communication with the jury. This claim is procedurally barred for failing to raise it on direct appeal. It is also without merit. Defendant's cell phone records which included text messages were admitted as State's Exhibit 7 at trial.³⁹ The court noticed that some of the text messages contained in these records contained irrelevant information which could possibly be prejudicial to the defense.⁴⁰ Therefore, with the consent of defense counsel and the State, it was decided that the irrelevant, possibly prejudicial portions of the exhibit would be redacted.⁴¹

28. The court then inquired as to whether there was any objection to her going into the jury room with the court reporter so that the jury could be given a "brief standard

³⁷ See, State's August 9, 2012 Supplemental Response to Defendant's Rule 61 Motion, at pg. 4.

³⁸ *Id.*

³⁹ February 24, 2010 Trial Transcript, pgs. 36-37.

⁴⁰ Trial Transcript of March 1, 2010, pgs. 75-77.

⁴¹ *Id.*

instruction” that they not speculate as to what was redacted.⁴² Neither the State nor defense counsel had any objection.⁴³

29. The court, with the consent of counsel, then went with the court reporter into the jury room and instructed the jury as follows: “Some of [the] Exhibits may have redactions, that is because I made rulings about admissib[ility] of evidence. If you see redacted portions, please don’t speculate as to what was redacted and why, understand I made legal rulings. You are to consider only evidence in this case.”⁴⁴ Defendant takes exception with this instruction. However, there was nothing improper or prejudicial with these remarks by the court to the jury. It was appropriate in all respects and Defendant was not prejudiced in any way. Defendant’s contention is without merit.

30. We now turn to Defendant’s ineffective assistance of counsel claims. The procedural requirement that a claim be raised on direct appeal to be preserved is not applicable to ineffective assistance of counsel claims.⁴⁵ A Rule 61 motion is the appropriate vehicle for an ineffective assistance of counsel claim.⁴⁶ Consequently, Defendant’s ineffective assistance of counsel claims are not procedurally barred and are properly presented herein.

31. In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level “below an objective standard of reasonableness” and that, (2) the deficient performance prejudiced the defense.⁴⁷ The first prong requires the defendant to show by a

⁴² March 1, 2010 Trial Transcript, pg. 77.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Malin v. State*, 2009 WL 537060, at *5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

⁴⁶ *Id.*

⁴⁷ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel's unprofessional errors, the outcome of the proceedings would have been different.⁴⁸

32. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.⁴⁹ Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.⁵⁰ Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.⁵¹

33. The United States Supreme Court recently reiterated the high bar that must be surmounted in establishing an ineffective assistance of counsel claim. In *Harrington v. Richter*,⁵² the United States Supreme Court explained that representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.⁵³ The challenger's burden on an ineffective assistance of counsel claim is to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial.⁵⁴

⁴⁸ *Id.* at 687-88, 694.

⁴⁹ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

⁵⁰ *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

⁵¹ *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

⁵² *Harrington v. Richter*, 131 S.Ct. 770 (2011).

⁵³ *Id.*, at * 791.

⁵⁴ *Id.*

34. Turning now to the subject case, it is clear from a thorough and complete review of the record that defense counsel provided active and capable advocacy. Indeed, the record reflects that defense counsel consistently and diligently defended the charges against Defendant.

35. In the subject motion, Defendant contends that his trial counsel was ineffective for failing to perfect and prosecute the appeal, and that his appellate counsel was ineffective for filing a conclusory no-merit brief and for failing to raise the claims that Defendant wanted raised on appeal.

36. Defendant's ineffective assistance of counsel claims are without merit. Defense counsel did not fail to perfect and prosecute a direct appeal. In fact, a direct appeal was perfected and pursued.⁵⁵ Appellate counsel did not file a conclusory no-merit brief on direct appeal. Appellate counsel consulted with trial counsel, considered all of the claims that Defendant wanted to raise, and reviewed the record. Based on a careful and thorough analysis of the record, Appellate Counsel determined that there was only one meritorious issue that should be raised on appeal.⁵⁶ Appellate counsel did not raise any other issue on direct appeal because after careful consideration she determined that there was no good faith basis to do so.⁵⁷

37. Defendant counsel cannot be deemed ineffective for failing to raise issues that lack merit. Moreover, even if arguably there was some meritorious issue that was not raised on appeal, appellate counsel is not required to raise every meritorious ground for appeal. Counsel may determine that weaker arguments should not be raised so as not to

⁵⁵ *Merritt v. State*, 2011 WL 285097 (Del.).

⁵⁶ Joint Affidavit of Defense Counsel, Superior Court Docket No. 83.

⁵⁷ *Id.*

detract from stronger arguments advanced.⁵⁸ Defendant has failed to meet his burden to establish that defense counsels' conduct was deficient in any way nor has he established actual prejudice resulting from any alleged deficiency. Defendant's ineffective assistance of counsel claims must fail.

38. To the extent that Defendant contends that his counsel was ineffective for failing to raise any of the issues on direct appeal which he included in the subject Rule 61 motion, Defendant's ineffective assistance of counsel claim lacks merit. As discussed above, none of the issues Defendant raised in the subject Rule 61 motion were meritorious and therefore defense counsel cannot be deemed ineffective for failing to have raised any of these issues on direct appeal.

39. Defendant appears to raise a couple additional grounds of counsel ineffectiveness in his response brief to the State's Answer to his Rule 61 motion.⁵⁹ Defendant appears to contend that his trial counsel was ineffective for failing to mark a Kleenex Tissue Box into evidence and for "failing to request the proper jury instruction in support of the lesser included offense."

40. Neither of these additional issues have merit. During the prosecutor's direct examination of the victim, a tissue box was used in a demonstration to represent a vagina and the victim used the tissue box to show how Defendant would rub his penis inside the lips but not in the hole.⁶⁰

41. The tissue box, which was used only as a prop for a demonstration did not need to be marked and moved into evidence at a trial exhibit. Defense counsel was not deficient

⁵⁸ See, *State v. Washington*, 2007 WL 2297092, at *3 (Del.Super.), *aff'd*, *Washington v. State*, 2008 WL 697591, at *2 (Del.).

⁵⁹ See, Superior Court Docket Nos. 94 & 95.

⁶⁰ February 24, 2010 Trial Transcript, pgs. 95-96.

for not doing so. Even if, defense counsel was somehow deficient for failing to do so, Defendant cannot satisfy the prejudice element of the *Strickland* test. The tissue box demonstration was observed by the jury during trial, it did not need to be marked and admitted as an exhibit. Moreover, the tissue box was irrelevant to the issue raised on direct appeal, and the tissue box added nothing to the analysis and determination of the issues raised herein.

42. Finally, Defendant contends that his counsel was ineffective for not requesting a proper jury instruction in support of the lesser included offense. Following discussions with the parties, the court decided that a charge on the lesser included offense of Unlawful Sexual Contact in the First Degree would be given.⁶¹ It was.⁶² There was nothing improper about this charge.

43. A defendant does not have a right to have the jury instructed in a particular form.⁶³ The defendant is entitled to have the jury instructed with a correct statement of the substantive law.⁶⁴ The primary function of jury instructions is to inform the jury of the law and its application to the facts as the jury finds them.⁶⁵ Each case should be viewed on its own facts and each set of jury instructions must be viewed in its entirety.

44. In this case, viewing the jury instructions as given in this case in its entirety, they were fair, they adequately advised the jury of the applicable law, adequately advised the jury how to weigh the testimony and how to fairly evaluate the case.⁶⁶ The jury instructions as given are adequate. Defense counsel was not ineffective for failing to

⁶¹ March 1, 2010 Trial Transcript, pgs. 6-10, 17.

⁶² March 1, 2010 Trial Transcript, pgs. 65-66.

⁶³ *Stones v. State*, 1996 WL 145775, at *3 (Del.).

⁶⁴ *Guy v. State*, 913 A.2d 558, 563 (Del. 2006).

⁶⁵ *Garden v. State*, 815 A.2d 327, 341 (Del. 2003)(superseded by statute on other grounds).

⁶⁶ March 1, 2010 Trial Transcript, pgs. 60-75.

request anything additional. Defendant has not established that his counsel was deficient or that he suffered actual prejudice as a result thereof.

45. In this case, for those claims that are procedurally barred, Defendant has failed to overcome any of the procedural bars by showing a “colorable claim that there was a miscarriage of justice” or that “reconsideration of the claim is warranted in the interest of justice.” The “miscarriage of justice” exception is a “narrow one and has been applied only in limited circumstances.⁶⁷ The defendant bears the burden of proving that he has been deprived of a “substantial constitutional right.”⁶⁸ The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. The Court does not find that the “interests of justice” require it to consider the otherwise procedurally barred claims for relief.⁶⁹

46. Defendant filed several motions related to his Rule 61 motion. Most of these motions were already addressed by the court.⁷⁰ To the extent there is any outstanding motion(s) related to this Rule 61 motion, such as a motion for the appointment of counsel or motion for an evidentiary hearing, any outstanding motion is hereby denied

47. Rule 61(e) permits the court to appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown. The Delaware Supreme Court has consistently held that there is no constitutional right to counsel in a postconviction proceeding.⁷¹ The United States Supreme Court’s decision in *Martinez v. Ryan*,⁷² did not change Delaware’s longstanding rule that defendants have no constitutional right to

⁶⁷ *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See, Superior Court Docket Nos. 77 & 96.

⁷¹ *Garnett v. State*, 1998 WL 184489 (Del.); *Cropper v. State*, 2001 WL 1636542 (Del.).

⁷² *Martinez v. Ryan*, 132 S.Ct. 1309 (2012).

counsel in a postconviction proceeding.⁷³ Indeed, the United States Supreme Court in *Martinez* made it clear that when, like Defendant's Rule 61 motion, a Rule 61 motion is insubstantial, wholly lacking in merit, and wholly without any factual support, a request for the appointment of counsel is properly denied.⁷⁴

48. Moreover, any outstanding request for an evidentiary hearing is also denied. The parties' submissions and the evidentiary record were carefully, fully and thoroughly considered. Defendant's allegations were either reasonably discounted as not supported by the record, persuasively rebutted by defense counsels' Affidavit, or not material to a determination of Defendant's claims. There is no just reason to delay the issuance of this decision in order to further expand the record or to otherwise hold any type of hearing.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc: Prothonotary
cc: John S. Edinger, Esquire
Nicole M. Walker, Esquire

⁷³ See, *Martinez*, 132 S.Ct. at 1315-1320.

⁷⁴ *Id.*