SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

February 23, 2012

Charles Duffy, Sr.
SBI# 0007
S-1-Unit, A-12
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: *State v. Duffy*, Def. ID# 84006719DI

DATE SUBMITTED: November 10, 2011

Dear Mr. Duffy:

Pending before the Court are a motion of defendant Charles Duffy, Sr. ("Duffy" or "defendant") seeking the appointment of counsel and alternative motions seeking either postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61") or a sentence correction pursuant to Superior Court Criminal Rule 35 ("Rule 35").[1] This is my decision denying the pending motions.[2]

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[1]Defendant does not label his motion as one seeking Rule 35 relief; however, the relief he requests is as I have categorized it.

[2]Defendant has filed various postconviction motions over the past twenty-six years. They all have been denied: *State v. Duffy*, Del. Super., Cr.A. No. S84-11-0037, Tease, J. (April 11, 1986) *aff'd, Duffy v. State*, 513 A.2d 1318, 1986 WL 17363 (Del. July 31,1986); *Duffy v. State*, 536

Defendant claims he is entitled to postconviction relief because the plea colloquy shows that the Court did not explain to him the elements of rape in the first degree. Defendant's other claim to relief stems from the duration of his life sentence. In brief, defendant establishes that he was told, at the time he entered his plea, that his life sentence was equivalent to 45 years. Subsequent thereto, case law has rendered this sentence to be one for his entire life; i.e., he may not be released unless he is paroled. This second argument is a significant one and requires close examination.

Defendant contends his guilty plea was involuntary and consequently, he is entitled to withdraw it because, at the time he entered his plea, the trial judge, the prosecutor, and defense counsel all believed and advised him that he was accepting a plea agreement "to a term of imprisonment which meant 45 years." He argues that because he was misinformed about the lawful punishment, he did not knowingly and voluntarily enter his plea. He further develops his argument:

> Clearly, in light of the plea colloquy record on its face, the trial judge in this case failed to inform the defendant personally in open court of the correct judgment and sentence as well as any mandatory minimum penalty and of the maximum possible penalty.

He maintains that he should be allowed to withdraw his plea because he has shown a reasonable probability that he would not have entered the plea if he had understood the maximum penalty to which he pled guilty "was for the balance of his natural life, and not a maximum 45 year sentence." He argues: "[I]n the instant case, the trial judge, prosecutor and defense counsel

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A.2d 615, 1987 WL 31556 (Del. Dec. 21, 1987); *State v. Duffy*, Del. Super., Cr. A. No. S84-11-0037, Chandler, J. (September 6, 1988), *aff'd*, 550 A.2d 34, 1988 WL 117521 (Del. Oct. 28, 1988); *State v. Duffy*, 2000 WL 33114366 (Del. Super. Dec. 1, 2000). The pending claims were not raised in these previous motions.

all believed and advised the defendant personally in open Court that *life imprisonment in Delaware actually by law meant 45 years.* [Emphasis in original.]"

Defendant's second argument is that trial counsel was ineffective because he did not advise defendant of the actual sentence he was facing.

His third argument is that the plea agreement was breached. He argues as follows:

> In the case at bar, the defendant's defense counsel Karl Haller, Esq., Assistant Public Defender confirmed three (3) days after the defendant accepted the plea agreement that on 9/13/85 before judge [sic] Tease with prosecutor Sandy present that Judge tease [sic] sentenced the defendant to life defined as 45 years imprisonment. Twenty years of this mandatory for rape in the first degree. [Sic] See letter dated, September 16, 1985 from Karl Haller, Esq., to the defendant.[3] This additionally supports the defendant's claim of Involuntary Plea and Ineffective Assistance of Counsel during defendant's Plea Colloquy proceedings. Judge Tease's Plea Colloquy is *both confusing and misleading* as to the sentence which invalidates the plea agreement. See **Plea Colloquy at page 8.** The Guilty Plea record in the defendant's case is clearly deficient in two fundamental respects: (1) the plea colloquy record does not adequately reflect that the defendant was properly advised of - and understood the elements of the offense (rape in the first degree) to which he plead guilty; and (2) in Evans v. State, 872 A.2d 539 (Del. 2005), the Court "held that, a life sentence with the possibility of parole imposed prior to the Truth in Sentencing Act of 1989 ("TIS") was not defined as a 45 year term," as such, where at the time the defendant's plea agreement was executed, and defense counsel Karl Haller Esq., the prosecutor Sandy and the trial court Judge Tease <u>all</u> mistakenly believed that "life imprisonment in {Delaware} under first degree rape is considered to be 45 years," and this erroneous information was conveyed to the defendant and he relied on it

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[3]The September 16, 1985, letter from Karl Haller, Esquire, which is attached to the Rule 61 motion, states:

> This will confirm what happened on 9/13/85 before Judge Tease with Prosecutor Sandy present. At that time you were sentenced on rape in the first degree.
>
> ***
>
> <u>Judge Tease sentenced you to life **defined as 45 years imprisonment**</u>. Twenty years of this is mandatory. [Underline in original; bold added.]

in accepting the plea, and such erroneous advice about sentencing is a direct consequence of the plea, thus, rendering the guilty plea involuntary. [Emphasis in original; footnote added.]

He asks the Court either to vacate the guilty plea or to honor the understanding of everyone that the sentence was for 45 years.

I turn to the facts.

On June 19, 1984, defendant was arrested for committing the crime of rape in the first degree in violation of 11 *Del. C.* § 764(2)[4] as well as other crimes. In December, 1984, defendant was indicted on ten charges, including the charge of rape in the first degree. The applicable sentencing provisions for the crime of rape required life imprisonment with the first twenty years being mandatory and not subject to reduction in any manner. 11 *Del. C.* § 4205(b)(1)[5] and

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[4]The rape statute, 11 *Del. C.* § 764, provided:

> A male is guilty of rape in the first degree when he intentionally engages in sexual intercourse with a female without her consent, and :
>
> (1) In the course of the offense he inflicts serious physical, mental or emotional injury upon the victim, or
>
> (2) The victim was not the defendant's voluntary social companion on the occasion of the crime and had not previously permitted him sexual contact.
>
> Rape in the first degree is a class A felony. 59 *Del. Laws*, c. 547 §2 (1974).

[5] In 11 *Del. C.* § 4205, it was provided in pertinent part as follows:

> (b) The term of imprisonment which the court may impose for a felony is fixed as follows:
>
> (1) For a class A felony, life imprisonment, except for conviction of first-degree murder in which event § 4209 of this title shall apply....

58 *Del. Laws*, c. 497, § 2 (1972); 59 *Del. Laws*, c. 203, § 32 (1973).

§4209A.[6] Particularly pertinent to defendant's sentence was the parole statute, 11 *Del. C.* § 4346.[7] It provided in pertinent part as follows:

> (a) A person confined to any correctional facility administered by the Department may be released on parole by the Board if he has served 1/3 of the term imposed by the court, such term to be reduced by such merit and good behavior credits as have been earned, or 120 days, whichever is greater.***[8]
> (b) Consistent with the law, the Board, upon written recommendation of the court which imposed the sentence, or the Department, may reduce the minimum term of eligibility when the Board is satisfied that the best interest of the public and the welfare of the person will be served by such reduction. ***
> (c) The Board shall have authority to act where the maximum term has been commuted by the Governor. **For 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.** [Emphasis added.]

In a letter dated January 28, 1985, defendant's trial attorney, Karl Haller, Esquire, enclosed a Guilty Plea Form to defendant. The blanks in the Guilty Plea Form were empty but for the following exception:

> What is the total consecutive maximum possible penalty provided by law for the charges to which your guilty plea is offered: **Rape I (life = 45 years - - 20 mandatory)** [Emphasis added.]

The phrase, "Rape I (life = 45 years - - 20 mandatory)", was typed onto the form.

Defendant ultimately entered a plea to rape in the first degree in exchange for the State

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[6]In 11 *Del. C.* § 4209A, which is titled "Punishment for First-degree rape," it is provided:

> Any person who is convicted of first-degree rape shall be punished by imprisonment for not less than twenty years without benefit of probation or parole or any other reduction.

63 *Del. Laws*, c. 393 (1982).

[7]54 *Del. Laws,* c. 349, § 7 (1964).

[8]"Department" references Department of Correction and "Board" references the Board of Parole.

agreeing to nolle prosse the remaining nine charges. The Plea Agreement, which defendant signed, and which, according to the defense attorney, the prosecutor filled out,[9] provided that defendant would enter a *Robinson*[10] plea to rape in the first degree and it states: "life imprisonment - **no good time** or parole eligibility for at least 20 years." [Emphasis added.] The Guilty Plea Form referenced above was completely filled out.

Defendant entered his plea on July 8, 1985. The transcript of the plea colloquy, starting at page 2, states:

> MR. SANDY [The Prosecutor]: *** Rape in the first degree is a Class A felony punishable by life imprisonment. There is no good time or parole eligibility for at least twenty years. ***
>
> MR. HALLER: Yes, Mr. Duffy is to your right ... and he is indeed pleading guilty to Count I which is rape in the first degree.
> Now, Investigator Kitchen and myself have been over this with Charles and he understands that by pleading Your Honor doesn't have any discretion as to what sentence to impose; namely, you have **to impose life equals forty-five years** and of this twenty years has to be served.
> ***
>
> THE COURT: What is the sentence that must be imposed by the Court?
>
> MR. DUFFY: **Forty-five**.
>
> THE COURT: **Actually deemed by law to be a forty-five year sentence, but is a sentence for the balance of your natural life.** For parole purposes and other purposes, excluding the twenty year business, it is a life sentence and **to be deemed to be a forty-five year sentence**. Is that your understanding?
>
> MR. DUFFY: Yes.

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[9]Transcript of July 8, 1985 Proceedings at 6.

[10]*Robinson v. State,* 291 A.2d 279 (Del. 1972), which authorizes a defendant's entering into a plea of guilty without admitting the actual commission of the offense if the plea is made knowingly, voluntarily and understandingly.

THE COURT: About the first twenty years, do you understand that that first twenty years is a mandatory minimum period of time which is not susceptible to any reduction of any kind?

MR. DUFFY: Yes.

THE COURT: Not subject to parole, probation or any other reduction. Do you understand that?

MR. DUFFY: Yes.

Transcript of July 8, 1985 Proceedings at 2-8. [Emphasis added.]

The Court did not sentence defendant on the day he entered the plea. A presentence investigation was undertaken and a report was prepared during the time between his plea and sentencing. During this time frame, defendant explained in a letter to Judge Tease dated August 28, 1985, that part of the reason he entered the plea was because his attorney informed him that the prosecutor planned to pursue an habitual offender designation against defendant. Although it never is expressly stated, the implication is that defendant thought if he was sentenced pursuant to the habitual offender statute, then he would have to spend the rest of his life in jail without any chance of release.

Judge Tease sentenced defendant on September 13, 1985. The sentence provided:

IT IS THE SENTENCE OF THIS COURT THAT YOU:
***
2. Be imprisoned for the balance of your natural life beginning June 18, 1984. The first twenty years of this term of imprisonment is a minimum mandatory sentence and not subject to suspension, probation or parole.

Over the years, defendant referenced his life sentence in various filings and letters. He did not discuss the duration of his sentence, however, until 2005. Defendant's December 25, 2005,[11]

[11]Docket Entry No. 82.

letter clarified that he was aware he might be serving a life sentence and not a 45 year sentence which was subject to conditional release. In this letter, defendant stated the following:

> On September 13th, 2005 Former Judge Claud Tease sentenced me to a life sentence which was defined as 45 years. I had to serve 20 mandatory years first before I could apply for parole and have access to good time credits.
>
> On my recent prison status sheet this institution [sic] records department informed me that I now have a natural life sentence and I am not intitled [sic] to any good time credits.
>
> On May 3rd 2005 I appeared before the parole board but was denied parole.
>
> Please send me information regarding the exact type sentence I have as well as information regarding good time credits. Am I allowed to have access to good time?
>
> I don't understand how I now have a natural life sentence and still be eligible for parole.

Defendant was sent a certified copy of his docket in response to this request; no other responses to his questions were given to him. Docket Entry No. 83.

In his documents seeking a pardon dated June 5, 2008, and filed with this Court on June 13, 2008,[12] defendant clarifies his understanding that the Department of Correction ("DOC") considers his sentence to be a life sentence which cannot be reduced unless he is paroled and is not a 45 year sentence which may be reduced by good time. He states in his conclusion:

> Members of the Board of Pardons, when I was sentenced on September 13, 1985, my assigned counsel, Karl Haller, Assistant Public Defender, informed me that my life sentence was defined as 45 years with the first 20 years mandatory. According to my prison status sheet I now have a natural life sentence and my earned good time credits have been terminated. I know that this is an issue currently being addressed by others in the judicial system as far as the legality of the classification of my sentence. Therefore, until that matter is resolved, I must address you about my natural life sentence, and ask that you please commute it in such a way that I am eligible for release as a result of my past and present earned good time credits earned.

Defendant, at the time he entered the plea, clearly was told that he need serve only 45

[12]Docket Entry No. 87.

years of his sentence; i.e., a life sentence was the equivalent of 45 years and did not mean life. That is an interpretation of 11 *Del. C.* § 4346(c)[13] and § 4348[14] which existed during this era.

After defendant was sentenced, the Truth in Sentencing Act of 1989 ("TIS") revamped the sentencing laws. *See* 67 *Del. Laws*, c. 130 (1989). Pursuant to TIS, "a sentence to level V incarceration for any crime committed after June 29, 1990, is no longer subject to the parole provisions of Section 4346. *See* 11 *Del. C.* §§ 4205(j), 4354." *Jackson v. Multi-Purpose Criminal Justice Facility*, 700 A.2d 1203, 1206 n. 6 (Del. 1997) ("*Jackson*"). TIS, in particular, 11 *Del. C.* § 4348, allowed for conditional release for those defendants sentenced for crimes committed after June 29, 1990.

After the enactment of TIS, various sentenced defendants raised issues as to whether their "life" sentences actually meant life or whether they meant 45 years. If the latter, then the defendant would be released in 45 years and would acquire credit time against that 45 year period so that he or she could be conditionally released before the end of 45 years. It is necessary to review the various decisions which lead to the conclusion that a defendant such as Duffy must spend the rest of his life in prison unless he is paroled.

The first case is *Jackson.* The question was whether Glenn Jackson, who was serving two life sentences (one for first degree kidnaping and one for first degree rape) with the possibility of

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[13]See page 5, *supra* for text of statute.

[14]In 11 *Del. C.* § 4348, it was provided in pertinent part:

> A person having served that person's term or terms in incarceration, less such merit and good behavior credits as have been earned, shall, upon release, be deemed as released on parole until the expiration of the maximum term or terms for which the person is sentenced.

parole, was entitled to conditional release by DOC under 11 *Del. C.* § 4348. The Supreme Court ruled that the language of 11 *Del. C.* § 4348 did not incorporate § 4346(c)'s definition of a life sentence as a fixed term of 45 years and thus, those serving life sentences were precluded from qualifying for early release.

Then came the decision in *Crosby v. State,* 824 A.2d 894 (Del. 2003) ("*Crosby*"). Crosby, who committed his crimes in 2001 and pled guilty in 2001, was given a life sentence under TIS. To reach the ultimate issue of whether the sentence was grossly disproportionate to the severity of his offense and therefore prohibited by the Eighth Amendment, the Supreme Court had to determine whether Crosby's life sentence as an habitual offender under section 11 *Del. C.* § 4514(a) meant "for his natural life" with no possibility of reduction or release prior to death or whether it meant "45 years" and consequently, was subject to conditional release. The Supreme Court held "that section 4348 incorporates section 4346(c)'s definition of a life sentence as a fixed term of 45 years. To the extent that *Jackson* is inconsistent with this opinion, it is overruled." *Crosby v. State*, 824 A.2d at 899. The Supreme Court also stated:

> **The enactment of section 4381(a) reflects the General Assembly's understanding, consistent with our holding in this opinion, that prior to the Truth-in-Sentencing Act, a *life sentence* for Class A felonies was considered to be a term of *45 years* under section 4346(c) and subject to conditional release pursuant to section 4348.** By eliminating parole completely and then eliminating good time credit that would lead to conditional release for class A felonies, the General Assembly intended that a life sentence for class A felonies would no longer be considered a term of 45 years but would, in fact, be a natural life sentence. [Italics in original; bold emphasis added.]

Id. at 900.

The Supreme Court issued two opposing decisions on the issue in the case of *State of Delaware v. Ward T. Evans.* It withdrew its first decision. That decision, however, is pertinent

and may be located at *Evans v. State*, 2004 Del. LEXIS 545 (Nov. 23, 2004) ("*Evans I*").

Ward T. Evans ("Evans") was convicted, in 1982, of rape in the first degree and was sentenced to life with the possibility of parole. Evans' inmate status sheet did not set forth a conditional release date; instead, it provided that his maximum release date was "death" and his maximum sentence, less good time, was "life." He was denied parole. He filed a motion with the Superior Court, arguing that his sentence was illegal. He argued that pursuant to *Crosby v. State, supra*, DOC had to calculate his sentence as a 45-year term for purposes of determining his qualification for conditional release.

In *Evans I*, the Supreme Court ruled that *Crosby* controlled and thus, Evans was serving a 45 year sentence subject to conditional release. The Court limited this holding to crimes committed before June 30, 1990, the effective date of TIS. *Evans I.*

However, the decision did not end the matter. The State, which initially supported Evans' argument, changed its position on the issue. The Supreme Court withdrew *Evans I* and issued a second decision in the matter, *Evans v. State*, 872 A.2d 539 (Del. 2005) ("*Evans II*"). In *Evans II*, the Supreme Court concluded that it had rendered over broad statements in *Crosby*; *Crosby* did not apply to Evans' situation; and *Jackson* controlled. It held that a life sentence for anyone sentenced before TIS means the sentence is for the balance of that person's life; the sentence must be served unless the defendant is paroled; the "life" term does not mean 45 years; and the defendant is not entitled to conditional release.

Since *Evans II*, numerous affected inmates have sought a review of their sentences, all to no avail: *Nash v. State*, 886 A.2d 1278, 2005 WL 2662770 (Del. Oct. 17, 2005)(Nash, who pled guilty, in 1983, to rape in the first degree and other counts, was sentenced to life imprisonment

with the possibility of parole after 20 years, was denied his writ of habeas corpus because, based on *Evans II*, he was not entitled to conditional release); *Weaver v. State*, 903 A.2d 323, 2006 WL1911330 (Del. July 10, 2006) (The Supreme Court held *Evans II* controlled Weaver's life sentence for rape in the first degree and kidnaping in the first degree, denying Weaver's motion to correct an illegal sentence pursuant to Rule 35 (a)); *Shockley v. Carroll,* 489 F. Supp.2d 397 (D. Del. 2007) (The District Court ruled *Evans II* did not constitute an ex post facto violation nor did a termination of his good time and merit credits and, in turn, an increase in his punishment constitute violations of his rights to due process and to equal protection); *Ricketts v. State*, 945 A.2d 1168, 2008 WL 697594 (Del. March 17, 2008) (The Supreme Court ruled that Ricketts, who was convicted in 1983 of first degree rape and was sentenced to life imprisonment, was not entitled to a correction of his "illegal" sentence because *Evans II* did not create an ex post facto issue since he never was entitled to conditional release); *State v. Serfuddin El*, 2009 WL 74128 (Del. Super. Jan. 7, 2009) (The Superior Court ruled defendant's argument that he was sentenced to 45 years imprisonment and told that after serving 12 years, he would be eligible to apply for parole constituted an attack on the legality of his sentence, not an attack on his conviction and was belied by the actual sentence to life imprisonment); *Evans v. Phelps*, 722 F. Supp.2d 523 (D. Del. July 13, 2010) (ruling defendant's argument that *Evans II* was unforeseeable and thereby violated his Due Process rights was meritless).

The case of *Jackson v. State* is most applicable to Duffy's case. Craig Jackson previously had argued that his trial counsel was ineffective when he failed to inform him that he would be serving a mandatory life sentence upon pleading guilty in 1987 to unlawful sexual intercourse in the second degree. The Supreme Court ruled that argument was meritless because everyone

stated on the record that he was to receive a life sentence. *Jackson v. State*, 548 A.2d 778, 1988 WL 93402 (Del. 1988).

Jackson later filed a motion seeking to withdraw his guilty plea; alternatively, he asked the Court to vacate his mandatory life sentence. He claimed trial counsel was ineffective and *Evans II* violated his due process rights. *State v. Jackson*, 2008 WL 1891712 (Del. Super. April 30, 2008).

The Superior Court dismissed his ineffective assistance of counsel claim as having been decided previously. As to his claim that *Evans II* unforeseeably enhanced his life sentence, the Superior Court ruled that Rule 61's three year time bar prohibited the claim filed 21 years later. It further ruled that defendant failed to establish the interest of justice exception because he failed to show that "'subsequent legal developments have revealed that the trial court lacked authority to convict or punish him.'" *Id.* at *1. The Court further ruled that *"Evans* is not a new retroactive right for the purposes of Rule 61(i)(1) because it was decided more than three years ago." *Id.* at *1.

The Supreme Court reviewed the Superior Court's decision in *Jackson v. State*, 962 A.2d 917, 2008 WL 4892732, *1 (Del. Nov. 12, 2008) and ruled:

> The postconviction motion, filed nearly twenty years after Jackson's conviction became final, is time-barred unless he can assert a retroactively applicable right that is newly recognized or can demonstrate a miscarriage of justice because of a constitutional violation. Jackson can do neither. Jackson was sentenced to a life sentence with the possibility of parole not "a sentence of forty-five years" as he argues. The *Evans* decision, which clarified whether an inmate who receives a paroleable life sentence is eligible for conditional release, did not serve to enhance Jackson's sentence. Reconsideration of Jackson's formerly adjudicated ineffective assistance of counsel claim is not warranted in the interest of justice. FN 13. [All other citations and footnotes omitted.]
>
> FN 13. Both this Court and the District Court have rejected contentions that the *Evans* decision had the effect of retroactively increasing a prisoner's sentence. *See Shockley v. Carroll*, 489 F.

Supp. 2d 397 (D.Del. 2007) ...; *Evans v. State*, 2005 WL 5118396 (Del. Supr.); *Nash v. State*, 2005 WL 2662770 (Del. Supr.).

Thus, based upon all of the decisions set forth above, I conclude that no procedural basis exists, either pursuant to Rule 35 or Rule 61, supporting Duffy's pursuit of this issue. His Rule 61 motion is procedurally barred.[15] The claim is time-barred. He should have asserted his claim within 3 years of the issuance of *Evans II* in 2005. He knew, at that point, that DOC considered his sentence to be one for life. Even if the Court ignored this fact and considered June 5, 2008,[16]

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[15]Rule 61 provides in pertinent part as follows:

> (i) Bars to relief. (1) Time limitation. A motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.
> (2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.
> (3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows:
> (A) Cause for relief from the procedural default and
> (B) Prejudice from violation of the movant's rights.
> (4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.
> (5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall 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.

[16]See page 8, *supra*, describing the contents of the June, 2008 pardon request wherein defendant details his knowledge that his sentence is for life.

to be the time when defendant definitively was aware of the case law and its effect on his sentence, his claim still is time-barred. Defendant has failed to show that an exception to that bar exists. He has failed to show 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. Rule 61(i)(5). *Jackson v. State*, 962 A.2d. Thus, defendant's claim based upon the length of his sentence is denied.

Defendant's other argument, that the trial court did not explain the elements of rape to him, also is barred procedurally. It is time-barred and it is barred because defendant should have raised it in previous postconviction motions but did not. Defendant has failed to show that the bars of Rule 61(i)(1) and (2) might not apply either because the Court lacked jurisdiction or because he has 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 or because the interest of justice requires consideration of the issue. Rule 61(i)(2) and (5).

Because the Court was able to address this matter on the record before it, no need exists for the appointment of counsel. That request is denied, also.

For the foregoing reasons, the Court denies defendant's pending motions.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Department of Justice
Public Defender's Office