

**SUPERIOR COURT  
OF THE  
STATE OF DELAWARE**

**RICHARD F. STOKES**  
*JUDGE*

**SUSSEX COUNTY COURTHOUSE**  
**1 THE CIRCLE, SUITE 2**  
**GEORGETOWN, DE 19947**  
**TELEPHONE (302) 856-5264**

November 7, 2012

John M. Franklin  
SBI# 2  
SCI  
P.O. Box 500  
Georgetown, DE 19947

RE: *State of Delaware v. John M. Franklin*, Def. ID# 0304010407C (R-3)

DATE SUBMITTED: October 25, 2012

Dear Mr. Franklin:

Pending before the Court is the third motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61") which defendant John M. Franklin ("defendant") has filed in this matter.

I set forth the correct factual and procedural scenarios below because defendant's motion contains misstatements and/or misunderstandings of the actual facts.

In April, 2003, defendant was arrested on three separate cases at about the same time. He was arrested, on April 15, 2003, on a charge of driving under the influence of alcohol in what was originally identified as Case ID# 0304010069. Also, on April 15, 2003, he was arrested on the following charges in Case ID# 0304010407: rape in the first degree causing injury (5 counts);

terroristic threatening; and endangering the welfare of a child. Then, on or about April 18, 2003, he was arrested on charges of unlawful sexual contact in the third degree (2 counts) and sexual harassment in what was originally identified as Case ID# 0304012439.<sup>1</sup>

The driving under the influence arrest occurred at 11:00 a.m. on April 15, 2003. Defendant did not take another drink after 8:45 a.m.<sup>2</sup> Defendant's BAC reading at 11:51 a.m. was .105.<sup>3</sup> At 5:26 p.m. on April 15, 2003, Detective Laurence D. Corrigan of the Delaware State Police interviewed defendant. The tape recording establishes the following.<sup>4</sup> The first thing Detective Corrigan did was to read defendant each of his *Miranda*<sup>5</sup> rights. He asked defendant if he understood them and defendant replied that he did. He asked defendant if he wished to speak to him at that time and defendant replied that he did. Detective Corrigan then explained that defendant's wife had made serious allegations against defendant, alleging defendant had sexually assaulted her. Detective Corrigan then questioned defendant regarding the matter. Defendant

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<sup>1</sup>As will be explained in more detail in this decision, these cases were consolidated and then severed back into their original groupings. That situation has resulted in the docketing of some items pertinent to this decision in a case other than this one. To make a complete record in this case, the Court is ordering that certain documents be docketed in this case, also. Furthermore, the Court will send defendant a copy of each affected document.

<sup>2</sup>Defendant appeared at Probation & Parole at approximately 8:45 a.m. He stayed at probation until a State Policeman arrived and took him into custody, after which he was arrested for driving under the influence of alcohol. Transcript of Proceedings in *State v. Franklin*, Def. ID# 0304010407A, at A-72 – A-114; A-123- A-164. He also was arrested that day on the charges of rape, terroristic threatening, and endangering the welfare of a child.

<sup>3</sup>*Id.* at A- 146-47.

<sup>4</sup>The audiotope is the State of Delaware's Exhibit #15 in the case of *State v. Franklin*, Def. ID# 0304010407C.

<sup>5</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

clearly answered the questions. There was absolutely no slurring on his part or any indication that he was under the influence of alcohol, which was a physical impossibility at that point, anyway. Thus, defendant's assertions in the pending Rule 61 motion that he was not given his *Miranda* warnings or that he was under the influence of alcohol at the time of this interview are factually incorrect.

Arraignment on the charges of unlawful sexual contact in the third degree (2 counts) and sexual harassment was scheduled for April 21, 2003, while the preliminary hearings on the other two sets of charges were scheduled for April 23, 2003. Defendant waived his preliminary hearings in the two felony cases and agreed that the matters could proceed by information rather than indictment.<sup>6</sup> The written waiver does not appear in any of the files. However, the transcript of the April 23, 2003 proceedings evidences defendant waived proceeding by indictment. He did that so that he could receive copies of the police reports more rapidly than he otherwise would have. The State of Delaware ("the State") provided defense counsel with copies of the various police reports on the same day as it filed the information, which was June 10, 2003.<sup>7</sup> Thus, although the written waiver cannot be located in any of the files, I find as an undisputed fact that

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<sup>6</sup>Docket Entry 103. This docket entry is the transcript evidencing that waiver, a copy of which is being provided to defendant. In Superior Court Criminal Rule 7(b), it is provided:

*Waiver of indictment.* An offense within the exclusive jurisdiction of Superior Court other than a capital crime may be prosecuted by information if the defendant, after having been advised of the nature of the charge and of the rights of the defendant, waives in writing or in open court prosecution by indictment.

<sup>7</sup>Docket Entry No. 2 in Def. ID#s 0304010407 and 0304012439 and Docket Entry No. 3 in Def. ID# 0304010069. This information may be found at Docket Entry No. 2 in the case of *State v. Franklin*, Def. ID# 0304010407A. It now is docketed in this case and defendant is being sent a copy of it.

defendant waived his right for the matter to proceed by indictment.

An information and an indictment must meet the same requirements, as set forth in Superior Court Criminal Rule 7( c):

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney general. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

The only difference between these charging documents is the entity issuing them; the Grand Jury issues an indictment while the Attorney General issues the information. Thus, contrary to defendant's apparent belief, there is no requirement that the language or information in an indictment be any different from that contained in an information.

The June 10, 2003, information contained all the charges from the three above-mentioned sets of charges: rape in the first degree (Counts 1-5); terroristic threatening (Count 6); endangering the welfare of a child (Count 7); driving under the influence (Count 9); unlawful sexual contact in the third degree (Counts 10 and 11); and sexual harassment (Count 12).<sup>8</sup> All of these charges were filed in Case ID# 0304010407 and the other two case files were closed. As noted earlier, on that same date, the Attorney General's office provided trial counsel with copies of the police reports. Thus, defendant received the benefit of his waiver.

On August 12, 2003, trial counsel filed a motion for a Bill of Particulars regarding all of

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<sup>8</sup>There was no Count 8.

the counts of the information except for that of driving under the influence.<sup>9</sup> The Court ruled as follows:<sup>10</sup>

The defendant's motion for a Bill of Particulars is granted in part and denied in part.

Pursuant to Superior Court Criminal Rule 7(f), a defendant may request a Bill of Particulars. "A Bill of Particulars serves to provide notice supplemental to information contained in the indictment." That is *Lovett v. State*, 516 A.2d 455, Page 467, a Delaware Supreme Court case of 1986.

The purpose of a Bill of Particulars is to protect the defendant against surprise during the trial, and to preclude a second prosecution for an inadequately-described offense. However, the State does not need to specify how it will attempt to prove the crimes charged or the precise manner in which the crimes alleged in the indictment were committed.

"An indictment is sufficient if it contains a plain statement of the essential facts constituting the offense charged." *Corbin v. State*, 711 A.2d 1227, State of Delaware Supreme Court case, 1998. "The Bill of Particulars clarifies gaps in the indictment to enable the defendant to develop a defense." *State v. Bittenbender*, Delaware Superior Court, Criminal Action No. IN-01-03-0569, Judge Del Pesco, June 25, 2001.

The Court, of course, exercises broad discretion in determining whether to grant or deny a motion for a Bill of Particulars. Here, the defendant seeks the date and location of the alleged rape and the nature of the physical injury in Counts 1 through 5 of the indictment.

The defendant also seeks the date and location of the alleged threat and the identify of the victim in Count 6 of the indictment. The defendant further requests the date and location of the alleged offense and the identity of the violent felony witnessed by the victim in Count 7 of the indictment.

The defendant also seeks the date and nature of the alleged conduct; whether the conduct was sexual contact or the causing of sexual contact with either a victim or a third person; whether the conduct occurred with the actor's knowledge that it was offensive to the alleged victim or occurred without the alleged victim's consent; and the identity of the alleged victim in Counts 10 and 11 of the indictment.

Although the indictment does not contain specific dates in Counts 1 through 7, it

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<sup>9</sup>This motion is located at Docket Entry No. 8 in Def. ID# 0304010407A. A copy thereof has been docketed in this case and another copy has been sent to defendant.

<sup>10</sup>The Court uses the term "indictment" when referring to the information. Since the requirements of the documents are the same, the use of the word "indictment" rather than "information" is irrelevant.

does state that the offenses occurred between April 11<sup>th</sup> and April 15<sup>th</sup>, 2003. “The State is not required to disclose the precise date where the date is not an essential element of the offense.” That is, of course, *State v. Bittenbender*.

Here, the date of the offense is not an essential element of the crimes of first-degree rape, terroristic threatening, or endangering the welfare of a child. Further, despite the defendant’s request, a specific date has been provided in Counts 10 and 11 of the indictment.

“The State is not required to state the precise manner in which the alleged crimes were committed.” That, of course, is *Lovett v. State*. Thus, the State is not required to provide the location of the alleged rape and the nature of the physical injury in Counts 1 through 5. Nor is the State required to provide the location of the alleged threat in Count 6 or the location where the child witnessed the felony in Count 7.

In addition, since the nature of the violent felony is not an essential element of the endangering the welfare of a child, the State need not specify the specific felony. “A Bill of Particulars cannot be used as a substitute for discovery.” Of course, that is *State v. Bittenbender*.

The information contained in Counts 10 and 11 is also sufficient in describing the nature of the offense, as the indictment tracks the language of the statute and does not leave out any essential elements of the offense. Moreover, the affidavit of probable cause states in further detail the date, location, and the nature of the alleged offense.

However, the State should provide the name of the alleged victim of the threat in Count 6. Although there is an affidavit of probable cause which I believe identifies the victim, out of an abundance of caution, I would ask the State to identify the victims in Counts 6, 10 and 11.

“This information is necessary for the defendant to be aware of the nature of the charges to be able to prepare an adequate defense.” *Lovett v. State*. The Bill of Particulars is granted in part and denied in part.<sup>11</sup>

Trial counsel successfully moved to sever the combined charges back to their original state so that the prosecution proceeded in the original groupings. The driving under the influence charge came to be identified as Def. ID# 0304010407A, the unlawful sexual contact in the third degree counts and the sexual harassment count came to be identified as Def. ID# 0304010407B, and the remaining counts came to be identified as Def. ID# 0304010407C.

Defendant was found guilty of the driving under the influence charge. He was found not

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<sup>11</sup>Transcript of October 27, 2003, Proceedings at A-5 - A-9 (Docket Entry No. 36).

guilty of the charges of unlawful sexual contact and sexual harassment. He was found guilty as charged on each of the rape first counts, the terroristic threatening count, and the endangering the welfare of a child count. Of course, the convictions in this last set of charges are the subject of this Rule 61 motion.

After his conviction, defendant appealed to the Delaware Supreme Court. The Supreme Court affirmed the judgment of the Superior Court.<sup>12</sup> The issues defendant raised on appeal were:

1) The trial court erred in failing to *sua sponte* exclude the SANE nurse's opinion testimony;

2) The admission of the following evidence unfairly prejudiced him:

- a) 1988 assault of his wife;
- b) his alcohol consumption;
- c) his viewing pornographic movies; and

3) The repeated references to defendant calling his wife's boyfriend by a racist name.

Soon thereafter, defendant filed his first motion for postconviction relief. The Superior Court denied that motion and the Supreme Court affirmed that denial.<sup>13</sup> The issues raised in the first postconviction motion were:

1) The trial judge's "failure" to recuse himself;

2) Trial counsel was ineffective because she

- 1) failed to object to defendant's immediate sentencing,

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<sup>12</sup>*Franklin v. State*, 869 A.2d 327, 2005 WL 528674 (Del. March 2, 2005) (TABLE).

<sup>13</sup>*State v. Franklin*, 2005 WL 3193713 (Del. Super. Nov. 29, 2005), *aff'd*, 901 A.2d 119, 2006 WL 1374675 (Del. May 17, 2006) (TABLE).

- 2) failed to offer mitigating evidence at the sentencing, and
- 3) failed to move that the trial judge recuse himself.

On appeal, defendant argued the trial court abused its discretion when deciding the ineffective assistance of counsel claims without an affidavit from trial counsel and without conducting a hearing on the reasonableness of her representation. The Supreme Court disagreed.<sup>14</sup> Defendant filed a second motion for postconviction relief in 2007. The Superior Court denied the motion on the ground the claims were procedurally barred and defendant had not overcome the bars, and the Supreme Court affirmed that decision.<sup>15</sup> The issues raised were:

- 1) Prosecutorial misconduct by
  - a) impermissibly commenting on defendant's exercise of his Fifth Amendment right not to testify;
  - b) failing to disclose potentially exculpatory evidence; and
  - c) misstating the law to the jury.
- 2) Trial counsel was ineffective for
  - a) failing to have the victim tested for herpes;
  - b) failing to consult with defendant about the testimony of a defense expert;
  - c) failing to cross-examine the victim on the effects of drugs she was taking on her ability to perceive and recollect defendant's

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<sup>14</sup>*Franklin v. State*, 2006 WL 1374675, \* 2.

<sup>15</sup>*State v. Franklin*, 2007 WL 2823328 (Del. Super. Sept. 26, 2007), *aff'd*, 956 A.2d 642, 2008 WL 361143 (Del. Feb. 12, 2008) (TABLE).



actions; and

d) failing to cross-examine the victim about her prior consensual sexual acts with defendant.

Defendant thereafter took his case to the federal courts. He filed a petition seeking a writ of habeas corpus. The District Court ruled he was not entitled to relief and that the decision was not an appealable one.<sup>16</sup> In rendering its decision, the District Court addressed a number of issues.

The District Court addressed whether defendant's trial was fundamentally unfair when the trial court did not *sua sponte* disallow the testimony of the SANE nurse. It ruled the claim that the admission of prior bad acts<sup>17</sup> violated due process was procedurally barred, and in any case, lacked merit. It concluded that the Delaware Supreme Court had ruled that defendant had no federal or state due process claims regarding the contention the prosecutor injected an improper racial element in the trial. The District Court agreed with the Delaware Supreme Court's ruling on the federal due process claim.

The ineffective assistance of counsel claims the District Court reviewed were:

- 1) trial counsel did not move for the trial judge's recusal;
- 2) trial counsel failed to present mitigating evidence that defendant was mentally slow;
- 3) trial counsel did not object to defendant's immediate sentencing; and
- 4) trial counsel failed to effectively cross-examine the SANE nurse.

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<sup>16</sup>*Franklin v. Phelps*, 2009 WL 3831375 (D. Del. Nov. 16, 2009).

<sup>17</sup>The prior bad acts were a previous assault on the victim in 1988, defendant's drinking history, and defendant's viewing of pornographic movies.

The District Court ruled that ground 4) of the ineffective assistance of counsel claims was procedurally barred for federal habeas corpus purposes. It held: “Franklin has not indicated that his default should be excused in order to avoid a miscarriage of justice, because he has not provided any reliable evidence of his actual innocence.”<sup>18</sup> As to the first three claims, the District Court ruled that the Delaware Supreme Court reasonably applied *Strickland*<sup>19</sup> in denying these ineffective assistance of counsel claims.

Defendant’s final claim before the District Court was that the Superior Court erred by not requiring defense counsel to file a Rule 61 affidavit responding to his assertions of ineffective assistance of counsel. The District Court held the only reviewable argument was that the Delaware Supreme Court unreasonably applied *Strickland* in denying his complaint regarding Superior Court’s failure to require an affidavit or hold a hearing. The District Court stated:

To begin, although the Delaware Supreme Court has opined that it is preferable if the Superior Court obtains a defense counsel's explanations in response to a petitioner's ineffective assistance allegations, there is no requirement under Delaware Superior Court Criminal Rule 61(g)(2) for defense counsel to submit an affidavit in every collateral proceeding. *See e.g. Comeger v. State*, 977 A.2d 898 (Table), 2009 WL 2426135 (Del. Aug.10, 2005). In fact, the Superior Court can summarily dismiss a Rule 61 motion when it plainly appears from the Rule 61 motion and the record that the petitioner is not entitled to relief. *See Del.Super. Ct.Crim. R. 61(d)(4)*.

Moreover, there is no United States Supreme Court precedent requiring state courts to automatically order attorneys to file responses to every ineffective assistance of counsel allegation. In addition, pursuant to *Strickland*, the performance component of the two-pronged *Strickland* test need not be addressed first if “it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice.” *Strickland*, 466 U.S. at. 697. As explained by the *Strickland* Court,

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<sup>18</sup>*Franklin v. Phelps*, 2009 WL 3831375, \* 11.

<sup>19</sup>*Strickland v. Washington*, 466 U.S. 668 (1984) (“*Strickland*”).

actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial.... Even if a defendant shows that particular errors of counsel were unreasonable, [ ] the defendant must show that they actually had an adverse effect on the defense.... [A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

*Strickland*, 466 U.S. at 693, 696. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

In Franklin's Rule 61 proceeding, the Superior Court presumed that counsel performed deficiently, and denied Franklin's ineffective assistance of counsel claim because Franklin failed to establish prejudice. In affirming the Superior Court's denial of the instant claim, the Delaware Supreme Court explained that,

[w]hen considering Franklin's ineffective assistance of counsel claim, the trial judge assumed for the purpose of the argument that counsel's representation was unreasonable. Given that assumption, neither an affidavit nor a hearing was necessary.”

*Franklin*, 2006 WL 1374675, at \*2.

In this proceeding, Franklin has not provided any indication that counsel's responses in a Rule 61 affidavit, or in an evidentiary hearing, would have helped to demonstrate prejudice under *Strickland*. Accordingly, to the extent claim five is cognizable on habeas review, the court concludes that the claim does not warrant relief because the Delaware Supreme Court's decision did not involve an unreasonable application of *Strickland*.<sup>20</sup>

The District Court, on September 22, 2010, denied defendant's motion to reargue which defendant based upon his assertion he was innocent.<sup>21</sup>

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<sup>20</sup>*Id.* at \*\* 15-16.

<sup>21</sup>*Franklin v. Phelps*, 2010 WL 3791972 (D. Del. Sept. 22, 2010).

On October 14, 2011, the Delaware Supreme Court dismissed defendant's motion for a writ of prohibition, wherein he asserted that no indictment was filed and he never waived the right for the State to proceed by indictment, on the ground that defendant was seeking an inappropriate remedy where a final judgment had been issued.<sup>22</sup>

Defendant filed another petition with the United States District Court seeking a writ of habeas corpus. The issues he raised were ineffective assistance of counsel, insufficient indictment, the State's repetitive counts of the same charge violated his constitutional rights, and prosecutorial misconduct. The District Court dismissed the writ for lack of jurisdiction, ruling that defendant could have asserted his grounds in the first petition but did not. Thus, he was not able to file it without first obtaining permission from the Third Circuit Court of Appeals.<sup>23</sup>

In 2012, defendant filed with the Delaware Supreme Court a petition seeking a writ of certiorari, challenging his convictions on the grounds that the information filed against him was defective and the State withheld evidence. The Supreme Court dismissed the petition, stating:

Both of these claims could have been raised on direct appeal or in any of his prior postconviction petitions. A petitioner who has or had an adequate remedy in the appellate process may not invoke the original jurisdiction of this Court through the writ process as a means to argue issues that were or could have been considered on direct appeal. Because Franklin has failed to establish that his petition involves a question of grave public policy and interest for which there was no other basis for review, we conclude that his petition must be dismissed. [Footnotes and citations omitted.]<sup>24</sup>

On August 2, 2012, defendant filed his third motion for postconviction relief, and I turn

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<sup>22</sup>*In re Franklin*, 31 A.2d 75, 2011 WL 4908352 (Del. Oct. 14, 2011).

<sup>23</sup>*Franklin v. Johnson*, 2012 WL 37367 (D. Del. Jan. 6, 2012).

<sup>24</sup>*In re Franklin*, 47 A.3d 971, 2012 WL 2466973 (Del. June 27, 2012) (TABLE).

to that motion.

In his motion, defendant asserts new evidence establishes the State withheld evidence of the victim's mental disorders for which she could have been impeached. This "new evidence" allegation should have been brought pursuant to a motion for a new trial within two years after the judgment was final on March 2, 2005.<sup>25</sup> This allegation, which is extremely vague and completely unsupported, is time-barred and denied.

I turn to the true postconviction claims. I set forth defendant's claims as I understand them. Defendant has the burden to make his claims clear. If I do not set forth his claims as he thinks they should be, that means defendant failed to establish his claim with clarity.

\* Defendant alleges constitutional violations based on the following assertions:

- The State proceeded by information rather than indictment;
- *Miranda* warnings were not given to him;
- He was impaired at the time he was interviewed;
- The prosecutor, in charging him, violated the multiplicity doctrine;
- The prosecutor alleged a "gesture" could be interpreted as a threat in support of a violation of 11 *Del. C.* § 621(a)(1) and this due process violation stemmed from a fraudulent scheme by the State to obtain a conviction without proof beyond a reasonable doubt;
- The victim was not identified in the terroristic threatening count. As noted

earlier, this Court, in addressing the motion for a Bill of Particulars, required the State to identify the victim and the victim was identified. The Court will not deal with this factually meritless

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<sup>25</sup>Super. Ct. Crim. R. 33.

contention any further.

\* He asserts the prosecutor was aware of these various violations and 1) violated *Brady*<sup>26</sup> by not informing the defense of these violations, and 2) committed prosecutorial misconduct in proceeding with the case in light of these constitutional violations.

\* He asserts trial counsel was ineffective for not raising the above-listed constitutional issues and taking appropriate steps regarding them.

\* He asserts trial counsel was ineffective for failing to investigate:

- 1) the victim's history of mental illness;
- 2) the status of their marriage;
- 3) the victim's affair with another male;
- 4) qualifications of expert witnesses;
- 5) the State's arrest and investigations;
- 6) the State's lack of evidence; and
- 7) the lack of a signed complaint to give cause for police to arrest

defendant. No requirement exists that a complaint must be signed by a victim in order for an arrest to occur. This contention is so legally frivolous and meritless that it does not bear further discussion.

\* He argues trial counsel was ineffective for failing to move for acquittal on all charges on a showing that proof at trial varied from what was charged.

\* He asserts trial counsel was ineffective for not moving to suppress the child's statement on hearsay grounds because she was asleep.

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<sup>26</sup>*Brady v. Maryland*, 373 U. S. 83 (1963) ("*Brady*").

\* Defendant attacks the proceedings, arguing they were defective because an indictment listing the essential elements of rape first, terroristic threatening, and endangering welfare of a child did not exist.

\* He asserts trial counsel was ineffective for failing to move to dismiss, pursuant to Rule 12(b)(2), on the grounds the charging instrument was ambiguous and indefinite and the “information” failed to list essential elements of crimes to inform defendant as to what he must defend.

\* He argues the X-rated tapes should have been suppressed and the State should not have considered them as evidence in support of the charges.

\* He argues trial counsel was ineffective for failing to object to the admission of these tapes. This contention is incorrect because trial counsel did object to the admission of the X-rated videos.<sup>27</sup> Thus, this contention bears no further consideration.

\* He asserts the trial court committed plain error in not requiring trial counsel to respond to previous Rule 61 ineffective assistance of counsel allegations.

\* He maintains the Superior Court lacked jurisdiction over the terroristic threatening charge as well as the endangering the welfare of a minor charge as they are misdemeanor charges over which Family Court has jurisdiction.

\* He maintains trial counsel was ineffective for failing to file a motion regarding lack of jurisdiction.

\* He vaguely asserts that by not identifying the “violent felony” in the information, there was an overwhelming abuse of the criminal system and cause exists to vacate convictions and

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<sup>27</sup>Transcript of Feb. 9, 2004 Proceedings at A-75; A-76, A77-79 (Docket Entry No. 47).

sentences for such charges.

\* He argues the following episodes of ineffective assistance of counsel:

- She failed to move to acquit because of a variance between the information and proof at trial;
- She failed to plead double jeopardy at sentencing for repetitive charges lacking independent proof at trial; and
- She failed to raise these issues on appeal.

Defendant asserts that the exceptions in Rule 61 are met by misconduct of the prosecutor, the court's abuse of discretion, and ineffective assistance of counsel in that these events caused the proceedings to have been unfair and thereby, fulfill the "interest of justice" exception. He further argues: "Colorable claims of due process violations caused by State's fraud before the trial that went unchallenged by defense counsel, resulting in erroneous finding of guilt, requires dismissal of all convictions in the interest of justice." He also attempts to establish the application of the miscarriage of justice exception with regards to what he considers to be defects in the information.

When defendant was convicted, the applicable provision of Rule 61(i) provided:

*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.

Defendant's conviction became final as of March 2, 2005. He filed his current motion seven (7) years and five (5) months after his convictions became final. Thus, the motion is time-barred.<sup>28</sup>

All of defendant's claims, except for the ineffective assistance of counsel claims, should have been asserted in the proceedings leading to the judgment of conviction and they are barred unless defendant shows cause for relief from the procedural default and prejudice from the violation of his rights.<sup>29</sup> Defendant has not even attempted to assert any cause for relief from the procedural default. Merely asserting prejudice is not sufficient. Thus, these claims are procedurally barred pursuant to Rule 61(i)(3).

All of defendant's claims, including the ineffective assistance of counsel claims, should have been raised in the previous two Rule 61 motions he filed and consequently, they all are barred pursuant to Rule 61(i)(2) unless defendant establishes the "interest of justice" exception.<sup>30</sup> To invoke that exception,

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<sup>28</sup>Rule 61(i)(1).

<sup>29</sup>Rule 61(i)(3).

<sup>30</sup>The "interest of justice" exception in Rule 61(i)(2) is the same as in Rule 61(i)(4). *State v. Travis*, 2008 WL 308485, \*2 (Del. Super. Feb. 4, 2008).

a movant must show that (1) subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him, (2) the previous ruling was clearly erroneous, or (3) there has been an important change in the factual basis for issues previously posed. [Footnotes and citations omitted.]<sup>31</sup>

Defendant has not shown, nor has he attempted to show, the existence of any of the three factors entitling him to relief under the “interest of justice” exception.

Many of defendant’s claims have been adjudicated previously and are barred.<sup>32</sup> The procedural recitation above establishes that this Court, the Supreme Court, and the District Court previously ruled on a multitude of his ineffective assistance of counsel claims which he again pursues here. In addition, defendant’s argument regarding the suppression of the pornographic movies was previously addressed. Defendant’s claim that the Superior Court erred in not requiring affidavit of trial counsel was formerly adjudicated by the District Court as well as the Delaware Supreme Court. These previously adjudicated contentions may not be considered unless defendant establishes the “interest of justice” exception. He has failed to show the existence of any of the three factors which might allow for a consideration of these previously-adjudicated claims.

Thus, the only exception to the procedural bars left available to defendant is the “miscarriage of justice” exception. In 61(i)(5), it is provided that bars to relief do not apply to claims 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. [Emphasis

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<sup>31</sup>*Guy v. State*, 999 A.2d 863, 868 (Del. 2010).

<sup>32</sup>Rule 61(i)(4).

added.]”

I first examine defendant’s arguments regarding the applicability of the jurisdictional exception.

One of his arguments is that Family Court had exclusive jurisdiction over the terroristic threatening and endangering the welfare of a child charges. That contention is legally meritless. Once this Court has jurisdiction over a case, it has jurisdiction over all charges arising from the incident.<sup>33</sup> Thus, this Court had full jurisdiction over all the charges pursued against defendant. This argument is legally meritless.

Defendant also argues that he was not indicted as he should have been. The facts establish that defendant waived the right to proceed by indictment. He received the benefits of that waiver. This Court had jurisdiction over him by way of the information. Thus, defendant has failed to establish this jurisdictional issue.

Defendant asserts what he considers to be colorable claims that there was a miscarriage of justice because of constitutional violations that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction. This exception is a narrow one.<sup>34</sup> Defendant sets forth a litany of violations he maintains constitute a miscarriage of justice. However, defendant’s assertion that a claim is a colorable one does not render it to be so.

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<sup>33</sup>10 *Del. C.* § 922(d). This statute provides as follows:

(d) Notwithstanding the provisions of (a)(1)-(a)(3), (a)(17) and (a)(20) of this section, if offenses or criminal cases within the exclusive original jurisdiction of Family Court otherwise may be joined properly with a felony within the jurisdiction of Superior Court, such offenses or criminal cases shall be within the jurisdiction of Superior Court.

<sup>34</sup>*Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

Any claims not examined below are deemed, by their omission, not to be worthy of consideration as colorable claims of a miscarriage of justice.

First, defendant attempts to establish the applicability of this exception with regards to the information, asserting numerous defects. In order to meet that exception, **defendant must establish** there was a defect in the indictment or information.<sup>35</sup> However, as this Court ruled, in addressing the Bill of Particulars motion, there were no defects with the information. As the factual recitation set forth above established, the only problem with the information was that Counts 6, 10 and 11 omitted the name of the victim and the Court required the State to provide that information. This problem was cured long before the trial. Defendant's assertions otherwise regarding the sufficiency of the information are factually and legally meritless.

Defendant asserts a multiplicity violation, arguing a single offense was split into multiple charges. However, because each count charged was a separate crime, each was separately punishable, and there was no multiplicity violation.<sup>36</sup> This claim is legally meritless.

Defendant also makes numerous assertions of alleged violations of his constitutional rights which, it turns out, are not true. He maintains he was not read his *Miranda* rights, he was impaired during the interrogation, he did not waive his right to be indicted. None of those allegations are factually true and all arguments based upon them fail, including the prosecutorial misconduct argument and the *Brady* violation argument. He has failed to establish a constitutional violation at all.

Defendant asserts ineffective assistance of counsel claims which bootstrap on all of the

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<sup>35</sup>*Brokenbrough v. State*, 2012 WL 4846539 (Del. Oct. 10, 2012).

<sup>36</sup>*Bowers v. State*, 933 A.2d 1249, 2007 WL 2359553 (Del. Aug. 20, 2007).

these above-noted meritless arguments. To the extent defendant seeks to establish a miscarriage of justice via ineffective assistance of counsel based upon the above-noted meritless arguments, those claims fail.

In sum, defendant's claims in the pending Rule 61 motion are procedurally barred and no exception exists to allow them to be considered. The motion is DENIED.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office  
Adam D. Gelof, DAG  
Carole J. Dunn, Esquire