IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	I.D. No. 011103002
	)	
v.	)	
	)	
GARY W. PLOOF,	)	
	)	
	)	
Defendant.	)	
	)	

Submitted: October 3, 2017
Decided: December 28, 2017

On the State's "Second Motion for Summary Dismissal of Amended Second Post-Conviction Relief Motion." **GRANTED.**

MEMORANDUM OPINION

John Williams, Esquire, Deputy Attorney General, Department of Justice, Dover, Delaware, Attorney for the State.

Herbert W. Mondros, Margolis Edelstein, Wilmington, Delaware, Attorney for Defendant Gary W. Ploof.

COOCH, R.J.

I. INTRODUCTION

Before this Court is the State's Second Motion for Summary Dismissal of Defendant's Amended Second Post-Conviction Relief Motion filed May 23, 2017.[1]

[1] On December 18, 2014, the State filed a "Motion for Summary Dismissal of [Defendant's] Second Postconviction Relief Motion," which latter motion had been filed on November 26, 2014; that Motion for Summary Dismissal was never acted upon by this Court. This motion is the first Motion for Summary Dismissal of Defendant's Amended Second Motion for Post-Conviction

Defendant has filed this Amended Second Motion (amending his Original Second Motion) more than a year after his conviction became final. Thus, it is procedurally barred under Del. Super. Ct. Crim. R. 61(i)(1)&(2). Furthermore, his claim fails to fall into the "actual innocence" exception to the procedural bars pursuant to Del. Super. Ct. Crim. R. 61(d)(2)(i); Defendant has made an insufficient showing "that new evidence exists that creates a strong inference that" he is "actually innocent." This Court has applied the current version of Del. Super. Ct. Crim. R. 61 as amended on June 4, 2014. Accordingly, the State's Second Motion for Summary Dismissal of both 1) Defendant's Amended Second Motion and 2) his Original Second Motion is **GRANTED.**

II. PROCEDURAL HISTORY[2]

The procedural history of this Kent County case provided by the State in its motion for summary dismissal is not contested by Defendant. As such, the procedural history of this case is set forth below *in toto*:

> 1. On June 16, 2003, a Kent County Superior Court jury convicted [Defendant] of the first degree murder of his wife, Heidi Ploof, and possession of a firearm during the commission of a felony. Following a penalty hearing, the jury found 12-0 that the murder was committed for pecuniary gain (a $100,000 life insurance policy on [Defendant's] spouse that went into effect three days before her murder), and also unanimously concluded that the aggravation evidence outweighed the mitigation evidence. After denying a defense new trial motion [*State v. Ploof*, 2003 WL 21999033 (Del. Super. Aug. 20, 2003)], then President Judge Ridgely sentenced Ploof to death. *State v. Ploof*, 2003 WL 21999031 (Del. Super. Aug. 22, 2003) (FINDINGS AFTER PENALTY HEARING).
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> 2. On direct appeal, the Delaware Supreme Court in 2004 affirmed [Defendant's] convictions and death sentence. *Ploof v. State*, 856 A.2 539 (Del. 2004). [Defendant] filed no petition for certiorari review in the United States Supreme Court, but on July 6, 2005, he did file a *pro se* first post-conviction relief motion in this Court. When [prior] post-conviction counsel was subsequently appointed to assist [Defendant], amended post-conviction relief motions were filed

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Relief filed (by new counsel) on May 23, 2017. This Court will refer to Defendant's two second and pending motions for post-conviction relief respectively as Defendant's "Original Second Motion" and "Amended Second Motion."

[2] Relatedly, Defendant also filed a "Motion to Correct/Reduce his Sentence" pursuant to Del. Super. Ct. Crim. R. 35 on July 10, 2017. This Court has today denied that motion. *State v. Ploof*, I.D. No. 0111003002, Cooch, R.J. (December 28, 2017) (ORDER).

in the Superior Court on June 9, 2008 and August 1, 2008. (Docket Items # 237-38, 242, and 252).

3. Pursuant to the provisions of Del. Super. Ct. Crim. R. 61(h), Judge Young [who had been subsequently re-assigned to this case] conducted a 6 day evidentiary hearing on October 26–28, and November 1, 3, and 12, 2010 to consider evidence in support of [Defendant's] post-conviction relief contentions contained in the 2005 first motion and the 2008 amended first motion. (Docket Item # 285). Following post-hearing briefing, Judge Young on January 30, 2012 denied post-conviction relief. *State v. Ploof*, 2012 WL 1413483 (Del. Super. Jan. 30, 2012).

4. The Delaware Supreme Court on June 4, 2013 affirmed the denial of post-conviction relief on the guilt phase claims, but remanded for reweighing of the penalty phase evidence. *Ploof v. State*, 75 A.3d 811 (Del. 2013). This Court submitted its Findings of Facts and Conclusions of Law on Remand on July 15, 2013. *State v. Ploof*, 2013 WL 9916948 (Del. Super. July 15, 2013). Next, on October 13, 2013, the Delaware Supreme Court affirmed the denial of post-conviction relief on the capital penalty phase claims. *Ploof v. State*, 75 A.3d 840 (Del. 2013). The Delaware Supreme Court Mandate was issued on October 4, 2013, following the decision on the guilty phase claims. (Exhibit A).

5. On January 17, 2014, after completion of State collateral review, [Defendant] filed a petition for federal habeas corpus relief in the United States District Court for the District of Delaware. *Ploof v. Coupe*, C. A. No. 13-294-LPS. District Court Judge Stark issued a Stay and Abeyance Order of the federal habeas proceeding on December 15, 2014. (Exhibit B).

6. While the federal habeas petition was pending in the Delaware District Court, [Defendant] on November 26, 2014 filed a second Motion for State post-conviction relief in this Court. (Docket Item # 327). Because this second Rule 61 Motion was procedurally barred as untimely under Del. Super. Ct. Crim. R. 61(i)(1), and as a repetitive motion under Del. Super. Ct. Crim. R. 61(i)(2), as amended effective June 4, 2014, the State on December 18, 2014 moved for summary dismissal of the November 26, 2014 second motion for post-conviction relief. (Docket Item # 331). Although summary dismissal of the November 26, 2014 second motion for post-conviction relief is required by Del. Super. Ct. Crim. R. 61(d)(5) for lack of jurisdiction, this Court has never ruled on the State's December 18, 2014 motion summary dismissal of the second motion for post-conviction relief.

7. Following the State Supreme Court decision in *Powell v. State*, 153 A.3d 69 (Del. 2016), [Defendant's] death sentence for the first degree murder

conviction in IK01-12-0066 was vacated on April 13, 2017, and [Defendant] has been resentenced to natural life for that homicide conviction. (Exhibit C).[3]

III. THE PARTIES' CONTENTIONS

A. The State's Contentions

The State's contentions state as follows:

> 8. Although [Defendant] is no longer a capital defendant, new counsel has filed an amended second motion for post-conviction relief on May 23, 2017 (Docket Item #355). Like the November 26, 2014 original second Rule 61 motion, this 188 page second amended motion[4] is also procedurally barred by Del. Super. Ct. Crim. R. 61(i)(1) as untimely, and by Del. Super. Ct. Crim. R. 61(i)(2) as a second motion. [Defendant] does not meet either exception of Del. Super. Ct. Crim. R. 61(d)(2)(i and ii), and summary dismissal of both the November 26, 2014 original second Rule 61 motion and the May 23, 2017 amended second Rule 61 motion are also procedurally defaulted under Del. Super. Ct. Crim. R. 61(i)(3), if not previously presented, or under Del. Super. Ct. Crim. R. 61(i)(4), if previously adjudicated.[5] After the June 4, 2014 amendment of Del. Super. Ct. Crim. R. 61, the prior "interest of justice" and "miscarriage of justice" exceptions to the procedural bars of Del. Super. Ct. Crim. R. 61(i)(1-4) no longer exist.
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> 9. In an attempt to avoid the procedural bars of Del. Super. Ct. Crim. R. 61(i)(1-4), [Defendant] makes several arguments in his May 23, 2017 amended second motion for post-conviction relief. None of [Defendant's] arguments against application of the procedural bars to the November 2[6], 2014 original Second Rule 61 motion or the May 23, 2017 amended Second Rule 61 motion is meritorious, and both second motions are procedurally barred and must be summarily dismissed. Del. Super. Ct. Crim. R. 61(d)(5).

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[3] State's Mot. at 2-5. The undersigned judge was re-assigned this case on June 20, 2017 due to the retirement of Judge Young.

[4] *See* Table of Contents of Amended Second Motion "I"–"XV" for a summary overview of Defendant's seventy-two present contentions. D.I. 355.

[5] The State has suggested the applicability also of Del. Super. Ct. Crim. R. 61(i)(3), prohibiting any ground for relief not asserted in the proceeding leading to a defendant's conviction, and (4), prohibiting any ground for relief that was formerly adjudicated. State's Mot. at 5. However, rather than advance them as arguments as it did with Del. Super. Ct. Crim. R. 61(i)(1) and (2), the State offers no authority or other argument for their support.

10. . . . By filing a second Rule 61 motion and now an amended second Rule 61 motion, [Defendant] is attempting to prolong his State collateral review and require the unnecessary expenditure of limited judicial resources. [Defendant] had a jury trial in 2003, where the jury rejected his trial testimony that his wife committed suicide. His murder conviction was affirmed on direct appeal in 2004. [Defendant] was afforded an extensive evidentiary hearing of 6 days in 2010 to present numerous post-conviction relief claims. The denial of post-conviction relief by this Court in January 2012 was also affirmed by the [Delaware] Supreme Court in two opinions in 2013. [Defendant] has already had ample opportunity for State collateral review of a crime that occurred in November 2001. It is not an abuse of discretion to summarily deny [Defendant's] attempt to restart the State post-conviction relief process anew a second time.

11. At page 12 of his May 23, 2017 amended Second Rule 61 motion, [Defendant] argues that the version of Del. Super. Ct. Crim. R. 61 in effect prior to the June 4, 2014 amendment of Rule 61 should apply to his November 2[6], 2014 initial second motion and this May 23, 2017 amended second motion. [Defendant] is incorrect. The Delaware Supreme Court has rejected this contention, and pointed out in *Collins v. State*, 2015 WL 4717524, at *1 (Del. Aug. 6, 2015) that ". . . the [post-conviction] motion was controlled by the version of Rule 61(i)(5) in effect on September 9, 2014 when the motion was filed, not by the former version of the rule as Collins contends." *See also Coble v. State*, 2016 WL 2585796, at *1 (Del. Apr. 28, 2016) ("Superior Court erroneously applied the provisions of Superior Court Rule 61 that were in effect before the appellant filed his second Rule 61 petition on September 1, 2015 . . . ."); *State v. Miller*, 2017 WL 1969780, at *5 (Del. Super. May 11, 2017) ("Because Rule 61 was significantly amended on June 4, 2014, the Court will consider later in the Opinion when each defendant filed his or her respective motion and apply the version of the Rule in effect at that time."); *State v. Hubbard*, 2017 WL 480567, at *5 (Del. Super. Jan. 25, 2017) ("The version of the Rule in effect at the time that Defendant's pro se motion for postconviction relief was filed, requires the Court to reject a motion for postconviction relief if it is procedurally barred."). Similarly, the fact that [Defendant] filed a timely first Rule 61 motion in 2005 does not mean that a new second motion filed in November 2014 is also timely. *Compare Denney v. State*, 2016 WL 3382220, at *2 (Del. June 10, 2016) (". . . as the State points out, Denney's filing of his first motion for sentence modification within ninety days of his sentencing does not make any subsequent motions for sentence modification that he filed more than ninety days after his sentencing fall within the ninety-day time period set forth in Rule 35(b)."). [Defendant's original November 2[6], 2014 Second Rule 61 motion and the May 23, 2017 amended second Rule 61 motion are both governed by the provisions of Rule 61 as amended on June 4, 2014, and both of those filings are now procedurally barred.

. . .

13. The version of Del. Super. Ct. Crim. R. 61 in effect when [Defendant] filed his original second post-conviction relief motion controls the deposition of that motion and the May 23, 2017 amended second motion. *Collins v. State*, 2015 WL 4717524, at *1 (Del. Aug. 6, 2015); *Coble v. State*, 2016 WL 2585793, at *1 (Del. Apr. 28, 2016). Under Del. Super. Ct. Crim. R. 61, as amended on June 4, 2014, any post-conviction relief motion filed "more than one year after the judgment of conviction is final" is procedurally barred. The "miscarriage of justice" exception to the 61(i)(1) time bar contained in former Del. Super. Ct. Crim. R. 61(i)(5) was eliminated by the June 4, 2014 amendment of Rule 61. [Defendant's] original second Rule 61 motion filed November 2[6], 2014 was not filed within 1 year of the June 4, 2013 Supreme Court decision on the guilt phase claims of the first post-conviction relief request [*Ploof v. State*, 75 A.3d 811 (Del. 2013)], or the October 4, 2013 Supreme Court Mandate for that appeal. (Exhibit A). The November 2[6], 2014 filing is also more than 1 year after the October 30, 2013 Supreme Court decision on the penalty phase claims [*Ploof v. State*, 75 A.3d 840 (Del. 2013)], although all of those capital penalty phase claims are now moot because [Defendant's] prior death sentence was vacated by this Court on April 13, 2017. (Exhibit C). A petition which is filed beyond the applicable statute of limitations must be dismissed because the court lacks jurisdiction to hear the untimely filing. "Time is a jurisdictional requirement." *Carr v. State*, 554 A.2d 778, 779 (Del. 1989) (untimely appeal from denial of eighth post-conviction relief motion). *See also Bey v. State*, 402 A.2d 362, 363 (Del. 1979); *Preform Building Components, Inc. v. Edwards*, 280 A.2d 697, 698 (Del. 1971); *McMillan v. State*, 2013 WL 5974110, at *1 (Del. Nov. 7, 2013). Both [Defendant's] November 2[6], 2014 original second Rule 61 motion and the May 23, 2017 amended second Rule 61 motion are untimely and they are now procedurally barred by Del. Super. Ct. Crim. R. 61(i)(1). These untimely second Rule 61 filing must be summarily dismissed because this Court lacks jurisdiction to hear the matter. There is no "manifest injustice" exception to the time bar of Rule 61(i)(1) now available.[6]

The State also responded to two of Defendant's arguments in its August 23, 2017 Reply Brief, in which the State argued:

II. COMITY. At pages 2-4 of [Defendant's] July 31, 2017 response, it is argued that a return to State court as permitted by Judge Stark's December 15, 2014 Stay and Abeyance Order further policies of Federal-State comity. [Defendant] adds that after his April 13, 2017 Superior Court resentencing, his May 23, 2017 Amended Second Rule 61 Motion ". . . presents only those claims challenging the validity of his convictions." (Ploof July 31, 2017 response at p.4).

Comity is a consideration in Federal habeas corpus litigation, but it is a lesser concern for State collateral review. Absent exceptional circumstances, a federal court will not entertain the claims of a habeas corpus petitioner until he has exhausted State remedies. *See* 28 U.S.C. § 2254(b)(1)(A); *Rose v. Lundy*, 455 U.S. 509, 519 (1982); *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993). The

[6] State's Mot. at 5-11

underlying policy of the State exhaustion requirement is rooted in the tradition of comity; that is, the State must be given the "initial opportunity to pass upon and correct" alleged violations of the petitioner's constitutional rights. *Picard v. Connor*, 404 U.S. 270, 275 (1971) (citing *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971)). *See also Tillett v. Freeman*, 868 F. 2d 106 (3d. Cir 1989).

Traditionally, to exhaust his claims, a petitioner must fairly present the identical claims (on both facts and legal theory) he wants the Federal habeas court to review to all levels of the State judicial system, including the State's highest court. *See Anderson v. Harless*, 459 U.S. 4 (1982); *Gibson v. Scheidmantal*, 805 F.2d 135 (3d Cir. 1986). Here, [Defendant] has satisfied any comity requirement when he first filed a direct appeal of his June 2003 first degree murder conviction to the Delaware Supreme Court which affirmed [Defendant's] conviction and sentence in 2004. *Ploof v. State*, 856 A.2d 539 (Del. 2004). Next, [Defendant] pursued available State collateral review back in the Superior Court where a 6 day evidentiary hearing was conducted on October 26-28, and November 1, 3 and 12, 2010 to consider [Defendant's] post-conviction relief claims. The Kent County Superior Court denied post-conviction relief on January 30, 2012. *State v. Ploof*, 2012 WL 1413483 (Del. Super. Jan. 30, 2012). This denial of State post-conviction relief was affirmed by the Delaware Supreme Court on June 4, 2013 for the guilt phase claims [*Ploof v. State*, 75 A.3d 811 (Del. 2013)], and on October 30, 2013 for the capital penalty phase claims. *Ploof v. State*, 75 A.3d 840 (Del. 2013).

For purposes of comity, State court review was concluded on October 30, 2013. Comity does not require that [Defendant] be permitted to return to State court to pursue new post-conviction claims over 14 years after his June 2003 trial. [Defendant] has already had one full round of State court reviews. *Merritt v. Pierce*, 2017 WL 927615, at *1 (D. Del. Mar 6, 2017). All Judge Stark's December 15, 2014 Order did was permit a return to State court to determine if summary dismissal is required in light of the June 4, 2014 amendment of Del. Super. Ct. Crim. R. 61. The Delaware District Court December 2014 Order is not a mandate that further State collateral review is permitted.

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V. ***GUY V. STATE.*** [Defendant had originally] argue[d] at pages 11-13 of his July 31, 2017 response that *Guy v. State*, 82 A.3d 710 (Del. 2013) "is still good law [for the proposition that the pre-June 4, 2014 provisions of Rule 61 should govern this case] and provides this Court an avenue by which to consider [Defendant's] claims." [Defendant] is incorrect.

The Delaware Supreme Court on July 31, 2017 definitively rejected this contention. In *Coles v. State*, 2017 WL 3259697, at *2 (Del. July 31, 2017), the [Delaware] Supreme Court ruled: ". . . this Court's decision in *Guy v. State*, which was decided before the substantive amendments to Rule 61 in June 2014, has no applicability to his case." *Coles* is binding on this trial court, and it holds that *Guy* has no application to Rule 61 filings after June 4, 2014.

> Any reliance by [Defendant] on *Guy* now is unavailing. The dicta in *Guy* about ineffective assistance of post-conviction counsel is no basis for [Defendant] to attack the actions of his prior Rule 61 counsel. *Guy* is not still good law.[7]

B. Defendant's Contentions

First, Defendant argues that both his Amended Second Motion and Original Second Motion before this Court are "designed to 'further the policies of federal-state comity and judicial economy."[8] Defendant contends that by "[r]especting the principles of comity, [he] is now simply affording the Delaware courts the opportunity to correct the constitutional violations underlying his convictions, many of which this Court has never heard."[9] Defendant implicitly seems to argue that the filing of motions for post-conviction relief upon "return to state court" furthers "comity" between the Delaware courts and the federal courts.[10]

Second, Defendant asserts that "this Court should not deem his [current] Rule 61 motion as second of successive[]" because "when a defendant is resentenced, he or she is confined pursuant to a new judgment even if the adjudication of guilt is undisturbed."[11]

Third, Defendant contends that "[t]he most recent version of Rule 61 (June, 2014) [] neglects the mandates of due process and equity to which this Court must adhere."[12] Defendant points out that "[i]n 2005, when [Defendant] filed his initial Rule 61 motion . . . if a claim had not been raised in a prior post-conviction proceeding or had been previously adjudicated, Rule 61 explicitly allowed the court to consider the claim in the interest of justice."[13] Defendant also identifies that "[s]imilarly, if a defendant raised a colorable claim that there was a miscarriage of justice, Rule 61 again explicitly allowed the court to consider the claim, even if it

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[7] State's Reply Br. at 3-5; 11. Notably, Defendant does not now take issue with the applicability of *Guy* insofar as his Amended Second Motion is concerned. *See infra* note 23 (acknowledging that *Guy* does not govern this motion nor is authority that Defendant's ineffective assistance of counsel claims should not be procedurally barred as untimely).

[8] Def.'s Resp. at 2 (quoting *Swan v. Coupe*, 967 F. Supp. 2d 1008, 1012 (Del. 2013)) (internal brackets omitted).

[9] *Id.* at 3 (footnote omitted).

[10] *Id.* at 2.

[11] *Id.* at 4 (quoting *In re Gray*, 850 F.4d 139, 142 (4th Cir. 2017) (internal brackets and internal quotation marks omitted).

[12] *Id.* at 6.

[13] *Id.* (internal quotation marks omitted).

was untimely or had not been raised in a prior proceeding."[14] Defendant requests that this Court apply the pre-amendment Rule 61 in order to afford Defendant a "safety valve[,]" "safeguard[,]" or "fail-safe."[15]

Fourth, Defendant argues that he was deprived of his rights to due process when he "received no notice of [the June 4, 2014 Rule 61 amendment]."[16] Defendant contends that when "the Superior Court issued an order amending Rule 61 by . . . removing references to [the] equitable exceptions to its procedural bars[,]" Defendant should have been "provided notice and an opportunity 'to be heard'" because he is a "'part[y] whose rights are . . . affected[.]'"[17]

Fifth, Defendant contests the State's use of *Collins*, distinguishing it factually.[18] Defendant argues that because both of the defendants in *Collins* and *Coble* pled guilty, they "waiv[ed] numerous appellate rights."[19] Defendant contends that because Defendant did not accept a guilty plea, he "is entitled to full appellate review of his case, which encompasses an 'adequate and effective' Rule 61 proceeding."[20]

Sixth, Defendant argues that, even "[i]f this Court rules that a fail-safe no longer exists in Rule 61 . . . [Defendant] still meets the exception for a successive motion under Rule 61(d)(2)(i)."[21] Defendant claims that he can "plead[] with particularity that new evidence exists that creates a strong inference that [he] is actually innocent."[22] Defendant advances that he "was set to inherit a million-dollar estate from his parents, who had provided him with financial support throughout his life, and that substantial amounts of money were available to him" as "new evidence" that he is "actually innocent."[23]

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[14] *Id.* at 6-7 (internal quotation marks omitted).
[15] *Id.* at 7-8, 15.
[16] *Id.* at 7-8
[17] *Id.* at 7-8 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)) (internal brackets omitted).
[18] *Id.* at 10; 119 A.3d 42 (Del. 2015) (holding "the [post-conviction] motion was controlled by the version of Rule 61(i)(5) in effect on September 9, 2014 when the motion was filed, not by the former version of the rule as Collins contends.") (footnote omitted).
[19] *Id.*
[20] *Id.*
[21] *Id.*at 13.
[22] *Id.* (quoting Del. Super. Ct. Crim. R. 61(d)(2)(i)).
[23] *Id.* at 14; Del. Super. Ct. Crim. R. 61(d)(2)(i); Defendant had originally argued that this Court should follow *Guy v. State* in order to allow him to bring an ineffective assistance of counsel claim as an exception to Rule 61's procedural bars. Def.'s Resp. at 11. Defendant relied on the proposition in *Guy* that the one-year time limitation on an ineffective assistance of post-conviction

Defendant also makes over-arching policy arguments throughout his response:

> Such care [in examining a Motion for Post-Conviction Relief pursuant to Del. Super. Ct. Crim. R. 61] is especially critical in this case, where [Defendant] . . . faces the severest penalty provided by Delaware law, a sentence of life imprisonment without the possibility of parole, but has repeatedly been denied the opportunity to have significant claims—all of which underlie the constitutionality of his convictions—heard because of the ineffective assistance of his court-appointed prior counsel. The interests of justice mandate that the State of Delaware afford [Defendant] a meaningful opportunity for a full and fair consideration of his constitutional claims.[24]

. . .

> In balancing "scarce defense resources" and the "fair consideration" of a defendant's constitutional rights, this Court cannot use summary dismissal as a tool to circumvent the adversarial process, and as the case is here, the righting of constitutional wrongs. . . . If the State's position on Rule 61 is recognized as correct—which it should not be—then there is no meaningful opportunity for [Defendant] to obtain redress in the Delaware courts for the constitutional violations that infected his trial. In fact, if Rule 61 is construed as narrowly as the State submits, Delaware's post-conviction process would be rendered "so clearly deficient as to render futile any effort to obtain relief." *Duckworth v. Serrano*, 454 U.S. 1, 2 (1981).[25]

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counsel claim will begin to run at the conclusion of a defendant's appeal of his first denial of post-conviction relief. 82 A.3d at 715 (holding nonetheless that the defendant's second motion for post-conviction relief was untimely as it was filed "more than two-and-a-half years after his postconviction appeal was decided."). However, Defendant now acknowledges that

> [w]ith respect to *Guy v. State*, the Court in *Coles* appears to indicate that *Guy* no longer is applicable to post-conviction motions filed after the June 4, 2014 amendments. [Defendant] maintains his position for the reasons set forth in his amended second Rule 61 motion and opposition to the State's motion for summary dismissal. While he disagrees with the Delaware Supreme Court's decision in *Coles*, he acknowledges that this Court is bound by that decision.

Def.'s Letter to the Ct., October 3, 2017. The Court thus need not reach Defendant's initial arguments about the applicability of *Guy v. State*.

[24] Def.'s Resp. at 1.

[25] *Id.* at 14-15 (citation omitted).

V. DISCUSSION

Del. Super. Ct. Crim. R. 61(d)(5) provides, "[i]f it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief, the judge may enter an order for its summary dismissal and cause the movant to be notified."

The State's Second Motion for Summary Dismissal of Defendant's Amended Second Motion is granted because Defendant's Amended Second Motion is procedurally barred as untimely and successive pursuant to Del. Super. Ct. Crim. R. 61(i)(1)&(2). The State additionally moves for summary dismissal of Defendant's never-decided Original Second Motion, which was filed on November 26, 2014.[26] Defendant's Original Second Motion is also summarily dismissed because it is also procedurally barred as untimely and successive pursuant to Del. Super. Ct. Crim. R. 61(i)(1)&(2). Furthermore, the "actual innocence" exception to the procedural bars pursuant to Del. Super. Ct. Crim. R. 61(d)(2)(i) does not apply to Defendant's claim because Defendant has failed to "plead[] with particularity that new evidence exists that creates a strong inference that" he is "actually innocent."

A. Defendant's Rule 61 Motion is Procedurally Barred

Rule 61 is the remedy for defendants "in custody under a sentence of this court seeking to set aside the judgment of conviction . . . ."[27] This Court "must first consider the procedural requirements of Rule 61 before addressing any substantive issues."[28] The procedural bars of Rule 61 include timeliness,[29] successiveness,[30] procedural default,[31] and former adjudication.[32] A motion is untimely if it is filed more than one year after the conviction is finalized or defendant asserts a new constitutional right that is retroactively applied more than one year after it is first recognized.[33] A motion is successive if it is a "second or subsequent motion."[34] If any of these bars apply, the movant must show entitlement to relief under Rule

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[26] State's Mot. at 1.
[27] Del. Super. Ct. Crim. R. 61.
[28] *State v. Stanford*, 2017 WL 2484588, at *2 (Del. Super. Ct. June 7, 2017) (quoting *Bradley v. State*, 135 A.3d 748, 756 (Del. 2016)).
[29] *Id.* at 2 (citing Del. Super. Ct. Crim. R. 61(i)(1)).
[30] *Id.* at 2 (citing Del. Super. Ct. Crim. R. 61(i)(2)).
[31] *Id.* at 2 (citing Del. Super. Ct. Crim. R. 61(i)(3), which is not at issue here).
[32] *Id.* at 2 (citing Del. Super. Ct. Crim. R. 61(i)(4), which is not at issue here).
[33] Del. Super. Ct. Crim. R. 61(i)(1).
[34] Del. Super. Ct. Crim. R. 61(i)(2).

61(i)(5).[35] The contentions in a Rule 61 motion must be considered on a "claim-by-claim" basis.[36]

In order for the Court to consider successive postconviction motions, the motion must either

> (i) plead[] with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted; or (ii) plead[] with particularity a claim that a new rule of constitutional law, made retroactive . . . applies to the movant's case and renders the conviction . . . invalid.[37]

a. Defendant's Original Second Motion and Amended Second Motion are Procedurally Barred as Untimely.

Both of Defendant's Second Motions for Postconviction Relief are procedurally barred because they are untimely pursuant to Del. Super. Ct. Crim. R. 61(i)(1). Because more than one year elapsed between October 30, 2013, when the Delaware Supreme Court issued its mandate on the appeal,[38] and November 26, 2014, when Defendant filed his Original Second Motion, Defendant's Original Second Motion is untimely. Also, Defendant's Amended Second Motion is procedurally barred because more than one year elapsed between October 30, 2013, when the Delaware Supreme Court decided the appeal,[39] and May 23, 2017, when Defendant filed his Amended Second Motion.

b. Both of Defendant's Rule 61 Motions are Procedurally Barred as they are both Second Motions that do not Satisfy the Rule 61(d)(2) Exception for Claims of "Actual Innocence."

Defendant's Original Second Motion and Amended Second Motion are both procedurally barred because they are his second motions pursuant to Del. Super. Ct. Crim. R. 61(i)(2). As they are Defendant's second motions for postconviction relief under Rule 61, they are successive motions, and in order to avoid the procedural bars

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[35] *Stanford*, WL 2484588, at *2.

[36] *State v. Reyes*, 155 A.3d 331, 342 n.15 (Del. 2017) (holding that "Rule 61 analysis should proceed claim-by-claim, as indicated by the language of the rule.").

[37] Del. Super. Ct. Crim. R. 61(d)(2)(i)&(ii). Defendant does not argue that that the "new rule of constitutional law" exception of Del. Super. Ct. Crim. R. 61(d)(2)(ii) applies to any of his claims. The Court thus need not reach the applicability of this exception.

[38] Del. Super. Ct. Crim. R. 61(m)(2).

[39] *Id.*

of Del. Super. Ct. Crim. R. 61(i)(2), Defendant must "plead with particularity" that (1) "new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted[.]"[40] If Defendant cannot satisfy the exception to the procedural bar set forth by Rule 61(d)(2), then his motions must be denied.[41]

Defendant argues that he has satisfied the "new evidence" exception to the subsequent motion procedural bar pursuant to Rule 61(d)(2)(i) because:

> [t]he evidence [Defendant] has alleged in his Rule 61 motion demonstrates that at the time of the offense, [Defendant] was set to inherit a million-dollar estate from his parents, who had provided him with financial support throughout his life, and that substantial sums of money were available to him. D.I. 355. None of this evidence was ever presented to the jury, thereby allowing the State to argue that a $100,000 life insurance policy pointed to [Defendant's] intent to kill the deceased. Had the jury heard the evidence alleged in [Defendant's] Second Rule 61, "it is more likely than not that no reasonable juror would have found [Defendant] guilty of first degree murder beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 537-38 (2006).[42]

In his Amended Second Motion, Defendant also set forth his actual innocence argument where he stated:

> [Defendant] was not motivated by pecuniary gain nor did he intend to kill the deceased. As the prosecution acknowledged in its guilt and penalty trial jury arguments, the pecuniary gain motive was the evidence of intent. Thus, he is actually innocent of the act underlying his first degree murder conviction, and he was also actually innocent of the act of committing first degree murder for pecuniary gain, the additional element of the distinct death-eligible conviction.[43]

In his original trial testimony, Defendant claimed that his wife had committed suicide.[44] This Court does not find that evidence of a possible expectancy "creates a strong inference that [Defendant] is actually innocent in fact of the acts underlying the charges of which he was convicted[,]" that is, first degree murder.[45] Defendant's

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[40] Super. Ct. Crim. R. 61(d)(2)(i).
[41] Super. Ct. Crim. R. 61(d)(2).
[42] Def.'s Resp. at 14 (internal brackets and internal quotation marks omitted).
[43] Def.'s Am. Second Mot. for Post-Conviction Relief at 181.
[44] State's Mot. at 7; *see Ploof v. State*, 75 A.3d 811, 817 (Del. 2013) ("Ploof's counsel during his trial (Trial Counsel) presented evidence she argued showed that Heidi had committed suicide.") (footnote omitted).
[45] Del. Super. Ct. Crim. R. 61(d)(2)(i).

argument that "no reasonable juror would have found [him] guilty of first degree murder beyond a reasonable doubt" because this evidence somehow belies his intent to commit first degree murder is unavailing.[46] The Court agrees with the State's arguments that "[i]f this evidence existed in 2001, it is not new evidence[]" and "it is not evidence that [Defendant] did not shoot his wife[.]"[47] Thus, Defendant's motions "shall be summarily dismissed" because the claim of "actual innocence" falls short of the requirements of this exception.

Therefore, Defendant's Original Second Motion and Amended Second Motion are procedurally barred as untimely and successive pursuant to Del. Super. Ct. Crim. R. 61(i)(1)&(2).

B. Comity is Not a Consideration Here Because Defendant Has Exhausted His State Law Remedies.

Defendant's argument that the purpose of his Original Second Motion and Amended Second Motion was to "further the policies of federal-state comity" is unavailing because he has exhausted his claim at the state level.[48] Typically, a federal court will not review a writ of habeas corpus unless the movant has exhausted his state court remedies.[49] "The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings."[50]

This Court agrees with the State's assertion that

> [f]or purposes of comity, State court review was concluded on October 30, 2013. Comity does not require that [Defendant] be permitted to return to State court to pursue new post-conviction claims over 14 years after his June 2003 trial. [Defendant] has already had one full round of State court reviews. All Judge Stark's December 15, 2014 Order did was permit a return to State court to determine if summary dismissal is required in light of the June 4, 2014 amendment of Del. Super. Ct. Crim. R. 61. The Delaware District Court December 2014 Order is not a mandate that further State collateral review is permitted.[51]

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[46] Def.'s Resp. at 14 (internal brackets and internal quotation marks omitted); *Bousley v. United States*, 523 U.S. 614, 623 (1998) ("'[A]ctual innocence' means factual innocence, not mere legal insufficiency.").
[47] State's Reply at 11-12.
[48] Def.'s Resp. at 2 (internal brackets omitted).
[49] 28 U.S.C. § 2254(b)(1)(A).
[50] *Rose v. Lundy*, 455 U.S. 509, 518 (1982).
[51] State's Reply Br. at 4-5 (citation omitted).

Defendant has satisfied the requirements of comity by exhausting his remedies at the state court level. He filed a direct appeal of his 2003 conviction, which the Delaware Supreme Court affirmed in 2004.[52] He filed a post-conviction claim with this Court, which held a "prolonged . . . evidentiary hearing" before denying his Rule 61 motion.[53] He then appealed this Court's denial of his Rule 61 motion to the Delaware Supreme Court, which was affirmed for the guilt phase claims,[54] remanded to this Court for review of the penalty phase claims,[55] and affirmed by the Delaware Supreme Court for the capital penalty phase claims.[56] Given this complete review of his state court claims, Defendant has satisfied the comity requirements.

V. CONCLUSION

Both of Defendant's second Rule 61 motions are procedurally barred under Del. Super. Ct. Crim. R. 61(i)(1) because they are untimely and under Del. Super. Ct. Crim. R. 61(i)(2) because they are second motions. Further, Defendant's Rule 61 claim falls short of the requisite particularity standard of the "actual innocence" procedural bar exception pursuant to Del. Super. Ct. Crim. R. 61(d)(2)(i). Lastly, this Court has applied the current version of Rule 61 as amended on June 4, 2014. As such, the previous "miscarriage of justice" and "in the interest of justice" exceptions to the procedural bars of Rule 61 no longer apply.

The Delaware Supreme Court has stated in this very case (albeit in another context) that "Rule 61 is intended to correct errors in the trial process, not to allow defendants unlimited opportunities to relitigate their convictions."[57]

The State's Second Motion for Summary Dismissal of Defendant's 1) Original Second Motion and 2) Amended Second Motion is **GRANTED.**

IT IS SO ORDERED.

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[52] *Ploof v. State*, 856 A.2d 539 (Del. 2004).
[53] *State v. Ploof*, 2012 WL 1413483, at *2 (Del. Super. Ct. Jan. 30, 2012), *aff'd in part, remanded in part,* 75 A.3d 811 (Del. 2013), *as corrected* (Aug. 15, 2013).
[54] *Ploof v. State*, 75 A.3d 811, 815 (Del. 2013).
[55] *State v. Ploof*, 2013 WL 9916948, at *1 (Del. Super. Ct. July 15, 2013), *aff'd,* 75 A.3d 840 (Del. 2013).
[56] *Ploof*, 75 A.3d at 834.
[57] *Id.* at 820.

Richard R. Cooch

Richard R. Cooch, R.J.

cc: Prothonotary (Kent County)