

convictions and sentences on direct appeal.¹ Since his convictions, Defendant has filed numerous motions seeking postconviction relief, habeas corpus relief, and modification of his sentence.² On February 5, 2019, Defendant filed a *pro se* twelfth motion for postconviction relief. On January 24, 2019 (later amended on February 21, 2019), Defendant filed a *pro se* Motion to Recuse the Bench. Both motions raise substantially the same arguments. Defendant contends that all judges of the Superior Court are unconstitutionally appointed and thus Defendant's 1992 convictions and 1993 sentences are illegal. Both motions are procedurally barred and without merit.

2. Rule 61 is the remedy for defendants "in custody under a sentence of this court seeking to set aside the judgment of conviction" Rule 61 requires this Court address certain "preliminary considerations" prior to addressing any substantive issues raised in a postconviction motion.⁴ Under Rule 61(i)(2), successive motions are barred unless the defendant satisfies the pleading requirements of 61(d)(2):

(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.⁵

3. Neither exception to subsequent motions applies here. Defendant has not provided newly discovered evidence that would support an inference of actual factual innocence. Nor has Defendant provided a

¹ *Desmond v. State*, 654 A.2d 821 (Del. 1994).

² *See, e.g., Desmond v. State*, 49 A.3d 1192 (Del. Aug. 9, 2012) (affirming the Superior Court's dismissal of Defendant's eighth motion for postconviction relief as procedurally barred); *State v. Desmond*, 2018 WL 3409916 (Del. Super. Ct. July 10, 2018) (dismissing Defendant's eleventh motion for postconviction relief); *State v. Desmond*, I.D. No. 9100984DI, Del. Super., Jan. 10, 2014 (LETTER ORDER) (denying Defendant's tenth motion for conviction relief as repetitive and procedurally barred); *State v. Desmond*, 2013 WL 1090965 (Del. Super. Ct. Feb. 26, 2013) (denying Defendant's ninth motion for postconviction relief as procedurally barred as untimely and repetitive); *State v. Desmond*, 2011 WL 91984 (Del. Super. Ct. Jan. 5, 2011) (detailing Desmond's history of postconviction applications up to and including his seventh motion under Superior Court Criminal Rule 61).

³ Del. Super. Ct. Crim. R. 61(a)(1).

⁴ Del. Super. Ct. Crim. R. 61(d).

⁵ Del. Super. Ct. Crim. R. 61(d)(2)(i)&(ii).

new constitutional rule that applies retroactively to his case. Defendant argues that Rule 61 does not apply to him, and thus cannot bar his twelfth motion, because the judges of this Court have allegedly been unconstitutionally appointed to the bench, basing this argument on the recent District Court for the District of Delaware decision in *Adams v. Carney*.⁶ Defendant misconstrues the holding in *Adams*. The District Court held, and the Third Circuit Court of Appeals affirmed, that the State of Delaware's application of the political balance requirement in Article IV, § 3 of the Delaware Constitution violated Mr. Adams' freedom of association rights. *Adams* does not state or imply that judges previously appointed pursuant to Delaware's political balance requirement are now unqualified to serve as judicial officers.⁷ All judges and justices deciding the various matters regarding Defendant's case were qualified when appointed and remain fully qualified to continue to serve in their positions. Therefore, Defendant's Motion to Recuse the Bench is without merit, and Rule 61 applies to his twelfth motion for postconviction relief.

4. Defendant cannot overcome the procedural bars of Rule 61(d). Defendant has failed to plead newly discovered evidence that creates a strong inference of actual factual innocence. Nor has Defendant provided a new constitutional rule that applies retroactively to his case. As discussed above, the holding in *Adams* does not invalidate past judicial appointments or Defendant's past convictions and sentences. Even if *Adams* stood for the proposition Defendant claims it does, which *Adams* clearly does not, *Adams* was prospective only, not retroactive, and would not overcome Rule 61.⁸
5. Therefore, Defendant's Motion to Recuse the Bench is **DENIED**. Defendant's Twelfth Motion for Postconviction Relief is **SUMMARILY DISMISSED**.

⁶ *Adams v. Carney*, 914 F.3d 827 (D. Del. 2019), *aff'd in part*, 922 F.3d 166 (3rd. Cir. 2019).

⁷ See *Adams*, 914 F.3d at 843; *State v. Johnson*, 2019 WL 1513192, at *2 (Del. Super. Ct. Apr. 5, 2019). (“[The Third Circuit’s] decision does not hold or imply that judicial officers appointed pursuant to Delaware’s political balance requirement have now become unqualified to serve as judicial officers.”); *State v. Kane & McNeil*, I.D. No. 061200862, Del. Super. Ct. Mar. 29, 2019 (ORDER) (denying defendants' motions to vacate their sentences where those defendants also relied upon the *Adams* decision).

⁸ See *Johnson*, 2019 WL 1513192, at *2.

IT IS SO ORDERED.



Richard R. Cooch, R.J.

cc: Prothonotary
Investigative Services