

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE )
v. ) Case No. 9506001505
KEVIN J. HOWARD, )
Defendant. )

Date Submitted: April 1, 2016
Date Decided: August 15, 2016

MEMORANDUM OPINION AND ORDER

Martin O’Conner, Esquire, Department of Justice, Wilmington, Delaware. Attorney for the State.
Christopher S. Koyste, Esquire, Wilmington, Delaware. Attorney for Defendant Kevin J. Howard.

Upon Consideration of Defendant’s Amended Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61
SUMMARILY DISMISSED

Upon Consideration of Motion to Withdraw as Counsel Pursuant to
Rule 61(e)(6) for Petitioner Kevin Howard
GRANTED

DAVIS, J.

Kevin J. Howard has been convicted of nineteen felonies and one misdemeanor. On July 19, 1996, the Court sentenced Mr. Howard to eight consecutive life sentences plus 113 years in prison. On March 19, 2013, Mr. Howard began the process of filing for relief under Rule 61 of the Superior Court Rules of Criminal Procedure (“Criminal Rule 61”). Mr. Howard then moved to amend this March 19, 2013 motion. In addition, Mr. Howard filed a series of motions seeking discovery and appointment of counsel.

As discussed below, the Court held a hearing to address Mr. Howard’s outstanding motions. After listening to Mr. Howard, the Court took certain steps to have Mr. Howard’s

Criminal Rule 61 claims handled in an orderly fashion. This resulted in Mr. Howard filing his Defendant's Amended Motion for Postconviction Relief Pursuant to Superior Court Criminal Rule 61 (the "Motion") – Mr. Howard had previously sought postconviction relief under Criminal Rule 61 – and the Court appointing Christopher S. Koyste ("Counsel").

After being appointed, Counsel undertook the representation and engaged in lengthy and extensive due diligence. Counsel then filed the Consideration of Motion to Withdraw as Counsel Pursuant to Rule 61(e)(6) for Petitioner Kevin Howard (the "Withdrawal Request").

The Court has reviewed the record in connection with the Motion. Moreover, the Court has considered all arguments made in support and against the relief sought in the Motion and the Withdrawal Request. For the reasons set forth below, the Court **SUMMARILY DISMISSES** the Motion and **GRANTS** the Withdrawal Request.

### **PROCEDURAL HISTORY<sup>1</sup>**

Mr. Howard was arrested on June 2, 1995 and indicted on July 24, 1995.<sup>2</sup> Mr. Howard's trials were severed. In trials concluding March 26, 1996 and May 21, 1996, juries found Mr. Howard guilty of a total of eight counts of Unlawful Sexual Intercourse in the First Degree, one count of Burglary in the First Degree, four counts of Burglary in the Second Degree, two counts of Robbery in the First Degree, two counts of Robbery in the Second Degree, one count of Kidnapping in the First Degree, and one count of Assault in the Third Degree.<sup>3</sup> The Court

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<sup>1</sup> The citations contained in the Procedural History and the Factual Background are to the appendix to the Withdrawal Request and docket entries in this matter.

<sup>2</sup> A1

<sup>3</sup> A4-5, A7, A9.

sentenced Mr. Howard to eight consecutive life sentences, in addition to 113 years of imprisonment on July 19, 1996.<sup>4</sup>

Mr. Howard appealed his conviction to the Delaware Supreme Court. On January 6, 1998, the Delaware Supreme Court affirmed the judgment of this Court. The Delaware Supreme Court issued its mandate on January 27, 1998.<sup>5</sup>

Mr. Howard filed his first *pro se* motion for postconviction relief (the “First Rule 61 Motion”) on February 12, 1999.<sup>6</sup> On February 25, 1999, Mr. Howard filed a Motion to Stay Proceedings.<sup>7</sup> The Court summarily dismissed the First Rule 61 Motion on March 8, 1999.<sup>8</sup> Having summarily dismissed the First Rule 61 Motion, the Court denied the Motion to Stay as moot.<sup>9</sup> Mr. Howard filed an appeal on April 9, 1999.<sup>10</sup> The Delaware Supreme Court dismissed Mr. Howard’s appeal on September 15, 2000.<sup>11</sup>

Mr. Howard filed the Motion on March 19, 2013.<sup>12</sup> Mr. Howard then filed an amendment to the Motion on April 10, 2013.<sup>13</sup> On that same date, Mr. Howard filed a number of additional motions seeking appointment of counsel and subpoenas *duces tecum*. The Court held a hearing on all outstanding motions on September 26, 2013. Mr. Howard attended that hearing. The Court noted the deficiencies in the motion, denied the motion and granted Mr. Howard leave to amend.<sup>14</sup> The Court provided leave to amend for two reasons: (i) Mr. Howard needed to present

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<sup>4</sup> A10.

<sup>5</sup> A14.

<sup>6</sup> A15.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*; A333-40.

<sup>9</sup> *Id.*

<sup>10</sup> A15.

<sup>11</sup> A16.

<sup>12</sup> A17.

<sup>13</sup> *Id.*, A146; A346-49.

<sup>14</sup> A18.

an amended motion that raised the issues discussed at the hearing; and, (ii) the Court felt that Mr. Howard would need proper representation to investigate the issues and present them if those issues raised valid arguments for postconviction relief.

Mr. Howard filed the Motion, as amended, on January 16, 2014.<sup>15</sup> Mr. Howard also submitted a *pro se* Memorandum of Law in Support of Defendant's Amended Rule 61 Motion on February 4, 2014.<sup>16</sup> Mr. Howard filed the Amended Motion for Postconviction Relief and a Memorandum of Law in Support of Defendant's Amended Rule 61 Motion (collectively, the "Motion") on January 16, 2014. On February 4, 2014, Mr. Howard filed his Motion for Appointment of Counsel. The Court granted the request for appointment of counsel and directed the Office of Conflict Counsel to appoint counsel for Mr. Howard on March 28, 2014.<sup>17</sup> Subsequently, the Office of Conflict Counsel appointed Counsel to represent Mr. Howard with respect to the Motion on June 9, 2014 .

Due to the passage of time and the claims made in the Motion, Counsel needed to engage in extensive and time consuming efforts to collect information that would support the Motion. On December 18, 2015, Counsel filed the Withdrawal Request.<sup>18</sup> Through the Withdrawal Request, Counsel informed the Court that it was his conclusion that the claims raised in the Motion are not meritorious. Counsel also told the Court that, after thorough review of the record, Counsel is not aware of any other meritorious postconviction claims that could be raised on behalf of Mr. Howard. Finally, Counsel seeks to withdraw from representation of Mr. Howard under Criminal Rule 61(e)(6).

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<sup>15</sup> A20.

<sup>16</sup> A20. The Court will collectively refer to the Motion and supporting memorandum as the "Motion."

<sup>17</sup> A21.

<sup>18</sup> D.I. No. 190.

Counsel made Mr. Howard aware of the Withdrawal Request and informed Mr. Howard that he needed to file a response to the Withdrawal Request. Mr. Howard did respond and filed his Petitioner Response to Counsel’s Motion to Withdraw Pursuant to Rule 61(e)(6) on January 20, 2016 and April 1, 2016 (collectively, the “Petitioner Response”).<sup>19</sup> The State of Delaware filed a letter response (the “Letter Response”) to the Withdrawal Request on January 21, 2016.<sup>20</sup> On June 1, 2016, Mr. Howard filed the Motion for Substitution of Counsel.<sup>21</sup> Then, on June 30, 2016, Mr. Howard submitted his Evidentiary Hearing Request.<sup>22</sup>

## **DISCUSSION**

### **LEGAL STANDARD UNDER CRIMINAL RULE 61<sup>23</sup>**

Before addressing the merits of a Rule 61 motion for postconviction relief, the Court must first determine whether Mr. Howard has satisfied the procedural requirements of Superior Court Criminal Rule 61.<sup>24</sup> Criminal Rule 61(i) establishes four procedural bars to postconviction relief: (1) a motion for postconviction relief may not be filed more than one year after the judgment of conviction is final; (2) any ground for relief not asserted in a prior postconviction proceeding is barred; (3) any ground for relief not asserted in the proceedings leading to the judgment of conviction is barred; and (4) any ground for relief previously adjudicated in any proceeding is barred.<sup>25</sup>

The Court may rescind the procedural bars contained in Criminal Rule 61(i)(1-4) only if

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<sup>19</sup> D.I. No. 196.

<sup>20</sup> State Resp. at p. 1.

<sup>21</sup> Motion for Sub. Of Counsel at p. 1.

<sup>22</sup> Motion for Evid. Hearing at p. 1.

<sup>23</sup> The Court is applying the version of Criminal Rule 61 that was in effect at the time of the filing of the Motion. See *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>24</sup> *Id.*

<sup>25</sup> Super. Ct. Crim. R. 61(i).

there is a means by which to do so in the applicable subsection of Criminal Rule 61.<sup>26</sup> Absent such relief, Criminal Rule 61(i)(5) provides additional reprieve from the procedural bars described in Criminal Rule 61(i)(1-3).<sup>27</sup> Under Criminal Rule 61(i)(5), “[t]he 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.”<sup>28</sup> The “fundamental fairness” exception of Criminal Rule 61(i)(5) is narrow and applies only in limited circumstances – *e.g.*, the right relied upon has been recognized for the first time after the direct appeal.<sup>29</sup>

#### **ANALYSIS AND APPLICATION OF CRIMINAL RULE 61 TO THE MOTION**

After a review of the Motion, the Withdrawal Request, the Petitioner Response, the Response Letter and the record of this criminal action, the Court holds that the Motion is procedurally barred under Criminal Rule 61(i)(1)-(4). Moreover, the Court finds that none of the Motion’s claims for relief meet the “fundamental fairness” exception contained in Criminal Rule 61(i)(5).

Mr. Howard makes ten basic claims in the Motion:

1. Ineffective assistance of trial counsel – trial counsel was ineffective because this attorney (i) did not recognize and rectify a purported transcription fabrication; (ii) did not hire a competent fingerprint expert; (iii) did not properly address the credibility of a witness testifying on DNA evidence; (iv) did not object to testimony of the State’s fingerprint experts; (v) did not press for a *Duberry* instruction regarding a purported failure to collect certain evidence; (vi) was unprepared to cross-examine a witness regarding a palm print; (vii) failed to prosecute an alleged *Franks* violation; (viii) failed to attack the chain of custody; and (ix) failed to subpoena certain medical records.

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<sup>26</sup> *State v. MacDonald*, 2007 WL 1378332 \*4 (Del. Super., May 9, 2007).

<sup>27</sup> *Id.*

<sup>28</sup> Super. Ct. Crim. R. 61(i)(5).

<sup>29</sup> *Younger*, 580 A.2d at 555.

2. Falsified trial transcripts that constitute a Due Process violation.
3. Abuse of discretion.<sup>30</sup>
4. Insufficiency of evidence regarding a purported *Franks*' violation and the blood draw.
5. Ineffective assistance of appellate counsel because this attorney failed to notice the purported transcript fabrication.
6. Ineffective assistance of post-conviction counsel.<sup>31</sup>
7. First Amendment violation of access of the courts because Mr. Howard was indigent and the Court did not allow him to retain proper expert witnesses.
8. False evidence relating to the purported fabricated transcripts.
9. Unreasonable search and seizure as Mr. Howard was arrested due to an outstanding *capias* that later proved to be a mistake. The Court addressed this argument and denied a request to suppress the evidence at a hearing.
10. The State's fingerprint experts' testimonies were overly prejudicial.<sup>32</sup>

Mr. Howard had not raised any of these claims at the trial level or on appeal.

Mr. Howard filed the Motion on or about March 13, 2013. The Supreme Court affirmed the Court's judgment and issued its mandate January 27, 1998. As such, the Motion is time-barred by Rule 61(i)(1), having been filed more than one year after the Supreme Court filed its Mandate.

Mr. Howard filed the First Rule 61 Motion on February 12, 1999. The Court reviewed and summarily dismissed the First Rule 61 Motion on March 8, 1999. To the extent Mr. Howard

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<sup>30</sup> Mr. Howard alternates between two different bases for his "Abuse of Discretion" claim. In the Amended Second Rule 61 Motion, Mr. Howard states that the abuse of discretion arises from the Court refusing to stay postconviction proceedings because Mr. Howard was held out of state and without access to Delaware legal reference materials. In his Response, Mr. Howard refers to the Delaware legal materials claim in his "Procedural Bars" section, where he discusses how his claims are colorable claims of constitutional violations. However, when Mr. Howard refers to "Ground 3" in his Petitioner Response, Mr. Howard claims that the abuse of discretion arises from the Trial Court admitting evidence without sufficient foundation, and makes no reference to being denied legal materials.

<sup>31</sup> Mr. Howard prosecuted his first Rule 61 motion *pro se* so he had no post-conviction counsel on that motion.

<sup>32</sup> A373.

failed to raise claims in the First Rule 61 Motion and these claims were known or should have been known, the claims are now procedurally barred under Criminal Rule 61(i)(2).<sup>33</sup> The Court, through a review of the Motion, the Withdrawal Request and the Petitioner Response, notes that most, if not, all of the Motion's claims were known or should have been known in February 12, 1999 – *e.g.*, the ineffective assistance of trial and appellate counsel, the Court's decision not to suppress evidence, the purported First Amendment violation, and the purported *Franks* violation.

The Court also finds that Criminal Rule 61(i)(3) and (i)(4) act to bar almost all of Mr. Howards claims – except maybe those relating to the “ineffective assistance of counsel” claims but those claims are barred under Criminal Rule 61(i)(1), (2) and (i)(4). For example, the claims regarding the Court's purported abuse of discretion at the suppression hearing, the purported Frank's violation, the insufficiency of the evidence, and the suppression hearing all relate to grounds for relief that were or were not asserted in the proceedings leading to the judgment of conviction.

The Court also finds that Mr. Howard has failed to demonstrate a violation of his constitutional rights which would warrant substantive consideration of his claims. Mr. Howard has not demonstrated a miscarriage of justice, in the form of a substantiated claim of ineffective assistance of counsel or otherwise, which would cause this Court to consider his claims under Criminal Rule 61(i)(5). The Court has gone through the Motion and has found no reason to apply the “fundamental fairness” exception contained in Criminal Rule 61(i)(5). Moreover, the Court appointed Counsel to assist Mr. Howard in a review of his criminal action. Counsel did a very thorough and time-consuming investigation. Counsel developed no facts that would support Mr. Howard's ten claims made in the Motion or any new claims that would warrant the application of

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<sup>33</sup> See, *e.g.*, *Eaddy v. State*, 901 A.2d 119 (Del. 2006).



Criminal Rule 61(i)(5).

In the Withdrawal Request, Counsel reviewed each of the Motion’s claims to determine whether these claims were valid even though procedurally barred. The Court has reviewed that analysis as well as the arguments made in the Response. The Court appreciates this “out of an abundance of caution” work and considered these analyses. The Court also agrees there is no valid basis – legally or factually – to support the Motion’s claims.

For the reasons set forth herein, the Court finds the Motion to be procedurally barred and summarily dismisses the Motion.

#### **ANALYSIS AND APPLICATION OF CRIMINAL RULE 61(E)(6)**

Criminal Rule 61(e)(6) governs the withdrawal of appointed post-conviction counsel.<sup>34</sup> If counsel considers the movant’s claims to be so lacking in merit that counsel cannot ethically advocate the claims, counsel may move to withdraw.<sup>35</sup> Counsel’s motion to withdraw must provide a factual and legal basis for counsel’s opinion, and counsel’s motion shall give notice that movant may file a response to the motion with thirty (30) days of service of the motion upon the movant.<sup>36</sup> Previous versions of Criminal Rule 61 pertaining to counsel’s motion to withdraw contain this same language, but were located at Rule 61(e)(2).<sup>37</sup> Unlike previous iterations, however, Rule 61(e)(6) also lays out counsel’s continuing duties to movant, in the event counsel’s motion is granted.<sup>38</sup>

In determining whether a postconviction counsel’s motion to withdraw should be granted, “the court must be satisfied that postconviction counsel made a conscientious examination of the

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<sup>34</sup> *Id.* at (e)(6).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *See*, Superior Ct. Crm. R. 61(e)(2)(2014); Superior Ct. Crim. R. 61(e)(2)(2013).

<sup>38</sup> Superior Ct. Crm. R. 61(e)(6).

record and the law for claims that could arguably support Defendant's Rule 61 motion."<sup>39</sup> The Court must conduct its own review of the record in order to determine whether the Withdrawal Request is devoid of any – at least arguable – claims.<sup>40</sup>

As stated above, the Court does not believe that the Motion asserts valid claims. Moreover, the Court finds that Counsel made a conscientious and thorough examination of the record and the law for claims that could arguably support the Motion. Accordingly, the Court will grant the Withdrawal Request.

### CONCLUSION

The Defendant's Amended Motion for Postconviction Relief Pursuant to Superior Court Criminal Rule 61 is **SUMMARILY DISMISSED** and the Motion to Withdraw as Counsel Pursuant to Rule 61(e)(6) for Petitioner Kevin Howard is **GRANTED**.

IT IS SO ORDERED.

/s/ *Eric M. Davis*

Eric M. Davis, Judge

Original to Prothonotary

cc: Martin O'Connor, Deputy Attorney General (w/encl.)  
Dallas Winslow, Esquire (w/encl.)  
Christopher Koyste, Esquire (w/encl.)  
Kevin J. Howard (SBI# 00148032)

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<sup>39</sup> *State v. West*, 2013 WL 6606833, at \*3 (Del. Super. December 12, 2013), *aff'd.*, 100 A.3d 1022 (Del. 2014).

<sup>40</sup> *Id.*