IN THE SUPREME COURT OF THE STATE OF DELAWARE

BEN ROTEN,	§	
	§	
Defendant Below-Appellant,	§	No. 476, 2013
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for Sussex County
	§	Cr. ID 0907011738
Plaintiff Below-Appellee.	§	
	§	

Submitted: September 27, 2013
Decided: October 28, 2013

Before **STEELE**, Chief Justice, **HOLLAND**, and **RIDGELY**, Justices.

O R D E R

This 28th day of October 2013, upon consideration of the appellant's opening brief, the State's motion to affirm, and the record below, it appears to the Court that:

(1) The appellant, Ben Roten, filed this appeal from the Superior Court's denial of his second motion for postconviction relief. The State has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Roten's opening brief that his appeal is without merit. We agree and affirm.

(2) The record reflects that a Superior Court jury convicted Roten in January 2010 of one count of Assault in a Detention Facility. The

Superior Court sentenced Roten as a habitual offender to twenty-five years at Level V incarceration to be followed by six months at Level IV work release. We affirmed on direct appeal.[1] Since that time, Roten has filed various unsuccessful motions seeking postconviction relief,[2] correction of sentence,[3] and a new trial.[4] Roten also filed a motion seeking to reopen his first postconviction proceeding on the ground that he had a right to counsel in that proceeding. We affirmed the Superior Court's denial of that motion.[5] Roten then filed his second motion for postconviction relief in July 2013, which the Superior Court denied. This appeal followed.

(3) Roten raises one issue in his opening brief on appeal. He argues that the Superior Court erred in denying postconviction relief because his state and federal constitutional rights were violated when the Superior Court failed to appoint counsel to represent him in his first postconviction proceeding in 2011. He appears to argue that the United States Supreme Court's decision in *Martinez v. Ryan*[6] and this Court's decision in *Holmes v.*

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[1] *Roten v. State*, 2010 WL 3860663 (Del. Oct. 4, 2010)

[2] *Roten v. State*, 2011 WL 5419684 (Del. Nov. 8, 2011).

[3] *Roten v. State*, 2012 WL 3096659 (Del. July 30, 2012).

[4] *Roten v. State*, 2012 WL 5844889 (Del. Nov. 16, 2012).

[5] *Roten v. State*, 2013 WL 3206746 (Del. June 21, 2013).

[6] 132 S. Ct. 1309 (2012).

State[7] created a newly-recognized retroactive right to counsel in order to overcome the procedural bars of Superior Court Criminal Rule 61(i).

(4) We disagree. The United States Supreme Court held in *Martinez v. Ryan* that inadequate assistance of counsel during initial postconviction proceedings may establish cause for a defendant's procedural default of a claim of ineffective assistance of counsel at trial in pursuing federal habeas corpus relief. Contrary to Roten's contention, *Martinez* does not hold that there is a federal constitutional right to counsel in first postconviction proceedings.[8] Furthermore, Roten misreads this Court's decision in *Holmes v. State*. In *Holmes*, we held that the Superior Court abused its discretion in denying Holmes' motion for the appointment of counsel to assist him in his first postconviction proceeding. We remanded for the appointment of counsel under the Superior Court's new Criminal Rule 61(e), which allows for the appointment of counsel in first postconviction proceedings. The rule was adopted May 6, 2013 and is *not* retroactive. We did not hold in *Holmes* that a right to counsel in first postconviction proceedings exists as a matter of Delaware constitutional law.

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[7] 2013 WL 2297072 (Del. May 23, 2013).

[8] *Martinez v. Ryan*, 132 U.S. at 1315 (stating that "This is not the case, however, to resolve whether [an exception to the constitutional rule that there is no right to counsel in collateral proceedings] exists as a matter of constitutional law.").

(5) Under the circumstances, we find nor error or abuse of the Superior Court's discretion in holding that Roten's second motion for postconviction relief was procedurally barred and that Roten had failed to overcome the procedural hurdles. Accordingly, the judgment of the Superior Court shall be affirmed.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice