IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
Plaintiff,	)	
	)	
v.	)	I.D. 0709033236
	)	
	)	
ANDRE BINAIRD,	)	
	)	
Defendant.	)	
	)	

ORDER

Defendant has filed a second Rule 61 motion in which he again claims that his trial counsel was ineffective. This motion is procedurally barred and will therefore be dismissed.

1.   In August, 2009 Defendant filed his first Rule 61 motion. In that motion Defendant asserted that his trial counsel was ineffective in several respects. This court considered the merits of that motion and found that Defendant was not denied the effective assistance of counsel. Defendant appealed, and the Supreme Court affirmed this court's decision.[1] The Supreme Court wrote:

> The record reflects that the Superior Court
> carefully reviewed each of Binaird's claims

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[1] *Binaird v. State,* 7 A.3d 484 (Del. 2010).

concerning his counsel's allegedly deficient performance. We find no error in the Superior Court's conclusion that Binaird's claims of ineffective assistance were unsupported by the record and, thus, legally insufficient to establish that his counsel's performance fell below an objective standard of reasonableness and was prejudicial.[2]

2. Defendant has now filed another Rule 61 motion, again alleging that his trial counsel was ineffective. Rule 61 (i)(4) bars consideration of any claim which was previously presented and adjudicated. The Rule states:

> *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.

Here Defendant's claim that his counsel was ineffective was previously adjudicated adversely to him, and therefore his second motion is procedurally barred.[3]

3. The bar in Rule 61(i)(4) contains an exception when "Reconsideration is warranted in the interest of justice." In order to invoke this exception Defendant "must show that (1) subsequent legal developments have

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[2] *Id.*

[3] The court notes that the bases for the ineffective assistance counsel claim need not be the same in both motions in order to be subject to the bar in 61(i)(4). "[A] defendant is not entitled to have a court re-examine an issue that has been previously resolved 'simply because the claim is refined or restated." *State v. Wright,* 67 A.3d 319, 323 (Del. 2013).

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."[4] Defendant has made no such showing here.

4.   Defendant argues that his current claim is not procedurally barred because he has purportedly stated "a colorable claim that there was a miscarriage of justice" as contemplated by the exception found in Rule 61(i)(5).   This argument fails because that exception by its own terms applies only to the bars found in Rule 61(i)(1), (2) and (3).   It does not apply to the bar found in Rule 61(i)(4).

It is therefore hereby **ORDERED** that Defendant's Rule 61 motion is **DISMISSED.**[5]

Dated: March 20, 2014

John A. Parkins, Jr.
Superior Court Judge

oc: Prothonotary
cc: Timothy J. Donovan, Esquire, Department of Justice, Wilmington, Delaware
Andre Binaird, SBI 259191, JTVCC, Smyrna, Delaware

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[4] *Guy v. State,* 999 A.2d 863, 868 (Del. 2010).
[5]   Defendant also seeks appointment of counsel. He cites no authority entitling him to appointment of counsel for prosecution of a second Rule 61 motion. That application is **DENIED.**