

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	Cr. ID. No. 1007020835
)	
ANDRE C. PETERS,)	
)	
Defendant.)	
)	

Submitted: February 27, 2014

Decided: March 18, 2014

**COMMISSIONER’S REPORT AND RECOMMENDATION THAT
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF
SHOULD BE DENIED
AND
COUNSEL’S MOTION TO WITHDRAW SHOULD BE GRANTED.**

Sonia Augusthy, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Anthony A. Figliola, Esquire, Figliola & Facciolo, 1813 Marsh Road, Suite A, Wilmington, Delaware, 19810, Attorney for Defendant Andre Peters.

PARKER, Commissioner

This 18th day of March, 2014, upon consideration of Defendant's Motion for Postconviction Relief and Defendant's Rule 61 Counsel's Motion to Withdraw, it appears to the Court that:

BACKGROUND AND PROCEDURAL HISTORY

1. Defendant Andre C. Peters was indicted on three counts of Robbery in the First Degree, one count of Burglary in the First Degree, four counts of Possession of a Firearm During the Commission of a Felony, and one count of Conspiracy in the Second Degree.
2. Following a Superior Court jury trial, on March 17, 2011, Defendant Peters was found guilty on all the counts of the indictment. On July 15, 2011, Defendant was sentenced to 30 years at Level V, suspended after the minimum mandatory period of 23 years, followed by probation.
3. Defendant filed a direct appeal to the Delaware Supreme Court. On direct appeal, Defendant's counsel filed a brief and a motion to withdraw pursuant to Supreme Court Criminal Rule 26 (c). On December 13, 2011, the Delaware Supreme Court found Defendant's claims to be without merit and affirmed the conviction and sentence of the Superior Court.¹

FACTS

4. The charges stemmed from a home invasion robbery committed in the late evening of July 21, 2010. Three armed men forcibly entered a dwelling in which three adults and three young children were residing. The intruders demanded money and drugs.

¹ *Peters v. State*, 2011 WL 6201315 (Del.).

One of the intruders threatened to shoot all of the occupants including the children. The intruders stole money, cell phones and prescription narcotics.

5. The victims were able to identify one of the intruders as a friend named Christopher Crawford. Crawford was arrested on July 23, 2010 and in his first post-Miranda interview denied any involvement in the crime. During his second interview, he admitted his involvement and stated that an individual named “Dre” was also involved.

6. Co-defendant Crawford advised that after the home invasion, they rented a room at an Econo-Lodge on Route 13 and that the individual named “Dre” signed the room registration.

7. The police went to the Econo-Lodge and obtained the room registration evidencing that Andre Peters rented a room at 12:50 a.m. on July 22, 2010. Crawford identified Defendant Andre Peters from a photo array as the individual who had the gun during the home invasion.

8. One of the adult victims identified Defendant Peters from a photo-array as the intruder who put the gun to his head.²

9. At trial, the State presented the three adult victims, all of whom identified Defendant Andre Peters as the intruder with the gun.³

² March 16, 2011 Trial Transcript, at pgs. 30-32 (Victim Joshua Kist identified Andre Peters from a photo array as the intruder that put a gun in his face.).

³ Victim Antoinette Pritchard- March 15, 2011 Trial Transcript, at pgs. 71- 85, 94-95, 140-142 (The intruder with the gun was Andre Peters. He pointed the gun at their heads and threatened to shoot them. He also grabbed Ms. Pritchard by the face, put the gun to her head and told her if she did not shut the kids up, he was going to kill them all.).

Victim Joshua Kist- March 16, 2011 Trial Transcript, at pgs. 35-36, 63-64 (Andre Peters is identified by Victim Joshua Kist as the intruder that put the gun in his face and poked him with the gun so that he felt the metal of the gun. Victim Kist saw Andre Peters point the gun at Antoinette Pritchard, Charles Prtichard and the children. Victim Kist knows what a firearm looks and feels like. Andre Peters’ gun was close enough to Victim Kist’s face that he could read the writing on the gun and saw that it said “Millennium Nine Millimeter”.)

10. On December 28, 2010, Co-Defendant Crawford pled guilty to Robbery in the First Degree and Burglary in the First Degree. The terms of his plea agreement required him to testify and cooperate with the State. On the eve of trial, Co-Defendant Crawford gave his third statement to the police. Crawford again implicated Defendant Peters as participating in the home invasion and possessing a gun during the crime.

RULE 61 MOTION AND COUNSEL’S MOTION TO WITHDRAW

11. January 7, 2013, Defendant filed a *pro se* motion for postconviction relief along with a supporting memorandum of law. Thereafter, Defendant filed an amended motion. Before making a recommendation, the record was enlarged and Defendant’s trial counsel was directed to submit an Affidavit responding to Defendant’s ineffective assistance of counsel claims. In turn, the State was also directed to, and did, file a response to the motion.⁴

12. After the submissions had been received by Defendant’s trial counsel and the State, Defendant Peters requested counsel to assist him on his Rule 61 motion. The court granted Defendant Peters’ motion for the appointment of counsel.

13. On January 30, 2014, assigned Rule 61 counsel filed a Motion to Withdraw as Postconviction Counsel pursuant to Superior Court Criminal Rule 61(e)(2).

14. Superior Court Criminal Rule 61(e)(2) provides that:

If counsel considers the movant’s claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, counsel may move to withdraw. The motion shall explain the factual and legal basis for counsel’s opinion and shall give notice that the movant may file a response to the

Victim Charles Pritchard- March 16, 2011 Trial Transcript, at pgs. 79-90 (Andre Peters is identified by Victim Charles Pritchard as the intruder with the gun that told him to get his hands over his head or he would be shot and told them to quiet the kids or the kids would be killed.).

⁴ See, Super.Ct.Crim.R. 61(g)(1)and (2).

motion within 30 days of service of the motion upon the movant.

15. In the motion to withdraw, Defendant's Rule 61 counsel represented that Defendant Peters has failed to allege, nor is counsel aware of, any meritorious grounds for postconviction relief.⁵ Defendant's Rule 61 counsel represented to the court that there are no potential meritorious grounds on which to base a Rule 61 motion and has therefore sought to withdraw as counsel.⁶

16. Defendant's Rule 61 counsel advised Defendant of his motion to withdraw and advised Defendant that he had the right to file a response thereto within 30 days, if Defendant desired to do so.⁷ Defendant filed a response to counsel's motion to withdraw on February 27, 2014.⁸ In his response, Defendant re-raises the three claims that he instructed counsel to pursue and opposes counsel's request to withdraw.

17. In order to evaluate Defendant's Rule 61 motion, and to determine whether Defendant's Rule 61 counsel's motion to withdraw should be granted, the court should be satisfied that Rule 61 counsel made a conscientious examination of the record and the law for claims that could arguably support Defendant's Rule 61 motion. In addition, the court should conduct its own review of the record in order to determine whether Defendant's Rule 61 motion is devoid of any, at least, arguable postconviction claims.⁹

⁵ See, Superior Court Docket No. 51- Defendant's Rule 61 counsel's Motion to Withdraw.

⁶ *Id.*

⁷ See, Superior Court Docket No. 51- Notice of Motion to Withdraw advising Defendant Peters' that he must file a response to the motion within 30 days, if he desired to respond to the motion.

⁸ Superior Court Docket No. 54- Defendant's Response to Counsel's Motion to Withdraw.

⁹ See, for example, *Roth v. State of Delaware*, 2013 WL 5918509, at *1 (Del. 2013)(addressing standard to be employed when deciding counsel's motion to withdraw on a defendant's direct appeal).

DEFENDANT’S RULE 61 MOTION IS WITHOUT MERIT

18. In his Rule 61 motion, Defendant raised four ineffective assistance of counsel claims, three of which he wanted Rule 61 counsel to continue to pursue.¹⁰ All of Defendant’s claims are without merit. Each claim will be addressed below.

19. In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level “below an objective standard of reasonableness” and that, (2) the deficient performance prejudiced the defense.¹¹ The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel’s unprofessional errors, the outcome of the proceedings would have been different.¹²

20. When a court examines a claim of ineffective assistance of counsel, it may address either prong first; where one prong is not met, the claim may be rejected without contemplating the other prong.¹³

21. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.¹⁴ There is a strong presumption that counsel’s conduct fell within a wide range of reasonable professional assistance and constituted sound trial strategy.¹⁵ Furthermore, an error by counsel, even

¹⁰ See, Superior Court Docket No. 47- Defendant’s letter to Rule 61 counsel dated September 24, 2013.

¹¹ *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

¹² *Id.*

¹³ *Strickland*, 466 U.S. at 697.

¹⁴ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

¹⁵ *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).

if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment.¹⁶

22. It is against this backdrop that each of Defendant Peters' claims for relief are considered.

First Claim: Trial Counsel Failed to Investigate a Potential Witness

23. Defendant first claims that his trial counsel was ineffective for failing to investigate a potential witness regarding the firearm charges. Defendant contends that his trial counsel failed to interview a witness named Gabby Vega who would have testified that Defendant possessed a BB gun and often used a BB gun similar to the weapon brandished during the robbery. Defendant Peters was charged with, and convicted of four weapons charges. A BB gun would not constitute a firearm or deadly weapon.

24. As an aside, Defendant's premise is not entirely correct. Even if he was able to establish that he possessed a BB gun, that would not, in and of itself, end the analysis. Although a BB gun would not constitute a firearm or deadly weapon, a hybrid gun, designed to work both as a BB gun and a compressed air pellet gun, would constitute a firearm.¹⁷

25. In this case, Defendant's trial counsel and Defendant's Rule 61 counsel both represented that they each either spoke directly with Ms. Vega, or their respective investigators did so, and both independently concluded that Ms. Vega could not provide any helpful information to the Defendant.

26. Defendant's trial counsel, in his Affidavit in response to Defendant's Rule 61 motion, advised that he hired a private investigator who conducted a thorough

¹⁶ *Strickland*, 466 U.S. at 687-88, 694.

¹⁷ See, *State v. Congo*, 2010 WL 1891700 (Del.Super.), *aff'd*, 2011 WL 721262 (Del.).

investigation.¹⁸ The private investigator met with Defendant on several occasions, and attempted to interview witnesses and the alleged victims.¹⁹ The private investigator's report reflected that he was introduced to Ms. Vega, the "potential witness" at issue, and that Ms. Vega never mentioned having any information about Defendant Peters carrying a BB gun.²⁰

27. In addition, trial counsel, in his Affidavit, represented that he had no recollection of Defendant having provided him with information about Ms. Vega's knowledge of Defendant's gun. In any event, trial counsel did speak with Ms. Vega and did not consider her to be a good defense witness. It appears, from trial counsel's notes, that Ms. Vega never mentioned that she had known Defendant Peters to possess a BB gun. Ms. Vega was also not very cooperative. She also had knowledge of Defendant Peters' felony criminal record, so trial counsel was concerned if she was called to testify this information may have been elicited on cross-examination.²¹

28. Defendant's Rule 61 counsel, in his motion to withdraw, represented that he retained the services of a different private investigator who interviewed Ms. Vega. Although Ms. Vega denied speaking with Defendant's trial counsel or anyone on his behalf, she also failed to provide any information that would have been helpful to Defendant Peters.²²

29. At trial, the three adult witnesses testified and identified Defendant as the intruder who forced his way into their home, armed with a gun, and robbed them. One could feel

¹⁸ Affidavit of Trial Counsel in response to Rule 61 Post-Conviction Relief Motion, at pg. 7.

¹⁹ Affidavit of Trial Counsel in response to Rule 61 Post-Conviction Relief Motion, at pg. 7.

²⁰ Affidavit of Trial Counsel in response to Rule 61 Post-Conviction Relief Motion, at pg. 7.

²¹ Affidavit of Trial Counsel in response to Rule 61 Post-Conviction Relief Motion, at pg. 7.

²² Defendant's Rule 61 Counsel's Motion to Withdraw, at pg. 2.

the metal of the gun on her head.²³ Another victim also testified that he too felt the metal of the gun in his face and that he was close enough to the gun to see the writing “Millennium 9 Millimeter” on it.²⁴ Both trial counsel and Rule 61 counsel concluded that Ms. Vega did not possess any information that would be helpful to Defendant Peters in his defense.

30. In this claim, Defendant has not shown that trial counsel’s conduct was deficient in any regard. Moreover, even if trial counsel had failed to investigate Ms. Vega as a potential witness, Defendant cannot establish that he suffered any actual prejudice as a result thereof. There is no showing that Ms Vega could have provided any information at trial that would have been helpful to Defendant Peters. In fact, both trial counsel and Rule 61 counsel independently concluded that she would not be helpful to the defense. Defendant’s ineffective assistance of counsel claim on this issue fails to meet either prong of the *Strickland* standard and should be denied.

Second Claim: Trial Counsel Abandoned Defendant During the Proffer

31. In Defendant’s second claim, he alleges that his trial counsel provided ineffective assistance because counsel did not remain in the room while Defendant made a proffer to the State during plea negotiations.

32. Defendant’s trial counsel, in his Affidavit in response to Defendant’s Rule 61 motion, explained that Defendant had already rejected two prior plea offers with a recommended sentence of six years. The evidence against Defendant was overwhelming

²³ Victim Antoinette Pritchard- March 15, 2011 Trial Transcript, at pg. 141.

²⁴ Victim Joshua Kist- March 16, 2011 Trial Transcript, at pgs. 35, 63-64.

and, if convicted at trial, he was facing a minimum mandatory sentence of 23 years at Level V.²⁵

33. Defendant had rejected the pre-trial plea offers based on his belief that the victims would not appear for trial. The victims did, however, appear for trial.²⁶ When the victims appeared for trial, Defendant's trial counsel requested a continuance so that Defendant would have an opportunity to provide a proffer about his involvement in order to be offered a six year plea deal.²⁷ The trial was rescheduled from February 2, 2011 to March 15, 2011.²⁸

34. Defense counsel met with Defendant to explain his options. Defendant counsel explained to Defendant that the plea offer was contingent upon Defendant's truthful proffer and testimony. Counsel explained the terms and conditions of the proffer.²⁹ Defendant agreed to give a proffer and to identify the third suspect.³⁰

35. Defense counsel advised Defendant that due to a scheduling conflict counsel would have to leave during the proffer. Counsel was present for about 15-20 minutes of Defendant's interview.³¹

36. The State was not satisfied with Defendant's proffer. The State did not believe that Defendant was telling the truth and Defendant did not identify the third suspect. The State was not satisfied that Defendant fulfilled his end of the agreement and withdrew the plea offer.

37. The State did not use Defendant's proffer at trial in any respect.

²⁵ Affidavit of Trial Counsel in response to Rule 61 Post-Conviction Relief Motion, at pgs. 3-4, 9-10.

²⁶ Affidavit of Trial Counsel in response to Rule 61 Post-Conviction Relief Motion, at pgs. 9-10.

²⁷ Affidavit of Trial Counsel in response to Rule 61 Post-Conviction Relief Motion, at pgs. 9-10.

²⁸ See, Superior Court Docket No. 9 & 10- February 2, 2011 trial continued until March 15, 2011.

²⁹ Affidavit of Trial Counsel in response to Rule 61 Post-Conviction Relief Motion, at pgs. 9-10.

³⁰ Affidavit of Trial Counsel in response to Rule 61 Post-Conviction Relief Motion, at pgs. 9-10.

³¹ *Id.*

38. Defendant contends in this claim that his counsel “abandoned him during plea negotiations.” Trial counsel did not abandon Defendant. Defendant’s trial counsel, in his Affidavit, represented that he spoke with Defendant in detail about the proffer, the limitations on the use of any statement made by Defendant, and that counsel remained present for part of the interview.³² Trial counsel negotiated the plea agreement and explained to Defendant in detail the parameters of the plea. Defendant had to be truthful about the home invasion and had to identify the third suspect.

39. Although it may have been improper for trial counsel to leave during Defendant’s proffer to the State, due to a scheduling conflict, Defendant cannot establish that he suffered any actual prejudice as a result thereof. Defendant does not provide any specifics as to how his proffer would have differed if counsel remained in the room during the entire interview.

40. Defendant was required to testify truthfully and identify the third suspect. The State did not believe that Defendant testified truthfully and Defendant did not identify the third suspect. Consequently, the State did not believe that Defendant fulfilled his part of the plea deal and would not move forward with the plea. Defendant’s proffer was not used in any way at trial.

41. The evidence against Defendant was overwhelming. Indeed, at trial, all three adult victims testified and identified Defendant as the intruder who forced his way into their home, armed with a gun and robbed them. Defendant’s co-defendant, Christopher Crawford, had given three statements that implicated Defendant as a co-conspirator. Co-Defendant Crawford’s proffer to the State detailed Defendant’s involvement in the crime and he had agreed to testify against Defendant.

³² Affidavit of Trial Counsel in response to Rule 61 Post-Conviction Relief Motion, at pgs. 9-10.

42. The State's case-in-chief was so strong that it did not call Crawford as a witness electing to hold him for rebuttal should the defense put on a case. Defendant's trial counsel advises that had Defendant taken the stand and testified, or otherwise put on a defense, Crawford's testimony on rebuttal would have "decimated" the defense. Crawford's statements were all consistent that Defendant was involved in the home intrusion and that Defendant was armed with a gun.³³

43. Since no information given during the proffer was used against Defendant at trial, he cannot establish any actual prejudice as a result of his having provided the proffer. Moreover, Defendant has not established how his proffer would have differed in any respect if his counsel had remained at the interview. Defendant has not met the *Strickland* standard of demonstrating that, but for, the supposed ineffective assistance of counsel, the result of the proceeding would have been different. The record before the jury that convicted him is as though Defendant never made a proffer at all.

Claim Three: Failure to Request a Mistrial Due to Improper *Voir Dire* of the Jury

44. In Defendant's third claim, he contends that his trial counsel was ineffective for failing to request a mistrial after a witness was heard mumbling something by the jury.

45. The court was alerted by the bailiff that a member of the jury commented on hearing a witness mumbling during trial.³⁴ The juror also advised the court that the witness was in the lunch area of the courthouse and some of the jurors heard the witness "making some noises" so they got up and left.³⁵

46. Defendant's trial counsel asked the court to have any jurors who may have heard the mumbling in the courtroom and those who may have heard anything in the lunch area

³³ *Id.*

³⁴ March 17, 2011 Trial Transcript, at pgs. 45-46.

³⁵ March 17, 2011 Trial Transcript, at pgs. 48-49.

questioned by the trial judge.³⁶ The court agreed and even expanded the scope to include any juror that heard the mumbling in the courtroom and any juror that was in the vicinity of the witness in the lunch area of the courthouse.³⁷

47. All of the jurors who heard remarks in the courtroom or were in the vicinity of the witness in the lunch area of the courthouse were examined.³⁸ Not one juror heard anything the witness was saying. They just heard mumbling.

48. Juror No. 11, the initial juror that reported the issue, represented to the court that she heard mumbling. She did not hear any words, just mumbling. She could not understand what the witness was saying. She represented to the court that the witness' actions had no impact on her in any way and would not affect her ability to be impartial.³⁹ 49. Juror No. 14 stated that she heard the witness mumbling in the

courtroom. She advised the court that the mumbling she heard would not impact how she might rule in the case.⁴⁰ Juror No. 10 stated that the witness sat nearby in the food area of the courthouse but said nothing.⁴¹ Juror No. 6 stated that he heard nothing at all.⁴²

Juror No. 13 stated that she heard mumbling and grumbling when the defense was speaking, but that it would not impact how she might rule in the case.⁴³ Juror No. 9 did

not hear anything.⁴⁴ Juror No. 3 stated that he saw the witness in the lunch area but had no interaction with the witness and did not hear the mumbling in the courtroom.⁴⁵ Juror

³⁶ March 17, 2011 Trial Transcript, at pgs. 47, 49-50, 55.

³⁷ March 17, 2011 Trial Transcript, at pgs. 50.

³⁸ March 17, 2011 Trial Transcript, at pgs. 55-56.

³⁹ March 17, 2011 Trial Transcript, at pgs. 47-48, 51-53, 65-66.

⁴⁰ March 17, 2011 Trial Transcript, at pgs. 56-57.

⁴¹ March 17, 2011 Trial Transcript, at pgs. 57-58.

⁴² March 17, 2011 Trial Transcript, at pg. 58.

⁴³ March 17, 2011 Trial Transcript, at pg. 59.

⁴⁴ March 17, 2011 Trial Transcript, at pg. 60.

⁴⁵ March 17, 2011 Trial Transcript, at pgs. 60-61.

No. 12 stated that he saw the witness but that he heard nothing.⁴⁶ Juror No. 1 stated that he heard the mumbling, nothing specific, during the prosecutor's summation. Juror No. 1 represented that the mumbling would not impact how he might rule in the case.⁴⁷

50. Defendant's trial counsel represented to the court that he had informed Defendant Peters of the issue.⁴⁸ Defendant's trial counsel advised the court that he informed Defendant Peters that those jurors who heard the witness mumbling in the courtroom or who sat near the witness in the lunch area of the courthouse were all individually *voir dire*d and that none of them heard any words, just mumbling, and that they all represented it would not affect their ability to be impartial in the case.⁴⁹

51. Defendant appears to claim that his trial counsel was ineffective for not requesting a mistrial because the trial court did not *voir dire* those jurors who did not hear the mumbling in the courtroom or did not sit near the witness in the lunch area of the courthouse.

52. All jurors who heard mumbling in the courthouse came forward and advised the court that none of them heard any words, just mumbling. All jurors who sat near the witness in the lunch area of the courthouse came forward and advised the court that, at most, they heard mumbling. No juror heard any words, just mumbling.

53. It does not appear likely that the jurors who did not see or hear anything could have been unduly influenced by the jurors who heard mumbling because the mumbling was not discernible and no juror heard what the witness actually said. Defendant cannot

⁴⁶ March 17, 2011 Trial Transcript, at pgs. 61-62.

⁴⁷ March 17, 2011 Trial Transcript, at pgs. 62.

⁴⁸ March 17, 2011 Trial Transcript, at pg. 73.

⁴⁹ March 17, 2011 Trial Transcript, at pg. 73.

establish any actual prejudice that those jurors who did not see or hear anything pertaining to the mumbling witness were not *voir dire*d.

54. Defendant's trial counsel, in his Affidavit in response to Defendant's Rule 61 motion, represented that he took appropriate actions when the issue arose.⁵⁰ The court granted his request to have the jurors who may have heard the mumbling questioned by the trial judge. Based upon several jurors being questioned with no concrete assertions that they had heard anything other than mumbling and that they could be impartial it appeared to be a dead issue that did not rise to the level of a motion for a mistrial.⁵¹

55. Defendant's Rule 61 counsel, in his motion to withdraw, agreed that there was nothing in the record to support a good faith claim that a mistrial motion was warranted.⁵² The record established that the court questioned the jurors who may have heard the comments and was satisfied that there no prejudice. Defendant's trial counsel was also satisfied that Defendant was not prejudiced by the mumbling of the witness.

56. This claim is without merit. Defendant's trial counsel's handling of this issue does not appear to be deficient nor did Defendant establish any actual prejudice as a result of any alleged deficiency thereof.

Claim Four: Appellate Counsel was Ineffective on Direct Appeal

57. In his fourth claim, Defendant contends that his appellate counsel was ineffective for filing a Brief and a Motion to Withdraw pursuant to Supreme Court Rule 26(c). Defendant does not allege what meritorious appealable issues existed that should have been raised on direct appeal.

⁵⁰ Affidavit of Trial Counsel in response to Rule 61 Post-Conviction Relief Motion, at pgs. 10-11.

⁵¹ Affidavit of Trial Counsel in response to Rule 61 Post-Conviction Relief Motion, at pgs. 10-11.

⁵² Defendant's Rule 61 Counsel's Motion to Withdraw, at pg. 3.

58. The Delaware Supreme Court after a careful review of the record already concluded that Defendant Peters' direct appeal was wholly without merit and devoid of any arguable appealable issue.⁵³ The Delaware Supreme Court further concluded that Defendant Peters' appellate counsel made a conscientious effort to examine the record and the law and properly determined that Defendant Peters could not raise a meritorious claim on direct appeal.⁵⁴

59. This claim has already been previously adjudicated and is now procedurally barred pursuant to Superior Court Criminal Rule 61(i)(4). Defendant merely re-states and recouches this claim as an ineffective assistance of counsel contention even though it has already been fully and thoroughly considered. The court is not required to re-examine claims that already received full and thorough resolution simply because the claim has now been restated and recouched as an ineffective assistance of counsel claim.⁵⁵

60. This claim, in addition to being procedurally barred as previously adjudicated, has already been found by the Delaware Supreme Court to be without merit.

61. Defendant's claims that his counsel provided ineffective assistance are undermined by the record and fail to satisfy *Strickland*. The conduct of defense counsel does not appear to be deficient nor has Defendant shown any actual prejudice allegedly as a result thereof.

62. The court has reviewed the record carefully and has concluded that Defendant's Rule 61 motion is without merit and devoid of any other substantial claims for relief. The court is also satisfied that Defendant's Rule 61 counsel made a conscientious effort

⁵³ *Peters v. State*, 2011 WL 6201315 (Del.).

⁵⁴ *Id.*

⁵⁵ *Johnson v. State*, 1992 WL 183069, at *1 (Del.); *Duhadaway v. State*, 877 A.2d 52 (Del. 2005).

to examine the record and the law and has properly determined that Defendant does not have a meritorious claim to be raised in his Rule 61 motion.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied and Defendant's counsel's motion to withdraw should be granted.

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc: Prothonotary
cc: Peter W. Veith, Esquire
cc: Mr. Andre Peters