SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOHN A. PARKINS, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801-3733
TELEPHONE: (302) 255-2584

June 6, 2014

Matthew B. Frawley, Esquire
Department of Justice
Carvel State Office Building
820 North French Street
Wilmington, Delawre 19801

Itius D. Wynn
SBI 52
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, Delaware 19977

Re: State v. Itius D. Wynn
ID No. 0910022262

Dear Counsel and Mr. Wynn:

The court is in receipt of a Motion for Modification of Sentence filed *pro se* by Defendant and received by the court on May 27, 2014.

Before addressing the present application it is useful to review briefly the facts of this case and its procedural history. On Halloween night in 2009 Defendant happened upon a party and asked to be invited in. The host of the party refused because she did not know Mr. Wynn, whereupon Mr. Wynn went home to get his gun. Mr. Wynn returned to the site of the party and fired three shots into the partygoers, seriously wounding and permanently maiming two of them. He was charged in a sixteen count indictment with assault, reckless endangering and weapons offenses. He later pled guilty to

five counts, including two counts of assault in the second degree, two counts of PFDCF and one count of reckless endangering in the first degree. After preparation of a Presentence Investigation in 2010 the court sentenced him to 24 years of incarceration. Defendant appealed his sentence, and the Supreme Court affirmed, holding "The sentencing judge imposed harsher sentences than those recommended by the SENTAC Benchbook guidelines based on two aggravating circumstances. Those sentences were neither illegal, nor an abuse of discretion."[1]

In 2012 Defendant filed a motion under Criminal Rule 61 claiming ineffective assistance of counsel. The claims raised in that motion are nearly identical to those raised in the instant application. He alleged a breach of the plea agreement and that his sentence was illegal.[2] A commissioner of this court recommended denial of the motion and a judge of this court adopted that recommendation. On appeal the Supreme Court affirmed. In 2013 Defendant, represented by counsel at the time, filed a Rule 35 motion seeking a reduction in sentence. That motion was denied in a six page opinion from this court.

Defendant's present motion asserts that this court was not informed of the State's agreement to limit its recommendation to eight years. Mr. Wynn contends in his motion that "the attorney and prosecutor failed to inform the Court of the agreed upon 'CAP' to 8 years." He also contends that the court "imposed an illegal sentence when sentencing Wynn over the agreed upon

[1] *Wynn v. State,* 23 A.3d 145, 151 (Del. 2011).
[2] He also alleged his counsel was ineffective, but that allegation is not pertinent here.

CAP." A review of the sentencing transcript shows that the court was fully informed of the State's agreement. And a review of the transcript of the plea colloquy shows that Defendant acknowledged he understood that the court was not bound by any recommendation by the State and that the court could sentence him to a term of incarceration of 71 years.

Although Defendant's motion is styled as a Motion for Reduction of Sentence under Rule 35, the substance of the motion appears to challenge the legitimacy of his plea. Out of an abundance of caution the court will treat Defendant's filing as both a Rule 35 and a Rule 61 motion.

a. Treating the application as a Rule 35 motion

Treating the present matter as a Rule 35 motion, it is procedurally barred. Rule 35 requires that motions for reduction of sentence be filed within 90 days of imposition of the sentence, except that the court may consider a motion filed more than 90 days after imposition of sentence "in extraordinary circumstances." The instant application was filed more than 90 days after Defendant's sentence was imposed and the court finds no "extraordinary circumstances" are set out in the motion which would warrant relief. Further, this is the second motion for a reduction of sentence filed by Defendant. Rule 35 provides that the "court will not consider repetitive requests for reduction of sentence." Accordingly, treating Defendant's application as a Rule 35 motion, that application is **DENIED.**

b. Treating the application as a Rule 61 motion

Treating this matter as a Rule 61 motion, it is also procedurally barred. Rule 61 bars presentation of "[a]ny ground for relief which was formerly adjudicated."[3] In its order affirming the denial of Defendant's first Rule 61 motion the Supreme Court rejected Defendant's contention that "the prosecutor breached the plea agreement when he made comments at [his] sentencing suggesting the State was in favor of a sentence greater than eight years." In other words, the contention that the prosecutor breached the plea agreement concerning the sentencing recommendation has already been adjudicated. The instant allegation that the prosecutor did not advise the court of the agreement is nothing more than a variation on a theme and therefore is now barred. "[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."[4] Therefore, treating the instant matter as a Rule 61 motion, that motion is **DISMISSED.**

SO ORDERED.

Very truly yours,

John A. Parkins, Jr.

oc: Prothonotary

[3] Criminal Rule 61(i)(4).
[4] *State v. Wright*, 67 A.3d 319, 323 (Del. 2013).