



## I. INTRODUCTION

Before the Court is (1) a Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”) and (2) a Motion for Appointment of Counsel filed by Miles Brice (“Defendant”). Defendant filed both Motions on November 6, 2013. The State did not respond to either of Defendant’s Motions. Defendant has previously filed four motions for postconviction relief, all of which were denied or summarily dismissed, and through the instant Motion for Postconviction Relief Defendant asserts ineffective assistance of his trial counsel. For the reasons discussed below, Defendant’s fifth Motion for Postconviction Relief is **DENIED** and Defendant’s Motion for Appointment of Counsel is **MOOT**.

## II. FACTS

### **A. Background**

In July 2001, Defendant, together with a co-defendant, chased an individual with whom Defendant had a feud into an apartment.<sup>1</sup> Defendant and the co-defendant tried to force their way into the apartment, and Defendant, who was carrying a semi-automatic handgun, fired eleven bullets through the door, killing two individuals as well as injuring another party.<sup>2</sup> Defendant and the co-defendant fled from the apartment building and were subsequently arrested one day after the shooting.<sup>3</sup> The police discovered the murder weapon under a sofa cushion where Defendant was sitting at the time he was arrested.<sup>4</sup>

A grand jury returned an indictment against Defendant on July 30, 2001, charging him with two counts of Felony Murder in the First Degree, one count of Attempted Murder in the First Degree, one count of Assault in the Second Degree, one count of Conspiracy in

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<sup>1</sup> *State v. Brice*, 2009 WL 477302, at \*1 (Del. Super. Ct. Feb. 26, 2009).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

the First Degree, two counts of Attempted Burglary in the Second Degree, five counts of Reckless Endangering in the First Degree, and a number of related weapons offenses. The case went to trial in December 2003.<sup>5</sup> Following the completion of the State's case-in-chief, Defendant pleaded guilty to two counts of Felony Murder First Degree in exchange for the State dismissing the remaining counts of the indictment and agreeing not to seek the death penalty.<sup>6</sup> Defendant was subsequently sentenced to two life terms.<sup>7</sup> Defendant did not file a direct appeal from his convictions or sentences.<sup>8</sup>

### **B. Defendant's Previous Motions for Postconviction Relief**

Defendant filed his first motion for postconviction relief in January 2008.<sup>9</sup> Through his first motion, Defendant asserted (1) that his guilty plea was involuntary and (2) ineffective assistance of counsel, asserting trial counsel failed to inform him regarding how Delaware's Felony Murder statute is interpreted.<sup>10</sup> As part of the briefing schedule for Defendant's first motion, this Court ordered Defendant's trial counsel to file an affidavit responding to Defendant's claims of ineffective assistance of counsel.<sup>11</sup> After considering Defendant's first motion, the State's response, and trial counsel's affidavit, this Court denied Defendant's first motion.<sup>12</sup> Defendant appealed this Court's decision to the Delaware Supreme Court.<sup>13</sup> The Supreme Court affirmed this Court's denial, finding Defendant's first motion was time-barred pursuant to Rule 61(i)(1), and, further, that Defendant failed to

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<sup>5</sup>*Brice v. State*, Del. Supr., No. 171, 2009, Berger, J. 1-2 (Apr. 8, 2010).

<sup>6</sup>*Id.* 1-3.

<sup>7</sup>*Id.* at 3.

<sup>8</sup>*Id.* Thus, pursuant to Superior Court Criminal Rule 61(m)(1), Defendant's judgment of conviction became final thirty days after his sentencing date.

<sup>9</sup>*State v. Brice*, Del. Super., No. 0107007736 Reynolds, Comm. 3 (Jan. 24, 2013).

<sup>10</sup>*Id.*

<sup>11</sup>*State v. Brice*, No. 0107007736 Docket No. 102 (Jul. 27, 2010).

<sup>12</sup>*State v. Brice*, 2009 WL 477302, at \*2-3 (Del. Super. Ct. Feb. 26, 2009).

<sup>13</sup>*Id.*

establish a “fundamental fairness” exception.<sup>14</sup> Regarding Defendant’s ineffective-assistance-of-counsel claim, the Delaware Supreme Court concluded there was no support in the record to support Defendant’s contention.<sup>15</sup>

Defendant filed a second motion for postconviction relief one day after the Delaware Supreme Court issued its decision affirming the denial of Defendant’s first motion.<sup>16</sup> Defendant’s second motion asserted, among other things,<sup>17</sup> ineffective assistance of counsel based on trial counsel’s alleged failure to inform Defendant of the “new” interpretation of Delaware’s Felony Murder statute.<sup>18</sup> This Court concluded that Defendant’s second motion was procedurally barred by Rule 61(i)(4), because the claims raised, including ineffective assistance of counsel, had been formerly adjudicated in the first motion for postconviction relief.<sup>19</sup> Defendant appealed this Court’s decision to the Delaware Supreme Court, which affirmed the denial of Defendant’s second motion by Order dated January 18, 2012.<sup>20</sup>

On February 10, 2012, Defendant filed his third motion for postconviction relief.<sup>21</sup> Among the grounds raised, Defendant asserted that his guilty plea was not knowingly and intelligently provided because he did not receive “real notice of the true nature of the charges against him.”<sup>22</sup> This Court found Defendant’s claim that his plea was not knowingly and intelligently given was a variation or restatement of his claim that he had been misinformed about the elements of Delaware’s Felony Murder statute, which was

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<sup>14</sup>*State v. Brice*, Del. Super., No. 0107007736 Reynolds, Comm. 6 (Jan. 24, 2013).

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>Defendant also asserted denial of due process based on his allegedly being misinformed of the elements of Delaware’s Felony Murder statute. *Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 7.

<sup>20</sup>*Brice v. State*, 2012 WL 162024, at \*1 (Del. Jan. 18, 2012).

<sup>21</sup>*State v. Brice*, Del. Super., No. 0107007736 Reynolds, Comm. 7 (Jan. 24, 2013).

<sup>22</sup>*Id.* at 7-8.

previously rejected.<sup>23</sup> For that reason, the Court found that Defendant's claim was procedurally barred and Defendant's third motion was summarily dismissed.<sup>24</sup> Defendant appealed to the Delaware Supreme Court, which affirmed this Court's judgment on October 15, 2012.<sup>25</sup>

Defendant filed his fourth motion for postconviction relief on November 7, 2012.<sup>26</sup> Defendant's fourth motion presented only one ground for relief, ineffective assistance of counsel.<sup>27</sup> This Court denied Defendant's motion, again, concluding that Defendant's ineffective-assistance-of-counsel claim was procedurally barred because it was formerly adjudicated in Defendant's previous motions for postconviction relief. The Delaware Supreme Court affirmed this Court's denial on May 24, 2013.

### **C. The Instant Motions**

#### *i. Motion for Postconviction Relief*

Through his Motion for Postconviction Relief, Defendant asserts ineffective assistance of counsel.<sup>28</sup> Defendant contends that trial counsel was ineffective because counsel "did not review the charges with [Defendant] by explaining the elements necessary for the government to secure a conviction, and discuss the evidence as it bears on those elements."<sup>29</sup> Defendant raises no other arguments and cites no other facts in his Motion for Postconviction Relief. However, Defendant raises additional contentions relevant to his claim of ineffective assistance of trial counsel through his Motion for Appointment of Counsel, which is discussed below.

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<sup>23</sup>*Id.* at 8.

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

<sup>25</sup>*Brice v. State*, 2012 WL 4880671, at \*1 (Del. Oct. 15, 2012).

<sup>26</sup>*State v. Brice*, Del. Super., No. 0107007736 Reynolds, Comm. (Jan. 24, 2013).

<sup>27</sup>*Id.* at 8.

<sup>28</sup>Def.'s Mot. for Postconviction Relief, *State v. Brice*, No. 0107007736, Docket No. 152 (Nov. 6, 2013) (hereinafter "Def.'s Rule 61 Mot.").

<sup>29</sup>*Id.* at 3.

ii. *Motion for Appointment of Counsel*

Defendant moves for court-appointed counsel, stating that he is unable to afford counsel to assist him with his Motion for Postconviction Relief.<sup>30</sup> Defendant asserts the “allegations [raised in his fifth Motion for Postconviction Relief], if proved, clearly would establish a constitutional violation.”<sup>31</sup> Defendant contends he has a right to “gain a meaningful review of all proceedings leading to the judgment of conviction,” . . . “as well as to open an inquiry into the intrinsic fairness of those proceedings.”<sup>32</sup> Defendant asserts that counsel is needed because “[t]he issues in this case are complex.”<sup>33</sup> Perhaps more relevant to his Motion for Postconviction Relief, in moving for appointment of counsel, Defendant asserts his trial counsel had impaired judgment when he counseled Defendant due to (1) being involved in two car accidents, (2) sustaining a concussion, (3) allegedly being diagnosed with Post-Traumatic Stress Disorder in 2000 as a result of witnessing a former client’s execution, as well as (4) “a combination of multiple prescription drugs.”<sup>34</sup> Defendant argues trial counsel “gave incorrect advice regarding [Delaware’s] Felony Murder [statute] in order to [e]ntice [Defendant] into a plea knowing if he gave the correct advice the Defendant would keep going where the death penalty was on the table.”<sup>35</sup> The Court notes that Defendant fails to articulate, through either his Motion for Appointment of Counsel or Motion for Postconviction Relief, the specific “incorrect advice” trial counsel allegedly provided.

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<sup>30</sup>Def.’s Mot. for Appointment of Counsel, *State v. Brice*, No. 0107007736, Docket No. 152 (Nov. 6, 2013) (hereinafter “Def.’s Mot. for Counsel”).

<sup>31</sup>*Id.* at 1.

<sup>32</sup>*Id.* at 2.

<sup>33</sup>*Id.* at 1.

<sup>34</sup>*Id.* at 2.

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

#### IV. DISCUSSION

Before considering the substantive merits of Defendant's Motion for Postconviction Relief, the Court must first address the procedural requirements of Rule 61(i). The procedural requirements set forth in Rule 61(i)(1)-(4) are as follows:

(1) the motion must be filed no more than [three] year[s] after the judgment of conviction is final; (2) any ground for relief that was not asserted in a prior postconviction proceeding is thereafter barred unless consideration of the claim is warranted in the interest of justice; (3) any ground for relief that was not asserted in the proceeding leading to the judgment of conviction is thereafter barred unless the movant shows (a) cause for relief from the procedural default and (b) prejudice from violation of the movant's rights; and (4) 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 petition, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.<sup>36</sup>

If the procedural requirements of Rule 61 are not satisfied, then the claim is barred and the Court should not consider the merits of the postconviction claim.<sup>37</sup> However, the procedural bars set forth in Rule 61(i)(1)-(3) are inapplicable, pursuant to Rule 61(i)(5), "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 legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."<sup>38</sup> Rule 61(i)(5), referred to as the "fundamental fairness" exception, applies in limited circumstance, such as when the right relied on has been recognized for the first time after the direct appeal.<sup>39</sup>

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<sup>36</sup>*State v. Ward*, Cr. ID No. 850062115DI, Docket No. 47, at 3-4. The Court notes that a three-year period, not one year, applies because the final order of conviction occurred before July 1, 2005. See Super. Ct. Crim. R. 61(i)(1) (July 1, 2005). However, this distinction is without a difference to the present Motion for Postconviction Relief.

<sup>37</sup>*Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>38</sup>Super. Ct. Crim. R. 61(i)(5).

<sup>39</sup>*Younger*, 580 A.2d at 555.

Defendant's Motion for Postconviction Relief is time barred under Rule 61(i)(1) because the instant Motion was filed almost eight years after Defendant's final conviction.<sup>40</sup> Defendant's claim is also procedurally barred under Rule 61(i)(4), because the contention Defendant raises in the subject motion—specifically, that his trial counsel was ineffective—has already been raised and adjudicated in, at least, four prior postconviction proceedings. Defendant claimed ineffective assistance of counsel through his first motion for postconviction relief. The Delaware Supreme Court affirmed this Court's denial of Defendant's first motion for postconviction relief, concluding Defendant's ineffective-assistance-of-counsel claim lacked merit.<sup>41</sup> Defendant's second, third, and fourth motions for postconviction relief also asserted ineffective assistance of counsel, as discussed above. The Delaware Supreme Court affirmed this Court's decisions finding Defendant's second,<sup>42</sup> third,<sup>43</sup> and fourth<sup>44</sup> motions for postconviction relief were procedurally barred, because the grounds for relief, including ineffective assistance of counsel, had been formerly adjudicated in Defendant's first motion for postconviction relief.<sup>45</sup>

Finally, Defendant has failed to provide any basis, and the record is devoid of any, that would permit this Court to consider whether any exception to the procedural bars<sup>46</sup> would apply in the case *sub judice*. Therefore, Defendant's Motion for Postconviction Relief is **DENIED**.

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<sup>40</sup> See *supra* note 8 and accompanying text.

<sup>41</sup> *Brice v. State*, 2010 WL 1408304, at \*2 (Del. Apr. 8, 2010).

<sup>42</sup> *Brice v. State*, 2012 WL 162024, at \*1 (Del. Jan. 18, 2012) (second motion for postconviction relief).

<sup>43</sup> *Brice v. State*, 2012 WL 4880671, at \*1 (Del. Oct. 15, 2012) (third motion for postconviction relief).

<sup>44</sup> *Brice v. State*, 2013 WL 2316558, at \*1 (Del. May 24, 2013) (fourth motion for postconviction relief).

<sup>45</sup> See *supra* notes 14-26.

<sup>46</sup> See *supra* notes 38-39 and accompanying text.

Having determined Defendant's Motion for Postconviction Relief is procedurally barred, Defendant's Motion for Appointment of Counsel to assist him with his postconviction motion is **MOOT**.<sup>47</sup>

**V. CONCLUSION**

For the reasons stated above, Defendant's Motion for Postconviction Relief is **DENIED** and Defendant's Motion for Appointment of Counsel is **MOOT**.

**IT IS SO ORDERED.**

\_\_\_\_\_/s/  
M. Jane Brady  
Judge

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<sup>47</sup>See *State v. Desmond*, 2013 WL 1090965, at \*3 (Del. Super. Feb. 26, 2013) (finding the defendant's motion for appointment of counsel to assist with his motion for postconviction relief was moot after denying the defendant's postconviction motion) *aff'd*, 74 A.3d 653 (Del. 2013) *cert. denied*, 2014 WL 103014 (U.S. Jan. 13, 2014); see also *State v. Stuart*, 2008 WL 4868658, at \*3 (Del. Super. Oct. 7, 2008) (“[Defendant] has failed to demonstrate that his extremely competent and experienced counsel made any errors, let alone grievous errors that probably would have resulted in a different outcome. [Therefore], Defendant's Motion for Postconviction Relief is hereby [denied]. For the same reasons, Defendant's Motion for Appointment of Counsel is hereby [denied].”) *aff'd*, 970 A.2d 257 (Del. 2009).