

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5264

February 14, 2014

David J. Buchanan
SBI # 231
S.C.I.
P.O. Box 500
Georgetown, DE 19947

RE: *State of Delaware v. David J. Buchanan*, Def. ID# 0801031784 (R-3)

DATE SUBMITTED: November 21, 2013

Dear Mr. Buchanan:

David J. Buchanan (“defendant”) has requested that he be allowed to file his third¹ motion for postconviction relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”).² The Court allows him to file it and considers the motion herein.

A review of defendant’s motion shows that it is procedurally barred. Because he does not establish any exceptions to the bars, the Court denies his motion.

¹Staff has marked this motion as his fourth motion for postconviction relief. However, his first motion was not considered because he filed it pro se at a time when counsel represented him. Thus, this is, in actuality, his third motion for postconviction relief.

²Because defendant has filed so many frivolous pleadings and because this Court deemed many of his filings to reflect a personal vendetta, this Court ordered defendant to request leave of court before filing a pleading. *State v. Buchanan*, 2010 WL 1529608, *2 (Del. Super. April 16, 2010).

Defendant maintains that the recently amended Rule 61(e)³ establishes he was entitled to the appointment of an attorney pursuant to that rule for his first postconviction proceeding and the rule requires an attorney be appointed for him in this third postconviction motion proceeding. Defendant's filings lead to the conclusion that defendant considers the recently amended Rule 61(e) to provide him with the opportunity to "do over" his original motion for postconviction relief. That is not the case.

The May 6, 2013, amendment to Rule 61, which provides for the appointment of counsel for an indigent defendant's **first** Rule 61 motion, was not retroactive and did not create any rights to an attorney for a defendant who previously has filed postconviction motions.⁴ Furthermore, recent decisions in the cases of *Martinez v. Ryan*⁵ or *Holmes v. State*⁶ did not establish a constitutional right to an attorney on a postconviction motion or the opportunity for a defendant

³The applicable version of the order amending Rule 61 provides:

(1) Superior Court Criminal Rule 61 is amended by deleting subparagraph (e) and substituting in lieu thereof the following:

(e) Appointment of counsel. (1) Order of appointment. The court will appoint counsel for an indigent movant's first postconviction proceeding. For an indigent movant's second or subsequent postconviction proceedings, the court will appoint counsel only in the exercise of discretion and for good cause shown, but not otherwise. Unless the judge appoints counsel for a limited purpose, it shall be the duty of counsel to assist the movant in presenting any substantial ground for relief available to the movant. Upon entry of a final order in a postconviction proceeding, counsel's continuing duty shall be provided in Supreme Court Rule 26.

(2) This amendment shall be effective on May 6, 2013 and shall apply to postconviction motions filed on or after that date. [Emphasis added].

⁴*State v. Roten*, Def. ID# 0907011738, Bradley, J. (Del. Super. Sept. 3, 2013), *aff'd*, 2013 WL 5808236 (Del. Oct. 28, 2013); *State v. Roten*, 2013 WL 4744681 (Del. Super. Sept. 3, 2013), *aff'd*, 2013 WL 5808121 (Del. Oct. 28, 2013).

⁵ ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012).

⁶2013 WL 2297072 (Del. May 23, 2013).

to redo his or her Rule 61 motion without the procedural bars applying.⁷ At this stage of the proceedings, defendant is entitled to an attorney “only in the exercise of discretion and for good cause shown”.⁸ Because, as discussed below, the procedural bars clearly apply, no need exists to appoint counsel to represent defendant in this pending motion. His request for an attorney is **DENIED.**

On September 24, 2008, a jury found defendant guilty of the charges of third degree burglary; criminal contempt; two counts of carrying a concealed deadly weapon; three counts of possession of a deadly weapon by a person prohibited; and resisting arrest. He was found not guilty on a charge of possession of a firearm during the commission of a felony and criminal mischief. On appeal, his convictions were affirmed, with the exception of that for third degree burglary.

Defendant’s case and the issues arising from it have been extensively addressed in previous decisions:⁹ the Supreme Court’s decision affirming the judgment below on defendant’s direct appeal, with the exception of the third degree burglary conviction;¹⁰ the Superior Court’s decision on his first motion for postconviction relief;¹¹ the Supreme Court’s affirmance of that

⁷*Frazier v. State*, 2014 WL 259434 (Del. Jan. 21, 2014); *Riley v. State*, 2014 WL 98643 (Del. Jan. 9, 2014).

⁸Rule 61(e)(1).

⁹I reference only the State Courts’ decisions addressing defendant’s direct appeal and his postconviction proceedings and the District Court’s decisions addressing his habeas corpus actions filed in the United States District Court in and for the District of Delaware. I do not reference the numerous decisions addressing defendant’s various other requests for relief filed with the State Courts or the District Court.

¹⁰*Buchanan v. State*, 981 A.2d 1098 (Del. Sept. 8, 2009).

¹¹*State v. Buchanan*, 2010 WL 6490064 (Del. Super. Dec. 3, 2010).

first postconviction relief motion;¹² the Superior Court's decision on his second motion for postconviction relief;¹³ and the Supreme Court's decision affirming the decision below on the second postconviction relief motion.¹⁴ Defendant also sought, unsuccessfully, habeas corpus relief in the United States District Court in and for the District of Delaware.¹⁵ I now examine his third postconviction relief motion.

Defendant argues his sentence was illegal. That is not a matter which may be pursued pursuant to Rule 61 and the Court refuses to address a motion for illegal sentence in the context of this Rule 61 motion.

As will be discussed below, the procedural bars of Rule 61(i)¹⁶ apply. The Court would

¹²*Buchanan v. State*, 26 A.3d 213, 2011 WL 3452148 (Del. Aug. 8, 2011).

¹³*State v. Buchanan*, Def. ID# 0801031784, Stokes, J. (Del. Super. June 20, 2012), *rearg. den.*, No. 772, 2010 (Del. Aug. 18, 2011).

¹⁴*Buchanan v. State*, 55 A.3d 838, 2012 WL 5077403 (Del. Oct. 18, 2012), *rearg. den.*, No. 362, 2012 (Del. Nov. 20, 2012).

¹⁵*Buchanan v. Johnson*, 723 F. Supp. 2d 727 (D.Del. 2010), *rearg. den.*, 2011 WL 4344347 (D.Del. Sept. 15, 2011), *motion to reopen den.*, 2012 WL 6645001 (D.Del. Dec. 19, 2012); *Buchanan v. Family Court*, 2013 WL 5631999 (D.Del. Oct. 16, 2013).

¹⁶Rule 61(i) provides:

Bars to relief. (1) Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, 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.

consider the merits of defendant's claims only if defendant establishes exceptions to those bars.¹⁷

Defendant's judgment was final in September 2009. Consequently, his motion is time-barred.¹⁸ The only exception to the bar he advances is that he is innocent, and as is discussed below, that contention is based on a premise which is not considered at this stage of the proceedings.

Most of his arguments have been advanced and adjudicated previously. I address those arguments below.

1) Many of defendant's arguments are based upon his contention that the protection from abuse ("PFA") order, from which his arrests and convictions stemmed, was invalid. His convoluted arguments using this basic premise take many forms. He reaches this conclusion that the PFA was invalid by advancing arguments concerning bankruptcy proceedings, the facts, and various statutory provisions regarding the PFA proceedings. He employs the basic premise of the invalid PFA for advancing a myriad of arguments asserting various constitutional violations, jurisdictional claims, prosecutorial misconduct, and ineffective assistance of trial and appellate counsel. Defendant argued this premise previously and the Supreme Court, in its decision

(4) 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.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply 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 fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

¹⁷Rule 61(i)(5).

¹⁸Rule 61(i)(1).

affirming the first postconviction motion, addressed it and found it lacking merit.¹⁹ Therein, the Supreme Court ruled that the PFA was not to be relitigated in this criminal matter.²⁰ Defendant, who did not appeal the Family Court decision granting the PFA to the Supreme Court, had the opportunity to advance these arguments and waived them by not appealing to the Supreme Court.²¹ The Supreme Court ruled he would not be allowed a second chance to relitigate the PFA proceedings in this criminal proceeding.²²

That ruling prohibits a consideration of defendant's arguments based on the premise that the PFA was invalid. The argument and all arguments based upon that premise are procedurally barred as having been previously adjudicated.²³ This conclusion encompasses his argument that this premise establishes his innocence, a bootstrap argument which he advances as an exception to the procedural bars. Furthermore, defendant has not presented any basis for reconsidering these claims in the interest of justice, a narrow exception applied only in limited circumstances.²⁴

In summary, this Court will not consider in any form any argument that is based upon defendant's contention that the Family Court PFA was invalid.²⁵ That argument and all others based upon it are barred.

Set forth below are arguments not based on the PFA premise which previously have been

¹⁹*Buchanan v. State*, 26 A.3d, at *3.

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³Rule 61(i)(4).

²⁴*Lindsey v. State*, 2014 WL 98645, * 3 (Del. Jan. 9, 2014).

²⁵The Courts need not reconsider arguments which repackage or refine previously considered arguments. *Id.* at *2.

adjudicated and consequently, are procedurally barred.²⁶

2) Defendant advances numerous assertions of improper conduct by the prosecutor, from improper vouching to withholding information to failing to disclose pertinent information in discovery. These arguments, or a form thereof, were asserted in his second postconviction motion and were considered in the decision thereon.²⁷ This Court found that the various claims were resolved within the context of his ineffective assistance of counsel claims in the first postconviction motion. The repackaged claim is barred as previously adjudicated as are the claims of ineffective assistance of counsel which bootstrap onto these underlying arguments pertaining to the prosecutor.²⁸ Defendant has not established any exceptions to the procedural bars exist and the claim fails.

3) Defendant asserts trial counsel was ineffective for failing

* to move to quash the indictment for jurisdictional issues.²⁹

* to subject the State of Delaware's ("the State") case to any meaningful adversarial testing before trial or at trial on direct appeal or in a properly filed post-conviction filing.³⁰

²⁶Rule 61(i)(4).

²⁷*State v. Buchanan*, Def. ID# 0801031784, Stokes, J. (Del. Super. June 20, 2012), *aff'd*, *Buchanan v. State*, 55 A.3d 838, 2012 WL 5077403 (Del. Oct. 18, 2012), *rearg. den.*, No. 362, 2012 (Del. Nov. 20, 2012).

²⁸Rule 61(i)(4).

²⁹This issue was considered in *State v. Buchanan*, 2010 WL 6490064 (Del. Super. Dec. 3, 2010), *aff'd*, *Buchanan v. State*, 26 A.3d 213, 2011 WL 3452148 (Del. Aug. 8, 2011), *rearg. den.*, No. 772, 2010 (Del. Aug. 18, 2011); *State v. Buchanan*, Def. ID# 0801031784, Stokes, J. (Del. Super. June 20, 2012), *aff'd*, *Buchanan v. State*, 55 A.3d 838, 2012 WL 5077403 (Del. Oct. 18, 2012), *rearg. den.*, No. 362, 2012 (Del. Nov. 20, 2012).

³⁰This is a general conclusion of defendant's various arguments regarding trial counsel. It fails for that reason. *Younger v. State*, 580 A.2d 552, 555 (Del. 1990). However, to the extent it is a refinement of previous arguments asserting ineffective assistance of counsel, it has been

* to file pretrial motions to dismiss the indictment.³¹

* to move to acquit all charges for which the State failed to present proof beyond a reasonable doubt for the counts of the indictment.³²

*to move to exclude evidence that was acquired by police without a warrant to arrest defendant from his home and without a valid cause to stop and search defendant when he drove from Family Court.³³

* to notice that due process was not provided before the State enforced claims by defendant's ex-wife causing him to be indicted for felonies.³⁴

* to raise defenses of violation of double jeopardy, by arguing 11 *Del. C.* §1442 and 11 *Del. C.* §1448(a)(6) appear to violate double jeopardy as protections against successive prosecutions against multiple charges separate statutes and against being charged multiple times

adjudicated and will not be reconsidered. *Lindsey v. State, supra*, at *2.

³¹This issue was considered in *State v. Buchanan*, 2010 WL 6490064 (Del. Super. Dec. 3, 2010), *aff'd, Buchanan v. State*, 26 A.3d 213, 2011 WL 3452148 (Del. Aug. 8, 2011), *rearg. den.*, No. 772, 2010 (Del. Aug. 18, 2011); *State v. Buchanan*, Def. ID# 0801031784, Stokes, J. (Del. Super. June 20, 2012), *aff'd, Buchanan v. State*, 55 A.3d 838, 2012 WL 5077403 (Del. Oct. 18, 2012), *rearg. den.*, No. 362, 2012 (Del. Nov. 20, 2012).

³²This issue was considered in *State v. Buchanan*, 2010 WL 6490064 (Del. Super. Dec. 3, 2010), *aff'd, Buchanan v. State*, 26 A.3d 213, 2011 WL 3452148 (Del. Aug. 8, 2011), *rearg. den.*, No. 772, 2010 (Del. Aug. 18, 2011).

³³This issue was considered in *State v. Buchanan*, 2010 WL 6490064 (Del. Super. Dec. 3, 2010), *aff'd, Buchanan v. State*, 26 A.3d 213, 2011 WL 3452148 (Del. Aug. 8, 2011), *rearg. den.*, No. 772, 2010 (Del. Aug. 18, 2011); *State v. Buchanan*, Def. ID# 0801031784, Stokes, J. (Del. Super. June 20, 2012), *aff'd, Buchanan v. State*, 55 A.3d 838, 2012 WL 5077403 (Del. Oct. 18, 2012), *rearg. den.*, No. 362, 2012 (Del. Nov. 20, 2012).

³⁴This issue was considered in *State v. Buchanan*, 2010 WL 6490064 (Del. Super. Dec. 3, 2010), *aff'd, Buchanan v. State*, 26 A.3d 213, 2011 WL 3452148 (Del. Aug. 8, 2011), *rearg. den.*, No. 772, 2010 (Del. Aug. 18, 2011); *State v. Buchanan*, Def. ID# 0801031784, Stokes, J. (Del. Super. June 20, 2012), *aff'd, Buchanan v. State*, 55 A.3d 838, 2012 WL 5077403 (Del. Oct. 18, 2012), *rearg. den.*, No. 362, 2012 (Del. Nov. 20, 2012).

under the same statute, or to present that the Court lacked jurisdiction to convict and repeatedly sentence defendant because he was not a person prohibited under 11 *Del. C.* §1448(a)(6), as the State failed to prove essential elements required to support a conviction for possession of a firearm by a person prohibited.³⁵

* to present arguments that the police lacked cause and warrants required to arrest defendant on both January 26, 2008, because Family Court had not issued a warrant to arrest, and on March 13, 2008, for there was no warrant issued to arrest him for driving while suspended nor was there a properly suspended license to support a traffic stop to provide evidence of the crimes listed on the indictment, for the State violated due process when indicting defendant for crimes that were improperly charged for violation of orders in civil proceedings without proceeding in the civil court first.³⁶

*to argue the State and Court violated his 5th amendment rights when subjecting him to a “multiplicious” indictment and multiple sentences for a single offense of the statute.³⁷

³⁵These matters were considered in *State v. Buchanan*, 2010 WL 6490064 (Del. Super. Dec. 3, 2010), *aff'd*, *Buchanan v. State*, 26 A.3d 213, 2011 WL 3452148 (Del. Aug. 8, 2011), *rearg. den.*, No. 772, 2010 (Del. Aug. 18, 2011); *State v. Buchanan*, Def. ID# 0801031784, Stokes, J. (Del. Super. June 20, 2012), *aff'd*, *Buchanan v. State*, 55 A.3d 838, 2012 WL 5077403 (Del. Oct. 18, 2012), *rearg. den.*, No. 362, 2012 (Del. Nov. 20, 2012).

³⁶These matters were considered in *State v. Buchanan*, 2010 WL 6490064 (Del. Super. Dec. 3, 2010), *aff'd*, *Buchanan v. State*, 26 A.3d 213, 2011 WL 3452148 (Del. Aug. 8, 2011), *rearg. den.*, No. 772, 2010 (Del. Aug. 18, 2011); *State v. Buchanan*, Def. ID# 0801031784, Stokes, J. (Del. Super. June 20, 2012), *aff'd*, *Buchanan v. State*, 55 A.3d 838, 2012 WL 5077403 (Del. Oct. 18, 2012), *rearg. den.*, No. 362, 2012 (Del. Nov. 20, 2012).

³⁷This issue was considered in *State v. Buchanan*, 2010 WL 6490064 (Del. Super. Dec. 3, 2010), *aff'd*, *Buchanan v. State*, 26 A.3d 213, 2011 WL 3452148 (Del. Aug. 8, 2011), *rearg. den.*, No. 772, 2010 (Del. Aug. 18, 2011); *State v. Buchanan*, Def. ID# 0801031784, Stokes, J. (Del. Super. June 20, 2012), *aff'd*, *Buchanan v. State*, 55 A.3d 838, 2012 WL 5077403 (Del. Oct. 18, 2012), *rearg. den.*, No. 362, 2012 (Del. Nov. 20, 2012).

These previously adjudicated arguments are procedurally barred.³⁸ The only exception to the bar which defendant advances is that the bar may be “overcome on a showing of actual innocence by motion pursuant to Rule 61(i)(5), in the interest of justice.” This innocence argument is based upon the previously discussed premise that the PFA was invalid. Defendant fails to overcome the procedural bars.

4) Defendant maintains appellate counsel was ineffective for failing

* to present any defense that would provide complete relief from all the charges.³⁹

* to review the records of the courts or police reports pertaining to arrests.⁴⁰

* to take notice that there had been no proceeding afforded defendant to address any claim causing him to be subject to 11 *Del. C.* §1448(a)(6) or for him to object to the Family Court excluding him from his home before the State arrested and indicted him for violations of such.⁴¹

Again, these previously adjudicated arguments are procedurally barred.⁴² The only

³⁸Rule 61(i)(4).

³⁹This issue was considered in *State v. Buchanan*, 2010 WL 6490064 (Del. Super. Dec. 3, 2010), *aff'd*, *Buchanan v. State*, 26 A.3d 213, 2011 WL 3452148 (Del. Aug. 8, 2011), *rearg. den.*, No. 772, 2010 (Del. Aug. 18, 2011).

⁴⁰This issue was considered in *State v. Buchanan*, 2010 WL 6490064 (Del. Super. Dec. 3, 2010), *aff'd*, *Buchanan v. State*, 26 A.3d 213, 2011 WL 3452148 (Del. Aug. 8, 2011), *rearg. den.*, No. 772, 2010 (Del. Aug. 18, 2011); *State v. Buchanan*, Def. ID# 0801031784, Stokes, J. (Del. Super. June 20, 2012), *aff'd*, *Buchanan v. State*, 55 A.3d 838, 2012 WL 5077403 (Del. Oct. 18, 2012), *rearg. den.*, No. 362, 2012 (Del. Nov. 20, 2012).

⁴¹These matters were considered in *State v. Buchanan*, 2010 WL 6490064 (Del. Super. Dec. 3, 2010), *aff'd*, *Buchanan v. State*, 26 A.3d 213, 2011 WL 3452148 (Del. Aug. 8, 2011), *rearg. den.*, No. 772, 2010 (Del. Aug. 18, 2011); *State v. Buchanan*, Def. ID# 0801031784, Stokes, J. (Del. Super. June 20, 2012), *aff'd*, *Buchanan v. State*, 55 A.3d 838, 2012 WL 5077403 (Del. Oct. 18, 2012), *rearg. den.*, No. 362, 2012 (Del. Nov. 20, 2012).

⁴²Rule 61(i)(4).

exception to the bar which defendant advances is that the bar may be “overcome on a showing of actual innocence by motion pursuant to Rule 61(i)(5), in the interest of justice.” This innocence argument is based upon the previously discussed premise that the PFA was invalid. Defendant fails to overcome the procedural bars.

Defendant advances an argument which he has not advanced before. It is that the State did not establish he possessed the weapons because **at the time of his arrest**, he was out of the vehicle and the weapons were in the vehicle. I dismiss this frivolous argument out of hand. As defendant well knows, the conviction pertained to the time frame when he was in the vehicle with the weapons.

In conclusion, defendant’s request for appointment of counsel is denied and his motion for postconviction relief is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothonotary’s Office
David Hume, IV, Esquire
Office of the Public Defender