

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,)	
)	
v.)	ID#: 9503004907
)	
ANDRE A RIVERA,)	
)	
Defendant.)	

ORDER

**Upon Defendant’s Fifth Motion for Postconviction Relief –
SUMMARILY DISMISSED,
Upon Defendant’s Motion for Appointment of Counsel –
*DENIED.***

1. In August 1995, a jury convicted Defendant of four counts of burglary second degree and other lesser offenses. Defendant was declared a habitual offender based on 19 prior home burglaries. Accordingly, he was sentenced to four consecutive life sentences pursuant to 11 *Del.C.* § 4214(b). In April 1996, Defendant’s conviction was affirmed.¹

3. On December 16, 2013, Defendant, *pro se*, filed this, his fifth motion for postconviction relief. The Rule 61 motion was properly referred.²

4. The motion for postconviction relief rests on two grounds: 1) ineffective assistance of counsel for failing to challenge the habitual offender status,

¹ *Rivera v. State*, 676 A.2d 906 (Del. 1996).

² Super. Ct. Crim. R. 61(d)(1).

and 2) failing to appoint postconviction counsel as sixth amendment and due process violations. The ineffective assistance of counsel claim has been previously adjudicated and is procedurally barred.³

5. Defendant's second claim is grounded in *Martinez v. Ryan*.⁴ Although not mentioned specifically, it presumably is also based on the recent amendment to Superior Court Criminal Rule 61.⁵ Neither *Martinez* nor the amendment to Rule 61 applies to Defendant's situation, considering Defendant's first motion for postconviction relief was denied in 1996. Further, *Martinez* is, by its terms, an "equitable ruling" rather than a "constitutional ruling" that would apply retroactively.⁶ Similarly, the recent modification of Rule 61 is simply not retroactive.⁷

6. Once again, the court notes it had no discretion in sentencing. Defendant was properly declared a habitual offender based on his past convictions. The sentence Defendant received was mandatory under the habitual offender statute, and has been upheld by state and federal law.⁸

6. After reconsidering the matter, even with Defendant's characterizing his claims as constitutional violations, the court remains satisfied that

³ Super. Ct. Crim. R. 61(i)(4).

⁴ *Martinez v. Ryan*, 132 S. Ct. 1309, 1311 (2012).

⁵ Super. Ct. Crim. R. 61(e)(1).

⁶ *Martinez*, 132 S. Ct. at 1319.

⁷ *Roten v. State*, 2013 WL 5808236, *1 (Del. Supr.) ("The rule was adopted May 6, 2013 and is not retroactive.") (emphasis in original).

⁸ *State v. Rivera*, 1997 WL 528275 (Del. Super. 1997).

Defendant has not sufficiently alleged either a miscarriage of justice or a colorable, constitutional claim requiring further review. Thus, the motion for postconviction relief is subject to summary dismissal.⁹

For the foregoing reasons, Defendant's fifth motion for postconviction relief is **SUMMARILY DISMISSED**. The Prothonotary shall notify Defendant.

IT IS SO ORDERED.

Date: March 17, 2014

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Criminal)
Joseph S. Grubb, Deputy Attorney General
Andre A. Rivera, Defendant

⁹ Super. Ct. Crim. R. 61(i)(5).