IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| BEN ROTEN, | § | |
| | § | No. 589, 2012 |
| Defendant Below- | § | |
| Appellant, | § | |
| | § | Court Below—Superior Court |
| v. | § | of the State of Delaware |
| | § | in and for Sussex County |
| STATE OF DELAWARE, | § | Cr. ID No. 0907011738 |
| | § | |
| Plaintiff Below- | § | |
| Appellee. | § | |

Submitted: May 23, 2013[1]
Decided: June 21, 2013

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices

**O R D E R**

This 21st day of June 2013, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Ben Roten, filed an appeal from the Superior Court's October 9, 2012 order denying his motion to "reopen" the proceedings on his Superior Court Criminal Rule 61 motion for postconviction relief and his motion for the appointment of counsel. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

[1] This appeal was stayed pending the Court's decision in *Holmes v. State*, Del. Supr., No. 350, 2012, Jacobs, J. (May 23, 2013).

Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.[2] We agree and affirm.

(2) The record before us reflects that, in January 2010, Roten was found guilty by a Superior Court jury of Assault in a Detention Facility. He was sentenced as a habitual offender[3] to twenty-five years of Level V incarceration, to be followed by six months of Level IV work release. Roten's convictions were affirmed by this Court on direct appeal.[4] Following his conviction, Roten filed a motion for modification of sentence, which was denied by the Superior Court.

(3) On February 9, 2011, Roten filed a motion for postconviction relief pursuant to Rule 61. In his motion, Roten claimed that a) his letter to his girlfriend admitting to the assault on a fellow inmate should not have been admitted into evidence at his trial; b) it was error for the judge to deny his motion to inform the jury that the inmate he assaulted had been convicted of rape; and c) his trial counsel provided ineffective assistance by not objecting to those rulings by the judge. This Court affirmed the Superior Court's denial of Roten's postconviction motion, finding no merit to Roten's

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[2] Supr. Ct. R. 25(a).
[3] Del. Code Ann. tit. 11, §4214(a).
[4] *Roten v. State*, Del. Supr., No. 108, 2010, Berger, J. (Oct. 4, 2010).

claims.[5] The record reflects that Roten did not file a motion for the appointment of counsel in connection with his postconviction motion.

(4) Roten subsequently filed a motion for correction of an illegal sentence and/or for a new trial. This Court affirmed the Superior Court's denial of that motion.[6] Roten then filed a supplemental motion for a new trial. This Court also affirmed the Superior Court's denial of that motion.[7]

(5) In its decision denying Roten's most recent motion, which Roten characterized as a motion to "reopen" the proceedings on his 2011 postconviction motion, the Superior Court, applying Superior Court Civil Rule 59(e) regarding motions for reargument, denied the motion as untimely. The Superior Court also denied Roten's motion for the appointment of counsel.

(6) In this appeal, Roten claims that a) the Superior Court abused its discretion when it denied his motions; and b) the Superior Court erred by relying on Superior Court Civil Rule 59(e) rather than Superior Court Criminal Rule 61(i) (1) in rendering its decision.

(7) We have reviewed the record and the parties' submissions carefully and conclude that, in the absence of any procedure under Rule 61

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[5] *Roten v. State*, Del. Supr., No. 437, 2011, Berger, J. (Nov. 8, 2011). The record reflected that Roten's counsel had, in fact, objected to both of the judge's rulings.
[6] *Roten v. State*, Del. Supr., No. 261, 2012, Steele, C.J. (July 30, 2012).
[7] *Roten v. State*, Del. Supr., No. 262, 2012, Jacobs, J. (Nov. 16, 2012).

for the "reopening" of a postconviction proceeding, the Superior Court properly relied on Rule 59 in denying Roten's motion.[8] Moreover, because Rule 61 does not contain a procedure for the "reopening" of a postconviction proceeding, Roten was not entitled to the appointment of counsel under Rule 61. As such, we find no error on the part of the Superior Court in denying Roten's request for the appointment of counsel. If Roten wishes his claims to be considered, he must file a new motion for postconviction relief in the Superior Court.

(8) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice

[8] Super. Ct. Crim. R. 57(d) ("In all cases not provided for by rule or administrative order, the court shall regulate its practice in accordance with the applicable Superior Court civil rule . . . .")