

ORDER

This 16th day of January, 2015, upon consideration of Defendant's third Motion for Postconviction Relief, it appears to the Court that:

1. In October 2003, following a jury trial, Defendant, Isaias R. Ortiz, was found guilty of seven drug-related offenses. In December 2004, the Delaware Supreme Court affirmed the conviction.¹ In the decision, the Delaware Supreme Court rejected Defendant's argument that the trial judge's refusal to grant a continuance to obtain an interpreter for Defendant was an abuse of discretion.²
2. Defendant's first Motion for Postconviction Relief, denied on September 15, 2006, alleged the same interpreter claim that Defendant had raised at trial and on direct appeal. The Court denied the Motion as procedurally barred and the ruling was upheld on other grounds by the Delaware Supreme Court.³ Additionally, Defendant raised the interpreter claim in a federal habeas corpus petition which was dismissed in 2008.⁴
3. Defendant filed a Second Motion for Postconviction Relief on March 7, 2012 and, again, alleged the same interpreter claim. Again, the

¹ See *Ortiz v. State*, 2004 WL 2741185, at *4 (Del. Nov. 16, 2004)(affirming conviction).

² *Id.*

³ See *Ortiz v. State*, 2007 WL 188173, at *2 (Del. Jan. 25, 2007)(affirming denial of postconviction relief).

⁴ See *Ortiz v. Phelps*, 2008 WL 5110965 (D. Del.)(dismissing petition for a writ of habeas corpus).

Motion was denied by the Court and the denial was affirmed by the Delaware Supreme Court.⁵ In its decision, the Delaware Supreme Court noted that the motion was untimely under Rule 61(i)(1), repetitive under Rule 61(i)(2) and formerly adjudicated under Rule 61(d)(4) and that Defendant made no showing that a miscarriage of justice occurred nor did he show that it would be in the interest of justice to reconsider the repetitive and formerly adjudicated claims.⁶

4. Defendant filed his third Motion for Postconviction Relief on April 25, 2014, alleging five grounds. Specifically, Defendant alleges that the Court erred in not severing his trial because of an error made by his co-defendant's trial counsel; that he was denied the right to confront a confidential informant to verify the accuracy of the information provided to police related to a suppression hearing; that the co-defendant's trial counsel made misleading and prejudicial statements regarding Defendant; that Defendant was denied the opportunity to cross-examine the confidential informant to determine if the confidential informant possessed information that would aid Defendant with his defense; and that Defendant was denied the right to an interpreter at trial.⁷

⁵ See *Ortiz v. State*, 2012 WL 4377782, at *1 (Del. Sept. 25, 2012).

⁶ *Id.*

⁷ Def.'s Mot. for Postconviction Relief, D.I. 55, 3.

5. The State contends that the Motion is procedurally barred because it is untimely and because Defendant failed to assert the grounds for relief at proceedings leading to his judgment of conviction.⁸ The State argues that Defendant has not satisfied the “fundamental fairness” exception to overcome the procedural bar which precludes the Court from considering Defendant’s arguments on the merits.⁹
6. In an affidavit submitted to the Court on August 25, 2014, Defendant’s trial counsel recalled that the issue of an interpreter was raised at trial and the trial judge determined that Defendant was competent to stand trial without an interpreter. Counsel asserted that the Court engaged in a colloquy with Defendant and Defendant answered all questions in English.
7. Before addressing the merits of Defendant’s claims, the Court must apply the procedural bars set forth in Super. Ct. Crim. R. 61(i).¹⁰ According to the version of the Rule in force at the time that this Motion was filed, the Court rejects a motion for postconviction relief as procedurally barred if the motion is untimely or repetitive, a procedural default exists, or the claim has been formerly adjudicated.¹¹

⁸ State’s Resp., D.I. 67, 4.

⁹ *Id.* at 5.

¹⁰ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹¹ *See* Super. Ct. Crim. R. 61(i)(1)-(4)(2013).

8. Rule 61(i)(1) provides that a motion for postconviction relief is time barred when it is filed more than one year after the conviction has become final or one year after a retroactively applied right has been newly recognized by the United States Supreme Court or by the Delaware Supreme Court.¹²
9. Rule 61(i)(2) provides that a motion is repetitive if the defendant failed to raise a claim during a prior postconviction proceeding unless “consideration of the claim is warranted in the interest of justice.”¹³
10. Rule 61(i)(3) bars consideration of any claim “not asserted in the proceedings leading to the conviction” unless the petitioner can show “cause for relief from the procedural default” and “prejudice from violation of the movant’s rights.”¹⁴
11. Rule 61(i)(4) provides that any claim that has been adjudicated “in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding” is barred “unless reconsideration of the claim is warranted in the interest of justice.”¹⁵
12. If a procedural bar exists, the Court will not consider the merits of Defendant’s postconviction claim unless Defendant can show that the

¹² Super. Ct. Crim. R. 61(i)(1)(2013).

¹³ Super. Ct. Crim. R. 61(i)(2)(2013).

¹⁴ Super. Ct. Crim. R. 61(i)(3)(2013).

¹⁵ Super. Ct. Crim. R. 61(i)(4)(2013).

exception found in Rule 61(i)(5) applies. Rule 61(i)(5) provides that claims barred for untimeliness, repetition and procedural default can be overcome if Defendant makes out 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.”¹⁶

13. Defendant’s Motion, filed almost ten years after the Delaware Supreme Court affirmed his conviction, is time-barred. Defendant has neither asserted that a retroactively applicable right applies nor has he made out a “colorable claim” that a “miscarriage of justice” occurred to overcome the time-bar.
14. Additionally, Defendant’s claim that he was denied the right to an interpreter has been considered and rejected by this Court, the Delaware Supreme Court and a federal court. Therefore, to the extent that Defendant’s interpreter claim is identical to those already asserted previously, the claim is barred under Rule 61(i)(4) and to the extent that the claim is different, the claim is barred under Rule 61(i)(2). Furthermore, the Court does not find that “the interest of justice”¹⁷ exception applies. The “interest of justice” exception is narrow and

¹⁶ Super. Ct. Crim. R. 61(i)(5)(2013).

¹⁷ Super Ct. Crim. R. 61(i)(2) and (i)(4).

will only be applied in limited circumstances.¹⁸ Specifically, the exception applies where “the previous ruling was clearly in error or there has been an important change in circumstances, in particular, the factual basis for issues previously posed,” or where there is an “equitable concern of preventing injustice.”¹⁹ Defendant fails to address the exception and the Court independently finds no basis to apply the exception.

15. Defendant’s four remaining claims are barred under Rule 61(i)(3) because the claims were not asserted in the proceedings leading to the judgment of conviction. Again, Defendant has failed to address the exception and does not allege any facts that would show cause for relief for failing to assert the issues on direct appeal or resultant prejudice from his failure to assert the claims. Moreover, Defendant has not made out a “colorable claim” that a “miscarriage of justice” occurred as to the four claims barred by Rule 61(i)(3).²⁰

Therefore, Defendant’s third Motion for Postconviction Relief is hereby **DENIED** as procedurally barred.

¹⁸ *Lindsey v. State*, 2014 WL 2178453, at *3 (Del. May 27, 2014)(quoting *Weedon v. State*, 750 A.2d 521, 527-28 (Del. 2000)).

¹⁹ *Id.*

²⁰ Super. Ct. Crim. R. 61(i)(5) does not apply to claims barred under Rule 61(i)(4).

IT IS SO ORDERED.

/s/ Ferris W. Wharton, J.

oc: Prothonotary
cc: Investigative Services
John S. Taylor, Esquire
Isaias R. Ortiz, SBI # 00480744