

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE : Def. ID# 0401005180 (R-3)  
v. :  
BEN ROTEN, :  
Defendant. :

DATE SUBMITTED: August 6, 2013  
DATE DECIDED: September 3, 2013

1) Ben Roten (“Roten” or “defendant”) has filed a motion pursuant to Superior Court Criminal Rule 61 (“Rule 61”) arguing that his constitutional rights were violated in connection with his first Rule 61 motion, which was filed and resolved in 2006, because he was not provided with counsel. He cites to the May 6, 2013, amendment to Rule 61<sup>1</sup> which provides for the appointment of counsel for an indigent defendant’s first Rule 61 motion. He argues the cases of

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<sup>1</sup>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].

*Holmes v. State*<sup>2</sup> and *George v. State*<sup>3</sup> provide authority for the propositions that 1) this amendment is retroactive and alternatively, 2) the Supreme Court has held that a defendant is entitled to appointment of counsel on his first conviction motion even without the amendment.

2) On August 6, 2004, defendant pled guilty to charges of assault in the first degree and aggravated menacing. He was sentenced to substantial periods of incarceration. Defendant has filed various motions seeking to overturn his intelligent and voluntary guilty plea. On February 27, 2006, defendant filed his first motion for postconviction relief. Defendant did not request counsel be appointed to represent him in his first postconviction motion and at the time the motion was filed, he had no right absolute right to an attorney.<sup>4</sup> This Court denied the motion as both procedurally barred and without merit.<sup>5</sup> The Supreme Court affirmed the denial of that motion.<sup>6</sup> Defendant's second motion for postconviction relief, filed on June 1, 2011, was denied by this Court.<sup>7</sup> The Supreme Court affirmed that judgment, also.<sup>8</sup>

3) On July 30, 2013, defendant filed his third motion for postconviction relief. Defendant is not arguing that, pursuant to *Martinez v. Ryan*,<sup>9</sup> he has a constitutional right to an

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<sup>2</sup>67 A.3d 1022, 2013 WL 3270894 (Del. June 24, 2013) ("*Holmes*").

<sup>3</sup>61 A.3d 618, 2013 WL 543899 (Del. Feb. 12, 2013) ("*George*").

<sup>4</sup>Rule 61(e) provided in pertinent part: "The court will appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown, but not otherwise."

<sup>5</sup>*State v. Roten*, 2006 WL 1360513 (Del. Super. May 18, 2006).

<sup>6</sup>*Roten v. State*, 922 A.2d 415, 2007 WL 773389 (Del. March 15, 2007).

<sup>7</sup>*State v. Roten*, 2011 WL 3116938 (Del. Super. July 25, 2011).

<sup>8</sup>*Roten v. State*, 2011 WL 6916540 (Del. Dec. 28, 2011).

<sup>9</sup>132 S.Ct. 1309 (2012).

attorney in his first postconviction motion, which must be retroactively applied.<sup>10</sup> Instead, he argues that the May 6, 2013, amendment to Rule 61 provides him with this right. He argues that the Supreme Court's decision in *Holmes* determined the right to counsel in a first postconviction motion is retroactive. He further argues that the decisions in *Holmes* and *George* establish a right to counsel without consideration of the amendment. Defendant's filing implies an argument that he is entitled to start anew with his Rule 61 claims solely because the Court, *sua sponte*, did not appoint counsel to represent him in the first motion.

4) The Superior Court, in amending Rule 61 and providing an indigent defendant the right to counsel in his or her first postconviction motion, clarified the right was not retroactive. The Court clearly stated the amendment only applied to those defendants whose first postconviction motions were **pending** as of May 6, 2013, and to those who should file their **first** postconviction motion after May 6, 2013. In a case where a defendant's **first** motion for postconviction relief is **pending** on appeal, the Supreme Court is concluding that the Superior Court abused its discretion in not appointing an attorney for that defendant and is remanding that case for counsel to be appointed in connection with the defendant's first postconviction motion.<sup>11</sup> The Supreme Court has not ruled that the amended version of Rule 61(e) is retroactive. Precedent for Roten's case are those cases where the Supreme Court has ruled against a defendant's demand for counsel in a second or subsequent postconviction motion and does not remand the

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<sup>10</sup>This Court has ruled otherwise. *State v. Evans*, 2013 WL 1090979 (Del. Super. Feb. 25, 2013); *State v. Smith*, 2012 WL 5577827 (Del. Super. June 14, 2012), *aff'd*, 53 A.3d 303, 2012 WL 3870567 (Del. 2012).

<sup>11</sup>*Howard v. State*, 2013 WL 3833335 (Del. July 19, 2013); *Walker v. State*, 2013 WL 3355899 (Del. June 28, 2013); *Ayers v. State*, 2013 WL 3270894 (Del. June 24, 2013); *Holmes v. State*, *supra*.

matter for the Superior Court to consider the postconviction matter in light of the demand for counsel.<sup>12</sup>

5) The case of *George v. State*<sup>13</sup> does not support defendant's argument. Rule 61 always has provided for the appointment of counsel in certain circumstances, such as where good cause exists. In *George*, the State of Delaware requested that counsel be appointed to assist Mr. George, who had mental illness issues, in his first postconviction proceedings and the Supreme Court agreed such an appointment was required under those circumstances. *George* does not create any new rights for someone in Roten's position.

6) Defendant has no right to have an attorney appointed to represent him nor does he have a right to reopen the claims of his initial motion for postconviction relief which were substantively resolved and which now are defaulted.<sup>14</sup> The motion for postconviction relief is **DENIED.**

**IT IS SO ORDERED THIS 3rd DAY OF SEPTEMBER, 2013.**

*/s/ Richard F. Stokes*

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JUDGE

cc: Prothonotary's Office  
Ben Roten  
Melanie C. Withers, Esquire

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<sup>12</sup>*Marvel v. State*, No. 347, 2013, Jacobs, J. (Del. Aug. 23, 2013); *Broadnax v. State*, 69 A.3d 370, 2013 WL 3270891 (Del. June 24, 2013); *Walls v. State*, 2013 WL 4505818 (Del. May 23, 2013).

<sup>13</sup>*George, supra.*

<sup>14</sup>*Marvel v. State, supra.*