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Case Number 112,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARNELL MARTIN,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 112, 2021
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S SUPPLEMENTAL ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On April 17, 2017, a Superior Court grand jury indicted Darnell Martin on one count each of drug dealing (marijuana), aggravated possession of marijuana, conspiracy in the second degree, and failure to use a turn signal.[1] On July 6, 2017, Martin moved to suppress the evidence seized in his case, which the Superior Court denied after a hearing.[2] On January 9, 2018, the Superior Court held a stipulated bench trial and found Martin guilty of drug dealing and aggravated possession, but not guilty of failure to use a turn signal.[3] The Superior Court merged the drug dealing and aggravated possession offenses at sentencing.[4] For drug dealing, the Superior Court sentenced Martin to 25 years of Level V incarceration, suspended after two years, for 18 months of probation.[5] This Court affirmed the Superior Court's judgment.[6]

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[1] Crim. DI 2. "Crim. DI __" refers to items on the Superior Court Criminal Docket in *State v. Darnell D. Martin*, I.D. #1702005493. A1-11C.

[2] Crim. DI 8, 15, 26.

[3] Crim. DI 30.

[4] Crim. DI 30.

[5] A135-38. "A__" refers to pages from Martin's supplemental opening brief's appendix.

[6] *Martin v. State*, 2018 WL 4959037, at *1 (Del. Oct. 12, 2018).

On December 6, 2018, Martin filed a *pro se* motion for postconviction relief under Criminal Rule 61 and a motion to appoint counsel.[7] The Superior Court appointed counsel to assist Martin in postconviction.[8] On December 3, 2019, Martin filed an amended Rule 61 motion, and trial counsel filed an affidavit on January 22, 2020, addressing Martin's ineffective-assistance-of-trial-counsel claims.[9] On April 24, 2020, the State responded to Martin's motion, and Martin filed a reply on August 13, 2020.[10] On November 30, 2020, the Superior Court ordered the parties to submit supplemental briefing regarding the applicability of *Green v. State*[11] and Criminal Rule 61(i)(4)[12] to Martin's postconviction motion.[13] On December 31, 2020, the parties submitted their supplemental responses.[14] On March 17, 2021, the Superior Court *sua sponte* dismissed Martin's postconviction motion because Martin lacked

[7] Crim. DI 39, 40.

[8] Crim. DI 43.

[9] Crim. DI 67, 68.

[10] Crim. DI 69, 72.

[11] 238 A.3d 160 (Del. 2020).

[12] The rule provides that "[a]ny 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." Super. Ct. Crim. R. 61(i)(4).

[13] Crim. DI 73.

[14] Crim. DI 74, 75.

standing once he completed his sentence, and his claims were thus moot as he had not demonstrated any collateral consequences from his conviction.[15]

Martin appealed from the Superior Court's dismissal. This Court remanded the matter for limited briefing on the collateral consequences rule and whether someone who had received a pardon should be treated the same as a first-time felon.[16] After additional supplemental memoranda from the parties, the Superior Court held a hearing on May 24, 2022.[17] On November 28, 2022, the Superior Court issued a decision answering this Court's questions.[18]

Thereafter, this Court ordered supplemental briefing from the parties.[19] On February 3, 2023, Martin filed his supplemental opening brief and, with this Court's permission, the American Civil Liberties Union ("ACLU") submitted an amicus brief.[20] This is the State's supplemental answering brief in response to Martin's supplemental opening brief and the ACLU's amicus brief.

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[15] *State v. Martin*, 2021 WL 1030348, at *1 (Del. Super. Ct. Mar. 17, 2021).

[16] D.I. 10.

[17] Crim. DI 84, 86, 88.

[18] *State v. Martin*, 2022 WL 17244558 (Del. Super. Ct. Nov. 28, 2022).

[19] D.I. 13.

[20] D.I. 14, 20, 27, 28. Both Martin and the ACLU subsequently corrected their briefs. D.I. 26, 30.

SUMMARY OF THE ARGUMENT

I. Martin's argument is denied. The Superior Court did not abuse its discretion by dismissing Martin's postconviction motion. Martin has not met the "in custody" requirement of Rule 61 because he completed his sentence while his postconviction motion was pending. Martin's loss of standing and the lack of a judicial remedy subjected his motion to dismissal under the mootness doctrine. Examining the history of postconviction relief under analogous federal habeas precedent, Rules 35 and 61, and certain Delaware precedent shows that the collateral consequences rule or doctrine does not apply to Rule 61. Even if the collateral consequences rule applies to Rule 61, Martin has failed to establish collateral consequences sufficient to overcome mootness as he does not provide specific evidence of burdens or disabilities. Moreover, whether someone who previously received a pardon must be treated the same as a first-time felon becomes insignificant because the collateral consequences rule does not apply. Nevertheless, the Superior Court reasonably determined that these individuals are not similarly situated. Finally, Martin's postconviction claim is meritless.

STATEMENT OF FACTS

Evidence presented at Martin's suppression hearing established that, on February 7, 2017, Wilmington Police Detective Ketler was conducting surveillance in an ongoing drug investigation involving Martin and others.[21] To conduct this surveillance, Ketler operated an unmarked, undercover Honda Accord, which was not equipped with emergency lights or sirens.[22] Ketler saw Martin, who was driving a Jeep Liberty, turn westbound onto Llangolen Drive without using a turn signal.[23] Because Ketler was in an undercover vehicle and unable to perform a traffic stop, F.B.I. Special Agent Oliver, who was following Ketler in a car equipped with emergency equipment, stopped Martin for the traffic offense in the area of Sterling and Dudley Place.[24] Ketler assisted with the traffic stop, arriving right after Oliver pulled over Martin.[25]

As Oliver approached Martin's car, Ketler parked directly behind Oliver's car, exited his car, put on a police vest, and approached the driver's side of Martin's car, standing with Oliver.[26] Ketler immediately "smelled a large amount of marijuana

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[21] A47.

[22] A49, A58.

[23] A48-49.

[24] A48-49, A64-65.

[25] A49-50.

[26] A50, A59, A65-66.

emanating from the vehicle."[27] Ketler stood next to Oliver when Oliver engaged with Martin.[28] Oliver asked Martin about the odor of marijuana coming from the car; Martin responded that he had a "small amount of marijuana" in the car and possessed a medical marijuana card.[29] Because the officers suspected that Martin possessed a significant quantity of marijuana, a K-9 was called to the scene.[30] Oliver and Ketler removed Martin from the Jeep, and Martin sat, unhandcuffed, on the hood of the police car as the K-9 performed a smell of the car.[31] The K-9 alerted to the vehicle.[32] The police searched the Jeep and located a black bag in its back seat containing a large quantity of suspected marijuana.[33] Upon discovering the suspected marijuana, the police arrested Martin.[34] Ketler was present from the initiation of the traffic stop to Martin's arrest.[35]

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[27] A51.

[28] A66.

[29] A52.

[30] *Id.*

[31] A52, A69.

[32] A53.

[33] A53-54. At Martin's stipulated bench trial, a lab report was admitted into evidence and showed that the substance found in the vehicle was marijuana and weighed approximately 2,305 grams. A128.

[34] *Id.*

[35] A68.

Martin testified at the hearing.[36] According to Martin, on that day, he drove his Jeep to a trucking yard in New Castle to see if his tractor trailer was operational.[37] Martin was pulled over by law enforcement after he left the yard to return home.[38] Martin claimed that one officer went to the driver's side of his car, and the other responded to the passenger side.[39] Martin denied that Ketler was present at the traffic stop.[40] Martin claimed Oliver yanked him out of the car, put him in handcuffs, and walked him down to Oliver's SUV.[41] Martin denied seeing Ketler's Honda, and claimed it was not until Oliver got him back to his vehicle that he confronted him about the odor of marijuana.[42] Martin alleged that Oliver asked for consent to search his car, which he declined.[43] Martin testified that a K-9 arrived on scene, but Oliver waved off the K-9, telling the handler that Martin had a "medical marijuana card."[44]

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[36] A78.

[37] A79.

[38] A80.

[39] A81.

[40] *Id.*

[41] A83.

[42] *Id.*

[43] A85.

[44] A86.

The K-9 and his handler left without searching the car.[45] Martin claimed he was taken to the Wilmington Police Department and held in a cell for 27 hours.[46]

[45] *Id.*

[46] A87.

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING MARTIN'S POSTCONVICTION MOTION.

Question Presented

Whether the Superior Court abused its discretion by dismissing Martin's postconviction motion.

Standard and Scope of Review

This Court reviews the denial of postconviction relief for an abuse of discretion.[47] It reviews associated legal and constitutional questions *de novo* and will assess the record to determine whether competent evidence supports the findings of fact below.[48]

Merits of the Argument

In his timely-filed Rule 61 motion, as amended, Martin claimed that his trial counsel was ineffective because, although counsel argued in support of Martin's suppression motion that police unlawfully extended the traffic stop based on the odor of marijuana, counsel did not claim in the motion and on direct appeal that the strength of the marijuana's odor does not correlate to its quantity.[49] While his Rule 61 motion was pending, Martin completed his sentence and was discharged from

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[47] *Cabrera v. State*, 173 A.3d 1012, 1018 (Del. 2017).

[48] *Id.*; *Outten v. State*, 720 A.2d 547, 551 (Del. 1998).

[49] A394, A407-08.

probation in February 2021.[50] In dismissing his postconviction motion *sua sponte*, the Superior Court found that "[o]ne seeking [postconviction] relief must be 'in custody'" under Rule 61(a) and that Martin was "released from all 'custody' under the conviction he now challenges."[51] Concluding that Martin would suffer no collateral consequences because of his lengthy criminal history, the Superior Court found that Martin lacked standing to file the motion and that his postconviction claims were moot.[52] However, the unconditional gubernatorial pardon that Martin had previously received was not known to the court.[53]

Martin subsequently appealed from the Superior Court's dismissal, and this Court remanded the matter for consideration of the following questions that Delaware courts had not directly addressed: (1) "whether a person convicted of a felony for the first time faces collateral consequences under *Gural* [*v. State*];[54] and (2) whether a person who has received a pardon must be treated the same as a first-time felon for purposes of analyzing the collateral consequences rule in connection with resolving a motion for postconviction relief."[55] The Superior Court was granted

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[50] *Martin*, 2021 WL 1030348, at *1.

[51] *Id.*

[52] *Id.*

[53] *Martin*, 2022 WL 17244558, at *2.

[54] 251 A.2d 344 (Del. 1969).

[55] D.I. 10 at 5.

leave "to request any supplemental briefing, submissions, evidence, or argument it deems necessary to address these issues."[56] The Superior Court received supplemental briefing from the parties and held a hearing thereafter.[57]

On November 28, 2022, the Superior Court issued its decision answering this Court's questions. For the first question, the Superior Court concluded that, based on federal habeas corpus precedent and this Court's post-*Gural* decision in *State v. Lewis*[58] and certain of its progeny, "it would seem the Court shouldn't apply the collateral consequences doctrine under present-day Rule 61 at all."[59] The Superior Court found that its "mere supposition and unexamined suggestion that application of the collateral consequences doctrine is still viable under Rule 61 was a misstep."[60] However, if the court was required to apply the doctrine, "it should be a cautious enterprise given *Gural*'s own terms and the Rule's development since *Gural*."[61] The Superior Court found that, "if at all, a first-time felon might resort to *Gural* in very limited circumstances," including where a Rule 61 movant either "pleads with particularity a strong inference of actual innocence" or "asserts a claim that the Court

[56] *Id.* at 6.

[57] Crim. DI 84-86, 88.

[58] 797 A.2d 1198 (Del. 2002).

[59] *Martin*, 2022 WL 17244558, at *2-4.

[60] *Id.* at *6.

[61] *Id.* at *5.

lacked jurisdiction to convict and sentence her."[62] The court determined that "[e]ven if Mr. Martin were to satisfy the exceptions suggested (which he hasn't), he must also plead specific and particular consequences of his conviction to avoid mootness."[63] The court found that "the simple listing of consequences cannot possibly satisfy the specific and particularity requirement because these consequences are shared among all felons."[64]

In answering the second question, the Superior Court determined that "one [previously] pardoned of a felony conviction need not be treated as one challenging his very first."[65] Noting that the Governor of Delaware can issue a conditional or unconditional pardon, the court concluded that a pardoned felon "might regain many or most civic abilities lost by the felony conviction, but not all."[66] And even if a felon had previously received an unconditional pardon, the pardon did not negate public memory of that offense.[67]

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[62] *Id.* at *7.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at *8.

[67] *Id.*

On return from remand, this Court has ordered supplemental briefing from the parties. While allowing the parties to brief "any arguments [they] wish to make," this Court has directed the parties to address:

> (1) *Lewis*;
>
> (2) "[C]ases since *Lewis* that analyze whether collateral consequences exist under *Gural*;"
>
> (3) "[C]ompeting policy considerations of finality and fairness in legal proceedings, including the possibility that an individual could lose standing to challenge an unconstitutional conviction due to the length and complexities of postconviction proceedings rather than matters within the individual's control;" and
>
> (4) "[W]hether the 'in custody' requirement of Rule 61 applies at the time the Rule 61 motion is filed so that jurisdiction, once obtained, continues to final judgment."

In his supplemental opening brief, Martin claims that the Superior Court erred in its reasoning. He contends that the collateral consequences rule overcomes mootness, but not standing.[68] He criticizes the Superior Court for not distinguishing between cases in which the movant was in custody when he petitioned for postconviction relief versus where the movant petitioned for relief after completing his sentence.[69] Martin argues that *Lewis* did not sidestep the standing requirement in which a movant only had to be in custody when he filed his postconviction

[68] Corr. Suppl. Opening Br. (D.I. 26) at 7.

[69] *Id.* at 15.

motion.[70] He claims that a first-time felon and a convicted, but pardoned, felon are similarly situated.[71] He asserts that the Superior Court's decision undermines the fairness of the criminal justice system because it imposes higher burdens on those who are convicted of minor felony offenses and thus receive shorter sentences.[72]

For its part, the ACLU argues that "[t]he Superior Court's decision is unfair to convicted individuals" because "there will no longer be any means for someone convicted of a felony and released from judicial supervision to collaterally attack their conviction under Delaware law."[73] The ACLU claims that the "in custody" rule allows an offender on low-level probation to maintain a Rule 61 motion "while someone suffering from severe collateral consequences is not."[74] According to the ACLU, "the Superior Court's strict version of the 'in custody' requirement . . . would punish defendants, and reward the State, for delays in processing Rule 61 motions."[75] The ACLU contends that the Superior Court's interpretation of the "in custody" requirement would afford "too much finality."[76] Moreover, the ACLU argues that

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[70] *Id.* at 19-20.

[71] *Id.* at 27.

[72] *Id.* at 28.

[73] Corr. Amicus Br. (D.I. 30) at 10.

[74] *Id.* at 12.

[75] *Id.* at 14.

[76] *Id.* at 16.

providing access to collateral review promotes fairness because "more than a third of exonerations result[] in the inculpation of the actual perpetrator, providing a significant law enforcement benefit;" exonerations force the criminal justice system to revise its tactics and practices; and the public "has an interest in criminal proceedings being conducted fairly."[77]

For the reasons below, the Superior Court did not abuse its discretion by dismissing Martin's Rule 61 motion. It is subject to dismissal under the mootness doctrine, and the collateral consequences rule does not apply to Rule 61. In any event, Martin has not met his burden to demonstrate collateral consequences. Whether someone who was previously pardoned is similarly situated to a first-time felon becomes insignificant because the collateral consequences rule does not apply. Nevertheless, the Superior Court's determination that they are not similarly situated was reasonable, and Martin's postconviction claim is meritless nonetheless.

A. The Superior Court properly dismissed Martin's Rule 61 motion under the mootness doctrine, and the collateral consequences rule does not apply.

Rule 61(a)(1) provides that a postconviction motion may be made "by a person in custody under a sentence of this court."[78] As will be explained, Martin cannot maintain the motion because he completed his sentence while it was pending.

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[77] *Id.* at 19-22 (cleaned up).

[78] Super Ct. Crim. R. 61(a)(1).

His loss of standing and the lack of a judicial remedy subjected his motion to the mootness doctrine. Tracing the history of postconviction relief under analogous federal habeas precedent, Rules 35 and 61, and Delaware precedent demonstrates that the collateral consequences rule does not apply, and, as such, his motion is not saved from mootness.

1. Martin's loss of standing results in the dismissal of his postconviction motion under the mootness doctrine.

The mootness doctrine provides that "although there may have been a justiciable controversy at the time the litigation was commenced, the action will be dismissed if that controversy ceases to exist."[79] "A proceeding may become moot in one of two ways: if the legal issue in dispute is no longer amenable to a judicial resolution; or if a party has been divested of standing."[80]

This Court had defined "standing" as the "requisite interest that must exist in the outcome of the litigation at the time the action is commenced."[81] It concerns "only . . . *who* is entitled to mount a legal challenge and not with the merits of the subject matter of the controversy."[82] The "party invoking the jurisdiction of a court"

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[79] *General Motors Corp. v. New Castle County*, 701 A.2d 819, 823 (Del. 1997).

[80] *Id.*

[81] *Id.*

[82] *Albence v. Higgin*, --- A.3d.---, 2022 WL 17591864, at *17 (Del. Dec. 13, 2022) (emphasis in original).

has the burden to demonstrate standing.[83] The party must show: (i) "an 'injury-in-fact,' *i.e.*, a concrete and actual invasion of a legally protected interest;" (ii) "a causal connection between the injury and the conduct complained of;" and (iii) the "injury will [likely] be redressed by a favorable court decision."[84] The party must show that the interest is "arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question."[85] While this Court "refer[s] to the federal courts' interpretation of [United States Constitution] Article III standing, Delaware courts are not bound by the federal rules of justiciability."[86] Rather, the concept of standing is applied as a "matter of self-restraint to avoid the rendering of advisory opinions."[87] "A change in the parties' standing may result from a myriad of subsequent legal or factual causes that occur while the litigation is in progress."[88]

Relatedly, "[a] party must have continued standing throughout the pendency of the action to avoid an invocation of the mootness doctrine."[89] Although federal

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[83] *Id.*

[84] *Id.*

[85] *Id.* (cleaned up)

[86] *Id.* Article III, section 2 of the United States Constitution provides for the judiciary's power to extend only to "Cases" and "Controversies." U.S. Const. Art. III, § 2.

[87] *General Motors Corp.*, 701 A.2d at 824.

[88] *Id.*

[89] *Id.*

habeas decisions have indicated that standing is fixed at the time of a petitioner's filing,[90] this Court's analysis indicates that it is not; rather, standing is fluid.[91] In other words, where a movant satisfies Rule 61's "in custody" requirement when the petition is filed does not mean that standing continues unabated until final judgment. Where a movant has completed his sentence and has been discharged from probation while a Rule 61 motion was pending, this Court has held that the movant has lost standing to pursue the motion.[92] In sum, this Court's precedent demonstrates that standing is part of the mootness doctrine, and the loss of standing results in the application of that doctrine.[93]

Here, the mootness doctrine applies to Martin's Rule 61 motion for two reasons. For one, he lost standing when he was no longer "in custody" upon completing his sentence in February 2021. Moreover, the fact that Martin is no longer in custody means that there is no relief available to him under Rule 61, which is designed to provide a remedy for those who are unlawfully in custody. In turn,

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[90] *See, e.g.*, *Nowakowski v. New York*, 835 F.3d 210, 217 (2d Cir. 2016) ("in custody" is fixed at the time of habeas petition filing).

[91] *See, e.g.*, *Brookfield Asset Management, Inc. v. Rosson*, 261 A.3d 1251, 1262 (Del. 2021) (noting that "[i]n corporate derivative litigation, for example a plaintiff's standing is extinguished as a result of loss of plaintiff's status as a stockholder.").

[92] *Crisco v. State*, 2015 WL 257867, at *1 (Del. Jan. 20, 2015).

[93] *See, e.g.*, *Smith v. State*, 2018 WL 6202281, at *1 (Del. Nov. 28, 2018) ("An appeal is moot if the issue in dispute is no longer amenable to a judicial resolution or if a party has been divested of standing.").

for the reasons below, the collateral consequences rule articulated in *Gural* does not apply to save his postconviction motion from becoming moot. And even if the collateral consequences rule does apply, Martin has not demonstrated a continuing injury under his specific circumstances.[94]

Martin argues that "[t]he collateral consequences doctrine serves to overcome mootness, not standing" and that whether the collateral consequences rule applies "cannot sidestep the requirement of Rule 61(a) that a petitioner be in custody when she initially files a postconviction motion."[95] Martin's attempt to avoid mootness by relying on standing is unavailing. This Court's precedent indicates that standing is a component of the mootness doctrine, and standing is not fixed. Accordingly, his Rule 61 motion was properly dismissed as moot.

2. The collateral consequences rule does not apply to Rule 61.

Martin cannot rely on the collateral consequences rule to save his postconviction motion from dismissal under the mootness doctrine. As will be discussed, in formulating the collateral consequences rule, *Gural* cited the United

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[94] *See United States v. Kissinger*, 309 F.3d 179, 181 (3d Cir. 2002) ("[O]nce a litigant is unconditionally released from criminal confinement, the litigant must prove that he or she suffers a continuing injury from the collateral consequences attaching to the challenged act."); *Nowakowski*, 835 F.3d at 217-18 ("Once . . . a petitioner's sentence has expired, 'some concrete and continuing injury other than the now-ended incarceration or parole—some 'collateral consequence' of the conviction—must exist if the suit is to be maintained.").

[95] Corr. Suppl. Opening Br. at 7, 19-20.

States Supreme Court's decision in *Carafas v. LaVallee*,[96] and analogous federal habeas precedent demonstrates the narrowing scope of federal habeas review. When *Gural* was decided, Rule 35 provided the remedy for postconviction relief and sentence modification. As the Superior Court concluded, this Court's subsequent decision in *Lewis*, which interpreted Rule 61, forecloses applying the collateral consequences rule to motions for postconviction relief. However, decisions after *Lewis* do not provide much guidance about whether or when the collateral consequences rule applies. Yet amendments to Rule 61 have narrowed its scope and show an intent to limit, not expand, the availability of postconviction relief. Nor does the interest of fairness require applying the collateral consequences rule to motions seeking postconviction relief.

a. Federal Precedent

In *Carafas*, a 1968 decision, the Supreme Court found that the petitioner had satisfied the "in custody" requirement for avoiding mootness although he was unconditionally released while his criminal appeal was pending.[97] *Carafas* observed that the petitioner faced consequences from his conviction, including an inability to engage in certain businesses, serve as an official in the labor union, vote in his state's

[96] *Gural*, 251 A.2d at 344-45 (citing *Carafas v. LaVallee*, 391 U.S. 234 (1968)).

[97] *Carafas*, 391 U.S. at 238.

election, or serve as a juror.[98] However, as the Superior Court noted, the Supreme Court's "decision ultimately turned on its interpretation of the federal habeas statute, which in turn, resulted in the creation of the federal collateral consequences rule."[99] The Supreme Court has construed *Carafas* as involving a substantial statutory interpretation issue and its holding as rooted "*not* on the collateral consequences of the conviction, but on the fact that the petitioner had been in physical custody under the challenged conviction at the time the petition was filed."[100]

In *Sibron v. New York*, also decided in 1968, the Supreme Court found that Sibron's completion of his jail sentence did not render his criminal appeal moot.[101] The Court concluded that the "mere possibility" of collateral consequences "is enough to preserve a criminal case from ending ignominiously in the limbo of mootness."[102] The Court extended *Carafas* by presuming that collateral consequences exist when a litigant challenges a criminal conviction.[103] Accordingly,

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[98] *Id.* at 237.

[99] *Martin*, 2022 WL 17244558, at *3.

[100] *Maleng v. Cook*, 490 U.S. 488, 492 (1989) (citing *Carafas*, 391 U.S. at 238) (emphasis in original).

[101] 392 U.S. 40, 55-56 (1968).

[102] *Id.* at 55.

[103] *See id.* at 55-56; *United States v. Huff*, 703 F.3d 609, 611 (3d Cir. 2013) ("[T]he Supreme Court carved a narrow exception to this rule [of mootness] by allowing the presumption of collateral consequences when a litigant challenges a criminal conviction."); *Nowakowski*, 835 F.3d at 232 (Livingston, J., dissenting) (*Sibron*

federal courts have relied on the *Sibron* presumption as a judicial doctrine for overcoming mootness under Article III.[104]

As the Superior Court noted, "[u]ndoutedly influenced by . . . considerations of practicality, finality, and use of judicial resources," the Supreme Court "began to significantly restrict the scope of federal habeas review post-*Carafas*."[105] Among other measures, federal courts have ruled that certain habeas claims are not cognizable where state courts provide a mechanism for review, established procedural default rules recognizing that independent and adequate state law grounds may sustain petitioner's convictions, and applied abuse-of-the-writ rules to prevent an endless cycle of habeas petitions.[106]

"extended the reasoning in *Carafas* . . . and articulated the presumption [of collateral consequences]").

[104] *Nowakowski*, 835 F.3d at 219 (citing *Liner v. Jafco*, 375 U.S. 301, 304 (1964)); *see Burkey v. Marberry*, 556 F.3d 142, 148 (3d Cir. 2009) (noting that, after *Sibron*, the Supreme Court "abandoned all inquiry into the existence of collateral consequences" and that "collateral consequences will be presumed when the defendant is attacking his conviction while still serving the sentence imposed for that conviction" but will also "be presumed where the defendant is attacking that portion of his sentence that is still being served") (cleaned up).

[105] *Martin*, 2022 WL 17244558, at *6 (citing *Edwards v. Vannoy*, 141 S. Ct. 1547, 1570 (2021) (Gorsuch, J., concurring).

[106] *Edwards*, 151 S. Ct. at 1570 (citing *Stone v. Powell*, 428 U.S. 465, 481-82 (1976) (holding, generally, that Fourth Amendment claims are not cognizable in federal habeas review); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (precluding federal habeas review based on state procedural waiver)).

Relatedly, the Superior Court concluded that, based on Rule 61's procedural bars, "Delaware's rules governing collateral attacks on convictions do much the same."[107] This Court in "address[ing] the scope of this State's postconviction relief remedy," has concluded that postconviction relief "is a collateral remedy which provides an avenue for upsetting judgments that otherwise have become final" and "is not designed as a substitute for direct appeal."[108] This Court has held that "[i]t is a matter of fundamental import that there be a definitive end to the litigable aspect of the criminal process."[109] This Court has determined that "the finality of convictions . . . is an integral part of the deterrent effect of the criminal justice system."[110]

This restriction in the scope of habeas review is also evidenced in *Spencer v. Kemna*.[111] In this decision, the Supreme Court declined to extend the *Sibron* presumption to permit a petitioner to maintain his federal habeas petition challenging his parole revocation because the petitioner was released from prison while his petition was pending.[112] Although the Court recognized that it has presumed

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[107] *Martin*, 2022 WL 17244558, at *6.

[108] *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

[109] *Id.*

[110] *Bailey v. State*, 588 A.2d 1121, 1127 (Del.1991).

[111] 523 U.S. 1 (1998).

[112] *Id.* at 8-14.

collateral consequences in certain instances, it determined that this presumption "sits uncomfortably beside the long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record" and that the party who is seeking relief has the burden to demonstrate that "he is a proper party to invoke judicial resolution of the dispute."[113] Because the petitioner had initially met the federal habeas statute's "in custody" requirement, his petition was not moot on that basis.[114] However, the petitioner had not established collateral consequences.[115] Accordingly, his habeas petition was moot since it no longer "presented a case or controversy under Article III, § 2 of the Constitution," which "subsists through all stages of federal judicial proceedings."[116] In sum, analogous federal habeas precedent shows an intent to limit, not expand the scope of collateral attacks on convictions.

[113] *Id.* at 8, 10-11.

[114] *Id.* at 7.

[115] *Id.* at 14-17.

[116] *Id.* at 7.

b. *Gural* permitted consideration of collateral consequences under a prior postconviction rule.

When *Gural* was decided in 1969, Superior Court Criminal Rule 35 provided the framework for granting either sentence modification or postconviction relief. Rule 35 stated, in part:

> The court may correct an illegal sentence at any time. A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside, or correct the same. * * * If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate.[117]

In *Gural*, the Delaware Supreme Court dismissed an appeal from the denial of postconviction relief as moot when the appellant completed his sentence while his appeal was pending.[118] Citing *Carafas*, *Gural* adopted the federal rule for evaluating whether to dismiss the appeal in which "the satisfaction of the sentence renders the case moot unless, in consequence of the conviction or sentence, the

[117] *Curran v. Woolley*, 104 A.2d 771, 772 (Del. 1954).

[118] *Gural*, 251 A.2d at 344-45.

defendant suffers collateral legal disabilities or burdens."[119] *Gural* places the burden on the appellant to "demonstrate[e] specifically a right lost or disability or burden imposed, by reason of the instant conviction."[120] In view of the appellant's prior criminal record and his assertion of collateral consequences in "general terms, with no specificity," the appellant could not avoid the dismissal of his appeal as moot.[121] *Gural* noted that "[t]he position of the appellant *may have more merit* if this conviction blemished an otherwise clean record."[122]

In critiquing the Superior Court's analysis of *Gural*, Martin argues that "[t]he analysis in *Gural* not only aligns with the federal rule as recognized in *Spencer*, but tracks myriad of other jurisdictions' assessment[s] of whether a postconviction motion can survive the satisfaction of a sentence."[123] Martin then cites a decision holding that "a criminal conviction creates a presumption that continuing collateral consequences exist."[124] To the extent Martin argues that a presumption of collateral consequences arises based on his criminal conviction, he is mistaken. *Gural* unquestionably places the burden on him to demonstrate collateral consequences.

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[119] *Id.* at 344 (citing *Carafas*, *supra*).

[120] *Id.* at 345.

[121] *Id.*

[122] *Id.* (emphasis added).

[123] Corr. Suppl. Opening Br. at 14.

[124] *Id.* (citing *Martinez-Hernandez v. State*, 380 P.3d 861, 865 (Nev. 2016)).

Moreover, *Gural* could have expressly relied on *Sibron*, which was decided during the same year as *Carafas* and created the presumption of collateral consequences, but *Gural* did not.

c. *Lewis* precludes consideration of collateral consequences under Rule 61.

In 1987, nearly two decades after *Gural*, Rule 61 (addressing postconviction proceedings) and a modified Rule 35 (addressing sentence modification and correction) became effective.[125] As the Superior Court noted, Rule 61 subsumed the *habeas corpus* and *coram nobis* doctrines and became the exclusive mechanism for defendants to collaterally attack their convictions.[126] When Rule 61(a)(1) was enacted, a petitioner "in custody or subject to future custody under a sentence" could seek postconviction relief.[127]

[125] *State v. Lewis*, 797 A.2d 1198, 1200 (Del. 2002).

[126] *Martin*, 2022 WL 17244558, at *4. The *coram nobis* writ was "a species of writ of error" and, under this writ, "in appropriate cases a judgment could be set aside by the court that entered it for material errors of fact, but not of law affecting its validity, and unknown to the court when it was entered." *Smulski v. H. Feinberg Furniture Co.*, 193 A. 585, 587 (Del. 1937). In federal courts, "coram nobis has traditionally been used to attack convictions with continuing consequences when the petitioner is no longer 'in custody' for purposes of [federal law]." *United States v. Baptiste*, 223 F.3d 188, 189 (3d Cir. 2000).

[127] *See Epperson v. State*, 2003 WL 21692751, at*1 (Del. Jul. 18, 2003).

Thereafter, in *Guinn v. State*, this Court upheld the Superior Court's denial of petitioner's postconviction motion under Rule 61(a)(1).[128] In this decision, the petitioner filed his third postconviction motion after completing his sentence.[129] This Court simply noted that the petitioner was no longer in custody or subject to future custody as required under the rule.[130] *Guinn* neither cited *Gural* nor engaged in any analysis about collateral consequences.

In 2002, this Court conducted a robust analysis of "the parameters and the scope of relief under Rule 35(b)" under *Lewis*, a split decision.[131] As the Superior Court noted, this was the "one rare factual circumstance" in which this Court "contextualized the dichotomy between present-day Rules 35(b) and 61 and *Gural*'s collateral consequences analysis under the prior embodiment of our postconviction rule."[132] In its answering brief preceding the remand in this appeal, the State overlooked *Lewis* and merely accepted that the collateral consequences rule applied

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[128] 1993 WL 144874, at *1 (Del. Apr. 21, 1993).

[129] *Id.*

[130] *Id.*

[131] 797 A.2d 1198, 1201 (Del. 2002). Rule 35(b) provides that, although the Superior Court "may reduce a sentence of imprisonment" within 90 days upon a motion, after 90 days, the court will only consider an application in "extraordinary circumstances." Super. Ct. Crim. R. 35(b).

[132] *Martin*, 2022 WL 17244558, at *4.

to Rule 61.[133] Similarly, on remand, the Superior Court admitted that it erred in supposing that the rule applied to motions for postconviction relief.[134]

In *Lewis*, the Superior Court modified the defendant's sentence under Rule 35(b) after it had expired.[135] On appeal, this Court found that the Superior Court could modify a sentence under the rule if collateral consequences exist.[136] *Lewis* interpreted *Gural* as not limiting the defendant to seeking "relief after completion of a sentence only when there is a constitutional or legal defect alleged," but that "collateral consequences, such as inability to engage in certain business activities or restricted civil rights, could be grounds to permit relief after the completion of a sentence."[137] *Lewis* noted *Gural*'s equitable considerations were not limited to the "fairness" and "interest of justice" exceptions to the procedural bars under the then-extant Rule 61 and that "[t]he open language of Rule 35(b) . . . can be plainly read as permitting such consideration."[138] However, *Lewis* construed Rule 61(a)(1) in light of *Guinn* as suggesting "that relief after the completion of a sentence cannot be secured under Rule 61, because the language of 61(a) appears to create a standing

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[133] Answering Br. (D.I. 7) at 12-13.

[134] *Martin*, 2022 WL 17244558, at *6.

[135] *Lewis*, 797 A.2d at 1199.

[136] *Id.*

[137] *Id.* at 1201.

[138] *Id.*

bar."[139] And Rule 61 did not allow consideration of *Gural*'s circumstantial factors in determining whether the rule's time limitation should be waived.[140] Therefore, "[i]f the collateral consequences rule for mootness is to have any applicability at all, it must be available under Rule 35 as opposed to Rule 61."[141] This Court upheld the Superior Court's ability to modify the defendant's sentence due to extraordinary circumstances.[142]

Notably, *Lewis*'s dissent believed that the majority erred by even applying the collateral consequences rule since *Gural* only mentioned "in passing, that collateral consequences might attach to sentencing" and that "even in its most liberal application at the federal level, the courts apply the collateral consequences doctrine only to challenges that were originated *before* the completion of a sentence."[143] The dissent noted that "[t]he appropriate remedy for a sentence, long since served, even one which allegedly subjects a person and his family to newly discovered unduly harsh consequences, but which was otherwise legally imposed is executive clemency, not judicial action."[144] The dissent contended that sound public policy

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[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* at 1202.

[143] *Id.* at 1203 (emphasis in original).

[144] *Id.*

reasons dictate adherence to time and procedural bars as "this Court has long recognized the necessity of dismissing most petitions for procedural noncompliance to keep that trial court from being overwhelmed by the burdensome task of deciding each claim on its supposed merits."[145] In sum, *Lewis*'s thorough examination of the history of Rule 61 shows that the collateral consequences rule is inapplicable to Rule 61.

d. Decisions after *Lewis* do not provide much guidance on the applicability of the collateral consequences rule to Rule 61.

Despite *Lewis* determining that the collateral consequences rule does not apply to Rule 61, decisions following *Lewis* do not offer much guidance on that point. Some decisions have applied the rule, while others have not.

In *Keita v. State*, the defendant was convicted of misdemeanor drug charges and sentenced to probation.[146] The defendant was subsequently found in violation of probation, and his probation was discharged once federal immigration authorities took him into custody.[147] This Court applied the collateral consequences rule and found that the defendant's appeal was moot because he was appealing from a completed sentence and had not established consequences from this case.[148] This

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[145] *Id.*

[146] 2010 WL 4970743, at *1 (Del. Dec. 7, 2010).

[147] *Id.* at *1-2.

[148] *Id.*

Court noted that, "to invoke the collateral consequences exception to the general rule of mootness," Keita had the burden to specifically demonstrate "a right lost or disability or burden imposed" and that he was already subject to deportation due to a prior felony conviction.[149] Although this Court has provided *Keita* as an example of a decision that the parties should address, it is of limited use since it did not concern the applicability of the rule to postconviction motions.

In *Paul v. State*, the defendant moved for postconviction relief after the expiration of his sentence, and the Superior Court denied his motion as untimely and moot.[150] This Court agreed with the Superior Court and found that his postconviction claim was moot.[151] Without citing *Lewis* or even addressing its rationale, this Court applied the collateral consequences rule and found that "[n]owhere does he specifically identify a right lost or a burden imposed as a result of his conviction."[152]

In *Anderson v. State*, the defendant filed a Rule 61 motion after completing his sentence, and the Superior Court denied the motion because he lacked standing.[153] In affirming the Superior Court, this Court determined that the

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[149] *Id.*

[150] 2011 WL 3585623, at *1 (Del. Aug. 15, 2011).

[151] *Id.*

[152] *Id.*

[153] 2014 WL 7010017, at *1 (Del. Nov. 11, 2014).

defendant had not "specifically identif[ied] a right lost or disability or burden imposed as a result of the conviction to overcome the general rule mooting his claims."[154] This Court concluded that "[a]s a result, [he] lack[ed] standing to move for postconviction relief."[155] Again, *Lewis* is not addressed. And using similar language about the defendants' failure to identify collateral consequences overcoming mootness and their lack of standing, *Steck v. State* and *Watson v. State* affirmed the Superior Court's summary dismissals of the postconviction motions that these defendants had filed after completing their sentences.[156] *Lewis* is not mentioned in these decisions either. However, this precedent has not expressly overruled *Lewis*.

In comparison, this Court has issued decisions after *Lewis* that do not mention the collateral consequences rule in affirming the denials or dismissals of Rule 61 motions where petitioners cannot meet the "in custody" requirement.[157] In *Baltazar*

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[154] *Id.* at *2.

[155] *Id.*

[156] *Steck v. State*, 2015 WL 2357161, at *1-2 (Del. May 15, 2015); *Watson v. State*, 2015 WL 1456771, at *1-2 (Del. Mar. 30, 2015).

[157] *See, e.g.*, *Cammile v. State*, 2009 WL 3367065, at *1 (Del. Oct. 20, 2009) (concluding that defendant lacked standing and his Rule 61 motion was moot where defendant filed motion several years after completion of sentence); *Lewis v. State*, 2012 WL 130700, at *1 (Del. Jan. 17, 2012) (concluding that petitioner who filed Rule 61 motion after discharge from probation "has no recourse under Rule 61 to seek postconviction relief"); *Short v. State*, 2013 WL 3807795, at *1 (Del. July 18, 2013) (affirming Superior Court's denial of motion based on mootness noting that his motion was moot where petitioner filed Rule 61 motion after discharge from

v. State, this Court affirmed both the Superior Court's denial of the defendant's motion to vacate his sentence under Rule 35 and his motion for postconviction relief under Rule 61.[158] Baltazar filed his motions after he was discharged from probation.[159] This Court cited *Lewis*, *Gural*, and the collateral consequences rule in considering the denial of his Rule 35 motion.[160] However, this Court simply noted that Baltazar lacked standing under Rule 61 since he was discharged from probation.[161] While *Baltazar* indicates that the collateral consequences rule does not apply to Rule 61, it is admittedly of limited use because it did not expressly reaffirm *Lewis*.

Martin attempts to harmonize this Court's precedent by arguing that the collateral consequences rule applies to mootness, but not to standing. Martin is mistaken. As previously explained, standing is a component of the mootness doctrine, and his attempt to bifurcate standing and mootness is unavailing.

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probation and that he lacked standing); *Crisco*, 2015 WL 257867, at *1 (defendant lost standing where discharged from probation after filing Rule 61 motion).

[158] *Baltazar v. State*, 2015 WL 257334, at *1 (Del. Jan. 20, 2015).

[159] *See id.* at *1-2.

[160] *Id.* at *2-3.

[161] *Id.* at *3.

e. The scope of Rule 61 has narrowed since *Lewis*.

Amendments to Rule 61 since *Lewis* have further narrowed its scope, and they demonstrate an intent to limit, not expand the availability of postconviction relief. The current version of Rule 61 no longer allows those "subject to future custody" under a sentence to seek postconviction relief.[162]

Moreover, Rule 61's procedural bars have been strengthened. Gone is the "interest of justice" exception under Rule 61(i)(4) for formerly adjudicated claims, while Rule 61(d)(2) has effectively subsumed Rule 61(i)(5).[163] Accordingly, there is no longer a "miscarriage of justice" exception under Rule 61(i)(5) based on a movant demonstrating 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 convictions."[164]

f. Fairness does not require application of the collateral consequences rule.

Nor does fairness require that the collateral consequences rule apply to Rule 61. Martin contends that the Superior Court's decision is unfair because defendants

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[162] *See* R. 61(a)(1).

[163] *See Swan v. State*, 248 A.3d 838, 857 (Del. 2021) (discussing prior version of the rule).

[164] *Id.*

who receive shorter sentences for lower-level felony offenses face a higher burden in collaterally attacking their convictions than those convicted of more serious offenses.[165] Citing the inevitable delays in the court system, Martin argues that "the proceedings in the instant case outlived [his] sentence, through no fault of his own."[166]

For its part, the ACLU focuses on fairness in its amicus brief. It complains that there will no longer be a mechanism for someone who is released from judicial supervision to collaterally attack a conviction.[167] It further contends that Rule 61's procedural bars are adequate and, without any supporting precedent, that the Superior Court is providing "too much finality" in criminal proceedings.[168] It asserts that fair criminal proceedings benefit the state, judiciary, and the public. More specifically, the ACLU notes that exonerating an innocent person often results in inculpating the actual perpetrator, who "often continues to commit crimes while the innocent person suffers the direct and collateral consequences of the conviction."[169] It argues that exonerations often result in reform to the criminal justice system,

[165] Corr. Suppl. Opening Br. at 28.

[166] *Id.* at 31.

[167] Corr. Amicus Br. at 10.

[168] *Id.* at 17-18.

[169] *Id.* at 20.

which was only possible where "finality gave way to fairness."[170] Finally, "[v]oters and their representatives have an interest in knowing that the state officials they elect, confirm, and/or pay are acting in accordance with the law."[171]

Martin's and the ACLU's arguments fail for several reasons. For one, states are not constitutionally required to provide postconviction relief.[172] This relief "is even further removed from the criminal trial than is discretionary direct review."[173] It is actually "civil in nature" and "is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction."[174] And "[s]tate collateral proceedings . . . serve a different and more limited purpose than either the trial or appeal."[175] As such, the ACLU's argument that the Superior Court's ruling provides too much finality is unavailing in the absence of any constitutional requirement for Martin to have been afforded postconviction relief at all. Whatever relief that Rule 61 could have provided Martin was more than he was constitutionally entitled to.

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[170] *Id.* at 21.

[171] *Id.* at 22.

[172] *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987).

[173] *Id.*

[174] *Id.*

[175] *Murray v. Giarratano*, 492 U.S. 1, 10 (1989).

Second, the United States Supreme Court has declined to find that a delay potentially attributable to the court or prosecution is sufficient to overcome mootness. Instead, the Court has concluded that "mootness, however, it may come about, simply deprives [the Court] of [its] power to act; there is nothing for [the Court] to remedy, even if [it] were disposed to do so."[176] The Court "is not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong."[177]

Third, the ACLU's focus on the role of postconviction motions in exonerating defendants overlooks the fact that Rule 61 does not limit relief to those asserting actual innocence. Rather, it affords relief to those who simply establish "any other ground that is a sufficient factual and legal basis for a collateral attack upon a criminal conviction"[178] Finality is integral to the deterrent effect of the criminal justice system and is fundamentally important. Allowing defendants to maintain Rule 61 motions once their sentences have ended undermines rather than promotes finality. "No one can accept without unease the thought that the legal system tolerates erroneous convictions. Yet we live in a world of scarcity, one in which the most inflexible commodity, time itself, sets a limit on [the court's] ability to prevent

[176] *Spencer*, 523 U.S. at 18.

[177] *Id.*

[178] R. 61(a)(1).

and correct mistakes."[179] Accordingly, "[e]very legal system tolerates a risk of error. It tries to find procedures that will hold error to a minimum, but then it must move on. Bygones are beyond recall," and, unfortunately, nothing can return to a defendant the time he has spent incarcerated.[180] However, "[t]he reopening of closed cases, though, means attention given to bygones at the expense of others in need of initial adjudication."[181]

Fourth, defendants have other avenues to attack their convictions. As *Lewis*'s dissent noted, defendants can seek gubernatorial clemency. Delaware's pardon process is a constitutionally-created procedure under Article VII, Sections 1-2 of the Delaware Constitution that allows the Governor to pardon someone unconditionally, conditionally, or not at all.[182] There are no time limitations for seeking clemency. And, while an admittedly difficult hurdle to overcome, defendants can petition federal courts for habeas relief and attempt to overcome the requirement that they must first exhaust their claims in the state courts by establishing that the

[179] *United States v. Keane*, 852 F.2d 199, 206 (7th Cir. 1988).

[180] *Id.*

[181] *Id.*

[182] *Arnold v. State*, 49 A.3d 1180, 1182 (Del. 2012).

government's inordinate delay excused them from the requirement.[183] Accordingly, fairness does not require this Court to apply the collateral consequences rule.

B. Martin has failed to demonstrate collateral consequences nonetheless.

Even if this Court concludes that the collateral consequences rule applies to Rule 61, Martin has not met his burden. To begin, the Superior Court reasonably determined that the collateral consequences rule "should be limited to just the circumstances denoted by Rule 61's most important procedural-bar exceptions."[184] The court concluded that a movant should first either plead with particularity the existence of evidence creating a strong inference of actual innocence or that the Superior Court did not have jurisdiction to convict or sentence him. Here, Martin's Rule 61 motion does not contend that the Superior Court lacked jurisdiction, nor does his motion contend that he is actually innocent. Accordingly, his motion does not overcome these bars.

In any case, Martin fails to demonstrate collateral consequences. *Gural* requires petitioners to "specifically" demonstrate "a right lost or disability or burden imposed" from their convictions.[185] Federal decisions discussing the standard for

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[183] *See, e.g.*, *Lee v. Stickman*, 357 F.3d 338, 342-44 (3d Cir. 2004) (eight-year delay in resolving postconviction motion excused exhaustion requirement).

[184] *Martin*, 2022 WL 17244558, at *7.

[185] *Gural*, 251 A.2d at 345.

issuing writs of *coram nobis* are instructive because these decisions have placed the burden on petitioners. For example, in *United States v. Biondi*, the district court acknowledged that a few federal courts have low thresholds for establishing collateral consequences, although it noted that a majority of federal circuits have imposed "a more demanding standard" for issuing the writ.[186] Under this standard, "felony status, alone, is not sufficient; rather, a petitioner must articulate an ongoing harm which flows from the allegedly invalid conviction."[187] "Courts have . . . granted coram nobis relief where the petitioner produced evidence that certain consequences caused by a conviction would be lifted if the conviction were vacated."[188] Under the Seventh Circuit's more rigorous standard, *coram nobis* petitions are rejected "except where there is a concrete threat that an erroneous conviction's lingering disabilities will cause serious harm to the petitioner" and where the harm "must be more than incidental."[189]

In this case, Martin has made no particularized showing of collateral consequences causing him present harm. This absence of evidence persists although

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[186] 2014 WL 1301144, at *3 (E.D. Pa. Apr. 1, 2014).

[187] *Salahuddin v. United States*, 2018 WL 5342766, at *5 (D.N.J. Oct. 29, 2018) (finding that petitioner provided sufficient evidence that a consent order's prohibition against public employment amounted to a collateral consequence).

[188] *Biondi*, 2014 WL 1301144, at *4.

[189] *Howard v. United States*, 962 F.2d 651, 654-55 (7th Cir. 1992) (cleaned up).

this matter was remanded to the Superior Court for additional findings. However, Martin has previously contended that, as a felon, he cannot serve on a jury or own or possess a firearm or ammunition; his "ability to obtain employment will be affected, as he could be disqualified by public employers due to his felony conviction," and "[f]or some professions, [he] could be outright excluded due to his felony conviction;" he is "ineligible to receive federal student loans for a period of time;" and he will suffer stigma.[190] He only provides general, incidental consequences of a felony conviction. He has not offered any evidentiary support that he has applied for employment or student loans and was unable to obtain them due to his convictions.[191] Nor do any bald complaints about an inability to own or possess a firearm evidence of present harm.[192] Similarly, Martin "does not claim to have pursued jury service and been denied," nor has he shown any "intent or desire

[190] Corr. Opening Br. at 18.

[191] *Biondi*, 2014 WL 1301144, at *4 (E.D. Pa. Apr. 1, 2014) (denying issuance of *coram nobis* writ because petitioner had not established that his convictions deprived him of an employment "opportunity that would otherwise be available to him").

[192] *See Howard*, 962 F.2d at 655 ("Howard has not demonstrated that his inability to possess a firearm poses a serious present harm to him."); *United States v. Loftus*, 796 F. Supp. 815, 827 (M.D. Pa. 1992) (granting *coram nobis* relief although finding that the petitioner had not sufficiently established a collateral consequence based on an inability to own a firearm because he "does not demonstrate a desire to own a firearm"). *But see Kipp v. State*, 704 A.2d 839, 842 n.1 (Del. 1998) (not concerning issue of mootness, although this Court noted "[t]hat a convicted felon may not own or possess a firearm is . . . [among] the list of collateral consequences which follow from a guilty plea.").

to serve on a jury in the future."[193] Martin likewise fails to support his assertion about suffering stigma. Nevertheless, such stigma would constitute "reputational or incidental injury which would accompany all convictions" and thus does not support granting relief.[194] His arguments fall short of meeting *Gural*. His approach would essentially nullify the mootness doctrine and make the "in custody" requirement of Rule 61(a)(1) superfluous because a mere incantation of the rights lost by all felons would be sufficient without any further showing.

C. Whether someone who has received a pardon must be treated the same as a first-time felon becomes insignificant because the collateral consequences rule does not apply, but the Superior Court's determinations were reasonable nonetheless.

In remanding this matter to the Superior Court, this Court asked whether someone who has received a pardon on a felony conviction must be treated the same a first-time felon. In answering the question, the Superior Court concluded that "neither a first-time felon nor one pardoned may resort to the collateral consequences

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[193] *See Moskowitz v. United States*, 64 F. Supp. 3d 574, 581 (S.D.N.Y. 2014) (in denying *coram nobis* petition, concluding that "[i]f loss of the right to serve on a jury constituted a civil disability for purposes of the writ, virtually all convictions would qualify and the continuing legal consequence test would be rendered superfluous.").

[194] *Blanton v. United States*, 896 F. Supp. 1451, 1457 (D. M.D. Tenn. 1995); *see Keane*, 852 F.2d at 203 (in denying a *coram nobis* petition, noting that "[c]riminal convictions sometimes produce financial penalties and diminish the reputation of the defendant, but these do not entail continuing legal effects of a judgment" for granting *coram nobis* relief); *United States v. Osser*, 864 F.2d 1056, 1060 (3d Cir. 1988) ("Damage to reputation is not enough" to show collateral consequences).

doctrine under Rule 61."[195] Thus, the inapplicability of the collateral consequences rule results in this issue becoming insignificant.

Nevertheless, the Superior Court properly determined that these individuals are not similarly situated. To be sure, on remand, the State took the position that Martin's unconditional pardon resulted in him being in the same position as someone convicted of felony offense for the first time. But the Superior Court disagreed and found that "a pardoned felon need not necessarily be treated the same as one challenging his first conviction."[196] The court noted that the Governor may issue a conditional or unconditional pardon, and that a conditional pardon may result in the defendant only regaining some of his lost civil liberties.[197] Further, the Superior Court concluded that, even where a defendant has been unconditionally pardoned, he need not "necessarily" be treated the same as though he is challenging his first felony conviction.[198] In determining that "a pardon doesn't necessarily create a clean slate," the Superior Court highlighted this Court's conclusion that a "pardon does not erase guilt."[199] The Superior Court also noted that a conviction has lasting effects and that the interests of finality, "the now-express limitations of" Rule 61, and

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[195] *Martin*, 2022 WL 17244558, at *7.

[196] *Id.* at *8.

[197] *Id.*

[198] *Id.*

[199] *Id.* (quoting *State v. Skinner*, 632 A.2d 82, 85 (Del. 1993)).

fairness considerations support not viewing one pardoned of a felony the same as one convicted of a felony for the first time.[200]

The Superior Court's conclusions were reasonable and, in light of its thorough analysis, the State does not disagree with the court's findings. Martin contends that the Superior Court "fail[ed] to take into account the rights lost by [him] as a result of a new felony conviction."[201] However, the court did consider this factor but found that other policy considerations warranted it concluding that a defendant who had received a pardon should not necessarily be treated the same as a first-time felon. Moreover, the Superior Court's analysis shows that a pardoned individual is not similarly situated to someone who has been convicted for the first time. A pardon entails forgiveness but not forgetfulness for a crime.[202] Setting aside *Gural*'s burden in establishing collateral consequences, courts have concluded that the lingering memory of a pardoned crime could amount to a collateral consequence despite the pardon's removal of the crime's legal consequences.[203] Someone who has been

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[200] *Id.*

[201] Corr. Opening Br. at 27.

[202] *Skinner*, 632 A.2d at 84.

[203] *See, e.g., Carr v. Louisville-Jefferson County*, 37 F.4th 389, 395 (6th Cir. 2022) ("While a pardon removes all legal consequences, it does not eliminate collateral consequences."); *Grossgold v. Supreme Court of Illinois*, 557 F.2d 122, 125-26 (7th Cir. 1977) (pardon did not preclude attorney disciplinary proceeding); *State ex rel. Wier v. Peterson*, 369 A.2d 1076, 1081 (Del. 1976) ("While a pardon removes all legal punishments and disabilities attached to a conviction, we hold that it cannot erase the Fact that the offender was convicted of an infamous crime and it is the fact

pardoned may still be cross-examined about the crime or may be precluded from having it expunged from a criminal record.[204] Therefore, the Superior Court did not err in its conclusions.

D. Martin's postconviction claim is meritless.

Martin's postconviction claim is meritless nonetheless. Martin contended in his amended Rule 61 motion that his trial counsel was ineffective under *Strickland v. Washington*[205] by not arguing that police could not lawfully extend his traffic stop based on Detective Ketler simply smelling a large amount marijuana because there is no correlation between the strength of the marijuana's odor and its amount.[206] Martin alleges that "other jurisdictions have held that an individual cannot determine the quantity of a substance based on the strength of the aroma."[207]

Martin cannot demonstrate that his trial counsel performed deficiently. Although counsel has a duty to learn the relevant law of a case,[208] "[o]nly in a rare case can an attorney's performance be considered unreasonable under prevailing

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of conviction alone, not its continuing viability, which renders the offender ineligible to hold public office.").

[204] *Skinner*, 632 A.2d at 84.

[205] 466 U.S. 668 (1984).

[206] A394-402, A407-08.

[207] A406.

[208] *See e.g., White v. State*, 173 A.3d 78 (Del. 2017) (counsel's failure to ask for a lesser-included offense instruction based on a mistaken understanding of Delaware law was objectively unreasonable).

professional standards when she does not make an [argument] which could not be sustained on the basis of the existing law."[209] In the context of analyzing probable cause for vehicle searches, this Court has determined, "[t]hat possession of personal uses of marijuana is not a criminal offense does not render marijuana odors, raw or burnt, irrelevant" in this determination.[210] Martin concedes that Delaware has not directly addressed whether a person can properly testify about smelling a large amount of marijuana.[211] His arguments would have required his counsel to have argued for either a change in existing Delaware law or for a new law. But his counsel was not required to have done so. Because Martin has not shown that his counsel erred, he cannot demonstrate that any error prejudiced him. Accordingly, the Superior Court did not abuse its discretion by dismissing Martin's postconviction motion.

[209] *United States v. Davis*, 394 F.3d 182, 189 (3d Cir. 2005) (cleaned up).

[210] *Valentine v. State*, 2019 WL 1178765, at *2 (Del. Mar. 12, 2019).

[211] A406.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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Date: March 27, 2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARNELL MARTIN,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 112, 2021
	)	
v.	)	On Appeal from the
	)	Superior Court of the
STATE OF DELAWARE,	)	State of Delaware
	)	
Plaintiff-Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 9,964 words, which were counted by Microsoft Word 2016.

Dated: March 27, 2023

/s/ Brian L. Arban
Brian L. Arban
Deputy Attorney General