

SUPERIOR COURT OF DELAWARE
SPECIAL RULE OF PROCEDURE 2017-1
FOR REVIEW OF
A REQUEST TO MODIFY A HABITUAL OFFENDER SENTENCE

(a) Scope of rule.

(1) *Nature of proceeding.* This rule governs the procedure on a petition by a person in custody and serving the Level V term of a sentence of this court imposed under 11 *Del. C.* § 4214 prior to July 19, 2016, when the petition seeks exercise of the court's jurisdiction to modify that sentence pursuant to 11 *Del. C.* § 4214(f) as enacted by 80 Del. Laws ch. 321 (2016) and clarified by 81 Del. Laws ch. 6 (2017).

(2) *Exclusiveness of remedy.* A petition under this rule shall be limited to a request for modification of a sentence pursuant to 11 *Del. C.* § 4214(f) when that sentence was imposed under the provisions of 11 *Del. C.* § 4214 extant prior to July 19, 2016, and when that sentence comprised a minimum sentence of not less than the statutory maximum penalty for a violent felony imposed under then-extant 11 *Del. C.* § 4214(a) or a life sentence under then-extant 11 *Del. C.* § 4214(b). The remedy afforded by this rule may not be sought by a motion for post-conviction relief or in any manner other than as provided herein. The availability of relief under this rule, however, shall not be construed to limit the court's ability to modify a sentence pursuant to Superior Court Criminal Rule 35 or 11 *Del. C.* § 4217 where the requirements thereof are met.

(b) Appointment of counsel.

The Office of Defense Services shall represent the petitioner in proceedings under this rule unless the petitioner privately retains an attorney. It shall be the duty of the assigned or retained attorney to prepare and present a petition and other filings that comply with the provisions of this rule and 11 *Del. C.* § 4214(f). Upon entry of a final order, the assigned or retained attorney's continuing duty shall be as provided in Supreme Court Rule 26.

(c) **Initial Review and Certificate of Eligibility.**

(1) *Certificate of Eligibility required.* Unless a judge of this court issues a certificate of eligibility, a petition seeking exercise of the court's jurisdiction to modify a sentence pursuant to 11 *Del. C.* § 4214(f), as enacted by 80 Del. Laws ch. 321 (2016) and clarified by 81 Del. Laws ch. 6 (2017), shall not be filed with the court.

(2) *Request for certificate of eligibility to be filed by attorney of record.* A request for a certificate of eligibility to file a petition to modify a sentence pursuant to 11 *Del. C.* § 4214(f) may only be filed under these rules by the petitioner's attorney of record, who has been privately retained by the petitioner or assigned by the Office of Defense Services. The court will not consider a pro se request for a certificate of eligibility or any other pro se filing under this rule unless the petitioner has been granted permission to proceed pro se.

(3) *Content of request for certificate of eligibility.* The request for certificate of eligibility shall:

- (i) specify the date on which the petitioner will meet or has met the time-served eligibility requirements set forth in 11 *Del. C.* § 4214(f) and all grounds for the belief that the petitioner will meet or has met the time-served eligibility requirements on that date; and
- (ii) include as an attachment thereto any notification of time-served eligibility from the Department of Correction provided for by 11 *Del. C.* § 4214(f) that has been received by the petitioner or the attorney; and
- (iii) be supported by specific averments that the attorney has conducted a diligent review of the petitioner's sentencing history and that there is a good faith basis to believe that:
 - a. the petitioner is serving a sentence imposed under the provisions of 11 *Del. C.* § 4214 extant prior to July 19, 2016, and that sentence consists of a minimum sentence of not less than the statutory maximum penalty for a violent felony imposed under previous

11 *Del. C.* § 4214(a) or a life sentence under previous 11 *Del. C.* § 4214(b); and

- b. the petitioner meets the time-served eligibility requirements set forth in 11 *Del. C.* § 4214(f); and
- c. a petition may be heard because the felony establishing the petitioner as a habitual offender is one for which review is then-permitted as provided for in 11 *Del. C.* § 4214(f) and subdivision (d)(11) of this rule.

(4) *Place and time of filing request for certificate of eligibility.* A request for a certificate of eligibility shall be filed in the office of the Prothonotary in the county in which the judgment of sentence was entered and shall be served upon the office of the Attorney General in the county of application. A request for a certificate of eligibility shall be filed no earlier than 120 days prior to the date on which the petitioner meets the time-served eligibility requirements set forth in 11 *Del. C.* § 4214(f).

(5) *Response to request for certificate of eligibility.* The Attorney General shall file a written response to the request for certificate of eligibility within 30 days of the filing of the request. The response to the request for a certificate of eligibility shall be supported by specific averments that the Attorney General has conducted a diligent review of the petitioner's sentencing history and that there is a good faith basis to believe that:

- (i) the petitioner either is or is not serving a sentence imposed under the provisions of 11 *Del. C.* § 4214 extant prior to July 19, 2016, that consists of a minimum sentence of not less than the statutory maximum penalty for a violent felony imposed under previous 11 *Del. C.* § 4214(a) or a life sentence under previous 11 *Del. C.* § 4214(b); and
- (ii) the petitioner either does meet or does not meet the time-served eligibility requirements set forth in 11 *Del. C.* § 4214(f); and

- (iii) a petition may or may not be heard because the felony establishing the petitioner as a habitual offender is one for which review is then-permitted as provided for in 11 *Del. C.* § 4214(f) and subdivision (d)(11) of this rule.

(6) *Disposition of request for certificate of eligibility.* A request for a certificate of eligibility may be considered without presentation, hearing, or argument unless otherwise ordered by the court. The court shall set forth on the record the reasons for granting or denying the request for a certificate of eligibility.

(7) *Provision of materials to petitioner upon the grant of a certificate of eligibility.* If, but only if, the court grants a certificate of eligibility to file a petition to modify a sentence pursuant to 11 *Del. C.* § 4214(f), the Department of Correction and the Department of Justice shall, consistent with a memorandum of understanding entered for the express purpose of facilitating the lawful and efficient transfer of materials and information required for consideration of a petition under 11 *Del. C.* § 4214(f) and this rule, provide to the petitioner's attorney of record, who has been privately retained by the petitioner or assigned by the Office of Defense Services, access to such materials and information.

(d) Petition for modification of sentence imposed under provisions of 11 *Del. C.* § 4214 extant prior to July 19, 2016.

(1) *Form of petition.* An application under this rule shall be made by a petition for sentence modification.

(2) *Filing of petition.* Consistent with the provisions of 11 *Del. C.* § 4214(f), no petition shall be filed under these rules except by the petitioner's attorney of record, who has been privately retained by the petitioner or assigned by the Office of Defense Services. The court will not consider a pro se petition or any other pro se filing under this rule unless the petitioner has been granted permission to proceed pro se.

(3) *Content of petition.* The petition shall:

- (i) specify all grounds for sentence modification that are available to the petitioner under 11 *Del. C.* § 4214(f);

- (ii) set forth in summary form the facts supporting each of the grounds thus specified;
- (iii) set forth a complete accounting of the petitioner's prior criminal history, including all arrests and convictions;
- (iv) set forth a complete history of the petitioner's conduct while incarcerated as derived from the materials and information provided by the Department of Correction under subdivision (c)(7) of this rule;
- (v) provide all available evidence as to the likelihood that the petitioner will not reoffend if released;
- (vi) provide the results of a formal risk assessment conducted by the Department of Correction no more than three years prior to the filing of the petition; and
- (vii) provide any other facts or circumstances that should be considered by the court when determining whether sentence modification is appropriate.

(4) *Multiple judgments of sentence.* If judgments of sentence under the prior provisions of 11 *Del. C.* § 4214 were entered on more than one offense at the same time because of joinder of offenses in one indictment, in one plea of guilt, or in one trial, the petitioner may seek modification of each such judgment of sentence in the petition. If other judgments of sentence were entered on one or more offenses at the same time and in the same sentencing order as a judgment of sentence under the prior provisions of 11 *Del. C.* § 4214 because of joinder of offenses in one indictment, in one plea of guilt, or in one trial, the Court may, notwithstanding any contrary provision of Superior Court Criminal Rule 35 or 11 *Del. C.* § 4217, consider modification of each such judgment of sentence to which 11 *Del. C.* § 4214 was not applied. Judgments entered at different times shall not be challenged in one petition but only by separate petitions.

(5) *Time of filing.* No petition shall be filed prior to January 1, 2017. A petition may not be filed until a judge of this court issues a certificate of eligibility under subdivision (c) of this rule. The court will consider a repetitive petition under this rule only in extraordinary circumstances.

(6) *Place of filing.* A petition shall be filed in the office of the Prothonotary in the county in which the judgment of sentence was entered and shall be served upon the office of the Attorney General in the county of application.

(7) *Response to the petition.* The Attorney General shall file a written response to the petition at a time specified by the court. That written response shall:

- (i) specify all grounds for the Attorney General's support of or opposition to the petition;
- (ii) set forth in summary form the facts supporting or basis for objecting to each of the grounds thus specified;
- (iii) verify, and supplement when necessary, the petitioner's prior criminal history, including all arrests and convictions;
- (iv) verify the history of the petitioner's conduct while incarcerated;
- (v) provide all available evidence as to the likelihood that the petitioner will reoffend if released;
- (vi) provide the Attorney General's position regarding the results of the formal risk assessment conducted and filed with the petition; and
- (vii) be supported by specific averments that the Attorney General has conducted a diligent review of the matter and that, if the petition involves a crime against a person or property the Attorney General has consulted with the victim as provided for in 11 *Del. C.* § 4214(f).

The court shall not act upon the petition without first providing the Attorney General with an opportunity to be heard on the matter. A petition for modification of sentence under this rule may be considered without presentation, hearing, or argument unless otherwise ordered by the court. In no case, however, shall the petition be considered in a manner inconsistent with the provisions of

11 *Del. C.* § 4214(f) and this rule. In any case in which presentation, hearing or argument is had on the petition, a victim shall be given an opportunity to provide a victim impact statement in a manner consistent with the provisions of 11 *Del. C.* §§ 4331(d), (e), and (f).

(8) *Summary dismissal.* If it plainly appears from the petition and the record of prior proceedings in the case that the petitioner is not entitled to relief or that the requirements of this rule have not been met, the court may enter an order for the petition's summary dismissal and cause the petitioner's attorney and the petitioner to be notified.

(9) *Disposition of petition.* The court may in its sole discretion grant or deny the petition for modification of sentence. Notwithstanding the provisions of 11 *Del. C.* § 4214 or § 4217, any court rule or any other provision of law to the contrary, the court upon consideration of a petition properly filed pursuant to this rule may modify, reduce, or suspend the petitioner's sentence imposed. In no instance, however, may the court modify, reduce, or suspend any portion of any applicable mandatory sentence as defined by 11 *Del. C.* § 4214(f). If the court modifies, reduces or suspends the petitioner's sentence, the court shall include a transition period of custodial supervision at either Level IV, III or II as provided for by 11 *Del. C.* § 4204(l). Nothing in this rule or in 11 *Del. C.* § 4214 shall require the court to grant sentence modification to a petitioner.

(10) *Record of disposition.* Whenever the court disposes of a petition, the court shall set forth on the record the results of its review and its reasons for granting or denying the petition.

(11) *Sequence of consideration of petitions.* To the extent possible, consistent with the provisions of 11 *Del. C.* § 4214(f), all petitions filed under this rule where the felony establishing an inmate as a habitual offender was a Title 16 offense shall be heard first, followed by all petitions filed where the felony establishing an inmate as a habitual offender was a crime against property, followed by all other petitions.

Effective November 8, 2017

(To be cited as "Del. Super. Ct. Spec. R. 2017-1_" and must be applied to all 11 *Del. C.* § 4217(f) sentence modification requests pending or filed on or after November 8, 2017.)