

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE	)	
	)	
v.	)	ID: 9503004907
	)	
ANDRE A. RIVERA,	)	
	)	
Defendant.	)	

**ORDER**

**Submitted: May 7, 2013**  
**Decided: May 16, 2013**

**Upon Defendant’s Second Motion under Rule 35 to  
Correct an Illegal Sentence - DENIED.**

1. Since 1995, Defendant has been serving a mandatory life sentence under 11 *Del. C.* § 4214(b). He has filed four motions for postconviction relief under Superior Court Criminal Rule 61. This is his second motion under Superior Court Criminal Rule 35 for correction of an illegal sentence.

2. This time, Defendant complains about alleged procedural defects in the habitual offender proceeding held immediately before his sentencing. Relying on *Morales v. State*,<sup>1</sup> Defendant claims that the State did not present the “text of the

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<sup>1</sup> 696 A.2d 390 (Del. 1997).

guilty plea” to prove Defendant’s predicate convictions. Defendant also claims the court mishandled the “colloquy” at the hearing. Finally, Defendant vaguely challenges the sentencing hearing on due process grounds.

3. The State filed opposition on May 7, 2013. In summary, the State contends that the motion is time-barred and substantially incorrect, as Defendant has “six separate and distinct Burglary Second Degree First [c]onvictions listed in the motion filed by the State.” Actually, motions to correct illegal sentences are never time-barred.<sup>2</sup> And, although the State’s motion to declare Defendant a habitual offender includes the required predicates, its reference to the other convictions is vague and unsubstantiated. (The response to Defendant’s latest motion, however, confirms that Defendant has *more* than the minimum predicates.)

4. Defendant’s motion conflates a Rule 35 motion for correction of an illegal sentence with a Rule 61 motion for postconviction relief. The former merely concerns whether the sentence, itself, is lawful. The latter provides a way to challenge the sentence’s imposition. Here, Defendant complains, in effect, that although the sentence may appear lawful, he is nonetheless entitled to relief because the sentence was the product of a procedurally flawed process.

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<sup>2</sup> *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998) (“Rule 35(a) permits the Superior Court to correct an illegal sentence ‘at any time.’”); *Marvel v. State*, 977 A.2d 899 (Del. 2009) (TABLE); *Benson v. State*, 36 A.3d 348 (Del. 2012) (TABLE); Super. Ct. Crim. R. 35(a) (“The court may correct an illegal sentence at any time [. . . .]”).

5. To the extent Defendant challenges, 18 years after-the-fact, the way the habitual offender status hearing under 11 *Del. C.* § 4214(b) was handled, that is not a subject for consideration under Rule 35. By the same token, Defendant's claim, if it is Defendant's claim – that there was insufficient proof of the § 4214(b) predicate convictions – is also not a matter for Rule 35 consideration. Again, those sorts of contentions were matters for Defendant's direct appeal or his first Rule 61 motion.<sup>3</sup>

6. As a courtesy, the court observes that the finding for 11 *Del. C.* § 4214(b)'s purposes started with a 1975 conviction in this court for burglary in the second degree. The finding also rested on a 1978 conviction in this court for burglary, second degree. The State's motion included certified copies of the records for those convictions, and even now those convictions are not denied. Moreover, as the State now provides, there are records showing burglary convictions in 1981, and at other times, and in other states. Accordingly, it appears now, as it did in 1995, this Defendant amply qualified as a habitual offender under 11 *Del. C.* § 4214(b). And, he was sentenced as the law required.

7. Because Defendant was properly found to be a habitual offender for § 4214(b)'s purposes, the only lawful sentence was life imprisonment

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<sup>3</sup> *Brittingham*, 705 A.2d at 579 (“[A defendant] cannot continue to litigate previously decided issues by changing the number of the Superior Court rule under which he seeks postconviction relief.”).

without benefit of probation or parole. That is the sentence he received and, therefore, it was legal.

8. As Defendant approaches his 20<sup>th</sup> year in prison for burglaries, the court questions when the point will be reached when Defendant's further confinement no longer serves a useful purpose and the interest of justice. The court, however, has no authority to reduce Defendant's sentence unilaterally.

For the foregoing reasons, Defendant's second Rule 35 motion for correction of illegal sentence is **DENIED**.

**IT IS SO ORDERED.**

\_\_\_\_\_  
/s/ Fred Silverman

Judge

cc: Prothonotary (Criminal)  
pc: Ipek Medford, Deputy Attorney General  
Andre A. Rivera, Defendant