

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
ORDER AMENDING RULE 61
OF THE
SUPERIOR COURT RULES OF CRIMINAL PROCEDURE

This 4th day of June, 2014, **IT IS ORDERED** that:

(1) Superior Court Criminal Rule 61 is amended by deleting subparagraph (a)(1), paragraph (d), paragraph (e), and paragraph (i) and by substituting in lieu thereof the following:

(a) *Scope of rule.*

(1) Nature of proceeding. This rule governs the procedure on an application by a person in custody under a sentence of this court seeking to set aside the judgment of conviction or a sentence of death on the ground that the court lacked jurisdiction or on any other ground that is a sufficient factual and legal basis for a collateral attack upon a criminal conviction or a capital sentence. A proceeding under this rule shall be known as a postconviction proceeding.

(d) *Preliminary consideration.*

(1) First postconviction motion. A first postconviction motion shall be presented promptly to the judge who accepted a plea of guilty or nolo contendere or presided at trial in the proceedings leading to the judgment under attack. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge in accordance with the procedure of the court for assignment of its work. The judge shall promptly examine the motion and contents of the files relating to the judgment under attack.

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(2) Second or subsequent postconviction motions. A second or subsequent motion under this rule shall be summarily dismissed, unless the movant was convicted after a trial and the motion either:

(i) pleads with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted; or

(ii) pleads with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme Court, applies to the movant's case and renders the conviction or death sentence invalid.

(3) Stay of proceedings. If any part of the record of prior proceedings in the case has been removed in connection with an appeal or federal habeas corpus proceeding, the judge may stay proceedings in this court until it has been returned.

(4) Preparation of transcript. The judge may order the preparation of a transcript of any part of the prior proceedings in the case needed to determine whether the movant may be entitled to relief.

(5) Summary dismissal. If it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief, the judge may enter an order

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for its summary dismissal and cause the movant to be notified.

(e) Appointment of counsel and withdrawal of counsel.

(1) First postconviction motions in specific cases. The judge shall appoint counsel for an indigent movant's first timely postconviction motion and request for appointment of counsel if the motion seeks to set aside:

(i) a judgment of conviction after a trial that has been affirmed by final order upon direct appellate review and is for a crime designated as a class A, B, or C felony under 11 *Del. C.* § 4205(b);

(ii) a judgment of conviction after a trial that has been affirmed by final order upon direct appellate review and resulted in the imposition of a sentence under 11 *Del. C.* § 4214(b); or

(iii) a sentence of death.

(2) First postconviction motions in guilty plea cases. The judge may appoint counsel for an indigent movant's first timely postconviction motion and request for appointment of counsel if the motion seeks to set aside a judgment of conviction that resulted from a plea of guilty or nolo contendere only if the judge determines that:

(i) the conviction has been affirmed by final

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order upon direct appellate review or direct appellate review is unavailable;

(ii) the motion sets forth a substantial claim that the movant received ineffective assistance of counsel in relation to the plea of guilty or nolo contendere;

(iii) granting the motion would result in vacatur of the judgment of conviction for which the movant is in custody; and

(iv) specific exceptional circumstances warrant the appointment of counsel.

(3) Other first postconviction motions. The judge may appoint counsel for any other first postconviction motion only if the judge determines that:

(i) the motion is an indigent movant's first timely postconviction motion and request for appointment of counsel;

(ii) the motion seeks to set aside a judgment of conviction after a trial that has been affirmed by final order upon direct appellate review;

(iii) the motion sets forth a substantial claim that the movant received ineffective assistance of trial or appellate counsel;

(iv) the motion sets forth a substantial claim

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that the movant is in custody in violation of the United States Constitution or the Delaware Constitution;

(v) granting the motion would result in vacatur of the judgment of conviction for which the movant is in custody; and

(vi) specific exceptional circumstances warrant the appointment of counsel.

(4) Second or subsequent motions. For an indigent movant's second or subsequent postconviction motion, the judge may appoint counsel for an indigent movant only if the judge determines that the second or subsequent motion satisfies the pleading requirements of subparagraphs (2)(i) or (2)(ii) of subdivision (d) of this rule.

(5) Continuing duty of counsel. 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 as provided in Supreme Court Rule 26.

(6) Motion to withdraw. If counsel considers the movant's claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, counsel may move to withdraw. The motion shall explain the factual and

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legal basis for counsel's opinion and shall give notice that the movant may file a response to the motion within 30 days of service of the motion upon the movant.

(i) *Bars to relief.*

(1) Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) *Successive motions.*

(i) No second or subsequent motion is permitted under this Rule unless that second or subsequent motion satisfies the pleading requirements of subparagraphs (2)(i) or (2)(ii) of subdivision (d) of this rule.

(ii) Under paragraph (2) of subdivision (b) of this Rule, any first motion for relief under this rule and that first motion's amendments shall be deemed to have set forth all grounds for relief available to the movant. That a court of any other sovereign has stayed proceedings in that court for purpose of allowing a movant the opportunity to file a second or subsequent motion under this rule shall not provide a basis to avoid summary dismissal under this

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rule unless that second or subsequent motion satisfies the pleading requirements of subparagraphs (2)(i) or (2)(ii) of subdivision (d) of this rule.

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows:

(A) Cause for relief from the procedural default and

(B) Prejudice from violation of the movant's rights.

(4) Former adjudication. Any 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.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), (3), and (4) of this subdivision shall not apply either to a claim that the court lacked jurisdiction or to a claim that satisfies the pleading requirements of subparagraphs (2)(i) or (2)(ii) of subdivision (d) of this rule.

(6) Movant's response. If ordered to do so, the movant shall explain on the form prescribed by the court why the motion for postconviction relief

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should not be dismissed or grounds alleged therein
should not be barred.

(2) This amendment shall be effective on June 4, 2014 and shall apply to postconviction motions filed on or after that date.