

Superior Court Amends Superior Court Criminal Rule 61 to Address Second or Subsequent Motions for Postconviction Relief and Clarify When Appointment of Counsel is Required or Discretionary.

By Order dated June 4, 2014, the Delaware Superior Court amended several provisions of Superior Court Criminal Rule 61.

Criminal Rule 61(a) has been amended to clarify that only movants who are currently in custody and are challenging the judgment for which they are in custody may file a motion under Criminal Rule 61.

Criminal Rule 61(d) has been amended to add a new subsection (2), which provides that any second or subsequent postconviction motion will be summarily dismissed unless the movant was convicted after a trial and the motion either: (i) pleads with particularity that new evidence exists to establish the movant's actual innocence in fact; or (ii) pleads with particularity that a new, retroactively applicable constitutional rule applies to the movant's case and renders a conviction or death sentence invalid.

Criminal Rule 61(e) has been amended to distinguish those cases in which counsel must be appointed to assist an indigent movant to pursue postconviction relief from those cases in which appointment of counsel is discretionary.

- Under Criminal Rule 61 (e)(1) the court, upon request, shall appoint counsel for any timely first postconviction motion if the underlying conviction was imposed following a trial and is for a crime designated as a class A, B, or C felony or if the conviction resulted in a habitual offender's life sentence or in a death sentence.
- Criminal Rules 61(e)(2) and 61(e)(3) permit the court, in its discretion, to appoint counsel for other timely filed first postconviction motions if the underlying conviction resulted from a guilty plea or was imposed following a trial for a less serious crime. The Rules now set forth the specific criteria for those cases in which the court may exercise such discretion.
- While Criminal Rule 61(e)(4) permits the judge to appoint counsel for an indigent movant's second or subsequent postconviction motion only if the motion meets the pleading requirements of new subsection (d)(2).

Criminal Rule 61(i)(2) has been amended to incorporate the new pleading standards for second or subsequent postconviction motions. Similarly, Criminal Rule 61(i)(5) has been amended to: (i) state that the procedural bars of Criminal Rules 61(i)(1)-(4) do not apply to claims that satisfy those new pleading standards; and (ii) clarify that the exception to those procedural bars are limited to claims that the court lacked jurisdiction or that satisfy those new pleading standards.

A copy of these Rule amendments and the complete text of revised Superior Court Criminal Rule 61, as effective June 4, 2014, can be found on the [Courts' Rules Web site](#).

SUPERIOR COURT CRIMINAL RULE 61

(eff. June 4, 2014)

Rule 61. Postconviction remedy.

(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.

(2) Exclusiveness of remedy. The remedy afforded by this rule may not be sought by a petition for a writ of habeas corpus or in any manner other than as provided herein.

(b) *Motion for postconviction relief.*

(1) Form of motion. An application under this rule shall be made by a motion for postconviction relief. The movant must use the prescribed form which shall be made available without charge by the prothonotary. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the movant.

(2) Content of motion. The motion shall specify all the grounds for relief which are available to the movant and of which the movant has or, by the exercise of reasonable diligence, should have knowledge, and shall set forth in summary form the facts supporting each of the grounds thus specified.

(3) Multiple convictions. A motion shall be limited to the assertion of a claim for relief against one judgment of conviction or, if judgments of conviction were entered on more than one offense at the same time because of a plea agreement or joinder of offenses at trial, against multiple judgments entered at the same time. Judgments entered at different times shall not be challenged in one motion but only by separate motions.

(4) Time of filing. A motion may not be filed until the judgment of conviction is final.

(5) Place of filing. A motion shall be filed in the office of the prothonotary in the county in which the judgment of conviction was entered.

(6) Amendment of motion. A motion may be amended as a matter of course at any time before a response is filed or thereafter by leave of court, which shall be freely given when justice so requires.

(c) *Duties of prothonotary.*

(1) Noncomplying motion. If a motion does not substantially comply with the requirements of subdivision (b) of this rule, the prothonotary shall return it to the movant, if a judge of the court so directs, together with a statement of the reason for its return, and shall retain a copy of the motion and of the statement of the reason for its return.

(2) Entry on docket. Upon receipt of a motion that appears on its face to comply with subdivision (b) of this rule, the prothonotary shall accept the motion and enter it on the docket in the proceeding in which the judgment under attack was entered. If the motion attacks judgments entered in separate criminal action files, the prothonotary shall place copies of the motion in each file and make the appropriate docket entries.

(3) Assignment of number. The prothonotary shall assign each motion for postconviction relief a separate criminal action number, which must appear on all filings in the postconviction proceeding.

(4) Service of motion. The prothonotary shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the attorney general. The filing of the motion shall not require the attorney general to respond to the motion unless ordered by the court.

(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.

(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 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 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 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 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.

(f) *State's response.*

(1) Order to respond. If the motion is not summarily dismissed, the judge shall order the attorney general to file a response to the motion or to take such other action as the judge deems appropriate. Unless otherwise ordered, the response shall be filed within 30 days of service of the order to respond upon the state.

(2) Content of response. The response shall explain the factual and legal basis for the state's position on each ground for relief alleged in the motion in sufficient detail to enable the court to determine whether an evidentiary hearing is desirable or summary disposition of the motion is appropriate. If the motion contains inaccurate or incomplete information about prior proceedings, the response shall supply the correct information.

(3) Movant's reply. The movant may file a reply to the state's response within 30 days of service of the state's response upon the movant.

(g) *Expansion of record.*

(1) Direction for expansion. The judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(2) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the motion, documents, exhibits, and contents of the file of an appeal or federal habeas corpus proceeding. If the motion alleges ineffective assistance of counsel, the judge may direct the lawyer who represented the movant to respond to the allegations. Affidavits may be submitted and considered as a part of the record.

(3) Submission to opponent. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the opposing party, who shall be afforded an opportunity to admit or deny their correctness.

(4) Authentication. The judge may require the authentication of any material filed under this subdivision.

(h) *Evidentiary hearing.*

(1) Determination by court. After considering the motion for postconviction relief, the state's response, the movant's reply, if any, the record of prior proceedings in the case, and any added materials, the judge shall determine whether an evidentiary hearing is desirable.

(2) Time for hearing. If an evidentiary hearing is ordered, it shall be conducted as promptly as practicable, having regard for the need of both parties for adequate time for investigation and preparation.

(3) Summary disposition. If it appears that an evidentiary hearing is not desirable, the judge shall make such disposition of the motion as justice dictates.

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

(j) *Reimbursement of expenses.* If a motion is denied, the state may move for an order requiring the movant to reimburse the state for costs and expenses paid for the movant from public funds. The judge may grant the motion if the movant's claim is so completely lacking in factual support or legal basis as to be insubstantial or the movant has otherwise abused this rule. The judge may require reimbursement of costs and expenses only to the extent reasonable in light of the movant's present and probable future financial resources.

(k) *Time for appeal.* The time for appeal from an order entered on a motion for relief under this rule is as provided in Supreme Court Rule 6. Nothing in these rules shall be construed as extending the time for appeal from the original judgment of conviction.

(1) *Capital cases.*

(1) Scope of subdivision. This subdivision applies when a defendant seeks to set aside a sentence of death. The defendant shall have a right to one postconviction proceeding under this subdivision. The other subdivisions of this rule shall apply except insofar as they are inconsistent with the special provisions of this subdivision.

(2) Waiver of rights. The defendant may waive the right to a postconviction proceeding or to appeal an adverse ruling. The court shall not accept a waiver without addressing the defendant personally in open court and determining that the defendant understands the legal consequences of the waiver.

(3) Status of representation. When the time for seeking certiorari to review the Supreme Court's order affirming a sentence of death expires or, if the defendant seeks certiorari, when the United States Supreme Court issues a mandate or order finally disposing of the case, the court shall promptly schedule a session with the defendant and defense counsel to determine the status of representation. Counsel who represented the defendant at trial or on appeal may not represent the defendant in the postconviction proceeding permitted by this subdivision unless the defendant and counsel request continued representation. The court may not grant the request without addressing the defendant personally in open court and determining that the defendant understands that the request for continued representation constitutes a waiver of the right to claim that counsel's representation at trial or on appeal was ineffective. If the defendant requests the appointment of new counsel, the court shall promptly rule on that request.

(4) Schedule of proceeding. When the status of representation has been determined, the court shall enter an order setting the schedule of the postconviction proceeding within the following time limits. The motion for postconviction relief shall be filed within 60 days of the date of the scheduling order and shall be submitted for decision within 270 days of the date of the scheduling order. The court for compelling cause may grant an enlargement of not more than an additional 60 days for filing or submission or both, provided that a request for enlargement is made before the expiration of the prescribed time period. If enlargement is granted, the court shall state its finding of compelling cause with specificity. The court shall enter a final order within 60 days of the date of submission.

(5) Sanction for delay. Upon a party's failure to comply with the scheduling order, the court shall immediately issue a rule directing the party to show cause why sanctions should not be imposed for the failure to comply. Unless a defendant shows compelling cause for failing to comply,

the court shall enter an order barring the defendant from filing a motion for postconviction relief or dismissing the defendant's motion for postconviction relief with prejudice.

(6) Date of execution. Following the completion of direct review, the court shall not set a date of execution until the defendant has an opportunity for one postconviction proceeding and review by the Supreme Court. If the defendant waives the right to a postconviction proceeding or to appeal, or the Supreme Court dismisses the defendant's appeal or affirms a ruling adverse to the defendant, the court shall promptly set a date for execution no less than 90 days, unless waived, nor more than 120 days from the date that the waiver was accepted or the Supreme Court's mandate issued.

(7) Stay for further proceedings. The court shall not entertain an application to stay an execution date set pursuant to paragraph (6) of this subdivision for the purpose of further postconviction proceedings. An application to stay execution for federal certiorari or habeas corpus proceedings shall be made to the appropriate federal court. An application to stay execution for any other purpose shall be made in accordance with Supreme Court Rule 35(e).

(m) *Definition.* A judgment of conviction is final for the purpose of this rule as follows:

(1) If the defendant does not file a direct appeal, 30 days after the Superior Court imposes sentence;

(2) If the defendant files a direct appeal or there is an automatic statutory review of a death penalty, when the Supreme Court issues a mandate or order finally determining the case on direct review; or

(3) If the defendant files a petition for certiorari seeking review of the Supreme Court's mandate or order, when the United States Supreme Court issues a mandate or order finally disposing of the case on direct review.