

Thereafter, Petitioner filed in this Court a form petition for habeas relief under 28 U.S.C. § 2254 challenging the Delaware state courts' denial of his Rule 35 motion. (D.I. 1) He contends that the Delaware state court ignored his medical issues and that their denial of his Rule 35 motion violated his constitutional rights to due process and equal protection. (D.I. 1 at 5-15)

II. STANDARD OF REVIEW

A district court judge may summarily dismiss a habeas petition “if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief.” Rule 4, 28 U.S.C. foll. § 2254. A petitioner is not entitled to federal habeas relief unless he has exhausted state remedies for his habeas claims by “fairly presenting” the substance of the claims to the state’s highest court, either on direct appeal or in a post-conviction proceeding, and in a procedural manner permitting the state courts to consider them on the merits. See 28 U.S.C. § 2254(b)(1)(A); *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997). Petitioners seeking habeas corpus relief in federal court have the burden to establish exhaustion of state court remedies,¹ even when they are seeking habeas relief based on the risks posed by COVID-19. See, e.g., *Valdez v. Kauffman*, 2021 WL 1425300, at *2-3 (M.D. Pa. Apr. 15, 2021); *Ginn v. Kauffman*, 2021 WL 1340140, at *2-3 (M.D. Pa. Apr. 9, 2021); *Davis v. Kauffman*, 2021 WL 1225930, at *3-4 (M.D. Pa. Apr. 1, 2021).

¹ See *DeFoy v. McCullough*, 393 F.3d 439, 442 (3d Cir. 2005).

III. DISCUSSION

There are two threshold issues in this case: (1) is a state prisoner's claim that the Eighth Amendment requires his release during the COVID-19 pandemic cognizable under 28 U.S.C. § 2254; and (2) did Petitioner exhaust state remedies for the instant claim. With respect to the first question, the Third Circuit has held that immigration detainees may proceed under 28 U.S.C. § 2241 to challenge allegedly unconstitutional conditions of confinement due to the COVID-19 pandemic. See *Hope v. Warden York Cty. Prison*, 972 F.3d 310 (3d Cir. 2020). Importantly, however, the *Hope* Court cautioned that it was "not creating a garden variety cause of action," and the Third Circuit has not extended its holding in *Hope* to cases outside the immigration context involving petitioners in custody pursuant to a state court judgment of conviction. *Hope*, 972 F.3d at 324-25; see, e.g., *Houck v. Moser*, 2021 WL 1840827, *1 (W.D. Pa. May 7, 2021) ("Even in the COVID-19 era, a writ of habeas corpus is not a generally available remedy outside the immigrant detainee context contemplated in *Hope v. Warden York County Prison* [...]"). Given the significant amount of uncertainty surrounding the issue, the Court will refrain from deciding whether Petitioner can challenge the Delaware courts' failure to release him despite the risks posed by COVID-19.

Instead, the Court concludes that the instant Petition is subject to summary dismissal because Petitioner failed to exhaust state remedies. In Delaware, a prisoner may file a motion for reduction or modification of sentence pursuant to Superior Court Criminal Rule 35(b) and/or apply to the Delaware Department of Correction for a medical modification of sentence under 11 Del. C. § 4217. Under § 4217, the

Department of Correction may seek modification of an inmate's sentence for good cause, including "a serious medical illness or infirmity." See *Eggleston v. State*, 203 A.3d 738 (Table), 2019 WL 343669 (Del. Jan. 24, 2019) (citing 11 Del. C. § 4217(c)). Particularly relevant to this case, the Delaware Supreme Court has held that § 4217 is the statutory vehicle for seeking sentence modification in light of an offender's underlying medical conditions and potential exposure to COVID-19. See *Johnson v. State*, 239 A.3d 388 (Table), 2020 WL 5626231, at *2 (Del. Sept. 18, 2020); see also *Chrichlow v. State*, 257 A.3d 449 (Table), 2021 WL 3087677, at *2 (Del. July 21, 2021) ("An application under § 4217 is the proper vehicle for Chrichlow's claims that his cancer treatment and potential exposure to COVID-19 warrants reduction of his sentence."); *Hernandez-Vargas v. State*, 240 A.3d 2 (Table), 2020 WL 5951372, at *2 (Del. Oct. 7, 2020) ("[T]he decision of whether the early release of low-risk offenders would lessen the dangers posed by COVID-19 to the general prison population is best left to the discretion of the Department of Corrections, which may move for the modification of any prisoner's sentence for good cause under 11 Del. C. § 4217.").

Although Petitioner filed a Rule 35(b) motion to modify his sentence and appealed the denial of that motion, the face of the instant Petition does not indicate that Petitioner pursued the discretionary process for determining his eligibility for a medical modification or sentence under § 4217 by submitting a request and the required form to the Department of Correction. Accordingly, the Court will summarily dismiss the instant Petition without prejudice for failure to exhaust available state remedies.

IV. CONCLUSION

For the reasons set forth above, the Court will summarily dismiss the instant Petition. The Court will also decline to issue a certificate of appealability because Petitioner has failed to make a “substantial showing of the denial of a constitutional right.” See 28 U.S.C. § 2253(c)(2); 3d Cir. L.A.R. 22.2 (2011); *United States v. Eyer*, 113 F.3d 470 (3d Cir. 1997). A separate Order will be entered.

Dated: March 7, 2022



Colm F. Connolly
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

EDWIN ANDREWS,

Petitioner,

v.

Civil Action No. 21-886-CFC

KOLAWOLE AKINBAYO, Warden, and
ATTORNEY GENERAL OF THE
STATE OF DELAWARE,

Respondents.

ORDER

At Wilmington, this Seventh day of March in 2022, for the reasons set forth in the Memorandum issued this date;

IT IS HEREBY ORDERED that:

1. Petitioner Edwin Andrews' Petition for Habeas Corpus Relief Under 28 U.S.C. § 2254 (D.I. 1) is **SUMMARILY DISMISSED without prejudice** for failure to exhaust state remedies.

2. The Court declines to issue a certificate of appealability because Petitioner has failed to satisfy the standards set forth in 28 U.S.C. § 2253(c)(2).



Colm F. Connolly
Chief Judge