

Rule Change 2004(2)

**Chapter 29. Colorado Rules of Criminal Procedure
For All Courts of Record In Colorado**

The following rule is amended as of July 1, 2004:

Rule 35. Postconviction Remedies.

Amended and Adopted by the Court, En Banc, January 29, 2004, effective July 1, 2004.

Justices Martinez and Bender would have included an exception for actual innocence in sections 35(a)(2) and 35(c)(3)(VII).

BY THE COURT:

Alex J. Martinez
Justice, Colorado Supreme Court

Rule 35. Postconviction Remedies

(a) Correction of Illegal Sentence. The court may correct an ~~illegal~~ sentence that was not authorized by law or that was imposed without jurisdiction at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) [***NO CHANGE]

(c) Other Remedies.

(1) [***NO CHANGE]

(2) [***NO CHANGE]

(I) [***NO CHANGE]

(II) [***NO CHANGE]

(III) [***NO CHANGE]

(IV) ~~That the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law,~~
REPEALED

(V) [***NO CHANGE]

(VI) [***NO CHANGE]

(VII) [***NO CHANGE]

(3) One who is aggrieved and claiming either a right to be released or to have a judgment of conviction set aside on one or more of the grounds enumerated in section (c)(2) of this Rule may file a motion in the court which imposed the sentence to vacate, set aside, or correct the sentence, or to make such order as necessary to correct a violation of his constitutional rights. The following procedures shall apply to the filing and hearing of such motions:

(I) Any motion filed outside of the time limits set forth in § 16-5-402, 6 C.R.S., shall allege facts which, if true, would establish one of the exceptions listed in 16-5-402(2), 6 C.R.S.

(II) Any motion filed also shall substantially comply with and contain the information detailed in Form 4, Petition for Postconviction Relief Pursuant to Crim. P. 35(c). See Appendix to Chapter 29.

(III) If a pro se motion substantially fails to comply with Form 4, Petition for Postconviction Relief Pursuant to Crim. P. 35(c), the court shall return to the defendant a copy of the document filed along with a blank copy of Form 4 and direct that a motion in substantial compliance with the form be filed within forty-five days.

(IV) The court shall promptly review all motions that substantially comply with Form 4, Petition for Postconviction Relief Pursuant to Crim. P. 35(c). In conducting this review, the court should consider, among other things, whether the motion is timely pursuant to §

16-5-402, whether it fails to state adequate factual or legal grounds for relief, whether it states legal grounds for relief that are not meritorious, whether it states factual grounds that, even if true, do not entitle the party to relief, and whether it states factual grounds that, if true, entitle the party to relief, but the files and records of the case show to the satisfaction of the court that the factual allegations are untrue. ~~Unless~~ If the motion and the files and record of the case show to the satisfaction of the court that the prisoner is not entitled to relief, the court shall enter written findings of fact and conclusions of law in denying the motion. The court shall complete its review within sixty days of filing or provide the defendant a notice of reasons for delay.

(V) If the court does not deny the motion under (IV) above, the court shall cause a complete copy of said motion to be served on the prosecuting attorney if one has not yet been served by counsel for the defendant. If the defendant has requested counsel be appointed in the motion, the court shall cause a complete copy of said motion to be served on the Public Defender. Within forty-five days, the Public Defender shall respond as to whether the Public Defender's Office intends to enter on behalf of the defendant pursuant to § 21-1-104(1)(b), 6 C.R.S. In such response, the Public Defender shall identify whether any conflict exists, request any additional time needed to investigate, and add any claims the Public Defender finds to have arguable merit. Upon receipt of the response of the Public Defender, or immediately if no counsel was requested by the defendant or if the defendant already has counsel, the court shall direct the prosecution to respond to the defendant's claims or request additional time to respond within thirty days and the defendant to reply to the prosecution's response within twenty days. The prosecution has no duty to respond until so directed by the court. Thereafter, the court shall grant a prompt hearing thereon, on the motion unless, based on the pleadings, the court finds that it is appropriate to enter a ruling containing written findings of fact and conclusions of law. At the hearing, the court shall and take whatever evidence is necessary for

the disposition of the motion. ~~If the petitioner has requested counsel and the court has not summarily determined that the prisoner is not entitled to relief, then the court shall also refer a copy of the motion to the public defender's office for consideration pursuant to § 21-1-104(1)(b), 6 C.R.S.~~

~~In all cases, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. The court shall enter written or oral findings either granting or denying relief within sixty days of the conclusion of the hearing or provide the parties a notice of the reason for delay and date by which the ruling will be issued.~~

If the court finds that defendant is entitled to postconviction relief, the court shall make such orders as may appear appropriate to restore a right which was violated, such as vacating and setting aside the judgment, imposing a new sentence, or granting a new trial, or discharging the prisoner, defendant. ~~or make such orders as may appear appropriate to restore a right which was violated.~~ The court may stay its order for discharge of the ~~prisoner~~ defendant pending appellate court review of the order. If the court orders a new trial, and there are witnesses who have died or otherwise become unavailable, the transcript of testimony ~~given at the trial, of such witnesses at the trial~~ which resulted in the vacated sentence ~~by witnesses who have since died or otherwise become unavailable,~~ may be used at the new trial. ~~The court need not entertain a second motion or successive motions for similar relief based upon the same or similar allegations on behalf of the same prisoner.~~

(VI) The court shall deny any claim that was raised and resolved in a prior appeal or postconviction proceeding on behalf of the same defendant, except the following:

- (a) Any claim based on evidence that could not have been discovered previously through the exercise of due diligence;
- (b) Any claim based on a new rule of constitutional law that was previously unavailable, if that rule has been applied

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retroactively by the United States Supreme Court or Colorado appellate courts.

(VII) The court shall deny any claim that could have been presented in an appeal previously brought or postconviction proceeding previously brought except the following:

(a) Any claim based on events that occurred after initiation of the defendant's prior appeal or postconviction proceeding;

(b) Any claim based on evidence that could not have been discovered previously through the exercise of due diligence;

(c) Any claim based on a new rule of constitutional law that was previously unavailable, if that rule should be applied retroactively to cases on collateral review;

(d) Any claim that the sentencing court lacked subject matter jurisdiction;—

(e) Any claim where an objective factor, external to the defense and not attributable to the defendant, made raising the claim impracticable.

(VIII) Notwithstanding (VI) (b) above, the court shall not deny a postconviction claim of ineffective assistance of trial counsel on the ground that all or part of the claim could have been raised on direct appeal.

(IX) The order of the trial court granting or denying the motion is a final order reviewable on appeal.

~~COMMITTEE COMMENT~~

~~As a practical matter and to avoid unnecessary delay any motion filed pursuant to Rule 35(c) should include the following information:~~

~~A. Case number;~~

~~B. County and court where convicted;~~

~~C. Date of conviction;~~

~~D. Nature and length of sentence;~~

~~E. Whether conviction was by trial or plea;~~

~~F. The names and addresses of any attorneys who represented the defendant at any stage of the proceeding;~~

~~G. Whether there was an appeal, and if so, the case number of the appeal, the name of the court that considered the appeal, the result of the appeal, and the date of the result of the appeal;~~

~~H. Other than appellate motions, the nature of any previous post-trial petitions, applications or motions filed with respect to the case;~~

~~I. Whether the petitioner is requesting counsel to be appointed;~~

~~J. All grounds for relief (failure to include all grounds may result in such additional grounds being barred from presentation in future motions); and~~

~~K. All facts which support each ground for relief presented as specifically as possible.~~

<input type="checkbox"/> District Court _____ County, Colorado Court Address: _____ <hr/> <u>People of the State of Colorado</u> <u>vs.</u> <u>Defendant</u> <hr/> <u>Attorney or Party Without Attorney: (Name & Address)</u> _____ _____ _____ Phone Number: _____ FAX Number: _____ E-mail: _____ Atty. Reg. #: _____		▲ COURT USE ONLY ▲ <hr/> <u>Case Number:</u> _____ <u>Div:</u> _____ <u>Ctrm:</u> _____
<u>Petition for Postconviction Relief Pursuant to Crim. P. 35(c)</u>		

CONVICTION UNDER ATTACK

1. What was the date of your conviction? _____
(day/month/year).
2. Which of the following resulted in your conviction? ☐ PLEA, ☐ JURY TRIAL, OR ☐ COURT TRIAL.
3. Were you represented by an attorney? ☐ YES ☐ NO

 If yes, list the names and addresses of any attorney who has ever represented you in this case. Attach additional sheets if necessary.

 Name: _____ Name: _____
 Address: _____ Address: _____

 Nature of Representation (for example: preliminary hearing, plea, trial)

DIRECT APPEAL

4. Was this case appealed? ☐ YES ☐ NO

_____ If yes, please provide the following:

_____ Appeal Case Number: _____

_____ Appellate Court: _____

_____ Result: _____

_____ Date: _____

POSTCONVICTION PROCEEDINGS

5. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal, such as Rule 35(a), Rule 35(c), or a Writ of Habeas Corpus ? ☐ YES ☐ NO

6. If your answer to 5 was "YES" give the following information for each petition filed:

a. FIRST petition, application or motion.

(1) Name of court _____

(2) Nature of proceeding (for example, Rule 35(a), Rule 35(c), § 2254 Writ of Habeas Corpus)

(3) Claims raised

(4) Name of attorney if any _____

(5) Did you receive an evidentiary hearing on your petition, application, or motion? ☐ YES ☐ NO

(6) Result _____

(7) Date of Result _____

(8) Did you appeal the result? ☐ YES ☐ NO

i) If you did appeal, what was the result and date of the court's decision (or attach a copy of the court's opinion or order) ?

ii) If you did not appeal, briefly explain why you did not.

b. For a second or subsequent petition, please answer the questions listed in (6)(a)(1) through (7) above. Attach a separate sheet of paper and state at the top that you are listing other motions or petitions filed in this case.

REQUEST FOR COUNSEL

7. Are you requesting that counsel be appointed to represent you on this petition?

☐ YES ☐ NO

If yes, please complete the attached indigency application.

CLAIMS

Briefly specify every ground on which you claim that you are being held unlawfully.

- STATE THE FACTS RELATED TO YOUR CLAIM ON ONE PAGE AND PUT ANY LEGAL AUTHORITY ON A SEPARATE PAGE.
- YOU SHOULD RAISE IN THIS PETITION ALL THE CLAIMS FOR RELIEF THAT RELATE TO THE CONVICTION OR SENTENCE UNDER ATTACK. IF YOU DO NOT RAISE ALL CLAIMS HERE, THE COURT MAY NOT HAVE TO ENTERTAIN LATER MOTIONS FOR SIMILAR RELIEF.

GROUND OF PETITION

Specify every ground on which you claim that you are being held unlawfully, by placing a check mark in the appropriate box below and providing the required information. Include all facts. Attach pages stating the grounds and the facts referenced to each claim.

8. The grounds for this Motion are as follows: (check all that apply)

a. ☐ The Defendant has sought appeal of a conviction within the time prescribed, and judgment on that conviction has not then been affirmed upon appeal, and there has been a significant change in the law which if applied to this conviction or sentence, the interests of justice allow the retroactive application of the changed legal standard. (In other words, there was a change in the law and the Defendant is allowed the positive retroactive effect of the change.)

b. No review of a conviction of crime was sought by appeal within the time prescribed therefor, or a judgment of conviction was affirmed upon appeal. However, in good faith the Defendant alleges one or more of the following:

(1) ☐ That the conviction was obtained or sentence imposed in violation of the Constitution or laws of the United States or the constitution or laws of this state.

(2) ☐ That the Defendant was convicted under a statute that is in violation of the Constitution of the United States or the constitution of this state, or that the conduct for which the applicant was prosecuted is constitutionally protected.

(3) ☐ That the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter.

(4) ☐ That the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law.

(5) ☐ That there exists evidence of material facts, not theretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned by the defendant or his

attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice.

(6) ☐ Any other ground otherwise properly the basis for collateral attack upon a criminal judgment.

(7) ☐ That the sentence imposed has been fully served or that there has been unlawful revocation of parole, probation, or conditional release.

For any box checked, YOU MUST attach a separate sheet of paper with the ground listed at the top of the page and number it accordingly, 8(a), 8(b)(1), 8(b)(2), 8(b)(3), 8(b)(4), 8(b)(5), 8(b)(6), and/or 8(b)(7). On each separate sheet of paper list each and every fact you feel supports that claim. Be specific and give details.

9. Colorado Revised Statutes § 16-5-402(1) provides that a person who has been convicted under a criminal statute in Colorado or another state may collaterally attack the validity of that conviction only if such attack is brought within a specified time period or completion of the direct appeal process for that conviction, unless one of the exceptions listed in § 16-5-402(2) are applicable. The specified time periods are as follows:

All class 1 felonies:	No limit
All other felonies:	Three years
Misdemeanors:	Eighteen month
Petty offenses:	Six months

a. Was this petition filed within the time limits set forth in § 16-5-402(1), 6 C.R.S. (above)?

☐ YES ☐ NO

b. If not, check any applicable exceptions listed in § 16-5-402(2), 6 C.R.S., and state the FACTS that relate to the exception. DO NOT MAKE LEGAL ARGUMENTS.

(1) ☐ The court entering judgment of conviction did not have jurisdiction over the subject matter of the alleged offense:

(2) ☐ The court entering judgment of conviction did not have jurisdiction over the person of the

defendant;

(3) ☐ The failure to seek relief within the applicable time period was caused by an adjudication of incompetence or by commitment of the defendant to an institution for treatment as a mentally ill person;

or

(4) ☐ The failure to seek relief within the applicable time period was the result of circumstances amounting to justifiable excuse or excusable neglect.

For every ground you checked as grounds for this petition not being filed within the statutory time limits, YOU MUST attach a separate sheet of paper with that ground listed at the top of the page and numbered accordingly 9(b)(1), 9(b)(2), 9(b)(3), and/or 9(b)(4). On this separate sheet of paper list each and every fact you feel supports this claim. Be specific and give details.

SUCCESSIVE PETITIONS

Important Notice Regarding Additional Petitions; Criminal Procedure Rule 35(c)(3) Provides:

"The court need not entertain a second motion or successive motions for similar relief based upon the same or similar allegations on behalf of the same prisoner."

Therefore, all claims related to the conviction under attack in this petition must be listed in this petition, or future motions may be denied.

Wherefore, petitioner prays that the Court grant relief to which petitioner may be entitled in this proceeding.

PETITIONER'S ORIGINAL SIGNATURE

PETITIONER'S PRINTED NAME

ADDRESS

CITY, STATE, ZIP CODE

PHONE NUMBER