

Second Corrective Order to Rule Change 2004(2)

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

Rule 35. Postconviction Remedies.

This Second Corrective Order is Adopted on June 25, 2004, nunc pro tunc 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)-(b) (NO CHANGE)

(c)(1)-(c)(2) (NO CHANGE)

(c)(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~~pro se shall be filed on Form 4, and any motion filed by an attorney 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.

(c)(3)(III) (NO CHANGE)

(c)(3)(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. If the motion and the files and record of the case show to the satisfaction of the court that the ~~prisoner-defendant~~ 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 set a notice of reasons new date for delay-completing its review and notify the parties of that date.~~

(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 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 take whatever evidence is necessary for the disposition of the motion. 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, granting a new trial, or discharging the defendant. The court may stay its order for discharge of the 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 of such witnesses at the trial which resulted in the vacated sentence may be used at the new trial.

(c) (3) (VI) - (c) (3) (IX) (NO CHANGE)

Form 4, Petition for Postconviction Relief Pursuant to Crim. P. 35(c).

(1) - (7) (NO CHANGE)

(8) (a) (NO CHANGE)

(8) (b) (1) - (3) (NO CHANGE)

(8) (b) (4) - (7):

(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.

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

(76) ☐ 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) (NO CHANGE)  
(SUCCESSIVE PETITIONS) :

#### SUCCESSIVE PETITIONS

#### **Important Notice Regarding Additional Petitions:**

With specific exceptions provided for in Criminal Procedure Rule 35(c)(3) ~~Provides:~~

~~"The-(VII), the court need not entertain a second motion shall deny any claim that could have been presented in an appeal or successive motions for similar relief based upon the postconviction proceeding previously brought.~~

~~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

