

# Court of Appeals

STATE OF COLORADO

DENVER

80203

JOHN DANIEL DAILEY  
JUDGE

SUITE 285  
2 EAST FOURTEENTH AVENUE  
(303) 861-1111

March 8, 2001

Honorable Alex Martinez  
Justice, Colorado Supreme Court  
Colorado State Judicial Building  
2 E. 14th Avenue  
Denver, Colorado 80203

RE: Proposed Crim.P. 35(c) amendments and proposed form

Dear Justice Martinez:

At the January 12, 2001 meeting of the Supreme Court Criminal Rules Committee, the Committee approved the submission of the attached changes to Crim. P. 35(c) and the attached form for your consideration.

The changes suggested are an outgrowth of the work begun by the Ad Hoc Committee on Crim. P. 35(c). That committee was formed by the Court over a year ago to address problems related to the substantial increase in filing of 35(c) motions and appeals. The Ad Hoc Committee explored various approaches to help respond to this increase. This included the possibility of using a form so as to insure that *pro se* defendants provided trial courts with accurate and complete information in support of their claims. The work of the Ad Hoc Committee was subsequently taken over by a subcommittee of the Criminal Rules Committee.

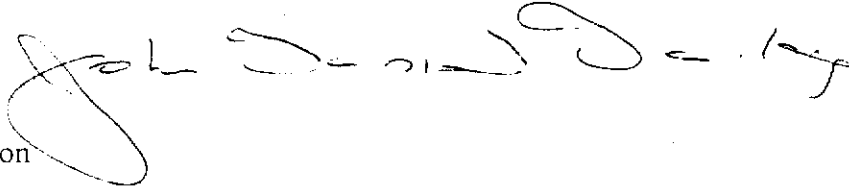
The proposed rule and form will provide substantial guidance to trial courts, prosecutors, defense counsel and defendants on how to proceed pursuant to the Rule. The requirements of a form and "substantially" providing specific information should cure what was viewed by the Committee as the major problem in this area -- the failure of *pro se* defendants to clearly state a claim, provide a history of the case, and provide facts in support of their claims. In order to insure that such motions are resolved in a timely fashion, the amendments to the Rule propose a series of time limits for each step in the process. The Committee spent substantial time reviewing and seeking comment on the structure and timelines proposed. The Committee believes that the time limits and notice requirements appropriately balance the realities of Crim. P. 35(c) practice. The Committee was also concerned about ensuring that there be an adequate record created for appellate review. This led to the inclusion of a requirement of explicit oral or written findings of fact and conclusions of law, as the situation warrants.

In drafting the rule, the Committee solicited comments from district court judges, prosecutors throughout the state, and the Colorado State Public Defender's Office. Many of their comments and concerns were integrated into the final proposed rule.

We believe the proposed amendments and form will go a long way toward streamlining the post conviction proceeding process.

Thank you for your consideration of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "John Deane Deane". The signature is written in a cursive style with a large, looping initial "J".

cc: Terri Morrison

## Rule 35. Postconviction Remedies.

### (c) Other Remedies.

(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 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). Unless 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 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. In all cases, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. 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. 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 vacate vacating and set setting aside the judgment, impose imposing a new sentence, or grant granting a new trial, or discharge 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.

(VI) 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 defendant.

(VII) 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.~~

District Court \_\_\_\_\_ County, Colorado

Court Address: \_\_\_\_\_

**People of the State of Colorado**  
vs.

**Defendant:** \_\_\_\_\_

Attorney or Party Without Attorney: (Name & Address) \_\_\_\_\_

Phone Number: \_\_\_\_\_

FAX Number: \_\_\_\_\_

E-mail: \_\_\_\_\_

Atty. Reg. #: \_\_\_\_\_

▲ COURT USE ONLY ▲

Case Number: \_\_\_\_\_

Div.: \_\_\_\_\_ Ctrm: \_\_\_\_\_

**Petition for Postconviction Relief Pursuant to Crim. P. 35(c)**

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: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Name: \_\_\_\_\_  
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 6a 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 cannot collaterally attack the validity of that conviction unless such attack is brought within a specified time period or completion of the direct appeal process for that conviction. 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

9a. Was this petition filed within the time limits set forth in § 16-5-402(1), 6 C.R.S. (above).  
 YES  NO

9b. 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 ARGUMENT.**

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 justifiably 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 (9b(1), 9b(2), 9b(3), and/or 9b(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