

TO: Crim. P. Rules Committee

FROM: Sub-Committee on Crim. P. 35(c) Procedural Bars

Our subcommittee was created to review concerns raised by Judge Taubman in the *Anderson* case. Judge Taubman suggested that the Supreme Court “consider amending Crim. P. 35(c) to allow the litigation of actual innocence claims in those few cases in which such a rule might apply.”

This is not a new issue for our Committee. This topic was “hotly” discussed twelve years ago resulting in the adoption of the procedural bars in Crim. P. 35(c)(3)(VI) and (VII). Attached is the transmittal letter sent to the Court at that time which outlines those discussions.

Our subcommittee has reviewed changes in federal law since that time and discussed local and national events that have occurred with respect to “actual innocence” cases. The subcommittee believes that post-conviction DNA testing has gone a long way to identify and provide relief to persons who were “wrongfully convicted.” However, some members of the subcommittee believe that there may be other incarcerated people who were “wrongfully convicted” but for whom advancements in forensic sciences offer no easy remedy. Also, some members of the subcommittee had difficulty with defining the scope of “wrongfully convicted.”

The subcommittee took as one task re-evaluating the need for additional exceptions to Crim. P. 35(c) procedural bars. Several lengthy discussions ensued in which some suggested that no change is necessary because state court defendants who are actually innocent are sufficiently protected by the right to seek a pardon from the executive branch or make a claim in federal court while others believed there should be a broad codification of language in U.S. Supreme Court cases that a court “must adjudicate even successive claims when required to do so . . . for fundamental miscarriages of justice” defined as “where a petitioner shows ‘that the constitutional error ‘probably’ resulted in the conviction of one who was actually innocent.’” One strategy the subcommittee attempted was to focus on a point between: (a) the present procedural bars that might provide no relief to someone who was clearly either factually or legally innocent, and (b) adopting a broad new provision that would eliminate procedural bars relating to actual innocence claims.

The subcommittee reviewed the federal rules and circuit case law on these issues but concluded they were of no real assistance because of their concern with issues such as congressional intent and exhaustion of state remedies as well as other issues Colorado has already addressed.

The subcommittee was unable to reach a consensus on whether there should be a change and if so, what language should be proposed. The subcommittee did not believe that further meetings would lead to a consensus on language acceptable to all subcommittee members but is willing to continue work at the full committee’s direction.