

19CA0569 Peo v Fuller 04-29-2021

COLORADO COURT OF APPEALS

DATE FILED: April 29, 2021

Court of Appeals No. 19CA0569
Weld County District Court No. 08CR1227
Honorable Timothy G. Kerns, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Larry Eugene Fuller,

Defendant-Appellant.

ORDER AFFIRMED

Division II
Opinion by JUDGE DAVIDSON*
Román and Welling, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced April 29, 2021

Philip J. Weiser, Attorney General, William G. Kozeliski, Senior Assistant
Attorney General, Denver, Colorado, for Plaintiff-Appellee

Larry Eugene Fuller, Pro Se

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.
VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

¶ 1 Defendant, Larry Eugene Fuller, appeals the district court's order denying his latest Crim. P. 35(c) motion without holding a hearing. We affirm.

I. Background

¶ 2 A jury found Fuller guilty of possession of an illegal weapon and possession of chemicals or supplies to manufacture a controlled substance. He was adjudicated as a habitual criminal and sentenced to ninety-six years in the custody of the Department of Corrections. A division of this court affirmed Fuller's conviction and sentence on direct appeal, and the appellate mandate was issued on August 8, 2012. *People v. Fuller*, (Colo. App. No. 09CA1578, Nov. 23, 2011) (not published pursuant to C.A.R. 35(f)).

¶ 3 A few months later, Fuller filed a pro se Crim. P. 35(c) motion asserting, among other things, that he had received ineffective assistance of counsel. The district court denied the motion without a hearing. A division of this court affirmed the district court's order but remanded the case to correct a clerical error on the mittimus. *People v. Fuller*, (Colo. App. No. 13CA0046, Nov. 26, 2014) (not published pursuant to C.A.R. 35(f)).

¶ 4 In December 2018, Fuller sought Crim. P. 35(c) relief for a second time. He asserted that, after trial, his counsel had asked for the jurors' contact information. He claimed that the court and the prosecution engaged in an improper ex parte communication with the jurors when the court subsequently sent them a letter telling them that they could have their contact information withheld if they so desired. He was unable to raise this claim previously, he asserted, because he only learned of it when he received the court file during the appeal of his first postconviction motion. And, he claimed, he had demonstrated justifiable excuse or excusable neglect for his late filing due to his lawyers' ineffective assistance in failing to previously disclose this information to him, and the district court's failure to appoint postconviction counsel in his first postconviction proceeding.

¶ 5 Fuller also claimed that he was entitled to retroactive application of a 2017 legislative amendment, which legalized the possession of gravity knives, because his possession of such a weapon had increased the felony classification of his drug offense.

¶ 6 The district court denied Fuller's motion as untimely, successive, and lacking merit.

II. Discussion

¶ 7 Reviewing the district court's summary denial of Fuller's Crim.

P. 35(c) motion de novo, *see People v. Chipman*, 2015 COA 142,

¶ 26, we perceive no error in the court's conclusion that the motion was time barred. Because this issue is dispositive, we need not reach the other grounds upon which the court relied in denying postconviction relief.

¶ 8 Section 16-5-402(1), C.R.S. 2020, gives a defendant convicted of non-class-1 felonies three years from the date of conviction to file a motion for postconviction relief. When a direct appeal is taken, the limitation period begins to run when the appellate mandate is issued. *See People v. Hampton*, 876 P.2d 1236, 1241 (Colo. 1994).

¶ 9 Fuller's second postconviction motion was filed more than six years after his conviction became final in August 2012. Thus, it was more than three years late and was therefore barred by the limitations period set forth in section 16-5-402(1).

¶ 10 A defendant may be excused from such a late filing if he can establish that the failure to seek relief within the applicable time period was the result of circumstances amounting to justifiable excuse or excusable neglect. § 16-5-402(2)(d). To be entitled to a

hearing on the applicability of this exception to the time bar, however, a defendant must allege facts that, if true, would establish justifiable excuse or excusable neglect. *People v. Wiedemer*, 852 P.2d 424, 440 n.15 (Colo. 1993). Factors relevant to such a determination include (1) whether circumstances or outside influences prevented a challenge to the prior conviction; (2) whether a defendant who had reason to question the constitutionality of a conviction investigated its validity and took advantage of avenues of relief that were available; (3) whether the defendant either knew that the conviction was constitutionally infirm or had reason to question its validity; (4) whether the defendant had other means of preventing the government's use of the conviction so that a postconviction challenge was previously unnecessary; (5) the time between the date of conviction and the defendant's challenge; and (6) the effect that the passage of time has on the state's ability to defend against the challenge. *Id.* at 441-42.

¶ 11 The district court correctly concluded that Fuller's allegations, even if true, did not amount to justifiable excuse or excusable neglect. The motion and order relating to Fuller's request for juror contact information became part of the record when they were filed

in September and October 2009, respectively. Although Fuller claims he only discovered them in 2013 when he received the record during his first postconviction appeal, he offers no valid reason for waiting more than five years to file the instant postconviction motion. Though he appears to claim that he needed to wait until his first postconviction proceedings concluded and that they did not actually finish until March 2018 when a federal habeas case concluded, nothing prevented him from filing a second Crim. P. 35(c) motion during the pendency of his first Crim. P. 35(c) appeal or during his federal proceedings. *See People v. Clouse*, 74 P.3d 336, 339 (Colo. App. 2002) (pendency of a previous Crim. P. 35(c) appeal does not toll the time for asserting further postconviction claims); *People v. Abad*, 962 P.2d 290, 291-92 (Colo. App. 1997) (initiation of federal habeas corpus action does not toll limitations period for filing Crim. P. 35(c) motion).

¶ 12 Likewise, although Fuller could not have raised his claim regarding the legalization of gravity knives until such legalization took effect in August 2017, he offers no reasons — other than those we have rejected — for waiting until December 2018 to raise this claim. *Wiedemer*, 852 P.2d at 441 (A court must “consider the

circumstances existing throughout the entire period from the inception of the conviction in question” until the filing of the postconviction motion.). We recognize that the district court did not apply the time bar to this claim but rather addressed it on the merits. We may determine the applicability of the time bar, however, even if it was not considered by the district court. See § 16-5-402(1.5).

III. Conclusion

¶ 13 The order is affirmed.

JUDGE ROMÁN and JUDGE WELLING concur.

DISTRICT COURT, WELD COUNTY, COLORADO Court Address: 915 10 th Street, Greeley, CO 80631 Mail Address: P.O. Box 2038, Greeley, CO 80632 (970) 475-2400	DATE FILED: February 14, 2019
PEOPLE OF THE STATE OF COLORADO, Plaintiff v. Larry Fuller, Defendant	▲ COURT USE ONLY ▲ Case Number: 08CR1227 Div: 11
ORDER RE: PETITION FOR POSTCONVICTION RELIEF PURSUANT TO CRIM. P. 35(C)	

THIS MATTER comes before the court on Defendant's *Petition for Post Conviction Relief Pursuant to Crim. P. 35(c)*, filed on January 3, 2019. Having reviewed Defendant's *Petition*, the file and record, the Court **FINDS** and **ORDERS** the following:

Background

On March 12, 2009 Mr. Fuller was convicted of Possession of Chemicals to Manufacture a Controlled Substance and was adjudicated a habitual offender. Mr. Fuller appealed his conviction and sentence which were affirmed by the Court of Appeals. (09 COA 1578). After the issuance of the Mandate on December 18, 2012, Mr. Fuller filed a *pro se* Crim. R. 35(c) motion which was denied by the trial court on December 24, 2012. Mr. Fuller appealed the trial court's decision and the Court of Appeals affirmed the trial court's denial of post-conviction relief. (2013CA46). Mr. Fuller now files an additional Crim. R. 35(c) motion and requests counsel be appointed. In support thereof, Mr. Fuller alleges seven reasons he should be appointed counsel and granted an evidentiary hearing pursuant to Crim. R. 35(c):

- 1) The Trial Court erred by failing to conduct a hearing to determine whether extraneous prejudicial information was introduced to the jury;
- 2) The Trial Court erred by communicating with jurors regarding post-trial investigation, thereby abusing its discretion and committing structural error;

- 3) The Trial Court erred by failing to conduct a hearing to determine whether the Trial Court abused its discretion and committed structural error regarding its communication with jurors regarding post-trial investigation;
- 4) The Trial Court abused its discretion and committed plain error by jury tampering and witness tampering;
- 5) A change in Colorado law applies to Mr. Fuller's case and the interests of comity and justice allow for retroactive application of the law;
- 6) Trial counsel was deficient for failing to inform Mr. Fuller of proceedings related to juror investigation;
- 7) Appellate Counsel was deficient for (i) failing to inform Mr. Fuller of trial counsel's and the court's actions related to juror investigations; (ii) failing to raise the issue on appeal of extraneous prejudicial information being introduced to the jury, and (iii) failing to raise the issue of whether the prosecution withheld exculpatory evidence or for failing to use such exculpatory evidence in Mr. Fuller's defense on appeal.

Relevant Law

"A Crim. P. 35(c) motion may be denied without a hearing if the motion, files, and record clearly establish that the defendant is not entitled to relief. Summary denial of a postconviction relief motion is also appropriate if the claims raise only an issue of law, or if the allegations, even if true, do not provide a basis for relief. Likewise, if the claims are bare and conclusory in nature, and lack supporting factual allegations, the motion may also be denied without a hearing. A trial court may decline to appoint counsel in connection with a motion that may be denied as a matter of law without an evidentiary hearing."

People v. Venzor, 121 P.3d 260 (Colo. App. 2005).

The court shall deny a claim that was raised and resolved in a prior appeal or post-conviction proceeding, with limited exceptions. Crim. P. 35(c)(3)(VI). Additionally, the court shall deny any claim that *could have* been presented in an appeal previously brought or postconviction proceeding previously brought, with limited exceptions. Crim. P. 36(c)(3)(VII). Claims shall be made within three years of the issuance of the mandate, except in circumstances involving jurisdiction, incompetency, or circumstances amounting to justifiable excuse or excusable neglect.

C.R.S. 16-5-402. C.R.S. § 16-5-402 applies to postconviction challenges to criminal convictions under Crim.P. 35(c). *People v. Wiedemer*, 852 P.2d 424 (Colo. 1993).

Given the framework for analysis, the Court proceeds with consideration of Mr. Fuller's seven claims of relief.

Claims 1-4

Relevant Facts

Following Mr. Fuller's trial, trial counsel filed a *Motion for Disclosure of Juror's Contact Information* to investigate whether the jurors were exposed to information about Mr. Fuller's prior convictions and improperly used that information during deliberations. To assist in the investigation, trial counsel requested juror contact information from the court. The trial court granted trial counsel access to juror contact information and sent jurors a letter notifying them: 1) that trial counsel might contact them; and 2) that should the juror wish not to be contacted, the juror should send a note to such effect to the jury commissioner. Trial counsel objected to the court's sending of the letter, and requested, if the court had not yet sent the letter, to have a hearing on the contents of the letter. No hearing was held on the propriety of the trial court sending the letter to the jurors. Four jurors, however, responded to the trial court's letter indicating they did not wish to be contacted. Given the response from the jurors, it is apparent the letters were sent by the trial court. Moreover, no post-sentence motions were filed by trial counsel, notwithstanding having the contact information and the apparent willingness of the remaining eight jurors to contact from the defense investigator.

Mr. Fuller brings claims 1-4 asserting this information could not have been discovered previously through the exercise of due diligence, per Crim. R. 35(c)(3)(VII)(b), because he did not receive a copy of the trial transcripts until after his appeal of his first R. 35(c) motion. He states that he was notified on April 22, 2013 that his transcripts were available at the Buena Vista Correctional Facility Law Library.

Exceptions to Crim. R. 35(c)(3)(VII) do not apply to Mr. Fuller's claims.

Mr. Fuller's claims one through four are barred as successive pursuant to Crim. P. Rule 35(c). Under Crim. R. 35(c)(3)(VII), "the court shall deny any claim that could have been presented in an appeal previously brought or postconviction proceeding previously brought," subject to five exceptions. *People v. Taylor*, 2018 COA 175. These issues could have been raised on appeal or through the initial post-conviction proceedings. Exception (b) to Crim. R. 35(c)(VII) provides, "Any claim based on evidence that could not have been discovered previously through the exercise of due diligence" may be brought even if it could have been presented on appeal. The record shows that trial counsel motioned for a free transcript June 24, 2009, and the trial court granted the motion the same day. The court sent the trial record to the public defender's office October 15, 2009. Mr. Fuller had access to the court file for his appeal and for his first 35(c) motion and could have discovered the events complained of and raised them on appeal or in the first 35(c) motion. Due diligence contemplates a review of the record and the court file, which was available to Mr. Fuller at the time of his direct appeal and his subsequent post-conviction motions. The decision to proceed with a post-conviction motion without first obtaining and reviewing the file precludes subsequent relief. Otherwise, the requirement of due diligence is superfluous. In short, these claims could have been discovered through the exercise of due diligence and as Mr. Fuller did not exercise due diligence, he is not entitled to relief through Crim. P. 35(c)(3)(VII)(b).

Mr. Fuller does not allege circumstances amounting to justifiable excuse or excusable neglect.

There is no explanation as to why these claims were not raised within three years of the mandate. To the extent they were not raised within three years, the assertions by Mr. Fuller do not rise to the level of justifiable excuse or excusable neglect to allow the claims to be litigated further.

In determining justifiable excuse, the Court balances "the interests of an accused person's interest in ensuring that an unconstitutional conviction is not used against him, society's interests in maintaining the integrity of the criminal justice system, and the State's interests in preserving the finality of criminal convictions and in implementing statutes requiring enhanced sentences for habitual offenders." *People v. Wiedemer*, 852 P.2d 424, 441 (Colo. 1993). The Court considers

the circumstances existing throughout the entire period from the inception of the conviction in question. *Id.* The Court considers the following factors:

1. The existence of circumstances or outside influences preventing a challenge to a prior conviction;
2. The extent to which a defendant having reason to question the constitutionality of a conviction investigates its validity and takes advantage of avenues of relief that are available to him;
3. Whether a defendant had any previous need to challenge a conviction;
4. Whether the defendant either knew that it was constitutionally infirm or had reason to question its validity;
5. Whether the defendant had other means of preventing the government's use of the conviction so that a postconviction challenge was previously unnecessary;
6. The extent of time between the date of conviction and the defendant's challenge;
7. The effect that the passage of that time has on the State's ability to defend against the challenge.

Id., at 442.

Mr. Fuller was convicted March 11, 2009. Mr. Fuller appealed, and the Court of Appeals affirmed August 10, 2012. Mr. Fuller filed his first 35(c) motion December 18, 2012. The trial court denied the motion, and Mr. Fuller appealed. The Court of Appeals affirmed August 26, 2015. Mr. Fuller filed this second 35(c) motion January 3, 2019.

The Court is unaware of any circumstances or outside influences preventing timely challenge of the conviction. Mr. Fuller had access to trial transcripts, investigated the validity of his conviction, and has taken advantage of avenues of relief several times between his direct appeal, his first 35(c) motion, and the appeal of the denial of the motion. Mr. Fuller could have discovered the facts giving rise to this claim earlier had he exercised due diligence. Nearly ten years have passed since the date of conviction, which has a high likelihood of impairing the State's ability to defend against a challenge. Thus, the circumstances do not warrant a determination of justifiable excuse.

Moreover, Mr. Fuller has not articulated how the trial court's letter prejudiced him. The record shows that only four jurors requested trial counsel not contact them, leaving eight remaining

nothing on the face of 2017 CO S.B. 8 to suggest legislative intent to apply the amendment retroactively. The statute does not clearly reveal the General Assembly's intent that it be applied retroactively. Mr. Fuller does not point to any statutory language or other applicable authority to show such intent. Therefore, the presumption of prospective application is upheld.

The Colorado Supreme Court and the Court of Appeals have consistently allowed convicted criminal defendants the benefit of amendatory legislation which became effective at any time before the conviction became final on appeal. *People v. Boyd*, 395 P.3d 1128, 1133 (2015). The mandate in this case was ordered in August of 2012. The amendment Mr. Fuller seeks to apply retroactively became effective in August of 2017. Accordingly, Mr. Fuller is not entitled to relief under the amended legislation.

The General Assembly has the inherent power to prescribe punishment for crimes and to limit the court's sentencing authority. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003). The Court does not have discretion to impose a sentence lower than the range identified by the General Assembly.

Mr. Fuller is not entitled to a reduced sentence based on the amended § 18-12-102.

Claims 6, 7(i), 7(ii)

"The defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, *Ardolino v. People*, 69 P.3d 73 (Colo. 2003). In addition to showing Counsel's performance was objectively unreasonable, Mr. Fuller must also affirmatively prove prejudice. *Ardolino*, 69 P.3d 73. An attorney is required to inform the client of any decision or circumstance which requires the client's consent, to reasonably consult with the client about how the client's objectives are to be accomplished, to keep the client reasonably informed about the status of the matter, and to promptly respond to reasonable requests for information from the client. CO RPC Rule 1.4(a)(1-3).

Claim 6: Trial counsel's performance did not fall below the objective standard of reasonableness, and Mr. Fuller has not demonstrated prejudice.

Mr. Fuller alleges trial counsel did not inform him: 1) of allegations that information about Mr. Fuller's prior convictions had been leaked to the jury, 2) that counsel requested juror contact information to investigate the allegation, 3) that the court sent a letter to jurors advising of trial

counsel's intent to investigate, 4) that counsel filed an objection to the court's letter to jurors, 5) that the court ordered release of juror contact information to trial counsel.

The Court finds trial counsel did not violate the rules of attorney conduct, and therefore did not fall below an objective standard of reasonableness. Mr. Fuller's consent was not required to file the motions and there is no evidence trial counsel did not reasonably advise Mr. Fuller as to the status of the representation.

Further, Mr. Fuller has not shown how trial counsel's alleged failure to inform him of these events prejudiced him. Trial counsel's informing of Mr. Fuller of the *Motion for Disclosure of Juror's Contact Information*, the trial court's letter to jurors, and trial counsel's objection would not have changed the information the jurors knew when trial counsel investigated whether jurors were aware of Mr. Fuller's prior convictions. No information confirming this fact was revealed, as can be inferred from the lack of record following up on this issue. Therefore, there is no evidence that the outcome of Mr. Fuller's conviction would have been different.

Claims 7(i) and 7(ii): Appellate counsel's performance did not fall below the objective standard of reasonableness, and Mr. Fuller has not demonstrated prejudice.

The Court finds appellate counsel did not commit attorney misconduct by failing to inform Mr. Fuller of actions taken by trial counsel with respect to juror investigation. Notwithstanding appellate counsel's alleged failure to communicate, Mr. Fuller does not show demonstrable prejudice that calls the validity of the conviction into question. Because no evidence of jury misconduct was discovered or is asserted with sufficient particularity, appellate counsel's decision not to raise jury misconduct as an issue on appeal was objectively reasonable.

Mr. Fuller fails to set forth facts to establish grounds for a Crim. P. Rule 35(c) motion.

Claim 7(iii)

Mr. Fuller alleges that the prosecution withheld exculpatory information. Alternatively, Mr. Fuller alleges defense counsel failed to use exculpatory information in Mr. Fuller's defense.


Where “claims are bare and conclusory in nature and lack supporting factual allegations, the [35(c)] motion may ... be denied without a hearing.” *People v. McGlaughlin*, 428 P.3d 691 (Colo. App. 2018).

Mr. Fuller did not explain in his motion what exculpatory information was withheld or not used. Mr. Fuller’s motion lacks supporting detail for the allegations. Therefore, Mr. Fuller fails to set forth facts to establish grounds for a Crim. P. Rule 35(c) motion.

Conclusion

The Court **DENIES** Defendant’s *Petition for Post-Conviction Relief Pursuant to Crim. P. 35(c)* and Defendant’s application for appointment of counsel.

SO ORDERED THIS 14th day of February, 2019.



Timothy G. Kerns
District Court Judge



Appendix C

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: January 18, 2022
Certiorari to the Court of Appeals, 2019CA569 District Court, Weld County, 2008CR1227	
Petitioner: Larry Eugene Fuller, v. Respondent: The People of the State of Colorado.	Supreme Court Case No: 2021SC551
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 18, 2022.

Filed 09/29/2009 01:55 PM

District Court, Weld County, Colorado Court Address: 901 9 th Avenue, Greeley, CO 80631	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff v. LARRY FULLER, Defendant	σ COURT USE ONLY σ
Jayne Muehlenkamp - 38224 Deputy State Public Defender 822 7th Street, Suite 250 Greeley, CO 80631 Phone: (970) 353-8224 Fax: (970) 352-8293	Case Number: 08CR1227 Division 11
MOTION FOR DISCLOSURE OF JURORS' CONTACT INFORMATION	

Mr. Fuller, through Counsel, moves this Court to disclose to undersigned counsel the final jury list for the jury seated on March 9, 2009. The grounds in support of this motion are as follows:

1. Mr. Fuller seeks disclosure of the jury list and seated jurors' contact information. It is critical to interview jurors before they forget important details.

Mr. Fuller must have an opportunity to interview jurors in order to determine whether jurors convicted him on an improper basis. Counsel has information that jurors may have known of prior convictions of Mr. Fuller prior to deliberations. No evidence of prior convictions was admitted during the first phase of Mr. Fuller's trial. Counsel is afraid evidence of prior convictions may have been discussed and used against Mr. Fuller in deliberations. Mr. Fuller is entitled to investigate and litigate any possible violations of his fundamental constitutional rights to trial by jury and due process of law.

2. The defense will follow the Court's discharge instruction and will not persist in questioning any juror who chooses not to discuss the case.
3. The defense will comply with any protective order or limitation the Court imposes concerning dissemination of jurors' contact information.

CHAMBERS

District Court

NINETEENTH JUDICIAL DISTRICT
POST OFFICE BOX 2038
GREELEY, COLORADO 80632-0138

(970) 351-7300
FAX: (970) 356-4356

MARCELO A. KOPCOW
JUDGE

October 2, 2009

Dear Jurors For *People v. Larry Fuller*, Weld County Case No. 08CR1227:

Thank you again for serving as a juror. Recently I received a request from Mr. Fuller's defense counsel, Jamie Muehlenkamp, to release the names and contact information of all jurors who served on this case in order to conduct post-trial investigation. If you recall, at the conclusion of the jury trial I made the following statement which continues to apply:

You have now completed your duties as jurors in this case and are discharged with the thanks of the court. The question may arise whether you may discuss this case with the lawyers, defendants, or other persons. For your guidance the court instructs you that whether you talk to anyone is entirely your own decision. It is proper for others to discuss the case with you and you may talk with them, but you need not. If you talk to them, you may tell them as much or as little as you like about your deliberations or the facts that influenced your decision. If any person persists in discussing the case over your objection, or becomes critical of your service either before or after any discussion has begun, please report it to me.

Prior to releasing the information requested, in order to avoid any confusion or surprise, I wanted you to have advanced notice of defense counsel's request. If you do not want to communicate with defense counsel and/or her investigator please notify the jury commissioner, Lanelle McEachron, in writing no later than **October 23, 2009**. If no written response is received by this date I will assume you have no objection to have the court release this information. Of course, all information that is released will be subject to a protective order requiring the parties not to copy, disseminate or share this information with a third party. Again, thank you for your service.


Marcelo A. Kopcow
District Court Judge

c: Lanelle McEachron, Jury Commissioner, Jaime Muehlenkamp, Esq., &
Deputy District Attorney Rick Wetmore

filed 10/05/2009 02:40 PM

District Court, Weld County, Colorado Court Address: 901 9 th Avenue, Greeley, CO 80631	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff v. LARRY FULLER, Defendant	σ COURT USE ONLY σ
Jayme Muehlenkamp - 38224 Deputy State Public Defender 822 7th Street, Suite 250 Greeley, CO 80631 Phone: (970) 353-8224 Fax: (970) 352-8293	Case Number: 08CR1227 Division 11
RESPONSE TO ORDER REGARDING MOTION FOR DISCLOSURE OF JURORS' CONTACT INFORMATION	

Mr. Fuller, through Counsel, objects to the Court sending letters to jurors regarding defense counsel's intention to interview jurors:

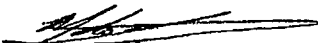
1. Mr. Fuller sought disclosure of the juror list in this case in order to interview jurors and determine whether or not he had been convicted on any improper basis. It is proper for counsel to interview jurors regarding any case that is completed. It is entirely up to a juror whether or not he or she would like to talk to anyone about their service.
2. The Court disclosed the juror list to counsel. In the Court's order it indicated a letter was being sent to each juror and each juror is to respond to the jury commissioner as to whether or not they would like to be contacted by defense counsel. They are to respond by October 23, 2009 in writing.
3. Counsel was not given an opportunity to review the letter and note any objections. No hearing was set as to determine whether or not a letter should be sent to jurors and for counsel to express an objection prior to letters being mailed. Counsel is not aware of any authority which grants the Court authority to send letters to jurors regarding being contacted concerning their jury service nor is counsel aware of authority precluding defense counsel from contacting jurors as long as they are willing to communicate with counsel.

District Court, Weld County, State of Colorado Court Address: 901 9 th Avenue, Greeley, CO 80631 Mail Address: P.O. Box 2038, Greeley, CO 80632 Phone Number : (970)351-7300	DATE FILED: October 27, 2009
Plaintiff: THE PEOPLE OF THE STATE OF COLORADO v. Defendant: LARRY FULLER	<div style="text-align: center;">COURT USE ONLY</div> <hr/> Case Number: 08CR1227 Div.11
ORDER REGARDING MOTION FOR DISCLOSURE OF JURORS' CONTACT INFORMATION AND ISSUANCE OF PROTECTIVE ORDER	

Attached are the names and contact information for the jurors in the above captioned case along with the received written responses to the jury commissioner. A protective order shall issue requiring the parties not to copy, disseminate or share this information with a third party other than the party's investigator.

Dated: October 27, 2009

BY THE COURT:


 Marcelo A. Kopcow
 District Court Judge

H

Court of Appeals, State of Colorado

Case No. 2019 CA 0569

Appeal from the District Court of Weld County

Honorable Timothy G. Kerns, Judge

Weld County District Court Case No.08CR1227

Typed copy

MOTION FOR LIMITED REMAND

With amended correction as stated
in petition for writ of certiorari.

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

LARRY FULLER,

Defendant-Appellant.

Comes now, Larry Fuller, pursuant to the provisions of C.A.R. 27 and respectfully moves this court to exercise its judicial discretion and issue an Order which will remand the above captioned action to the Weld County District Court, to allow that Court to rule upon a properly presented issue it failed to address in its Order denying Mr. Fuller's Crim.P. Rule 35(c) motion. See: Record on Appeal, (ROA), pp. 49-50. As grounds for this request, Mr. Fuller states:


- 1) On Jan. 3, 2019, Mr. Fuller filed a Crim.P. Rule 35(c) motion in the Weld County District Court in which he was convicted and sentenced. See ROA, pp. 38-52. In that motion, Mr. Fuller raised a claim that he was entitled to benefit from a substantive change in the law (enacted in 2017 S.B. 8), Which removed from the state's definition under section 18-12-101 C.R.S., the term gravity knife or switch-blades as a deadly weapon. Given that Mr. Fuller's current sentences for Possession with intent to manufacture, as a second offense § 18-18-405(1), (2)(a)(I)(B), C.R.S.(2008) [F2] and §18-18-407(1)(f), C.R.S.(SE), being a Special Offender were Enhanced because he was convicted of being in possession of an illegal weapon, § 18-12-102(4), C.R.S. M1. This substantive change in the law became relevant to Mr. Fuller's case. If the substantive change in the law were to be applied to Mr. Fuller's current sentence, it would be reduced from a class II felony level offence to a class III level felony, thereby reducing the term of his confinement significantly, ie, from 96 years to 64 years; as Mr. Fuller was also assessed as being an Habitual criminal. See § 18-1.3-801(2), C.R.S.
- 2) In his Crim.P. Rule 35(c) motion, Mr. Fuller sought the ameliorative benefit from this change in the law, See, ROA, pp. 49-50; however, when assessing the substance of Mr. Fuller's claim, the lower court determined only that the statute's change applied prospectively, rather than retroactively. See, ROA, pp. 58-59. As a result the lower court found that it lacked the discretion to apply the ameliorative benefits from the substantive change in the statute to Mr. Fuller's case. ROA, pp. 59.
- 3) Respectfully, Mr. Fuller's claim was misinterpreted, i.e. Mr. Fuller was in all actuality seeking a proportionality review of his current sentence given the change by the Colorado General Assembly as enacted in 2017 S.B. 8. See,

e.g., People v. Loris, 2018 COA 101, para. 13, 434 P.3d 754, 757 (citing People v. McRae, 2016 COA 117, para. 22, 26, and finding that as part of an abbreviated proportionality review a court should consider the General Assembly's current assessment of the seriousness of the offense at issue to include any relevant amendments to the criminal statutes as issue.) Consequently, the lower court failed to consider the proportionality of Mr. Fuller's current 96-year sentence as enhanced by a "deadly weapon"; which is in fact no longer considered as said. In other words, the lower court did have the ability/discretion to consider the application of the substantive change in the law to Mr. Fuller's sentence, thus the request for remand on this issue.

- 4) Mr. Fuller recognizes that perhaps the substance of his proportionality request could have been better stated to the lower court; however, given Mr. Fuller is a pro-se prisoner litigant with very little experience in the law, the lower court could have granted him liberal construction and read into his claim the strongest argument suggested, i.e. that under Loris and McRae *supras*, see People v. Bergerud, 223 P.3d 686, 696-97 (Colo.2010)(citing Haines v. Kerner, 404 U.S. 519, 520-21 (1972)), and finding that no pro-se litigant should be denied the review of a clearly meritorious claim based upon his inability to properly articulate the substance of said and/or cite controlling legal authority); see also e.g., Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991)(requiring a reviewing court to read into a pro-se litigant's claim the strongest argument suggested).
- 5) Mr. Fuller respectfully suggest that remand of this limited claim will serve not only the interest of all parties to this appeal, but also the interest of judicial economy and efficiency, as should the lower court deny Mr. Fuller's proportionality review, that issue may be properly presented to this Court on the current appeal. Moreover, Mr. Fuller respectfully submits that his request for limited remand is proper, (see e.g., People v. Dillon, 655 P.2d 841, 844 (Colo. 1982); Anstine v. Churchman, 74 P.3d 451, 453 (Colo. App. 2003), and that no party to this action would be adversely affected by the granting of said.

Wherefore, for the reasons set forth herein, Mr. Fuller respectfully moves this Court to grant him a limited remand to allow the lower court to review the proportionality of his sentence based upon the substantive change in the laws as related to his conviction for possession of a deadly weapon. this as well as any and all other available relief is also respectfully sought.

Respectfully submitted this 16th day of Sept., 2019.

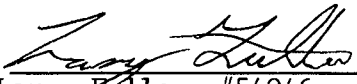

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Certificate of Service

A true and correct copy of the foregoing **MOTION FOR LIMITED REMAND**, was served on the below listed parties, through postage prepaid U.S. mail on the date indicated, addressed as follows:

Colorado Court of Appeals
2 East 14th Avenue
Denver, CO. 80203
(original served)

Colorado Att. Generals Office
1300 Broadway, 9th Floor
Denver, CO. 80203
(1 copy served)

 sep 17 - 16th - 2019
Larry Fuller, #54946