DISTRICT COURT, EL PASO COUNTY, COLORADO El Paso County Judicial Building 270 S. Tejon Street, PO Box 2980 Colorado Springs, CO 80903 Telephone: 719.452.5000	DATE FILED: December 6, 2021 11:00 AM
The People of the State of Colorado, Plaintiff(s), vs. JAMES WOO, Defendant.	▲COURT USE ONLY▲
	Case #: 2016CR2069 Division: 17

ORDER DEFERRING RULING ON DEFENDANT'S MOTION FOR RETURN OF PROPERTY, DENYING DEFENDANT'S MOTION FOR DISCOVERY, AND DENYING MOTION TO MODIFY PROTECTIVE ORDERS

There are several issues in this matter pending before this Court. But prior to addressing those issues, the Court must recite some of the history in this matter. First, a jury convicted Mr. Woo of first-degree murder on February 6, 2018. In accord with Colorado law, Judge Dubois sentenced him to life in prison without the possibility of parole on that same day.

The Office of the Public Defender, on Mr. Woo's behalf, filed a notice of appeal for the criminal conviction on March 26, 2018 (the "Direct Appeal"). The Court of Appeals identified the Direct Appeal under case number 18CA584.

On May 22, 2018, Mr. Woo, through his then local trial counsel Richard Bednarski, filed a Motion to Allow Release of Hard Drives to James Woo's Family (the "Hard Drive Return Motion"). In that motion Mr. Woo's counsel sought an order from the Court permitting him to release hard drives in discovery to Mr. Woo. At a hearing held on May 25, 2018 on the Hard Drive Return Motion, the defense clarified that request and indicated defense counsel wanted to release copies he received from the district attorney to Mr. Woo's family. The district attorney objected. The trial court ordered defense counsel to state specifically what Mr. Woo wanted released from the hard drive.

On March 18, 2020, Mr. Woo's local trial counsel moved to withdraw. The trial court denied that motion based upon the outstanding issue regarding the Hard Drive Return Motion via an order issued May 17, 2019.

APPENDIX A

Local trial counsel filed the status report requested by the court's order of May 17, 2019 on May 29, 2019. The upshot of that response indicated that Mr. Woo sought everything other than photographs and videos related to the murder victim in this case. The response also indicated that some of the materials on the hard drives at issue were the subject of a protective order from the trial court.

Mr. Woo, *pro se*, filed a motion to appear telephonically regarding the Hard Drive Return Motion that the court received on June 5, 2019. On September 18, 2019, the court received two additional *pro se* motions from Mr. Woo. One sought the removal of the protection orders on some of the discovery, specifically the removal of the protection order on what he described as being a six-terabyte hard drive. The second requested both release of property in his attorney's possession as well as release of discovery to him.

The prosecution filed a response on to those motions on February 4, 2020, which claimed, with authority, that the trial court lacked jurisdiction to issue any orders on the case while the matter was on direct appeal.

The trial court held a hearing on February 6, 2020. The court ruled that local counsel could release all discovery to Mr. Woo except for the six-terabyte hard drive subject to the court's protection order. The court reiterated that the defendant had to specify what he wanted from the hard drive prior to the court ordering the release of anything.

Local trial counsel filed a letter on March 9, 2020 detailing compliance with the court's orders. That letter indicated he provided a complete copy of the bates stamped discovery to Mr. Woo's sister. The letter indicated counsel withheld some items, including discs 90-91 containing pornographic and sadistic images and discs 106A-E, which counsel identified as a cell phone extraction which, apparently, he could not copy.

Mr. Woo filed another *pro se* motion which the court received on March 25, 2020. That motion, among other things, requested the court order the district attorney to provide discs 106A-E to his designee. The motion also sought several other things.

The Court of Appeals denied Mr. Woo's Direct Appeal in an unpublished decision on November 25, 2020. The Colorado Supreme Court denied Mr. Woo's petition for review of that decision on March 29, 2021.

And finally, Mr. Woo filed a Motion to Address Pending Motions on January 28, 2021. Judge Dubois issued an order requiring a status report from the prosecution on October 8, 2021, and they filed that status report on November 5, 2021.

ISSUES

There are several issues the court must now address in this matter. First, although the parties have treated Mr. Woo's request for release of property and request for discovery as the same request, they raise separate and distinct issues. And the legal standards applicable to the two issues are different. Second, Mr. Woo requested the Court lift protection orders on portions of

the discovery. Third, there is a real question as to whether the trial court had authority to issue any orders during the pendency of Mr. Woo's direct appeal.

JURISDICTION

Taking the last of those issues first. On February 6, 2020, after Mr. Woo's appeal had been perfected in the underlying criminal case, Judge Dubois issued an order which stated that, if Mr. Woo could not receive all of the items he was requesting from his original trial and appellate counsel, the court could "possibly order DA to re-provide all discovery to [Defendant] again" but in that case the court would require Mr. Woo to provide a list of everything being sought and the reason for his request.

Mr. Woo sought to appeal Judge Dubois's order and in 2020CA564 the Court of Appeals found that the order was not a final appealable order, but also expressed concern that the trial court may have lacked jurisdiction to issue the February 6, 2020 order because the direct appeal was still pending at that time. Case law justifies their concern:

> Unless otherwise specifically authorized by statute or rule, once an appeal has been perfected, the trial court has no jurisdiction to issue further orders in the case relative to the order or judgment appealed from. Consequently, should it be necessary for the trial court to act, other than in aid of the appeal or pursuant to specific statutory authorization, the proper course would be for a party to obtain a limited remand from the appellate court.

People v. Dillon, 655 P.2d 841, 844 (Colo. 1982).

Because there was no limited remand at the time Judge Dubois issued the February 6, 2020 order, and because the return of property order did not relate to assist in the appeal and was not done pursuant to any specific statutory authorization, the trial court did not have jurisdiction at the time. "It is axiomatic that any action taken by a court when it lacked jurisdiction is a nullity." *Id.*

Where does that leave the parties? That is the crux of the issue now facing the court. And given the court lacked authority for its prior orders; the slate is clean for this court to address the issues.

RETURN OF PROPERTY

Going back to the two different requests Mr. Woo makes—and addressing his request for release of property first.

Mr. Woo's request for the return of property seized by law enforcement presents a difficulty because there is a split of authority among Colorado Court of Appeals divisions as to whether trial courts have jurisdiction to resolve such motions after a defendant has been sentenced. In *Strepka v. People*, 489 P.3d 1227 (Colo. 2021) the Colorado Supreme Court acknowledged this split of authority but, since the exact issue was not before the court in that case, declined to articulate which approach to determining jurisdiction was appropriate:

> The division in [*People v.*] *Chavez*[, 487 P.3d 997 (Colo. App. 2018)] is one of a number of divisions of the court of appeals to consider the extent of a trial court's jurisdiction to resolve motions for return of property in criminal cases. *See Chavez*, ¶ 13 ("[O]nce a valid sentence is imposed . . . a criminal court has no further jurisdiction."); *People v. Wiedemer*, 692 P.2d 327, 329 (Colo. App. 1984) ("A trial court loses jurisdiction upon imposition of a valid sentence except under the circumstances specified in Crim. P. 35."); *see also People v. Hargrave*, 179 P.3d 226, 228 (Colo. App. 2007) ("When the need for property seized in a case has ended, the trial court has the jurisdiction and the obligation to order its return and, if necessary, to conduct a hearing to determine its appropriate disposition . . . .").
>
> With the exception of *Hargrave*, the divisions in these cases have generally concluded that the trial court loses jurisdiction upon the imposition of a valid conviction and sentence.

Strepka, 489 P.3d at 1231. However, because these cases addressed the return of *lawfully* seized property and the defendant in *Strepka* was seeking the return of *illegally* seized property, the court determined that the "question of which, if any, of these approaches is correct" was not before them, and did not resolve the split of authority. So the question remains unanswered.

Case law presents two different approaches to resolve this issue. The Court of Appeals described them in *Chavez:*

> Divisions of this court are split on whether criminal courts have jurisdiction over motions for return of property made after a defendant has been sentenced.
>
> In *People v. Wiedemer*, 692 P.2d 327, 329 (Colo. App. 1984), a division of this court held that the imposition of sentence ends a criminal court's subject matter jurisdiction, with the sole exception of motions brought under Crim. P. 35. Because Crim. P. Rule 35 did not authorize the court to deal with matters of property, the division reasoned that criminal courts do not have jurisdiction over such motions made after sentencing. *Id.*; *see also People v. Galves*, 955 P.2d 582 (Colo. App. 1997).
>
> A different division held in *People v. Hargrave*, 179 P.3d 226, 230 (Colo. App. 2007), that "the [criminal] court has ancillary jurisdiction, or inherent power, to entertain defendant's post-sentence motion for return of property." *See also People v. Rautenkranz*, 641 P.2d 317, 318 (Colo. App. 1982). The division relied on the test for ancillary jurisdiction used by federal courts. 179 P.3d at 229-30. Under this test, ancillary jurisdiction attaches when:
>
> > (1) the ancillary matter arises from the same transaction which was the basis of the main proceeding, or arises during the course of the main mater, or is an integral part of the main matter; (2) *the ancillary matter can be determined without a substantial new factfinding proceeding*; (3)

> determination of the ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) the ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated.

People v. Chavez, 487 P.3d at 998 (quoting *Hargrave*, *supra* and *Morrow v. District of Columbia*, 417 F.2d 728, 740 (D.C. Cir. 1969) (emphasis supplied in *Chavez*).

But as the Supreme Court in *Strepka* court noted, most cases find that trial courts lack jurisdiction to resolve requests for the return of *lawfully* seized property after a defendant has been sentenced.

The case with facts most like Mr. Woo's is *Chavez*, where the Defendant sought the return of two computers and numerous compact discs holding information. In that case, although the court ultimately elected to follow the line of cases which stated that criminal courts have no jurisdiction beyond that granted by Crim. P. 35 after a defendant has been sentenced, the court still noted that even if the *Hargrave* ancillary jurisdiction test were applied, the court would not have jurisdiction because the property requested "could contain both property subject to return, such as innocuous family photos, as well as (or only) contraband not subject to return, such as photos of unlawful sexual behavior involving" the defendant, and that such "an inquiry would invariably involved 'substantial new factfinding proceedings.'" *Chavez*, 487 P.3d at 999 (quoting *Hargrave*, 179 P.3d at 229-30). So too here.

But even the *Chavez* case presents a wrinkle in considering this matter. Because the *Chavez* court noted in a footnote that their determination that the criminal court did not have jurisdiction did not leave Mr. Chavez without a remedy because civil district courts are courts of general jurisdiction and Mr. Chavez could potentially file an action there for the return of his property. Here, Mr. Woo did. He did so by filing a replevin action against both the El Paso County Sheriff's Office and the Fourth Judicial District Attorney's Office in case 2019CV103 (the "Replevin Case").

A different district court judge dismissed the Replevin Case. Mr. Woo appealed that determination. And while the Court of Appeals upheld the district court's decision to dismiss the Replevin Case the Colorado Supreme Court has since granted Mr. Woo's petition for review.

Now, a defendant's ability to receive alternate relief was not a determinative issue in *Chavez* or any of the other cases where court addressed jurisdiction to resolve return of property motions. But Mr. Woo's replevin litigation, referenced above, seems likely to provide an answer to the question of whether this court retains jurisdiction to order the return of lawfully seized property.

That is because the Colorado Supreme Court granted review on his case to determine, "[w]hether the court of appeals erred in holding that the Colorado Governmental Immunity Act does not violate petitioner's constitutional right against deprivation of property without due process in barring his replevin claim, even if the criminal court lacks jurisdiction to address a post-sentence motion for return of property." *See* 2021 WL 37113304.

Under these extremely unusual circumstances, the Court believes reserving ruling on Mr. Woo's property return request to be the appropriate course. Any order this court issues given the pending appellate case clouds, not clarifies the issue. Should the Colorado Supreme Court permit Mr. Woo's replevin claim to proceed, then he has a method to seek the return of his property. If the opinion rules otherwise, then this Court will render a decision with guidance from the Colorado Supreme Court, if any, from that case. And finally, if the Colorado Supreme Court takes no action, the Court will then consider these issues on their merits.

Depending on what happens, the issue of whether Mr. Woo has an alternative recourse in his civil case is one factor the court could consider in determining whether the court has jurisdiction to resolve this issue. After all, if there is a right the law should provide a remedy. But until the case before the Colorado Supreme Court resolves, this court cannot perform the full analysis necessary.

The Court therefore orders that Mr. Woo re-raise this issue, if necessary, after the Colorado Supreme Court takes some action in *Woo v. El Paso County Sheriff's Office and Fourth Judicial District Attorney's Office*, Supreme Court case 20SC865.

MR. WOO'S DISCOVERY REQUEST

The second issue for the court is to determine how to handle Mr. Woo's current discovery requests. In addressing this issue, the court first notes that the court issued several orders during the pendency of Mr. Woo's direct appeal. Because the court lacked jurisdiction to enter those orders and because orders issued without jurisdiction are a nullity, this court vacates them.

The status of post-conviction discovery requests is not at all certain under the rules of criminal procedure or Colorado law. Crim. P. Rule 16, by its title and terms, applies to "Discovery and Procedure Before Trial." And generally speaking, a district court has little authority to do anything in a criminal case after conviction, save for proceedings pursuant to Crim. P. Rule 32 and 35.[1] Neither of those rules address discovery requests or requirements. Further, Colorado "remains one of the few states that has never deviated from the traditional doctrine holding that courts lack power to grant discovery outside of those statutes or rules." *People in the Interest of E.G.*, 2016 CO 19 ¶ 12 (denying the defense access to a crime scene inside a non-party's residence). Further, there is no general right to discovery in criminal cases. *Id.* at ¶ 23 *citing Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

In 2009 the United States Supreme Court, in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 577 U.S. 52 addressed whether defendants have a constitutional due process right to discovery in postconviction proceedings. The Court stated:

> A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. At trial, the defendant is presumed innocent and may demand that the government prove its

[1] Crim. P. Rule 32.2 does deal with post-conviction proceedings in death penalty cases and deals with discovery issues. But by its terms it applies only in the now defunct death penalty process.

> case beyond a reasonable doubt. But "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera v. Collins*, 506 U.S. 390, 399, 113 S.Ct. 853, 122 L.Ed. 203 (1993). "Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." [*Connecticut Bd. of Pardons v.*] *Dumschat*, [452 U.S.] at 464, 101 S.Ct. 2460 (internal quotation marks and alterations omitted).
>
> The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. "[W]hen a State chooses to offer help to those seeking relief from convictions," due process does not "dictat[e] the exact form such assistance must assume." *Pennsylvania v. Finley*, 481 U.S. 551, 559, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). [A defendant's] right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. *Brady* is the wrong framework.

Osborne, 577 U.S. at 68-9.

So *Osborne* and other state cases which have examined a defendant's postconviction right to discovery have looked to a particular state's postconviction procedures to determine whether a discovery right exists. In a survey of state criminal cases, all of the cases where a defendant has been found to have had a right to discovery in postconviction cases have relied on the particular state's postconviction statute or state-specific caselaw.[2]

As noted in footnote two above, most state cases allowing postconviction discovery find it permissible as an exercise of the trial court's inherent authority. This inherent authority over discovery issues though, may not apply in Colorado. "[U]nder Colorado law, district courts have 'no freestanding authority to grant criminal discovery beyond what is authorized by the Constitution, the rules, or by statute.'" *People v. Kilgore*, 455 P.3d 746, 749 (Colo. 2020) quoting *People in Interest of E.G.*, 368 P.3d 946, 950. A "trial court's authority to grant discovery . . . must be limited to the categories expressly set forth in the rule." *Richardson v. District Court*, 632 P.2d 595, 599 (Colo. 1981).

---

[2] *See State v. Szemple*, 252 A.3d 1029, 1044 (N.J. 2021) (State postconviction rules and due process did not typically allow discovery in postconviction proceedings, but "where a defendant presents the [postconviction] court with good cause to order the State to supply the defendant with discovery . . . the court has the discretionary authority to grant relief."); *Canion v. Cole*, 115 P.3d 1261, 1263 (Ariz. 2021) (State postconviction rule did "not provide a process for obtaining discovery in [postconviction] proceedings" but "trial judges have inherent authority to grant discovery requests in [postconviction] proceedings upon a showing of good cause."); *State v. Kleitzen*, 762 N.W.2d 750, 761 (Wisc. 2008) ("Nowhere in the statute does it specifically address postconviction discovery requests, although case law does permit postconviction discovery in certain circumstances . . . Nevertheless the statute obligates, pursuant to the due process requirement, that the State disclose any exculpatory evidence."); *Reed v. State*, 116 So.3d 260, 267 (Fla. 2013) ("There is no unqualified general right to engage in discovery in a postconviction proceeding. '[A]vailability of discovery in a postconviction case is a matter firmly within the trial court's discretion.").

Because, pursuant to *Osborne*, there is no due process right to postconviction discovery and under *Kilgore* and *Richardson*, a district court's authority to order discovery is limited to that authorized by rule or statute, the prosecution can only be required to provide postconviction discovery to Mr. Woo if such discovery is expressly provided for in the discovery rules. By its plain terms, Crim. P. 16 only applies to discovery obligations prior to trial. Similarly, the "plain language of Crim. P. 35(c), promulgated by the supreme court, does not authorize discovery procedures. . . . Had the supreme court intended to allow such discovery in connection with at Crim. P. 35(c) motion, it easily could have said so." *People v. Thompson*, 485 P.3d 566, 572 (Colo. App. 2020). Again, the court notes the legislature built in discovery requirements in the death penalty context and did not build in those requirements for proceedings under Crim. P. Rule 35.

Although *Thompson* examined a defendant's postconviction request for *additional* discovery of testing which had not been done prior to trial, reading its plain language interpretation of Crim. P. 35(c) alongside *Kilgore* creates a strong presumption that Crim. P. 35(c) does not authorize discovery at all, and absent such authorization in the rule, the court does not have the authority to grant discovery in postconviction proceedings.

Even Federal courts impose limitations on post-conviction discovery. *See U.S. v. Cuya*, 964 F.3d 969, 974 (11th Cir. 2020). There, a prisoner has no right to discovery until after a prisoner files a petition under 28 U.S.C.A. Sec. 2255 (the rough federal equivalent of a petition under Crim. P. Rule 35). Once a person files a petition, the federal courts apply a good cause standard to discovery requests. *Id.*

But, the Court notes that there is a sense of fundamental fairness that should allow Mr. Woo, even after his conviction and denied appeal, to have materials necessary to participate in whatever remains of his defense. And discovery, at least the relevant discovery, is the method to do that. This court, absent the Colorado case law noted above, would find a limited discovery right to provide some of the materials Mr. Woo requests if left to its own devices. That being said, the court has no authority, at least at this juncture, to order what Mr. Woo requests.

The court notes, though, that there is evidence Mr. Woo received the bulk of discovery. According to the letter filed by Mr. Bednarski on March 9, 2020, he provided a complete copy of the paper discovery to Mr. Woo's designee (his sister) as well as all discs of information except items clearly subject to the Court's protective orders and series of discs he could not copy. The Court is also uncertain as to whether the prosecution provided any discovery directly to Mr. Woo.

Given the status of these issues and given that Mr. Woo received the bulk of discovery through his attorney, the court respectfully denies his motion for discovery.

MR. WOO'S REQUEST FOR REMOVAL OF THE PROTECTION ORDERS

Mr. Woo also requests the court remove the protection orders issued in this case for certain portions of discovery. The history of this issue bears mention. The prosecution filed a "Motion to Protect the Release of Intimate Photos of the Victim, Deny the Use of These Images at Trial,

and Require the Defense to Return or Destroy Explicit Images at the end of the trial" on December 18, 2017.

The trial court granted that motion on December 22, 2017. Mr. Woo's defense counsel conceded the motion, made no objection to the protective order, and agreed to return those images after the trial.

Mr. Woo now request the court lift that order. The court notes, pursuant to Crim. P. Rule 16(III)(d), that Judge Dubois had authority to enter a protective order for these materials. And the court believes the danger of emotional damage, psychological damage, and embarrassment to the family of the murder victim justified the court's decision then.

And those dangers continue and justify the protective orders now. As a court of general jurisdiction, the court believes it has the authority to restrict access to materials such as these. The protective orders exist to do just that. The court denies Mr. Woo's request to lift the orders. And if the court lacks jurisdiction, because this issue is not one falling under Crim. P. Rule 35, the court could not afford him the relief he requests anyway. The court therefore denies his motion to lift the protection orders in this matter.

SO ORDERED: December 6, 2021

/s/ Samuel A. Evig
District Court Judge

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: March 21, 2022
El Paso County 2016CR2069	
Plaintiff-Appellee: The People of the State of Colorado, **v.** **Defendant-Appellant:** James T Woo.	Court of Appeals Case Number: 2022CA184
ORDER OF COURT	

To: All Parties and the Clerk of the District Court

Upon consideration of appellant's response to the Court's Order to Show Cause of February 11, 2022, the Court determines that no final order exists from which an appeal may be taken.

IT IS THEREFORE ORDERED that the appeal is DISMISSED without prejudice.

BY THE COURT

Fox, J.
Berger, J.
Schutz, J.

Copies to: Counsel of Record
Clerk of the District Court

APPENDIX B

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: September 12, 2022
Certiorari to the Court of Appeals, 2022CA184 District Court, El Paso County, 2016CR2069	
Petitioner: James T. Woo, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2022SC327
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, SEPTEMBER 12, 2022.
JUSTICE HOOD does not participate.

APPENDIX C

Colo. Crim. P. 35

(a) Correction of Illegal Sentence. The court may correct a 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) Reduction of Sentence. The court may reduce the sentence provided that a motion for reduction of sentence is filed (1) within 126 days (18 weeks) after the sentence is imposed, or (2) within 126 days (18 weeks) after receipt by the court of a remittitur issued upon affirmance of the judgment or sentence or dismissal of the appeal, or (3) within 126 days (18 weeks) after entry of any order or judgment of the appellate court denying review or having the effect of upholding a judgment of conviction or sentence. The court may, after considering the motion and supporting documents, if any, deny the motion without a hearing. The court may reduce a sentence on its own initiative within any of the above periods of time.

(c) Other Remedies.

(1) If, prior to filing for relief pursuant to this paragraph (1), a person has sought appeal of a conviction within the time prescribed therefor and if judgment on that conviction has not then been affirmed upon appeal, that person may file an application for postconviction review upon the ground that there has been a significant change in the law, applied to the applicant's conviction or sentence, allowing in the interests of justice retroactive application of the changed legal standard.

(2) Notwithstanding the fact that no review of a conviction of crime was sought by appeal within the time prescribed therefor, or that a judgment of conviction was affirmed upon appeal, every person convicted of a crime is entitled as a matter of right to make application for postconviction review upon the grounds hereinafter set forth. Such an application for postconviction review must, in good faith, allege one or more of the following grounds to justify a hearing thereon:

(I) 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;

(II) That the applicant 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;

(III) That the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(IV) Repealed eff. July 1, 2004.

(V) 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;

(VI) Any grounds otherwise properly the basis for collateral attack upon a criminal judgment; or

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

(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 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 shall substantially comply with the format of Form 4 and shall substantially contain the information identified in Form 4, Petition for Postconviction Relief Pursuant to Crim. P. 35(c). See Appendix to Chapter 29.

(III) If a motion fails to comply with Subsection (II) the court shall return to the defense 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 49 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. If the motion and the files and record of the case show to the satisfaction of the court that the 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 63 days (9 weeks) of filing or set a new date for 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 49 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 35 days and the defendant to reply to the prosecution's response within 21 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 63 days (9 weeks) of the conclusion of the hearing or provide the parties a notice of the 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.

(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 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 (VII) 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.

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the People peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.