

FILED IN THE  
COURT OF APPEALS  
STATE OF COLORADO

FEB 21 2006

COURT OF APPEALS, STATE OF COLORADO  Colorado State Judicial Building Two East 14 <sup>th</sup> Avenue Denver, Colorado 80203	Clerk, Court of Appeals
Arapahoe County District Court Honorable William Blair Sylvester, Judge Case Number: 98CR3336	
THE PEOPLE OF THE STATE OF COLORADO  Plaintiff-Appellee  v.  JESUS MANUEL MACIAS  Defendant-Appellant	σ COURT USE ONLY σ
David S. Kaplan, Colorado State Public Defender Kathleen A. Lord, Chief Appellate Deputy 110 16 <sup>th</sup> Street, Suite 800 Denver, Colorado 80202  (303) 620-4888 (Telephone) <a href="mailto:kathleen.lord@state.co.us">kathleen.lord@state.co.us</a> Registration Number: 14190	Case Number: 05CA2108
<b>APPELLANT'S AMENDED NOTICE OF APPEAL</b>	

I. DESCRIPTION OF NATURE OF CASE AND DISPOSITION IN TRIAL COURT

NATURE OF CASE: This case is a criminal defendant's appeal of the denial of Defendant's Crim.P. 35(c) motion. The appeal is taken pursuant to C.A.R. 3.

CHARGES FOR WHICH DEFENDANT WAS CONVICTED: One Count Second Degree Murder; One Count Violent Crime – Death/Serious Injury

DATE JUDGMENT OF CONVICTION ENTERED: May 26, 2000

DATE SENTENCE IMPOSED: April 5, 2001

SENTENCE: 40 Years Department of Corrections plus Five Years Mandatory Parole

DATE MOTION FILED: August 11, 2005

DATE MOTION DENIED: August 23, 2005

WHETHER APPEAL BOND GRANTED, AMOUNT OF BOND: Not Applicable

## II. ISSUES PROPOSED TO BE RAISED ON APPEAL

Issues on appeal may include, but are not limited to: All issues preserved by the Appellant's motion, raised in any hearing held on the motion, or raised in any motion by Appellant requesting hearing of the motion.

## III. TRANSCRIPT INFORMATION

The transcripts in this matter were previously prepared for Mr. Macias' direct appeal in Case Number 01CA934.

## IV. ATTORNEY INFORMATION

Defendant-Appellant Attorney:  
DAVID S. KAPLAN  
Colorado State Public Defender  
110 Sixteenth Street, Suite 800  
Denver, Colorado 80202  
(303) 620-4888


Plaintiff-Appellee Attorney:  
JOHN W. SUTHERS  
Colorado State Attorney General  
1525 Sherman Street, Fifth Floor  
Denver, Colorado 80202  
(303) 866-5785

## V. APPENDICES TO THIS AMENDED NOTICE OF APPEAL

Attached to this Amended Notice of Appeal are copies of the following:

1. Amended Designation of Record
2. Order denying the Motion

DAVID S. KAPLAN  
Colorado State Public Defender



KATHLEEN A. LORD, #14190  
Chief Appellate Deputy  
110 Sixteenth Street, Suite 800  
Denver, Colorado 80202  
(303) 620-4888

**CERTIFICATE OF SERVICE**

I certify that a copy of this Amended Notice of Appeal with attachments was served by mail delivery on the District Court, the Office of the District Attorney, and the Office of the Attorney General (by placing the same in the Attorney General's mailbox at the Colorado Court of Appeals).

2/21/06

Albert D. Thomas

DISTRICT COURT ARAPAHOE COUNTY, STATE OF COLORADO Arapahoe County Justice Center 7325 South Potomac Street Centennial, Colorado 80112	▲ COURT USE ONLY ▲
<b>Plaintiff(s):</b> People of the State of Colorado  v.  <b>Defendant(s):</b> Jesus Manuel Macias	
	Case No. 98-CR-3336 Courtroom: 408
<b>ORDER DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF PURSUANT TO CRIM.P. 35(C)</b>	

THIS MATTER comes before the court on Defendant's Pro-Se Motion dated 8/11/05 for Post-Conviction Relief under Crim.P. Rule 35 (c). The Court has reviewed all of the filings and has also considered each of the following:

1. The offense committed by the Defendant.
2. The circumstances of the Defendant as presented at the sentencing hearing.
3. The sentence imposed 5/26/00 pursuant to a finding of guilty, and affirmed in appeals case 01-CA-934 on 4/17/03.
4. The matters contained in the Defendant's motion, and any matters submitted on the Defendant's behalf.
5. The Court notes that the Defendant filed his motion seeking post-conviction relief on 8/11/05, timely pursuant to *People v. Hampton*, 857 P.2d 441 (Colo.App.1992), which states that "if an appeal is pursued, then the conviction is not final until the appellate process is exhausted."
6. The Court has reviewed all of the arguments and applicable law and has determined that a hearing in this matter is unnecessary.
7. Defendant's constitutional claims in his motion for post conviction relief under Crim.P. Rule 35(c) have been litigated in both the trial and appellate court. A defendant may not use a proceeding under this rule to relitigate issues that were fully and finally resolved in an earlier appeal. *People v. Johnson*, 638 P.2d 61 (Colo.1981).
8. The Court finds that the defendant's claim regarding speedy trial is in fact an argument of ineffective assistance of counsel, as the motivation for making a knowing and voluntary waiver of speedy trial is irrelevant. The defendant knew he had a right to speedy trial, and voluntarily gave up that right.

(RIA)

### Ineffective Assistance of Counsel

The defendant asserts that he is entitled to relief under Crim.P. Rule 35(c) on the grounds of ineffective assistance of counsel. In order to obtain relief based on a claim of ineffective assistance of counsel, a defendant must affirmatively prove both that his counsel's performance fell below the standard of professional reasonableness and that such performance prejudiced him, i.e., that there is a reasonable probability that, but for such deficient performance, the outcome at trial would have been different. *People v. Palmer*, 888 P.2d 348 (Colo. App. 1994).

The defendant has the burden to show inadequate representation, and a conviction will not be set aside unless, based on the record as a whole, there was a denial of fundamental fairness. *People v. Geis*, 738 P.2d 398 (Colo. 1987). A motion for post conviction relief under Crim.P. Rule 35(c) shall be denied when the defendant fails to establish that he had suffered prejudice due to patently deficient performance of the attorney in handling the criminal appeal. *People v. Valdez*, 789 P.2d 406 (Colo. 1990).

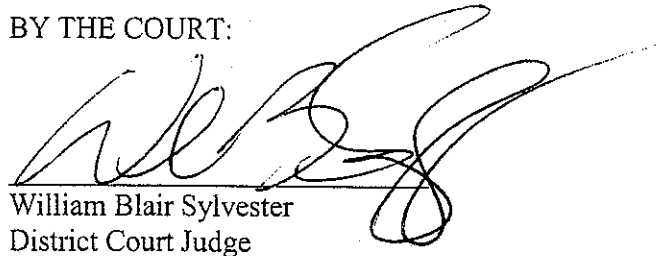
The Court thus examines the first prong of the *Palmer* analysis in asking whether or not counsel's performance fell below the standard of professional reasonableness. The defendant asserts that his counsel lied to him about the waiver of speedy trial. The defendant alleges that his attorney was suspended from the practice of law for thirty days two days before the trial. The defendant alleges the attorney coerced him into the waiver of speedy trial so that the attorney could still represent him at trial. This Court finds that this conduct, if in fact true, may fall below the standard of professional reasonableness for counsel.

The Court does not find that the alleged deficiency prejudiced the defendant to a level so high as to change the outcome of the case. The defendant argues that the waiver of speedy trial allotted extra time to the prosecution to prepare for trial. This is pure speculation, and even if true is not the type of prejudice contemplated by *Palmer*. The Court does not believe that the outcome of the case was at all affected by this extra time. Further, the defendant has failed to provide this Court with any affirmative evidence to the contrary. Therefore, the Court finds that the assistance of counsel was not ineffective.

ACCORDINGLY, the Defendant's Motion for Post-Conviction relief is hereby DENIED in its entirety.

Done this 23 day of August 2005.

BY THE COURT:



William Blair Sylvester  
District Court Judge

<input type="checkbox"/> District Court, Arapahoe County, Colorado  Court Address: 7325 South Potomac Street Centennial, Colorado 80112	
THE PEOPLE OF THE STATE OF COLORADO  Plaintiff-Appellee  v.  JESUS MANUEL MACIAS  Defendant-Appellant	<p style="text-align: center;">σ COURT USE ONLY σ</p>
David S. Kaplan, Colorado State Public Defender Kathleen A. Lord, Chief Appellate Deputy 110 16 <sup>th</sup> Street, Suite 800 Denver, Colorado 80202  Phone: (303) 620-4888 E-mail: <a href="mailto:kathleen.lord@state.co.us">kathleen.lord@state.co.us</a> Fax: (303) 620-4931 Atty. Reg. #: 14190	Case Number: 98CR3336    Division: 408
<b>AMENDED DESIGNATION OF RECORD ON APPEAL</b>	


The Clerk will prepare for the Court a record on appeal, which shall include the following:

1. All original process and pleadings on file in the trial court including all motions, judgments, orders of the court, presentence report, and minute orders.
2. The complete record on appeal from Mr. Macias' previous appeal in Case Number 01CA934, including transcripts of all hearings on motions, trial (including voir dire), and sentencing.
3. All exhibits, including exhibits tendered and refused.

The Clerk of the Court shall send a copy of the register of actions to the Appellate Division of the Public Defender's Office thirty days after filing of the notice of appeal.

Pursuant to C.A.R. 11, the record on appeal must be transmitted to the clerk of the court May 9, 2006 (pursuant to the Colorado Court of Appeals' Order of February 8, 2006). Please notify the Appellate Division of the Public Defender's Office if you will be unable to complete the record on appeal within this time limitation.

DAVID S. KAPLAN  
Colorado State Public Defender



KATHLEEN A. LORD, #14190  
Chief Appellate Deputy  
110 Sixteenth Street, Suite 800  
Denver, Colorado 80202  
(303) 620-4888

**CERTIFICATE OF SERVICE**

I certify that a copy of this Amended Designation of Record was served by mail delivery on the District Court, the Office of the District Attorney, and the Office of the Attorney General (by placing the same in the Attorney General's mailbox at the Colorado Court of Appeals).

2/21/06

Alicia D. Thomas