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COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203	
Arapahoe District Court Honorable William Blair Sylvester Case Number 98CR3336	FILED IN THE COURT OF APPEALS STATE OF COLORADO FEB 23 2007 Clerk, Court of Appeals
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. JESUS MANUEL MACIAS Defendant-Appellant	▲ COURT USE ONLY ▲
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OPENING BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

Defendant-Appellant was the defendant in the trial court and will be referred to by name or as the Defendant. Plaintiff-Appellee, the State of Colorado, will be referred to as the prosecution or the State. Numbers in parentheses refer to the volume and page number of the record on appeal. The record consists of sixteen volumes and five (unsealed) envelopes, plus some sealed record not necessary to this appeal.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the district court erred by denying Mr. Macias' Crim. P. Rule 35(c) motion, alleging conflict of interest and ineffective assistance of counsel, without first granting a hearing and appointing him counsel, even after finding that the conduct of his counsel, as described in the 35(c) motion "may fall below the standard of professional reasonableness for his counsel"?

II. Whether the district court likewise erred by denying the 35(c) motion without a hearing without ever addressing Macias' assertion that he was unfairly deprived his right to direct appeal of an erroneous and prejudicial modified-Allen instruction that Macias alleges the trial court gave the jury during deliberations, because the record on appeal contained no evidence of any such instruction, and

because his appellate counsel was therefore not alerted to the instruction and unable to include the issue in the direct appeal?

STATEMENT OF THE CASE

This is an appeal of the trial court's ruling denying relief on Mr. Macias' Crim. P. 35(c) motion without ever holding an evidentiary hearing.

On or about December 30, 1998, the State charged Jesus Manuel Macias with one count of murder in the first degree after deliberation,[1] and one count of the mandatory sentence enhancer for a crime of violence involving a deadly weapon[2] for his involvement in a shooting. (v1, p48-53) Mr. Macias maintained that the shooting was an accident, however, and the jury was instructed on the lesser-included offenses of murder in the second degree, manslaughter, and criminally negligent homicide. (v1, p151, 168-70, 171)

After Mr. Macias waived his right to speedy trial twice, the court conducted several pre-trial motions hearings, and the case was tried to a jury from May 15 -- 26, 2000. (v8-15, v6, Transcript of 5/26/00) At the conclusion of trial, the jury found Mr. Macias guilty of second-degree murder, and also guilty of using a deadly weapon on the sentence enhancing charge. (v1, p176-77) On April 4, 2001, the district court

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[1] § 18-3-102(1)(a), C.R.S. (1998), a class one felony.
[2] § 16-11-309(2)(a)(I)(A) & (B), C.R.S. (1998).

sentenced Mr. Macias to forty years at the Department of Corrections plus five years of mandatory parole. (v6, Transcript of April 5, 2001, p36) Mr. Macias filed a direct appeal and this Court issued an opinion affirming his conviction and sentence. (v2, p296-306 (original opinion issued 4/17/03), p307-319 (opinion as modified)). Our Supreme Court denied review on August 4, 2004, and the mandate issued, returning jurisdiction to the district court on August 10, 2004. (v1, p320, 343)

On July 6, 2005, acting *pro se*, Macias filed a motion in the district court for transcripts and the appointment of counsel to help him prepare a Crim. P. Rule 35(c) motion. (v1, p361-70) In this motion, Macias made no substantive collateral attack on his conviction or sentence, and stated that this motion was **NOT** a Rule 35(c) motion itself, but merely a request for appointment of counsel and provision of transcripts to assist him in preparing a Crim. P. Rule 35(c) motion. (v1, p361: "This is not a postconviction relief motion, as it is without any claims, supporting arguments etc . . . . but a motion asking for leave & permission to file for postconviction relief, and to ask this court for permission to either obtain state-expense transcripts, loan of already transcribed transcripts, or appointment of counsel.")

Despite the clearly stated purpose of this motion for transcripts and counsel, on July 13, 2005, the district court construed the motion as Macias' 35(c) motion

itself, and ordered Macias to re-file the motion within 45 days to comply with the rule's new formal filing requirements. (v1, p371) Although Macias had until approximately August 10, 2007, in which to file a timely 35(c) motion pursuant to rule and statute[3], therefore, the district court erroneously ordered him to file his 35(c) motion within 45 days (of July 13, 2005) or forfeit his post-conviction rights under Crim. P. Rule 35(c). (v1, p371)

On August 11, 2005, (within 45 days of the court's order) Macias hurriedly filed a 35(c) motion that conformed to the new filing requirements established in 2004. (v1, p375-94) On August 23, 2005, the district court denied the motion without holding a hearing. (v1, 372-73) It is this ruling that Mr. Macias now appeals.

STATEMENT OF THE FACTS

The 35(c) motion contained three predominant claims. (see v1, p379-90)

First, Macias claimed that his trial attorney, Lucero, labored under a conflict of interest when he advised Macias to waive his right to speedy trial (the first time). (v1,

[3] In Colorado, post-conviction felony litigants (other than those convicted of class one felonies) have three years (from the date that the mandate issues returning jurisdiction to the district court following a direct appeal) in which to file a timely Crim. P. Rule 35(c) motion. See CRS §16-5-402(1); People v. Wiedemer, 852 P.2d 434, 428 (Colo. 1993) (A defendant has three years in which he may attack any felony conviction other than a conviction for a class 1 felony, eighteen months for challenging a misdemeanor conviction, and six months for challenging a conviction for a petty offense. § 16-5-402(1)). Here, Macias' mandate issued on August 10, 2004, so he had until approximately August 10, 2007, in which to file the timely motion.

p379-83) The conflict of interest existed because Lucero was suspended from the practice of law for a thirty-day period during which Macias' trial was scheduled to occur. (v1, p379-80) Anticipating the suspension, Lucero advised Macias to waive his right to speedy trial so that Lucero could continue to represent him at trial at a later date (and continue to receive payment from Macias, as Lucero was privately retained). (v1, p379-83) Macias argued that his waiver was not knowing, intelligent, and voluntary because he was never advised that his counsel had a conflict of interest concerning whether to advise him to waive his speedy trial right, and he was never given conflict-free advice about whether the waiver was in his best interest. Macias waived his speedy trial right to his eventual detriment, because in the extra time allowed by the waiver, the prosecution greatly strengthened its case against Macias. (v1, p379-83)

In a related claim, Macias argued that Lucero provided ineffective assistance of counsel, both due to the conflict of interest, and due to distinct failures in performance at trial. (v1, p387-89)

Macias also claimed that he was unfairly deprived his right to directly appeal an erroneous and prejudicial modified-Allen instruction that the trial court gave the jury during deliberations, because the record on appeal contained no evidence of any such instruction, and because his appellate counsel was therefore not alerted to the

instruction/error, and therefore unable to include the issue in the direct appeal. (v1, p384) Macias now seeks to reconstruct the record on this issue so that he can support his claim of error with record evidence.

The following record facts are relevant to these 35(c) claims:

On December 30, 1998, R. Antonio Lucero of the Lucero and Associates law firm entered his appearance as defense counsel for Mr. Macias. (v1, p75) On March 25, 1999, Jesus Macias appeared with Lucero and pled "not guilty" to his charges. (v3, 3/25/99, p2) This entry of plea started the clock running for purposes of Macias' six-month speedy trial period. The court set the date of trial for August 23, 1999. (v3, 3/25/99, p2)

On July 9, 1999, the district attorney filed a motion to admit evidence of Macias' uncharged misconduct *via* CRE 404(b) and hearsay *via* CRE 803 and 804. (v1, p79-81) On July 30, 1999, before litigation of the district attorney's 404(b)/hearsay motion, defense counsel Lucero filed a motion explaining the following:

"1. Defendant is scheduled for a jury trial in this matter on August 23, 1999. The trial is scheduled to last one week. The case is also set for a trial status hearing on August 13, 1999.

2. The undersigned counsel for the Defendant will be unable to act as counsel for the defendant during this trial as he has been suspended from the practice of law. Counsel has been suspended for a period of thirty days, commencing on August 21, 1999. Counsel will be able to resume the practice of law again on September 21, 1999. A copy of the Supreme Court Order is attached hereto and incorporated herein.

3. Counsel has informed counsel of counsel's suspension and subsequent inability to act as his attorney in this matter and the Defendant does not wish to proceed to trial without the undersigned counsel. While there is co-counsel on the case, Evans Garcia, the undersigned counsel is the lead attorney on the case and Defendant does not feel comfortable with only Mr. Garcia as his attorney. The Defendant wishes that this matter be postponed until such time as the undersigned counsel can again act as counsel.

4. The Defendant understands that he will be waiving his right to a speedy trial if a continuance is granted in this matter.

Wherefore, Defendant Requests this court to grant a continuance in this matter upon the grounds above stated."

(v1, p82-83: attached as Appendix A) See also, Supreme Court Disciplinary Order suspending Lucero as of August 21, 1999. (v1, p84-86: attached as Appendix B) At the trial status hearing of August 13, 1999, Lucero produced a written waiver of speedy trial, in boilerplate language, bearing his signature and that of Macias. (v1, p87: attached as Appendix C) The district attorney did not object to the defense motion for continuance, and the court inquired the following of Macias:

"COURT: Mr. Macias, did you read and sign the waiver of speedy trial document?"

"THE DEFENDANT: Yes, sir.

COURT: You understand that by signing this document, you must be tried within six months of today's date rather than the original arraignment date, which was--

THE DEFENDANT: Yes, sir.

COURT: Well, I need to find out the date. They've got it as December 28, 1999.

MR. LUCERO: It was March 25th.

THE COURT: March 25th?

MR. SMITH: Right.

THE COURT: Do you understand what you did by signing this waiver document?

THE DEFENDANT: Yes, I understand.

THE COURT: The Court will find a valid waiver of speedy trial, start speedy trial running from today's date. We need to set a new jury trial." (v3, 8/13/99, p2-3) The court then set the new trial date for January 7, 2000. (v3, 8/13/99, p4)

After Macias waived his speedy trial rights to accommodate his attorney's suspension period, the prosecutor dramatically strengthened its case against Macias. On October 15, 1999, the prosecutor filed a motion to endorse twenty-three additional witnesses (not previously endorsed). (v1, p88-89) On November 22-23, 1999, the court held hearings to litigate the prosecutor's motion to admit uncharged misconduct and hearsay evidence against Macias. (v4) The prosecutor informed the court that, after his recent interviews with the additional witnesses, he discovered

additional "other acts evidence" not included in his 404(b) motion, and an "additional theory for admissibility of evidence." (v4, 11/22/99, p9)

After the hearing, on December 27, 1999, the prosecutor filed a "Delineation of Statements and Other Acts Sought to be Admitted" that greatly expanded the motion to admit hearsay and 404(b) evidence filed by the prosecutor before Macias waived his right to speedy trial. (compare original motion of 7/9/99, attached as Appendix D (v1, p79-80) with expanded motion of 12/27/99, attached as Appendix E (v1, p100-110)) In the expanded "delineation" motion, the prosecutor also stated, for the first time, that he intended to call the "People's domestic violence expert(s), Barbara Shaw and possibly Ron Gallup" to use the new hearsay testimony (generated by the pre-trial hearing of November 22-23, 1999) "as the bases for giving expert testimony and opinions, pursuant to CRE 702 and 703, concerning the victim's and defendant's relationship, domestic violence, battered and abusive partners, the dynamics of such relationships, and the significance of these factors upon the defendant's state of mind at the time the homicide . . ." (v1, p100)

The defense objected to the admission of all of this evidence. (v4, 11/22/99 p6: "we're objecting to the admission of any of these prior acts, obviously"; see v1, p94-96: (Defendant's) "Motion in Limine I: Motion to Prohibit Introduction of

Evidence of Defendant's Character by Prosecution" objecting to expert witness testimony)

On December 9, 1999, the prosecutor moved to endorse an additional witness--domestic violence expert witness Barbara Snow. (v1, p113) The defense moved to continue the trial date again so that it could prepare rebuttal evidence to all of the additional evidence generated by the newly endorsed prosecution witnesses and expanded 404(b) motion. (v1, p382-83) The district court then vacated the January 7, 2000 trial date and re-set trial for May 15, 2000. (v1, p112) On April 4, 2000, the prosecutor moved to endorse an additional witness that would become key to the prosecution's case—Anthony Cunningham. (v1, p114)

Cunningham was a former jail cellmate of Macias that contacted the district attorneys' office offering alleged information about Macias in hopes of getting a sentence reduction. Over defense objection, Cunningham testified at trial that Macias had told him that he was in jail for shooting a drug dealer, and that he made the dealer get on his knees and ask God for forgiveness. (v15, p88) Cunningham also testified that Macias had told him that, before shooting him, Macias stated that he was the drug dealer's god, and told him, "You're a dead motherfucker." (v15, p88) Although the district attorney admitted that there was no evidence to support the drug dealer story, he argued that it was a "half-truth" indicative of Macias' culpable mental state

when he shot the actual victim in this case---his girlfriend. (v14, p229-34) The district attorney described Cunningham as "an essential witness" to its case and even offered immunity in exchange for his testimony against Macias at trial. (v1, p139)

Finally, on May 4, the prosecutor moved to endorse one more witness—Ted Ritter, of the Colorado Bureau of Investigations. (v1, p118) After a trial that included the testimony of **seven more witnesses** than those the district attorney originally endorsed (before Macias first waived his right to speedy trial), Macias was convicted of second-degree murder. (v1, p88-89; see v9: testimony of Patricia Alderete; v10: testimony of Nicole Gutierrez, Iris Macias, and Josephine Gutierrez; v13: testimony of Benita Gonzales; v14: testimony of Priscilla Olivas; v15: testimony of "essential witness" Anthony Cunningham).

SUMMARY OF THE ARGUMENT

The district court erred by ruling on Mr. Macias' Crim. P. Rule 35(c) motion, alleging conflict of interest and ineffective assistance of counsel, without first granting a hearing and appointing him counsel, even after finding that the conduct of his counsel, as described in the 35(c) motion "may fall below the standard of professional reasonableness for his counsel." The district court erroneously ignored the conflict of interest claim, and ruled solely on the ineffective claim. The court concluded that Macias' allegations of prejudice from the conflict/ineffective assistance were

speculative---but prejudice is presumed as a matter of law if the defendant shows that his attorney labored under a conflict of interest. Furthermore, the court prematurely concluded that Macias could not show prejudice from any ineffectiveness, when Macias was never granted an evidentiary hearing at which he could admit evidence proving the prejudice prong of his ineffective assistance of counsel claim (assuming *arguendo* that he has to show any prejudice).

Additionally, the district court erred by denying the 35(c) motion, without a hearing, without ever addressing Macias' assertion that he was unfairly deprived of his right to directly appeal an erroneous and prejudicial modified-Allen instruction that Macias contends the trial court gave the jury during deliberations, because the record on appeal contained no evidence of any such instruction, and because his appellate counsel was therefore not alerted to any such instruction and unable to include the issue in the direct appeal.

ARGUMENT

I. The district court erred by denying Mr. Macias' Crim. P. Rule 35(c) motion, alleging conflict of interest and ineffective assistance of counsel, without first granting a hearing and appointing him counsel, even after finding that the conduct of his counsel, as described in the 35(c) motion "may fall below the standard of professional reasonableness for his counsel."

A. Standard of Review

Findings of historical fact: Normally, an appellate court will not set aside a district court's findings of historical fact when there is competent record evidence to support those findings, unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." People v. D.F., 933 P.2d 9, 14 (Colo. 1997). However, a more "extensive review" is warranted when the "the key evidence consisted primarily of documents" and "[c]redibility evaluations played a minor role." Easley v. Cromartie, 532 U.S. 234, 242-43 (2001). Here, the more "extensive review" of the district court's findings of historical fact is warranted given that the court held no evidentiary hearing and disposed of Macias' 35(c) claim based only on his 35(c) documents.

Application of the law: The district court's legal conclusions, *i.e.*, conclusions resulting from the application of the legal standard to the historical facts, are subject to *de novo* review. For example, this *de novo* standard of review applies to the district court's decision to analyze only the "ineffective assistance" prong of Macias' claim,

but to ignore the related "conflict of interest" argument. *De novo* review also applies to the district court's conclusion that Macias was not entitled to an evidentiary hearing at which he could have admitted evidence to prove his "speculative" claim that his first waiver of speedy trial unfairly prejudiced his case.

B. Legal Analysis

Crim. P. 35(c)(3) provides:

> 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.
>
> . . . .
>
> Unless 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 cause a copy of said motion to be served on the prosecuting attorney, grant a prompt hearing thereon, 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.

The Rule provides that the district court "must hold an evidentiary hearing unless the motion, the files, and the record of the case 'clearly establish that the allegations presented in the defendant's motion are without merit and do not warrant postconviction relief.'" White v. District Court, 766 P.2d 632, 634 (Colo. 1988) (quoting People v. Trujillo, 190 Colo. 497, 499, 549 P.2d 1312, 1313 (1976)); see also

People v. Muniz, 667 P.2d 1377, 1380 (Colo. 1983); People v. Stark, 902 P.2d 928 (Colo. App. 1995); People v. Rael, 681 P.2d 530, 532 (Colo. App. 1984); ABA Standards for Criminal Justice 22-4.6 (2d ed. 1980) (evidentiary hearing is required "whenever there are material questions of fact which must be resolved in order to determine the proper disposition of the application for [postconviction] relief") (alteration in original). A defendant is not required to set forth the evidentiary support for his allegations in his initial Crim. P. 35 motion. See White, 766 P.2d at 635. The defendant need only assert facts that, if true, would provide a basis for relief under Crim. P. 35. See id.

An accused has a constitutional right to the reasonably effective assistance of an attorney acting as his "diligent and conscientious advocate." Stroup v. People, 656 P.2d 680, 683 (Colo. 1982); see also U.S. Const. amend. VI; Colo. Const. art. II, § 16; Strickland v. Washington, 466 U.S. 668, 684-85 (1984); McMann v. Richardson, 397 U.S. 759, 770-71 (1970); Davis v. People, 871 P.2d 769, 772 (Colo. 1994); People v. White, 182 Colo. 417, 421, 514 P.2d 69, 71 (1973). Constitutional standards requiring effective assistance of counsel demand that attorneys must satisfy minimal standards of competency. People v. Williams, 908 P.2d 1157, 1160 (Colo. App. 1995).

1. The conflict of interest claim

The right to effective assistance of counsel "may be violated not only by representation that falls below the level of competence to be expected of a reasonably competent attorney practicing criminal law, but also by representation that is intrinsically improper due to a conflict of interest." People v. Castro, 657 P.2d 932, 943 (Colo. 1983); accord, Strickland, 466 U.S. at 692; Cuyler v. Sullivan, 446 U.S. 335, 344, 348-50 (1980); People v. Martinez, 869 P.2d 519, 524 (Colo. 1994); U.S. Const. amend. VI; Colo. Const. art. II, § 16.

Loyalty is an "essential element" in the attorney-client relationship. C.R.P.C. 1.7, cmt.; People v. District Court, 951 P.2d 926, 929 (Colo. 1998). To provide effective legal assistance, an attorney must maintain a paramount duty of loyalty to the client. Hutchinson v. People, 742 P.2d 875, 881 (Colo. 1987). "The need for defense counsel to be completely free from a conflict of interest is of great importance and has a direct bearing on the quality of our criminal justice system." Allen v. District Court, 184 Colo. 202, 205, 519 P.2d 351, 352-53 (Colo. 1974); see also Castro, 657 P.2d at 943-45. Loyalty to a client is impaired when a lawyer's other responsibilities or interests forecloses courses of action that reasonably should be pursued on the client's behalf. C.R.P.C. 1.7 cmt.

A lawyer whose professional obligations are affected by personal interests labors under a conflict of interest. C.R.P.C. 1.7(b) provides, "A lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests." ABA Standard 4-3.5(a), (b), & cmt. states that, "counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests," and that attorneys must disclose and explain the existence and implications of a conflict to the client in sufficient detail to allow the client to appreciate its significance. Also, the ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.6 (3d ed. 1992) provides, "Under no circumstances should the funding power interfere with or retaliate against professional judgments made in the proper performance of defense services."

Once a conflict of interest becomes apparent, defense counsel must disclose the conflict to the trial court and advise the client about the right to conflict-free representation, the nature of the particular conflict, the risks associated with continued representation, and the specific ways in which the conflict may affect the attorney's ability to represent the client. Rodriguez v. District Court, 719 P.2d 699, 708 (Colo. 1986); Sullivan, 446 U.S. at 346.

As a general principle, a defendant claiming ineffective assistance of counsel must show that counsel's performance was not reasonable under prevailing professional norms, and that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 687, 688, 693-94; People v. Danley, 758 P.2d 686, 688 (Colo. App. 1988).

An exception to this rule is that a showing of prejudice under the Strickland standard is not a condition for relief if the defendant demonstrates that his lawyer labored under an actual conflict of interest. Castro, 657 P.2d at 943. An actual conflict of interest means one that "adversely affected" counsel's performance in some way. Sullivan, 446 U.S. at 348. A conflict of interest involving an attorney's financial self-interest or lack of communication is properly analyzed under the Sullivan standard. Wood v. Georgia, 450 U.S. 261, 268-70 (1981) (remanding for trial court to apply Sullivan standard to conflict arising from third party fee arrangement); Mickens v. Taylor, 535 U.S. 162, 171 (2002) (interpreting language in Wood as "shorthand" for the Sullivan standard); People v. Campbell, 58 P.3d 1148, 1157 (Colo. App. 2002) (communication breakdown between attorney and client was an actual conflict under Sullivan).

The adverse effect showing is merely a showing that, absent the conflict, counsel likely would have done something that was not done; it does *not* require a showing that the result of the proceedings would have been different. Sullivan, 446 U.S. at 349-50 ("[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."); Armstrong v. People, 701 P.2d 17, 20 (Colo. 1985). Once the defendant proves that the conflict had an adverse effect upon counsel's representation, prejudice is presumed. Mickens, 122 S. Ct. at 1244. As the Colorado Supreme Court has acknowledged:

> [T]he evil—it bears repeating—is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. . . . [T]o assess the impact of a conflict of interests on the attorney's options, tactics and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

Castro, 657 P.2d at 943-44 (quoting Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978)); accord Anaya v. People, 764 P.2d 779, 781 (Colo. 1988); Armstrong, 701 P.2d at 20; People v. Edebohls, 944 P.2d 553, 559 (Colo. App. 1996).

Here, Macias clearly raised the conflict of interest claim in his motion. (see v2, p375-90: attached herein as "Appendix F.") For example, Macias stated, "Defendant claims conflict of interest existed with trial counsel Mr. Richard Antonio Lucero . . .

and also with Mr. Evens A Garcia" . . . (v1, p379) Macias explained the nature of the conflict—that due to Lucero's suspension, Lucero "could not represent the Defendant at trial unless the Defendant waived his speedy trial rights." "The Defendant's speedy trial rights were waived August 13, 1999, under Mr. Lucero's conflicted advice. . . . " (v1, p379-80)

Nevertheless, the district court completely failed to address this paramount conflict of interest claim. Instead, the court narrowed the issue to a straight ineffective assistance claim (without the conflict layer of analysis) with the following conclusion:

"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 he voluntarily gave up that right." (v2, p372: see district court's complete 35(c) ruling, herein attached as "Appendix G.")

The court then disposed of the claim under the Strickland test, concluding that Macias' assertion of prejudice was "pure speculation" and concluded that Lucero was "not ineffective." (v1, p373) The district court erred by failing to analyze Macias' conflict of interest claim under Castro, supra, Rodriguez, supra; Sullivan, supra, etc. The district court's error is in no way harmless because, once Macias established that

Lucero labored under a conflict of interest when he advised Macias to waive his right to speedy trial, then prejudice is presumed as a matter of law. Therefore, the district court could not, and should not have disposed of this 35(c) motion based on a conclusion that Macias did not suffer prejudice from Lucero's conflict or ineffectiveness.

Instead, the record reveals that once Lucero learned that he would be suspended during the time that the trial was set to commence, his advice to Macias to waive his right to speedy trial was advice given under a conflict of interest. The conflict existed because Lucero risked losing Macias' business as a paying client on a big case due to the timing of the suspension. (Macias had the right to ask for a new attorney to try the case within the original speedy trial period.) The record provides no evidence that Lucero ever disclosed this conflict of interest, and in fact may have known of the impending conflict long before he disclosed it to Macias or the trial court. Macias waived his right to speedy trial within the original speedy trial period upon the advice from his counsel that suffered from a conflict of interest.

The district court likewise failed to advise Macias of the conflict when giving his advisement on the speedy trial waiver, so that waiver was not knowing, voluntary, and intelligent. The existing record supports these claims to such a strong extent that the issue requires a hearing so that Macias can prove these claims with more

evidentiary support. See People v. Kenny, 30 P.3d 734, 742-46 (Colo. App. 2000) ("Because defendant's motion asserted facts which may have showed that trial counsel's actions fell below the norm and which may have altered the outcome of the trial, . . . and because the trial court did not examine trial counsel's performance under the heightened scrutiny required by the analyses [of] conflict of interest and *per se* ineffective representation issues, we conclude that the hearing should encompass an opportunity for defendant to present evidence and arguments on his assertions of ineffective assistance.)

Macias also deserves an opportunity to make a record on whether, due to this conflict issue, his remedy is to have the case dismissed because his speedy trial rights were violated. (If his waiver was invalid, then his trial occurred outside of his speedy trial period in the absence of a valid waiver and his remedy is dismissal of the case.)

2. The "straight" ineffective assistance of counsel claim

An accused has a constitutional right to the reasonably effective assistance of an attorney acting as his "diligent and conscientious advocate." Stroup v. People, 656 P.2d 680, 683 (Colo. 1982); *see also* U.S. Const. amend. VI; Colo. Const. art. II, § 16; Strickland v. Washington, 466 U.S. 668, 684-85 (1984); McMann v. Richardson, 397 U.S. 759, 770-71 (1970); Davis v. People, 871 P.2d 769, 772 (Colo. 1994); People v. White, 182 Colo. 417, 421, 514 P.2d 69, 71 (1973). Constitutional standards requiring

effective assistance of counsel demand that attorneys must satisfy minimal standards of competency. People v. Williams, 908 P.2d 1157, 1160 (Colo. App. 1995).

Because relief for ineffective assistance of counsel requires a criminal defendant to prove both deficient representation and prejudice, denial of the motion without a hearing is justified **ONLY IF** the existing record establishes that the defendant's allegations, even if proven true, would fail to establish one or the other prong of the Strickland test. Ardolino v. People, 69 P.3d 73, 77 (Colo. 2003). If a criminal defendant has alleged acts or omissions by counsel that, if true, could undermine confidence in the defendant's conviction or sentence, and the motion, files, and record in the case do ***not*** clearly establish that those acts or omissions were reasonable strategic choices or otherwise within the range of reasonably effective assistance, the defendant must be given an opportunity to prove they were not. Id.

If a Crim. P. 35(c) hearing is necessary, the assistance of counsel is essential unless the asserted claim for relief is wholly unfounded. See People v. Hubbard, 184 Colo. 243, 519 P.2d 945, 948 (1974). Thus, a Crim. P. 35 movant has a right to counsel at postconviction proceedings unless the Public Defender determines that the issues raised by the defendant have no arguable merit. See People v. Duran, 757 P.2d 1096, 1097 (Colo. App. 1988) (there is statutory right to counsel in Crim. P. 35

hearing unless public defender concludes issues raised by defendant have no arguable merit); People v. Naranjo, 738 P.2d 407, 409 (Colo. App. 1987) (same).

Lawyers must communicate their findings and assessment to the client so that the client can make informed decisions. A defendant who relies on a lawyer's advice is entitled to assume that the attorney will provide sufficiently accurate advice to enable the defendant to fully understand and to assess the legal proceedings in which he is involved. See People v. Williams, 908 P.2d 1157, 1160 (Colo. App. 1995); People v. Pozo, 746 P.2d 523, 526 (Colo. 1987); ABA Standards for Criminal Justice: Defense Function, Standard 4-3.8 (b) (3d ed. 1993) ("ABA Standards") (counsel must "explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions"); Standard 4-4.1(a) (counsel must "explore all avenues leading to facts relevant to the merits of the case and the penalty . . . includ[ing] efforts to secure information in the possession of the prosecution and law enforcement") (3d ed. 1992); C.R.P.C 1.1 & cmt (lawyers must be qualified to handle a legal matter and prepare for all legal work); C.R.P.C. 1.4(b) & cmt ("A lawyer should exert best efforts to insure that decisions of the client are made only after the client has been informed of relevant legal considerations.").

Here, Macias claimed that not only did Lucero labor under a conflict of interest, but also that he was ineffective (independent of the conflict claim) for failing

to inform Macias that the prosecution might dramatically strengthen its case if he agreed to waive his speedy trial rights. Without such information, Macias could not and did not make a fully informed decision about whether it was in his best interest to waive his right to speedy trial. (v2, p383) The district court agreed with this claim to some extent, concluding that Lucero's alleged conduct "may fall below the standard of professional reasonableness for counsel." (v2, p373) This is an obvious conclusion.

The district court's analysis becomes problematic when it moves to the prejudice prong of the Strickland test. The court employed the wrong analysis because it faulted Macias for failing to produce detailed record evidence that "the waiver of speedy trial allotted extra time to the prosecution to prepare for trial," calling this claim "pure speculation." (v2, p373) But Macias was **not** required to set forth complete evidentiary support for his claim in the 35(c) motion, because that is the purpose of the 35(c) hearing. See Ardolino, 69 P.3d at 77 (35(c) hearing is required to afford defendant an opportunity to prove the prejudice prong of the Strickland test unless defendant's claim would fail to warrant relief even assuming it could be proven at a hearing); People v. Blehm, 983 P.2d 779 (Colo. 1999) (a claim of ineffective assistance of counsel raised in a post-conviction proceedings may be

supplemented by evidence supporting the claim, whereas review of ineffective claim raised on direct appeal is limited to existing record).

And, the record here is replete with evidence that the prosecutor dramatically strengthened his case after Macias waived his speedy trial rights the first time. The record is clear that the prosecutor expanded his use of "similar transaction" and hearsay evidence, and elicited trial testimony from seven witnesses not previously endorsed, including the "essential witness" Cunningham whose testimony the prosecutor used to argue Macias' culpable mental state. With this evidence in mind, the district court erred when it concluded that even if Macias could prove that he was prejudiced by the prosecutor's extra time to prepare for trial, that this "is not the type of prejudice contemplated by *Palmer*." (v2, p373) However, our Supreme Court has held that an ineffective assistance of counsel claim is the appropriate legal challenge for defense counsel's failure to adequately advise his client regarding the potential effects of waiving an important legal right. See, e.g., People v. Naranjo, 840 .2d 319, 322 (Colo. 1992) (analyzing postconviction claim of inadequate advisement by defense counsel of right to testify for ineffective assistance of counsel under the Strickland test); People v. Wimer, 681 P.2d 967, 969 (Colo. App. 1983) (analyzing whether defense counsel's failure to enter defendant's plea to commence speedy trial period amounted to ineffective assistance of counsel).

Here, because Macias "has alleged acts or omissions by counsel that, if true, could undermine confidence in the defendant's conviction or sentence, and the motion, files, and record in the case do ***not*** clearly establish that those acts or omissions were reasonable strategic choices or otherwise within the range of reasonably effective assistance, the defendant must be given an opportunity to prove they were not." Ardolino, 69 P.3d at 77. This matter requires a hearing.

II. The district court likewise erred by denying the 35(c) motion without a hearing without ever addressing Macias' assertion that he was unfairly deprived his right to directly appeal an erroneous and prejudicial modified-Allen instruction that Macias alleges the trial court gave the jury during deliberations, because the record on appeal contained no evidence of any such instruction, and because his appellate counsel was therefore not alerted to the instruction and unable to include the issue in the direct appeal.

In responding to the jury regarding a possible deadlock, the trial court may not give an instruction that is potentially coercive. People v. Raglin, 21 P.3d 419 (Colo. App. 2000). However, the court may issue a modified- Allen instruction informing the jurors that: (1) they should attempt to reach a unanimous verdict; (2) each juror should decide the case for himself or herself after impartial consideration with the others; (3) they should not hesitate to re-examine their views and change their opinions if convinced they are incorrect; and (4) they should not surrender their honest convictions solely because of the opinions of other jurors or for the purpose

of returning a verdict. Allen v. People, 660 P.2d 896 (Colo. 1983); see also CJI-Crim. 38:14 (1983).

The trial court also must inform the jurors that they will be excused and a mistrial declared if they cannot reach a unanimous verdict. But, the exact wording of such instruction is within the discretion of the trial court. People v. Raglin, supra; see also People v. Lewis, 676 P.2d 682 (Colo.1984); People v. Grace, 55 P.3d 165, 170 (Colo. App. 2001).

Here, Macias claims in his 35(c) motion that the district court erroneously issued a modified-Allen instruction to the jury during the last day of deliberations. The 35(c) motion reads:

"Defendant claims JUDGE'S MISCONDUCT" on the grounds that the Judge gave the jury defective instructions to the jury on 05/26/2000. The "TIME FUSE" instruction giving the jury a time limit to reach a verdict at the end of their diliberatons [sic] or they would be dismissed." (v2, p384) Macias argued that this instruction "coerced the jury verdict." (v2, p384) Macias correctly concedes, however, that the record on appeal reveals no such instruction. (v2, p384) It was for this reason that this issue was not litigated on direct appeal, as Macias acknowledges. (v2, p384) (Appellate counsel was not defense counsel at trial and had no knowledge of the trial independent of the record on appeal.)

Nevertheless, Macias believes that he remembers the district court giving this instruction during the last day of deliberations, and now seeks to reconstruct the record on this point. Macias seeks a hearing on this issue so that he might call witnesses that would remember the instruction from trial, including members of his jury. (v2, p384) Macias argues that, unless he is afforded this opportunity, he will be denied his statutory and constitutional rights to his direct appeal of this potential error at his trial. (v2, p384)

Every person in Colorado is entitled under Article VI, § 2 clause (2) of the Colorado Constitution to appeal a judgment against him to the Supreme Court. Various statutory provisions define the procedures for this appeal of right. *See, e.g.*, Section 13-4-102, 5 C.R.S. (1998) (Court of Appeals' jurisdiction); Section 13-4-108 to 110, 5 C.R.S. (1998) (supreme court review); Section 16-12-101, 6 C.R.S. (1998) (right to appeal). Furthermore, there is a fundamental right to appeal a criminal conviction under both the state and federal constitutions. Weason v. Colorado Court, 731 P.2d 736 (Colo. 1987); see also, Hardy v. United States, 375 U.S. 277 (1964) (due process entitles a criminal defendant to a record on appeal that includes a complete transcript of the proceedings at trial); U.S. CONST. amends. VI, XIV; COLO. CONST. art. II, §§ 16, 25.

Moreover, the Due Process Clauses and right to counsel under both the United States and Colorado Constitutions guarantee an accused procedural safeguards on appeal. U.S. CONST. amends. VI, XIV; COLO. CONST. art. II, §§ 16, 25. Due process requires that the right of appeal be a right to an "adequate and effective" appeal, which is more than a meaningless ritual. U.S. CONST. amends. VI, XIV; COLO. CONST. art. II, §§ 16, 25; see also Evitts v. Lucey, 469 U.S. 387, 396 (1985) (due process requires that the accused have "effective" assistance of counsel on his first appeal as of right); Anders v. California, 386 U.S. 738 (1967); Douglas v. California, 372 U.S. 353 (1963); Stroup v. People, 656 P.2d 680 (Colo. 1982) (constitutional right to counsel extends to counsel's assistance and advice with regard to pursuit of appeal rights made available by state procedure). "[T]he procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994).

Accordingly, when an appellant, through no fault of his/her own, is deprived of all or part of a record necessary for an appeal, a conviction cannot be affirmed. See Hawkins v. Superior Court, 196 Colo. 86, 580 P.2d 811 (1978); People v. Killpack, 793 P.2d 642 (Colo. App. 1990).

"If the needed records are lost or destroyed, automatic reversal of the conviction may be the result." JONATHAN M. PURVER & LAWRENCE E. TAYLOR, HANDLING CRIMINAL APPEALS, 100 § 69 (1980). In Hawkins v. Superior Court, the trial court denied the defendant's motion for a jury trial, and the case was tried to the court. On appeal, no record of the hearing on the defendant's motion for a jury trial could be located. Our supreme court held that, under these circumstances, the lack of a record denied the defendant his right to a meaningful appeal, and that the defendant should be afforded an entirely new trial. Hawkins, 580 P.2d 813.

Similarly, in People v. Killpack, the court reporter lost the stenographic notes of the testimony of the prosecution's rebuttal witness. The defendant's attorney filed a motion for a new trial reflecting his recollection of the witness' testimony, which the trial court denied. The court of appeals held that "[w]hen testimony this crucial is in dispute and the precise language used is critical, reconstruction is not an appropriate remedy for the missing transcript." Killpack, 793 P.2d at 643. The court in Killpack concluded that "when a defendant can show that the incomplete record visits a hardship upon the appellant and prejudices his appeal, reversal is proper."

Federal courts have recognized that summations (*i.e.*, closing argument), **jury instructions**, and the return of the jury verdict are all "critical stages" of trial. See

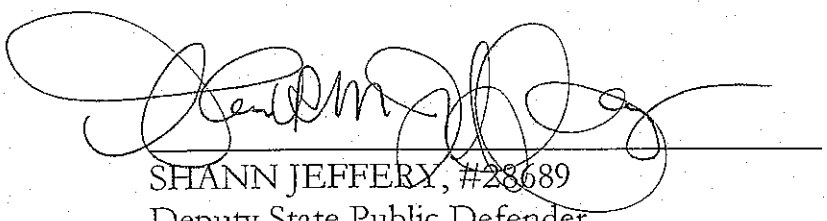
Larson v. Tansy, 911 F.2d 392, 394 (10th Cir. 1990); see also, People v. Luu, 813 P.2d 826, 827-28 (Colo. App. 1991), aff'd, 841 P.2d 271 (Colo. 1992).

Here, Macias argues that the transcript of the last day of jury deliberation is erroneous because it omits a modified-Allen instruction. Macias should be afforded an opportunity at his 35(c) hearing to conduct a record reconstruction on this issue, since it bears on a critical stage of his trial (jury instructions). If the evidence at the hearing reveals that a modified-Allen instruction was given, then the district court should rule on whether that instruction violated Macias' rights to the extent that a new trial is warranted.

CONCLUSION

THEREFORE, based on the arguments and authorities presented in this Opening Brief, Mr. Macias respectfully requests that this Court reverse the district court's ruling denying relief on his 35(c) motion and remand to the district court with instructions to appoint counsel and conduct a hearing on the issues discussed in this brief.

DOUGLAS K. WILSON
Colorado State Public Defender



SHANN JEFFERY, #28689
Deputy State Public Defender

Attorneys for Jesus Manuel Macias
110 Sixteenth Street, Suite 800
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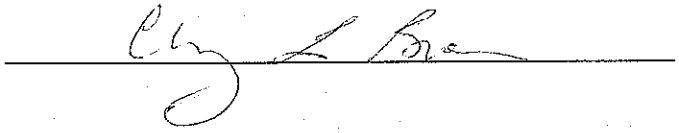
(303) 620-4888

CERTIFICATE OF SERVICE

I certify that, on February 23, 2007, a copy of this Opening Brief of Defendant-Appellant was hand-delivered to the Colorado Court of Appeals for deposit in the Attorney General's mailbox to the attention of:

Catherine P. Adkisson
Assistant Solicitor General
Appellate Division, Criminal Justice Section
1525 Sherman Street, 5th Floor
Denver, CO 80203



DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO
Case No. 98 CR 3336 Division 6

MOTION TO CONTINUE

THE PEOPLE OF THE STATE OF COLORADO. Plaintiff,

vs.

JESUS MANUEL MACIAS, Defendant.

THE DEFENDANT by and through counsel, hereby moves this court for a continuance of the trial in this matter.

As grounds therefore, Defendant states al follows:

1. Defendant is scheduled for a jury trial in this matter on August 23, 1999. The trial is scheduled to last one week. The case is also set for a trial status hearing on August 13, 1999.

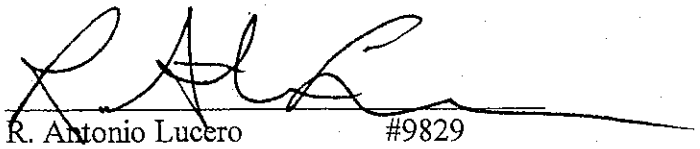
2. The undersigned counsel for the Defendant will be unable to act as counsel for the defendant during this trial as he has been suspended from the practice of law. Counsel has been suspended for a period of thirty days, commencing on August 21, 1999. Counsel will be able to resume the practice of law again on September 21, 1999. A copy of the Supreme Court Order is attached hereto and incorporated herein.

3. Counsel has informed counsel of counsel's suspension and subsequent inability to act as his attorney in this matter and the Defendant does not wish to proceed to trial without the undersigned counsel. While there is co-counsel on the case, Evans Garcia, the undersigned counsel is the lead attorney on the case and Defendant does not feel comfortable with only Mr. Garcia as his attorney. The Defendant wishes that this matter be postponed until such time as the undersigned counsel can again act as counsel.

4. The Defendant understands that he will be waiving his right to a speedy trial if a continuance is granted in this matter.

Wherefore, Defendant Requests this court to grant a continuance in this matter upon the grounds above stated.

Respectfully submitted,



R. Antonio Lucero #9829
Lucero And Associates
3030 W. 38th Ave.
Denver, CO 80211
303-455-7699
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of July, 1999, a true and correct copy of the above Motion to Continue was placed in the US Mail, postage prepaid, addressed to :

Philip M. Smith
Deputy Distinct Attorney
7325 S. Potomac St.
Englewood, CO 80112

Sandra Lucero

SUPREME COURT, STATE OF COLORADO
CASE NO. GC97C75 and GC98C108
ORIGINAL PROCEEDING IN DISCIPLINE BEFORE
THE PRESIDING DISCIPLINARY JUDGE

ORDER APPROVING CONDITIONAL ADMISSION AND IMPOSING SANCTIONS

THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

v.

RICHARD ANTHONY LUCERO,

Respondent.

The Office of Attorney Regulation Counsel and the Respondent, Richard Anthony Lucero have submitted a Stipulation, Agreement, and Affidavit Containing Respondent's Conditional Admission of Misconduct ("Conditional Admission of Misconduct") for consideration by the Presiding Disciplinary Judge pursuant to the provisions of C.R.C.P. 251.22. The parties have waived their respective right to a hearing under C.R.C.P. 251.22(c).

The court, having reviewed the court's file in this matter, the Conditional Admission of Misconduct, and being fully advised of the issues presented, enters the following Order:

1. The Conditional Admission of Misconduct is accepted and approved.

2. Richard Anthony Lucero, Attorney Registration No. 09829, is SUSPENDED from the practice of law effective August 21, 1999, for a period of ninety (90) days. Sixty (60) days of the period of suspension are stayed and Richard Anthony Lucero is placed on probation for a period of one (1) year subject to the following terms and conditions of probation:

a. Respondent will attend the one day ethics program sponsored by the Office of Attorney Regulation Counsel; and

b. Respondent shall have no further violations of the Colorado Rules of Professional Conduct within one year from the date of this Order.

3. In case number GC98C108 the charges under Count I of violation of the Colorado Rules of Professional Conduct (Colo. RPC") 1.4(b), Colo. RPC 1.7(b), Colo. RPC 8.4(a), Colo. RPC 8.4(c) and Colo. RPC 8.4(h) and the charges under Count II of violation of Colo. RPC 8.4(a) and Colo. RPC 8.4(c) are DISMISSED.

THIS ORDER IS ENTERED THE 21st DAY OF JULY, 1999, AND THE SUSPENSION IS EFFECTIVE THE 21st DAY OF AUGUST, 1999.

SUPREME COURT STATE OF COLORADO

ROGER L. KEITHLEY
PRESIDING DISCIPLINARY JUDGE

085

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086

DISTRICT COURT
COUNTY OF ARAPAHOE
STATE OF COLORADO

CRIMINAL ACTION DIVISION 6

CASE NO. 98CR3336

THE PEOPLE OF THE STATE OF COLORADO, PLAINTIFF

vs.

Jesus Manuel Macias., DEFENDANT

WAIVER OF SPEEDY TRIAL

THE ABOVE NAMED defendant, having been advised that he or she has a right to a speedy trial under the Constitutions of the United States and the State of Colorado, and that, pursuant to rule 48(b) of the Colorado Rules of Criminal Procedure, he or she as the right to a trial within six months after the trial court receives a plea of not guilty from the defendant, and further, that, pursuant to the Colorado Criminal Code, SECTION 18-1-405, C.R.S. he or she has a right to a trial within six months after entering a plea of not guilty, the defendant hereby knowingly, voluntarily, and intelligently waives said rights to a speedy trial and voluntarily consents to having the trial of this case continued for a period of six months from today's date. Such additional six month period is to commence this :

13th day of August, 1999.

8/13/99
DATE

Jesus Macias M.
DEFENDANT

8/13/99.
DATE

DEFENDANT'S ATTORNEY
atty. reg. no. 9825

087

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO
CASE NO. 98 CR 3336 DIVISION 6

PEOPLE'S NOTICE OF INTENTION TO ADMIT OTHER ACTS OF DEFENDANT PURSUANT TO RULE 26, COLORADO RULES OF CRIMINAL PROCEDURE RULE 404, AND OF INTENT TO RELY ON RESIDUAL HEARSAY PURSUANT TO C.R.E. 803(24) AND 804(5)

THE PEOPLE OF THE STATE OF COLORADO,

vs.

MANUEL JESUS MACIAS
Defendant.

COME NOW the People of the State of Colorado, by and through James J. Peters, District Attorney for the Eighteenth Judicial District, State of Colorado, and his duly appointed Deputy, and inform the Defendant as follows:

1. Pursuant C.R.S Section 18-6-801.5, Rule 26 of the Colorado Rules of Criminal Procedure, and Rule 404 of the Colorado Rules of Evidence the People will offer various incidents of domestic violence between the Defendant and the victim, Martha Munoz.

2. The People also give notice of intent to offer statements of the deceased, Martha Munoz pursuant to C.R.E. 803(24) and 804(5).

3. The Defendant committed three acts of violence towards Martha Munoz.

a. Maria Munoz, Martha's sister said that she observed the Defendant point a gun at her and Martha Munoz on New Year's Day, 1998, at 13210 East 14th Avenue. See discovery page 307 attached. Defendant admitted this event at pages 307 and 308, but said on December 26, 1998 that it happened 10 months before.

b. Approximately five or six months prior to the date of offense in this case, according to Defendant, he stated he threw an object at Martha her causing a cut that required stitches. See page 308.

Iris Macias, Martha's sister, states that about one year prior to Martha's death see saw Martha with stitches on her forehead. Iris was told by Martha that the Defendant had hit her with a gun. Martha was treated at University Hospital. See page 306.

c. The Defendant bit Martha Munoz on the shoulder. This occurred, according to the Defendant "recently." See page 308 of

discovery. A bite mark was noted in the autopsy report by Dr. Bowerman. See page 502 of discovery attached.

5. The People submit that the circumstances of the incidents are admissible pursuant to Rule 26 of the Colorado Rules of Criminal Procedure, Rule 404 of the Colorado Rules of Evidence and C.R.S., Section 18-6-801.5 to show identity, plan, scheme, design, intent, absence of mistake and modus operandi of the defendant.

6. Statements of the deceased made to her sister, Iris, confirmed the events outlined above in paragraph 4.a. See page 306.

7. Statements made by the deceased to her aunts and conduct observed by them (Josephine Gutierrez, 7611 Leyden Lane, and Janice Crespin, 328 Maple Drive, Fredrickson, Colorado) on the night before her death are set out in discovery at 292, 293, 306. These relate to phone conversations of Martha Munoz with the Defendant the night before this offense. The People submit that these statements are admissible as res gestae, excited utterances, then existing mental, emotional, and physical condition, and as a residual exception to the hearsay rule.

8. The evidence is admissible as direct evidence and for purposes of cross examination.

Respectfully submitted,

JAMES J. PETERS,
District Attorney

By _____
Philip M. Smith, #9968
John Franks, #16518
Deputy District Attorney
Registration No. 19937
7325 S. Potomac St.
Englewood, Colorado 80112

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO
CASE NO. 98CR3336 DIVISION SIX

DELINEATION OF STATEMENTS AND OTHER ACTS SOUGHT TO BE ADMITTED

THE PEOPLE OF THE STATE OF COLORADO,

VS.

JESUS MANUEL MACIAS,
Defendant.

COMES NOW JAMES PETERS, District Attorney in and for the Eighteenth Judicial District, and sets forth with additional particularity the statements sought to be admitted at trial, incorporating by reference, Attachment A.

The People's domestic violence expert(s), Barbara Shaw and possibly Ron Gallup, will use the incidents and statements listed in Attachment A as the bases for giving expert testimony and opinions, pursuant to C.R.E. 702 and 703, concerning the victim's and defendant's relationship, domestic violence, battered and abusive partners, the dynamics of such relationships, and the significance of these factors upon the defendant's state of mind at the time of the homicide, when by his own statements, he intended to scare her with his handgun and threatened to shoot her in the leg.

Specifically, the proposed expert testimony will identify Martha as the battered partner, the defendant as the abusive partner, traits of each type, then address the cycle of violence, the increasing level of violence. This testimony will address the significance of the abuser controlling the battered partner, denial and secretiveness by the battered partner, and plans and attempts by the battered partner to leave the relationship. To explain these patterns and their importance, the following acts and statements are relevant.

The specific statements of the victim, Martha Munoz, are offered pursuant to the Residual Exception, C.R.E. 807. A number of her statements are also admissible under other specific exceptions such as "Then existing mental, emotional, or physical condition," C.R.E. 803(3), "Statement of personal or family history, C.R.E. 804(4), "Present sense impression," C.R.E. 803(1), or "Excited utterance" C.R.E. 803(2).

Many of the deceased victim's statements are also admissible pursuant to Section 18-6-801.5, C.R.S., "Domestic Violence--evidence of similar transactions." and C.R.E. 404(b), "Other...acts".

Many of the victim's statements are not offered to prove the truth of the matter asserted, thus are not hearsay. This includes for example the many times in which the victim would cover for the defendant's acts of domestic violence by attributing the injury to her falling or bumping something or attributing his action as playing around or being "ancias".

The people do not set forth in Attachment A the events, phone calls and victim statements occurring at the Christmas party the night before victim's death. This Court has already ruled that these are admissible.

Cases supporting admission of these acts and statements are:
People v. Fuller, 788 P.2d 741 (Colo. 1990),
Berger v. People, 224 P.2d 228 (Colo. 1950),
People v. Melanson, 937 P.2d 826 (Colo.App. 1996),
People v. Meyer, 952 P.2d 774 (Colo.App. 1997),
People v. Rudnick, 878 P.2d 16 (Colo.App. 1994),
People v. Gordon, 765 P.2d 633 (Colo.App. 1988),
People v. Moore, 902 P.2d 366 (Colo.App. 1994),
People v. Hulsing, 825 P.2d 1027 (colo.App. 1991).

Following each statement or event listed in Attachment A is a reference to additional or alternate theories of admissibility using the following abbreviations;

DV: Section 18-6-801.5, C.R.S.

OA: Other acts, C.R.E. 404(b)

RE: Residual exception, C.R.E. 804(5)

SOM: State of mind, C.R.E. 803(3)

EU: Excited utterance, C.R.E. 803(2)

LO: Lay opinion, C.R.E. 701

PO: Statement of party opponent, C.R.E. 801(D)(1)

RG: Res gestae

Respectfully submitted,

Philip M. Smith, Reg.#9968
John Franks, Reg. #16518

Deputy District Attorneys

ATTACHMENT A

PART 1-REFERENCES ARE ALL TO TRANSCRIPT OF HEARING HELD 11-22-99

PART 1(a) Declarant is Iris Macias, sister of the Defendant

page 14 "She (victim) always told me a lot of times when she would fight with my brother and she would attempt to hit him or he would attempt to hit her, and she would always say that she was not afraid of my brother." This happened "more than one time" but "wouldn't be able to say more than five times." These events occurred before victim and defendant began to live together.

(RE, SOM, OA, DV)

page 16-17 "A couple of times she (victim) told me that she did (cause injury to defendant)". Regarding defendant pointing a gun at victim, "(s)he told me about an incident that happened after a New Year's party". There were other times that victim said defendant pointed gun at her. Martha said "that she wasn't afraid of my brother and if she had to she would hit him with his own gun", and confirming "yes" that he did point a gun at her (that New Year's). Note, page 27, later clarified that "(i)t was like two days after New Years, the 2nd or 3rd" and that, page 29, "this happened at their house" after the party, and that defendant hit victim with the gun "in their bedroom".

(RE, SOM, DV, OA)

page 18-19 Victim pointed a gun at the defendant "that incident when she got hit in the head with the gun, that's what she said, that she had pointed it at him, too" on New Years. (note, page 30, that later the witness says reference defendant pointing gun at her this incident that "(s)he didn't say that. She said she pointed it at him") She told me that when they were fighting that she got mad at my brother and she pointed it at him because she wasn't going to let him point guns at her because she wasn't afraid of him" and that this happened after he pointed a gun at her, but not sure whether she pointed the gun before or after he hit her with it.

(RE, SOM, DV, OA)

Page 21-22 Although (page 20 and 21) she talked about loving defendant, wanting to marry him and never leaving him, "She just wanted to leave him, but I would tell her to come live with me and she didn't want to leave him. She said she was in love with him". This occurred after she was pregnant.

(RE, SOM, DV, OA)

page 25 After the baby was born she saw a change in Martha, noting that she was "(d)epressed, angry, frustrated".

(LO)

page 26 After the baby was born "she would always go home for the weekend with her mom and dad and not be with my brother because they were always fighting about that kind of stuff (see above, age 26, about ongoing concerns by victim's family about defendant not being able to take care of the baby).

(OA, DV, LO)

PART 1(B) Declarant is Josephine (Josie) Gutierrez, victim's aunt

page 46-47 Victim told Josie that she was going to go home and leave him, declarant also says that victim had previously spoken of plans to leave the defendant. "She said she--she would leave him, that she was--that she was tired of it and everything, and then she--she loved him."

(RE, SOM)

page 47- Regarding the incident at K-Mart, before Christmas but after the baby was born, when defendant took baby from Viola (victim's mother), the victim said, while upset, "Jesus is acting stupid again. He went and picked up the baby and he just took her in a receiving blanket. He found out my mom was taking her and he acted all dumb and everything and he went and got her."

(RE, OA, SOM)

page 48 Observed defendant grab victim by the face, "(h)e grabbed her a couple times at my house and that, and he says they were just messing around. And I (Josie) got upset with him and told him that he needed to stop." Also, defendant hit victim while defendant was in the car and victim was leaning inside the car. (This was before victim was pregnant. Regarding the incident where defendant hit victim in car, see also page 67, for more detailed exposition, and page 70, confirming that this incident occurred at Josie's house, and that this occurred before victim was pregnant, page 67).

(OA, DV)

Page 49 Repeated accusations by defendant that victim was cheating on him. Accusations observed at Josie's house and victim would raise her voice and tell defendant to "stop acting stupid".

(OA, DV, PO)

page 49-50 Bite mark incidents.

(OA, DV)

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page 51 Defendant told Josie that if victim left him that he would kill her. This occurred at defendant's apartment (when defendant staying with Priscilla) when Josie went to speak to defendant and told him to quit biting her (page 50-51).

(PO, OA, DV)

page 52-53 Relates incident at the trailer, also confirmed by Maria, when defendant pointed a gun at victim and victim's sister, Maria. Occurred before the baby was born.

(RE, OA, DV)

page 53-54 Victim told her of another time that victim came to her house complaining of defendant having just hit her. She saw bruises but describes victim as regularly having bruises. At page 54 "she always basically had bruises." Victim stayed with Josie for a few days this time and Josie describes victim saying defendant was acting stupid and that victim said that she needed out of the relationship.

(RE, SOM, OA, DV)

page 55 Regularly heard defendant accuse victim of having been unfaithful, of having a "Sancho" (boyfriend on the side.) That at page 56, victim never went out on defendant to her knowledge.

(PO, OA, LO)

page 56-57 Verifying having seen the staples in victim's head, and saying that victim explained this by saying that she had hit her head after defendant pushed her but also said at another time that she fell and hit her head.

(OA, DV, RE, SOM)

page 58 Victim told Josie that "he (defendant) had a lot of guns, she said a lot of guns, and he was always bragging". That reference separate incidents of defendant pointing a gun at victim "that I (Josie) knew, about three times".

(RE, PO, OA, DV)

page 59-63 Victim would fight back and "never put up with nothing with him". That though victim tried to explain away a bite mark and other bruises that she could tell victim was lying about this (in this instance explanation of one of the bite marks) and that Josie threatened to not let victim see defendant if it continued. Victim

describes bite marks on back and chin as a result of physical fight with the defendant, as was a separate incident with a bite on victim's back.

(OA, DV, SOM, RE, LO)

page 63-64 That on the night preceding her death victim "promised me that she was going to leave (the defendant), and she was tired of all of this shit" (said as victim hugged Josie as she was leaving the party).

(RE, SOM, RG, EU)

page 65 Heard defendant yelling at victim on phone at party "You better come home."

(PO, OA, DV, RG)

page 66-67 Clarifying earlier statements about defendant grabbing victim at Josie's house a couple times that "He would grab her around the arms. tight, he would grab her around the wrist" out of anger.

(OA, DV)

pages 67-68 That though Josie would want to call the police after some of these incidents the victim would cry and talk her out of it, saying that she didn't want the defendant to go to jail.

(RE, SOM, OA, DV)

PART 1(C) Declarant Maria Munoz, younger sister of victim

page 78-79 Martha said "her and Jesus went to like a farm or field or something and he let her shoot three or four something of his guns". In context of victim talking about defendant being stupid and talking (threatening?) victim in reference to his guns.

(RE, SOM)

page 80-81 How victim tried to hide the domestic violence from her sister and that when Maria asked victim would just say defendant was acting "stupid." That in about July, per victim, "that he was stupid and that he called her a whore, that he had mentioned she was going to be just like my cousin Anna and that she was telling me she didn't want to be with him because he would call her a whore and all kinds of different stuff".

(RE, OA, DV)

page 82-83 When Maria would visit her mom's house and victim was there "that they would fight on the phone" and "most of the time she would tell him she (sic, believe this should be "he") was stupid and stuff like that". That victim said (once) that she was going to leave defendant.

(RE, DV, OA, SOM)

pages 83-84 The King Soopers incident where victim has bruises on left side of her face and realizes for sure that Maria was aware of the domestic violence.

(OA, DV)

page 85-86 About a month after the baby was born-incident where victim and Maria and the baby leave with their uncle (actually Daniel or Gefeermin (sic), the boyfriend of Aunt Patricia, pp 101-103). In this incident defendant follows them in another car and after repeated efforts to stop the car pulls his car ahead of Uncle Daniel's and tried to take the baby and threatened Uncle Daniel, "why didn't he pull over, that if he had a problem, something about his gun", and later clarifying "I guess more likely wanting--threatening him, to shoot him (Uncle Daniel).

(OA, DV, PO)

page 87-90 The K-Mart incident, where defendant was angry that the victim left the baby with her mother, Viola, and went to Viola's and took the baby, and of victim's attempts to keep the defendant from learning that Viola had the baby and her concern for herself and the baby.

(RE, OA, DV, SOM)

page 91-94 The entire incident and events at the trailer of victim and defendant where defendant pointed a gun at Maria's head in front of the victim, later threatening victim with the gun as well. Victim's actions toward defendant with two knives the running out. (see also i.e. pp 106-107)

(OA, DV)

page 96 Victim not afraid of defendant when he pulled a gun on her.

(RE, SOM, OA, DV)

page 96-98 Maria saw bruises on victim, including on victim's hand (see also page 116) where defendant had bitten her (including the version of the cut head closed by staples wherein victim told Maria that she had struck her head on a dresser).

(OA, DV, SOM)

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PART 2 TRANSCRIPT OF HEARING HELD 11-23-99

Part 2(a) Declarant is Nichole Gutierrez, 1st cousin of victim

page 6-7 She saw defendant hit victim in the face with an open hand, knocking victim back. Nichole pushed the defendant out of her house after this, cussing at him.

(OA, DV)

page 7 She saw bruise on victim's face, that victim explained as the result of defendant "just playing around" (see also re this page 14 a defendant playing around).

(OA, DV, RE, SOM)

page 8- Saw bite-marks as result of three different occasions where defendant bit her, on victim's chest, breast and shoulder. This occurred after the bruise on victim's eye (and page 14 defendant acting stupid when the bite-marks occurred).

(OA, DV)

pages 10-13 Many phone arguments between victim and defendant before she was pregnant. She saw defendant push victim in the face in the summer of 1998. This also occurred while defendant in a car and the victim was leaning in but appears to clearly be a different occasion as per Nichole no one else was present to observe this incident. This push did not make the victim fall but did shove her back (also re this incident see pages 16-17).

(OA, DV)

The relationship was not healthy and was a controlling one, partly on the part of the victim but mostly on the part of the defendant.

(LO)

That per victim the defendant didn't want victim to be around her own family.

(RE, DV)

page 14-15 Victim's statements re injuries that victim was angry about defendant having caused bruises to her. That defendant was the instigator but that the victim fought back.

(RE, OA, DV, SOM)

Part 2(b) Declarant is Viola Castillo, mother of the victim

page 25-26 Defendant didn't like victim to leave the baby anywhere and on December 23, 1998 (three days before victim's death) he came and took the baby from Viola when victim was shopping (the K-Mart incident). He took the baby wearing only a T-shirt and a sheet (receiving blanket). Defendant was angry. (see also pages 39-40 re this)

(DV, OA, PO)

page 26-27 On December 24, 1998 per victim she argued with defendant on the phone as she waited in vain for him to pick her up to go to defendant's mom's (Andrea's) house. Per victim they never did go.

(RE, OA, DV)

page 28 In November or early December, 1998, Viola was with victim and defendant when Martha told viola about the defendant having (recently by implication) pointed a gun at her. Viola then told the defendant that they needed to get rid of the gun. The defendant just laughed.

(RE, OA, DV, PO, SOM)

page 28-29 Viola saw bite marks on victim and victim said that defendant liked to bite her. (This includes the "ancias" explanation by the victim.) Viola saw a total of five bite marks reflecting three different incidents.

(OA, DV, RE, SOM)

page 30-31 She confirms taking victim to the hospital when victim got staples in her head (victim explained this as both hit by gun and bumping head).

(RE, DV, RE, SOM)

page 32-33 Victim said on three occasions that she wanted out of the relationship, including on/about October 14, 1998 and a Saturday 2 A.M. incident when victim was pregnant and defendant kicked her out of the trailer into the cold and snow.

(RE, DV, OA, SOM)

page 33-34 Victim left defendant and came to live with Viola about four times while pregnant and two times after the baby was born (one of which was simply directly after the baby was born) following fights with the defendant. Would go back after periods of time varying from two or three days to a week.

(OA, DV)

page 35-36 Viola heard the victim tell the defendant on the phone that she was tired and wanted out of the relationship. This was about a week before Thanksgiving in 1998.

(RE, EU, SOM)

Part 2(c) Declarant Janice Crespin, victim's aunt

page 47-48 She saw bruises on the victim's arm from the bite of defendant. (Note, page 49, that victim didn't tell her that defendant bit her, Josie did.)

(OA, DV)

Part 2(d) Declarant APD Detective Chuck Mehl

page 51-61 In post-Miranda interview with defendant (second interview following interview with Det. Petrucelli) defendant made following admissions that confirm or bolster other witness statements as follows:

--admitted he shot victim (on 12-26-98)

--admitted (his version was a pellet gun) pointing a gun at victim and her sister Maria some ten months before the homicide

--confirmed that victim received a cut head (his victim was that this was as a result of defendant throwing an object at her, that he could not remember what object he threw but that she had stitches (staples) as a result

--admitted that he had recently bitten victim on her shoulder. (confirmed by autopsy and consistent with other witnesses' observations)

--that he had called the victim at the party the night before her death and that he was angry about victim being at the party that he did not get along with the victim's family

--that in argument preceding the shooting defendant made the statement that he could keep the victim from leaving or he could stop her by shooting her in the leg

CERTIFICATE OF SERVICE

I hereby certify that I have faxed a true copy of the foregoing Delineation of Statements and Other Acts Sought to be Admitted to Antonio Lucero at (303)458-8249 on this 26th day December, 1999.

Philip M. Smith

☒ District Court ARAPAHOE County, Colorado Court Address: **People of the State of Colorado** **vs.** **Defendant:** JESUS MANUEL MACIAS Attorney or Party Without Attorney: (Name & Address) JESUS MACIAS P.O. Box 1010 Canon City, Co. 81215 Phone Number: FAX Number: E-mail: Atty. Reg. #:	▲ COURT USE ONLY ▲ 98CR3336 Case Number: Div.: 6. Ctrm: 408

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

CONVICTION UNDER ATTACK

1. What was the date of your conviction? May,26,00 (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: Evens Garcia
Richard A. Lucero
Address: 3030 W. 38th Ave
Denver Co. 80211

Name: Chris Attmann
Address: 50 South Steel, Suite 333.
Denver Co. 80209

Nature of Representation (for example: preliminary hearing, plea, trial)

Jury Trial

Sentencing Only

DIRECT APPEAL

4. Was this case appealed? ☒ YES ☐ NO

If yes, please provide the following:
Appeal Case Number: # 01CA934

Appellate Court: COLARADO COURT OF APPEALS

Result: Affirmed Date: April,17,2003

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 District court

2. Nature of proceeding. For example, Rule 35(a), Rule 35(c), § 2254 Writ of Habeas Corpus.
Motion for leave And permission to file motion for post-conviction relief pursuant C.R.C.P. 18-1-410 & Crim.P Rule 35(c)(1) (I-VIII & (3) and for Alternative relief for counsel and for Transcripts.

3. Claims raised None

4. Name of attorney if any None

5. Did you receive an evidentiary hearing on your petition, application, or motion? ☐YES ☒NO

6. Result Did to file 35c motion within 45 days on Form 4

7. Date of Result July 13, 05

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. Defendant had to file this 35(c) motion to meet deadline for 2254 writ of Habeas corpus and the 45 day deadline.

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.*

GROUNDS 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 justifiable 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.

Jesus Macias
PETITIONER'S ORIGINAL SIGNATURE

Jesus Macias
PETITIONER'S PRINTED NAME

Territorial Correctional Facility
P.O. Box 1010
ADDRESS

Canon City, Co. 81215
CITY, STATE, ZIP CODE

PHONE NUMBER

1. Defendant claims conflict of interest existed with trial counsel Mr. Richard Antonio Lucaro Reg #9829 & also with Mr. Evens A Garcia #11288. Based on the following law and facts.

LAW

The Colorado Rules Of Professional Conduct, describes conflects of interest and states that a Lawyer "shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to other clients or to a third person, or by the lawyer's own interests [.]" Colo. RPC 1,7(b). The rules futher requires that an attorney "Shall Not" represent a client and "Shall Withdraw" from representing a client if the representation will result in violation of the rules or professional conduct or other laws. Colo.RPC 1.16(a)

FACTS

1. Trial Counsel Lucero was suspended from the practice of Law for thirty days commencing August 21,1999. two days before Defendant Mr. Jesus M. Macias was scheduled for Jury Trial August, 23,1999.
   Hear, the suspention itself created a conflict with the Defendant was materially limited by the Supreme Court's order to to immediately cease practicing Law.
   This suspention also meant that mr. Lucero could not represent the Defendant at trial unless the Defendant waived his speedy trial rights.

The Defendants speedy trial rights were waived August,13,1999 under Mr. Luceros conflicted advice.
If the Defendant had refused to waive his speedy trial rights, then Mr. Lucero would have lost the Defendant as a paying client, and thus he had a personal monetary incentive to convince the Defendant to waive his right to speedy trial rights, whether or not it was in the Defendants best legal interest to continue to retain his services.
In fact, the waiver of the Defendant,s speedy trial rights did harme the Defendant, becuase the District Attorney was able to expand his motion for admisson of "similar transactions" under the rules of evidence and domestic violence statute, to be used aginst the Defendant at trial during the New six month period following the Defendants waiver of speedy trial, due to the Defedants Attorney's suspention from the practice of Law,
Date of original delineation of "other acts" of evidence filed July,9,1999. and expanded delineation of "other acts" filed December,27,1999.
Which if not for Mr. Luceros suspention and conflicted advice would have never been expanded.
There fore Mr. Luceros ability to affectively represent the Defendant was again limted by his own intrests.

Mr. Lucero created another Layer of conflict by failing to advise the Defendant that he had a right to conflict-free counsel to help him make the dicision of whether he should continue with Mr. Luceros representation (after the suspension ceased) or find a new Attorney.
Due to the fact that neither the District Court nor Mr. Lucero advised the Defendant that he had the right to seek advise from conflict-free counsel.
The Defendant had no opportunity to exercise his due process and Sixth Amendment Rights to have Mr. Lucero replaced or to represent himself.
(Mr. Lucero was retained not Appointed)

The fact that Mr. Lucero continued to represent the Defendant under a conflict and, give the Defendant conflicted advice at all cost to the Defendant only suggests actual impairment of Mr.Lucero own interest.

As our Supreme Court has recognized, "[W]hat is critical, in our view, is the presence of a real and substantial conflict that placed the Defense Attorney in a situation inherently conducive to and productive of Divided loyalties."People v. Castro, 675 P.2b 932,945 (Colo. 1983); See also Holloway v. Arkansas, 435 U.S. 475 (1978).

Hear, Defendant was adversely affected by the violation of his right toseek the advice ofconflict-free counsel, because he was advised (by conflicted counsel) to waive his speedy trial right in order to keep his privately retained Attorney (Lucero) and the adverse affect was that the prosecution was able to seek and eventually admit many more instances of "similars" than originally sought out to do in the mntion filed before the original speedy trial deadline, June 24,1999 & June 25,1999. In short, the prosecution was much better prepared for trial after speedy trial was waived due to Mr. Lucero's suspention from the practice of Law.

Furthermore the Defendant claims he was denied his right to counsel.
A Defendant has the right to be represented by counsel of his choice, a right rooted in the Sixth Amendment, Rodriguez v. District Court, 719 P.2d, 699,705 (Colo. 1986).
This right "reflects the substantial interest of a Defendant in retaining the freedom toselect an Attorney the Defendant trusts and in whom the Defendant has confidence."
Rodriguez v. District Court, 719 P.2d 705-706. Preservation of Freedom of choice of counsel is a central feature of our adverary system, and is of substantial importance to the integrity of the Judical process."
Id. At 706.

2. Defendant claims his waiver of speedy trial was not knowing, inteligently or volonitary, based on the following facts.

LAW

Because a waiver of a constitutional right must be made (conflict-free counsel) knowing, inteligently and volonitary and the Defendant needs advisment of the waiver on the record.

FACTS

Defendants waiver of his speedy trial was not knowing, int-eligently or voluntary, because he was not advised by the District Court of (Mr. Lucero's) conflict of interest in advising the Defendant anout waiver of speedy trial due to Mr. Lucero's suspension from the practice of Law.
Also, Defendant was not advised by "conflict-free" counsel about wheter it was in his best interest ot waive his speedy trial rights given the circumstances of Mr. Luceros suspension from the practice of law.
In other words, Defendant was acting on his "conflicted" Attorney's advice when he waived his speedy trial rights, but neither Mr. Lucero nor the District Court advised the Defendant that Mr. Lucero had a conflict of interest on advising him on the issue.
And neither the Court nor Mr. Lucero advised Defendant of his right to seek legal advice on the waiver of speedy trial issue from "conflict-free" councel.
Therefore Defendand did not waive his right to speedy trial knowing, inteligently or voluntary, and was denied his right to speedy trial.

Not only did the Defendant waive his right to speedy trial once, but twice, yes twice.
The second waiver taking place December 29,1999. When Defendant was forced to waive speedy trial right by conflicting advice of

Mr. lucero, due to the fact that becuase of first waiver of speey trial August,13,1999.

The District Attorney expanded thier motion for admission of "similar transactions" under the rules of evidence and domestic violence statute, the Defendant was not prepaired for the new issues that were introduced so was advised by conflicting Attorney Mr. Lucero to waive his right to speedy trial to prepair for the new evidence introduced against him.

Once again nithere the trial Court nor Mr. Lucero advised the Defendant of the esesting conflict-free advice on what would be in his best intrest to waive his right to speedy trial, also no one tells the Defendant that he has already waived his right to speedy trial.

In those instance where the trial Court knows or reasonably should know of a conflict, the trial Court possesses the affirmative duty to inquire about the propriety of continued representation.

In this case in the motion to continue filed July,30,1999. It clearly states that Mr. Lucero was unable to ack as counsel for the Defendant during his trial, because he was suspended from the practice of Law.

The Court should have then advise the Defendant on the record regarding his right to conflict-free counsel and the risk associated with proceeding despite defence counsel's conflict of intrest, but failed to do so.

Next the Court should have established whether Defendant wished to waive the conflict and, so, whether his waiver is voluntry, knowing, and intelligent.

In this case the Defendant firmly belives he meets the burden of establishing a conflict of interest <u>existed</u> and that he did not legally waive his right to cnflict-free counsel.

The defendant, herein, claims he was denied a COMPLETE and CORRECT reccord of the trascript. Because of this his right to due process, his appeal was damaged by the incomplete record of what occured during the jury deliberations.

Because the transcrpt of the "ALLEN INSTRUCTIONS", the Appealate counsel had NO knowledge of the ALLEN INSTRUCTIONS" prior to writing the opening brief. The "ALLEN INSTRUCTIONS" were giving on 05/26/2000.

This issuue is tied in with the following;

Defedant claims JUDGE'S MISCONDUCT" on the grounds that the Judge gave the jury defective instructions to the jury on 05/26/2000.

The "TIME FUSE" instruction giving the jury a time limit to reach a verdict at the end of thier diliberations or they would be dimissed.

There is no record of this. But given the chance the defendant/or counsel, by interviewing the jurors can provide proof that thi happened as a matter of fact.

Also the defendant claims, whether the judge coerced the jury verdict by giving the jury defective instructions. The defendant believes that he (the judge) did do this as a matter of fact. Also that the trail Judge, prior to giving the "ALLEN INSTRCTIONS" to the jury, gave the jury an instuction to DISR EGAURD a PRIOR DELIBERATION" and start A NEW." (this instrction should be in the record for the date of 05/26/2000.) And the "ALLEN" was the fist insruction given to the jury after doing so.

If a verdict was not reached in th prior 2 1/2 days how could they have reached one in the 1/2 day like they did?

There was no communication from the jury to indicte a deadlock, hung jury, or even an impass, so we ask our-selfs why the "ALLEN INSTUCION? The giving of the instruction only suggests prejudice from the judge.

I, the defendant herein, am giving my permission to interview the jury with appointed council, to prove the evidence needed to prove this took place on 05/26/2000.

The following are the case laws to support these issues; (see page #2)

Every person in Colorado is entitled under Article VI,§ 2 clause(2) of the Colordo Constitution to appeal a judgement against him to the Supreme Court. Various statutary provisions define the procedures for this appeal of right. SEE, e.g.,Section 13-4-102,5 C.R.S. (2001)(Court of Appeals' jurisdiction);Section 13-4-108 to 110,5 C.R.S. (2001)(supreme court review);Section 16-12-101, 6 C.R.S. (2001)(right to appeal). Furthermore,there is a fundamental right to appeal a criminal conviction uder both the state and federal constitutions. **WEASON V.COLORADO, 731 P.2d 736(COLO.1987);** see also, **HARDY V. UNITED STATES, 375 U.S. 277 (1964)**(due process entitles a criminal defendant to a record on appeal that includes a complete transcipt of the proceedings at trail);**U.S. CONST.** amenda. **VI,XIV;COLO. CONST.** art. II,§§ 16,25.

Additionally, the **DUE PROCESS CLAUSE** and right to council under both the United States and Colordo Constitutions guarantee an accused procedural safeguards on appeal. **U.S. CONST.** amemnds. **VI,XIV;COLO.CONST.** art. II, §§ 16,25. Due process requires that the right of appeal be a right to an "adequate and effective" appeal, which is more than a meaningless ritual. **U.S. CONST. amenda. VI,XIV;COLO.CONST.art. II,§§ 16,25;** see also **EVITTS V. LUCEY, 469 U.S.387,396(1985)**(due process requires that the accused have "effective"assistance of council on his fist appeal as of right); **ANDERS V. CALIFORNIA,386 U.S.738(1967); DOUGLAS V. CALIFORNIA,372 U.S.353(1963); STROUP V. PEOPLE,656 P.2d 680(COLO.1982)** (constitutional right to council extends to council's assistance and advice with regard to pursuit of appeal rights made available by state procedure)."[T]he procedures used in deciding appeals must comport with the demands of the Due Process and Equal Prodectioin Clauses of the Constitution." **HARRIS V. CHAMPION, 15 F.3d 1538(10th Cir. 1994).**

Accordingly,when an appellant,through no fault of his/her own,is deprived of all or part of a record necessary for an appeal,a conviction cannot be affirmed. See **HAWKINS V. SUPERIOR COURT,196 COLO.86,580 P.2d. 642(COLO. APP. 1990).** "If the needed records are lost or destroyed, automatic reversal of the conviction may be the result." **JONATHAN M.PURVER & LAWRENCE E. TAYLOR, HANDLING CRIMINAL APPEALS,100 § 69(1980).** In **HAWKINS V. SUPERIOR COURT,** the trial court denied the defendant's motion for a jury trial,and the case was tried to the court. On appeal, no record of the hearing on the defenant's motion for a jury trial could be located. Our supreme court held that, under these circumstances, the lack of a record denied the defendant his right to a meaningful appeal, and that the defendant should be afforded an entirely new trial. **HAWKINS, 580 P.2d 813.**

Similarly, in **PEOPLE V. KILLPACK**, the court reporter lost the stenographic notes of the testimony of the prosecution's rebuttal witness.The defendant's attorney filed a motion for a new trial reflecting his recollection of the witness' testimoney,which the court denied. The court of appeals held that **"[w]hen testimoney this crucial is in dispute and the precie language used is criical, reconstruction is not an appropriate remedy for the missing transcript."** KILLPACK 793 P.2d at643.The court in **KILLPACK** concluded that "when a defendant can show that the incomplete record visits a hardship upon the appellant and prejudices his appeal, reversal is proper." See also **PEPLE V. LOGGINS, 981 P.2d 630,633(COLO. APP. 1998)**,cert.denied,(reaffirming **KILLPACK** standard for assessing when reversal is required). Federal courts have recognized that summations (i.e.,closing argument),**JURY INSTRUCTIONS**, and the return of the jury verdict are all "critical stages" of trial. See **LARSON V. TANSY, 911 F.2d 392,394(10th CIR. 1990).**
(AN **ALLEN** instruction is a jury instruction.)

The defendant's claim of ineffective assistance of council is based on conflict of interest. This NOT ONLY prejudiced his case but also deprived him of due process in having a fair trail.

"LAW"

The **"STRICKLAND STANDARD"** for determing whether council was ineffective has been adopt by Colorado as the so called **"STRICKLAND TEST"** and is the standard for determing whether a criminal conviction was obtained in violation of a defendant's constitutional right to effective assistance of council. In order tp establish a claim that defence council was constitutional ineffective in representing a criminal defendant, the defendant must show: (1) defence council's representation fell "outside the wide range of prfessional competent assistance" which is reasonably demaned of defence council in criminal cases under prevailing professional norms",(2) the defendant was actually prejuciced as a result.

"FACTS"

A defendant has a constitutional right under both the United States and Colorado constitutions to receive reasonably effective assistance of an attorney as his advocate. U.S. CONST. amends. VI,XIV; COLO. CONST. art.II 16; PEOPLE V. SPARKS 914 P.2d 544(COLO.APP. 1996).

How could the defendant,herein,have received reasonably effective assitance of council when there was a conflict of interest that effected council's performance in defending him in this case? Defence council caused more harm to the defenant than he did good. Therefore defence council's performance was constituionally deficient in that it fell below the objective standard of reasonably effective assistance demanded of attorneys in this criminal case.
Also the deficient performance and poor choices made by Mr. Lucero and conflicted advice given by Mr Lucero to wave defendants right to a speedy trial have **TWICE** perjudiced the defendants case to the point that the District Attorney was able to expand his motion for admission of **"SIMILAR TRANSACTIONS"** under the rules of evidence and domestic violence statute. Evidence that would have never been brought to light if not for for defendant's trial councils ineffective,conflicting advice.Which meant defence council's errors and not to mention the trial courts's error to allow conflicted council to contiue to represent the defendant were **so** prejudice that it deprived the defendant of due process of a fair trial and to effective council.These are guaranteed under both the United States and Colorado constitutions. **U.S. CONST. amenda. VI,XIV;COLO. CONST. art.II 16.**

Here the defendant shows inadequate representation based on the record as a whole. The defendant was denied fundamental fairness. Also the defendant shows what councilchose to do or not to do,as to which he had conflicting duties,and shows that the course taken was influened by the conflict in the first two,and this issue raised in this motion. Therefore the defendant is entitled to relief.

Also the defendant brings forth the following issues as to ineffective assistance of council;

1.)Mr. Lucero did not advise the defendant of pending disciplnary proceedings **in time** for defendant to seek different council who could be orepared for trial within the **original speedy trial period.** This is because he wanted to keep defendant as paying customer.

2.)Mr Lucero failed to have a gun expert to prove gun had a broken safety. Which was later brought to light by the Distric Attorney's gun expert. In which Mr. Lucero tried to change defence towards the broken safety.Which he would have known if he'd hired a gun expert to begin with.

3.)Mr Lucero failed to call witness for the defence that would have changed the out-come of the trial.Such as Hide:Hoover,and Ramon Macias.

4.) Mr. Lucero failed to preserve on the record an out-burst made by procution witness Josiphine Gz. .That defendant was a drug dearler, and the trial Judge strucked from the record. Mr. Lucero also failed to preserve this issue for direct appeal. This denies defendant the right to raise the issue on direct appeal.

(con't on page #3)

5.)Mr. Lucero failed to bring forward police note that witnesses stated they never saw or heard of Mr. Macies hitting the **VICTIM.** Then at trial said they did see me hit the **VICTIM.**
6.)Mr. Lucero faild to file a motion to suppress defendant police interview. When in the interview the defendant clearly stated he neede an attorney,and that he had nothing else to say.
7.)Mr. Lucero failed to object to so called "key evidence" that was the District Attorney's probable cause to bind over on charge of fist degree murder. When the judge asked to have C.B.I. test back before ruleing. And key evidence of a gray t-shirt turned out to have nothing to do with the case. But was still used to bind over charges of first degree murder,and presented at trial as evidence. Hearing was held **20/24/99**,a review was set for **03/25/99**. But Mr. Lucero never got the evidence out,when he should have because it had nothing to do with the case.
8.)Mr. Lucero failed to object to alternate juor replacing ill juior. Were trial court should have followed **(CRIM. pro. rule 24E)**,juior should replace ill juiors in the order they were seated.
9.)Mr. Lucero faled to hire Domestic Violence expert for the defence.
10.)Mr. Lucero failed to preserve the giving of the defective jury instruction on the record because it was given **off** the record. Also Mr. Lucero failed to object to the defective instruction that was given to the jury known as the **"TIME FUSE** instruction that limited the jury to reach a verdict by a certain time before ending deliberations.This therefore,forcing a verdict from the jury.
11.)Mr. Lucero told the jury that **Macias** may have lied to informant in the case to be cool in jail.
12.)The defendant claims his miranda rights were violated. This because when he told police he needed a lawyer they did not honor his request. The defendant also told police he had nothing else to say and police kept questioning him. The defendant claims his confession was not volantary due to his state of mind.

Wherefore, the Defendant prays that this Honorable Court issue its order apponiting conflict-free consel to represent him the ligitagtion of this post-conviction relief motion.

CERTIFICHT of Mailing:

I certif that on this 8th day of August' 2005 that a true and copy of this document was deposited in the U.S. mail, first class posteg pre-paid and addressed to.

Hornorable William Blair Sylvester,
Arapahoe County District Attorney
Arapahoe County Justice Center
Division. 6 Court Room 408
7 325 South Potomag Street
Englewwd Colo. 80112

Jesus Macias

JESUS MACIAS

Subscribed and Sworn to
Before me this 8th day of August 2005

John C. Evans
Notary Public

My commission expires: 11-26, 2006

DISTRICT COURT ARAPAHOE COUNTY, STATE OF COLORADO Arapahoe County Justice Center 7325 South Potomac Street Centennial, Colorado 80112	
Plaintiff(s): People of the State of Colorado v. **Defendant(s):** Jesus Manuel Macias	**▲ COURT USE ONLY ▲**
	Case No. 98-CR-3336 Courtroom: 408

ORDER DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF PURSUANT TO CRIM.P. 35(C)

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 he 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 counsels performance fell below the standard of professional reasonableness and that such performance prejudiced him, i.e., that there is 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