

STATE OF COLORADO  
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Honorable Alex Martinez  
Colorado Supreme Court  
Colorado State Judicial Building  
2 E. 14th Avenue  
Denver, Colorado 80203

RE: Proposed Rule Changes Relating to Specific Exceptions to Procedural Bars in Crim.  
P. 35(c)

Dear Justice Martinez:

In April 2003, the Court requested that our committee consider additional matters relating to Crim. P. 35(c). This request was the fruit of the Court's review of our prior proposals relating to Crim. P. 35(c) and the Court's consideration of information obtained through a public hearing on the proposed rule change. The Court specifically requested that the committee "include specific exceptions to 35(c)(3)(VI) and (VII) similar to those suggested at the (public) hearing on these changes by Bob Russell from 28 U.S.C. 2254 and 2255." In response to the Court's request, the Rules Committee appointed a subcommittee to review the federal exceptions. The sub-committee submitted a report, a copy of which is attached.

Included in the subcommittee's report were the various exceptions proposed by Mr. Russell as well as other exceptions that appear in the federal rules. The Committee as a whole voted on all the proposed exceptions individually. There was not consensus. The committee was split 5-3 or 6-3 on every vote.

The proposal which was finally adopted by the majority of the committee included two exceptions to Crim. P. 35(c)(3)(VI). Subsection VI deals with successive motions raising an issue that had been previously raised. The two adopted exceptions included exceptions for:

- (a) Any claim based on evidence that could not have been discovered previously through the exercise of due diligence,

- (b) Any claim based on a new rule of constitutional law that was previously unavailable, if that rule has been applied by the United States Supreme Court or Colorado Appellate courts.

Although the language in the exception detailed in (b) is different than that originally proposed, those members of the committee voting against the language feel that it still would adequately address the concerns of the Court relating to exceptions to subsection (VI). However, this is not the case as to the exceptions adopted by the Committee as to subsection VII.

Those members of the committee disapproving of the final version of exceptions to subsection VII believe the Court should be aware of alternative exceptions and the arguments in support of those alternatives prior to deciding whether to adopt the rule changes as proposed.

As originally approved and proposed to the Court, there were four exceptions to subsection VII. Subsection VII deals with motions which raise issues which have never been raised before but could have been raised previously. The committee approved and the Court appears to have agreed that exceptions (a) – (d) are appropriate. This includes exceptions to deal with: (a) events occurring after initiation of the litigation, (b) newly discovered evidence, (c) new constitutional rules of law, and (d) lack of subject matter jurisdiction.

The federal law suggests additional exceptions. This would include exceptions to deal with persons who are able to establish their actual innocence and situations where external factors prevented the defendant from raising the claim. The first exception was noted by Mr. Russell in the materials he provided the Court at the public hearings. The second exception is recognized in federal case law. This second new exception was effectively adopted by the Committee as a whole, but the first one, an exception to recognize actual innocence, was repeatedly rejected by the Committee as a whole. The Committee took this position even though this Court seemed clear in its request that the Committee “include specific exceptions . . . similar to those suggested at the (public) hearing on these changes by Bob Russell.”

Two forms of an “actual innocence” exceptions were presented to the Committee. The first form proposed an exception stating that:

Any claim based on newly discovered evidence that if proven and viewed in light of the evidence as a whole would be sufficient to establish by a preponderance of the evidence that no reasonable fact finder would have found the defendant guilty of the offense,

This was rejected by the Committee. The second version proposed was:

“Any claim based on an assertion of actual innocence which in the interest of justice should be heard.”

This was also rejected by the majority of the Committee on a 4-5 vote.

Those members of the Committee in support of an “actual innocence” exception would note to the court the following arguments in support of adopting such an exception:

1. Those persons who can establish that they are actually innocent would be barred from raising a petition based on newly discovered evidence unless they can establish that they exercised due diligence in trying to discover the evidence previously. Hypertechnical arguments relating to lack of diligence will in effect keep innocent persons incarcerated in violation of one of the most fundamental due process concepts that our government does not punish the innocent.
2. There is an interest in state issues being resolved in state court. The federal exception relating to actual innocence exists to allow state prisoners to raise such issues when states have not given them a similar chance to raise them in state court. There is no valid governmental interest in barring state prisoners from raising in state court issues relating to their actual innocence that they clearly would be able to raise in federal court under the federal exceptions detailed by Mr. Russell.
3. It should be remembered that the exceptions in Subsection VII do not apply to second or successive 35(c) motions; rather, the exceptions in VII only apply to claims that have never been raised but could have been raised previously, for example, on appeal. Subsection VII creates a procedural bar to claims raised in an individual's first 35(c) motion, a limitation unprecedented in Colorado. There has been substantial minority opposition to adopting such a bar. The minority believes that the new revisions to 35(c), including the form motion, will eliminate many of the perceived problems with duplicative or successive 35(c) motions and that an additional procedural bar to claims that "could have" been raised on appeal is ill-advised. If the Court adopts this procedure bar, it is essential to the integrity of the state system to have an actual innocence exception.

Those members of the committee voting for adding an actual innocence exception believe that given the above arguments, an actual innocence exception should be added to subsection VII.

Thank you for your consideration of these additional arguments.

Sincerely,

Steven K. Jacobson