

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Colorado Supreme Court Records and Briefs Collection

---

6-16-1978

### Boules v. District Court In and For Nineteenth Judicial Dist.

Follow this and additional works at: <https://scholar.law.colorado.edu/colorado-supreme-court-briefs>

---

#### Recommended Citation

"Boules v. District Court In and For Nineteenth Judicial Dist." (1978). *Colorado Supreme Court Records and Briefs Collection*. 3093.

<https://scholar.law.colorado.edu/colorado-supreme-court-briefs/3093>

This Brief is brought to you for free and open access by Colorado Law Scholarly Commons. It has been accepted for inclusion in Colorado Supreme Court Records and Briefs Collection by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact [rebecca.ciota@colorado.edu](mailto:rebecca.ciota@colorado.edu).

FILED IN THE  
SUPREME COURT  
OF THE STATE OF COLORADO  
JUN 13 1978

No. 8205

*David W. Bregina*

IN THE SUPREME COURT OF THE STATE OF COLORADO

ROBERT BOULIES,	]	
	]	
Petitioner,	]	
	]	
vs.	]	ORIGINAL PROCEEDING
	]	PURSUANT TO RULE 21
THE DISTRICT COURT IN AND	]	COLORADO APPELLATE RULES
FOR THE NINETEENTH JUDICIAL	]	IN THE NATURE OF MANDAMUS
DISTRICT AND STATE OF	]	
COLORADO: Honorable Donald A.	]	
Carpenter, Presiding.	]	

COMES NOW Robert Boulies, Petitioner herein, by and through his attorneys, and respectfully requests this Honorable Court to issue an Order directing Respondent Court to (1) grant Petitioner's motion pursuant to Rule 35 (a), Colorado Rules of Criminal Procedure and C.R.S. 1973, 18-1-410 (1)(f), as amended, and resentence Petitioner on his aggravated robbery conviction, pursuant to C.R.S. 1973, 18-1-105, as amended; (2) to proceed with a determination on the merits of Petitioner's motion pursuant to Rule 35 (a), Colo. R. Crim. P. and C.R.S. 1973, 18-1-410 (1)(f), as amended, in respect to whether Petitioner should be resented to concurrent sentences for his two convictions which are based on the same act arising out of the same criminal episode, pursuant to C.R.S. 1973, 18-1-408 (3); and (3) to proceed with a determination as to whether Petitioner should be granted a sentence reduction/reconsideration as requested in Petitioner's motion pursuant to Rule 35 (a), Colo. R. Crim. P., the aforesaid motion being filed in and subsequently denied by Respondent Court.

AND as grounds therefor, Petitioner, by and through his attorneys, states as follows:

I

That Respondent Court has proceeded in direct contravention of the promulgated rules and previous decisions of this Court, ruling that it lacks jurisdiction to entertain the relief requested in Petitioner's motion pursuant to Rule 35 (a), Colorado Rules of Criminal Procedure. The Respondent Court has abused its discretion by denying Petitioner relief to which he is entitled as a matter of law. Petitioner is without a plain, speedy and adequate remedy should this Honorable Court refuse to exercise its original jurisdiction in this matter.

II

That the facts upon which Petitioner contends that Respondent Court is acting in direct contravention of previous decisions of this Court and in a manner abusing its discretion are as follows:

1. On April 26, 1972, Petitioner was convicted of the offenses of first degree murder and aggravated robbery, pursuant to C.R.S. 1963, 40-2-3, as amended and C.R.S. 1963, 40-5-1, as amended, respectively.

2. Petitioner was sentenced on July 10, 1972, to a term of life for the first degree murder and to a term of fifty (50) years to life for the aggravated robbery, said sentences to run consecutively. These sentences were, at the time of sentencing, within the statutorily prescribed penalties.

3. On May 20, 1975, the Colorado Court of Appeals, in case number 74-329, affirmed Petitioner's convictions in a decision reported at 545 P.2d 1050.

4. That a Petition for Rehearing was filed on June 3, 1975, in the Court of Appeals, which was denied on June 10, 1975.

5. As a result of the oversight or negligence of one of Petitioner's previous Deputy Public Defenders, a Petition for Writ of Certiorari was never filed in the Colorado Supreme Court within the time frame provided by Rule 52, Colorado Appellate Rules. Two years later, upon being advised

of the failure of his attorneys to file the necessary petition for review by the Colorado Supreme Court, Petitioner prepared, as soon as possible thereafter, pro se motions which he filed with the Colorado Supreme Court. By those motions, Petitioner sought leave to proceed in forma pauperis and leave to file a Petition for Writ of Certiorari out-of-time.

6. On August 18, 1977, the Colorado Supreme Court entered an Order in case number C-1331, Boulies v. People, denying Petitioner's Petition fo Writ of Certiorari.(See Appendix I)

7. As a result of the entry of this Court's Order denying the Petition for Writ of Certiorari, Petitioner filed on December 14, 1977, within the 120 days provided therefore, a motion pursuant to 35 (a), Colo. R. Crim. P., seeking resentencing pursuant to C.R.S. 1973, 18-1-410 (1) (f), as amended, in conformance with the amendatory legislation which had been enacted since his 1972 sentencing, and a sentence reduction/reconsideration.(Appendix II)

8. On May 31, 1978, the Respondent Court conducted a hearing on Petitioner's Rule 35 (a), Colo. R. Crim. P. motion and denied said motion, ruling that the court did not have jurisdiction to grant Petitioner the relief requested therein.(Appendix III)

### III. THE TRIAL COURT HAS JURISDICTION TO GRANT THE RELIEF REQUESTED IN PETITIONER'S MOTION PURSUANT TO RULE 35 (a), COLORADO RULES OF CRIMINAL PROCEDURE.

Rule 35 (a), Colorado Rules of Criminal Procedure, provides, in pertinent part, as follows:

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of a sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a remittitur issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the appellate court denying review, or having the effect of upholding a judgment of conviction. . . . (Emphasis added)

The August 18, 1977 Order of this Court (Appendix I) denying Petitioner's Petition for Writ of Certiorari, preceded as it was by Petitioner's pro se motion pursuant to Rule 26 (b), Colorado Appellate Rules, for leave to file a Petition for Writ of Certiorari out-of-time, impliedly granted Petitioner's motion for leave to file out-of-time. Though Petitioner's convictions had been affirmed by the Court of Appeals in May, 1975, this Court's granting of Petitioner's motion for leave to file out-of-time a Petition for Writ of Certiorari, pursuant to his showing of good cause, reinstated jurisdiction, which had heretofore lapsed, in the appellate courts of Colorado. In the same manner as the appellate courts may cure the jurisdictional defect of an untimely filed Notice of Appeal in a criminal case through the procedural vehicle of Rule 26 (b), Colorado Appellate Rules, see People v. Allen, 182 Colo. 395, 513 P.2d 1060 (1973), so too may they rely upon Rule 26 (b), Colorado Appellate Rules, to reinstate jurisdiction in the judiciary by granting a motion to enlarge the time prescribed by Rule 52, Colorado Appellate Rules.

Once the appellate courts reinstated jurisdiction, the Order of August 18, 1977 had the effect of upholding Petitioner's judgments of convictions in criminal action number 7704 in the Weld County District Court. Resultantly, the provisions of Rule 35 (a), Colo. R. Crim. P., then permitted Petitioner 120 days to seek relief in the nature of correction or reconsideration of previously imposed sentence.

Moreover, the Colorado courts have held that Crim. P. 35 (a) is a valid procedural rule which suspends the finality of a conviction for a period of 120 days after final disposition on appeal. People v. Smith, \_\_\_ Colo. \_\_\_, 536 P.2d 820 (1975). Inasmuch as Petitioner's Crim. P. 35 (a) motion was filed in Respondent Court within 120 days of this Court's August 18, 1977 Order upholding Petitioner's 1972 convictions, prior to the attachment of finality, the trial court had jurisdiction to entertain the relief requested in that motion. Spann v. People, \_\_\_ Colo. \_\_\_, 561 P.2d 1268 (1977); Naranjo v. District Court, \_\_\_ Colo. \_\_\_, 536 P.2d 36 (1975).

Specifically, as finality had not yet reattached to Petitioner's convictions prior to his request for resentencing pursuant to C.R.S. 1973, 18-1-410 (1)(f), Petitioner is entitled, as a matter of law, to be resentenced on the aggravated robbery. Salas v. District Court, \_\_\_ Colo. \_\_\_, 548 P.2d 605 (1976). Under the same analysis, Petitioner is also entitled, as a matter of law, to the Respondent Court's determination as to whether he should have his sentences corrected to run concurrently, rather than consecutively, in conformance with C.R.S. 1973, 18-1-408 (3). This determination will hinge upon the Respondent Court's ruling as to whether the two convictions were supported by identical evidence, as is Petitioner's contention. People v. Anderson, 187 Colo. 171, 529 P.2d 310 (1974). Lastly, Petitioner, having filed his Crim. P. 35 (a) motion within 120 days of this Court's August 18, 1977 Order, must be accorded the Respondent Court's discretionary ruling as to whether or not Petitioner should be granted a sentence reduction/reconsideration.

WHEREFORE, Robert Boulies, Petitioner herein, respectfully requests this Honorable Court to issue an Order directing Respondent Court to (1) grant Petitioner's motion pursuant to Rule 35 (a), Colorado Rules of Criminal Procedure and C.R.S. 1973, 18-1-410 (1)(f), as amended, and resentence Petitioner on his aggravated robbery conviction, pursuant to C.R.S. 1973, 18-1-105, as amended; (2) to proceed with a determination on the merits of Petitioner's motion pursuant to Rule 35 (a), Colo. R. Crim. P. and C.R.S. 1973, 18-1-410 (1)(f), as amended, in respect to whether Petitioner should be resentenced to concurrent sentences for his two convictions which are based on the same act arising out of the same criminal episode, pursuant to C.R.S. 1973, 18-1-408 (3); and (3) to proceed with a determination as to whether Petitioner should be granted a sentence reduction/reconsideration as requested in Petitioner's motion pursuant to Rule 35 (a), Colo. R. Crim. P.

Respectfully submitted,

---

PAULA K. MILLER  
Deputy State Public Defender  
Attorney for Petitioner  
1575 Sherman Street  
Denver, Colorado 80203  
839-2665

IN THE SUPREME COURT  
OF THE STATE OF COLORADO

ROBERT BOULIES,

Petitioner,

C-1331

v.

THE PEOPLE OF THE STATE OF  
COLORADO,

Respondent.

CERTIORARI TO THE COURT OF APPEALS

Court of Appeals No. 74-329

Upon consideration of the motion of the petitioner for leave to proceed in forma pauperis with the petition for writ of certiorari in the above cause, and being sufficiently advised in the premises, it is this day ordered that said motion be, and hereby is, granted.

On consideration of the petition of the petitioner for a writ of certiorari in the above cause, and being sufficiently advised in the premises, it is this day ordered that said petition be, and hereby is, denied.

BY THE COURT, EN BANC, AUGUST 18, 1977.

Supreme Court  
State of Colorado  
Certified to be a full, true and correct copy

AUG 18 1977

WALSH  
Clerk of the Supreme Court

Seal by *Jean M. Kluge*  
Deputy Clerk





minimum of four (4) years and maximum of life provided for by the then applicable robbery statute, and to life imprisonment for the first degree murder. The sentences imposed were ordered to be served consecutively.

3. On May 20, 1975, the Colorado Court of Appeals affirmed Defendant's convictions in a decision reported at 545 P.2d 1050.

4. Defendant filed a pro se motion with the Colorado Supreme Court seeking leave to proceed in forma pauperis and out-of-time with a Petition for Certiorari in this case.

5. On August 10, 1977, in case number C-1331, the Colorado Supreme Court, en banc, denied Defendant's Petition for a Writ of Certiorari, thereby making a final disposition of Defendant's direct appeal. A certified copy of the Supreme Court's August 10, 1977 Order is appended to this Motion and marked as Defendant's Exhibit I.

6. Pursuant to Rule 35 (a), Colorado Rules of Criminal Procedure, the finality of a defendant's convictions are suspended for a period of 120 days after final disposition on appeal, to allow the filing of a motion for correction and/or reduction of sentence(s) in the trial court.

7. This Honorable Court has jurisdiction of this Motion in that 120 days have not yet elapsed from the August 10, 1977 Order denying Defendant's Petition for Certiorari.

8. The Colorado legislature enacted the Colorado Criminal Code, inapplicable to Defendant at the time of his April, 1972 trial, but applicable now to Defendant pursuant to C.R.S. 1973, 18-1-410 (f), as amended, its present provisions having effectuated the following significant changes in Colorado law in respect to the sentences imposed upon Defendant on July 10, 1972:

- a. C.R.S. 1973, 18-4-302 classifies aggravated robbery as a class 3 felony;

b. C.R.S. 1973, 18-1-105, as amended, fixes the punishment for class 3 felonies at a minimum of five (5) years and a maximum of forty (40) years;

c. C.R.S. 1973, 18-1-403 (3) mandates the imposition of concurrent sentences if more than one guilty verdict is returned in a single prosecution based on the same act or series of acts arising from the same criminal episode.

9. Pursuant to Rule 35 (a), Colorado Rules of Criminal Procedure and C.R.S. 1973, 18-1-410 (f), as amended, Defendant is entitled, as a matter of law, to be resentenced in conformance with the amendatory legislation which has mitigated the penalties for the crimes of which he has been previously convicted, in that Defendant, by this Motion, is seeking relief in this Honorable Court prior to the attachment of finality to his convictions.

10. Defendant seeks herein to have his sentences corrected pursuant to C.R.S. 1973, 18-1-410 (f), as amended, as follows:

a. To be resentenced on the aggravated robbery conviction in conformance with the mitigated penalty provisions of the Colorado Criminal Code, sections 18-4-302 and 18-1-105;

b. To be resentenced in accordance with the Colorado Criminal Code, section 18-1-403 (3) providing that the sentences imposed on Defendant run concurrently.

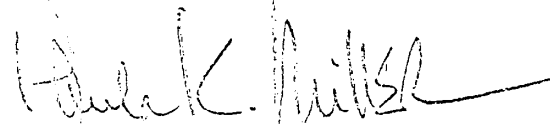
11. Defendant has been incarcerated in the Maximum Security Unit of the Colorado State Penitentiary since the summer of 1972. While there, he has demonstrated an excellent attitude and shown his willingness to take advantage of the rehabilitation programs made available to him at said institution. As a direct consequence of his outstanding adjustment and positive attitude, Defendant has been a resident of the Honor Unit of the Maximum Security Unit for the past several years. Moreover, Defendant has made serious and successful efforts to cure, or if cure is an inappropriate

term for this type of disease, to confront and deal realistically with his problem of alcoholism since his incarceration. Appended to this Motion are reports and letters from prison guards, supervisors, and administrators, as well as from individuals not employees of the institution, with whom Defendant has had contact through his years of participation in and association with rehabilitational and educational programs, which attest to the above. These letters and reports are marked as Defendant's Exhibits, Numbers 2 through 27.

12. In light of the excellent progress Defendant has made in his nearly six (6) years of continuous incarceration at the Colorado State Penitentiary, evidenced by the letters appended hereto and the testimony which will be presented at Defendant's hearing on this Motion, extended incarceration may prove counterproductive to the rehabilitative goals of our penal system and contrary to the best interests of Defendant and society.

WHEREFORE, Defendant prays that this Honorable Court grant his motion for correction and reduction of his previously imposed sentences in accordance with the statutory provisions and the relevant and material matters as set forth herein.

Respectfully submitted,



PAULA K. MILLER  
Deputy State Public Defender  
Attorney for Defendant  
1575 Sherman Street  
Denver, Colorado 80203  
839-2664

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached Motion Pursuant to Rule 35 (a), Colorado Rules of Criminal Procedure was duly served upon Honorable Robert Miller, District Attorney of Weld County, by depositing it in the United States Mails, postage prepaid, addressed to the following addressee, this 12th day of December, 1977.

Honorable Robert N. Miller  
District Attorney  
P.O. Box 1167  
Greeley, CO 80631

Flora M. Jones

