Chapter 53

Wyoming

§ 53:33 Erroneous Convictions Act

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§ 53:1 Summary of postconviction remedies in Wyoming

Principal postconviction remedy:

Wyoming Post Conviction Relief Act remedy. This remedy is applied for in the convicting court. The remedy is a postsentencing phase of the original criminal case, not an independent civil action. The remedy is authorized by a statute. There is a custody requirement applicable to the remedy. Newly discovered evidence of innocence is a ground for relief under the remedy.

Right to counsel:

In death sentence cases there is a right to counsel in proceedings under the Wyoming Post Conviction Relief Act. In noncapital cases there is no right to counsel in such proceedings.

Statute of limitations:

A proceeding under the Wyoming Post Conviction Hearing Act must be instituted within 5 years of the date the final judgment of conviction was entered.

Secondary postconviction remedies:

Habeas corpus

Motion to correct illegal sentence

Motion to reduce sentence

Motion to correct clerical error

Other remedies:

Coram nobis is no longer a recognized remedy in Wyoming.

Wyoming has a postconviction DNA testing statute.

Wyoming does not have an erroneous convictions act.

Helpful readings:

(1) Raper, Post Conviction Remedies, 19 Wyo. L.J. 213 (1965)

(2) Comment: Post Conviction Relief: Do It Once, Do It Right and Be Done with It, 24 Land & Water L. Rev. 473 (1989)

(3) Lyttle, Return of the Repressed: Coping With

Post-Conviction Innocence Claims in Wyoming, 14 Wyo. L. Rev. 555 (2014)

(4) Case Note, Criminal Law—Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel in Wyoming After Osborne v. State, 2012 Wyo. 123, 285 P.3d 248 (Wyo. 2012), 14 Wyo. L. Rev. 161 (2014)

§ 53:2 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108

The principal postconviction remedy in Wyoming is the Wyoming Post Conviction Relief Act remedy, which was created by the Act of Feb. 13, 1961, ch. 3, 1961 Wyo. Sess. Laws 75, and which, as amended, is codified in Chapter 14 ("Remedy for Violation of Constitutional Rights") of Title 7 ("Criminal Procedure") of the Wyoming Statutes (Wyo. Stat. § 7-14-101 through § 7-14-108).

The 1961 statute was entitled "Prisoner's Constitutional Rights," and described itself as an "[a]ct to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed to them by the Constitution of the United States or the State of Wyoming, or both, have been denied or violated in proceedings in which they were convicted."

The 1961 statute: (1) created an entirely new state postconviction remedy, in the nature of coram nobis and available in the convicting court; (2) required petitioners to be in custody; (3) made violations of constitutional rights grounds for relief; (4) secured a statutory right to counsel for petitioners; (5) deemed to be waived any claims of violation of rights not raised in the original or amended petition; and (6) authorized an appeal as of right from final judgments granting or denying relief.

Since its enactment in 1961, the Wyoming PCRA, as codified, has been amended four times—in 1987, 1988, 1989, and 1990.

The 1987 amendment made a number of changes in the Wyoming PCRA; perhaps the most significant was that it added a new limitation on relief under which the convicted person applying for relief must have been convicted of a felony. The 1988 amendment made these important changes in the PCRA: (1) it provided, subject to two exceptions, for the forfeiture of postconviction claims by reason of procedural default where the claim raised could have been raised in a direct appeal, or had been decided on the merits or on procedural grounds in any previous proceeding now final; (2) it abolished the right to counsel in PCRA proceedings and made appointment of counsel discretionary; (3) it deleted from the 5 year statute of limitations on applications for relief a statutory exception for cases where the delay was not

due to the convicted person's neglect; and (4) it abolished appeal of right from final judgments in PCRA proceedings and replaced it with appellate review by the discretionary writ of certiorari. The 1988 statute, in short, "singularly reduce[d] coverage and the constitutional protections . . . available." *Sanchez v. State*, 755 P.2d 245, 246 (Wyo. 1988) (Urbigkit, J., dissenting). The 1989 amendment simply corrected a typographical error in the 1988 amendment, The 1990 amendment to the Wyoming PCRA provided that an applicant for relief was not entitled to legal representation by the public defender or by appointed counsel, and even changed the title of Wyo.Stat. § 7-14-104 from "Appointment of Attorney" to "No Right to Appointed Counsel."

§ 53:3 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-101—Grounds for relief

The language in the Wyoming PCRA setting forth the grounds for relief—claims by the petitioner "that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the constitution of the United States or of the state of Wyoming, or both," Wyo.Stat. § 7-14-101(b)-is borrowed from similar language in the Illinois Postconviction Hearing Act of 1949.

Under the Wyoming PCRA, as a general rule, only claims of violations of constitutional rights are cognizable.

§ 53:4 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-101—Custody requirement

There is a custody requirement in proceedings under the Wyoming PCRA. Wyo. Stat. § 7-14-101(b) (a person serving a felony sentence in the state penitentiary may institute proceedings under this act).

Furthermore, as Wyo. Stat. § 7-14-101(b) clearly states, not only must the petitioner for relief be in custody, he must also have been convicted of a felony. The Wyoming PCRA, that is, may only be used in behalf of persons convicted of a felony; persons convicted of a misdemeanor are not entitled to use the PCRA to obtain judicial review of their conviction. Under the PCRA as originally enacted in 1961 it was not necessary that the petitioner have been convicted of a felony. The requirement that the person petitioning for PCRA relief stand convicted of a felony was added to the PCRA by a 1987 amendment of the PCRA; see Act of Mar. 6, 1987, ch. 157, § 3, 1987 Wyo. Sess. Laws 299, 375. Wyoming and Missouri are the only states where the principal postconviction remedy extends only to felony convictions.

§ 53:5 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-101—Text

The Wyoming PCRA, codified at Wyo. Stat. §§ 7-14-101 et seq., provides:

§ 7-14-101. Definition of "this act"; commencement and conduct of proceedings.

(a) As used in W.S. 7-14-101 through 7-14-108 "this act" means W.S. 7-14-101 through 7-14-108.

(b) Any person serving a felony sentence in a state penal institution who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the constitution of the United States or of the state of Wyoming, or both, may institute proceedings under this act. The proceeding shall be commenced by filing with the clerk of the court where the conviction occurred a petition verified by affidavit. A copy of the petition shall be served by the inmate on the Wyoming attorney general by certified or registered mail. The clerk shall docket the petition upon receipt and bring it promptly to the attention of the court.

(c) Unless otherwise inconsistent with the provisions of this act, proceedings under this act shall be conducted pursuant to the Wyoming Rules of Civil Procedure and the Wyoming Rules of Evidence, except:

(i) Any evidentiary hearing shall be conducted before the court without a jury; and

(ii) 3, 4, 14, 22, 23, 24, 38, 39, 40.1, 42, 47, 48, 51, 55, 59 and 64 through 71.1 Rules of the Wyoming Rules of Civil Procedure shall not apply to proceedings under this act.

§ 53:6 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-101—Case law

For case law on § 7-14-101, see e.g., *Hauck v. State*, 2007 WY 113, 162 P.3d 512 (Wyo. 2007) (postconviction relief is available in limited circumstances to redress constitutional errors occurring in the proceedings resulting in the defendant's conviction; constitutional errors relating to the finding of guilt are open for consideration in a postconviction relief action, whereas claims of error pertaining to sentencing are not; Hauck's challenges to his competency, his Sixth Amendment right to counsel, the use of restraints at trial, and prosecutorial misconduct all implicate constitutional protections and relate to the finding of guilt and

all implicated constitutional protections, thus, claims were cognizable on collateral review; the district court also ruled that Hauck's claims were barred from consideration in the postconviction relief action because they could have been raised in a direct appeal from conviction, which generally would be correct in light of Hauck's failure to timely appeal his conviction; however, we find that Hauck was effectively denied his direct appeal; the right to appeal, if that right is granted by a state, as Wyoming has, is a due process right; the record shows that the district court, after imposing sentence, abrogated its duty to protect this right by failing to advise Hauck of his right to appeal his conviction as mandated by W.R.Cr.P. 32(c)(3); the record does not otherwise reflect that Hauck knew of his right to appeal and the process involved to effectuate that right; under these extenuating circumstances, where the district court undermined Hauck's ability to take a timely direct appeal, we will not allow the district court's mistake to prejudice Hauck; Hauck's failure to appeal cannot be relied upon as grounds for summarily dismissing his petition for postconviction relief); *Harlow v. State*, 2005 WY 12, 105 P.3d 1049 (Wyo. 2005), subsequent determination, 2005 WY 16, 105 P.3d 1078 (Wyo. 2005) (death sentence case; although postconviction relief proceedings are a continuation of the criminal case, they are conducted pursuant to the rules of civil procedure; the right to claims for relief by petition for postconviction relief does not afford the right to treat such proceedings as an appeal from the original trial; original trial proceedings will not be reviewed by postconviction proceedings unless and until it is shown that such is necessary to review some claim having to do with denial of petitioner's constitutional rights; it is virtually universally recognized that postconviction relief is not a substitute for an appeal and the petition will not lie where the matters alleged as error could or should have been raised in an appeal or in some other alternative manner; relief may be granted only in extraordinary circumstances which strongly suggest a miscarriage of justice; there is no constitutional requirement that a state provide any postconviction relief action; thus, any allowed remedy is strictly limited to the statutory parameters set out by statute or case law; only substantial violations of constitutional rights amounting to a miscarriage of justice will warrant relief under Wyoming's postconviction relief statutes; the burden is on a petitioner to show specifically what facts exist that establish a violation of constitutional dimension that occurred during the proceedings resulting in his conviction; relief may be granted only in extraordinary circumstances that strongly suggest a miscarriage of justice; additionally, relief is limited to violations that occur in the proceedings which resulted in the conviction; ac-

cordingly, under Wyoming's postconviction relief system, alleged errors occurring during the sentencing phase of a case, regardless of merit, are simply not cognizable; errors relating to the appellate process are not reachable per se under this system, as the appellate process occurs after the proceedings that result in conviction; however, claims of ineffective assistance of appellate counsel are statutorily recognized as the portal through which otherwise waived claims of trial level error may be reached; if the issues already were decided on the merits or on procedural grounds in an earlier proceeding (such as the direct appeal), the claim is barred and cannot be relitigated in a postconviction proceeding; postconviction claims are procedurally barred, and no court has jurisdiction to hear them, if the claims could have been raised in a direct appeal but were not).

§ 53:7 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-102—Filing

The required contents of a petition for postconviction relief filed under the Wyoming PCRA are specified by Wyo. Stat. § 7-14-102.

A petition for postconviction relief under the Wyoming PCRA is filed in the convicting court. Wyo. Stat. § 7-14-101(b). The convicting court will always be a district court; in Wyoming, only district courts have trial jurisdiction in felony criminal cases.

Under Wyo. Stat. § 7-14-103(d) a petition for postconviction relief under the Wyoming PCRA must be filed within 5 years of the date the judgment of conviction was entered. The 5 year statute of limitations on PCRA petitions was included in the original version of the PCRA enacted in 1961. Act of Feb. 13, 1961, ch. 3, 1961 Wyo. Sess. Laws 75, 76. Under that 1961 statute, however, there was an exception to the 5 year time limitation where "the petitioner alleges facts showing that the delay was not due to his own neglect." Act of Feb. 13, 1961, ch. 3, 1961 Wyo. Sess. Laws 75, 76; see also Act of Mar. 6, 1987, ch. 157, § 3, 1987 Wyo. Sess. Laws 299, 375 (providing for same exception to the 5 year statute of limitations on PCRA petitions). This exception for instances where the delay was not the convicted person's fault was abolished in 1988, see, Act of Mar. 11, 1988, ch. 46, § 1, 1988 Wyo. Sess. Laws 116, 117, and therefore there is currently no statutory exception to the 5 year limitations period.

A Wyoming PCRA proceeding is a postsentencing phase of the original criminal case, not an independent civil action. See, e.g., *Harlow v. State*, 2005 WY 12, 105 P.3d 1049 (Wyo. 2005), subsequent determination, 2005 WY 16, 105 P.3d 1078 (Wyo.

2005) (death sentence case; although postconviction relief proceedings are a continuation of the criminal case, they are conducted pursuant to the rules of civil procedure).

Within 30 days after the filing of the petition for postconviction relief, or within any further time the court may fix, the attorney general shall answer or move to dismiss the petition. Wyo. Stat. § 7-14-105(a). At any stage of the proceeding prior to judgment the court may grant the petitioner leave to withdraw the petition. Wyo. Stat. § 7-14-105(b). The court may allow amendment of the petition or any further pleadings, the filing of further pleadings, or an extension of time for filing any pleading other than the original petition for postconviction relief. Wyo. Stat. § 7-14-105(c).

With respect to a transcript of the criminal proceedings resulting in the conviction attacked, Wyo Stat. § 5-3-405 provides:

"In any case arising as a postconviction relief proceeding, W.S. 7-14-101 through 7-14-108, in which the presiding judge has determined that the postconviction petition is sufficient to require an answer, the court reporter shall transcribe the record of the criminal proceeding in which the petitioner was convicted in full unless the court shall, by written order, determine that portions of the record are not required or material for decision in the proceeding. Additionally, the court reporter shall record evidentiary proceedings conducted under this section and shall transcribe that record if an appeal is taken."

§ 53:8 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-102—Text

§ 7-14-102. Contents of petition.

(a) The petition shall state:

(i) The proceeding in which the petitioner was convicted;

(ii) The date of the rendition of the final judgment;

(iii) The facts which show the petitioner's constitutional rights were violated; and

(iv) Any previous proceedings in which the petitioner has been involved to secure relief from his conviction.

(b) The petition shall be accompanied by affidavits, records or other evidence supporting the allegations or shall state why the same are not attached.

(c) The petition may contain argument, citations and discussion of authorities.

§ 53:9 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-103—Procedural default

The provisions of the Wyoming PCRA relating to procedural default are set forth at Wyo. Stat. § 7-14-103(a), (b). Under these provisions, a claim is procedurally barred and the court has no jurisdiction to consider the claim if: (1) it could have been but was not raised in a direct appeal; (2) it was not raised in the original or an amendment to the original petition under the Wyoming PCRA; or (3) it was decided on the merits or on procedural grounds in any previous proceeding which has become final. Wyo. Stat. § 7-14-103(a). Excepted from the procedural bar are (1) claims involving facts or evidence which was not known and could not reasonably have been known at the time of the direct appeal, and (2) cases where the petitioner received ineffective assistance of counsel on direct appeal. Wyo. Stat. § 7-14-103(b).

Under Wyo. Stat. § 7-14-103(c), the Wyoming PCRA does not apply to claims of error or denial of rights in any proceeding: (1) for the revocation of probation or parole; or (2) provided by statute or court rule for new trial, sentence reduction, sentence correction, or other post-verdict motion.

§ 53:10 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-103—Text

§ 7-14-103. Claims barred; applicability of act.

(a) A claim under this act is procedurally barred and no court has jurisdiction to decide the claim if the claim:

(i) Could have been raised but was not raised in a direct appeal from the proceeding which resulted in the petitioner's conviction;

(ii) Was not raised in the original or an amendment to the original petition under this act; or

(iii) Was decided on its merits or on procedural grounds in any previous proceeding which has become final.

(b) Notwithstanding paragraph (a)(i) of this section, a court may hear a petition if:

(i) The petitioner sets forth facts supported by affidavits or other credible evidence which was not known or reasonably available to him at the time of a direct appeal; or

(ii) The court makes a finding that the petitioner was denied constitutionally effective assistance of counsel on his direct appeal. This finding may be reviewed by the supreme

court together with any further action of the district court taken on the petition.

(c) This act does not apply to claims of error or denial of rights in any proceeding:

(i) For the revocation of probation or parole;

(ii) Provided by statute or court rule for new trial, sentence reduction, sentence correction or other post-verdict motion.

(d) No petition under this act shall be allowed if filed more than five (5) years after the judgment of conviction was entered.

§ 53:11 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-103—Case law

For case law on § 7-14-103, see e.g., *Schreibvogel v. State*, 2012 WY 15, 269 P.3d 1098 (Wyo. 2012) (notwithstanding a procedural bar, a court may hear a postconviction relief petition if it first makes a finding that the petitioner was denied constitutionally effective assistance of counsel on his direct appeal; the postconviction petitioner seeking to assert a procedurally-barred claim must demonstrate to the district court, by reference to the record of the original trial without resort to speculation or equivocal inference, what occurred at that trial; particular facts upon which the claim of inadequate representation by appellate counsel rests must be presented; a postconviction petitioner must show an adverse effect upon a substantial right, which is shown by demonstrating a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome; the word "claim" in statute governing postconviction remedies for constitutional violations encompassed the broader concept of the constitutional right to the effective assistance of counsel, rather than merely each separate factual assertion of alleged ineffectiveness; therefore, after defendant's claim of ineffective assistance of trial counsel based upon one set of alleged deficiencies was decided against him on the merits on direct appeal, defendant could not raise claim of ineffective assistance of trial counsel in petition for postconviction relief based on different set of alleged deficiencies; counsel's work was required to be assessed as a whole, and it was the overall deficient performance, rather than a specific failing, that constituted the ground of relief); *Rathbun v. State*, 2011 WY 116, 257 P.3d 29 (Wyo. 2011) (both the doctrine of res judicata and specific statutory restrictions forbid raising matters in a postconviction relief petition that were, or could have been, raised

on appeal); *Amin v. State*, 2006 WY 84, 138 P.3d 1143 (Wyo. 2006) (Amin has exhausted all of his state remedies with respect to the convictions at issue in this matter, see Wyo. Stat. §§ 7-14-101 through 7-14-108, and we authorize the district court to decline to permit the filing of any further papers from Amin that relate to these convictions, unless Amin has first obtained the consent of the district court for such a filing; furthermore, we authorize the clerk of this court to decline to file any papers submitted by Amin that relate to these matters without having first obtained the consent of the court for such a filing); *Keats v. State*, 2005 WY 81, 115 P.3d 1110 (Wyo. 2005) (ineffective counsel claim; any claim that could have been raised on direct appeal, but was not raised, is procedurally barred from being raised on a petition for postconviction relief; claims of ineffective assistance of appellate counsel are statutorily recognized as the portal through which otherwise waived claims of trial-level error may be reached; the simple failure to raise an issue on appeal, even if it was meritorious, does not necessarily demonstrate ineffective assistance of counsel; instead, it must be demonstrated that counsel's representation was deficient by showing errors were made that were so serious that counsel was not functioning in accordance with the constitutional guarantee, and furthermore, the deficient performance prejudiced the appellant; trial counsel's failure to investigate possibility of entering plea of not guilty by reason of mental illness (NGMI) on defendant's behalf and make NGMI plea was not sound strategy and prejudiced defendant; relief granted).

§ 53:12 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-104—Right to counsel

Under a statute enacted in 1999 and codified in the Wyoming Public Defender Act, there is a right to counsel in a Wyoming PCRA proceeding filed in behalf of a death row inmate. Wyo. Stat. § 7-6-104(c)(ii) (a needy person who is entitled to be represented by an attorney under subsection (a) of this section is entitled to be represented in cases in which the death penalty has been imposed or in such other cases as the state public defender deems appropriate, in proceedings under the Wyoming PCRA). In noncapital cases, however, a person seeking relief under the Wyoming PCRA has no right to counsel. Wyo. Stat. § 7-14-104(c) (an indigent petitioner seeking relief under this act is not entitled to representation by the state public defender or by appointed counsel). See, e.g., *DeLoge v. State*, 2007 WY 71, 156 P.3d 1004 (Wyo. 2007) (under Wyo. Stat. § 7-6-104(c)(vi), a needy person who is entitled to be represented is to be represented

by counsel at every stage of the proceedings, from the time of the initial appointment by the court until the entry of final judgment, at which time the representation shall end, unless the court appoints counsel for purposes of appeal, correction or modification of sentence; there is no statutory requirement for appointment of counsel at every posttrial motion; instead, such a decision rests within the discretion of the district court; likewise, the U.S. Constitution does not require counsel for indigent defendants seeking postconviction relief); *Gould v. State*, 2006 WY 157, 151 P.3d 261 (Wyo. 2006) (proceeding for correction of illegal sentence under Rule 35, Wyo. R. Crim. Proc.; pursuant to Wyo. Stat. § 7-6-104, the district court has discretion as to whether or not to appoint counsel at non-critical stages of a criminal proceeding, and our review of a denial of a request for appointment of counsel is limited to determining whether or not the district court abused its discretion; § 7-6-104(c)(vi) indicates appointment of counsel for postjudgment proceedings is a matter within the district court's discretion); *Amin v. State*, 2006 WY 84, 138 P.3d 1143 (Wyo. 2006) (Amin seeks review of the district court's order denying his motion which he denominated "Motion for Illegal Sentence Rule 35(a);" what Amin seeks to do in these proceedings is to generally challenge his convictions and sentences that were affirmed on direct appeal; we conclude that the claims raised in the present appeal are barred by the doctrine of res judicata).

With respect to granting a statutory right to counsel to persons applying for PCRA relief, Wyoming has gone through four stages. From 1961 until 1988 persons petitioning for PCRA relief had a right to counsel. From 1988 to 1990 appointment of counsel for PCRA petitioners was discretionary. From 1990 until 1999 persons seeking relief under the PCRA had no right to counsel. Since 1999 there has been a right to counsel in PCRA proceedings for petitioners under a death sentence, but not for petitioners in noncapital cases.

From 1961 until 1988 the Wyoming PCRA provided that all persons applying for relief under the PCRA enjoyed a right to counsel. Act of Mar. 6, 1987, ch. 157, § 3, 1987 Wyo. Sess. Laws 299, 375 to 76 (if requested in the petition for postconviction relief, the court shall appoint the public defender to represent a petitioner who is determined to be a needy person); Act of Feb. 13, 1961, ch. 3, 1961 Wyo. Sess. Laws 75, 76 (if the petitioner is without counsel and alleges that he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him; if appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel). Furthermore, a 1987 statute amended the Wyoming Public Defender Act so as to

provide a right to counsel in PCRA proceedings. Act of Mar. 6, 1987, ch. 157, § 3, 1987 Wyo. Sess. Laws 299, 342 (a needy person is entitled to be represented by an attorney in a postconviction proceeding that the attorney or the needy person considers appropriate, unless the court determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense). A 1988 statute eliminated the language in the PCRA securing a right to counsel, providing instead that the court "may" appoint counsel to represent the petitioner. Act of Mar. 11, 1988, ch. 46, § 1, 1988 Wyo. Sess. Laws 116, 117 (if requested in the petition for postconviction relief, the court may appoint the public defender, or in the court's discretion a private attorney, to represent a petitioner who is determined by the court to be without any reasonable financial means to hire an attorney; before appointing the attorney, the court shall determine that the petition for postconviction relief is not frivolous, is the first petition of the convicted person, is not procedurally barred, and raises issues which cannot be reasonably presented without the assistance of an attorney). A 1990 statute amended the PCRA to provide that indigents seeking relief were not entitled to appointed counsel, and even changed the title of Wyo.Stat. § 7-14-104 from "Appointment of Attorney" to "No Right to Appointed Counsel." Act of Mar. 21, 1990, ch. 95, § 1, 1990 Wyo. Sess. Laws 255 (an indigent petitioner seeking relief under PCRA is not entitled to representation by the state public defender or by appointed counsel). Another portion of the 1990 statute (1) repealed the language in the Wyoming Public Defender Act, added in 1987, which provided a right to counsel in PCRA proceedings, and (2) inserted into the Wyoming Public Defender Act new language specifying that the Act "does not create a right to appointed counsel in proceedings under" the PCRA. Act of Mar. 21, 1990, ch. 95, § 1, 1990 Wyo. Sess. Laws 255. Nine years later, see Act of Feb. 24, 1999, ch. 95, § 1, 1999 Wyo.Sess.Laws 189, 190, the Wyoming legislature enacted Wyo. Stat. § 7-6-104(c)(ii), which creates a right to counsel in a Wyoming PCRA proceedings, but limits the right to death row inmates.

§ 53:13 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-104—Text

§ 7-14-104. No right to appointed counsel.

[Subsections (a) and (b) were repealed in 1990.]

(c) An indigent petitioner seeking relief under this act is not entitled to representation by the state public defender or by appointed counsel.

§ 53:14 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-104—Right to counsel—Case law

For case law on the right to counsel in Wyoming PCRA proceedings, see, e.g., *DeLoge v. State*, 2007 WY 71, 156 P.3d 1004 (Wyo. 2007) (under Wyo. Stat. § 7-6-104(c)(vi), a needy person who is entitled to be represented is to be represented by counsel at every stage of the proceedings, from the time of the initial appointment by the court until the entry of final judgment, at which time the representation shall end, unless the court appoints counsel for purposes of appeal, correction or modification of sentence; there is no statutory requirement for appointment of counsel at every posttrial motion; instead, such a decision rests within the discretion of the district court; likewise, the U.S. Constitution does not require counsel for indigent defendants seeking postconviction relief); *Gould v. State*, 2006 WY 157, 151 P.3d 261 (Wyo. 2006) (proceeding for correction of illegal sentence under Rule 35, Wyo. R. Crim. Proc.; pursuant to Wyo. Stat. § 7-6-104, the district court has discretion as to whether or not to appoint counsel at non-critical stages of a criminal proceeding, and our review of a denial of a request for appointment of counsel is limited to determining whether or not the district court abused its discretion; § 7-6-104(c)(vi) indicates appointment of counsel for post-judgment proceedings is a matter within the district court's discretion).

§ 53:15 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-105—Text

§ 7-14-105. Answer by state; withdrawal of petition; amendments and further pleadings.

(a) Within thirty (30) days after filing the petition, or within any further time as the court may fix, the attorney general on behalf of the state shall answer or move to dismiss the petition. No other or further pleadings shall be filed except as the court may order on its own motion or on that of either party.

(b) The court may grant leave to the petitioner, at any stage of the proceeding prior to entry of judgment, to withdraw the petition.

(c) The court may by order authorize:

(i) Amendment of the petition or any other pleadings;

(ii) The filing of further pleadings; or

(iii) An extension of the time for filing any further pleading other than the original petition.

§ 53:16 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-106—Proof

With certain exceptions, the Wyoming Rules of Civil Procedure and the Wyoming Rules of Evidence apply to proceedings under the Wyoming PCRA. Wyo. Stat. § 7-14-101(c). The court hearing the petition for postconviction relief may receive proof by affidavits, depositions, oral testimony or other evidence, and may order the petitioner brought before the court for the hearing. Wyo. Stat. § 7-14-106(a).

§ 53:17 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-106—Relief granted

If the court grants the petition for postconviction relief, it has broad powers to order appropriate relief. Wyo. Stat. § 7-14-106(b). The text of Wyo. Stat. § 7-14-106(b) is borrowed from the Illinois Postconviction Hearing Act of 1949.

§ 53:18 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-106—Text

§ 7-14-106. Evidence received by court; orders entered upon favorable finding; contents of final judgment or order.

(a) The court may, if it determines it to be necessary, receive proof by affidavits, deposition, oral testimony or other evidence and may order the petitioner brought before the court for the hearing.

(b) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and any supplementary orders as to rearraignment, retrial, custody, bail or discharge as may be necessary and proper.

(c) The final judgment or order on a petition under this act shall state the basis for the court's decision and may contain findings of fact and conclusions of law.

§ 53:19 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-107—Appeals

A final judgment granting or denying relief under the Wyoming PCRA is reviewable via the writ of certiorari in the state

supreme court pursuant to the Wyoming Rules of Appellate Procedure. Wyo. Stat. § 7-14-107. Thus, neither the petitioner nor the state may appeal of right; appellate review is available only at the discretion of the appellate court. (Prior to 1988, a final judgment in a PCRA proceeding was appealable of right; see Act of Mar. 6, 1987, ch. 157, § 3, 1987 Wyo. Sess. Laws 376; Act of Feb. 13, 1961, ch. 3, 1961 Wyo. Sess. Laws 77. A 1988 amendment of the PCRA, however, Act of Mar. 11, 1988, ch. 46, § 1, 1988 Wyo. Sess. Laws 116, 117, replaced appeals of right in PCRA cases with discretionary review via the writ of certiorari, and even changed the title of Wyo.Stat. § 7-14-107 from "Appeal" to "Appellate Review".)

In implementation of Wyo.Stat. § 7-14-107, Rule 13, Wyo.R.App.Proc., governs appellate review of final judgments in PCRA cases. See Rule 13.1(a), Wyo.R.App.Proc. (all applications to the state supreme court for interlocutory or extraordinary relief from orders of the district courts, including such applications as are established by statute (e.g., Wyo. Stat. § 7-14-107), may be made as petitions for a writ of review; the granting of a petition for review is within the discretion of the state supreme court).

A petition for a writ of review must be filed with the reviewing court within 15 days after entry of the order from which relief is sought. Rule 13.03(a), Wyo.R.App.Proc. The required contents of a petition for a writ of review are set forth in Rule 13.04, Wyo.R.App.Proc. Any party may file a response within 15 days after filing of the petition. Rule 13.03(b), Wyo.R.App.Proc. The reviewing court may grant the petition at any time after the 30th day or as soon as both the petition and the response have been filed with the reviewing court, but it shall be deemed denied if the reviewing court does not accept review within 40 days from the date of the petition. Rule 13.03(c), Wyo.R.App.Proc. An order granting the writ of review may set forth the particular issue or point of law which will be considered and may be on such terms as the reviewing court conditions; if the petition is granted, all proceedings shall be within the time required for appeals; oral argument will not be held except at the direction of the reviewing court; and no petition for rehearing shall be permitted. Rule 13.07, Wyo.R.App.Proc.

§ 53:20 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-107—Text

§ 7-14-107. Appellate review.

Any final judgment or order entered upon a petition under this act may be reviewed by the supreme court on writ of cer-

tiorari upon the petition of either party pursuant to the Wyoming Rules of Appellate Procedure.

§ 53:21 Wyoming Post Conviction Relief Act under Wyoming Statutes §§ 7-14-101 to 7-14-108—§ 7-14-108—Text

§ 7-14-108. Existing statutory provisions.

W.S. 7-14-101 through 7-14-108 shall not repeal any existing laws.

§ 53:22 Writ of habeas corpus

Another Wyoming postconviction remedy is the writ of habeas corpus.

A habeas corpus proceeding in Wyoming is a civil action. See, e.g., *Nixon v. State*, 2002 WY 118, 51 P.3d 851 (Wyo. 2002) (in Wyoming, habeas corpus is not a continuation of the criminal proceeding but a separate civil proceeding).

Under the state constitution, the Wyoming Supreme Court has original jurisdiction to entertain habeas corpus petitions filed directly in that court. Wyo.Const. art. 5, § 3 (the state supreme court shall have original jurisdiction in habeas corpus; each of the judges of the state supreme court shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of a person held in actual custody, and may make such writs returnable before himself or before the supreme court, or before any district court of the state or any judge thereof). The state constitution also grants the district courts of Wyoming authority to entertain habeas petitions. Wyo.Const. art. 5, § 10 (the district courts shall have power to issue writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective districts).

Wyoming's habeas corpus statutory provisions are codified in Chapter 27 ("Habeas Corpus") of Title 1 ("Code of Civil Procedure") of the Wyoming Statutes (Wyo.Stat. § 1-27-101 through § 1-27-134).

These statutes, like article 5 of the state constitution, grant both the Wyoming Supreme Court and the district courts jurisdiction to entertain habeas corpus petitions. Wyo.Stat. § 1-27-103 (the writ of habeas corpus may be allowed by the state supreme court or a district court or by any judge of those courts).

A petitioner may file an original petition for a writ of habeas corpus directly in the Wyoming Supreme Court either before or after filing a similar habeas petition in a district court. However,

as a practical matter, the Wyoming Supreme Court will almost always decline to entertain an original habeas petition unless the petitioner demonstrates that he previously filed a similar habeas petition in a district court, and the district court denied relief.

The Rules of the Wyoming Supreme Court discourage a habeas petitioner from filing an original habeas petition in that court unless the petitioner has previously (and unsuccessfully) filed the habeas petition in a district court. Rule 3, Wyo. Sup.Ct.R. (in any application made to the court for a writ of habeas corpus, to be issued in the exercise of its original jurisdiction and for which an application might have been lawfully made to some other court in the first instance, the petition shall, in addition to the necessary matter requisite by the rules of law to support the application, also set forth the circumstances which, in the opinion of the applicant, render it necessary or proper that the writ should issue originally from this court, and not from such other court).

The venue for habeas corpus petitions filed in a district court is set forth in Wyo.Stat. § 1-27-104: the petition for a writ of habeas corpus "shall be made to the court or judge most convenient in point of distance to the applicant."

Wyoming's habeas corpus statutes limit postconviction habeas relief to cases where the convicting court lacked jurisdiction. Wyo.Stat § 1-27-125 (habeas corpus is not permissible to question the correctness of the action of a grand jury in finding a bill of indictment, or a petit jury in the trial of a cause nor of a court or judge when acting within their jurisdiction and in a lawful manner).

There is no statute of limitations on filing a petition for a writ of habeas corpus in Wyoming.

A final order of a district court granting or denying habeas corpus relief is not appealable.

Although no appeal is allowed in Wyoming from the final judgment of a district court denying habeas corpus relief, it is well settled that a petitioner denied habeas relief by a district court may thereafter file a fresh habeas petition directly in the Wyoming Supreme Court. See, e.g., *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988), judgment aff'd, 806 P.2d 259 (Wyo. 1991).

In Wyoming, prior to the enactment of the PCRA in 1961, it was well established that the writ of habeas corpus was available to collaterally attack convictions only on jurisdictional grounds; furthermore, as a general rule, violations of constitutional rights were not, for habeas purposes, deemed to deprive the convicting court of jurisdiction.

§ 53:23 Writ of habeas corpus—Effect of Wyoming Post Conviction Relief Act

Since enactment of the PCRA in 1961, the Wyoming courts, fortified by Wyo.Stat § 1-27-125—which bars use of habeas corpus to question the correctness of the action of a grand jury in finding a bill of indictment, or of a petit jury in the trial of a cause, or of a court or judge when acting within their jurisdiction—have adhered to the position that only narrowly defined jurisdictional errors are grounds for postconviction relief. They have also generally taken the position that claims cognizable under the PCRA should be raised pursuant to that statute rather than by habeas corpus. Thus, although available, the postconviction habeas corpus remedy is, as it always has been in Wyoming, narrow in operation.

§ 53:24 Motions to correct illegal sentence, correct sentence imposed in an illegal manner and reduce sentence under Wyoming Rule of Criminal Procedure 35

Rule 35, Wyo. R. Crim. Proc., closely resembles the pre-1987 version of Rule 35, Fed. R. Crim. Proc., and authorizes three postconviction remedies: (1) motions to correct illegal sentence; (2) motions to correct sentence imposed in an illegal manner; and (3) motions to reduce sentence. Each of the remedies is available in the convicting court.

Rule 35, Wyo.R.Crim.Proc., was adopted by the Wyoming Supreme Court in 1991, and became effective in 1992.

Under the Wyoming Public Defender Act, there is no right to counsel in proceedings under Rule 35, Wyo. R.Crim.Proc. Wyo.Stat. § 7-6-104(c)(vi) (needy person charged with crime has right to be represented by counsel at every stage of the proceedings, from the time of the initial appointment by the court until the entry of final judgment, at which time the representation shall end, unless the court appoints counsel for purposes of appeal, correction or modification of sentence).

A final order of a district court denying a Rule 35 motion is appealable. See, e.g., *Padilla v. State*, 2004 WY 66, 91 P.3d 920 (Wyo. 2004) (the denial of a motion for sentence reduction is a final appealable order that must, under Rules 1.05 and 2.01, Wyo.R.App.Proc., be appealed within 30 days to obtain the court's jurisdiction).

If an appeal is sought from a denial of a Rule 35 motion, the notice of appeal must be filed in the district court within 30 days of entry of the order. Rule 2.01(a), Wyo.R.App.Proc. (an appeal from a trial court to an appellate court shall be taken by filing

the notice of appeal with the clerk of the trial court within 30 days from entry of the appealable order); see also *Padilla v. State*, 2004 WY 66, 91 P.3d 920 (Wyo. 2004) (the denial of a motion for sentence reduction is a final appealable order that must, under Rules 1.05 and 2.01, Wyo.R.App.Proc., be appealed within 30 days to obtain the court's jurisdiction).

§ 53:25 Motions to correct illegal sentence, correct sentence imposed in an illegal manner and reduce sentence under Wyoming Rule of Criminal Procedure 35—Text

Rule 35, Wyo.R.Crim.Proc., provides:

(a) Correction. The court may correct an illegal sentence at any time. Additionally the court may correct, reduce, or modify a sentence within the time and in the manner provided herein for the reduction of sentence.

(b) Reduction. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within one year after the sentence is imposed or probation is revoked, or within one year after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within one year after entry of any order or judgment of the Wyoming Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision. The court may determine the motion with or without a hearing.

§ 53:26 Motions to correct illegal sentence, correct sentence imposed in an illegal manner and reduce sentence under Wyoming Rule of Criminal Procedure 35—Case law regarding motions to correct illegal or illegally imposed sentences

For case law on motions to correct illegal or illegally imposed sentences under Rule 35(a), Wyo.R.Crim.Proc., see, e.g., *Palmer v. State*, 2016 WY 46, 371 P.3d 156 (Wyo. 2016) (motions to correct illegal sentences are subject to the doctrine of res judicata; in determining whether res judicata bars a claim, Supreme Court considers the following four factors: (1) identity in parties; (2) identity in subject matter; (3) the issues are the same and relate to the subject matter, and (4) the capacities of the persons are identical in reference to both the subject matter and the issues

between them; motions to correct a sentence are subject to the discretion of the sentencing court; imposition of an illegal sentence is not within the discretion of a sentencing court; a sentence is illegal when it exceeds statutory limits, imposes multiple terms of imprisonment for the same offense, or otherwise violates constitutions or the law); *Bird v. State*, 2015 WY 108, 356 P.3d 264 (Wyo. 2015) (courts can correct illegal sentences at any time, but the bases for correcting the sentence remain subject to res judicata; res judicata barred defendant's claim that his sentence was illegal because sentencing court did not state whether he was to serve his life sentences concurrently with or consecutively to sentence imposed upon revocation of his parole; defendant could have raised issue in his direct appeal and made no attempt to demonstrate good cause as to why he did not do so); *Tucker v. State*, 2015 WY 65, 349 P.3d 987 (Wyo. 2015) (illegal sentence is one which exceeds statutory limits, imposes multiple terms of imprisonment for the same offense, or otherwise violates constitutions or the law; double jeopardy claim may be cognizable on a motion to correct an illegal sentence; district court has discretion in ruling on a motion to correct an illegal sentence; defendant was barred, as a matter of res judicata, from raising in motion to correct illegal sentence claim that his two convictions arising out of a single drug transaction should merge for sentencing purposes, where defendant had raised the same issue in previously denied motions and appeals); *Hamilton v. State*, 2015 WY 39, 344 P.3d 275 (Wyo. 2015) (rule authorizing a court to correct, reduce, or modify a sentence does not confer jurisdiction on the district court to increase a previously-imposed, legal sentence; court may take action to correct or reduce sentence without either party making a motion); *Coy v. State*, 2014 WY 49, 322 P.3d 821 (Wyo. 2014) (sentence is illegal if it violates the constitution or other law); *Dax v. State*, 2014 WY 34, 319 P.3d 911 (Wyo. 2014) (sentence is illegal if it does not include proper credit for time served prior to trial); *Patterson v. State*, 2013 WY 153, 314 P.3d 759 (Wyo. 2013) (corrected sentence of 240–267 months, with credit for time served, for being an accessory before the fact to second degree murder, as imposed six weeks after case was remanded to district court, and six years after defendant's conviction, was imposed without "unnecessary delay," and thus did not violate defendant's due process right to timely and speedy sentencing, after the Supreme Court determined on defendant's second appeal that original sentence violated clear language of sentencing statute because minimum sentence exceeded 90% of maximum sentenced and that a subsequent, increased sentence was illegal because it had been imposed without notice and an opportunity for hearing); *Patterson v. State*, 2012 WY 90, 279

P.3d 535 (Wyo. 2012) (res judicata did not bar defendant, on appeal from a reinstatement of his original sentence of 20-22 years for accessory to second-degree murder after he filed a motion to correct illegal sentence, from challenging the legality of the original sentence or an attempted corrected sentence of 240-267 months, even though defendant directly appealed from his conviction, and the state argued that defendant could have challenged his sentence on direct appeal; defendant had no notice of the sentence of 240-267 months, the lack of notice was good cause for defendant's failure to challenge it on direct appeal, and the original sentence of 20-22 years had been amended and was not in effect during the direct appeal); *Deloge v. State*, 2012 WY 128, 289 P.3d 776 (Wyo. 2012) (courts can correct illegal sentences at any time, but the bases for correcting the sentence remain subject to res judicata); *Kurtenbach v. State*, 2012 WY 162, 290 P.3d 1101 (Wyo. 2012) (District court was without jurisdiction to consider defendant's motion to execute sentence, where rules of criminal procedure did not authorize filing of such motion, defendant did not file motion as one to correct illegal sentence and pointed to no illegality in sentence ordered by district court following his conviction, and no other rule or statute provided for filing of motion to execute sentence); *Dax v. State*, 2012 WY 40, 272 P.3d 319 (Wyo. 2012) (claims brought pursuant to Rule 35(a) are subject to the principles of res judicata, which applies when a defendant could have raised such an issue in an earlier appeal or motion for sentence reduction but did not do so; if a party fails to show good cause why the issue of correction of an allegedly illegal sentence was not raised at an earlier opportunity, a court may decline to consider the issue); *Baker v. State*, 2011 WY 123, 260 P.3d 268 (Wyo. 2011) (an illegal sentence is one which exceeds statutory limits, imposes multiple terms of imprisonment for the same offense, or otherwise violates constitutions or the law; whether a sentence is illegal is determined by referencing the applicable statute or constitutional provisions, and is subject to statutory interpretation; the determination of whether the appropriate rule was applied to a set of facts is a question of law, requiring de novo review); *Bonney v. State*, 2011 WY 51, 248 P.3d 637 (Wyo. 2011) (a trial court enjoys broad discretion in determining whether to reduce a criminal defendant's sentence; on review, the Supreme Court affords considerable deference to the trial court's determination, and will not disturb that determination absent demonstration of a clear abuse of discretion; judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously); *Cooper v. State*, 2010 WY 22,

225 P.3d 1070 (Wyo. 2010) (claims brought pursuant to W.R.Cr.P. 35(a) are subject to the principles of res judicata; doctrine of res judicata bars litigation of issues that were or could have been determined in a prior proceeding; four factors are used to determine the applicability of the doctrine: "(1) identity in parties; (2) identity in subject matter; (3) the issues are the same and relate to the subject matter; and (4) the capacities of the persons are identical in reference to both the subject matter and the issues between them; res judicata doctrine applies when a defendant could have raised such an issue in an earlier appeal or motion for sentence reduction but did not do so; if a party fails to show good cause why the issue was not raised at an earlier opportunity, the court may decline to consider the issue; appellant did not raise the illegal-sentence issue, in his appeal, that he now raises, even though the issue would then have existed; appellant failed to make any argument to show good cause as to why this issue was not brought to the attention of the district court or the Supreme Court on these prior occasions; consequently, res judicata applies); *Gould v. State*, 2006 WY 157, 151 P.3d 261 (Wyo. 2006) (a district court has discretion in ruling on a motion to correct an illegal sentence; consequently, we review the district court's ruling for abuse of discretion; however, the exercise of discretion in the context of a motion to correct an illegal sentence is limited to a determination by the trial court as to whether the sentence was legal or illegal; the determination of whether a specific rule applies to a given set of facts is a question of law, requiring a de novo review; the defendants filed parallel motions to correct illegal sentence in the district courts where they were convicted; they also filed motions for appointment of legal counsel to assist them with their postjudgment efforts; pursuant to Wyo. Stat. § 7-6-104, the district court has discretion as to whether or not to appoint counsel at non-critical stages of a criminal proceeding, and our review of a denial of a request for appointment of counsel is limited to determining whether or not the district court abused its discretion; pursuant to Rule 35(a), a motion to correct an illegal sentence may be brought at any time; an illegal sentence is one which exceeds statutory limits, imposes multiple terms of imprisonment for the same offense, or otherwise violates constitutions or the law; we have rejected the argument that, because Rule 35 states that a motion to correct an illegal sentence may be brought at any time, it is not subject to bar under the doctrine of res judicata; our inquiry under Rule 35 focuses on the sentence itself, not upon the state's actions in executing the sentence; Wyo. Stat. § 7-6-104(c)(vi) indicates appointment of counsel for postjudgment proceedings is a matter within the district court's discretion); *Sarr v. State*, 2007 WY 140, 166 P.3d

891 (Wyo. 2007) (motion to correct an illegal sentence is properly addressed to the trial court in the first instance; for reasons of judicial economy, however, we have considered illegal sentence claims when the issue was raised for the first time on appeal and when the issue, although mentioned in the trial court, was not pursued until appeal; trial court's error in sentencing defendant to four to five years in prison under amended statute, rather than two year maximum term allowed under version of statute in effect at time of offense, was harmless; defendant had already served more time in jail at time of judgment and sentence than either statute allowed, and court ordered that defendant be released from custody upon imposition of sentence); *Capellen v. State*, 2007 WY 107, 161 P.3d 1076 (Wyo. 2007) (in the criminal context, we are frequently confronted with appeals while additional proceedings are continuing in district court; as is obvious from this case, district courts continue to consider motions to modify sentences; they also consider motions to correct illegal sentences pursuant to W.R.Cr.P. 35(a), and make determinations modifying or revoking probation; the sentencing judge is in the best position to decide if a sentence modification is appropriate; there is no provision in our appellate rules that would allow this Court to consider, in the first instance, a motion to reduce or modify a sentence; if the district court is deprived of subject matter jurisdiction when the appeal is docketed, and no procedure exists at the appellate level for sentence modification, much of the incentive for an individual to seek treatment evaporates); *Amin v. State*, 2006 WY 84, 138 P.3d 1143 (Wyo. 2006) (Amin seeks review of the district court's order denying his motion which he denominated "Motion for Illegal Sentence Rule 35(a);" what Amin seeks to do in these proceedings is to generally challenge his convictions and sentences that were affirmed on direct appeal; we conclude that the claims raised in the present appeal are barred by the doctrine of res judicata); *Whitten v. State*, 2005 WY 55, 110 P.3d 892 (Wyo. 2005) (claim that convicting court's restitution order is illegal; Rule 35(a) governs motions to correct an illegal sentence; an illegal sentence is one which exceeds statutory limits, imposes multiple terms of imprisonment for the same offense, or otherwise violates constitutions or the law; we employ an abuse of discretion standard when evaluating a trial court's denial of a motion to correct an illegal sentence; the exercise of discretion in the context of a motion to correct an illegal sentence is limited to a determination by the trial court as to whether the sentence was legal or illegal); *Brown v. State*, 2004 WY 119, 99 P.3d 489 (Wyo. 2004) (illegal sentence is one that exceeds statutory limits, imposes multiple terms of imprisonment for the same offense, or otherwise violates constitutions or the law; determina-

tion of whether a sentence is illegal is made by reference to the authorizing statute or applicable constitutional provisions and is, therefore, a matter of statutory interpretation; a motion to correct an illegal sentence does not permit a defendant to relitigate an issue which has already been considered and decided; these issues are governed by the law of the case and cannot be raised in subsequent motions under Rule 35(a)); *Gomez v. State*, 2004 WY 15, 85 P.3d 417 (Wyo. 2004) (the decision to grant or deny a motion to correct an illegal sentence is usually left to the sound discretion of the district court; a criminal defendant is entitled to receive credit against his sentence for the time he was incarcerated prior to sentencing, provided that such confinement was because of his inability and failure to post bond on the offense for which he was awaiting disposition; a sentence, which does not include credit for presentence incarceration, is illegal and constitutes an abuse of discretion; a defendant is not, however, entitled to credit for the time he spent in custody when that confinement would have continued despite his ability to post bond).

§ 53:27 Motions to correct illegal sentence, correct sentence imposed in an illegal manner and reduce sentence under Wyoming Rule of Criminal Procedure 35—Case law regarding motion to reduce sentence

For case law on motions to reduce sentence under Rule 35(b), Wyo.R.Crim.Proc., see, e.g., *Mendoza v. State*, 2016 WY 31, 368 P.3d 886 (Wyo. 2016) (under W.R.Cr.P. 35(b), the trial court is afforded considerable deference in deciding whether to grant or deny a motion for sentence reduction; purpose of Rule 35(b) is to give a convicted defendant a second opportunity to reduce his sentence by presenting additional information and argument to the sentencing judge; in considering such a motion, the sentencing court is free to accept or reject such information at its discretion; the reviewing court will affirm a district court's decision on whether to grant a sentence reduction so long as there is a rational basis, supported by substantial evidence, from which the district court could reasonably draw its conclusion); *Hart v. State*, 2016 WY 28, 368 P.3d 877 (Wyo. 2016) (district court did not abuse its discretion in denying defendant's motion for sentence reduction; defendant, whose guilty plea to felony shoplifting had been held in abeyance, admitted to violating conditions of probation and was sentenced to not less than four nor more than six years in state women's center, and although her good behavior and rehabilitative progress while incarcerated was commendable, her productive behavior alone did not require sentencing court to reduce sentence); *Hitz v. State*, 2014 WY 58, 323 P.3d 1104 (Wyo.

2014) (if a motion to reduce a sentence is filed outside of the prescribed time limits, the district court is deprived of jurisdiction to hear the motion); *Gomez v. State*, 2013 WY 134, 311 P.3d 621 (Wyo. 2013) (timely filing of a motion to modify or reduce sentence is a jurisdictional requirement; Addicted Offender Accountability Act, pursuant to which defendant convicted of conspiracy to deliver methamphetamine was recommended to complete intensive treatment for substance abuse, did not create separate right to seek modification and reduction of sentence upon completion of treatment, so as to avoid application of criminal rule providing for one-year limitations period on motion to modify or reduce sentence); *Boucher v. State*, 2012 WY 145, 288 P.3d 427 (Wyo. 2012) (fact that trial court's order, denying defendant's motion for sentence reduction, did not describe the specific information defendant and his counsel provided in support of his motion did not establish an abuse of discretion); *Eckdahl v. State*, 2011 WY 152, 264 P.3d 22 (Wyo. 2011) (trial court lacked subject matter jurisdiction over untimely motions to terminate or reduce sentence that were filed more than one year after judgment of sentence); *Patrick v. State*, 2005 WY 32, 108 P.3d 838 (Wyo. 2005) (purpose of Rule 35(b) is to give a convicted defendant a second round before the sentencing judge (a second bite at the apple as it were) and to give the judge the opportunity to reconsider the original sentence in light of any further information about the defendant; the second chance provided by this rule is for the defendant to get in front of the sentencing judge to give that judge the opportunity to reconsider the sentence on its merits; the sentencing judge is in the best position to reconsider the sentence imposed and decide in its discretion whether to grant the motion, not this court on any resulting appeal from a deemed denied motion; we merely review those decisions for an abuse of discretion once the district court has applied its discretion and determined the motion on its merits; while the rule does impose a one-year time limitation, a plain reading of the rule indicates that the one-year limitation applies to the time in which a party must file a motion for reduction or the court must reduce a sentence in the absence of such a motion; thereafter, once a motion is filed within the one-year time limit, the district court has a reasonable time to determine the motion; accordingly, simply failing to rule on a validly filed motion within one year does not per se deny the district court jurisdiction to rule on the motion; it suffices that the defendant's motion was made within the time limit and that the court determines the motion within a reasonable time thereafter; it is clear that it is not necessary that the court determine the motion within the one-year time limit, but instead it suffices if the motion is filed within one year; we

conclude that the convicting court has jurisdiction to determine the motion for reduction of sentence, and we remand for the convicting court to determine the motion to amend and the motion for sentence reduction on the merits; the present version of Rule 35, Fed. R. Crim. Proc., differs significantly from our Rule 35 as the federal rule was amended as part of the Sentencing Reform Act of 1984); *Padilla v. State*, 2004 WY 66, 91 P.3d 920 (Wyo. 2004) (the denial of a motion for sentence reduction is a final appealable order that must, under Rules 1.05 and 2.01, Wyo.R.App.Proc., be appealed within 30 days to obtain the court's jurisdiction).

§ 53:28 Motion to correct clerical error under Wyoming Rule of Criminal Procedure 36

Another Wyoming postconviction remedy is the motion to correct clerical error, a remedy available in the convicting court, and authorized by Rule 36, Wyo.R.Crim. Proc., which is modeled after Rule 36, Fed.R.Crim.Proc. Rule 36, Wyo.R.Crim.Proc., was adopted by the Wyoming Supreme Court in 1991, and became effective in 1992.

Rule 36, Wyo.R.Crim.Proc., provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

§ 53:29 Motion to correct clerical error under Wyoming Rule of Criminal Procedure 36—Case law

For case law on the correction of clerical errors pursuant to Rule 36, Wyo.R.Crim.Proc., see, e.g., *Kovach v. State*, 2013 WY 46, 299 P.3d 97 (Wyo. 2013) (Rule 36 authorizes a court to correct clerical mistakes in judgments at any time and after such notice, if any, as the court orders; nothing changed in the district court's sentence between the time that it announced its sentence during the sentencing hearing and its issuance of the Amended Judgment and Sentence; the record clearly reflects that the court did no more than correct a mathematical error, a clerical adjustment that Rule 36 plainly allows; petitioner failed to establish a clear and obvious violation of an unequivocal rule of law in the court's amendment of its Judgment and Sentence); *Washington v. State*, 2011 WY 132, 261 P.3d 717 (Wyo. 2011) (when an error is clerical, rule 36 is designed to correct such mistakes; the goal is to effectuate the contemporaneous intent of the court and to ensure that the judgment reflects that intent; clerical errors are "all er-

rors, mistakes, or omissions which are not the result of the exercise of the judicial function; failure of a modified judgment and sentence to include all information required by the rule governing judgments and sentences was a clerical error; nothing indicated that the omission was anything other than a mere accident, nothing indicated that trial court was attempting to clarify the original judgment and sentence through the omission, and there was no reason to believe that a stipulated motion to modify, which the parties had made previously, would have been denied had the omission been noticed sooner; appropriate remedy for clerical error in a failure of a modified judgment and sentence to include all information required by the rule governing judgments and sentences was remand for trial court to amend the modified judgment and sentence; most clerical errors are easily remedied, particularly when there is a deviation from the instruments upon which the judgments were intended to be based; such errors may be corrected at any time); *Cubba v. State*, 2009 WY 87, 210 P.3d 1086 (Wyo. 2009) (a clerical mistake in a judgment may be corrected at any time; an unambiguous oral sentence controls over a written judgment and sentence that conflicts with the court's oral pronouncement; trial court has a duty to correct a written judgment to accurately reflect the sentence imposed; for Mr. Cubba to prevail in this case, he must establish that the district court unambiguously imposed concurrent sentences at the sentencing hearing; he must prove that the written Judgment and Sentence, as entered, differs from the sentence orally imposed by the district court; the record clearly illustrates ambiguity in the court's oral sentence; when explaining the plea agreement-in the change of plea and sentencing hearings-defense counsel specifically stated that Mr. Cubba's sentences were to be served consecutively; initially, the district court sentenced Mr. Cubba in accordance with that agreement; this indicates that the court intended a consecutive sentence; however the exchange between the parties and the court at the end of the hearing suggests that the sentences were to be concurrent; at best, Mr. Cubba has demonstrated that the court made two statements, one reflecting an intent to impose consecutive sentences and the other suggesting an intent to impose concurrent sentences; when the record is reviewed in its entirety, Mr. Cubba has not established that the district court unambiguously imposed concurrent sentences); *Parker v. State*, 2006 WY 73, 137 P.3d 124 (Wyo. 2006); *Beck v. State*, 2005 WY 56, 110 P.3d 898 (Wyo. 2005) (Rule 35, the rule governing a motion to correct a clerical mistake, is intended to correct clerical, not judicial, errors; if the error was clerical, the reviewing court reviews the trial court's order to ascertain whether it altered or modified the original judgment; here, the action to which Beck

objects, namely the imposition of consecutive terms instead of concurrent terms, is a result of judicial, not clerical, action).

§ 53:30 Writ of error coram nobis

Prior to the adoption of the 1961 postconviction relief statute, the common law writ of error coram nobis appears to have been a recognized postconviction remedy in Wyoming. Since 1961 coram nobis appears to no longer be recognized as a postconviction remedy in Wyoming.

§ 53:31 Post-Conviction DNA testing statute

Wyoming now has a postconviction DNA testing statute located at W.S. 7-12-302. to 7-12-315.

§ 53:32 Post-Conviction DNA testing statute—Text

§ 7-12-302. Short title

This act shall be known and may be cited as the "Post-Conviction DNA Testing Act."

§ 7-12-303. New trial; motion for postconviction testing of DNA; motion contents; sufficiency of allegations, consent to DNA sample; definitions

(a) As used in this act:

(i) "DNA" means deoxyribonucleic acid;

(i) "Movant" means the person filing a motion under subsection (c) of this section;

(iii) "This act" means W.S. 7-12-302 through 7-12-315.

(b) Notwithstanding any law or rule of procedure that bars a motion for a new trial as untimely, a convicted person may use the results of a DNA test ordered pursuant to this act as the grounds for filing a motion for a new trial.

(c) A person convicted of a felony offense may, preliminary to the filing of a motion for a new trial, file a motion for postconviction DNA testing in the district court that entered the judgment of conviction against him if the movant asserts under oath and the motion includes a good faith, particularized factual basis containing the following information:

(i) Why DNA evidence is material to:

(A) The identity of the perpetrator of, or accomplice to, the crime;

(B) A sentence enhancement; or

(C) An aggravating factor alleged in a capital case.

(ii) That evidence is still in existence and is in a condition that allows DNA testing to be conducted;

(iii) That the chain of custody is sufficient to establish that the evidence has not been substituted, contaminated or altered in any material aspect that would prevent reliable DNA testing;

(iv) That the specific evidence to be tested can be identified;

(v) That the type of DNA testing to be conducted is specified;

(vi) That the DNA testing employs a scientific method sufficiently reliable and relevant to be admissible under the Wyoming Rules of Evidence;

(vii) That a theory of defense can be presented, not inconsistent with theories previously asserted at trial, that the requested DNA testing would support;

(viii) That the evidence was not previously subjected to DNA testing, or if the evidence was previously tested one (1) of the following would apply:

(A) The result of the testing was inconclusive;

(B) The evidence was not subjected to the testing that is now requested, and the new testing may resolve an issue not resolved by the prior testing; or

(C) The requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice.

(xi) That the evidence that is the subject of the request for testing has the potential to produce new, noncumulative evidence that will establish the movant's actual innocence.

(d) The court may not order DNA testing in cases in which the trial or a plea of guilty or nolo contendere occurred after January 1, 2000 and the person did not request DNA testing or present DNA evidence for strategic or tactical reasons or as a result of a lack of due diligence, unless the failure to exercise due diligence is found to be a result of ineffective assistance of counsel. A person convicted before January 1, 2000 shall not be required to make a showing of due diligence under this subsection.

§ 7-12-304. Service of process; response by the state; preservation of evidence

(a) Notice of the motion filed under W.S. 7-12-303(c) shall be served upon the district attorney in the county in which the conviction occurred and, if applicable, the governmental agency or laboratory holding the evidence sought to be tested.

(b) The district attorney who is served shall within sixty (60) days after receipt of service of a copy of the motion, or within any additional period of time the court allows, answer or otherwise respond to the motion requesting DNA testing.

(c) The district attorney who is served may support the motion requesting DNA testing or oppose the motion with a statement of reasons and may recommend to the court, if any DNA testing is ordered, that a particular type of testing should be conducted, or object to the proposed testing laboratory, or make such other objections, recommendations or requests as will preserve the integrity of the evidence, including, but not limited to, requests for independent testing by the state or procedures in the event that the proposed testing will deplete the DNA sample.

(d) If a motion is filed pursuant to W.S. 7-12-303(c), and the motion asserts the evidence is in the custody of the state or its agents, the court shall order the state to preserve during the pendency of the proceeding all material and relevant evidence in the state's possession or control that could be subjected to DNA testing and analysis. The state shall prepare an inventory of the evidence and shall submit a copy of the inventory to the movant and to the court. If the state determines that the evidence is no longer available, the state shall notify the court and the movant of the loss or destruction of the evidence and explain its loss or destruction. The state shall provide copies of chain of custody documentation or other documents explaining the loss or destruction of the evidence. After a motion is filed under W.S. 7-12-303(c), prosecutors in the case, law enforcement officers and crime laboratory personnel shall cooperate in preserving material and relevant evidence and in determining the sufficiency of the chain of custody of the evidence which may be subject to DNA testing.

§ 7-12-305. Review by the court; hearing on motion, findings; order

(a) If the court determines that a motion is filed in compliance with the requirements of W.S. 7-12-303(c) and the state has had opportunity to respond to the motion, the court shall set a hearing for not more than ninety (90) days after the date the motion was filed. If the court finds that the motion does not comply with the requirements of W.S. 7-12-303(c), the court may deny the motion without hearing.

(b) The hearing under subsection (a) of this section shall be heard by the judge who conducted the trial that resulted in the movant's conviction unless the judge is unavailable.

(c) The movant and the state may present evidence by sworn

and notarized affidavits or by testimony; provided, however, any affidavit shall be served on the opposing party at least fifteen (15) days prior to the hearing.

(d) The movant shall be required to present a prima facie case showing that the evidence supports findings consistent with the facts asserted under W.S. 7-12-303(c) and DNA testing of the specified evidence would, assuming exculpatory results, establish:

(i) The actual innocence of the movant of the offense for which the movant was convicted; or

(ii) In a capital case:

(A) The movant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance; or

(B) A mitigating circumstance as a result of the DNA testing.

(e) If the court finds that the movant has presented a prima facie case showing that the evidence supports findings consistent with W.S. 7-12-303(c) and the evidence would establish actual innocence, the court may order testing, subject to W.S. 7-12-306.

§ 7-12-306. Designation of testing laboratory

(a) If the court orders DNA testing pursuant to W.S. 7-12-305(e), the DNA test shall be performed by the Wyoming state crime laboratory unless the movant establishes that the state crime laboratory has a conflict of interest or does not have the capability to perform the necessary testing.

(b) If the court orders that the DNA testing under W.S. 7-12-305(e) shall be conducted by a laboratory other than the state crime laboratory, the court shall require that the testing be performed:

(i) Under reasonable conditions designed to protect the state's interests in the integrity of the evidence;

(ii) By a laboratory that:

(A) Meets standards that at minimum comply with the standards of the DNA advisory board established pursuant to 42 U.S.C. 14131; and

(B) Is accredited by the American society of crime laboratory directors accreditation board.

§ 7-12-307. Discovery

(a) If the DNA evidence being tested under this act has been previously subjected to DNA analysis by either the state or defense prior to the hearing conducted under W.S. 7-12-305,

the court may order the state or defense to provide each party and the court with access to the laboratory reports prepared in connection with the DNA analysis, as well as the underlying data and laboratory notes. If DNA or other analysis was previously conducted by either the state or defense without the knowledge of the other party, all information relating to the testing shall be disclosed by the motion filed under W.S. 7-12-303(c) or any response thereto.

(b) The results of any DNA testing ordered under W.S. 7-12-305(e) shall be fully disclosed to the movant, the district attorney, the attorney general and the court. If requested by any party, the court shall order production of the underlying laboratory data and notes or chain of custody documents.

§ 7-12-308. Right to counsel

A convicted person is entitled to counsel during a proceeding under this act. Upon request of the person, the court shall appoint counsel for the convicted person if the court determines that the person is needy and the person wishes to submit a motion under W.S. 7-12-303(c). Counsel shall be appointed as provided in W.S. 7-6-104(c)(viii).

§ 7-12-309. Costs of testing

(a) The person filing a motion under W.S. 7-12-303(c) shall bear the cost of the DNA testing unless:

(i) The person is serving a sentence of imprisonment;

(ii) The person is needy; and

(iii) The DNA test supports the person's motion.

(b) In the case of a person meeting the criteria specified in paragraphs (a)(i) through (iii) of this section, the costs of testing shall be paid by the state.

§ 7-12-310. Order following testing

(a) If the results of the DNA analysis are inconclusive or show that the movant is the source of the evidence, the court shall deny any motion for a new trial based upon the DNA evidence and shall provide the results to the board of parole.

(b) If the results of the DNA analysis are consistent with assertions contained in the movant's motion, the court shall set the matter for hearing on the motion for a new trial.

(c) Upon the stipulation of both parties or a motion for dismissal of the original charges against the movant by the state in lieu of a retrial, the court shall:

(i) Vacate the movant's conviction consistent with the evidence demonstrating the movant's actual innocence;

(ii) Issue an order of actual innocence and exoneration; and

(iii) Issue an order of expungement.

(d) In the event a retrial is pursued and conducted and the movant is acquitted at the retrial, the court shall:

(i) Issue an order of actual innocence and exoneration; and

(ii) Issue an order of expungement. Following any motion filed under this act, the district attorney shall provide notice to the victim that the motion has been filed, the time and place for any hearing that may be held as a result of the motion; and the disposition of the motion. For purposes of this section, "victim" means as defined in W.S. 1-40-202(a)(ii).

§ 7-12-312. Rights not waived; refiling of uncharged offenses

(a) Notwithstanding any other provision of law, the right to file a motion under W.S. 7-12-303(c) shall not be waived. The prohibition against waiver of the right provided under this section applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendere.

(b) If a movant is granted a new trial under this act, any offense that was dismissed or not charged pursuant to a plea agreement that resulted in the conviction that has been set aside as a result of this act may be refiled by the state.

§ 7-12-313. Appeal

(a) An order granting or denying a motion for DNA testing filed under W. S. 7-12-303(c) shall not be appealable, but may be subject to review only under a writ of review filed by the movant, the district attorney or the attorney general. The petition for a writ of review may be filed no later than twenty (20) days after the court's order granting or denying the motion for DNA testing.

(b) Any party to the action may appeal to the Wyoming supreme court any order granting or denying a motion for a new trial under W.S. 7-12-310(b).

§ 7-12-314. Subsequent motions

The court shall not be required to entertain a second or subsequent motion under W.S. 7-12-303(c) on behalf of the same movant, except where there is clear and compelling evidence that the evidence sought to be tested was wrongfully withheld from the movant by the state or its agents.

§ 53:33 Erroneous Convictions Act

Wyoming does not have an erroneous convictions act.