

GETTING THE DEAL THROUGH

# Dispute Resolution

in 48 jurisdictions worldwide

# 2010

Contributing editor: Simon Bushell



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# Colombia

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## Litigation

### 1 Court system

What is the structure of the civil court system?

The Colombian civil court system comprises municipal judges, circuit judges, specialised circuit judges, superior district tribunals and the Supreme Court. First instance courts are defined by the value of the claim. There are three value thresholds updated every year: minimum, small and major.

Municipal judges hear minimum-value claims, which are not subject to review, and are the trial courts for small claims. Circuit judges serve as trial courts for major-value claims and as appellate courts for small claims.

Superior tribunals are the appellate courts for cases heard before circuit judges and have some other review powers through extraordinary actions. The Supreme Court serves as a review body deciding extraordinary review actions, such as cassation, review and complaint and hears all civil *exequatur* cases regardless of value.

Municipal and circuit courts are presided over by a single judge. Superior tribunals are divided into decision panels formed by an odd number of justices with the only rule being that tribunals have to comprise at least three justices. The civil division of the Supreme Court has seven justices.

### 2 Judges and juries

What is the role of the judge and the jury in civil proceedings?

The Colombian justice system does not use juries. Civil trials can only be opened by a complaint from the parties. However, the judge is responsible for carrying out the process and is responsible for any delays caused by his or her own negligence. Regarding evidence, the Colombian Code of Civil Procedure establishes that the parties have the burden of proving any fact supporting their claims, but judges have ample powers to request evidence not requested or offered by the parties that may be helpful in establishing the veracity of the claims.

### 3 Limitation issues

What are the time limits for bringing civil claims?

Prescription, a concept akin to the statute of limitations, covers both ordinary and executive proceedings. Ordinary actions are unactionable 10 years from the date when the obligation became due and executive actions are unactionable after five years. After that they become ordinary actions and are unactionable, as such, five years later.

Prescription extinguishes both the action and its underlying rights. However, it cannot be declared by the judge if it is not raised by the defendant in the response to the complaint. Prescription is interrupted when the defendant recognises, expressly or tacitly, the underlying obligation and when the plaintiff files the claim.

Certain actions also have an expiry date known as *caducidad*. Once the expiry date passes the action is time-barred and the judge can declare it time-barred without requiring any other conditions.

### 4 Pre-action behaviour

Are there any pre-action considerations the parties should take into account?

Colombian law requires that before a claim is filed in a civil court the parties have to attempt conciliation. The conciliation hearing, a pre-trial procedural requirement, has to take place unless the plaintiff submits a statement, under oath, declaring that he or she does not know the whereabouts of the defendant. If the plaintiff seeks pre-trial measures (a type of injunction set of measures) then it is also possible to file in court without attempting the pretrial conciliation hearing.

If the conciliation hearing fails, or only partially settles the dispute, the matter can be filed before a court. The judge, when reviewing the compliance with the pretrial conciliation hearing, can impose a fine on any party that did not have a valid reason for not attending the conciliation hearing.

### 5 Starting proceedings

How are civil proceedings commenced?

The first step in a civil procedure is to file a written complaint before a judicial distribution office, whereupon it is assigned to a court that reviews whether it has been properly filed.

The complaint has to contain the following information:

- the designation of the judge to whom it is addressed (ie, municipal judge, circuit judge, etc);
- the name, age and domicile or residence of the plaintiff and the defendant;
- if applicable, the name, age and domicile or residence of the representatives of the parties;
- the name of the plaintiff's attorney;
- the precise claims being made;
- the facts supporting the claims being made;
- the applicable law that supports the claims being made;
- the value of the claim or an estimation if a precise calculation is not possible (this will determine the applicable procedure);
- an indication of the applicable procedure;
- the request regarding the evidence the plaintiff asks to be taken into account by the judge;
- the addresses where the plaintiff and his or her attorney and the defendant or his or her attorney can be served with notices; and
- depending on the claim, the Code of Civil Procedure may set other specific requirements.

**6 Timetable**

What is the typical procedure and timetable for a civil claim?

There are several different procedure classes with different timetables; the most common procedure is the ordinary or major value claim, which has the following timetable:

- Once the complaint is received, the judge decides whether all prerequisites have been met; if so, the complaint is accepted.
- Service or notification of the complaint has to be requested by the plaintiff and it should be delivered personally to the defendant. For that purpose the secretary of the court, within five days of receiving the plaintiff's request, issues a notification letter and sends it via the postal service. If the secretary fails to issue the notification within five days from the request, the plaintiff can post the notification letter directly.
- Once the receipt from the postal service showing delivery to the address of the defendant is received, the law grants the defendant five days to appear before the court and be notified (the term is 10 days when the domicile of the defendant is in another county and 30 if it is outside Colombia).
- Once the defendant appears before the court and is notified of the complaint, the law grants the defendant 20 days to answer the complaint.
- If the defendant files a counterclaim, the plaintiff will have 20 days to file an answer.
- If the defendant files a request to cease the proceeding based on the preliminary exceptions recognised by law, the plaintiff has five days to file a document requesting and offering evidence against the defendant's request.
- Once all due dates have passed the judge will call a hearing to conciliate (if no pretrial conciliation was attempted). If the conciliation fails the judge decides on the preliminary exceptions proposed by the defendant and will review the proceedings up until that point so that corrective measures can be taken and avoid a mistrial.
- In the same hearing the judge will interview the parties to define the facts and claims to be heard.
- Once the hearing is completed the judge will open the evidence period, expressly stating which evidence will be considered. The evidence period lasts 40 days.
- Once the evidence period is complete, the parties are granted eight days to file a closing statement with the court.
- After the closing statements term is complete, the judge has 40 days to issue a decision.

It should be noted that all references to days refer to working days. The heavy volume of cases at the trial courts, in some cases, prolongs procedures well beyond the terms established by law.

**7 Case management**

Can the parties control the procedure and the timetable?

No. Procedural rules, which include timetables, are considered public order rules and are not subject to private agreements modifying them. Nonetheless, the party benefited by a period allowed by law can renounce it in writing or orally in a hearing.

**8 Evidence – documents**

Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Documents are divided into public and private. Records of public documents are kept by the office charged with doing so (notaries public, national registries, etc). Private documents can be offered as evidence by the parties when they have them. If the existence of the document is known but the party relying on it does not have it, is

possible to request the judge to order the document to be exhibited.

Substantive law imposes certain obligations, especially on corporations, to preserve documents and maintain an archive. Procedural law allows the parties to offer the evidence they have and request the judge to order all other evidence that the law authorises and that may support their claims, but there is no obligation to share documents with the opposing party (except when such exhibition is ordered by the judge).

**9 Evidence – privilege**

Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Documents can be confidential if the law recognises them as such and, in some instances, may be safeguarded by the attorney's professional secrecy duties. Colombian procedure, in most cases, allows the production of documents to the interested party. However, when presentation of a document is requested there are two possible scenarios:

- when the document is held by the other party, the judge will order its production. Unless there are significant issues to support refusal to exhibit the document (ie, legal reserve), the law orders the judge to reach certain adverse conclusions against the party unwilling to exhibit the document; or
- if a party requests the exhibition of a document by a third party, the judge has to decide on the request. When the exhibition of a document is ordered the third party can oppose it but if it does so without valid reasons, the judge can levy a fine. In any event, third parties do not have to produce documents entirely of their property if they are protected by legal reserve or exhibiting them will cause damages.

The attorney's professional secrecy duties are briefly defined by the profession's disciplinary code. It is described as a duty to professional secrets even after representation of the client ends. Revealing or using secrets entrusted to an attorney by his or her client, even if subpoenaed by the authorities, is a disciplinary violation.

The professional secrecy duties can be broken when authorised in writing by the party or to avoid the commission of a crime. Attorney work products or advice from an in-house counsel is not protected by privilege beyond the general provisions for professional secrecy duties.

**10 Evidence – pretrial**

Do parties exchange written evidence from witnesses and experts prior to trial?

No, parties do not exchange evidence from witnesses prior to trial. Witnesses may present documents related to the facts to which they are testifying. In such cases the parties have three days to file a brief to refute or support the new evidence. Experts do not testify; rather, they file a report that the parties can refute within the three days after its contents are made public.

**11 Evidence – trial**

How is evidence presented at trial? Do witnesses and experts give oral evidence?

Presentation of evidence depends on its type. Documents are filed or requested alongside the complaint and the answer to the complaint and the judge decides on its admissibility when he or she issues an order opening the evidence period. The parties can question the validity or truthfulness of the document and ask for further evidence that will prove their contentions.

Testimony can be of two kinds: a party declaration and third-party declarations. Party declarations are requested by the parties in the complaint or its answer or the judges can order them on their

own once the evidence period is opened. When requested, the declaration is taken by the judge, the requesting party should file 20 questions to be asked of the deponent and the judge reviews them before the hearing.

The requesting party can attend the hearing and conduct the questioning, even replacing the questionnaire submitted to the judge, or abstain from attending and leave the judge to ask the submitted questions. In both cases the judge can ask additional questions. The main objective of a party declaration is to achieve a confession as to some, or all, of the facts that are the basis for the complaint.

Third-party declarations are requested by the parties, reviewed and ordered by the judge and are conducted in hearings. The questioning is conducted orally by the parties or they can file with the court a questionnaire following the same rules for party declarations. When the judge finds it useful, a confrontation of witnesses or deponents can be ordered and conducted in a hearing.

In some cases, especially when the law allows a party to make an estimate of the value of the claims, the judge can ask a party to make a statement under oath, which will be considered as evidence.

Expert reports are requested by the parties to establish concretely the issues of the inquiry. The judge decides on the request and proceeds to appoint an expert that will present the report. The expert can request funds to cover any expenses incurred, which are to be covered by the party requesting the report. Once the report is completed and filed with the court, the parties can ask for the expert to clarify or complement the report and they can also object to the findings. When objecting to the findings, the parties can consult other experts and present their reports to the judge.

Documents, testimonies and expert reviews can also be filed as evidence in the course of judicial inspections.

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## 12 Interim remedies

What interim remedies are available?

There are three interim remedies that can be available (depending on the facts giving rise to the complaint). When the dispute involves real estate it is possible to inscribe the complaint in the Public Registry that holds the registration file for said property.

It also possible to ask the judge to order any type of good to be confiscated. As with the inscription of the complaint, these interim remedies can only be ordered over the goods directly involved in the dispute.

The final interim remedy is a combination of the two already described. It is called seizure and confiscation. In this case the interested party can request the impoundment of a car (if the claim is for compensation for damages arising from a traffic accident) and the seizure of any kind of property when the complaint pursues damages for contractual and non-contractual responsibility.

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## 13 Remedies

What substantive remedies are available?

Under Colombian law there is contractual and non-contractual civil responsibility. Depending on the underlying contractual obligation (whether the debtor has to give, do or not do something) specific performance may be available. Non-performance of contractual obligations may entitle the non-bridging party, depending on the contract type and the facts of the case, to ask for consequential damages and lost profits. There are no punitive damages in the context of contractual responsibility.

Non-contractual responsibility, akin to the tort concept, may entitle the plaintiff to ask for consequential damages, lost profits and moral damages (compensation for pain and suffering).

The judge will order the payment of interest over the principal amount if requested by the party. Once a favourable and final declaratory judgment has been issued, it is possible to request in the executive complaint the payment of interest over the amount established in the judgment.

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## 14 Enforcement

What means of enforcement are available?

The judgment itself has to be enforced via an executive action brought before a civil court once the declaratory sentence is finalised (when the opportunity to review it has passed). Violation of court orders, such as those dealing with production of evidence, is punishable by a fine.

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## 15 Public access

Are court hearings held in public? Are court documents available to the public?

Trial court hearings are usually not open to the public and only the parties and their counsellors are allowed to participate. Transcriptions of the hearings and all documents are part of the file that remains in the court's archives. Access to the file is restricted to the parties, their attorneys of record, the authorised aides of the attorneys of record, the courts aides, public officers authorised by law and persons conducting research or using the files for educational ends authorised by the judge.

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## 16 Costs

Does the court have power to order costs?

The court is required by law to assess the costs; this is usually done at sentencing although certain fees, such as expert fees, can be assessed beforehand. When the assessment is done in the sentence, the losing party has to pay the process costs, which can include:

- the fiscal stamp tax value;
- the fees of experts and other judicial aides;
- any judicial expenses incurred by the winning party (proven and authorised by law); and
- law agencies' (attorneys') fees, assessed in accordance with the values set forth by the Superior Judicial Council.

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## 17 Funding arrangements

Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Contingency or success fees are allowed. Third-party funding is not prohibited; however, when a third party acquires the litigious rights of another (through a legal concept known as 'ceding of litigious rights') the recovery on the claim is limited to the amount paid for the acquisition.

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## 18 Insurance

Is insurance available to cover all or part of a party's legal costs?

Certain policies, such as car insurance or professional responsibility insurance, include coverage for legal representation or assistance. Corporate insurance for civil responsibility and lost profits are also available as well as a general assistance insurance policy.

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## 19 Class action

May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Class actions are recognised under Colombian law. Class actions are limited by article 3 of Law 472 of 1998 to 'claims presented by a plural number or a group of people who meet uniform conditions regarding one same cause that led to individual damages for them. The uniform conditions must also take place with respect to all the elements constituent of liability'. Class actions are reserved for the recognition and payment of damages.

**20 Appeal**

On what grounds and in what circumstances can the parties appeal?  
Is there a right of further appeal?

The party defeated in the sentence can appeal it. There are no grounds for appeal stated by law; the appealing party has to request the appeal before the trial court and file the arguments in support of its appeal before the appeal judge. If the trial court denies the appeal is possible to ask the appellate court, via the complaint recourse, to review the matter and decide if it should be granted.

There is no right to further appeals in a strict sense; nonetheless, there are a number of extraordinary recourses that allow further review of a sentence. The cassation recourse, established mainly to unify case law, is decided by the Supreme Court and reserved to cases meeting the standards set forth by article 366 of the Code of Civil Procedure and for the circumstances established by article 368 of the same Code. The cassation recourse has to be requested before the appellate tribunal and in some limited cases is possible to renounce the appeal and ask for cassation directly.

The extraordinary recourse review is heard by the Supreme Court or the Superior Tribunals. For the recourse to be granted, one of the conditions stated in article 380 of the Code of Civil Procedure has to be met. This recourse allows review of a sentence when new evidence is found or when the evidence supporting it is found by a criminal court to be false or to have been tampered with. The recourse has to be filed within two years of the sentence being issued or the criminal judgment relating to the evidence which supported it being issued.

**21 Foreign judgments**

What procedures exist for recognition and enforcement of foreign judgments?

In the absence of a treaty or agreement, foreign judgments can be recognised and enforced, by comity, via the *exequatur* proceeding as long as the foreign judgment does not involve real property and real rights located in Colombia, does not oppose Colombian law and public policy, the issue adjudicated is not of the exclusive competence of Colombian judges and there is no judgment or current proceeding in Colombia regarding the same matter.

Also, there are two formal requirements: the foreign judgment must be final (ie, not subject to review or appeal) and should have been rendered in accordance with the local laws governing service (notification) and contradiction by the opposing party. It has to have *res judicata* effect.

**22 Foreign proceedings**

Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

The Code of Civil Procedure establishes that circuit judges are competent to answer letters rogatory and requests ordered by foreign judges or arbitration tribunals, as long as the request is valid under Colombian law and not against public policy.

Colombia is party to the Inter-American convention on foreign evidence and the Inter-American convention on requests and letters rogatory.

**Arbitration****23 UNCITRAL Model Law**

Is the arbitration law based on the UNCITRAL Model Law?

No, the Colombian arbitration law is not based on the UNCITRAL Model Law.

**24 Arbitration agreements**

What are the formal requirements for an enforceable arbitration agreement?

The arbitration pact or agreement can be of two kinds, the compromising clause and the compromise. The pact is defined as the means through which the parties bind themselves to subject their differences before an arbitration tribunal and relinquish all rights to present their claims before a judge.

The compromising clause is an agreement between the parties to subject their differences to an arbitration tribunal. It may be a clause within a contract or a different document attached to the principal contract, in which case the names of the parties should appear alongside a clear identification of the contract to which the attached compromising clause applies.

Under Colombian law the validity of the compromising clause is separate from that of the contract or agreement. In other words, when the disagreement of the parties includes questions regarding the validity of the contract itself, such claims are subject to arbitration and the decision by the arbitration tribunal is binding and final, even if the decision rendered declares the contract null and void.

The compromise is an agreement between parties with an existing and determined conflict, in which they agree to submit their conflict to an arbitration tribunal. Any document is suitable to contain the compromise but it has to name the parties and their addresses, a description of the differences and conflicts to be settled by the arbitration tribunal, and if a judicial process has already begun the parties can widen or restrict the claims to be decided by the tribunal.

**25 Choice of arbitrator**

If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

The arbitrators are to be elected jointly by the parties. However, they can delegate the appointment, partially or completely, to a third party. The law requires three arbitrators except when the disagreement is characterised as a small claim; in that case, only one arbitrator is required.

There is a legal standard procedure for formation of the Tribunal:

- one or both parties files the request for the opening of arbitration proceedings with the agreed upon arbitration centre;
- if no arbitration centre has been selected in the arbitration clause or compromise, the request is sent to the other parties' domicile;
- if the parties have named the arbitrators, the director of the arbitration centre summons them via telegram. The lack of a response within five days is understood as declining the appointment;
- if the parties have assigned on the appointment of the arbitrators to another person, the director of the arbitration centre summons them via telegram. No answer within five days is understood as declining the request to name the arbitrators;
- when the named arbitrators decline the appointment or the parties have not named any, the centre calls a hearing for the parties to agree on the appointments. If the hearing is unsuccessful the appointments are made by the arbitration centre; and
- before the tribunal begins deliberation, the parties can agree to replace one or all of its members.

Arbitrators can be challenged on the same grounds established by the Code of Civil Procedure for the challenging of civil judges. Arbitrators agreed upon by the parties can only be challenged for causes arising after the designation. Arbitrators named by a third party or a judge can be challenged within five days of their designation.

**26 Arbitral procedure**

Does the domestic law contain substantive requirements for the procedure to be followed?

Yes, the ADR Statute sets forth a number of proceedings that have to be followed by domestic arbitration tribunals and refers to a number of rules contained in the Code of Civil Procedure.

**27 Court intervention**

On what grounds can the court intervene during an arbitration?

Once the arbitration tribunal accepts jurisdiction, any civil court hearing the same dispute covered by the arbitration agreement will suspend the process once it is notified of the arbitration proceeding. When the arbitration tribunal conducts its first hearing it will receive the file of the civil court process and continue with the proceedings; the civil court will only regain jurisdiction and continue with the proceedings if the arbitration process ends without an award or with a partial award.

The only situation, provided for by the ADR Statute, when a civil judge can intervene in the arbitration procedure is in the context of a successful challenge to one of the arbitrators when the interested party fails to name a new one. In such cases a circuit civil judge will make the decision on the request of the remaining arbitrators.

**28 Interim relief**

Do arbitrators have powers to grant interim relief?

The tribunal can issue the temporary injunctions authorised by law (see question 12), when requested by the parties, relating to the controversies before it to ensure the effectiveness of its decision.

**29 Award**

When and in what form must the award be delivered?

The decision of an arbitration tribunal is taken by a majority vote and issued in writing once the evidence period has concluded and the parties have filed their final arguments. Dissenting opinions are to be issued separately in writing.

Once the decision is issued it should be converted to a public deed, notarised by a notary public. The tribunal can correct, complement or add new elements to its decision within five days of its issuance at the request of the parties or on its own decision.

**30 Appeal**

On what grounds can an award be appealed to the court?

Decisions by arbitration tribunals are subject, under Colombian law, to review via annulment recourse. Annulment of the decision has to be requested before the tribunal within five days of its issue.

**Update and trends**

Currently the Colombian Congress is discussing the House Bill of Law 177 of 2007, which proposes reforms to the arbitration regime. Among the noteworthy changes proposed are allowing arbitration tribunals to request assistance from civil courts for the collection of evidence and eliminates the requirement of converting the award into a public deed.

Congress is also considering a proposal backed by the government to reform small claims procedures.

Reviews of arbitration decisions are conducted by the superior tribunal of the judiciary district where the arbitration tribunal convenes. When the arbitration decision involves a state contract, however, the Council of State is the only court with jurisdiction for review purposes.

Annulment is only granted when some of the events listed by article 163 of Decree 1818 of 1998 are evidenced. If the superior tribunal accepts the review the parties will have five days to file their arguments supporting or opposing the annulment of the arbitration decision.

Once the five days granted to the parties to file their arguments have passed, the superior tribunal has three days to issue a decision in review. If no specific reason for annulment is found the arbitration decision stands. In certain circumstances the superior tribunal will have to correct, complement or add new elements to the arbitration decision. Only if one of the grounds for annulment is found will the Superior Tribunal issue a new decision completely replacing the arbitration tribunal ruling.

Both the decisions of the arbitration tribunal and, if one is issued, the decision by the Superior tribunal can be reviewed, on a very narrow basis, via the extraordinary review recourse by the superior tribunal (in the case of the arbitration decision) or by the Supreme Court (in the case of a review decision rendered by a Superior Tribunal).

**31 Enforcement**

What procedures exist for enforcement of foreign and domestic awards?

The execution of domestic awards is done through the courts via the regular executive process. Colombia is a party to the New York convention and other international conventions and agreements. Foreign arbitration awards not covered by such conventions and agreements are subject to the exequatur proceeding (see question 21).

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**32 Costs**

Can a successful party recover its costs?

The successful party can recover costs and fees, including attorneys' fees.

**Alternative dispute resolution****33 Types of ADR**

What types of ADR process are commonly used? Is a particular ADR process popular?

The ADR Statute regulates conciliation, arbitration and amicable composition. Conciliation in family law cases, where it is not a pre-trial requirement, is popular for setting alimony because the conciliation records can be used to execute any unpaid sums and to file a criminal complaint if the agreement is breached.

**34 Requirements for ADR**

Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

As explained in question 4, conciliation is a pre-trial requirement before filing a complaint in a civil court. If the pre-trial requisite is excused, the first trial hearing will begin as a conciliation hearing.

Filing an arbitration claim is not subject to the conciliatory attempt requirement; however, the first arbitration hearing, once the complaint has been answered, is also a conciliatory hearing.

**Miscellaneous**

**35** Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

The Colombian Constitution recognises three main jurisdictions: the ordinary, the contentious-administrative and the constitutional.

The ordinary jurisdiction includes specialised civil, labour and criminal courts. The law assigns the competence of each court taking into account several factors and the cases they can hear are limited by their specialism.

The contentious-administrative jurisdiction decides on the constitutionality of decrees and hears claims involving the state or its agencies and agents. The constitutional jurisdiction controls the constitutionality of laws and hears *tutela* actions, which provide immediate protection of basic constitutional rights including due process. *Tutela* actions can result in the review of sentences issued in violation of any constitutional basic right.

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