

April 3, 2017

MEMORANDUM

TO: Criminal Rules Committee
FROM: Judge Shelley Gilman, Kevin McGreevy, and Matthew Holman
RE: Amendment to Crim. P. 35 Form 4

The subcommittee was asked to consider whether Form 4, which is used by defendants to raise Crim. P. 35(c) claims, should be amended to include: (1) a line for the date that the mandate issued following direct appeal; and (2) a statement informing defendants that the trial court lacks jurisdiction to consider a postconviction motion until the mandate has issued.

The subcommittee recommends adding a line for the date of the mandate, but does not recommend advising the defendant that the court does not have jurisdiction to consider the postconviction motion until the mandate has issued.

Pursuant to Crim. P. 35(c)(3)(II), any motion for postconviction relief under Crim. P. 35(c) shall substantially comply with Form 4 and shall substantially contain the information identified in Form 4. The pertinent part of Form 4, which concerns information about the defendant's direct appeal, currently reads as follows:

DIRECT APPEAL

4. Was this case appealed? YES NO If yes, please provide the following:

Appeal Case Number: _____

Appellate Court: _____

Result: _____ Date: _____

Adding a line for the defendant to indicate the date on which the mandate issued would be useful because it would help the trial court and the parties determine whether the direct appeal is completed.

However, including a statement that the trial court lacks jurisdiction to consider a postconviction motion until the mandate issues might improperly discourage defendants from filing a postconviction motion when they are entitled to do so and might create issues related to the timeliness of a postconviction motion under section 16-5-402, C.R.S. 2016).

A defendant may file a Crim. P. 35(c) motion while his/her case is on direct appeal even though the trial court may lack jurisdiction to rule on the motion. Under such circumstances, the defendant may seek a limited remand to have the motion considered or the appellate court may order a remand on its own. *See, e.g., People v. Francis*, 630 P.2d 82 (Colo. 1981).

Further, the trial court may retain jurisdiction to hear some postconviction motions during the direct appeal without a remand. In at least one unpublished case, the Court of Appeals has held that a trial court retains jurisdiction to consider a postconviction motion under Crim. P. 35(c)(1), which states:

If, prior to filing for relief pursuant to this paragraph (1), a person has sought appeal of a conviction within the time prescribed therefor and if judgment on that conviction has not then been affirmed upon appeal, that person may file an application for postconviction review upon the ground that there has been a significant change in the law, applied to the applicant's conviction or sentence, allowing in the interests of justice retroactive application of the changed legal standard.

So, it is unclear whether a trial court always lacks jurisdiction to consider a postconviction motion while the case is on appeal.

Given these circumstances, a statement that the trial court lacks jurisdiction to consider a postconviction motion until the mandate issues may be incorrect or, even if correct, may improperly discourage a defendant from filing a postconviction motion when he/she is entitled to file one. This, in turn, could impact the timeliness of a postconviction motion under the limitations period in §16-5-402, since it might discourage the filing of an otherwise timely postconviction motion.

Finally, procedures are currently used to address such motions. The Court of Appeals has granted motions for limited remand in cases where a defendant seeks consideration of a postconviction motion during direct appeal; and the Court has also ordered a limited remand where a defendant has sought to appeal a postconviction order entered by the trial court when the trial court lacked jurisdiction.

Under the circumstances, adding a statement to Form 4 concerning the trial court's jurisdiction seems unnecessary and carries the potential to mislead a defendant.

For these reasons, the subcommittee recommends adding a line for the date on which the mandate issued, but does not recommend advising the defendant that the trial court lacks jurisdiction to consider a postconviction motion until the mandate has issued.

The subcommittee proposes including the following additional language to this section of Form 4 regarding the mandate (shown in bold print):

DIRECT APPEAL

4. Was this case appealed? YES NO If yes, please provide the following:

Appeal Case Number: _____

Appellate Court: _____

Result: _____ Date: _____

Date of mandate from the appellate court: _____