D

|  |  |
| --- | --- |
| DATE FIL  DISTRICT COURT, ADAMS COUNTY, COLORADFOILING I  CASE NU  1100 Judicial Drive  Brighton, Colorado 80601  **PLAINTIFF:** PEOPLE OF THE STATE OF COLORADO  **DEFENDANT:** PABLO GUTIEREZ | ED: November 14, 2017 8:58 AM  : D8C8AB6C718BC MBER: 2014CR2365  COURT USE ONLY |
| Attorney for Defendant:  Tara Jorfald, Reg. No. 46193 (ADC) THE NOBLE LAW FIRM, LLC  215 Union Boulevard, Suite 305  Lakewood, CO 80228  Tel: (303) 232-5160  Fax: (303) 232-5162  Email: [tara@noble-law.com](mailto:antony@noble-law.com) | Case No. 14CR2365  Division Q |
| **SECOND MOTION FOR RULING ON**  **PETITION FOR POSTCONVICTION RELIEF PURSUANT TO CRIM. P. 35(c)** | |

Defendant Pablo Gutierez, by and through the undersigned counsel, files this second motion for a ruling on his petition for postconviction relief pursuant to Crim. P. 35(c), and states as follows:

1. On July 6, 2016, Mr. Gutierez pleaded guilty to attempt to influence a public servant and driving under the influence.
2. On August 17, 2016, the court sentenced Mr. Gutierez to four years in the Department of Corrections on the attempt to influence a public servant conviction and a concurrent one-year term in jail on the driving under the influence conviction.
3. On March 1, 2017, Mr. Gutierez filed a timely pro se combined Crim. P. 35(a) and 35(c) petition for postconviction relief in which he asserted the following claims:
   1. The court erred by imposing a sentence against him in the absence of a provision to do so under the sentencing scheme statutes pursuant to section 18-1.3-401, C.R.S.
   2. He was denied due process of law regarding the confiscated

$59,500.00 that was found in the trunk of his car before he was sentenced by the court.

* 1. He was denied due process of law of a preliminary hearing.
  2. He was denied due process of law of a PSIR hearing.
  3. Authorities erred in setting his bail amount before the court could inform him under Crim. P. 5(a)(1)(2)(V).

1. On March 30, 2017, Mr. Gutierez filed an addendum to his combined Crim. P.

35(a) and 35(c) petition, in which he asserted the following claims of ineffective assistance of counsel:

1. Counsel did not address the absence of his “Miranda warning” after his arrest.
2. Counsel did not object to imposition of a “conviction” and “sentencing” of him in absence of a “provision” that would allow/exclude him performance of “mandatory period of parole” under section 18-1.3-401(v)(a)(b), C.R.S.
3. On May 23, 2017, the district court appointed the public defender, who subsequently withdrew because of a conflict of interest. On June 21, 2017, the court appointed the Office of Alternate Defense Counsel (ADC) and ordered the ADC to respond within 49 days as to whether Mr. Gutierez’s claims have merit and whether more time is needed to investigate the claims that have merit.
4. Undersigned counsel was appointed by the ADC on July 27, 2017. This court granted an extension of time until November 8, 2017, to file a supplemental petition.
5. On October 31, 2017, counsel advised the court that Mr. Gutierez would not be filing any additional claims and requested a ruling on his claims.
6. On November 9, 2017, the court denied Mr. Gutierez’s motion for ruling, stating that the court had already taken action, “as this motion has previously been addressed by the Court.”
7. After review of the court file, undersigned counsel is aware that a motion to return of personal property was ruled as moot on January 5, 2017, but undersigned counsel is unaware of any order related to Mr. Gutierez’s claims filed in his petition for postconviction relief listed above.
8. Mr. Gutierez respectfully requests a ruling on his claims in his petitions for postconviction relief filed on March 1 and March 30, 2017.

# ARGUMENT

Pursuant to Crim. P. 35(c)(3)(IV), when a postconviction motion is filed, the court must:

* Promptly review the motion.
* Determine whether the motion complies with Form 4.
* Consider whether the motion is timely filed.
* Consider whether the motion fails to state adequate factual or legal grounds for relief.
* Consider whether the motion states legal grounds for relief that are not meritorious.
* Consider whether the motion states factual grounds, that, if true, entitle the party to relief, or the files and records of the case show to the satisfaction of the court that the factual allegations are untrue.

Pursuant to Crim. P.35(c)(3)(V):

* The court must have a copy of said motion to be served on the prosecuting attorney if one has not yet been served by counsel for the defendant.
* If the defendant has requested counsel be appointed in the motion, the court shall cause a complete copy of said motion to be served on the Public Defender.
* Within 49 days, the Public Defender shall respond as to whether the Public Defender's Office intends to enter on behalf of the defendant pursuant to § 21-1-104(1)(b), 6 C.R.S.
* In such response, the Public Defender shall identify whether any conflict exists, request any additional time needed to investigate, and add any claims the Public Defender finds to have arguable merit.
* Upon receipt of the response of the Public Defender, or immediately if no counsel was requested by the defendant or if the defendant already has counsel, the court shall direct the prosecution to respond to the defendant's claims or request additional time to respond within 35 days and the defendant to reply to the prosecution's response within 21 days.
* Thereafter, the court shall grant a prompt hearing on the motion unless, based on the pleadings, the court finds that it is appropriate to enter a ruling containing written findings of fact and conclusions of law.

“A district court commits error by “departing from the mandatory procedure outlined by

Crim. P. 35(c)(3)(IV) and (V).” *See People v. Higgins*, 2017 COA 57, ¶ 13 (reversing summary denial of postconviction relief and remanding with instructions to the district court to follow mandatory procedure) (citing *People v. Davis*, 272 P.3d 1167, 1169 (Colo. App. 2012)); *see also Dooly v. People*, 302 P.3d 259, 262 (Colo. 2013) (district court must comply with procedural requirements of Crim. P. 35(c)(3)(IV) and (V)) (citing *People v. Breaman*, 939 P.2d 1348, 1352 (Colo. 1997)). Here, appointed counsel has notified the court that it does not intend to add any additional claims. The appropriate procedure for the court is to direct the prosecution to respond and thereafter either grant a hearing or enter a ruling.

Mr. Gutierez, by and through undersigned counsel, respectfully requests this court to order a response from the prosecution and issue a ruling on all of his claims in the pro se petition.

Dated this 14th day of November 2017.

Respectfully submitted,

THE NOBLE LAW FIRM, LLC

s/ Tara Jorfald

Tara Jorfald, Reg. No. 46193

Attorney for Defendant

# CERTIFICATE OF SERVICE

I certify that on this 14th day of November 2017, this **SECOND MOTION FOR RULING ON PETITION FOR POSTCONVICTION RELIEF PURSUANT TO CRIM. P.**

**35(c)** was served via Colorado Courts E-Filing on the Office of District Attorney.

s/ Tara Jorfald