



COLORADO LAWYERS COMMITTEE

February 4, 2010

The Honorable Bill Ritter
 Governor of Colorado
 136 State Capitol
 Denver, CO 80203-1792

Re: Unconstitutionality of Colo. Rev. Stat. § 116-7-301(4)

Dear Governor Ritter:

We write on behalf of the Colorado Lawyers Committee's Sixth Amendment Task Force regarding Colorado's failure to comply with the Sixth Amendment's right-to-counsel clause in misdemeanor and petty offense cases.

The Lawyers Committee is a nonprofit, nonpartisan consortium of 50 Colorado law firms whose volunteer lawyers do high impact *pro bono* work to create and increase opportunities for children, the poor, and other disadvantaged communities. Since the decision of the United States Supreme Court in *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2592 (2008), we have become increasingly concerned that Colorado Revised Statute § 16-7-301(4) violates the Sixth Amendment's right-to-counsel clause by deferring the appointment of counsel until after a critical stage of the proceedings and is therefore unconstitutional. In late 2009, the Colorado Lawyers Committee formed a Task Force, in cooperation with the National Association of Criminal Defense Lawyers, to research the Colorado statute and explore remedies for criminal defendants whose constitutional rights are being violated. A list of Task Force members is included below.

In *Rothgery*, the United States Supreme Court held that the Sixth Amendment right to counsel attaches at "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction." 128 S. Ct. 2578, 2592 (2008). "Once attachment occurs," the Court held, "the accused *at least* is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings." *Id.* at 2591 (emphasis added). However, Colorado Rev. Stat. § 16-7-301(4) provides that, in "misdemeanors, petty offenses, or offenses under title 42, C.R.S. [traffic offenses]," a defendant's "application for appointment of counsel and the payment of the application fee shall be deferred until after the prosecuting attorney has spoken with the defendant as provided in this subsection (4)." A defendant's "discussions" with a prosecuting attorney under subsection (4) occur after the defendant's initial appearance before the judicial officer. Subsection (4) thus defers the appointment of counsel until after the right to counsel attaches under *Rothgery*.

Subsection (4) requires that, in the discussions with the defendant, the prosecuting attorney "tell the defendant any offer that can be made based on the facts as known by the prosecuting attorney at that time." Colo. Rev. Stat. § 16-7-301(4). As many courts have recognized, a discussion of plea offers is a critical stage of the proceedings. *See Williams v. Jones*, 571 F.3d 1086, 1090 (10th Cir. 2009) (*per curiam*). Defendants can accept or reject plea offers prosecuting attorneys communicate pursuant to subsection (4), and thereafter be subject to imprisonment — whether based on acceptance of a plea offer, conviction at trial after rejection of a plea offer, or otherwise — despite having been deprived of counsel at a critical stage of the proceedings. Subsection (4) thus violates the Sixth Amendment's right-to-counsel clause. *See Alabama v. Shelton*, 535 U.S. 654, 661-62 (2002).

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While Colorado's statute applies only to defendants charged with "misdemeanors, petty offenses, or offenses under title 42, C.R.S. [traffic offenses]," convictions for such offenses can have serious consequences. Leaving aside the imprisonment that may result directly from accepting an offer under subsection (4), convictions for misdemeanors, petty offenses, and traffic offenses frequently have significant collateral effects. They can impact a defendant's parole status, immigration status (even for legal immigrants), alimony and child support obligations, ability to purchase a gun, and ability to obtain or retain a driver's license. Unrepresented defendants generally will not know about such collateral consequences and, because prosecuting attorneys are adverse to defendants, prosecuting attorneys are ethically barred from advising these defendants of the consequences of accepting or rejecting a plea offer. *See* Colo. RPC 4.3. It should be noted that Colorado is the only state that has such a statute.

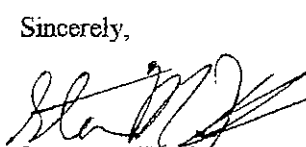
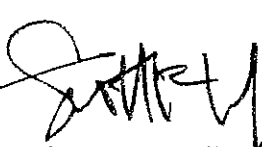
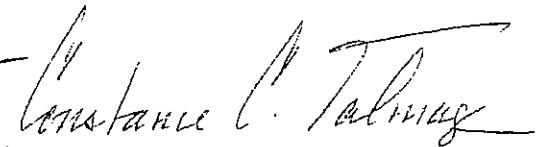
While Colorado's statute states that "the defendant is under no obligation to talk to the prosecuting attorney," it does not require the court or the prosecuting attorney to inform defendants that they have no such obligation. Because courts direct defendants to engage in "discussions" with the prosecuting attorney, many defendants are instead likely to believe that they should talk to the prosecuting attorney. Further, while the statute requires prosecuting attorneys to inform defendants that they have the "right to retain counsel or seek appointment of counsel," many defendants are likely to believe that they will not receive further plea offers — or will receive worse offers — if they choose not to accept plea offers from the prosecuting attorney and instead wait to obtain counsel.

Colorado could remedy this unconstitutional statutory scheme by prohibiting its prosecuting attorneys — who have an independent duty to uphold the Constitution of the United States — from engaging in discussions with these unrepresented defendants. Alternatively, the legislature could amend the statute to strike the clause of subsection (4) providing that "[t]he application for appointment of counsel and the payment of the application fee shall be deferred until after the prosecuting attorney has spoken with the defendant as provided in this subsection (4)."

The Task Force has drafted a complaint seeking a declaratory judgment that Colorado's statute is unconstitutional. However, we would prefer to resolve this matter without litigation, whether through one of the methods described above or other suitable means.

We appreciate your consideration of our concerns and would like to meet with you to discuss ways of resolving them. We would appreciate a response within two weeks, after which we will consider pursuing our other options.

Sincerely,

		
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cc: Hon. John W. Suthers, Colorado Attorney General

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