

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. _____

COLORADO CRIMINAL DEFENSE BAR, a Colorado non-profit corporation;
COLORADO CRIMINAL JUSTICE REFORM COALITION, a Colorado non-profit
corporation,

Plaintiffs,

v.

BILL RITTER, JR., in his official capacity as Governor of the State of Colorado,

Defendant.

COMPLAINT

Plaintiffs bring this action pursuant to 28 U.S.C. § 2201(a) to obtain a declaration that Colorado violates the Sixth Amendment to the United States Constitution by deferring the appointment of counsel for certain indigent criminal defendants until after such defendants engage in discussions with prosecuting attorneys regarding potential plea offers.

PARTIES

1. Plaintiff Colorado Criminal Defense Bar is a Colorado non-profit corporation based in Denver, Colorado.

2. Plaintiff Colorado Criminal Justice Reform Coalition is a Colorado non-profit corporation based in Denver, Colorado.

3. Defendant Bill Ritter, Jr., is Governor of the State of Colorado. Governor Ritter is sued in his official capacity only.

JURISDICTION AND VENUE

4. The Court has personal jurisdiction over Governor Ritter because he resides in this district, and venue is appropriate because Colo. Rev. Stat. § 16-7-301(4) is enforced in this district.

5. The Court has subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201(a).

GENERAL ALLEGATIONS

6. In *Rothgery v. Gillespie County*, the United States Supreme Court held that a defendant's right to counsel under the Sixth Amendment to the United States Constitution 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." 554 U.S. 191, 213 (2008).

7. *Rothgery* held that "[o]nce attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings." *Id.* at 212.

8. In *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473, 1486 (2010), the Supreme Court held "that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."

9. Under Colo. Rev. Stat. § 16-7-301(4), Colorado does not provide appointed counsel during a critical stage of postattachment proceedings against indigent defendants with a right to counsel.

10. Colo. Rev. Stat. § 16-7-301(4) provides that, in "misdemeanors, petty offenses, or offenses under title 42, C.R.S. [traffic offenses]," an indigent 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).”

11. Subsection (4) requires the prosecuting attorney to “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).

12. Subsection (4) provides that “[t]he defendant and the prosecuting attorney may engage in further plea discussions about the case, but the defendant is under no obligation to talk to the prosecuting attorney.” *Id.*

13. Subsection (4) further provides that “[t]he prosecuting attorney shall advise the defendant that the defendant has the right to retain counsel or seek appointment of counsel.” *Id.*

14. Indigent defendants whose applications for counsel are deferred under subsection (4) have already appeared before a judicial officer to learn the charges against them and the potential restrictions on their liberty.

15. The Sixth Amendment right to counsel thus has already attached for indigent defendants whose applications for counsel are deferred under subsection (4).

16. Indigent defendants subject to Colo. Rev. Stat. § 16-7-301(4) nonetheless cannot apply for appointed counsel until after plea discussions with the prosecuting attorney.

17. Plea discussions with the prosecuting attorney under Colo. Rev. Stat. § 16-7-301(4) are a critical stage of the proceedings against indigent defendants.

18. Colo. Rev. Stat. § 16-7-301(4) deprives indigent defendants accused of misdemeanors, petty offenses, or traffic offenses of their right to counsel during this critical stage of the postattachment proceedings against them.

19. Colo. Rev. Stat. § 16-7-301(4) applies to all defendants charged with “misdemeanors, petty offenses, or offenses under title 42, C.R.S.”

20. Colo. Rev. Stat. § 16-7-301(4) does not require a prior written statement, pursuant to Colo. Rev. Stat. § 16-5-501, that the prosecuting attorney does not intend to seek incarceration as part of the penalty upon conviction of an offense for which the defendant has been charged.

21. In proceedings against indigent defendants under Colo. Rev. Stat. § 16-7-301(4), any written statement by the prosecuting attorney “that incarceration is not being sought as provided in section 16-5-501” is deferred until after the prosecuting attorney has engaged in plea discussions with such defendants pursuant to Colo. Rev. Stat. § 16-7-301(4). Colo. Rev. Stat. § 16-7-207(1)(c).

22. Under Colo. Rev. Stat. § 16-7-301(4), unrepresented indigent defendants may accept plea offers involving incarceration, including time served.

23. Under Colo. Rev. Stat. § 16-7-301(4), unrepresented indigent defendants may reject plea offers and be incarcerated following further proceedings or a trial.

24. Colo. Rev. Stat § 16-7-301(4) violates the Sixth Amendment right to counsel of indigent defendants by deferring their applications for assistance of counsel until after plea discussions with the prosecuting attorney.

25. The provision in Colo. Rev. Stat. § 16-7-301(4) that “the defendant is under no obligation to talk to the prosecuting attorney” does not render constitutional Colo. Rev. Stat. § 16-7-301(4).

26. Colo. Rev. Stat. § 16-7-301(4) does not require the prosecuting attorney or the court to inform indigent defendants subject to Colo. Rev. Stat. § 16-7-301(4) that they are “under no obligation to talk to the prosecuting attorney.”

27. A prosecuting attorney’s obligation to advise defendants subject to Colo. Rev. Stat. § 16-7-301(4) of their right to retain or seek appointment of counsel does not render constitutional Colo. Rev. Stat. § 16-7-301(4).

28. In *Padilla*, the Supreme Court held that, during negotiation of a plea, the Sixth Amendment right to counsel includes the right to be advised of certain consequences of accepting a plea offer. *Padilla*, 130 S. Ct. at 1478.

29. Accepting a plea offer may affect a defendant’s parole or immigration status, alimony or child support obligations, ability to obtain or retain a driver’s license, or ability to own a gun.

30. Prosecuting attorneys are adverse to defendants subject to Colo. Rev. Stat. § 16-7-301(4), and are ethically barred from providing legal advice to such defendants regarding the consequences of accepting or rejecting a plea offer. *See* Colo. RPC 4.3.

31. Because Colo. Rev. Stat. § 16-7-301(4) defers applications for appointment of counsel until after plea discussions with the prosecuting attorney, indigent defendants with a right to counsel are deprived of their right to be advised of certain consequences of accepting a plea offer.

Plaintiff Colorado Criminal Defense Bar

32. Plaintiff Colorado Criminal Defense Bar is a Colorado non-profit corporation dedicated to representing and protecting the rights of persons accused of crimes.

33. Colorado Criminal Defense Bar has individual standing to bring this lawsuit.

34. Colorado Criminal Defense Bar has a substantial interest in the treatment of criminal defendants in Colorado.

35. Colorado Criminal Defense Bar suffers injury-in-fact to its mission of protecting the rights of persons accused of crime when Colorado defers, until after plea discussions with the prosecuting attorney under Colo. Rev. Stat. § 16-7-301(4), applications for assistance of counsel by indigent defendants.

36. Colorado Criminal Defense Bar suffers injury-in-fact when it expends resources attempting to mitigate the effects of Colorado's deferral, until after plea discussions with the prosecuting attorney under Colo. Rev. Stat. § 16-7-301(4), of applications for assistance of counsel by indigent defendants.

37. Colorado Criminal Defense Bar's injury would be redressed by (i) a declaratory judgment that Colo. Rev. Stat. § 16-7-301(4) violates the Sixth Amendment right to counsel of indigent defendants, and (ii) an injunction against enforcement of Colo. Rev. Stat. § 16-7-301(4).

38. Colorado Criminal Defense Bar also has associational standing to bring this lawsuit.

39. Colorado Criminal Defense Bar brings this lawsuit to protect its interest in representing and protecting the rights of persons accused of crimes.

40. Members of Colorado Criminal Defense Bar assist and represent indigent defendants in criminal cases in Colorado state courts.

41. Members of Colorado Criminal Defense Bar include attorneys within the Office of the State Public Defender.

42. Members of Colorado Criminal Defense Bar suffer injury-in-fact when they are denied the opportunity to represent, in plea discussions with the prosecuting attorney under Colo. Rev. Stat. § 16-7-301(4), indigent defendants with a right to counsel.

43. The injury to members of Colorado Criminal Defense Bar would be redressed by (i) a declaratory judgment that Colo. Rev. Stat. § 16-7-301(4) violates the Sixth Amendment right to counsel of indigent defendants, and (ii) an injunction against enforcement of Colo. Rev. Stat. § 16-7-301(4).

44. A declaratory judgment that Colo. Rev. Stat. § 16-7-301(4) violates the Sixth Amendment right to counsel of indigent defendants and an injunction against enforcement of Colo. Rev. Stat. § 16-7-301(4) would inure to the benefit of members of Colorado Criminal Defense Bar actually injured by such enforcement.

45. Neither Colorado Criminal Defense Bar's claim under 28 U.S.C. § 2201(a) nor its request for declaratory and injunctive relief requires the participation of its individual members in this lawsuit.

46. Colorado Criminal Defense Bar also has third-party standing to bring this lawsuit on behalf of indigent defendants whose applications for counsel are deferred until after plea discussions with the prosecuting attorney under Colo. Rev. Stat. § 16-7-301(4).

47. Through the assistance and representation its members provide to indigent defendants, Colorado Criminal Defense Bar has developed a substantial relationship with those defendants.

48. Indigent defendants whose applications for counsel are deferred until after plea discussions with the prosecuting attorney under Colo. Rev. Stat. § 16-7-301(4) face genuine practical hindrances to their ability to assert their Sixth Amendment right to counsel.

49. Indigent defendants whose applications for counsel are deferred until after plea discussions with the prosecuting attorney under Colo. Rev. Stat. § 16-7-301(4) are unlikely to know that their right to counsel attaches at the time they appear before a judicial officer to learn the charge against them and potential restrictions on their liberty.

50. Indigent defendants are unlikely to know that their right to counsel already has attached when their requests for appointed counsel are deferred under Colo. Rev. Stat. § 16-7-301(4).

51. Indigent defendants are unlikely to know that required plea discussions with the prosecuting attorney under Colo. Rev. Stat. § 16-7-301(4) constitute a critical stage of the proceedings against them.

52. Indigent defendants are unlikely to be able to argue effectively that the Sixth Amendment entitles them to appointed counsel during their required plea discussions with the prosecuting attorney under Colo. Rev. Stat. § 16-7-301(4).

53. Accordingly, indigent defendants will be genuinely hindered in bringing, or unable to bring, a claim that they have been denied their constitutional right to counsel if Colorado Criminal Defense Bar cannot bring this claim on their behalf.

Plaintiff Colorado Criminal Justice Reform Coalition

54. Plaintiff Colorado Criminal Justice Reform Coalition is a non-profit corporation dedicated to reversing the trend of mass incarceration in Colorado.

55. Colorado Criminal Justice Reform Coalition has individual standing to bring this lawsuit.

56. Colorado Criminal Justice Reform Coalition has a substantial interest in the treatment of indigent Colorado defendants with a right to counsel.

57. Colorado Criminal Justice Reform Coalition suffers injury-in-fact to its mission of reversing the trend of mass incarceration in Colorado when Colorado defers, until after plea discussions with the prosecuting attorney under Colo. Rev. Stat. § 16-7-301(4), applications for assistance of counsel by indigent defendants.

58. Colorado Criminal Justice Reform Coalition suffers injury-in-fact when it expends resources attempting to mitigate the effects of Colorado's deferral, until after plea discussions with the prosecuting attorney under Colo. Rev. Stat. § 16-7-301(4), of applications for assistance of counsel by indigent defendants.

59. Colorado Criminal Justice Reform Coalition's injury would be redressed by (i) a declaratory judgment that Colo. Rev. Stat. § 16-7-301(4) violates the Sixth Amendment right to counsel of indigent defendants, and (ii) an injunction against enforcement of Colo. Rev. Stat. § 16-7-301(4).

60. Colorado Criminal Justice Reform Coalition also has third-party standing to bring this lawsuit on behalf of indigent defendants whose applications for counsel are deferred until after plea discussions with the prosecuting attorney under Colo. Rev. Stat. § 16-7-301(4).

61. By serving as a resource for prisoners and their families, Colorado Criminal Justice Reform Coalition has developed a substantial relationship with indigent Colorado defendants with a right to counsel.

62. Indigent defendants will be genuinely hindered in bringing, or unable to bring, a claim that they have been denied their constitutional right to counsel if Colorado Criminal Justice Reform Coalition cannot bring this claim on their behalf.

Defendant Bill Ritter

63. For “litigation purposes, the governor is the embodiment of the state.” *Developmental Pathways v. Ritter*, 178 P.3d 524, 530 (Colo. 2008).

64. Governor Ritter has a constitutional duty to “take care that the laws be faithfully executed.” Colo. Const. art. IV, § 2.

65. Colo. Rev. Stat. § 16-7-301(4) is among the laws of Colorado that Governor Ritter must “take care” to “execute[.]”

66. “Colorado has long recognized the practice of naming the governor, in his role as the state’s chief executive, as the proper defendant in cases where a party seeks to ‘enjoin or mandate enforcement of a statute, regulation, ordinance, or policy.’” *Developmental Pathways*, 178 P.3d at 529-30 (quoting *Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004)).

67. Governor Ritter has permitted enforcement of Colo. Rev. Stat. § 16-7-301(4).

68. Governor Ritter has a substantial interest in this case because a declaration that Colo. Rev. Stat. § 16-7-301(4) is unconstitutional would require the Governor and his subordinates to (i) cease plea discussions under Colo. Rev. Stat. § 16-7-301(4) with unrepresented indigent defendants with a right to counsel, or (ii) fund representation during plea discussions under Colo. Rev. Stat. § 16-7-301(4) with indigent defendants with a right to counsel.

CLAIM FOR RELIEF

Declaratory Judgment, 28 U.S.C. § 2201

69. The foregoing paragraphs are hereby incorporated as if set forth in this claim for relief.

70. An actual controversy exists between Plaintiffs and Defendant because Defendant must take care to execute Colo. Rev. Stat. § 16-7-301(4), which violates the Sixth Amendment to the United States Constitution.

71. Under Colo. Rev. Stat. § 16-7-301(4), Colorado defers, until after a critical stage of postattachment proceedings against indigent defendants, those defendants' applications for assistance of counsel.

72. Defendant's execution of Colo. Rev. Stat. § 16-7-301(4) in violation of the Sixth Amendment to the United States Constitution is of such immediacy and reality as to warrant the issuance of a declaratory judgment.

73. A declaration of rights pursuant to 28 U.S.C. § 2201(a) will terminate the legal controversy between Plaintiffs and Defendant.

74. A declaration of rights pursuant to 28 U.S.C. § 2201(a) will clarify and settle the legal relations between Plaintiffs and Defendant.

75. A declaration of rights pursuant to 28 U.S.C. § 2201(a) is the most effective remedy to the constitutional controversy between Plaintiffs and Defendant.

76. Such a declaration will have broad reach and is likely to be speedy. *See* Fed. R. Civ. P. 57.

77. Because no direct constitutional challenge to Colo. Rev. Stat. § 16-7-301(4) is pending or anticipated in the Colorado courts, a declaration of rights pursuant to 28 U.S.C. § 2201(a) will neither increase friction between the federal and state courts nor improperly encroach upon state jurisdiction.

78. Because Plaintiffs do not challenge a pending criminal proceeding in the Colorado courts, a declaration of rights pursuant to 28 U.S.C. § 2201(a) will neither increase friction between the federal and state courts nor improperly encroach upon state jurisdiction.

79. Plaintiffs' injuries caused by Colo. Rev. Stat. § 16-7-301(4) will be remedied by a declaratory judgment that Colo. Rev. Stat. § 16-7-301(4) is unconstitutional.

WHEREFORE, Plaintiffs request:

- (1) a declaratory judgment that Colo. Rev. Stat. § 16-7-301(4) violates the Sixth Amendment to the United States Constitution by deferring, until after plea discussions with the prosecuting attorney, applications for assistance of counsel by indigent defendants;
- (2) any further necessary or proper relief in light of this declaratory judgment, as authorized by 28 U.S.C. § 2202;
- (3) an injunction forbidding enforcement of Colo. Rev. Stat. § 16-7-301(4) against indigent defendants with a right to counsel;
- (4) attorneys' fees and costs; and
- (5) all other relief to which Plaintiffs are entitled in law or equity.

Dated: December 2, 2010

Respectfully submitted,

s/Scott F. Llewellyn

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