

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.10-CV-02930-JLK-BNB

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

Plaintiffs,

v.

JOHN HICKENLOOPER, in his official capacity as Governor of the State of Colorado;
JOHN W. SUTHERS, in his official capacity as Attorney General of the State of Colorado;
DOUGLAS K. WILSON, in his official capacity as Colorado State Public Defender;
GERALD A. MARRONEY, in his official capacity as Colorado State Court Administrator;
SCOTT STOREY, in his official capacity as District Attorney,
 First Judicial District;
MITCHELL R. MORRISSEY, in his official capacity as District Attorney,
 Second Judicial District;
FRANK RUYBALID, in his official capacity as District Attorney,
 Third Judicial District;
DAN MAY, in his official capacity as District Attorney,
 Fourth Judicial District;
MARK HURLBERT, in his official capacity as District Attorney,
 Fifth Judicial District;
TODD RISBERG, in his official capacity as District Attorney,
 Sixth Judicial District;
DANIEL HOTSENPILLER, in his official capacity as District Attorney,
 Seventh Judicial District;
LARRY ABRAHAMSON, in his official capacity as District Attorney,
 Eighth Judicial District;
MARTIN BEESON, in his official capacity as District Attorney,
 Ninth Judicial District;
BILL THIEBAUT, in his official capacity as District Attorney,
 Tenth Judicial District;
THOM LEDOUX, in his official capacity as District Attorney,
 Eleventh Judicial District;
DAVID MAHONEE, in his official capacity as District Attorney,
 Twelfth Judicial District;

ROBERT E. WATSON, in his official capacity as District Attorney,
Thirteenth Judicial District;
ELIZABETH OLDHAM, in her official capacity as District Attorney,
Fourteenth Judicial District;
JENNIFER SWANSON, in her official capacity as District Attorney,
Fifteenth Judicial District;
ROD FOURACRE, in his official capacity as District Attorney,
Sixteenth Judicial District;
DON QUICK, in his official capacity as District Attorney,
Seventeenth Judicial District;
CAROL CHAMBERS, in her official capacity as District Attorney,
Eighteenth Judicial District;
KENNETH R. BUCK, in his official capacity as District Attorney,
Nineteenth Judicial District;
STANLEY L. GARNETT, in his official capacity as District Attorney,
Twentieth Judicial District;
PETE HAUTZINGER, in his official capacity as District Attorney,
Twenty-First Judicial District;
RUSSELL WASLEY, in his official capacity as District Attorney,
Twenty-Second Judicial District,

Defendants.

FIRST AMENDED COMPLAINT

Pursuant to Fed. R. Civ. P. 15(a)(1)(B) and 28 U.S.C. § 2201(a), Plaintiffs file this First Amended Complaint to obtain a declaration that Colo. Rev. Stat. § 16-7-301(4) violates the Sixth and Fourteenth Amendments 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 John Hickenlooper is the Governor of the State of Colorado. Governor Hickenlooper is sued in his official capacity only.

4. Defendant John W. Suthers is the Attorney General of the State of Colorado. Attorney General Suthers is sued in his official capacity only.

5. Defendant Douglas K. Wilson is the Colorado State Public Defender. Colorado State Public Defender Wilson is sued in his official capacity only.

6. Defendant Gerald A. Marroney is the Colorado State Court Administrator. Colorado State Court Administrator Marroney is sued in his official capacity only.

7. Defendant Scott Storey is the District Attorney for the First Judicial District. District Attorney Storey is sued in his official capacity only.

8. Defendant Mitchell R. Morrissey is the District Attorney for the Second Judicial District. District Attorney Morrissey is sued in his official capacity only.

9. Defendant Frank Ruybalid is the District Attorney for the Third Judicial District. District Attorney Ruybalid is sued in his official capacity only.

10. Defendant Dan May is the District Attorney for the Fourth Judicial District. District Attorney May is sued in his official capacity only.

11. Defendant Mark Hurlbert is the District Attorney for the Fifth Judicial District. District Attorney Hurlbert is sued in his official capacity only.

12. Defendant Todd Risberg is the District Attorney for the Sixth Judicial District. District Attorney Risberg is sued in his official capacity only.

13. Defendant Daniel Hotsenpiller is the District Attorney for the Seventh Judicial District. District Attorney Hotsenpiller is sued in his official capacity only.

14. Defendant Larry Abrahamson is the District Attorney for the Eighth Judicial District. District Attorney Abrahamson is sued in his official capacity only.

15. Defendant Martin Beeson is the District Attorney for the Ninth Judicial District. District Attorney Beeson is sued in his official capacity only.

16. Defendant Bill Thiebaut is the District Attorney for the Tenth Judicial District. District Attorney Thiebaut is sued in his official capacity only.

17. Defendant Thom LeDoux is the District Attorney for the Eleventh Judicial District. District Attorney LeDoux is sued in his official capacity only.

18. Defendant David Mahonee is the District Attorney for the Twelfth Judicial District. District Attorney Mahonee is sued in his official capacity only.

19. Defendant Robert E. Watson is the District Attorney for the Thirteenth Judicial District. District Attorney Watson is sued in his official capacity only.

20. Defendant Elizabeth Oldham is the District Attorney for the Fourteenth Judicial District. District Attorney Oldham is sued in her official capacity only.

21. Defendant Jennifer Swanson is the District Attorney for the Fifteenth Judicial District. District Attorney Swanson is sued in her official capacity only.

22. Defendant Rod Fouracre is the District Attorney for the Sixteenth Judicial District. District Attorney Fouracre is sued in his official capacity only.

23. Defendant Don Quick is the District Attorney for the Seventeenth Judicial District. District Attorney Quick is sued in his official capacity only.

24. Defendant Carol Chambers is the District Attorney for the Eighteenth Judicial District. District Attorney Chambers is sued in her official capacity only.

25. Defendant Kenneth R. Buck is the District Attorney for the Nineteenth Judicial District. District Attorney Buck is sued in his official capacity only.

26. Defendant Stanley L. Garnett is the District Attorney for the Twentieth Judicial District. District Attorney Garnett is sued in his official capacity only.

27. Defendant Pete Hautzinger is the District Attorney for the Twenty-First Judicial District. District Attorney Hautzinger is sued in his official capacity only.

28. Defendant Russell Wasley is the District Attorney for the Twenty-Second Judicial District. District Attorney Wasley is sued in his official capacity only.

JURISDICTION AND VENUE

29. The foregoing paragraphs are hereby incorporated as if set forth herein.

30. The Court has personal jurisdiction over each defendant because each defendant resides in this district.

31. Venue is appropriate because all defendants reside in the state and district of Colorado and because Colo. Rev. Stat. § 16-7-301(4) is enforced in this district.

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

GENERAL ALLEGATIONS

33. The foregoing paragraphs are hereby incorporated as if set forth herein.

34. 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).

35. *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.

36. 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.”

37. The Sixth Amendment to the United States Constitution is made obligatory upon the states by the Fourteenth Amendment to the United States Constitution. *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963).

38. 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.

39. 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).”

40. 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).

41. 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.*

42. 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.*

43. 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.

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

45. 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.

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

47. 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.

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

49. Misdemeanors are punishable by imprisonment, including sentences up to 18 months’ imprisonment. Colo. Rev. Stat. § 18-1.3-501.

50. Petty offenses are punishable by imprisonment, including sentences up to 6 months' imprisonment. Colo. Rev. Stat. § 18-1.3-503.

51. 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.

52. 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).

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

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

55. 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.

56. 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).

57. 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.”

58. 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).

59. Indigent defendants subject to Colo. Rev. Stat. § 16-7-301(4) do not necessarily waive their right to counsel during plea discussions with the prosecuting attorney when their applications for appointed counsel are deferred until after those plea discussions.

60. 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.

61. 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.

62. 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.

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

64. On July 1, 2008, Colorado State Public Defender Wilson and State Court Administrator Marroney requested that Attorney General Suthers issue an opinion regarding the constitutionality of Colo. Rev. Stat. § 16-7-301(4) because they had “concern[s] about the continued constitutionality” of the statute “in light of *Rothgery*.”

65. On July 2, 2008, Attorney General Suthers sent a letter to Colorado State Public Defender Wilson and State Court Administrator Marroney declining to issue a formal opinion, but asserting that enforcement of Colo. Rev. Stat. § 16-7-301(4) is “constitutionally defensible.”

66. In a memorandum dated January 30, 2009, and addressed to Colorado State Public Defender Wilson, Assistant Solicitor General Catherine P. Adkisson analyzed the constitutionality of Colo. Rev. Stat. § 16-7-301(4) in light of *Rothgery*, concluding that the statute was “defensible.”

67. On February 6, 2009, Colorado State Public Defender Wilson sent a letter to Assistant Solicitor General Adkisson inquiring about the memorandum and whether it had authoritative status.

68. On February 18, 2009, Attorney General Suthers responded to Colorado State Public Defender Wilson’s letter dated February 6, 2009, reiterating that Colo. Rev. Stat. § 16-7-301(4) is “constitutionally defensible” and characterizing Assistant Solicitor General Adkisson’s memorandum as “neither a formal or informal opinion of the attorney general’s office.”

69. Colorado State Public Defender Wilson and State Court Administrator Marroney continued to act in accordance with Colo. Rev. Stat. § 16-7-301(4) after receiving Attorney General Suthers’s assertion that Colo. Rev. Stat. § 16-7-301(4) is “constitutionally defensible.”

70. Colo. Rev. Stat. § 21-1-104(1)(a) requires public defenders to “[c]ounsel and defend” indigent defendants, whether they are “held in custody, filed on as a delinquent, or charged with a felony offense, at every stage of the proceedings following arrest, detention, or service of process.”

71. Required plea discussions with the prosecutor under Colo. Rev. Stat. § 16-7-301(4) are a “stage of the proceedings following arrest, detention, or service of process.”

72. Public defenders’ statutorily mandated duties thus include counseling and defending indigent defendants during plea discussions pursuant to Colo. Rev. Stat. § 16-7-301(4).

73. Colo. Rev. Stat. § 16-7-301(4) defers indigent defendants’ applications for appointment of counsel until after plea discussions with the prosecuting attorney, thereby (i) creating inconsistency and uncertainty for public defenders attempting to comply with their professional and statutory obligations, (ii) impairing public defenders’ ability to carry out their professional obligations and statutorily mandated duties, (iii) impairing public defenders’ economic and liberty interest in practicing and receiving the benefits of their chosen profession, and (iv) impairing public defenders’ ability to fulfill their mission of representing indigent defendants with a right to counsel.

74. Colo. Rev. Stat. § 21-2-104(1)(a) requires alternate defense counsel to “[c]ounsel and defend” indigent defendants, whether they are “held in custody, filed on as a delinquent, or charged with a felony offense, at every stage of the proceedings following arrest, detention, or service of process.”

75. Required plea discussions with the prosecutor under Colo. Rev. Stat. § 16-7-301(4) are a “stage of the proceedings following arrest, detention, or service of process.”

76. Alternate defense counsel’s statutorily mandated duties thus include counseling and defending indigent defendants during plea discussions pursuant to Colo. Rev. Stat. § 16-7-301(4).

77. Attorneys listed as alternate defense counsel are paid an hourly rate for representing indigent defendants.

78. Colo. Rev. Stat. § 16-7-301(4) defers indigent defendants’ applications for appointment of counsel until after plea discussions with the prosecuting attorney, thereby (i) creating inconsistency and uncertainty for attorneys listed as alternate defense counsel attempting to comply with their professional and statutory obligations, (ii) impairing the ability of attorneys listed as alternate defense counsel to carry out their professional obligations and statutorily mandated duties, (iii) impairing the economic and liberty interests of attorneys listed as alternate defense counsel to practice and receive the benefits of their chosen profession, (iv) reducing the hourly compensation available to attorneys listed as alternate defense counsel, and (v) impairing the ability of attorneys listed as alternate defense counsel to fulfill their mission of representing indigent defendants with a right to counsel.

Plaintiff Colorado Criminal Defense Bar

79. The foregoing paragraphs are hereby incorporated as if set forth herein.

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

81. Colorado Criminal Defense Bar has organizational standing to bring this lawsuit.

82. Colorado Criminal Defense Bar has a substantial interest in the representation and treatment of criminal defendants in Colorado.

83. Colorado Criminal Defense Bar is a professional association of attorneys, investigators, and paralegals who represent persons accused of crime.

84. Colorado Criminal Defense Bar provides support for its active professional network, criminal defense training programs, and numerous other public and member services related to protecting the rights of the accused.

85. Colorado Criminal Defense Bar provides a referral service that assists convicted individuals when they discover the collateral consequences of a guilty plea entered without representation.

86. Colorado Criminal Defense Bar suffers and will continue to suffer 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.

87. Colorado Criminal Defense Bar expends significant resources in contracting with a consultant to provide policy development and lobbying services.

88. During the 2009 legislative session, Colorado Criminal Defense Bar diverted significant resources from its other policy development and lobbying services when the consultant expended numerous hours drafting, and lobbying for, a bill that would pay for counsel for indigent defendants currently denied counsel during plea discussions under Colo. Rev. Stat. § 16-7-301(4).

89. Colorado Criminal Defense Bar expended significant funds for the consultant's time drafting a bill that would pay for counsel for indigent defendants currently denied counsel during plea discussions under Colo. Rev. Stat. § 16-7-301(4), thereby draining these funds from Colorado Criminal Defense Bar's resources.

90. After the 2009 legislative session, Colorado Criminal Defense Bar expended significant additional resources when the consultant worked with organizations and legislators to consider other legislative means to ensure that Colorado complies with *Rothgery*.

91. Colorado Criminal Defense Bar continues to expend significant resources in response to Colo. Rev. Stat. § 16-7-301(4) because the consultant continues to expend time working to ensure that Colorado complies with *Rothgery*.

92. Colorado Criminal Defense Bar has suffered and will continue to suffer injury because it must expend significant funds to maintain and upgrade the functionality of its website in connection with its referral service that assists convicted individuals when they discover the collateral consequences of a guilty plea entered without representation, thereby diverting resources from its other programs and website activities.

93. Colorado Criminal Defense Bar has suffered and continues to suffer injury from the continued application of Colo. Rev. Stat. § 16-7-301(4).

94. Colorado Criminal Defense Bar has suffered and will continue to suffer injury-in-fact because Attorney General Suthers has asserted that enforcement of Colo. Rev. Stat. § 16-7-301(4) is "constitutionally defensible" and Defendants have continued to act in accordance with the statute.

95. 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 and Fourteenth Amendments to the United States Constitution, and (ii) an injunction against enforcement of Colo. Rev. Stat. § 16-7-301(4), because the organization would no longer need to divert its resources to ensure that Colorado complies with *Rothgery*.

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

97. Colorado Criminal Defense Bar has approximately 50 members who work as public defenders in the Office of the State Public Defender.

98. Colorado Criminal Defense Bar has approximately 300 members who work as attorneys listed as eligible alternate defense counsel under Colo. Rev. Stat. § 21-2-105.

99. Colo. Rev. Stat. § 16-7-301(4) has impaired and continues to impair the ability of Colorado Criminal Defense Bar members who are public defenders or attorneys listed as eligible alternate defense counsel to (i) avoid inconsistency and uncertainty regarding compliance with their professional and statutory obligations, (ii) carry out their professional obligations and statutorily mandated duties to represent indigent defendants in Colorado state court, (iii) fulfill their economic and liberty interests in practicing and receiving the benefits of their chosen profession, and (iv) fulfill their mission of representing indigent defendants.

100. Colo. Rev. Stat. § 16-7-301(4) reduces the hourly compensation available to the members of the Colorado Criminal Defense Bar who are attorneys listed as eligible alternate defense counsel.

101. Colorado Criminal Defense Bar is aware of specific members who are attorneys in the Office of the State Public Defender or attorneys listed as eligible alternate defense counsel who, on information and belief, regularly face uncertainty regarding fulfillment of their professional and constitutional obligations because of Colo. Rev. Stat. § 16-7-301(4).

102. Colorado Criminal Defense Bar is aware of specific members who, on information and belief, have had to turn down requests for counsel from indigent defendants subject to Colo. Rev. Stat. § 16-7-301(4).

103. The injury to the Colorado Criminal Defense Bar members who are public defenders or attorneys listed as eligible alternate defense counsel would be redressed by (i) a declaratory judgment that Colo. Rev. Stat. § 16-7-301(4) violates the Sixth and Fourteenth Amendments to the United States Constitution, and (ii) an injunction against enforcement of Colo. Rev. Stat. § 16-7-301(4), because a declaratory judgment and injunction would resolve inconsistencies and uncertainties impairing those members' ability to fulfill their professional and statutory obligations, and allow those members to fulfill their obligations to represent indigent defendants in plea discussions with the prosecuting attorney.

104. 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.

105. 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).

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

107. On information and belief, Colorado Criminal Defense Bar members have substantial, continuing relationships with indigent defendants through their representation of these defendants on multiple occasions.

108. Indigent defendants with a right to counsel rely on members of Colorado Criminal Defense Bar to provide the representation to which those defendants are constitutionally entitled.

109. Colorado Criminal Defense Bar's members are precluded from being appointed to represent indigent defendants with a right to counsel when those indigent defendants are prevented from applying for appointed counsel.

110. Because Colo. Rev. Stat. § 16-7-301(4) prevents indigent defendants from applying for appointed counsel until after the required discussion with the prosecuting attorney, Colorado Criminal Defense Bar and its members do not learn of these indigent defendants' plea discussions until after the fact, when it is too late to provide counsel.

111. Colo. Rev. Stat. § 16-7-301(4) precludes Colorado Criminal Defense Bar's members from establishing the attorney-client relationship to which indigent defendants with a right to counsel are entitled during their plea discussions with the prosecuting attorney.

112. 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.

113. 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).

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

115. 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).

116. Indigent defendants whose applications for counsel are deferred until after plea discussions with the prosecuting attorney under Colo. Rev. Stat. § 16-7-301(4) thus face genuine practical hindrances to their ability to assert their Sixth Amendment right to counsel during those plea discussions if Colorado Criminal Defense Bar and its members cannot bring this claim on their behalf.

Plaintiff Colorado Criminal Justice Reform Coalition

117. The foregoing paragraphs are hereby incorporated as if set forth herein.

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

119. Colorado Criminal Justice Reform Coalition has organizational standing to bring this lawsuit.

120. Colorado Criminal Justice Reform Coalition is a membership organization comprising over 100 diverse organizations and faith communities and over 6,000 individuals from across Colorado.

121. Colorado Criminal Justice Reform Coalition's individual members and coalition partners represent a diverse cross-segment of Colorado, including people who are currently or formerly defendants, inmates and parolees, family members, attorneys, researchers, criminal justice professionals, educators, students, mental health and substance abuse treatment providers, civil and human rights organizations, victim advocates, child welfare professionals, various faith communities, fiscal conservatives, and civil libertarians.

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

123. Colorado Criminal Justice Reform Coalition serves as a resource for people in jail and prison, people who were incarcerated previously, and their families.

124. Colorado Criminal Justice Reform Coalition engages in policy research, legislative lobbying, and educational initiatives to teach the public and policymakers about effective alternatives to incarceration, drug policy and sentencing reform, parole and re-entry issues, and collateral consequences of a criminal conviction.

125. Colorado Criminal Justice Reform Coalition sits on Colorado's Comprehensive Sentencing Task Force of Colorado's Commission on Criminal and Juvenile Justice.

126. Colorado Criminal Justice Reform Coalition sits on the Drug Policy Task Force of Colorado's Commission on Criminal and Juvenile Justice.

127. Colorado Criminal Justice Reform Coalition suffers and will continue to suffer injury 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.

128. Colorado Criminal Justice Reform Coalition has expended and continues to expend resources in conducting numerous meetings with attorneys and the Colorado Criminal Defense Bar to discuss and research the effects of Colo. Rev. Stat. § 16-7-301(4) on the organizations, their members, and their clients, thereby diverting resources from its core activities of drug policy and sentencing reform.

129. Colorado Criminal Justice Reform Coalition has expended and continues to expend significant resources responding to a growing number of people who contact the organization for assistance relating to issues of proper representation during criminal proceedings.

130. Due to a growing number of people who contact the organization for help in dealing with or overcoming barriers arising from the collateral consequences of plea deals, including, on information and belief, plea deals reached under Colo. Rev. Stat. § 16-7-301(4), Colorado Criminal Justice Reform Coalition has diverted and will continue to divert significant resources from its core activities in drug policy and sentencing reform, devoting those resources instead to addressing the collateral consequences, in part, of such plea deals.

131. In 2008, Colorado Criminal Justice Reform Coalition expended significant resources when it created a new position and hired a Re-Entry Coordinator to focus specifically on addressing barriers to re-entry, reducing collateral consequences, and responding to an ever-

increasing volume of requests from members and the general public who were suffering from the collateral consequences of conviction, in part due to the uninformed convictions pursuant to Colo. Rev. Stat. § 16-7-301(4).

132. In November 2007, Colorado Criminal Justice Reform Coalition expended significant resources when it published the first edition of its guide for people who have been incarcerated: *Getting on After Getting Out: A Re-Entry Guide for Colorado*.

133. Colorado Criminal Justice Reform Coalition distributed over 23,000 free copies to people in prison or on parole.

134. In January 2011, Colorado Criminal Justice Reform Coalition expended significant resources when it published the second edition of its guide for people who have been incarcerated: *Getting On After Getting Out: A Re-Entry Guide for Colorado*.

135. From 2007 through 2011, Colorado Criminal Justice Reform Coalition has expended significant resources in lobbying the Colorado legislature to mitigate the collateral consequences of certain felonies, misdemeanors and petty offenses, including misdemeanors and petty offenses for which uncounseled indigent defendants may reach plea deals under Colo. Rev. Stat. § 16-7-301(4).

136. Colorado Criminal Justice Reform Coalition had to increase its fundraising activities significantly in order to have the resources to expand our activities to include addressing the collateral consequences of convictions, including convictions obtained as a result of Colo. Rev. Stat. § 16-7-301(4).

137. Colorado Criminal Justice Reform Coalition has suffered and continues to suffer injury from the continued application of Colo. Rev. Stat. § 16-7-301(4).

138. Colorado Criminal Justice Reform Coalition suffers and will continue to suffer injury-in-fact because Attorney General Suthers has asserted that enforcement of § 16-7-301(4) is “constitutionally defensible” and Defendants have continued to act in accordance with the statute.

139. Colorado Criminal Justice Reform Coalition also has associational standing to bring this lawsuit.

140. Colorado Criminal Justice Reform Coalition’s membership includes over 100 members who work as attorneys in the Office of the State Public Defender or private defense attorneys who may work as alternate defense counsel under Colo. Rev. Stat. § 21-2-105.

141. Colo. Rev. Stat. § 16-7-301(4) has impeded and continues to impede the ability of Colorado Criminal Justice Reform Coalition members who are public defenders or attorneys listed as eligible alternate defense counsel to (i) avoid inconsistency and uncertainty regarding compliance with their professional and statutory obligations, (ii) carry out their professional obligations and statutorily mandated duties to represent indigent defendants in Colorado state court, (iii) practice and receive the benefits of their chosen profession, and (iv) fulfill their mission of representing indigent defendants.

142. Colorado Criminal Justice Reform Coalition is aware of specific members who are attorneys in the Office of the State Public Defender or attorneys listed as eligible alternate defense counsel who, on information and belief, regularly face uncertainty regarding their professional and statutory obligations because of Colo. Rev. Stat. § 16-7-301(4).

143. On information and belief, the prisoners and former prisoners on whose behalf Colorado Criminal Justice Reform Coalition advocates include indigent defendants who were denied their right to counsel under Colo. Rev. Stat. § 16-7-301(4).

144. The injury to the Colorado Criminal Justice Reform Coalition members who are public defenders or attorneys listed as eligible alternate defense counsel would be redressed by (i) a declaratory judgment that Colo. Rev. Stat. § 16-7-301(4) violates the Sixth and Fourteenth Amendments to the United States Constitution, and (ii) an injunction against enforcement of Colo. Rev. Stat. § 16-7-301(4), because a declaratory judgment and injunction would resolve inconsistencies and uncertainties impairing those members' ability to fulfill their professional and statutory obligations, and allow those members to fulfill their obligations to represent indigent defendants in plea discussions with the prosecuting attorney.

145. Neither Colorado Criminal Justice Reform Coalition'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.

146. 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).

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

148. On information and belief, the prisoners and former prisoners with whom Colorado Criminal Justice Reform Coalition has developed a substantial, continuing relationship

include indigent defendants who were denied their right to counsel under Colo. Rev. Stat. § 16-7-301(4) and imprisoned in violation of the Sixth Amendment.

149. On information and belief, Colorado Criminal Justice Reform Coalition members have developed substantial, continuing relationships with indigent defendants through their representation of these defendants on multiple occasions.

150. 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 Governor John Hickenlooper

151. The foregoing paragraphs are hereby incorporated as if set forth herein.

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

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

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

155. “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)).

156. Governor Hickenlooper has permitted or facilitated enforcement of Colo. Rev. Stat. § 16-7-301(4).

157. Pursuant to Colo. Rev. Stat. § 24-31-101(1)(a), Governor Hickenlooper is empowered to require the attorney general to “appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested.”

158. Prosecution of the misdemeanors, petty offenses, and traffic offenses specified in Colo. Rev. Stat. § 16-7-301(4) is a criminal action and proceeding in which the state may be a party or may be interested.

159. On information and belief, Governor Hickenlooper thus is empowered to require the attorney general to prosecute the misdemeanors, petty offenses, and traffic offenses specified in Colo. Rev. Stat. § 16-7-301(4).

160. Governor Hickenlooper is required to make “recommendations for court appropriations as part of his or her regular budget message and according to Section 24-37-301, C.R.S.” Colo. Rev. Stat. § 13-3-106(b).

161. Governor Hickenlooper thus is empowered to recommend funding for indigent defense in Colorado courts, including indigent defense under Colo. Rev. Stat. § 16-7-301(4).

162. Governor Hickenlooper 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.

Defendant Attorney General John W. Suthers

163. The foregoing paragraphs are hereby incorporated as if set forth herein.

164. Attorney General Suthers has responsibility for enforcing Colo. Rev. Stat. § 16-7-301(4) because he must “appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor.” Colo. Rev. Stat. § 24-31-101 (1)(a).

165. Prosecution of the misdemeanors, petty offenses, and traffic offenses specified in Colo. Rev. Stat. § 16-7-301(4) is a criminal action and proceeding in which the state may be a party or may be interested.

166. Attorney General Suthers thus may be required by the governor to prosecute the misdemeanors, petty offenses, and traffic offenses specified in Colo. Rev. Stat. § 16-7-301(4).

167. Attorney General Suthers has enforced or facilitated enforcement of Colo. Rev. Stat. § 16-7-301(4).

168. Attorney General Suthers has a substantial interest in this case because a declaration that Colo. Rev. Stat. § 16-7-301(4) is unconstitutional would require the Attorney General 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) ensure that indigent defendants with a right to counsel receive representation during plea discussions under Colo. Rev. Stat. § 16-7-301(4).

Defendant Colorado State Public Defender Douglas K. Wilson

169. The foregoing paragraphs are hereby incorporated as if set forth herein.

170. Colorado State Public Defender Wilson has a statutory obligation to “provide legal services to indigent persons accused of crime that are commensurate with those available to nonindigents.” Colo. Rev. Stat. § 21-1-101(1).

171. Colorado State Public Defender Wilson has a statutory obligation to “employ and fix the compensation for a chief deputy public defender, deputy state public defenders, investigators, and any other employees necessary to discharge the functions of the office,” as well as the responsibility to “establish such regional offices as he deems necessary to carry out his duties.” Colo. Rev. Stat. § 21-1-102(3)-(4).

172. Colorado State Public Defender Wilson has a statutory obligation to review applications and appointments for counsel and make a “determination of indigency.” Colo. Rev. Stat. § 21-1-103(3).

173. Colorado State Public Defender Wilson continued to act in accordance with Colo. Rev. Stat. § 16-7-301(4) after Attorney General Suthers asserted that Colo. Rev. Stat. § 16-7-301(4) was “constitutionally defensible.”

174. Colorado State Public Defender Wilson has not authorized or instructed his subordinate public defenders to represent indigent defendants during plea negotiations subject to Colo. Rev. Stat. § 16-7-301(4).

175. Colorado State Public Defender Wilson has a substantial interest in this case because a declaration that Colo. Rev. Stat. § 16-7-301(4) is unconstitutional would require the Colorado State Public Defender and his subordinates to (i) review and process applications and appointments for counsel of defendants engaging in plea discussions under Colo. Rev. Stat. § 16-7-301(4), and (ii) ensure that his subordinates represent indigent defendants during plea discussions under Colo. Rev. Stat. § 16-7-301(4).

Defendant State Court Administrator Gerald A. Marroney

176. The foregoing paragraphs are hereby incorporated as if set forth herein.

177. State Court Administrator Marroney, “subject to the approval of the chief justice, . . . prepare[s] annually a consolidated operating budget for all courts” that is “known as the judicial department operating budget.” Colo. Rev. Stat. § 13-3-106(1)(a).

178. State Court Administrator Marroney, “subject to the approval of the chief justice, . . . prepare[s] an annual budget request” for submission to “the department of personnel and the joint budget committee,” and “upon recommendation of the joint budget committee,” the General Assembly makes “appropriations to courts based on an evaluation of the budget request and the availability of state funds.” Colo. Rev. Stat. § 13-3-106(1)(b).

179. State Court Administrator Marroney thus has budgeting responsibility for the Colorado Judicial Department, which includes the Office of the Public Defender and the Office of Alternate Defense Counsel.

180. State Court Administrator Marroney’s constitutional and statutory duties require him to provide administrative and technical support to the trial and appellate courts, to provide centralized policy guidance, to develop and implement standards and guidelines, to serve as an advocate in obtaining necessary resources from the legislature, and to provide services in an accurate, timely, and equitable manner.

181. State Court Administrator Marroney oversees the district administrators for each of Colorado’s 22 Judicial Districts and the Clerk of the Court for each of the 64 counties.

182. State Court Administrator Marroney thus has administrative and oversight responsibility for the Colorado Judicial Department, which includes the Office of the Public Defender and the Office of the Alternate Defense Counsel.

183. State Court Administrator Marroney continued to act in accordance with Colo. Rev. Stat. § 16-7-301(4) after Attorney General Suthers asserted that Colo. Rev. Stat. § 16-7-301(4) was “constitutionally defensible.”

184. State Court Administrator Marroney has a substantial interest in this case because a declaration that Colo. Rev. Stat. § 16-7-301(4) is unconstitutional would require the State Court Administrator and his subordinates to (i) facilitate the administration and processing of applications for counsel by indigents before plea negotiations under Colo. Rev. Stat. § 16-7-301(4), and (ii) allocate and request adequate funding to ensure that indigents with a right to counsel are appointed counsel for plea negotiations under Colo. Rev. Stat. § 16-7-301(4).

Defendants District Attorneys

185. The foregoing paragraphs are hereby incorporated as if set forth herein.

186. Under Colorado law, each district attorney must “appear on behalf of the state” in “all indictments, actions and proceedings which may be pending in the district court in any county within his district wherein the state or the people thereof or any county of his district may be a party.” Colo. Rev. Stat. § 20-1-102.

187. The misdemeanors, petty offenses, and traffic offenses specified in Colo. Rev. Stat. § 16-7-301(4) are prosecuted through summonses and complaints, indictments, actions, and proceedings wherein the state or the people thereof or any county may be a party.

188. On information and belief, all defendant district attorneys have continued to act in accordance with Colo. Rev. Stat. § 16-7-301(4) after Attorney General Suthers asserted that Colo. Rev. Stat. § 16-7-301(4) was “constitutionally defensible.”

189. By virtue of Colo. Rev. Stat. § 21-1-103(3), the district attorneys, as prosecuting attorneys, participate in the process of appointing counsel to indigent defendants.

190. The district attorneys have a substantial interest in this case because a declaration that Colo. Rev. Stat. § 16-7-301(4) is unconstitutional would require the district attorneys and their 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) ensure 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

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

192. Plaintiffs and Defendants have adverse legal interests because Defendants execute Colo. Rev. Stat. § 16-7-301(4), which violates the Sixth and Fourteenth Amendments to the United States Constitution.

193. A substantial and justiciable controversy exists between Plaintiffs and Defendants because Defendants execute Colo. Rev. Stat. § 16-7-301(4), which violates the Sixth and Fourteenth Amendments to the United States Constitution.

194. A substantial and justiciable controversy exists between Plaintiffs and Defendants because Plaintiffs' members consistently confront inconsistency and uncertainty regarding their compliance with their professional and statutory obligations due to Colo. Rev. Stat.

§ 16-7-301(4)'s deferral of appointment of counsel until after indigent defendants' plea discussions with the prosecuting attorney.

195. A declaratory judgment that Colo. Rev. Stat. § 16-7-301(4) violates the Sixth and Fourteenth Amendments to the United States Constitution will relieve Plaintiffs' members of their conflicting and uncertain obligations and terminate the legal controversy.

196. A declaratory judgment that Colo. Rev. Stat. § 16-7-301(4) violates the Sixth and Fourteenth Amendments to the United States Constitution will remedy the constitutional violation and terminate the legal controversy.

197. A declaratory judgment that Colo. Rev. Stat. § 16-7-301(4) violates the Sixth and Fourteenth Amendments to the United States Constitution will remedy Plaintiffs' harms because (i) Plaintiffs will no longer need to divert resources from their typical activities in an attempt to mitigate the effects of Colo. Rev. Stat. § 16-7-301(4); (ii) Plaintiffs will no longer need to expend substantial resources to ensure that Colorado complies with *Rothgery*; (iii) certain of Plaintiffs' members will no longer be hindered in carrying out their professional obligations and statutorily mandated duties to represent indigent defendants in Colorado state courts; (iv) certain of Plaintiffs' members will no longer be denied their economic and liberty interests in practicing their chosen profession; (v) Defendants Attorney General Suthers and the District Attorneys will no longer conduct plea discussions with uncounseled indigent defendants who have a right to counsel and who are subject to Colo. Rev. Stat. § 16-7-301(4); and (vi) Defendants Governor Hickenlooper and State Court Administrator Marroney will need to allocate and request adequate funding to ensure that indigent defendants with a right to counsel are appointed counsel for plea negotiations under Colo. Rev. Stat. § 16-7-301(4).

198. Defendants' execution of Colo. Rev. Stat. § 16-7-301(4) in violation of the Sixth and Fourteenth Amendments to the United States Constitution occurs regularly and is of sufficient immediacy and reality as to warrant the issuance of a declaratory judgment.

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

200. Such a declaration will have broad reach and is likely to be speedy.

201. Plaintiffs seek a declaratory judgment for the legitimate purpose of resolving a substantial and justiciable controversy.

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

203. 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.

204. 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 and Fourteenth Amendments 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) an injunction requiring Governor Hickenlooper 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) provide adequate resources for appointment of counsel for indigent defendants subject to Colo. Rev. Stat. § 16-7-301(4);
- (5) an injunction requiring that Attorney General Suthers (i) not conduct plea negotiations under Colo. Rev. Stat. § 16-7-301(4) until and unless defendants with a right to counsel have had the opportunity to apply for and receive counsel, and (ii) instruct his subordinates to do the same;
- (6) an injunction requiring that Colorado State Public Defender Wilson (i) represent indigent defendants in plea negotiations under Colo. Rev. Stat. § 16-7-301(4), and (ii) instruct his subordinates to do the same;
- (7) an injunction requiring that Colorado State Court Administrator Marroney (i) budget and request adequate funding to provide counsel to indigent defendants with a right to counsel during plea negotiations under Colo. Rev. Stat. § 16-7-301(4), and (ii) administer and process applications for appointed counsel for indigent defendants subject to Colo. Rev. Stat. § 16-7-301(4);

- (8) an injunction requiring that Colorado District Attorneys (i) not conduct plea negotiations under Colo. Rev. Stat. § 16-7-301(4) until and unless defendants with a right to counsel have had the opportunity to apply for and receive counsel, and (ii) instruct their subordinates to do the same;
- (9) attorneys' fees and costs; and
- (10) all other relief to which Plaintiffs are entitled in law or equity.

Dated: February 25, 2011

Respectfully submitted,

/s/Scott F. Llewellyn

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. I hereby certify that I have served the document or paper to the following non-CM/ECF participants by U.S. mail to the following addresses:

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s/ Scott F. Llewellyn

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