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. MORRISEY, 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

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs Colorado Criminal Defense Bar ("CCDB") and Colorado Criminal Justice Reform Coalition ("CCJRC") allege that Colorado Revised Statutes § 16-7-301(4) violates the rights of indigent criminal defendants by deferring their applications for counsel until after mandatory plea discussions with the prosecuting attorney. (Dkt. #10, First Amended Complaint ("Am. Compl.").) Two Defendants—Public Defender Wilson and District Attorney Thiebaut—have answered Plaintiffs' complaint and admitted that (1) the statute violates the Sixth and Fourteenth Amendment rights of indigent criminal defendants, (2) enforcement of the statute harms CCDB, CCJRC, and their members, and (3) the requested declaratory and injunctive relief would remedy those harms. (*See* Dkt. #45, State Public Defender Douglas Wilson's Answer to

First Amended Complaint ("PD Answer") ¶¶ 5, 8, 25; Dkt. #46, Defendant Thiebaut's Answer to First Amended Complaint ("DA Thiebaut Answer") ¶¶ 5, 8, 10, 18.)

Two groups of Defendants—the Attorney General, the Court Administrator, and the Governor (the "State Defendants") and the remaining district attorneys (the "DA Group Defendants")—have moved to dismiss. But the State Defendants admit that (1) a criminal defendant's right to counsel attaches before plea negotiations under Colorado Revised Statutes § 16-7-301(4); (2) the negotiation of plea bargains is a critical stage of the criminal proceedings at which defendants are entitled to counsel; and (3) criminal defendants are not provided with counsel prior to or while engaging in plea discussions with the prosecuting attorney under the statute. (*See* Dkt. #38, State Defendants' Motion to Dismiss ("State Defs.' Mot.") at 2, 8-10.) The State Defendants thus effectively admit that the statute is unconstitutional, absent a waiver of the right to counsel. And the DA Group Defendants admit to being divided over the "wisdom of the policy behind" the statute. (DA Defs.' Mot. at 3 n.2.) These admissions demonstrate that there is an actual controversy concerning the constitutionality of Colorado Revised Statutes § 16-7-301(4), leaving aside the various admissions that the statute is unconstitutional.

The DA Group and State Defendants nonetheless ask this Court to avoid reaching the merits of Plaintiffs' Complaint. *First*, the DA Group Defendants argue that there is no sufficiently definite controversy for resolution. But Plaintiffs have the requisite interests to bring this suit: (1) their missions are impaired by the statute; (2) they divert resources to combat the statute's deleterious effects; and (3) their members are hindered in practicing their chosen profession by the statute. And the relief Plaintiffs seek in this lawsuit—a declaration that the statute is unconstitutional and an injunction against enforcement—would remedy these harms.

Second, the State Defendants argue that (1) some defendants subject to the statute do not have a right to counsel, and (2) the defendants subject to the statute who have a right to counsel necessarily waive that right. (*See generally* State Defs.' Mot.) But the statute is unconstitutional in at least the "vast majority" of its applications. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1255-56 (10th Cir. 2008). By its language, § 16-7-301(4) is limited to defendants with the right to counsel. Moreover, the Court may fashion a remedy to reach only those defendants subject to the statute who have a right to counsel and whose constitutional rights are violated thereunder. And there is no support in the statute's language or structure to support the State Defendants' argument that defendants subject to the statute necessarily waive their right to counsel.

Accordingly, Plaintiffs respectfully request that the Court deny Defendants' Motions to Dismiss.[1]

BACKGROUND

Colorado Revised Statutes § 16-7-301(4) provides:

> In misdemeanors, petty offenses, or offenses under title 42, C.R.S., the prosecuting attorney is obligated to tell the defendant any offer that can be made based on the facts as known by the prosecuting attorney at that time. The 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. The prosecuting attorney shall advise the defendant that the defendant has the right to retain counsel or seek appointment of counsel. The 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

[1] In conjunction with this response, Plaintiffs have filed a notice dismissing without prejudice their claims against State Defendants Governor Hickenlooper and Court Administrator Marroney. Accordingly, Plaintiffs do not respond to the Eleventh Amendment immunity defense raised in the State Defendants' Motion.

> this subsection (4). Upon completion of the discussions, the prosecutor shall inform the court of whether a plea agreement has been reached . . . .

Under its plain language, § 16-7-301(4) defers the application for counsel of defendants subject to the statute until after they discuss plea offers with the prosecuting attorney. The statute requires prosecuting attorneys to advise defendants of their right to counsel, but does not specify the scope of that advisement or its timing. *See id.* The statute provides that defendants have no obligation to speak with the prosecuting attorney, but does not require the prosecuting attorney to inform defendants that they have no obligation to engage in plea discussions. *See id.* The statute does not provide that defendants necessarily waive their right to counsel by engaging in plea discussions with the prosecuting attorney. *See id.* Nor does the statute require prosecuting attorneys to obtain waivers of defendants' right to counsel before engaging in plea discussions. *See id.*

Plaintiffs CCDB and CCJRC have a substantial interest in this litigation. (Am. Compl. ¶¶ 82-95, 120-38.) CCDB is a professional association of attorneys, as well as investigators and paralegals, who represent persons accused of crime, including indigent criminal defendants. (*Id.* ¶ 83.) To protect the rights of indigent and other criminal defendants, CCDB provides active support for its professional network, including criminal defense training programs. (*Id.* ¶ 84.) CCDB also works directly with indigent criminal defendants as it provides a referral service and website—that it developed and maintains at significant expense—to assist individuals when they discover the collateral consequences that flow from an uncounseled guilty plea. (*Id.* ¶ 85.) CCDB has also contracted with a consultant to provide policy development and lobbying services to counter the effects of uncounseled pleas, and the consultant drafted a proposed bill

that would provide funding for representation during plea discussions under § 16-7-301(4). (*Id.* ¶¶ 87-88.)

CCJRC is a membership organization of over 6,000 individuals and 100 diverse organizations and faith communities. (*Id.* ¶ 120.) CCJRC has a mission of reversing the trend of mass incarceration in Colorado with a core focus on drug policy and sentencing reform. (*Id.* ¶¶ 118, 128.) CCJRC has worked to counter the effects of § 16-7-301(4) directly, and with other organizations and attorneys, including research on the effects of the statute. (*Id.* ¶ 128.) CCJRC has also directly assisted individuals who have sought assistance with issues relating to proper representation during criminal proceedings. (*Id.* ¶ 129.) In response to the growing number of individuals contacting the organization on such issues, CCJRC has created a new position that focuses on barriers to re-entry, reducing the impact of collateral consequences, and responding to the ever-increasing volume of requests for assistance from individuals suffering the collateral consequences of convictions, including uncounseled guilty pleas. (*Id.* ¶ 131.) CCJRC has also increased its fundraising and lobbying efforts to counter the effects of § 16-7-301(4). (*Id.* ¶ 135-36.)

The members of CCDB and CCJRC also have an interest in this lawsuit. (*Id.* ¶¶ 97-104, 139-45.) CCDB and CCJRC each have over 100 members serving as state public defenders or private attorneys listed as eligible alternate defense counsel. (*Id.* ¶¶ 97-98, 140.) Members who are state public defenders face conflicting statutory obligations arising from the right to counsel under the U.S. Constitution. Section 21-1-103(2) requires state public defenders to represent indigent defendants accused of misdemeanors after the right to counsel attaches. But § 16-7-301(4) precludes them from providing such representation during plea discussions with the

prosecuting attorney. (*See also* Am. Compl. ¶¶ 99-102, 141-42, 144.) The public defenders (and private attorneys that serve as alternate defense counsel) thus cannot fulfill their missions to represent indigent defendants or their constitutional and professional obligations to do so. (*Id.*) Further, the statute interferes with the ability of these members to practice their chosen profession and receive the benefits that flow from that practice. (*Id.* ¶¶ 99, 141.)

Plaintiffs seek (among other things) a declaration that § 16-7-301(4) deprives indigent defendants of their right to counsel and an injunction against its unconstitutional enforcement. (Am. Compl. at 32-34.) This relief would eliminate the obstacle to Plaintiffs' missions, settle the conflicting obligations faced by Plaintiffs' members, redress the additional harms suffered by Plaintiffs and Plaintiffs' members, and protect indigent defendants' against a deprivation of their rights to counsel. (*Id.* ¶¶ 193-204.)

STANDARD OF REVIEW

To resolve the Defendants' Rule 12(b)(6) motions to dismiss, the Court must "accept as true all well-pleaded factual allegations in [the] complaint and view these allegations in the light most favorable to the plaintiff." *Smith v. United States*, 561 F.3d 1090, 1097-98 (10th Cir. 2009). The Court does not weigh evidence, but merely assesses whether the complaint sufficiently alleges a claim for which relief may be granted. *Id.* at 1098.

ARGUMENT

I. THE DA GROUP DEFENDANTS' MOTION SHOULD BE DENIED.

The DA Group Defendants argue that Plaintiffs fail to raise an actual controversy under the Declaratory Judgment Act. (*See generally* DA Defs.' Mot.) Plaintiffs, however, have raised an ongoing controversy that warrants resolution on the merits, as confirmed by the other

Defendants' concessions that § 16-7-301(4) deprives indigent defendants of their right to counsel, absent waiver. Moreover, CCDB, CCJRC, and their members, have tangible interests in this controversy, and Plaintiffs' requested relief would remedy the harms to CCDB, CCJRC, and their members by preventing the unconstitutional enforcement of § 16-7-301(4). Accordingly, contrary to the DA Group Defendants' assertions, Plaintiffs do not seek an advisory opinion or present a friendly lawsuit.

A. Plaintiffs have alleged an actual controversy under the Declaratory Judgment Act.

In *Rothgery*, the Supreme Court reaffirmed that the right to counsel attaches at the first formal proceeding and explicitly called into question Colorado's procedures. *See Rothgery*, 554 U.S. 191, 205 (2008) (citing App. To Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 5a-7a, 2008 WL 218874 (citing Colo. Rev. Stat. § 16-7-301)). As a result of *Rothgery*, Public Defender Wilson sought guidance from the Attorney General. (Am. Compl. ¶ 64.) Although the Attorney General did not issue a formal opinion, the Attorney General and Assistant Solicitor General responded with an analysis concluding that § 16-7-301(4) is "constitutionally defensible." (Am. Compl. ¶¶ 64-68.) But in this action, both Public Defender Wilson and District Attorney Thiebaut have admitted that enforcement of § 16-7-301(4) violates indigent defendants' right to counsel. (PD Answer ¶¶ 5, 25; DA Thiebaut Answer ¶¶ 5, 18.) Even the State Defendants—including the Attorney General—appear to concede that, in at least some instances, enforcement of the statute "undoubtedly" results in Sixth Amendment violations. (State Defs.' Mot. at 4.) And the DA Group Defendants admit to internal disagreement regarding the "wisdom" of § 16-7-301(4). (DA Defs.' Mot. at 3 n.2.)

Accordingly, Defendants' admissions belie the DA Group Defendants' assertion that there is a mere hypothetical controversy.

B. Plaintiffs have a sufficient interest in this controversy to maintain this action.

1. Section 16-7-301(4) impairs Plaintiffs as organizations.

Section 16-7-301(4)'s deferral of indigent defendants' right to counsel until after plea negotiations impairs the ability of CCDB and CCJRC to fulfill their missions. *Cf. Common Cause of Colo v. Buescher*, No. 08-cv-2321-JLK 2010 WL 4537073, at *8 (D. Colo. Nov. 3, 2010) (Kane, J.) (explaining in standing context that "[a]n independent basis for organizational standing exists when a defendant's conduct makes it difficult or impossible for the organization to fulfill one of its essential purposes"). A core mission of CCDB is to represent and advise criminal defendants, including indigent defendants. (Am. Compl. ¶ 80.) But CCDB cannot fulfill this mission when § 16-7-301(4) mandates that certain indigent defendants cannot even apply for, much less receive, counsel during a critical stage of the adversary process. Similarly, the failure to provide these defendants with the appointed counsel to which the Sixth Amendment entitles them undermines CCJRC's efforts to prevent improper and unnecessary incarcerations and assist defendants facing collateral consequences from convictions. (*Id.* ¶¶ 118, 121, 127.)

CCDB and CCJRC also have a tangible interest in resolving this controversy as the organizations expend human and economic resources to counter the effects of § 16-7-301(4), diverting these resources from their core projects and activities. *See Common Cause*, 2010 WL 45373703, at *8 (explaining in standing context that "[a]n organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the

organization to divert resources to counteract those illegal acts" (quotations omitted)). CCDB now provides a referral service and has developed an expensive website to assist those individuals facing collateral consequences as a result of an uncounseled conviction. (Am. Compl. ¶¶ 85, 92.) In addition to its regular lobbying activities, CCDB has even hired a lobbying consultant to draft and advocate for a bill that would provide funding for indigent defendants subject to § 16-7-301(4) to receive counsel. (*Id.* ¶¶ 87-91.)

CCJRC has also suffered. It has expended resources to meet with attorneys and CCDB to discuss and research the effects of the challenged statutes and to respond to the increased numbers of individuals contacting the organization for assistance with issues of proper representation and the collateral consequences that flow from uncounseled guilty pleas. (Am. Compl. ¶¶ 128-131.) The uptick in requests for assistance forced CCJRC to place greater emphasis on its fundraising activities to cover its additional costs and led CCRJC to hire an additional employee. (*Id.* ¶ 136.) And like CCDB, CCJRC invests significant resources into lobbying to mitigate the collateral consequences of plea agreements entered into without the benefit of appointed counsel. (*Id.* ¶ 135.)

2. Plaintiffs' members have liberty, economic, and practical interests in this controversy.

Section 16-7-301(4) also impairs the interests of Plaintiffs' members, which, as the DA Group Defendants concede, includes public defenders and private counsel that accept paid appointments as alternate defense counsel. (S*ee* DA Defs.' Mot. at 4.) By preventing these attorneys from representing indigent defendants during the initial plea negotiations with the prosecuting attorney, § 16-7-301(4) impairs their interest in practicing their chosen profession and obtaining the benefits that follow from that practice. (Am. Compl. ¶¶ 96-104, 139-45.) This

impairment of the members' liberty and economic interests in practicing their profession "doubtless constitutes a cognizable injury to legally protected interests." *Fieger v. Ferry, Jr.*, 471 F.3d 637, 647 (6th Cir. 2006) (Clay, J., concurring); *see also Lepelletier v. Federal Deposit Insurance Corp.*, 164 F.3d 37, 42 (D.C. Cir. 1999) (stating that "the denial of a business opportunity" provides a plaintiff with a sufficient interest to invoke the judicial process). In fact, the Supreme Court recognizes "that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment." *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999).

Plaintiffs' members also have a sufficient interest in the outcome of this litigation because the statute creates conflicting obligations. (Am. Compl. ¶¶ 73, 78, 99, 101, 141, 142, 144.) Colorado Revised Statutes § 21-1-103 provides that public defenders "shall represent indigent persons charged in any court with crimes which constitute misdemeanors." That rule provides only a single exception to this obligation: where the prosecuting attorney states in writing that he will not pursue incarceration. *See id.* But while § 21-1-103 mandates public defenders represent indigent criminal defendants charged with misdemeanors, § 16-7-301(4) prevents them from fulfilling that obligation. Section 16-7-301(4) thus inhibits their ability to satisfy their constitutional and professional obligations to represent indigent defendants. And Plaintiffs' members have an interest in protecting the constitutional rights of the indigent criminal defendants they are charged to represent but cannot during plea negotiations pursuant to the statute.

The members' interest in reconciling these inconsistent obligations under the United States Constitution and Colorado law is at least as worthy of invoking the judicial process as the

injuries to members of environmental organizations that courts have readily deemed sufficient to maintain an action. The Tenth Circuit has held that a mere threat to areas used for "recreational or educational purposes" is sufficient to allow environmental organizations to maintain actions challenging environmental regulations. *See Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1265 (10th Cir. 2002). Plaintiffs' interest in resolving this controversy is at least as immediate, real, and practical as those in *Sierra Club*. Plaintiffs' members face threats to their constitutional, statutory, and professional obligations on a daily basis.

C. Declaratory and injunctive relief will remedy the harms suffered by Plaintiffs and their members.

The DA Group Defendants erroneously argue that a declaratory judgment would not remedy the injuries to CCDB, CCJRC, and their members. (DA Defs. Mot. at 8-9.) The Defendants suggests that the injuries suffered by CCDB, CCJRC, and their members could only be cured if the Colorado legislature passed a new statute. (*Id.* at 9.) CCDB, CCJRC, and their members, however, do not need a new statute to remedy their injuries.

The declaratory and injunctive relief requested by CCDB, CCJRC, and their members would prevent prosecuting attorneys from engaging in uncounseled plea negotiations with indigent defendants entitled to representation. Several consequences naturally flow from this relief: CCDB and CCJRC would no longer have to expend and divert resources to counteract the effects of the challenged statute through educational programs, referral services, programs to assist in addressing collateral consequences, and lobbying efforts. The members of CCDB and CCRJC would no longer be deprived of the opportunity to practice their chosen profession and fulfill their constitutional, statutory, and ethical obligations because the public defenders and alternative defense counsel would no longer be absent from plea negotiations under the

challenged statute. And declaratory and injunctive relief would ensure that prosecuting attorneys no longer defer indigent defendants' applications for counsel until after they have conducted plea negotiations under § 16-7-301(4). Thus, the relief requested by CCDB, CCJRC, and their members is more than likely to redress their harms. *Cf. United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1204 (10th Cir. 2001) (explaining in standing context that a party need only show that alleged injury would "likely" be redressed by a favorable decision).

D. Plaintiffs do not seek an advisory opinion.

Given that resolution of this case would remedy the Plaintiffs' harms, Plaintiffs have not sought an advisory opinion. In fact, this controversy is precisely the type of controversy that the Declaratory Judgment Act was designed to resolve; it will settle a dispute and eliminate uncertainty and ambiguity as to Plaintiffs' obligations. *See Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1248 (10th Cir. 2008) (explaining that declaratory relief is more appropriate where it will settle the controversy between the parties and "serve a useful purpose in clarifying the legal relations at issue").

Resolution of this action on the merits is also the most practical means to remedy the harms suffered by Plaintiffs, their members, and indigent defendants subject to § 16-7-301(4). Indigent defendants who accept plea deals after § 16-7-301(4) plea negotiations (even if to their ultimate detriment) will almost never directly appeal from the entry of guilty pleas. Thus, the issue likely will not arise through a direct appeal of a guilty plea based on an uncounseled plea agreement. Even if defendants later discover that the plea was to their detriment (*e.g.*, it resulted in collateral consequences of which defendants were not aware during negotiations), defendants may not be able to challenge the constitutionality of the uncounseled plea agreement because the

proceeding may not allow such a challenge or defendants may fall outside the limitations period for collaterally attacking a conviction. *See* Colo. R. Crim. P. 35(c)(3)(I). Moreover, the right to counsel during a Rule 35(c) attack is circumscribed. *See* Colo. R. Crim. P. 35(c)(3)(V). And those indigent defendants who reject a plea deal and proceed to trial will eventually receive counsel, thereby mooting their Sixth Amendment claims, even if they were harmed by rejecting a plea deal that they would have accepted if represented by counsel.

E. Plaintiffs have not brought a friendly suit.

The DA Group Defendants also argue that Plaintiffs have brought a "friendly" suit to obtain additional work and budgetary accommodations for Public Defender Wilson's office. (DA Defs.' Mot. at 9-10.) But Plaintiffs have already established an actual controversy, their and their members' interests in resolving that controversy, and that resolving that controversy will remedy the harm to CCDB, CCJRC, and their members. Thus, Plaintiffs can maintain this lawsuit.

Moreover, the Public Defender has followed and will continue to follow the statute so long as it remains in effect. That past and continued adherence to the statute alone renders the parties adversarial. The DA Group Defendants do not cite a single case to support their argument to the contrary.

F. Plaintiffs' Complaint Satisfies the Zone of Interests Test.

The DA Group Defendants argue that Plaintiffs' Complaint raises concerns outside the "'zone of interests' protected by *Rothgery* . . . ." (DA Defs.' Mot. at 11.) But the zone of interests test, a creature of federal administrative law, is inapplicable to this constitutional challenge. *See, e.g.*, Erwin Chemerinsky, Federal Jurisdiction 100 (5th ed. 2007) ("This

requirement applies when a person is challenging an administrative agency regulation that does not directly control the person's actions."). The zone of interests test is a judicially created prudential standing doctrine which asks "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *see also* Chemerinsky, *supra*, at 101 ("Although the Court's statement of the test includes its application to constitutional provisions . . . the zone of interests requirement is used only in statutory cases, usually involving administrative law issues."). The DA Group Defendants cite no case applying the prudential zone of interests test as a basis for dismissing a constitutional claim in a situation such as this.

Moreover, Plaintiffs' Complaint satisfies the zone of interests test. "The [zone of interests] test is not meant to be especially demanding." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987). The Sixth Amendment protects indigent criminal defendants' rights to appointed counsel. *See generally Gideon v. Wainright*, 372 U.S. 335 (1963). Colorado has implemented that right, in part, through the enactment of legislation. *See* Colo. Rev. Stat. §§ 21-1-101 *et seq.*; *id.* §§ 21-2-101 *et seq.*; *see also* Colo. Const. art. II, § 16. *Rothgery* affirms that the right to counsel attaches at a criminal defendant's initial appearance before a judicial officer. *Rothgery*, 554 U.S. at 213. The State Defendants admit that, under *Rothgery*, "an indigent criminal defendant's Sixth Amendment right to counsel has already attached by the time any plea negotiations pursuant to § 16-7-301(4) begin." (State Defs.' Mot. at 8-9.) The Complaint alleges that Colorado Revised Statutes § 16-7-301(4) interferes with this right by denying counsel to indigent criminal defendants until the conclusion of plea negotiations with the

prosecuting attorney. And CCDB and CCJRC are at least "arguably" within the Sixth Amendment's zone of interests because they are comprised of individual lawyers who have constitutional and statutory obligations with respect to providing counsel to indigent criminal defendants and who are subject to conflicting directives with respect to satisfying those obligations under Colorado Revised Statutes § 16-7-304(4). *Cf. Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1243-44 (10th Cir. 2008) (holding that the State of Wyoming fell within the zone of interests of the Federal Gun Control Act, which primarily regulated possession and transportation of firearms by individuals, because the state had a role in the implementation of the Act and the interpretation in question hindered the state's ability to enforce its laws). Plaintiffs have properly challenged a statutory provision that unconstitutionally infringes on indigent criminal defendants' Sixth Amendment rights to counsel and hinders their own interests and obligations in the process.[2]

II. THE STATE DEFENDANTS' MOTION SHOULD BE DENIED.

The State Defendants provide further support for Plaintiffs' refutation of the DA Group Defendants' arguments, as the State Defendants expressly concede that Plaintiffs' Complaint contains sufficient allegations, at this stage, to frame this constitutional controversy and establish harm to Plaintiffs and their members which would be remedied by the requested relief. (*See* State Defs.' Mot. at 4.) The State Defendants nevertheless argue that the Court should not

[2] The DA Group Defendants also argue that "the Amended Complaint raises abstract questions more properly addressed by the legislative branch." (DA Defs.' Mot. at 12.) Of the reasons given in support of that argument, most relate to Plaintiffs' ability to maintain a declaratory judgment action, an issue addressed above. The other reason given is that Plaintiffs seek certain relief from Defendant Governor Hickenlooper. (*See id*.) The Governor has been voluntarily dismissed from this action, as has the Court Administrator.

entertain the merits of Plaintiffs' suit because (1) some criminal defendants subject to the statute do not have the right to counsel and (2) those criminal defendants subject to the statute who do have a right to counsel waive that right by engaging in plea discussions with the prosecuting attorney. (*See generally* State Defs. Mot.) But the language of the statute as a whole makes clear that § 16-7-301(4) applies to criminal defendants entitled to counsel, and statutory procedures cannot force an indigent criminal defendant to knowingly and voluntarily waive the right to counsel.

A. There is no facial versus as-applied bar to Plaintiffs' suit.

The State Defendants argue that Plaintiffs cannot bring a facial challenge to the statute because they cannot show that the challenged provision is "'invalid in the vast majority of its applications.'" *Id.* at 8 (quoting *Hernandez-Carrera*, 547 F.3d at 1256). The statute itself—its plain language, structure, history, and place in the statutory scheme governing criminal procedure in Colorado—belie this argument and demonstrate that Colorado Revised Statutes § 16-7-301(4) applies to criminal defendants entitled to counsel. Even if some defendants to whom the statute applies do not have the right to counsel, it undoubtedly applies to defendants who do have that right, and the Court may fashion a remedy to prohibit the statute's unconstitutional application to those defendants.

1. Section 16-7-301(4) violates indigent criminal defendants' Sixth Amendment rights.

There is no question that, absent waiver, indigent criminal defendants' Sixth Amendment rights to counsel are violated under Colorado Revised Statutes § 16-7-301(4). Accordingly, the serious constitutional questions presented by this lawsuit do not raise the types of concerns that courts sometimes express in limiting facial challenges. While Defendants rely on *Washington*

State Grange v. Washington State Republican Party, that court simply declined to look "beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases," and refused to rule on "the possibility" of, or "sheer speculation" about, constitutional violations. 552 U.S. 442, 450, 454 (2008). Here, by contrast, not only do Plaintiffs' allegations expressly relate to the "facial requirement[s]" of the statute, but several parties admit that the alleged constitutional violations occur and are ongoing. In fact, even the State Defendants acknowledge that "mistakes"—which in this case presumably means violations of indigent defendants' constitutional rights—are made in the application of Colorado Revised Statutes § 16-7-301(4). Thus, this case is a far cry from the "sheer speculation" at issue in *Washington State Grange*.

Further, in the context of Sixth Amendment rights, the Supreme Court has not enforced a rigid distinction between facial and as-applied challenges. In the two cases on which Plaintiffs' case is premised, the Supreme Court granted "facial" relief, broadly declaring criminal defendants' Sixth Amendment rights, when presented with "as-applied" challenges by individual criminal defendants. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1477-78, 1486 (2010); *Rothgery*, 554 U.S. at 195, 212-13. Defendants cite no case in which a court declined to hear a facial Sixth Amendment challenge to a state statute on the grounds that there might be some defendants without the right to counsel subject to the statute. *Cf.* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 Const. Commentary 227, 230 (2006) (noting that, rather than apply traditional scrutiny tests to Sixth Amendment claims, "the Court uses categorical rules to 'implement' the right to counsel").

2. Section 16-7-301(4) does not apply to defendants ineligible for counsel.

Defendants assert that Plaintiffs must show that the challenged statute is unconstitutional in all of its applications, and then argue that Plaintiffs cannot make such a showing because there is no right to counsel for "many" offenses "covered by section 16-7-301(4)" (State Defs.' Mot. at 6). When read in context, however, it is apparent that the statutory framework contemplates that the criminal defendants subject to Colorado Revised Statutes § 16-7-301(4) have the right to counsel.

The statute says that prosecutors may engage in plea discussions in the interests of justice, but that such discussions shall proceed only in the presence of defense counsel, subject to three exceptions: where the defendant: "[1] is not eligible for appointment of counsel, or [2] refuses appointment of counsel and has not retained counsel, or [3] except as provided in subsection (4) . . . ."[3] The first exception expressly excludes defendants who are not eligible for the appointment of counsel. *See* Colo. Rev. Stat. § 16-7-301(1). The second exception excludes those who are eligible for appointed counsel, but have refused appointed counsel, and who have not retained counsel. *See id.*[4] The third exception—for certain misdemeanor defendants—is at

[3] The full text of subsection 301(1) reads as follows:

> Where it appears that the effective administration of criminal justice will thereby be served, the district attorney may engage in plea discussions for the purpose of reaching a plea agreement. He should engage in plea discussions or reach plea agreements with the defendant only through or in the presence of defense counsel except where the defendant is not eligible for appointment of counsel, or refuses appointment of counsel and has not retained counsel, or except as provided in subsection (4) of this section.

[4] In either case, of course, defendants under the second exception have *the right* to counsel. Indeed, the entire statutory scheme makes little sense unless it is read to apply to

(Footnote continues on next page.)

issue in this case. The statutory framework thus makes clear that the procedures at issue in this case apply to defendants who are eligible for counsel, and have not refused appointed counsel, but nonetheless are required to meet with the prosecuting attorney to discuss plea offers before applying for counsel. Section 16-7-301(4) confirms as much by requiring the prosecuting attorney to provide notice to defendants regarding their right to counsel.

The related statutory framework governing the prosecution of indigent criminal defendants in Colorado further undermines the State Defendants' arguments. Section 16-7-207(c) allows indigent criminal defendants to apply for and be assigned counsel *except* if the defendant is charged with one of the offenses enumerated in Colorado Revised Statutes § 16-7-301(4) *and* the prosecutor files a written statement that incarceration is not being sought as provided in Colorado Revised Statutes § 16-5-501. *See* Colo. Rev. Stat. § 16-7-207(c); *see also id.* § 21-1-103(2) (requiring public defenders to represent indigent criminal defendants charged with misdemeanors, except as provided in Colorado Revised Statutes § 16-5-501).[5] By

---

(Footnote continued from previous page.)

criminal defendants with a right to counsel; otherwise the prohibition against speaking with the defendant outside the presence of counsel makes no sense.

[5] Colorado Revised Statutes § 16-5-501 states as follows:

> Except as otherwise provided, in any criminal prosecution for class 2 and class 3 misdemeanors, petty offenses, class 1 and class 2 misdemeanor traffic offenses, or municipal or county ordinance violations, the prosecuting attorney may, at any time during the prosecution, state in writing whether or not he or she will seek incarceration as part of the penalty upon conviction of an offense for which the defendant has been charged. If the prosecuting attorney does not seek incarceration as part of such penalty, legal representation and supporting services need not thereafter be provided for the defendant at state expense, and no such defendant shall be incarcerated if found guilty of the charges against him or her, but the defendant shall be subject to all alternatives available to the court under

(Footnote continues on next page.)

providing a mechanism expressly designed to identify those defendants without the right to counsel—a written statement that the prosecutor will not seek incarceration—the statutory framework suggests that defendants who are not the subject of such a written statement have the right to counsel.

3. The Court is empowered to fashion a suitable remedy

Even if some defendants subject to the statute may not have the right to counsel, many obviously do, and the Court can tailor its remedy to those defendants. Plaintiffs' Complaint seeks "an injunction forbidding enforcement of Colo. Rev. Stat. § 16-7-301(4) against indigent defendants *with a right to counsel*." (Am. Comp. ¶ 204(3) (emphasis added); *see also* PD Answer ¶ 25; DA Thiebaut Answer ¶ 18.) And District Attorney Thiebaut and Public Defender Wilson admit that a declaration as to the unconstitutionality of Colorado Revised Statutes § 16-7-301(4) will remedy the harms alleged in Plaintiffs' Complaint, because the Attorney General 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)." (Am. Comp. ¶ 197(v) (emphasis added); PD Answer ¶ 25; DA Thiebaut Answer ¶ 18.)

The Supreme Court has held that lower courts can resolve a facial challenge to a statute's constitutionality by granting narrower declaratory and injunctive relief. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 323 (2006). In *Ayotte*, the Court considered a facial challenge to the constitutionality of a statute that was applied unconstitutionally in only "some very small percentage of cases." The Court nevertheless allowed the challenge to proceed, because the

(Footnote continued from previous page.)

> section 18-1.3-702, C.R.S., and to alternatives available to each municipality under its municipal ordinances for failure to pay fines and costs.

remedy could properly be limited to that "very small percentage" of cases. *Id.* at 328. Here, by contrast, if the statute is not unconstitutionally applied in the "vast majority" of cases—the standard the Tenth Circuit has applied in analyzing facial challenges—it nonetheless is unconstitutionally applied in far more than a "very small percentage" of cases. (*See* State Defs.' Mot. at 5.)

4. Plaintiffs may maintain an as-applied challenge.

Plaintiffs may, at a minimum, raise an as-applied-challenge to Colorado Revised Statutes § 16-7-301(4), because there is no dispute that the statute applies to many defendants with the right to counsel. The State Defendants suggest that, to maintain an as-applied challenge, Plaintiffs would have had to have alleged "*specific instances*" in which Colorado Revised Statutes § 16-7-301(4) violated the constitutional rights of "*an individual* criminal defendant in Colorado." (State Defs.' Mot. at 4 (emphases added); *see also* DA Defs.' Mot. at 2.) As-applied constitutional challenges, however, are not so limited.

In *Tennessee v. Lane*, when faced with an as-applied challenge to Title II of the Americans with Disabilities Act, the Supreme Court upheld that statute "as it applies to the *class of cases* implicating the fundamental right of access to the courts," 541 U.S. 509, 533-34 (2004) (emphasis added), rather than just as-applied to the individual plaintiffs who filed suit based on the denial of their rights of access to the courts. Similarly here, Plaintiffs may challenge the statute as it applies to the class of cases involving criminal defendants subject to the statute who have the right to counsel. And there is no dispute that the number of such cases is substantial, if not the vast majority.

B. Indigent defendants do not knowingly and voluntarily waive their right to counsel.

While the State Defendants concede that indigent defendants' Sixth Amendment right to counsel has attached "by the time any plea negotiations pursuant to § 16-7-301(4) begin," they nonetheless argue that defendants engaging in these negotiations have voluntarily waived their rights to counsel.[6] (State Defs.' Mot. ¶¶ 8-13.) The statute, however, belies that argument as it makes no mention of waiver, much less a knowing, intelligent, and voluntary waiver. *See* Colo. Rev. Stat. § 16-7-301(4).

The statute defers applications for counsel until after a defendant discusses plea offers with the prosecuting attorney. *Id.* The statute does not require the prosecuting attorney to obtain a waiver of the right to counsel before engaging in such discussions. *See id.* Nor does the statute provide that defendants waive their right to counsel merely by talking with the prosecuting attorney. *See id.* The statute does not even mention waiver, which is surprising if, as the State Defendants assert, its procedures necessarily result in the waiver of a defendant's right to counsel.

Regardless, the statute does not satisfy the standard for a valid waiver, which must be knowing, intelligent, and voluntary. *See United States v. DeShazer*, 554 F.3d 1281, 1288 (10th Cir. 2009). The State Defendants emphasize the statute's requirement that prosecuting attorneys advise defendants regarding their right to counsel. (State Defs.' Mot. at 8-13.) But merely informing indigent defendants of their right to counsel is insufficient to establish knowing and

[6] District Attorney Thiebaut and Public Defender Wilson, on the other hand, admit that indigent defendants do not waive their rights to counsel when they engage in discussions under the statute. (Am. Compl. ¶ 59; PD Answer ¶ 5; DA Thiebaut ¶ 5.)

intelligent waiver. *See Brewer v. Williams*, 430 U.S. 387, 404 (1977) (emphasizing that mere comprehension of the right is not sufficient for waiver). The State Defendants also emphasize the statute's statement that the defendant has no obligation to speak with the prosecuting attorney. But there is no requirement that prosecuting attorneys inform defendants that they have no obligation to engage in plea discussions, and thus the statute's statement provides no support for knowing or intelligent waiver.

Nor can the statutory procedures effect a "voluntary" waiver of the right to counsel. The statute requires plea discussions before a defendant may apply for counsel. There is no suggestion in the statute that such discussions are voluntary, let alone that engaging in the required discussions constitutes a voluntary waiver of the right to counsel for the duration of those discussions, with the right to counsel springing back into effect after the plea discussions end and a defendant is permitted to apply for counsel.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the motions to dismiss of the DA and State Defendants.

Dated: June 27, 2011

Respectfully submitted,

/s/ Scott F. Llewellyn

Scott F. Llewellyn (Reg. No. 34821)
Ian Kellogg (Reg. No. 40247)
Colin M. O'Brien (Reg. No. 41402)
Morrison & Foerster LLP
5200 Republic Plaza
370 Seventeenth Street
Denver, Colorado 80202-5638
Telephone: 303.592.1500
Facsimile: 303.592.1510
Email: sllewellyn@mofo.com
ikellogg@mofo.com
cobrien@mofo.com

Kathryn A. Reilly
Joshua D. Franklin
JACOBS CHASE LLC
1050 17th Street, Suite 1500
Denver, CO 80265
Telephone: 303.685.4800
Facsimile: 303.685.4869
E-mail: kreilly@jacobschase.com
jfranklin@jacobschase.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2011, I electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

Matthew David Grove	matthew.grove@state.co.us
Rebecca Adams Jones	rebecca.jones@state.co.us
Henry Richard Reeve	hrr@denverda.org
L. Andrew Cooper	acooper@da18.state.co.us
Stanley L. Garnett	sgarnett@bouldercounty.org
Christopher C. Zenisek	czenisek@bouldercounty.org
Lisa Kay Michaels	lmichaels@bouldercounty.org
John M. Barth	barthlaw@aol.com
Jeffrey S Pagliuca	jpagliuca@hmflaw.com

s/ Scott F. Llewellyn

Scott F. Llewellyn
Morrison & Foerster LLP
5200 Republic Plaza
370 Seventeenth Street
Denver, Colorado 80202-5638
Telephone: 303.592.1500
Facsimile: 303.592.1510
Email: SLlewellyn@mofo.com