

COLORADO HOUSE BILL 16-1309: SAFEGUARDING THE RIGHT TO AN ATTORNEY IN MUNICIPAL COURT?

New legislation governing a defendant's right to counsel will soon impact municipal court procedures in Colorado. During the 2016 legislative session, the General Assembly passed a bill requiring the presence of a public defender at each session of jail advisements for individuals in custody.¹ In seeking to limit the number of defendants entering uncounseled pleas, House Bill 16-1309 dictated that municipalities must provide legal representation for defendants at their first court appearances.² Most state and county courts already provide access to public defenders for defendants prior to their appearances. In contrast, municipal defendants in Colorado often receive counsel after entering their plea.³ House Bill 16-1309 looked to alter this trend by compelling additional safeguards for a defendant's right to an attorney in municipal court.

A defendant's right to an attorney is a fundamental aspect of the criminal justice system. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . and to have the Assistance of Counsel for his defense."⁴ Each individual in custody must be informed of their right to counsel under the purview of the Due Process Clause of the Fourteenth Amendment.⁵ The Supreme Court established in *Michigan v. Jackson*⁶ and *Brewer v. Williams*⁷ that the right to counsel attaches at the initial appearance before a judicial officer who informs the defendant of the formal charges against him. In *Jackson*, the Court held that the defendants' request for an appointed attorney during their arraignment invalidated the confession obtained at a police initiated interrogation before the defendants had the opportunity to consult with counsel.⁸ Similarly, in *Brewer*, the Court ordered a new trial after the defendant was deprived of the right to assistance of counsel when officers elicited a confession during the defendant's transfer to another city.⁹

1. H.B. 16-1309, 70th Gen. Assemb., 2nd Reg. Sess. (Colo. 2016) (codified by Colo. Rev. Stat. § 13-10-114.5) (taking effect May 1, 2017).

2. *Id.* at § 1.

3. Nathan Woodliff-Stanley, *Governor Hickenlooper: Fix the Hole in Colorado Municipal Courts*, HUFFINGTON POST (May 6, 2016), http://www.huffingtonpost.com/nathan-woodliffstanley-governor-hickenlooper-fix_b_9860124.html.

4. U.S. CONST. amend VI.

5. See *Powell v. Alabama*, 287 U.S. 45 (1932).

6. 475 U.S. 625, 629 (1985).

7. 430 U.S. 387, 398-99 (1977).

8. *Michigan*, 475 U.S. at 636.

9. *Brewer*, 430 U.S. at 406.

Most recently, the Supreme Court affirmed the *Jackson* and *Brewer* holdings in *Rothgery v. Gillespie*¹⁰ and found that the Sixth Amendment right requires counsel be appointed within a reasonable time after the point of attachment. *Rothgery* involved a defendant whose right to counsel was violated by an unwritten policy in a Texas county court that denied counsel appointments for indigent clients on bond until the entry of their indictment.¹¹ While these cases ensure representation for defendants, they do not expressly require courts to have attorneys available for immediate representation of defendants at their first appearance.

The *Rothgery* Court noted, however, that the “overwhelming consensus practice conforms to the rule that the first formal proceeding is the point of attachment”¹² and emphasized that forty-three states appoint counsel before or at the defendant’s initial appearance.¹³ The decision specifically lists the seven states that did not follow such practices, including Colorado.¹⁴

In 2013, Colorado responded to the *Rothgery* decision by ensuring the right to legal counsel in plea negotiations. The legislature repealed a law requiring an indigent person charged with a misdemeanor, petty offense, traffic offense, or municipal or county ordinance violation, for which there was a possible jail sentence, to meet with a prosecuting attorney prior to the appointment of legal counsel.¹⁵ Then, in 2014, the State adopted a policy to “assist the administration of justice with respect to the appointment of counsel in criminal cases” as well as for the “appointment of counsel to an indigent person cited for contempt where a jail sentence is contemplated.”¹⁶ This policy encouraged the immediate availability of public defenders at the state and county levels. Colorado municipal courts, however, did not adopt a similar process. Minimal resources and a belief that municipal punishments typically did not create a requisite need for immediate counsel kept municipalities from transitioning to the new standard.

Most proceedings at the municipal level dealt with monetary fines, not imprisonment. Thus, municipalities instead chose to follow an interpretation of *Rothgery* that focused on the reasonable time requirement.¹⁷

10. 554 U.S. 191, 213 (2008).

11. *Id.* at 196.

12. *Id.* at 202.

13. *Id.* at 202–03.

14. *Id.* at 203.

15. H.B. 13-1210, 68th Gen. Assemb., 1st Reg. Sess. (Colo. 2013) (codified by Colo. Rev. Stat. §§ 16-7-301 et seq.).

16. Nancy E. Rice, APPOINTMENT OF STATE-FUNDED COUNSEL IN CRIMINAL CASES AND FOR CONTEMPT OF COURT 1 (Chief Justice Directive 04-04 amended Nov. 2014), https://www.courts.state.co.us/Courts/Supreme_Court/Directives/04-04_Amended%202014%20Nov1%20&%20Attach%20A-F.pdf.

17. Denv. Post Editorial Bd., *Piling expenses on cities’ courts*, DENV. POST (April 28, 2016, 11:26 AM), www.denverpost.com/2016/04/28/piling-expenses-on-cities-courts/.

The Supreme Court determined that a reasonable time must be a time “to allow for adequate representation at any critical stage before trial, as well as the trial itself.”¹⁸ Municipal judges, therefore, advised defendants at their first appearance that he or she had a right to an attorney.¹⁹ After asking for an attorney, the defendants would wait for their representation to arrive before the court proceeded with their case.²⁰ This process informed defendants of their rights and allowed the choice to ask for a continuance and apply for an attorney or immediately enter a plea with the court. An example of an advisement from the Colorado Springs Municipal Court provides:

You are presumed innocent until proven guilty beyond a reasonable doubt. You need make no statement, and any statement made by you can be used against you. You have the right to be represented by an attorney at your own expense. You have the right to have this arraignment continued to obtain one. In certain cases, if you cannot afford an attorney one may be appointed to represent you.²¹

Municipal courts consistently applied similar instructions across the state.²² If a defendant asked for an attorney, the court issued a continuance and the defendant did not enter a plea. This process allowed defendants either the opportunity to secure their own attorney or, if the defendant was indigent, provided time for the court to appoint counsel. House Bill 16-1309 prohibits this procedural option for municipal courts and instead requires courts to comply with the state policy of immediate availability of counsel.²³ For this purpose, no indigence finding is required prior to appointment.

House Bill 16-1309, now codified in the Colorado Revised Statutes, states that “[a]t the time of first appearance on a municipal charge, if the defendant is in custody and the charged offense includes a possible sentence of incarceration, the court shall appoint counsel to represent the defendant for purposes of the initial appearance.”²⁴ This standard exists unless the defendant makes a knowing, intelligent, and voluntary waiver of his right to an attorney.²⁵ Additionally, the appointment of counsel must continue until the defendant is released from custody.²⁶

18. *Rothgery v. Gillespie*, 554 U.S. 191, 198 (2008).

19. *Denv. Post Editorial Bd.*, *supra* note 17.

20. *Id.*

21. City of Colo. Springs, *Advisement of Rights* (rev. Nov. 2013), https://coloradosprings.gov/sites/default/files/municipal_court/pdfs/advisementofrightscriminal_01012014.pdf.

22. Letter from Colo. Mun. League to John W. Hickenlooper, Governor of Colorado, at 1 (May 3, 2016), <http://www.cml.org/issues.aspx?taxid=11013>.

23. *Denv. Post Editorial Bd.*, *supra* note 17.

24. Colo. Rev. Stat. § 13-10-114.5 (taking effect May 1, 2017).

25. *Id.*

26. *Id.*

While this legislation will reduce the number of unrepresented pleas in municipal courts, it fails to address the initial concern regarding the cost of immediate counsel. House Bill 16-1309 implemented an unfunded mandate on municipal courts.²⁷ Colorado law prohibits such unfunded directives as C.R.S. § 29-1-304.5(1) provides:

“[N]o new state mandate or an increase in the level of service for an existing state mandate beyond the existing level of service required by law shall be mandated by the general assembly or any state agency on any local government unless the state provides additional moneys to reimburse such local government for the costs of such new state mandate or such increased level of service.”²⁸

The legislature implemented these laws to prevent burdensome expenditure increases on local governments. Such unexpected costs inhibit the ability of municipalities to effectively budget for the governing of local communities.²⁹ Financial analysts estimated that the costs to implement House Bill 16-1309’s requirements would range from \$12,000 per year in smaller municipalities to between \$20,000 and \$60,000 in larger municipalities.³⁰ The impact of these numbers depends on the relative size of the community. The Town of Meeker’s annual municipal court budget is \$30,000. Funding an additional \$12,000 for extra attorneys will be a difficult task for the town.³¹ The Colorado Municipal League estimated the overall cost for providing immediate counsel will be anywhere from \$2.1 million to more than \$5 million per year.³²

Aside from the costs, House Bill 16-1309 disproportionately affects rural communities by requiring immediate access to attorneys. There are not enough public attorneys in rural areas to be immediately available to defendants on a daily basis.³³ Courts already struggle to find qualified counsel to represent defendants at their second appearance. The bill also creates unnecessary continuations of cases in municipal courts with limited resources and extends the workload of an already busy system.³⁴ Further, the bill implements safeguards to a right that municipal courts had not threatened. Municipal courts must now pay for attorneys to remain accessible despite the uncertainty regarding their need.³⁵ Additional questions may also be raised regarding the effectiveness of representation that occurs in limited time frames. The *Rothgery* court avoided de-

27. Denv. Post Editorial Bd., *supra* note 17.

28. *See also* COLO. CONST. art. X, § 20(9).

29. Colo. Mun. League, *supra* note 22.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 2.

34. *Id.*

35. Denv. Post Editorial Bd., *supra* note 17.

claring a specific moment for the attachment of counsel as it likely understood the variety of factors influencing different court systems.

While the Sixth Amendment right to counsel remains well-protected in Colorado, new municipal requirements in House Bill 16-1309 must confront several issues before successful implementation, including funding costs and attorney availability. Colorado voluntarily undertakes these additional obstacles as the bill ensures a broader standard of accessibility for defendants seeking counsel than the national guidelines required by the Supreme Court. It remains to be seen how this new standard will affect due process in municipal settings.

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