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Suit argues all defendants deserve counsel from the start

By Felisa Cardona
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Colorado's long-standing practice of withholding public lawyers from defendants in minor cases until after they have considered a plea deal is now being challenged in federal court.

The practice, enacted in a 1992 state statute, is the subject of a suit filed in Denver's U.S. District Court by Colorado's Criminal Defense Bar and the Criminal Justice Reform Coalition.

The two nonprofit organizations argue in the suit, filed against the governor's office, that the practice violates the Sixth Amendment right to counsel.

Colorado is the only state with a law that, in effect, requires indigent defendants to go without legal representation until an effort at a plea agreement with a prosecutor is made.

If the defendant can't reach an agreement with the prosecutor or does not want to negotiate, he or she can request an attorney.

The law was passed because it was seen as a cost-cutting measure when the Colorado public defender asked for more money from the legislature to handle its growing case load.

Although the cases affected by the statute are not felonies, they can have serious consequences.

"It impacts a group who don't have money to hire a lawyer," said Lisa Wayne, a Colorado attorney and president-elect of the National Association of Criminal Defense Lawyers.

Defendants may learn from a prosecutor that they are not seeking a jail sentence and see the offer as a great deal, but they don't realize there are consequences down the line.

"They don't report to probation or they don't change their address or some other kind of violation really affects them, and they were never advised of these collateral consequences," Wayne said.

Defendants in the U.S. on a green card could face deportation if not properly advised, she said.

"Those are things as a lawyer I would tell my client, and the DA does not have a burden to tell them those things," Wayne said.

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Colorado's statute was criticized in 2008 by the U.S. Supreme Court in an opinion issued in the case of Walter Rothgery, a Texas man who was not provided an attorney for several months after a first appearance in court.

Rothgery's charges were later dismissed, but he filed a suit against Gillespie County, which said he should have been provided counsel earlier. The county's defense was that it had an unwritten policy to deny counsel to indigent defendants out on bond until an indictment was filed.

The justices ruled in Rothgery's favor and found the right to counsel attaches when a defendant makes an initial appearance before a judge to be advised of charges.

Since the high court issued that opinion, Colorado Public Defender Douglas Wilson said he has tried to challenge the statute in the legislature without success.

After the Rothgery decision, Wilson wrote a letter to Attorney General John Suthers that said staffing needs will increase if Colorado's statute is challenged in federal court.

"Our best estimates right now is that it would increase our caseload somewhere in the neighborhood of 15,000 cases a year," Wilson said. "I personally believe it is unconstitutional, but I have an obligation to follow the law until someone tells me it is not the law anymore."

Suthers declined to comment because a lawsuit is pending, said spokesman Mike Saccone.

But in a January 2009 memo addressed to Wilson, the Attorney General's office said it was prepared to defend the statute. Suthers also filed a friend-of-the-court brief in support of Texas in the Rothgery case.

"Even though the statutes defer assignment of counsel until after the prosecutor talks with the defendant, the statutes identify the defendant's rights not to talk to the prosecutor and to benefit from appointed counsel," the memo says. "The Colorado statutes in question do not negate attachment of the Sixth Amendment right to counsel, and in fact they specifically allow for the defendant to exercise that right."

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