

[As Approved]

PRETRIAL RELEASE TASK FORCE
FINAL RECOMMENDATION PRESENTED TO THE
COLORADO COMMISSION ON CRIMINAL AND JUVENILE JUSTICE
January 11, 2019

FY19-PR #09. Clarify Public Defender and District Attorney Involvement in Bail Hearings [Statutory]

Recommendation FY19-PR #09

Append §16-4-104, C.R.S., to clarify in statute that a person is entitled to counsel at the initial bail setting hearing. Clarify that counsel shall have adequate time to prepare for an individualized hearing on bail. Retain language that the district attorney has the right to appear and pretrial information shall be shared.

Proposed Statutory Language

Append §16-4-104, C.R.S. with subsections **(4)**, **(5)**, and **(6)**.

- (4) AT THE INITIAL HEARING, THE PERSON SHALL HAVE THE RIGHT TO BE REPRESENTED BY AN ATTORNEY AND SHALL BE ADVISED OF THE POSSIBLE CHARGES, PENALTIES AND HIS OR RIGHTS AS SPECIFIED IN RULE 5, COLORADO RULES OF CRIMINAL PROCEDURE, UNLESS WAIVED BY THE DEFENDANT. THE COURT SHALL NOTIFY THE PUBLIC DEFENDER OF EACH PERSON IN CUSTODY BEFORE THE INITIAL HEARING AND THE PERSON SHALL HAVE THE RIGHT TO BE REPRESENTED BY THE PUBLIC DEFENDER AT THAT HEARING. ADDITIONALLY, THE COURT SHALL PROVIDE THE PUBLIC DEFENDER SUFFICIENT TIME TO PREPARE FOR AND PRESENT AN INDIVIDUALIZED ARGUMENT REGARDING THE RELEASE OF THE PERSON AND ANY CONDITIONS OF RELEASE AT THE INITIAL HEARING, CONSISTENT WITH THE COURT’S DOCKET AND SCHEDULING PRIORITIES.**
- (5) THE PROSECUTING ATTORNEY HAS THE RIGHT TO APPEAR AT ALL HEARINGS TO PROVIDE HIS OR HER POSITION ON BAIL AND CONDITIONS OF RELEASE AND ANY OTHER RELEVANT INFORMATION.**
- (6) PRIOR TO THE INITIAL HEARING, THE PERSON, PROGRAM OR AGENCY THAT HAS CONDUCTED THE PRETRIAL RELEASE SCREENING SHALL PROVIDE TO THE PROSECUTION AND THE DEFENSE ANY AND ALL INFORMATION GATHERED REGARDING THE PERSON IN CUSTODY WHICH SHALL INCLUDE, BUT NOT BE LIMITED TO, THE RESULTS FROM ANY EMPIRICALLY-DEVELOPED AND VALIDATED RISK ASSESSMENT INSTRUMENT AND THE ARREST AFFIDAVIT OR OTHER PROBABLE CAUSE STATEMENT.**

Discussion

Pursuant to CJD 04-04,¹ if a person is in custody and cannot post or is not allowed bail, the Public Defender, or Alternate Defense Counsel if the Public Defender has determined that a conflict exists and has notified ADC that conflict representation is necessary, may automatically elect to represent that person and will notify the court, either verbally or in writing, of the circumstances. The person need not complete a JDF 208² until and unless the person is released from custody. If the person is released from custody, then all provisions under Section II, Indigency Determination – Out of Custody, apply.

¹ Chief Justice Directive, 04-04: Appointment of State-Funded Counsel in Criminal Cases and for Contempt of Court. (See “Chief Justice Directives” at, courts.state.co.us/Courts/Supreme_Court/cjds/index.cfm)

² Form JDF 208: Application for Public Defender, Court-Appointed Counsel, or Guardian Ad Litem. (See, “Apply for a Public Defender” at, courts.state.co.us/Forms/Forms_List.cfm?Form_Type_ID=256)

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However, in certain jurisdictions, the court is not allowing PD to appear for first advisements or not notifying the PD when people are in custody and a hearing to set bond is to be held. The need for counsel is important at all critical stages and bail setting is a critical stage. Also, the courts cannot give a pro forma gesture to Gideon and the need for adequate representation by not allowing counsel enough time to interview and prepare for a bail hearing.

Therefore, it is important to clarify the statutory language to allow for public defenders to appear at all first appearances and for all bail setting hearings for persons in custody. The statute should also require the court to notify the state public defender for that jurisdiction of all bail setting hearings and require the court to give the public defender/defense counsel sufficient time prior to all first appearances to interview clients in order that they might present client-specific individualized bail arguments to the court.

The language also needs to be clear that the DA has the right to be present at all hearings on bail and that the information from pretrial services or other investigation shall be provided to both parties.