

## **UPDATED REPORT TO THE COMMITTEE RE PROPOSED CHANGES TO CRIM.P. 5 AND 7**

**TO:** Colorado Supreme Court Criminal Rules Committee

**FROM:** Crim.P. 5 and 7 subcommittee

**SUBJECT:** Changes to Crim.P. 5 and 7 to reflect changes to C.R.S. 16-5-301 regarding eligibility for preliminary hearing in drug offense cases

**DATE:** 4.20.18

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### **HISTORY**

This report is meant to function as an addendum to my original subcommittee submission from the July 2017 meeting.

In sum, my previous suggestions involved adding language to Crim.P. 5(a)(4) and Crim.P. 7(h)(1) to harmonize the rules with C.R.S. 16-5-301 regarding eligibility for preliminary hearing in drug felony cases.

The feedback from the committee from the July meeting included suggestions to re-work the language to make it flow better. There was also discussion about a potential tension between the statute and rule 7(h)(1) as far as whether both the prosecution and defense are able to request the setting of a PH.

I reported at the October 20, 2017 meeting that the subcommittee was still discussing these matters.

### **NEW PROPOSED LANGUAGE FOR CRIM.P. 5(A)(4) AND 7(H)(1):**

Here are the revised proposals:

Crim.P. 5(a)(4):

Every person accused of a class 1, 2, or 3 felony **or a level 1 or 2 drug felony** in a felony complaint has the right to demand and receive a preliminary hearing to determine whether probable cause exists to believe that the offense charged in the felony complaint was committed by the defendant. In addition, only those persons accused of a class 4, 5, or 6 felony **or level 3 or 4 drug felony** by felony complaint which felony requires mandatory sentencing or is a crime of violence as defined in section 18-1.3-406 or is a sexual offense under part 4 of article 3 of title 18, C.R.S., shall have the right to demand and receive a preliminary hearing to determine whether probable cause exists to believe that the offense charged in the felony complaint was committed by the defendant. However, any defendant accused of a class 4, 5, or 6 felony **or level 3 or 4 drug felony** who is not otherwise entitled to a preliminary hearing may request a preliminary hearing if the defendant is in custody

for the offense for which the preliminary hearing is requested; except that, upon motion of either party, the court shall vacate the preliminary hearing if there is a reasonable showing that the defendant has been released from custody prior to the preliminary hearing. Any person accused of a class 4, 5, or 6 felony **or level 3 or 4 drug felony** who is not entitled to a preliminary hearing shall, unless otherwise waived, participate in a dispositional hearing for the purposes of case evaluation and potential resolution. The following procedures shall govern the holding of a preliminary hearing. . .

Crim.P. 7(h)(1):

In cases in which a direct information was filed pursuant to Rule 7(c), charging: **(1) a class 1, 2, or 3 felony; (2) a level 1 or 2 drug felony; or (3) a class 4, 5, or 6 felony or level 3 or 4 drug felony** if such felony requires mandatory sentencing or is a crime of violence as defined in section 18-1.3-406 or is a sexual offense under part 4 of article 3 of title 18, C.R.S., **a preliminary hearing is authorized. Either** the defendant or the prosecutor may request a preliminary hearing to determine whether probable cause exists to believe that the offense charged in the information has been committed by the defendant. However, any defendant accused of a class 4, 5, or 6 felony **or level 3 or 4 drug felony** who is not otherwise entitled to a preliminary hearing may request a preliminary hearing if the defendant is in custody for the offense for which the preliminary hearing is requested; except that, upon motion of either party, the court shall vacate the preliminary hearing if there is a reasonable showing that the defendant has been released from custody prior to the preliminary hearing. Any person accused of a class 4, 5, or 6 felony **or level 3 or 4 drug felony** who may not request a preliminary hearing shall participate in a dispositional hearing unless otherwise waived for the purposes of case evaluation and potential resolution. Except upon a finding of good cause, the request for a preliminary hearing must be made within 7 days after the defendant is brought before the court for or following the filing of the information in that court and prior to a plea. No request for a preliminary hearing may be filed in a case which is to be tried upon indictment.

**TENSION BETWEEN C.R.S. 16-5-301 AND CRIM.P. 7(H)(1)**

The language of Crim.P. 7(h)(1) allows either the prosecutor or defense to request the PH in the three situations listed in the first sentence of the rule, but the language of CRS 16-5-301 does not contain a similar provision. The question was raised whether allowing the prosecutor to request a PH in the situations allowed under Crim.P. 7 placed it into tension with C.R.S. 16-5-301 which does not contain similar language.

After looking into the history of Crim.P. 7(h)(1), the wording of the rule was changed in 2012 and prior to that in 2008; however, in both instances, the provision that the prosecution can request a PH under Crim.P. 7(h)(1) has always been present.

Additionally, upon further reading of C.R.S. 16-5-301, I'm not sure that the rule is actually in tension with the statute. Under 16-5-301(1)(a), "[T]he procedure to be followed in asserting the right to a preliminary hearing and the time within which demand therefor must be made, as well as the time within which the hearing, if demanded, shall be had, *shall be as*

*proscribed by applicable rule of the supreme court of Colorado.*" (emphasis added). From that language, it seems that the legislature left it to the Criminal rules to figure out how cases eligible for PH get set into Court and under what time-frames. Given that Crim.P. 7(h)(1) has historically included an option for the prosecution to request the setting of the PH, and the statute has long included the provision that the procedures for requesting a PH shall be as listed in our Rules, I do not believe there is actual tension between the statute and the criminal rules.

From my perspective, that leaves us with only the first issue of how we want to craft the language of the rules to account for the drug felony offenses.