

## **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:** 7/17/17

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## **REPORT FROM THE RULES 5(A)(4) AND 7(H) SUBCOMMITTEE**

As I mentioned at the April meeting, one of our deputies brought my attention to the current discrepancies between C.R.S. 16-5-301(1)(a) and Crim.P. 5(a)(4) and 7(h) regarding which offenses are PH eligible. Given the changes to the classification of drug offenses, the legislature amended two subsections of 16-5-301 in 2013 to account for the new drug felony (“DF”) offenses. The criminal rules have not been modified to bring them in line with the current statute and thus, this subcommittee was born.

I believe there are three subsections of C.R.S. 16-5-301 containing language with which we need to harmonize our rules. I underlined the particular language which, I believe, needs to be incorporated into the rules:

16-5-301(1)(a):

Every person accused of a class 1, 2, or 3 felony or level 1 or level 2 drug felony by direct information or felony complaint has the right to demand and receive a preliminary hearing within a reasonable time to determine whether probable cause exists to believe that the offense charged in the information or felony complaint was committed by the defendant. In addition, only those persons accused of a class 4, 5, or 6 felony by direct information or felony complaint which felony requires mandatory sentencing or is a crime of violence as defined in section 18-1.3-406, C.R.S., 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 within a reasonable time to determine whether probable cause exists to believe that the offense charged in the information or felony complaint was committed by the defendant. The 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 provided by applicable rule of the supreme court of Colorado. A failure to observe and substantially comply with such rule shall be deemed a waiver of this right to a preliminary hearing.

16-5-301(1)(b)(I):

No person accused of a class 4, 5, or 6 felony or level 3 or level 4 drug felony by direct information or felony complaint, except those which require mandatory sentencing or which are crimes of violence as defined in section 18-1.3-406, C.R.S., or which are sexual offenses under part 4 of article 3 of title 18, C.R.S., shall have the right to demand or receive a preliminary hearing; except that such person shall participate in a dispositional hearing for the purposes of case evaluation and potential resolution.

16-5-301(1)(b)(II):

Any defendant accused of a class 4, 5, or 6 felony or level 3 or level 4 drug felony who is not otherwise entitled to a preliminary hearing pursuant to subparagraph (I) of this paragraph (b), may demand and shall receive a preliminary hearing within a reasonable time pursuant to paragraph (a) of this subsection (1), 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.

The current version of Crim.P. 5(a)(4) reads:

Every person accused of a class 1, 2, or 3 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 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 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 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

Likewise, the current version of Crim.P. 7(h)(1) reads:

In cases in which a direct information was filed pursuant to Rule 7(c), charging a class 1, 2, or 3 felony or a class 4, 5, or 6 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. 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 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 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.

The changes to the statutes seemed generally aimed at addressing each of the three situations where a person would be PH eligible: (1) when the level of offense itself entitled them to PH, (2) when the level of offense does not entitle one to PH by itself but the particular offense required mandatory sentencing, is a COV, or a sex offense, and (3) when the offense does not otherwise qualify but the person is in custody. For your consideration, here are my suggested changes to the criminal rules with the new language highlighted and bolded.

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

Every person accused of a class 1, 2, or 3 felony **or a level 1 or level 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 level 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 level 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 level**

**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 a class 1, 2, or 3 felony, **a level 1 or level 2 drug felony**, or a class 4, 5, or 6 felony **or level 3 or level 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. 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 level 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 level 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.

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Admittedly, the changes to the first part of 7(h)(1) make the language a bit clunky but I could not think of a better way to word it.