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BY KATRINA LIVESAY
CLERK

1 Jeffrey M. Hindoien
Todd D. Baker
2 OFFICE OF THE CITY ATTORNEY
316 North Park Avenue
3 Helena, MT 59623
T: 406.457.8595
4 jhindoien@helenamt.gov
tbaker@helenamt.gov

5 Attorneys for Plaintiff

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8 IN THE MUNICIPAL COURT FOR THE CITY OF HELENA
LEWIS & CLARK COUNTY, STATE OF MONTANA
9 HONORABLE BOB WOOD, MUNICIPAL JUDGE

10 CITY OF HELENA,
11 Plaintiff,

12 v.

13 MARK ALLEN LEE,
14 Defendant.

Case No. 2013-NT-005172

**BRIEF IN OPPOSITION TO
MOTION RESCIND OPD
APPOINTMENTS**

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17 **BACKGROUND / PROCEDURAL POSTURE**

18 This matter involves the issuance of a citation to Mr. Lee by the Helena Police
19 Department on August 23, 2013 for Criminal Trespass. Mr. Lee made his initial
20 appearance in Helena Municipal Court on or about August 30, 2013, and the City was
21 advised through its standard weekly notification from the Office of the State Public
22 Defender (OPD) on September 6, 2013 that Assistant Public Defender Steve Williams

1 had been appointed to serve as Mr. Lee’s counsel in this matter. Again, in accordance
2 with standard Municipal Court procedure, the case has been scheduled for an Omnibus
3 Hearing on October 2, 2013.

4 **THE OPD MOTION AND BRIEF**

5 On September 5, 2013, the Chief Public Defender for OPD submitted a document
6 in this case entitled *Motion to Rescind Appointment in Pending Case and in Additional*
7 *Cases*, along with a supporting Brief. The Motion outlines the statutory structure for
8 OPD in Title 47, MCA, the process by which OPD counsel are assigned, and the
9 statewide standards established by the Public Defender Commission for counsel who
10 provide defense services. With respect to the latter, the Motion specifically discusses the
11 manner in which the statewide standards address caseload and workload monitoring
12 protocols as discussed in Mont. Code Ann. § 47-1-105(2)(b). *See Motion*, pp. 5-7.

13 The Motion also outlines the established OPD processes for addressing “excess
14 caseloads”, as well as notes the ethical obligations imposed upon defense counsel.
15 Finally, the Motion makes certain factual representations – as supported by affidavits
16 from the Regional PD and several Assistant PD’s – regarding the caseload situation in
17 Region 4. *Id.* at pp. 7-13. The Motion concludes by requesting that the Court “hold a
18 hearing and accept evidence and testimony”, and specifically seeks the following
19 relief from the Court:

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- 1 ■ That the Court issue an order (1) rescinding the appointment of OPD to
2 represent Mr. Lee in the present matter and (2) assigning the case to a new
3 private counsel;
- 4 ■ That the Court issue an order declaring that the Chief Public Defender and the
5 Region Four Deputy Public Defender may, consistent with their ethical,
6 constitutional and statutory obligations, legally decline to accept appointments
7 to represent indigent criminal defendants and civil litigants for a defined period
8 of time;
- 9 ■ That the Court further order that, if the City determines to prosecute indigent
10 criminal defendants whose cases OPD declines pursuant to the authority
11 requested above, that such indigent persons must be appointed private counsel,
12 who must be paid with funds from the State of Montana; and
- 13 ■ That the Court further order that, unless such state-compensated private
14 counsel are appointed, that such prosecutions be prohibited from proceeding
15 and the underlying charges dismissed.

16 *See Motion*, p. 13-14.

17 The Motion is then supported by a separate Brief that generally sets forth several
18 very broad – and largely undisputed – principles of law concerning the state and federal
19 constitutional guarantees to effective assistance of counsel, the idea that workload issues
20 can – *at a certain point* -- affect the ability of counsel to provide that effective assistance,
21 and the idea that workload issues can – *at a certain point* – give rise to ethical issues
22 under the Montana Rules of Professional Conduct. The crux of the Brief, however, is the

1 monumental “leap” from those general principles of law to the assertion that this Court
2 should – based simply on the “representations” of OPD concerning its workload – not
3 only order the rescission of the appointment of Mr. Williams in the present case¹, but also
4 order “systemic relief”, i.e., “declare” that the Chief Public Defender may legally decline
5 to accept further appointments in other cases and direct the appointment – at the expense
6 of the State of Montana – of private counsel to provide defense services in such cases.
7 As outlined more fully below, however, OPD’s Motion, i.e., its request that the Court
8 take that “leap”, should be denied as a matter of law.

9 **ARGUMENT**

10 ***A. Introduction – Joinder in Arguments to be Advanced by State of Montana***

11 As the Court is aware, OPD has filed an identical motion in a separate
12 misdemeanor proceeding in the Lewis & Clark County Justice’s Court (*State of Montana*
13 *v. David Phillips*, TK 2013-2469), and the hearing on the present motion is being
14 conducted jointly on October 1, 2013 with the hearing to be conducted by Judge
15 Swingley in that case. The City hereby joins with the arguments to be advanced by the
16 Lewis & Clark County Attorney’s Office in opposition to that motion, and incorporates
17 those arguments as though fully set forth herein.

18 ***B. The Motion Does Not Present a Justiciable Controversy for the Court***

19 It is critical to note that the factual representations made by OPD in support of the
20 motion do not include any assertion that, *in the context of this particular case*, the
21 services being provided to Mr. Lee by his assigned counsel Mr. Williams are somehow

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¹ It should be noted that counsel in this particular case (i.e., Mr. Williams) has not himself made any factual representations concerning his workload in support of the present motion.

1 constitutionally deficient at present, or for that matter even somehow might become so
2 during the course of the prosecution. In reasoning acknowledged as “possess[ing] a
3 measure of merit” by one of the case authorities cited by OPD in its Brief, the New York
4 Court of Appeals noted as follows:

5 Defendants reason that the prescribed, deferential . . . and highly context
6 sensitive inquiry into the adequacy and particular effect of counsel’s performance
7 cannot occur until a prosecution has concluded in a conviction, and that, once
8 there is a conviction, the appropriate avenues of relief are direct appeals and the
9 various other established means of challenging a conviction such as . . . motions
10 and petitions for writs of habeas corpus or coram nobis. They urge, in essence,
11 that the present plaintiffs can, based upon their ongoing prosecutions, possess no
ripe claim of ineffective assistance and that any ineffective assistance claims that
might eventually be brought by them would, given the nature of the claim, have to
be individually asserted and determined; they argue that a finding of
constitutionally deficient performance – one necessarily rooted in the particular
circumstances of an individual case – cannot serve as a predicate for systemic
relief

12 *See Hurrell-Harring et al. v. State of New York et al.*, 15 N.Y.3d 8, 17, 930 N.E.2d 217,
13 220-21. The Court went on further to note that “a fair reading of *Strickland* and our
14 relevant state precedents support defendants’ contention that ineffective assistance is a
15 judicial construct designed to do no more than protect an individual defendant’s right to a
16 fair adjudication; *it is not a concept capable of expansive application to remediate*
17 *systemic deficiencies.*” *Id.*

18 The case presently before the Court – Mr. Lee’s prosecution for alleged trespass at
19 a Town Pump – does not involve any ineffective assistance of counsel, nor is OPD even
20 alleging that such ineffective assistance might occur in this particular case. Rather, OPD
21 candidly acknowledges the alleged “systemic” basis for the Motion -- “[t]he pending
22 motion is premised on the representation that Region Four public defenders are unable to

1 provide the level of representation demanded by the state and federal constitution and
2 rules of ethics” (See *OPD Brief*, p. 11)

3 As such, the present case is not the appropriate forum for OPD to advance its
4 “systemic” arguments concerning the present circumstances in Region Four. As noted by
5 one of the lower court Judges in the Florida litigation that appears to be the rough
6 “model” for OPD’s present motion, “. . . this action is nothing more than a political
7 question masquerading as a lawsuit, and should be dispatched on that basis.” See *State of*
8 *Florida v. Public Defender, Eleventh Circuit*, 12 So. 3d 798, 806 (Fl. 3rd District Court of
9 Appeal 2009) (Shepard J., specially concurring), reversed on appeal in *Public Defender,*
10 *Eleventh Circuit v. State of Florida*, 115 So. 3d 261 (Fl. 2013). In short, as also noted by
11 Judge Shepard:

12 I empathize with PD-11’s argument that its attorneys are overworked and under-
13 resourced. Such appears to be the natural condition of the public servants who
14 serve clients before the judicial branch of this state. Absent individual proof of
constitutional injury to those clients, however, empathy or lack thereof is for the
legislature.

15 *Id.* at 807.

16 ***C. The Present Case Is Not An Appropriate Procedural Vehicle For Litigating***
17 ***Any “Systemic” Claims***

18 Even assuming that the Court were to decide that OPD’s “systemic” assertions are
19 somehow appropriate for judicial resolution, the present case, i.e., the prosecution of Mr.
20 Lee for trespass, is not the appropriate judicial vehicle for doing so. For example, most
21 of the cases cited by OPD in its Brief that relate to “systemic” workload issues involve
22 either the assertion of such claims in a declaratory relief-type civil action (see *Hurrell-*
Haring et al., supra, 15 N.Y.3d at 15-16, 930 N.E.2d at 219) or the advancement of an

1 original writ proceeding advanced before a Supreme Court (*see State ex rel. Missouri*
2 *Public Defender Commission v. Orr*, 370 S.W.3d 592 (Mo. 2012)). To the extent that
3 OPD is not alleging the presence or future likelihood of any alleged ineffective assistance
4 *in the context of this particular prosecution*, any claims regarding “systemic” issues in
5 Region Four should more appropriately be advanced in a civil declaratory, injunctive or
6 original writ proceeding.

7 ***D. Even Assuming This Prosecution Is An Appropriate Vehicle For Litigating***
8 ***OPD’s “Systemic” Issues, the Motion Should Either be Denied As a Matter***
9 ***of Law or Considered Only After Opportunity for Discovery and Further***
10 ***Fact Development***

11 Although the case authority that appears to be the “central” support for OPD’s
12 motion here (i.e., *Public Defender, Eleventh Circuit*, 115 So. 3d 261 (Fl. 2013)) involved
13 consolidated individual criminal cases, even that case involved a fundamental “analysis”
14 disagreement between the majority of the Florida Supreme Court (which remanded the
15 cases for further trial court proceedings) and the two Justices who sided with the lower
16 District Court of Appeals ruling. In terms of the latter, Chief Justice Polston (with Justice
17 Canady concurring) took the following perspective:

18 . . . However, unlike the majority, I do not believe that the Public Defender’s
19 Office for the largest circuit in Florida should be permitted to withdraw from 60%
20 of its cases by testifying that, due to its high caseload, attorneys may possibly end
21 up violating the Florida Bar rules Instead, because there has been no proof of
22 harm (or even proof of the likelihood of imminent harm) to individual defendants’
constitutional rights due to excessive caseload, I would approve the Third
District’s decisions reversing withdrawal

Rather than proving actual (or the likelihood of imminent) violations of individual
defendants’ constitutional right to effective representation, the Public Defender’s

1 Office presented general evidence regarding the average caseload of its attorneys,
2 its lack of funding, and its difficulties in hiring new attorneys

3 None of this constitutes competent substantial evidence of actual (or imminent)
4 violations of individual defendants’ constitutional rights due to excessive caseload
5 or underfunding Nor does the generalized and speculative testimony
6 presented by the Public Defender’s Office constitute competent substantial
7 evidence that public defenders face the substantial risk of violating their ethical
8 and professional obligations under the Florida Bar rules.

9 *See Public Defender, Eleventh Circuit*, 115 So. 3d at 285 (Polston, C.J. dissenting)

10 In short, the affidavit evidence proffered by OPD in support of its Motion in the
11 present case is no different than the type of evidence referred to by Chief Justice Polston
12 above. This Court can – and should – simply deny OPD’s Motion on that basis, i.e., that
13 the general type of evidence they’ve proffered (regardless of its quantum) cannot – as a
14 matter of law – support the “systemic” relief sought under the Motion.

15 To the extent the Court is not inclined to do so, however, or is not inclined to deny
16 the motion on the other grounds outlined above (i.e., non-justiciability and/or the grounds
17 advanced by the County Attorney in the separate *Phillips* case), the Court needs to
18 establish an appropriate discovery schedule and process for developing an appropriate
19 factual record for further consideration of the Motion. Put bluntly, if the Court is inclined
20 to allow the OPD motion to proceed, the City is entitled to conduct discovery concerning
21 the factual assertions advanced by OPD, and the matter will ultimately involve an
22 extensive fact hearing (or hearings) with both lay and expert testimony to develop the
record. Again, even the case cited as the apparent “model” for OPD’s motion here
involved an extensive record, and ultimately a remand by the Florida Supreme Court for
even further trial court assessment of that “lengthy” record. *See Public Defender,*

1 *Eleventh Circuit*, 115 So. 3d at 273, n.6 (“[t]he combined record in these two cases
2 comprises twenty-six volumes. The evidence in each case includes testimony,
3 documents, statistics, and expert opinion”)

4 **CONCLUSION**

5 For the reasons set forth above, the City respectfully requests that the Court issue
6 an Order denying OPD’s Motion. Alternatively, to the extent the Court is not inclined to
7 presently deny the Motion, the City respectfully requests that the Court establish an
8 appropriate discovery schedule and process for developing an appropriate factual record
9 for further consideration of the Motion.²

10 RESPECTFULLY SUBMITTED this 20th day of September, 2013.

11 OFFICE OF THE CITY ATTORNEY

12 By: 

13 Jeffrey M. Hindoien, City Attorney

14 Attorneys for Plaintiff

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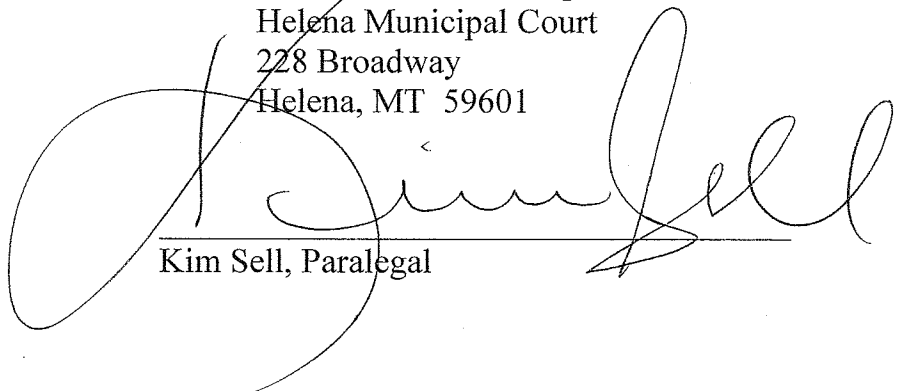
21 ² As the Court will no doubt recognize, and consistent with the point made by the City above regarding
22 the inappropriateness of the present case as a litigation “vehicle” for any “systemic” issues, a discovery
and fact-development process that could reasonably take several months at best does not align
pragmatically or legally with the reality that Mr. Lee’s case – absent a waiver on his own individual part –
is subject to speedy trial limitations.

1 CERTIFICATE OF SERVICE

2 I hereby certify that a true and correct copy of the foregoing *Brief in Opposition to*
3 *Motions To Rescind OPD Appointments* was served on the following on this 26 day
4 of September, 2013:

4 William F. Hooks
5 Chief Public Defender
6 44 W. Park Street
7 Butte, MT 59701

8 Steve Williams
9 Asst. Public Defender
10 Public Defender wall pocket
11 Helena Municipal Court
12 228 Broadway
13 Helena, MT 59601

14 
15 _____
16 Kim Sell, Paralegal