

REC'D BY  
SEP 26 2013  
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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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16  
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 case<sup>1</sup>, 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

22 \_\_\_\_\_  
<sup>1</sup> 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. 3<sup>rd</sup> 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  
15 constitutional injury to those clients, however, empathy or lack thereof is for the  
16 legislature.

17 *Id.* at 807.

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

20 Even assuming that the Court were to decide that OPD’s “systemic” assertions are  
21 somehow appropriate for judicial resolution, the present case, i.e., the prosecution of Mr.  
22 Lee for trespass, is not the appropriate judicial vehicle for doing so. For example, most  
of the cases cited by OPD in its Brief that relate to “systemic” workload issues involve  
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 . . . .

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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,*

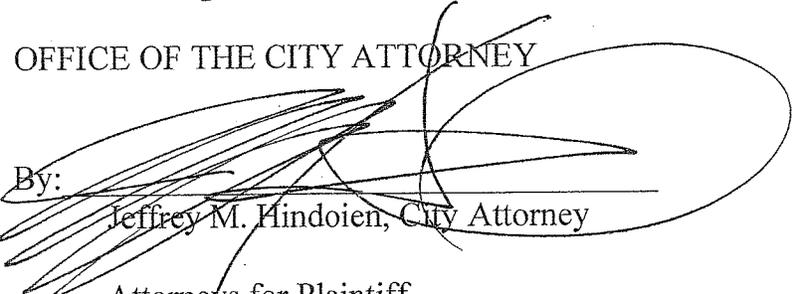
1 *Eleventh Circuit*, 115 So. 3d at 273, n.6 (“[t]he combined record in these two cases  
2 comprises twenty-six volumes. The evidence in each case includes testimony,  
3 documents, statistics, and expert opinion”)

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.<sup>2</sup>

10 RESPECTFULLY SUBMITTED this 20<sup>th</sup> 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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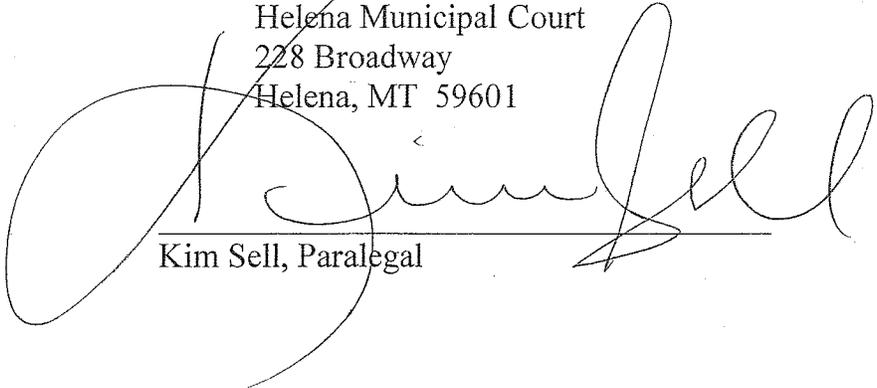
21 <sup>2</sup> As the Court will no doubt recognize, and consistent with the point made by the City above regarding  
22 the inappropriateness of the present case as a litigation “vehicle” for any “systemic” issues, a discovery  
and fact-development process that could reasonably take several months 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.

CERTIFICATE OF SERVICE

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

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Steve Williams  
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Public Defender wall pocket  
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