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Region 4 OPD

HELENA MUNICIPAL COURT

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7 IN THE HELENA MUNICIPAL COURT, CITY OF HELENA
8 BEFORE ROBERT WOOD, MUNICIPAL COURT JUDGE

9 THE CITY OF HELENA,)

10 Plaintiff,)

11 -vs-)

12 MARK ALLEN LEE,)

13 Defendant.)
14)

Cause No. 2013-NT-5172

REPLY BRIEF IN SUPPORT
OF MOTION TO RESCIND
APPOINTMENT IN PENDING
CASE AND IN ADDITIONAL
CASES

15
16 Enforcing and safeguarding constitutional rights are core functions of the Court. This
17 Court possesses the inherent authority to take all actions necessary to fulfill this judicial
18 function. For the following reasons, the arguments raised by the City of Helena and by Lewis &
19 Clark County in opposition to OPD's motion lack merit.¹ OPD is entitled to the relief
20 requested.
21
22

23 ¹ The City claimed in brief that it joins with the arguments to be advanced by the County
24 Attorney in opposition to an identical motion filed by OPD in a Justice Court proceedings,
25 *State v. Phillips*, TK 2013-2469. OPD does not concede it is appropriate for a party to rely on
arguments not raised in its brief, but will respond to both opponents in the interest of time and
judicial economy.

1 **I. This Court Possesses the Authority to Grant the Relief Requested. The Opponents’**
2 **Arguments that the Court Lacks Inherent Authority to Act are Contrary to the**
3 **Facts and the Applicable Legal Authority.**

4 This Court clearly has the legal authority to consider the merits of the issues raised and
5 to grant relief if it finds in favor of OPD. Ample statutory and other authority supports this
6 conclusion. (See OPD’s Brief in Support, at 12-13.)

7 **A. The Court Has the Authority and the Obligation to Consider the Case.**

8 The County does not deny that the Court possesses inherent authority to act in general;
9 rather, it argues that the bases required to exercise such authority are not presented here.
10 County’s Brief, at 4-10. The County’s argument should be rejected.

11 First, the County argues that the Court does not have authority “to ignore Legislative
12 directives and *deprive Mr. Phillips as well as other indigent defendants of their constitutional*
13 *and statutory right to receive representation* until some amorphous point when OPD
14 determines it has time to meet its statutory obligations.” (County’s Brief, at 4 (emphasis
15 added)). If this statement is intended to imply or insinuate that OPD seeks permission to
16 deprive indigent persons of the right to be represented, it is a clear misrepresentation of OPD’s
17 motion. The named defendant and other persons whom OPD are ordered to represent are
18 entitled to be effective representation; OPD asks that this Court appoint others to fulfill that
19 obligation for a period of time to be determined by the Court.

20 Next, the County props up the provisions of Title 47 and argues that these provisions
21 define both the right to counsel and the limits of this Court’s authority. Neither argument is
22 correct. The Court must exercise its authority to protect and vindicate fundamental
23 constitutional guarantees, which exists independent of Title 47.

1 The promise of the right to counsel is found in the Constitution, not in a statute. Article
2 II, § 24 of the Montana Constitution² and the Sixth and Fourteenth Amendments guarantee the
3 right to counsel. Title 47 sets out administrative procedures and protocols by which OPD is
4 directed to provide the representation mandated by these constitutional guarantees. The stated
5 purpose of Title 47 is to “establish a statewide public defender system” to provide the level of
6 representation required. Sec. 47-1-102(1), MCA.³ So, § 46-8-101, MCA, states the stage at
7 which a court must advise the accused of the right to counsel; § 47-1-104(4), MCA, lists cases
8 in which “[a] court may order an office to assign counsel[;]” § 47-1-111, MCA, sets out
9 financial eligibility criteria; and § 47-1-216, MCA, sets out rules by which OPD may contract
10 with private attorneys to provide legal services. These statutory provisions implement the
11 constitutional mandate for the right to counsel; they do not define the limits within which the
12 Court may act to enforce that right. Should OPD be unable to provide the constitutionally-
13 mandated level of effective representation for the named defendant and for other defendants, as
14 OPD asserts, the Court has an obligation to act.

15
16 ² Montana’s constitutional guarantee provides: “In all criminal prosecutions the accused shall
17 have the right to appear and defend in person and by counsel[.]” The Sixth Amendment,
18 applicable to the States through the Fourteenth Amendment, provides the same guarantee.

18 ³ 47-1-102. **Purpose.** The purposes of this chapter are to:

- 19 (1) establish a statewide public defender system to provide effective assistance of counsel to
20 indigent criminal defendants and other persons in civil cases who are entitled by law to
21 assistance of counsel at public expense;
22 (2) ensure that the system is free from undue political interference and conflicts of interest;
23 (3) provide that public defender services are delivered by qualified and competent counsel in a
24 manner that is fair and consistent throughout the state;
25 (4) establish a system that utilizes state employees, contracted services, or other methods of
providing services in a manner that is responsive to and respectful of regional and community
needs and interests;
(5) ensure that adequate public funding of the statewide public defender system is provided and
managed in a fiscally responsible manner; and
(6) ensure that clients of the statewide public defender system pay reasonable costs for services
provided by the system based on the clients' financial ability to pay.

1 If, as the County contends, a court is bound to follow a statute unquestioningly, that
2 court would essentially abdicate its judicial role and become a mere administrative entity. Of
3 course, that is not what courts are supposed to do. For example, in Public Defender v. State,
4 115 So.3d 261 (Fla. 2013), the Florida Supreme Court was confronted with cases in which
5 public defenders sought relief on the grounds that excessive caseloads created impermissible
6 conflicts. The state legislature had enacted a statute which provided that “[i]n no case shall the
7 court approve a withdrawal by the public defender . . . based solely on the inadequacy of
8 funding or excess workload.” Public Defender, 115 So. 3d 261, at 279. The Court did not
9 simply defer to the statute, but considered the legal arguments, found the statute to be facially
10 constitutional, but further held that “the statute should not be applied to preclude a public
11 defender from filing a motion to withdraw based on excessive caseload or underfunding that
12 would result in ineffective representation of indigent defendants nor to preclude a trial court
13 from granting a motion to withdraw under those circumstances.” 115 So. 3d at 282.

14 Similarly, in DeWolfe v. Richmond, 2013 Md. LEXIS 598 (Md. App. September 25,
15 2013), the Court did not simply defer to a legislative amendment which purported to limit the
16 right to counsel for indigents who appeared in certain circumstances for initial appearances and
17 bail hearings. The Court concluded that constitutional provisions guaranteed the right to
18 counsel, and that the statute at issue did not adequately provide for that right.

19 The County’s argument fails on the facts as well. It argues, for example, that OPD
20 failed to show its workload monitoring procedures haven’t “worked.” (County’s Brief, at 7.) In
21 truth, OPD’s factual representations, including those set out in an affidavit, demonstrate the
22 monitoring does work – it shows that OPD attorneys have excessive workloads. The result is
23 that the attorneys are placed in untenable situations, and the clients’ rights to counsel are
24 violated. This point is supported by affidavits. The county further claims OPD failed to state
25 whether it has the ability to use contract or conflict attorneys. (County’s Brief, at 7.) OPD

1 represented that “[a]ttorneys who have contracts with OPD to provide representation to
2 indigent clients do not provide adequate relief.” (OPD Motion, at 12.) The County’s factual
3 arguments are erroneous.

4 The County improperly disregards the representations that OPD attorneys are failing to
5 meet the standards set by the Public Defender Commission, pursuant to legislative directive. As
6 directed, the Commission developed “statewide standards for the qualification and training of
7 attorneys providing public defender services to ensure that services are provided by competent
8 counsel and in a manner that is fair and consistent throughout the state.” Section 47-1-205(2),
9 MCA. As required, the Commission considered “acceptable caseloads and workload
10 monitoring protocols to ensure that public defender workloads are manageable;” and “practice
11 standards[.]” Section 47-1-105(2)(b), (e), MCA. The Commission also “establish[ed] policies
12 and procedures for handling excess caseloads[.]” Section 47-1-105(6), MCA. (*See generally*,
13 OPD Motion, at 4-7.)

14 In sum, the right to counsel is found in the Constitution. Title 47 provides the means for
15 implementing that right. The Legislature entrusted to the Commission the manner in which the
16 provisions of Title 47 are to be carried out. OPD has represented in good faith that in Region
17 Four, OPD is unable to provide the appropriate level of representation. The Commission
18 authorized the chief public defender to take the action sought in OPD’s Motion. (*See* PDC
19 Resolution (February 15, 2013), attached hereto as Exhibit E.)

20 This Court has the inherent authority to proceed and consider the merits of the case.

21
22 B. The Opponents’ Argument that the Court Should Deny Relief Because there is no
23 Justiciable Controversy Is a Red Herring.

24 Both the City and the County argue that OPD’s motion does not present a justiciable
25 controversy, and the Court therefore should decide it does not have the authority to act. They

1 both cite and quote extensively from the same case. (City’s Brief, at 4-5; County’s Brief, at 11.)
2 While they use the term “justiciable controversy,” the opponents’ argument in fact is not about
3 jurisdiction or authority to grant relief. Instead, their argument has to do with the nature of
4 relief which may be granted once the Court acts pursuant to its inherent authority. The
5 opponents’ argument is without merit.

6 The opponents each rely on a quote from Hurrell-Harring v. State, 930 N.E.2d 217, 227
7 (N.Y. 2010), in support of the argument that post-conviction, case-by-case scrutiny should be
8 applied here. Their argument is misleading, for while the Hurrell-Harring court said, in the text
9 quoted in brief, that this approach had “a measure of merit,” that Court in fact *rejected* this
10 standard and applied a different approach. The issue in Hurrell-Harring was whether the State
11 has met its foundational obligation to provide legal representation. 15 N.Y.3d at 19. The Court
12 then went on to explain why the Strickland case-by-case standard now urged by the opponents
13 in this case should not be used to dismiss the claims.

14 Collateral preconviction claims seeking prospective relief for absolute, core denials of
15 the right to the assistance of counsel cannot be understood to be incompatible with
16 Strickland. These are not the sort of contextually sensitive claims that are typically
17 involved when ineffectiveness is alleged. The basic, unadorned question presented by
18 such claims where, as here, the defendant-claimants are poor, is whether the State has
19 met its obligation to provide counsel, not whether under all the circumstances counsel's
20 performance was inadequate or prejudicial.

21 Hurrell-Harring, 15 N.Y.3d at 23.⁴ The opponents’ argument actually is undermined, and not
22 supported, by this decision.

23 C. OPD Has Not Raised a “Political Question” and the Opponents’ Argument that this
24 Court Should Decline to Resolve a Political Question Should be Summarily
25 Rejected.

⁴ The County states, incorrectly and without citation, that “OPD in its Brief, notes” the above-
quoted text in Hurrell-Harring. OPD cited the case for a different rule of law. (*See* OPD Brief,
at 12.)

1 While the County urges this Court to abstain from ruling on a non-justiciable political
2 question, it does not define what “political question” means in a legal sense. Instead, the
3 County creates a straw-man factual argument that is not found in the record, and then claims
4 that a political question is presented. The County claims, inaccurately, that OPD is “indirectly”
5 challenging its funding; OPD, according to the County, really is claiming the funding it
6 received is inadequate to hire the attorneys or contract counsel necessary to fulfill its function,
7 and this is really just a political question which the Court ought not to decide. (County’s Brief,
8 at 14.) Saying it does not make it so. The Motion is based on the situation as it exists in Region
9 Four. Within this context at the time of filing the motion and currently OPD’s attorneys cannot
10 keep up to the detriment of our clients. OPD is not challenging the level of funding in its
11 motion. The level of funding is simply an evidentiary fact which supports the motion. As a
12 matter of fact, no political question is presented.

13 Authority on which the County relies does not support its “political question”
14 arguments. For example, in Marbut v. Secretary of State, 231 Mont. 131, 752 P.2d 148 (1988)
15 and in Gryczan v. State, 283 Mont. 433, 942 P.2d 112 (1997), on which the County relies
16 (County’s Brief, at 15), parties filed court actions seeking declaratory relief. Title 27 of the
17 MCA authorizes actions for declaratory judgment on the validity or application of legislation or
18 other governmental acts. In order for the Court to consider the party’s challenge, there must be
19 present a justiciable controversy. The Supreme Court held that Marbut, who filed a petition
20 asking the Court to direct the Secretary of State to take specific acts relative to ballot initiatives,
21 did not present a justiciable controversy suitable for declaratory judgment. 231 Mont., at 134,
22 752 P.2d at 150. In Gryczan, the Court held that the persons who filed a declaratory judgment
23 action challenging the constitutionality of that portion of Montana’s deviate-sexual-conduct
24 statute that criminalized consensual sex between adults of the same gender, did present a
25

1 justiciable controversy. In so holding, the Court rejected the State’s argument that the challenge
2 raised only a political dispute. Gryczan v. State, 283 Mont., at 442, 942 P.2d at 117-118.⁵

3 In making the “political question” argument, the County misstates provisions from a
4 law review article which discussed the power of courts to exercise judicial review and to
5 declare legislative acts unconstitutional. As the article’s author wrote, “[i]n the main, the effect
6 of judicial review in ruling legislation unconstitutional is to nullify the finished product of the
7 lawmaking process.” J. Choper, *The Supreme Court and the Political Branches: Democratic*
8 *Theory and Practice*, 122 U.Pa.L.Rev. 810, 830 (1974). The author went on to state: “[i]t is the
9 very rare Supreme Court decision *on constitutionality* that affirmatively mandates the
10 undertaking of government action.” *Ibid.* (emphasis added). Compare this text with the state’s
11 paraphrased reliance on this same sentence: “[i]t is the rare case in which a court affirmatively
12 mandates the undertaking of governmental action.” County’s Brief, at 15. Deleting the focal
13 point of the article – a ruling on the constitutionality of a legislative enactment – changes the
14 analysis entirely. The argument does not apply here, as OPD is not asking this Court to
15 overrule a “legislative enactment.”⁶

16 Finally, the opponents’ reliance on Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L.
17 Ed. 2d 663 (1962) is misplaced. County’s Brief, at 15. There, petitioners filed a civil action in
18 which they alleged their federal constitutional rights were violated by a state statute which
19

20 ⁵ The County claims in its Brief that the Gryczan Court discussed “the limitation on
21 justiciability presented by ‘purely political’ questions[.]” County’s Brief, at 15. However, a
22 discussion of this issue does not appear in the cited portion of the opinion.

23 ⁶ A second quote is presented out-of-context. According to the County, “[t]he court’s duty of
24 judicial review normally works ‘to prevent the translation of popular wishes into governing
25 rules rather than to produce laws that are contrary to majority sentiment.’” County’s Brief, at
14, quoting J. Choper, at 830-32. In fact, Prof. Choper actually wrote that “the antimajoritarian
elements that have been found in the American legislative process-both quantitatively and
qualitatively-are negative ones. They work to prevent the translation of popular wishes into
governing rules rather than to produce laws that are contrary to majority sentiment.” *Ibid.*

1 apporportioned members of the state's legislature among the state's counties. A plurality of the
2 Court wrestled with the argument that allegations posed a political question, and looked to a
3 number of types of cases, such as those involving foreign relations and the status of Indian
4 tribes, for guidance.

5 Prominent on the surface of any case held to involve a political question is found a
6 textually demonstrable constitutional commitment of the issue to a coordinate political
7 department; or a lack of judicially discoverable and manageable standards for resolving
8 it; or the impossibility of deciding without an initial policy determination of a kind
9 clearly for nonjudicial discretion; or the impossibility of a court's undertaking
10 independent resolution without expressing lack of the respect due coordinate branches
of government; or an unusual need for unquestioning adherence to a political decision
already made; or the potentiality of embarrassment from multifarious pronouncements
by various departments on one question.

11 Baker, 369 U.S. at 217. Baker provides scant guidance on the issues at hand.

12 D. Contrary to the Opponents' Argument, OPD's Motion for Relief is the Appropriate
13 Means to Present the Issues and Request for Relief.

14 The City argues that other petitioners in other cases have asked for systemic relief using
15 other procedural devices, and this means the Court should hold that OPD's motion is not the
16 proper procedural step. (City's Brief, at 6-7.) This is a spurious argument. The City does not
17 cite any statute or other legal authority for the proposition that OPD's motion is inadequate or
18 insufficient for the type of relief requested. That other parties have done something different
19 does not mean, as the City argues, that OPD's motion is therefore legally insufficient.

20 Further, the City's argument is clearly misleading. The City is aware of the Florida
21 Supreme Court's decision in Public Defender v. State, 115 So.3d 261 (Fla. 2013), in which that
22 Court ordered that systemic relief be granted to an over-burdened public defender agency; in
23 fact, the City opines that this decision is the central support for OPD's motion. (See City's
24 Brief, at 7.) However, the City fails to inform this Court that in the Florida case, public
25 defenders filed the same sort of motion that OPD filed before this Court. As the Florida

1 Supreme Court stated, one public defender “filed motions in twenty-one criminal cases seeking
2 to be relieved of the obligations to represent indigent defendants in non-capital felony cases.
3 The Public Defender certified a conflict of interest in each case, claiming that excessive
4 caseloads caused by underfunding meant the office could not carry out its legal and ethical
5 obligations to the defendants.” Another public defender “filed a motion to withdraw from
6 representing defendant Antoine Bowens. The motion alleged that the excessive caseload of the
7 assigned public defender created a conflict of interest.” Public Defender v. State, 115 So. 3d at
8 265, 266.

9 The opponents’ argument on this point is clearly inaccurate.

10
11 E. The Opponents’ Argument that Proactive, Systemic Relief is Unavailable is Not
12 Supported by the Weight of Authority.

13 The opponents’ argument in favor of piecemeal, post-conviction, case-by-case scrutiny,
14 and against systemic relief, is based on opinions offered by a lower court judge and by a
15 dissenting Supreme Court justice, which were squarely rejected by the majority of the Florida
16 Supreme Court in Public Defender v. State. (See City’s Brief, at 6-7, *citing* 12 So.2d at 807
17 (Shepard, J., concurring); City’s Brief, at 7-8, *citing* 115 So.3d at 285 (Poston, C.J.,
18 dissenting.))

19 In short, the opponents urge this Court to adopt arguments which were rejected by the
20 highest state court.

21 The opponents’ reliance on State v. St. Dennis, 2010 MT 229, 358 Mont. 88, 244 P.3d
22 292 is also misplaced. (See County’s Brief, at 13.) The issue addressed in St. Dennis is wholly
23 unrelated to this case, and the Court’s resolution has no application. There, public defenders
24 from two separate regions represented co-defendants, and St. Dennis argued on appeal of his
25 conviction that joint representation of co-defendants by public defenders is always a conflict of

1 interest. 2010 MT 229, at ¶20. The Court considered special characteristics of the state-wide
2 public defender agency, including the sheer size of the state and the not-for-profit nature of
3 public defense, and ruled that the joint representation of which St. Dennis complained is not
4 always a conflict of interest. 2010 MT 229, at ¶¶ 29-32.

5 The County also claims that “[t]he Montana Supreme Court has ruled that Attorneys
6 [sic] are presumed to be competent in *State v. St. Dennis*.” (County’s Brief, at 16.)
7 Respectfully, the Court did not so rule in St. Dennis. This argument is incorrect and misleading.

8 The remedy OPD seeks is consistent with concerns for the efficiency of the Court, and
9 the practicalities of the situation. OPD seeks to assist the Court in carrying out the fundamental
10 duty to protect the rights of citizens. As the Florida Supreme Court recently noted, “[i]n
11 extreme circumstances where a problem is system-wide, the courts should not address the
12 problem on a piecemeal case-by-case basis. This approach wastes judicial resources on
13 redundant inquiries. If this Court had not approved systemic aggregate relief in the appellate
14 cases cited above, the courts would have been clogged with hundreds of individual motions to
15 withdraw. This is tantamount to applying a band aid to an open head wound.” Public Defender
16 v. State, 115 So. 3d at 274. The Court reaffirmed that “aggregate/systemic motions to withdraw
17 are appropriate in circumstances where there is an office-wide or wide-spread problem as to
18 effective representation.” Id.

19
20 **II. The Opponents Should Endorse Steps Designed to Remedy Systemic Inequities.**

21 The opponents’ status as parties to the criminal cases does not automatically mean that
22 they should be permitted to oppose OPD’s determination that its attorneys are laboring under
23 impermissible excessive workloads, or that the opponents have any right to demand that it be
24 permitted to undertake extensive discovery.

1 A prosecutor has an obligation to take all necessary steps to remove obstacles to
2 effective representation for indigent persons imposed by excessive public defender workloads.
3 The Montana Supreme Court has recognized that a prosecutor's role differs from, and is more
4 expansive than, the role of an ordinary advocate. A prosecutor "is the representative not of an
5 ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is
6 as compelling as its obligation to govern at all; and *whose interest therefore, in a criminal*
7 *prosecution is not that it shall win a case, but that justice shall be done.*" State v. Toner, 127
8 Mont. 283, 288, 263 P.2d 971, 974 (1953) (emphasis added), quoting and agreeing with Berger
9 v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

10 The prosecutor's duty to seek justice includes the obligation to ensure that the process
11 by which cases are presented and resolved is fair and adequate. Comment [1] to Rule 3.8 of the
12 Model Rules of Professional Conduct recognizes that "[a] prosecutor has the responsibility of a
13 minister of justice and not simply that of an advocate. This responsibility carries with it specific
14 obligations to see that the defendant is accorded procedural justice, that guilt is decided upon
15 the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify
16 the conviction of innocent persons." Similarly, Standard 3-1.2 of the ABA Standards for
17 Criminal Justice: Prosecution and Defense Function (3d ed., 1993), outlines the function of the
18 prosecutor. "It is an important function of the prosecutor to seek to reform and improve the
19 administration of criminal justice. When inadequacies or injustices in the substantive or
20 procedural law come to the prosecutor's attention, he or she should stimulate efforts for
21 remedial action." Standard 3-1.2(d).

22 Respectfully, the State ultimately is responsible for fulfilling the state and federal
23 constitutional mandates that counsel be provided to eligible persons. When those
24 representatives oppose efforts by the provider of indigent defense services to limit workloads to
25

1 appropriate levels, the state exploits those systemic weaknesses and gains an unfair advantage,
2 ultimately at the expense of those citizens whose rights and interests are at stake.

3 Situations exist in which the state does not have an interest to protect. For example, an
4 accused person may ask the court to appoint a new attorney, and during a Gallagher⁷ hearing,
5 the court may exclude the state while hearing the accused and counsel on the issue. As another
6 example, OPD must move to rescind an order of appointment if, based on application of
7 policies and internal management decisions, OPD determines that the applicant does not
8 qualify. Sections 47-1-104, -111, MCA. The State has no standing to appear and take a
9 position in opposition in those cases. Here, too, OPD management has made decisions -
10 consistent with standards adopted by the Public Defender Commission, and OPD policies - that
11 its lacks the resources needed at this time to provide to eligible persons in Region Four the
12 level of representation required by the constitutions and Montana Rules of Professional
13 Conduct.

14 The opponents may be heard on the issue of appropriate remedies; specifically, whether
15 cases must be dismissed.

16
17 **III. The Opponents' Responses Should Be Rejected as Untimely.**

18 OPD filed its Motion and Brief in Support on September 5. OPD asked this Court to
19 hold a hearing and accept evidence and testimony. (*See* Motion to Rescind, at 13.)

20 Three weeks passed. Then, on September 26, three working days before the October 3
21 hearing, the City filed its brief in opposition. The County filed its Brief on October 1, on the
22 eve of the scheduled hearing.

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⁷ State v. Gallagher, 1998 MT 70, 288 Mont. 180, 955 P.2d 1371.

1 This Court simply should not permit this last-minute stall. This Court should rule that
2 the State's failure to timely file a brief is deemed an admission that OPD's motion is well
3 taken, pursuant to Rule 2, Montana Uniform District Court Rules.

4 The opponents could not have been surprised by OPD's motion. As will be developed at
5 an evidentiary hearing, representatives of OPD met with members of the judiciary and others,
6 in an effort to address the problems identified in OPD's motion. Although invited, no
7 representative of the City appeared at that meeting. The Public Defender Commission, on
8 February 15, 2013 – almost seven months before the motion was filed – authorized undersigned
9 counsel to take all necessary action to address excessive caseloads, including seeking to halt
10 case assignments.

11 Further, the Court should reject the opponents' argument that the delay the City seeks to
12 force on the process should be held against OPD's clients for purposes of speedy trial analysis.
13 Simply stated, the opponents cannot force a person to choose one constitutional right at the
14 expense of another. An accused person has the right to conduct investigations and otherwise
15 prepare a defense to the charges, which is a corollary to the fundamental right to defend. State
16 v. Couture, 2010 MT 201, ¶77, 357 Mont. 398, 240 P.3d 987.⁸ That being the case, the court
17 cannot force a defendant to waive his right to be brought to trial promptly in order to exercise
18 his right to prepare a defense. Couture, 2010 MT 201, ¶ 78.⁹ The opponents' argument is
19 contrary to precedent, and should summarily be rejected by this Court.

21 ⁸ The Couture Court relied on Art. II, § 24 of the Montana Constitution, as well as State v.
22 Knowles, 2010 MT 186, ¶49, 357 Mont. 272, 239 P.3d 129; State v. Egelhoff, 272 Mont. 114,
23 123, 900 P.2d 260, 265 (1995), rev'd on other grounds, Montana v. Egelhoff, 518 U.S. 37, 116
S. Ct. 2013, 135 L. Ed. 2d 361 (1996); Taylor v. Illinois, 484 U.S. 400, 408-09, 108 S. Ct. 646,
652-53, 98 L. Ed. 2d 798 (1988).

24 ⁹ The Court cited the following authority for this rule: State v. Bailey, 201 Mont. 473, 480, 655
25 P.2d 494, 498 (1982); Simmons v. United States, 390 U.S. 377, 394, 88 S. Ct. 967, 976, 19 L.
Ed. 2d 1247 (1968); see also Doyle v. O'Fallon, 2010 U.S. Dist. LEXIS 23897 at *19 (D. Mont.

1
2 **IV. The Court Should Reject the Opponents' Argument that Discovery Procedures**
3 **Should be Required.**

4 The City argues in part that the Court should permit the City to conduct "discovery
5 concerning the factual assertions advanced by OPD [.]" (City's Brief, at 8.) The County also
6 argues in favor of undertaking discovery. That is, OPD represents that the Region Four office is
7 in a state of crisis and its ability to provide the constitutionally-required level of representation
8 is at imminent risk; while the City waits until shortly before the hearing to argue for delay "*that*
9 *could reasonably take several months at best[.]*" (City's Brief, at 9 n. 2 (emphasis added).)

10 Any argument that this Court should permit lengthy discovery procedures should be
11 rejected for several reasons.

12 First, the opponents have not cited any legal authority by which this Court could
13 authorize the prosecutors to undertake discovery.

14 The City notes that the Florida Supreme Court had before it "an extensive record," in
15 Public Defender v. State. (City's Brief, at 8.) This decision does not support the opponents'
16 request to be permitted to undertake discovery. The opponents fail to explain the proceedings
17 that led to that record. Public Defender involved consideration of two separate cases in which
18 public defenders sought to withdraw due to conflict based on excessive caseloads. 115 So.3d at
19 264 n. 1. In one case, the public defender had filed in the trial court motions to withdraw in 21
20 cases, while in the second case the trial court held a three-day evidentiary hearing. Each was
21 then appealed to an intermediate appellate court, and then on to the state Supreme Court. *See* 12
22 So.3d 798, 804 (Fla.App. 3rd Dist. 2009); 39 So.3d 479, 480 (Fla.App. 3rd Dist. 2010). The fact

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25 Feb. 5, 2010) ("A defendant cannot be forced to abandon his right to a fair trial to realize his
right to a speedy one."), adopted, 2010 U.S. Dist. LEXIS 23894 at *2 (D. Mont. Mar. 15,
2010).

1 that consolidated cases create an extensive record for an appeal hardly supports the argument
2 that the opponents should be permitted to create an extensive record before this Court.

3 Third, neither opponent offers valid justification or explanation as to why it believes it
4 should be permitted to delay the proceedings for several months and pursue discovery. OPD's
5 motion and request for relief are supported by affidavits from counsel who work in Region
6 Four, including the Regional Deputy Public Defender. They are officers of this Court, and have
7 informed this Court of the reality of their situation under oath.

8 Much of the work OPD performs is a matter of public record, and this fact also negates
9 the City's non-specific demand for delay for the purposes of discovery. Title 47 imposes on
10 OPD a mandate to report annually on a wealth of case-related information. Specifically, § 47-1-
11 105(9), MCA, requires that the Public Defender Commission submit a biennial report to the
12 governor, the supreme court, and the legislature. OPD must also report data for each fiscal year,
13 representing the caseload for the entire public defender system. The report must include
14 "unduplicated count data for all cases for which representation is paid for by the office of
15 public defender, the number of new cases opened, the number of cases closed, the number of
16 cases that remain open and active, the number of cases that remain open but are inactive, and
17 the average number of days between case opening and closure for each case type." Section 47-
18 1-201(10)(a), MCA.

19 Given this level of transparency in reporting, it is clear that there is no need for lengthy
20 periods of delay for purposes of non-specific discovery on the issue of whether the attorneys
21 and staff in Region Four are struggling under the burden of excessive workloads. A great deal
22 of information is either readily accessible or can quickly be accessed.

23 Finally, the opponents' demand for lengthy discovery proceedings will result in a great
24 deal of extra work for this Court, both in terms of managing the months-long discovery
25 process, and in likely increased cases added to the docket at the end. If the opponents prevail

1 and are authorized to take depositions or other discovery procedures, OPD will resist inquiries
2 which inappropriately delve into matters protected by the attorney-client privilege and/or the
3 work-product privilege. These privileges belong to the client, may be waived only by the client,
4 have not been waived, and have not been raised in any manner by OPD. Further, if the Court
5 permits the City and County to pursue questions that infringe on the privileges or which seek to
6 develop in case-specific instances details of representation, this Court could then be faced with
7 a number of requests for post-conviction relief by those affected clients.

8
9 **V. The Court Should Grant the Relief Requested.**

10 Undersigned counsel fully understands that the relief OPD seeks will have a profound
11 effect on the operations of this Court. The decision to file the motion pending before the Court
12 was made only after thorough deliberation. Further, the filing of the motion does not alleviate
13 the concerns presented by attorneys laboring under excessive caseloads. Our managers and
14 staff attorneys have continuing duties to respond to these problems. "If a lawyer believes that
15 her workload is such that she is unable to meet the basic ethical obligations required of her in
16 the representation of a client, she must not continue the representation of that client or, if
17 representation has not yet begun, she must decline the representation." ABA Comm. on Ethics
18 & Prof'l Responsibility, Ethical Obligations of Lawyers Who Represent Indigent Indigent
19 Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent
20 Representation, Formal Op. No. 06-441 (2006), at 4. A copy is attached hereto as Exhibit F.

21 OPD attorneys and managers who are faced with excessive workloads and potential
22 conflicts will have to proceed in a manner dictated by ethical and professional mandates.

23 //

24 //

25 //

1 **VI. Conclusion.**

2 This Court should grant the relief requested, for the reasons discussed in OPD's motion
3 and supporting Brief, and in this Reply Brief.

4 DATED this 8th day of October, 2013.

5 
6 WILLIAM F. HOOKS
7 Chief Public Defender

8
9
10 **CERTIFICATE OF SERVICE**

11 The undersigned certifies that the foregoing motion was duly served upon Helena City
12 Attorney Jeff Hindoien by delivering a copy to the City Attorney's Office at 316 N Park,
13 Helena, MT 59601 via inter-office mail on the 8th day of October, 2013.

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Exhibit E

PUBLIC DEFENDER COMMISSION RESOLUTION

Whereas, the Montana Legislature created in 2005 a statewide public defender system to deliver public defender services in all courts in this state; and

Whereas, the system is supervised by the Public Defender Commission (Commission) and administered by the Office of the State Public Defender (OPD); and

Whereas, the Commission is assigned by statute the duty to establish statewide standards for the qualification and training of attorneys providing public defender services to ensure that services are provided by competent counsel and in a manner that is fair and consistent throughout the state; and such standards must take into consideration a number of factors, including:

- (a) the level of education and experience that is necessary to competently handle certain cases and case types, such as criminal, juvenile, abuse and neglect, civil commitment, capital, and other case types, including cases on appeal, in order to provide effective assistance of counsel;
- (b) acceptable caseloads and workload monitoring protocols to ensure that public defender workloads are manageable;
- (c) access to and use of necessary professional services, such as paralegal, investigator, and other services that may be required to support a public defender in a case;
- (d) continuing education requirements for public defenders and support staff;
- (e) practice standards;
- (f) performance criteria; and
- (g) performance evaluation protocols.

And,

Whereas, the Commission is assigned by statute the duty to establish policies and procedures for handling excess caseloads; and

Whereas, the Commission has promulgated Standards relating to attorney caseloads, with the goal that caseloads must not be oppressive, and should match counsel's experience, training, and expertise; and the following principles should govern attorney caseloads:

Counsel caseloads should be governed by the following:

A. Individual Public Defender. Caseload levels are the single biggest predictor of the quality of public defense representation. Not even the most able and industrious lawyers can provide effective representation when their work loads are unmanageable. Whenever a salaried or contracting counsel determines, in the exercise of counsel's best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases, will lead to furnishing representation lacking in quality or the breach of professional obligations, the attorney is required to inform the Regional Public Defender's Office, who shall inform the Chief Public Defender. The Chief Defender will then inform the Montana Public Defender Commission.

B. Chief Public Defender. The caseload of public defense attorneys should allow each lawyer to give each client the time and effort necessary to ensure effective representation. Whenever the Chief Public Defender determines, in the exercise of his or her best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will, by reason of their excessive size and complexity, interfere with the rendering of quality representation, or the breach of professional obligations, the Chief Public Defender is required to inform the Montana Public Defender Commission, which in turn will inform the Law and Justice Interim Committee, the Legislative Finance Committee, and the Office of Budget and Program Planning and shall take all reasonable steps to alleviate the situation.

And,

Whereas, these Standards identify entities to notify during periods when the Legislature is not in session, and the Commission believes it appropriate to notify the Senate and House Judiciary Committees, the Section D Joint Appropriations Subcommittee, the Senate Finance and Claims Committee and the House Appropriations Committee during such time as the Legislature is in session; and

Whereas, the Commission has adopted OPD Policy Number 117, which states that a mission of OPD is to insure that no attorney doing public defender work, either as an employee or as a contract attorney, has a workload of such an amount that clients are not being adequately represented and/or the wellbeing of the attorney is jeopardized; which establishes that regional deputy public defenders and managing

attorneys in each public defender office are responsible for managing the workloads of the attorneys they supervise; which sets out a procedure to follow to monitor caseloads, steps to alleviate workload burdens; and which requires supervising attorneys to keep the Chief Public Defender fully informed; and which requires the Chief Public Defender to report to the Commission as workload problems arise; and

Whereas, the American Bar Association, Standing Committee on Ethics and Professional Responsibility, in Formal Opinion 06-441, dated May 13, 2006, concluded that all lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently. If a lawyer's workload is such that the lawyer is unable to provide competent and diligent representation to existing or potential clients, the lawyer should not accept new clients; further, if a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, the supervisor is responsible for the subordinate's violation of the Rules of Professional Conduct; and

Whereas, attorney workloads throughout the public defender system are becoming excessive for a number of reasons outside the control of the Commission and OPD, including, but not limited to:

- Caseloads in criminal and civil cases increased dramatically in Fiscal Year 2012, and continue to increase in Fiscal Year 2013;
- OPD's salary structure is not competitive with the salaries and benefits offered by municipalities, counties, other state agencies, and the private sector;
- OPD has experienced substantial turnover, including the loss of over 30 attorneys, or approximately 27% of its attorney work force, and 25 support staff, or approximately 36% of its staff work force;

And,

Whereas, funds appropriated by the 2011 Montana Legislature have not been sufficient to keep up with the increase in workloads or to alleviate the turnover, and OPD lacks the ability to obtain additional resources during the interim; and

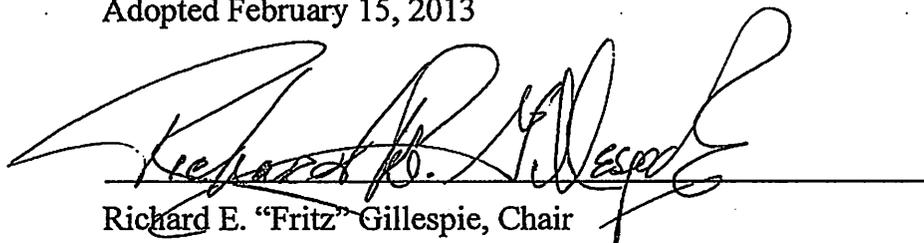
Whereas, attorneys have ethical obligations to avoid caseloads which are excessive, and supervisors have ethical obligations not to require staff attorneys to be responsible for excessive caseloads; and

Whereas, the Chief Public Defender has fully informed the Commission that in certain of the OPD regions, the acceptance of additional case assignments will interfere with the rendering of quality representation, or the breach of professional obligations;

NOW, THEREFORE, BE IT RESOLVED BY THE PUBLIC DEFENDER COMMISSION OF THE STATE OF MONTANA:

1. When conditions exist such that OPD no longer can provide effective assistance of counsel to indigent criminal defendants and other persons in civil cases who are entitled by law to assistance of counsel at public expense, OPD shall limit its case assignments in such a way as to match to the extent possible workload with available resources.
2. The Commission authorizes the Chief Public Defender to take any and all actions necessary to align caseloads with resources, including, but not limited to, taking all necessary and appropriate actions, in conjunction with and in consultation with judges and prosecutors, to limit acceptance of new case assignments, until OPD either receives additional resources to cover caseloads, or caseloads subside to a level that OPD can handle with current resources, or some combination of both.

Adopted February 15, 2013

A handwritten signature in black ink, appearing to read "Richard E. Gillespie", is written over a horizontal line. The signature is stylized and cursive.

Richard E. "Fritz" Gillespie, Chair
Montana Public Defender Commission

Exhibit F

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 06-441

May 13, 2006

Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation

All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.

Lawyer supervisors, including heads of public defenders' offices and those within such offices having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct. To that end, lawyer supervisors must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers.

In this opinion,¹ we consider the ethical responsibilities of lawyers, whether employed in the capacity of public defenders or otherwise, who represent indigent persons charged with criminal offenses, when the lawyers' workloads prevent them from providing competent and diligent representa-

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2003. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, 321 N. Clark Street, Chicago, Illinois 60610-4714 Telephone (312)988-5300 CHAIR: William B. Dunn, Detroit, MI □ Elizabeth Alston, Mandeville, LA □ T. Maxfield Bahner, Chattanooga, TN □ Arnie L. Clifford, Columbia, SC □ Timothy J. Dacey, III, Boston, MA □ James A. Kawachika, Honolulu, HI □ Steven C. Krane, New York, NY □ John P. Ratnaswamy, Chicago, IL □ Irma Russell, Memphis, TN □ Thomas Spahn, McLean, VA □ CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel

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Model Rules of Professional Conduct 1.1, 1.2(a), 1.3, and 1.4 require lawyers to provide competent representation, abide by certain client decisions, exercise diligence, and communicate with the client concerning the subject of representation.⁸ These obligations include, but are not limited to, the responsibilities to keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; communicate effectively on behalf of and with clients; control workload so each matter can be handled competently; and, if a lawyer is not experienced with or knowledgeable about a specific area of the law, either associate with counsel who is knowledgeable in the area or educate herself about the area. The Rules provide no exception for lawyers who represent indigent persons charged with crimes.⁹

8. Rule 1.1(a) provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Rule 1.2(a) states:

[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 1.3 states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."

Rule 1.4(a) and (b) states:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

9. See ABA Formal Opinion Op. 347 (Dec. 1, 1981) (Ethical Obligations of Lawyers to Clients of Legal Services Offices When Those Offices Lose Funding), in FORMAL AND INFORMAL ETHICS OPINIONS, FORMAL OPINIONS 316-348, INFORMAL OPINIONS 1285-1495 at 139 (ABA 1985) (duties owed to existing clients include duty of adequate preparation and a duty of competent representation); ABA Informal Op. 1359 (June 4, 1976) (Use of Waiting Lists or Priorities by Legal Service Officer), *id.* at 237 (same); ABA Informal Op. 1428 (Sept. 12, 1979) (Lawyer-Client Relationship Between the Individual and Legal Services Office: Duty of Office Toward Client When Attorney Representing Him (Her) Leaves the Office and Withdraws from the Case), *id.* at 326 (all lawyers, including legal services lawyers, are subject to mandatory duties owed by lawyers to existing clients, including duty of adequate preparation

lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in her workload becoming excessive. When an existing workload does become excessive, the lawyer must reduce it to the extent that what remains to be done can be handled in full compliance with the Rules.

When a lawyer receives appointments directly from the court rather than as a member of a public defender's office or law firm that receives the appointment, she should take appropriate action if she believes that her workload will become, or already is, excessive. Such action may include the following:

- requesting that the court refrain from assigning the lawyer any new cases until such time as the lawyer's existing caseload has been reduced to a level that she is able to accept new cases and provide competent legal representation; and
- if the excessive workload cannot be resolved simply through the court's not assigning new cases, the lawyer should file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.¹⁵

If the lawyer has sought court permission to withdraw from the representation and that permission has been denied, the lawyer must take all feasible steps to assure that the client receives competent representation.

When a lawyer receives appointments as a member of a public defender's office or law firm, the appropriate action to be taken by the lawyer to reduce an excessive workload might include, with approval of the lawyer's supervisor:

- transferring non-representational responsibilities within the office, including managerial responsibilities, to others;
- refusing new cases;¹⁶ and
- transferring current case(s) to another lawyer whose workload will allow for the transfer of the case(s).¹⁷

15. Whenever a lawyer seeks to withdraw from a representation the client should be notified, even if court rules do not require such notification. See Rule 1.4.

16. It should be noted that a public defender's attempt to avoid appointment or to withdraw from a case must be based on valid legal grounds. Rule 6.2(a) provides, in pertinent part, that "[a] lawyer shall not seek to avoid appointment by a tribunal to represent a person *except for good cause*, such as representing the client is likely to result in violation of the Rules of Professional Conduct or other law." (Emphasis added). Therefore, a public defender should not claim an excessive workload in an attempt to avoid new cases or to withdraw from current cases unless good cause objectively exists.

17. It is important to note that, for purposes of the Model Rules, a public defender's office, much like a legal services office, is considered to be the equivalent of a law firm. See Rule 1.0(c). Unless a court specifically names an individual lawyer within a public defender's office to represent an indigent defendant, the public defender's office should be considered as a firm assigned to represent the client; responsibility for handling the case falls upon the office as a whole. See ABA Informal Op. 1428, *supra* note 9 (legal services agency should be considered firm retained by client; responsibility for handling caseload of departing legal services lawyer falls upon office as whole rather than upon lawyer who is departing). Therefore, cases may ethically be reassigned within a public defender's office.

Ethical responsibility of a lawyer who supervises a public defender

Rule 5.1 provides that lawyers who have managerial authority, including those with intermediate managerial responsibilities, over the professional work of a firm or public sector legal agency or department shall make reasonable efforts to ensure that the other lawyers in the agency or department conform to the Rules of Professional Conduct. Rule 5.1 requires that lawyers having direct supervisory authority take reasonable steps to ensure that lawyers in the office they supervise are acting diligently in regard to all legal matters entrusted to them, communicating appropriately with the clients on whose cases they are working, and providing competent representation to their clients. As an essential first step, the supervisor must monitor the workloads of subordinate lawyers to ensure that the workload of each lawyer is appropriate. This involves consideration of the type and complexity of cases being handled by each lawyer; the experience and ability of each lawyer; the resources available to support her, and any non-representational responsibilities assigned to the subordinate lawyers.

If any subordinate lawyer's workload is found to be excessive, the supervisor should take whatever additional steps are necessary to ensure that the subordinate lawyer is able to meet her ethical obligations in regard to the representation of her clients. These might include the following:

- transferring the lawyer's non-representational responsibilities, including managerial responsibilities, to others in the office;
- transferring case(s) to another lawyer or other lawyers whose workload will allow them to provide competent representation;²⁵
- if there are no other lawyers within the office who can take over the cases from which the individual lawyer needs to withdraw, supporting the lawyer's efforts to withdraw from the representation of the client;²⁶ and finally,
- if the court will not allow the lawyer to withdraw from representation, providing the lawyer with whatever additional resources can be made available to assist her in continuing to represent the client(s) in a manner consistent with the Rules of Professional Conduct.

(Iowa 1996) ("ignoring a court order is simply not an appropriate step to test the validity of the order under our Code of Professional Responsibility"); Utah Bar Eth. Adv. Op. 107 (Feb. 15, 1992) (if grounds exist to decline court appointment, lawyer should not disobey order but should seek review by appeal or other available procedure).

25. See note 17, *supra*.

26. See *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1138-39 (Fla. 1990) (in context of inadequate funding, court stated that if "the backlog of cases in the public defender's office is so excessive that there is no possible way he can timely handle those cases, it is his responsibility to move the court to withdraw"); see also *In re Order on Motions to Withdraw Filed by Tenth Circuit Public Defender*, 612 So.2d 597 (Fla. App. 1992) (en banc) (public defender's office entitled to withdraw due to excessive caseload from representing defendants in one hundred forty-three cases).

Ceballo (2006)

Conclusion

The obligations of competence, diligence, and communication under the Rules apply equally to every lawyer. All lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently. If a lawyer's workload is such that the lawyer is unable to provide competent and diligent representation to existing or potential clients, the lawyer should not accept new clients. If the problem of an excessive workload cannot be resolved through the non-acceptance of new clients or by other available measures, the lawyer should move to withdraw as counsel in existing cases to the extent necessary to bring the workload down to a manageable level, while at all times attempting to limit the prejudice to any client from whose case the lawyer has withdrawn. If permission of a court is required to withdraw from representation and permission is refused, the lawyer's obligations under the Rules remain: the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to provide competent and diligent representation to the defendant.

Supervisors, including the head of a public defender's office and those within such an office having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct. To that end, supervisors must, working with the lawyers they supervise, monitor the workload of the subordinate lawyers to ensure that the workloads are not allowed to exceed that which may be handled by the individual lawyers. If a supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action, the supervisor is responsible for the subordinate's violation of the Rules of Professional Conduct.