May 26, 2017

Montana Public Defender Advisory Commission
c/o Cathy Doyle
Central Services Administration
Office of State Public Defender
44 West Park
Butte, MT 59701

RE: Director, Montana Office of Public Defender

To Whom It May Concern:

Pursuant to the notice that this Commission is seeking candidates for the position of the newly created Director position, I am submitting this cover letter, the attached resume, and, the attached writing sample.

I am applying for this position to bring a substantial change to the Office of the State Public Defender.

Funding:

The problems faced by the agency are many, and the most often stated excuse for their existence is the lack of funding. I am **not** convinced that funding is the key to solving the agency problems. The agency has received increased funding and manpower through the years, but the problems, while changing to some degree, have remained.

Personnel:

Issues with personnel are the heart of the problem, not funding. The clients of this agency face devastating circumstances, whether in their lives in general, or more particularly, because of the circumstances that caused the government to act against them.

Knowing and understanding how to work with the clients of the agency is fundamental but often lacking in staff and attorneys alike. This agency has failed to provide rudimentary life-skills training that would equip the agency employees to successfully deal with the clients of the agency. There is often a lack of understanding of the stress our clients are under and how that stress reflects in personal interactions. Further, the agency personnel are too pessimistic in regard to client outcomes which in turn hinders proper client relationships.

It is not unusual for the employees that most identify with the clients to have the most difficulty with management. This has resulted in the loss of important employees as well

as some very good contract attorneys. These are often the people that this agency needs to develop and keep.

Cost-effective training is available and should be implemented.

General Training:

The agency has provided fairly exceptional training CLE's to the attorneys. However, that training has not produced corresponding results, and this issue has been ignored.

An example is known to the agency. It has been recognized that juvenile proceedings take a different form in Cascade County as opposed to other counties. These differences were pointed out in an agency CLE. Cascade County Deputy Attorney Matthew Robertson and a public defender put on a CLE on the Youth Court Act that established that when respect is used throughout the process everyone benefits and outcomes are better understood and accepted. The agency response was that these things can work with juveniles but not with adults and not in other types of cases.

However, I have used these techniques and practices that were implicit in the CLE in all types of cases with better than average success.

In regard to specific training that is lacking, the underlying training materials have not been developed.

The agency developed a Criminal Practice Manual which is based of *The Rench Book* by Steve Rench (an extraordinary public defender and past training director for the Colorado Public Defender's Office). That resource has been underused.

The agency has not developed a bail manual, nor a client interview manual, nor a witness interview manual, nor a manual for pattern cross-examinations, nor much of anything else. The agency has the resources to develop these materials but has neglected them, probably because they are seen as unnecessary by management that lacks the fundamental understanding of being on the front lines.

The agency did develop a manual to be used in youth in need of care cases, authored by Nick Aemisegger.

Large Agency:

The agency is viewed as a large agency. Most of the financials are set costs, with the majority going to salaries and benefits of fulltime employees. And, there are a lot of employees. The agency is also increased in economic size because it pays out sizable chunk of cash to pay for contractors from outside the agency including attorneys. However, the functional units are still relatively small in size. Therefore, similarily sized law firms across Montana provide a better study sample to guide management, not necessarily public defender operations from other states.

Litigation:

The backbone of a public defender system is its trial capabilities. Trials have the power to make the system work correctly. Successful trial work helps clients beyond the one in trial. Good trial skills produce better plea agreements, better sentencing outcomes, and more dismissal.

A key attraction to bring young attorneys into a public defender office is that they can do trials and that they can be well-trained to do trials.

Alternative Funding:

I was involved in a program that reduced substantially the length of time DN cases stayed open while at the same time increased the rate of successful completion.

This program was paid for by a grant from the Montana Board of Crime Control. There is money and other resources out there to help this agency and those things should be sought out. This agency needs to identify more potential resources and use them.

Other Issues:

Many significant issues exist within this agency, and I will address them if I get an interview.

Though many issues exist within the agency, **all** or nearly all of them can be fairly easily remedied. Some of the issues will also take time to remedy, and most of these issues are socialization issues.

Personal Background:

My personal background comes from the same cloth as that of many of our clients. I am an enrolled member of a federally recognized Indian tribe. I was born and raised in poverty and understand how it is to be looked at when you are "one of those type of people (regardless of race)."

I understand what the employees face that deal with our clients on a daily basis. I also understand that many of them are not trained to do this work. But they could be.

I bring success to this agency. With more than 70 jury trials, I have experience. I demonstrated success by winning over 30 percent of those trials (the average prosecutor wins over 90 percent). I have handled a significant number of deliberate homicide cases, including two (2) of the highest profile cases in Montana history. I have successfully defended five (5) deliberate homicide cases.

I know how to win in public defender situations, I know what winning looks like, and I know this agency has a lot of potential within its employees. IT IS THE TIME FOR CHANGE!

If hired, I will bring change to this agency.

Thank you for your consideration.

Lawrence A. LaFountain
Assistant Public Defender

RESUME
Of
Lawrence A. LaFountain
Assistant Public Defender (Region 3)
615 2nd Avenue North – 3rd Floor
Great Falls, Montana 59401
(406) 770-3200

EDUCATION:

B.S. Sociology, Montana State University, 1986
J.D., University of Montana School of Law, Missoula, Montana

WORK EXPERIENCE:

Assistant Public Defender (July 2006 to Present): Great Falls, Montana. Handled the entire range of cases – felonies, misdemeanors, youth in need of care, juvenile, mental health commitments, incapacitated persons, and one putative father case -from initial appearance through termination of the case in the trial courts.

Public Defender (May 2002 to July 2006): Cascade County Public Defender's Office, Great Falls, Montana. Contract/in-house. Handled the entire range of cases – felonies, misdemeanors, youth in need of care, juvenile, mental health commitments, and incapacitated person cases -from initial appearance through termination of the case in the trial courts, as well as appeals to the Montana Supreme Court.

Student (September 2001 to May 2002): Bozeman, Billings, and Power, Montana. Computer technology classes at MSU-Bozeman, teacher certification classes from MSU-Billings, and student teaching at Power School, K-12.

Contract Appeals Defender (January 2001 to May 2002): Cascade County Public Defender's Office. Contracted appeals of two (2) deliberate homicide cases to the Montana Supreme Court.

Public Defender (July 1994 to January 2001): Cascade County Public Defender's Office, Great Falls, Montana. Contract/in-house. Handled the entire range of cases – felonies, misdemeanors, youth in need of care, juvenile, mental health commitments, and incapacitated person cases -from initial appearance through termination of the case in the trial courts, as well as appeals to the Montana Supreme Court.

Solo Practitioner (October 1993 to July 1994): Lewistown, Montana. General practice.

Public Defender (March 1991 to October 1993): Hill County Public Defender's Contract, Havre, Montana. Handled the entire range of cases – felonies, misdemeanors, youth in need of care, juvenile, mental health commitments, and incapacitated person cases -from initial appearance

Staff Attorney (September 1990 to March 1991): Montana Legal Services, Havre, Montana. Practiced family, collection, and contract law.

Solo Practitioner (July 1989 to September 1990): Lewistown, Montana. General practice.

Asbestos Removal (Spring/Summers of 1986-1988): Western United States.

House Parent (September 1984 to March 1986): Yellowstone Boys & Girls Ranch, Billings, Montana. Developed and implemented treatment programs for troubled youth.

Oil Field Worker (intermittent from June 1975 to September 1984): Worked oil rigs and as a roust-about when not in college.

PARTIAL COMMUNITY INVOLVEMENT:

NACDL (2013 to present) member
Gardens From Garbage (2013 to present) member
Friends of the Library (2016 to present) member
Cascade County Law Clinic Board (2007 to 2013) member
University of Great Falls Paralegal Advisory Board (2007 to 2013) member
Native American Center Board (Great Falls, past member)
Opportunities, Inc. Board (Great Falls, past member)
Native American City-County Government Advisory Board (Great Falls, past member)

LAW RELATED AWARDS:

Excellence Award (Civil Law) - the Office of the Public Defender (2013)
Excellence Award –the Office of the Public Defender (2010)
GAL Service Award – Cascade County GAL Program
Honorable Judge Goff Pro Bono Award – Cascade County Bar Association

IN THE SUPREME COURT OF THE STATE OF MONTANA

No.

DEFENDANT,

Petitioner,

v.

MONTANA JUDICIAL DISTRICT COURT,

Respondent.

PETITION FOR WRIT OF SUPERVISORY CONTROL

APPEARANCES:

LAWRENCE A. LAFOUNTAIN
Assistant Public Defender
XX Ave.
Anytown, MT 59400

ATTORNEY FOR PETITIONER

TIM FOX
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

PROSECUTOR
County Attorney

Deputy County Attorney
XX Ave.
Anytown, MT 59400

ATTORNEYS FOR RESPONDENT

IN THE SUPREME COURT OF THE STATE OF MONTANA

No.

DEFENDANT,

Petitioner,

v.

MONTANA JUDICIAL DISTRICT COURT,

Respondent.

PETITION FOR WRIT OF SUPERVISORY CONTROL

Petitioner requests that the Court issue a writ of supervisory control reversing the District Court's decision denying his motion to change his plea to guilty on a misdemeanor count. The District Court's ruling violates the Petitioner's right to due process (Fifth Amendment of the U.S. Constitution as applied to the States through the Fourteenth Amendment of the U.S. Constitution) and to his statutory right to plead guilty. The District Court's ruling prohibits the Petitioner from pleading guilty to a misdemeanor charge and thereafter seeking performance of the State to dismiss the remaining counts. The District Court's ruling forces the parties to go to trial which is against the wishes of both parties. Trial is currently set for November 9, 2000 at 9:00 a.m.

BACKGROUND

The State charged Petitioner by Information with four (4) counts, Count I, Negligent Vehicular Assault; Count II, Driving a Motor Vehicle While Under the Influence of Alcohol or Drugs; Count III, Minor in Possession of Alcohol; and Count IV, Seatbelt Violation . Exhibit 1. The Petitioner entered into a plea agreement with the State of Montana wherein Petitioner would plead guilty to Count II, Driving a Motor Vehicle While Under the Influence, a misdemeanor, with the remaining counts to be dismissed. Exhibit 2. On October 1, 2000, the District Court held a Change of Plea Hearing at which time the District Court rejected the plea agreement without allowing the Petitioner to change his plea. Exhibit 3. The Petitioner filed a motion on October 21, 2000, to change his plea to Count II, Driving a Motor Vehicle While Under the Influence, a misdemeanor. Exhibit 4. The State responded that it would move to dismiss the remaining counts once the Petitioner changed his plea on Count II. Exhibit 5. On November 2, 2000, the District Court held a status hearing and again did not allow the Petitioner to change his plea on Count II.

SUMMARY OF ARGUMENT

Constitutional due process requires that a citizen be allowed to reasonably exercise any right given to him by state law. This Court has recognized that an accused in a criminal proceeding has the right to change a not guilty plea to guilty.

This Court has also recognized that an accused in a criminal proceeding has the right to enter into a plea agreement with the State of Montana and to seek to have that plea agreement enforced. This Court has further recognized that prosecutorial discretion allows the State of Montana through its county attorney offices to bring and to dismiss charges based upon only a minimal showing. Further, prosecutors are required to seek justice and not convictions when using their judgment.

A plea agreement was reached between the parties. Petitioner wishes to change his plea to Count II. The State wishes to move to dismiss the remaining counts. The District Court should not be allowed to force the parties to go to trial despite a valid plea agreement, therefore this Court should stay the proceeding in the District Court.

ARGUMENT AND AUTHORITIES

A. Prerequisites for Writ of Supervisory Control

The Court has declined to establish fixed prerequisites for granting a request for supervisory control, an exercise of jurisdiction separate and distinct from the Court's appellate jurisdiction. Mont. Const. Art. VII, § 2(2); Mont. R. App. P. 14.

> This Court has observed that [supervisory control] is a power which is called into use when necessary to meet exigent circumstances for which no express remedy has been provided. Its primary purpose is to "keep the courts themselves within bounds, and to insure the harmonious working of our judicial system." The writ should only be issued in extraordinary situations.

Washington v. Montana Mining Properties, 243 Mont. 509, 515, 795 P.2d 460, 464 (1990) (citations omitted).

> In matters involving supervisory control, this Court has followed the practice of proceeding on a case-by-case basis though we are careful not to substitute the power of supervisory control for an appeal. Justice and judicial economy is served when, faced with a record that shows the relator is deprived of a fundamental right, we resolve the issue in favor of the relator and assume jurisdiction. We have also said that when a cause in the District Court is mired in procedural entanglements and an appeal is not an adequate remedy, we will issue a writ of supervisory control.

Plumb v. Fourth Jud. Dist. Court, 279 Mont. 363, 370, 927 P.2d 1011, 1015 (1996) (citations omitted). "We are reluctant to exercise supervisory control as it is an extraordinary remedy. Supervisory control, however, is appropriate where the district court is proceeding under a mistake of law and, in so doing, is causing a gross injustice." *Evans v. Montana Eleventh Jud. Dist. Ct.*, 2000 MT 38, ¶ 15, 298 Mont. 279, 995 P.2d 455. "Acceptance of supervisory control is decided on a case-by-case basis and is 'limited to cases involving purely legal questions, in which the district court is proceeding under a mistake of law causing a gross injustice or constitutional issues of statewide importance are involved.'" In re Estate of Bennett, 2013 MT 230, ¶ 7, 2013 Mont. LEXIS 327, ¶ 7 (citations omitted).

> "This Court has general supervisory control over all other courts and may, on a case-by-case basis, supervise another court by way of a writ of supervisory control. *See* Mont. Const. art. VII, § 2(2); M. R. App. P. 14(3). Supervisory control is an extraordinary

> remedy, which we exercise only when (1) urgency or emergency factors exist making the normal appeal process inadequate, (2) the case involves purely legal questions, and (3) one or more of the following circumstances exist: (a) the other court is proceeding under a mistake of law and is causing a gross injustice, (b) constitutional issues of state-wide importance are involved, or (c) the other court has granted or denied a motion for substitution of a judge in a criminal case. *Lamb v. Fourth Jud. Dist. Ct.*, 2010 MT 141, P 10, 356 Mont. 534, 234 P.3d 893. We conclude that the present case is appropriate for the exercise of supervisory control under these factors."

State v. Eighteenth Jud. Dist. Ct., 2010 MT 263, 358 Mont. 325, ___ P.3d ___.

Montana Rule of Appellate Procedure 14(5)(b)(iii) requires petitions for supervisory control to make their arguments for supervisory control in a summary fashion.

B. <u>Mistake of Law and Gross Injustice and Statewide Constitutional Issue</u>

In the District Court, the Defense and the State made the following offer of proof:

1. Petitioner has entered into a plea agreement with the State and wishes to change his plea to guilty on count II, Driving a Motor Vehicle While Under the Influence, a misdemeanor. Exhibit 2 and Exhibit 4.
2. The State wishes the Petitioner to change his plea on Count II. Exhibit 2.
3. The State wishes to dismiss all but Count II after Petitioner changes his plea to Count II. Exhibit 2 and Exhibit 5.

4. Petitioner explained that the cause of the accident was his swerving to miss a deer.
5. The State advised the District Court that further investigation of the case supported the Petitioner's contention that the cause of the accident was his swerving to miss a deer. Exhibit 3.
6. Defense counsel advised the District Court that Petitioner was conceding the accuracy of the .08 BAC test despite the inherent error rate of the test in lieu of going to trial.

This Court has recognized that a defendant has the absolute right to plead guilty to a charge. *State v. Peplow*, (2001), 307 Mont. 172, ¶42 and ¶43, 36 P.3d 922 ¶42 and ¶43:

> Under § 46-16-105, MCA (1997), "[b]efore or during trial, a plea of guilty may be accepted" if the defendant enters the plea in open court and the court has informed the defendant of the consequences of the plea and the potential maximum penalties that may be imposed (emphasis added). Thus, prior to or during trial, a court is mandated to accept a defendant's guilty plea, as long as the statutory requirements of voluntariness, intelligence, and factual basis for the plea, are fulfilled. Likewise, the Montana Code also confers a right to plead guilty at arraignments under § 46-12-204(1), MCA (1997) ("A defendant may plead guilty or not guilty."). There is no limitation imposed upon a defendant's right to plead. Presumably, had the Legislature intended to require the consent of the court or State as a condition to a plea of guilty, it would have so stated. In fact, the Legislature imposed a consent of the court condition to a plea of nolo contendere in the 1999 Amendments to § 46-12-204(1), MCA ("A defendant may plead guilty, not guilty, or, with the consent of the court and the prosecutor, nolo contendere."). Notably, no such limitation upon a plea of guilty appears in either version of the statute.

> We conclude that Montana statutes confer upon a defendant the right to plead guilty to the crime charged either at the arraignment, pursuant to § 46-12-204, et. al, MCA, or before or during trial, pursuant to § 46-16-105, MCA. Thus the District Court erred in denying Peplow that right prior to trial.

Herein, the Petitioner came before the District Court on October 1, 2000, and on November 2, 2000, and attempted to plead guilty to Count II, Driving Under the Influence. On neither occasion did the District Court allow the defendant to plead guilty. Federal due process requires that the District Court allow Petitioner to change his plea since State law grants this right to him. *Goldberg v. Kelly*, 397 U.S. 254 (1970). Therefore, the District Court is infringing Petitioner's constitutional rights.

Additionally, Petitioner has the right to enter into a plea agreement with the State and to have the State hold to and support the agreement. *State v. LaMere* (1995), 272 Mont. 355, 900 P.2d 926. The State herein fully intends to support the plea agreement entered into with the Petitioner. Exhibit 5. Therefore, the District Court has to allow the Petitioner to change his plea to guilty.

The District Court appears to reason that the Petitioner cannot change his plea because it is pursuant to a plea agreement which will not be accepted. However, Montana statute allows for the State and defendants to enter into plea agreements. Section 46-12-211, M.C.A. (2001). The statute does allow the District Court to reject a plea agreement, but only in a proscribed manner. Section

46-12-211(2) and (4), M.C.A. (2000). The proper procedure is to allow the defendant to change his plea. Once the defendant changes his plea, the State would be required pursuant the plea agreement to move to dismiss the remaining counts that the defendant did not plead to if that is the agreement as it is in this case. At that point it would be up to the District Court to accept or reject the plea agreement, and upon rejecting the plea agreement, and allow the defendant an opportunity to withdraw his plea. Herein, Petitioner would not withdraw his guilty plea which would then lead to the point as to whether the District Court could refuse to grant the State's motion to dismiss the remaining charges.

Similar situations have been faced by courts in other jurisdictions. See *U.S. v. Garcia-Valenzuela*, 232 F.3d 1003 (9th Cir. 2000), and *In Re U.S.*, 345 F.3d 450 (7th Cir. 2003).

If the District Court would allow Petitioner to change his plea, the case would be similar to the situation in *In Re U.S.* Kenneth Bitsky, defendant in *In Re U.S.*, made a plea agreement with the government under which he would plead guilty to one count of obstruction of justice and the government would dismiss two other counts. The court rejected the plea agreement, but Bitsky persisted in his plea of guilty. The government moved for a dismissal of the remaining counts which the court denied. The government filed a writ of mandamus to the Seventh

Circuit Court of Appeals. The Circuit Court ordered the federal district court to grant the dismissals.

In part, the Circuit Court reasoned, *In Re U.S.*, 345 F.3d 450 at¶5 and ¶6 that:

> "The government wants to dismiss the civil rights count with prejudice, and that is what Bitsky wants as well. The district judge simply disagrees with the Justice Department's exercise of prosecutorial discretion. As he explained in his response to the petition for mandamus, he thinks the government has exaggerated the risk of losing at trial: "the evidence was strong and conviction extremely likely." The judge thus is playing U.S. Attorney. It is no doubt a position that he could fill with distinction, but it is occupied by another person. ...
>
> We are mindful of speculations in some judicial opinions that a district judge could properly deny a motion to dismiss a criminal charge even though the defendant had agreed to it. These opinions say that such a motion should be denied if it is in bad faith or contrary to the public interest, as where "the prosecutor appears motivated by bribery, animus towards the victim, or a desire to attend a social event rather than trial." *In re Richards*, supra, 213 F.3d at 787. The "bad faith or contrary to the public interest" formula is also found, though not necessarily in those words, in *Rinaldi v. United States*, 434 U.S. 22, 30,98 S.Ct. 81, 54 L.Ed.2d 207 (1977) (per curiam); *United States v. Martin*, supra, 287 F.3d at 623; *United States v. Jacobo-Zavala*, supra, 241 F.3d at 1012-13; *United States v. Garcia-Valenzuela*, supra, 232 F.3d at 1007-08; *United States v. Palomares*, supra, 119 F.3d at 558; *United States v. Smith*, supra, 55 F.3d at 158-59; *United States v. Hamm*, supra, 659 F.2d at 630; *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975), and *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973). We are unaware, however, of any appellate decision that actually upholds a denial of a motion to dismiss a charge on such a basis. That is not surprising. The Constitution's "take Care" clause (art. II, § 3) places the power to prosecute in the executive branch, just as Article I places the power to legislate in Congress. A judge could not properly refuse to enforce a statute because he

> thought the legislators were acting in bad faith or that the statute disserved the public interest; it is hard to see, therefore, how he could properly refuse to dismiss a prosecution merely because he was convinced that the prosecutor was acting in bad faith or contrary to the public interest."

This same outcome is what Petitioner argues is proper under the law in this case. Petitioner should be allowed to change his plea to guilty on Count II, and have the remaining counts dismissed as the State intends.

This outcome would appear consistent with established Montana law. See *State ex rel. Fletcher v. District Court* (1993), 260 Mont. 410; 859 P.2d 992. When dismissing a case entirely, this Court has advised that the executive branch only has to make a minimal showing:

> "The showing of good cause and the furtherance of justice required under § 46-13-401(1), MCA, by the state, while minimal because of the prosecutor's responsibilities and broad discretionary powers regarding the charging and maintaining of criminal actions as outlined above, is, nevertheless, mandated, and should the district court find that either the good cause or furtherance of justice elements are not met, then the court properly exercises its discretion in denying the motion."

State ex rel. Fletcher, 260 Mont. at 417; 859 P.2d at 996.

And:

> "…When they are acting lawfully and within their constitutional and statutory authority, the district court may not interfere in the prosecutorial functions of the Attorney General and the county attorney -- the executive branch -- without violating the separation of powers embodied in Article III, Section 1 of the Constitution of the

> State of Montana. To hold otherwise would erode that fundamental constitutional mandate."

State ex rel. Fletcher, 260 Mont. at 418; 859 P.2d at 997.

The standard should be no greater when dismissing only part of the case due to a plea agreement where the State is actually gaining a conviction short of trial. The State has met these burdens by acknowledging that the accident could well have been the result of Petitioner swerving to miss a deer, truly an accident and not a crime based on the further investigation.

Petitioner further requests that these proceedings be stayed in the District Court until addressed by this Court. Otherwise the parties will be required to go to trial when it appears this case would be resolved short of that expenditure of resources.

CONCLUSION

Based on the foregoing, Petitioner requests that the Court issue a writ reversing the District Court's refusal to allow Petitioner to change his plea on Count II, and requiring the District Court to accept the dismissal of the remaining counts when made by the State. Petitioner further requests that these proceedings be stayed in the District Court until addressed by this Court.

Respectfully submitted this ___ day of November, 2000.

OFFICE OF THE STATE PUBLIC DEFENDER
XX Avenue
Anytown, MT 59400

By: _____
LAWRENCE A. LAFOUNTAIN
Assistant Public Defender