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MONTANA FIRST JUDICIAL DISTRICT COURT
COUNTY OF LEWIS AND CLARK

LARRY WHITE, CANDACE BERGMAN, DAVID CHASE, MICHAEL SHIELDS, KENNETH INGRAHAM, GARY ACKERMANN, and DANIEL FINLEY Plaintiffs, vs. GOVERNOR JUDY MARTZ, ET AL., Defendants.	No. CDV-2002-133 **STIPULATION AND ORDER OF POSTPONEMENT OF TRIAL**

WHEREAS, by Complaint dated February 14, 2002, Amended Complaint dated April 1, 2002, and Second Amended Complaint dated January 8, 2004 (hereinafter "the complaints"), Plaintiffs filed suit against Defendants Governor Judy Martz; Supreme Court Administrator James Oppedahl; Appellate Defender Commissioners Todd Hillier; Dorothy McCarter, Beverly Kolar, Michael Sherwood, and Randi Hood; District Court Council members Chief Justice Karla Gray, District Court Judge Katherine R. Curtis, District Court Judge Thomas McKittrick, District Court Judge John McKeon and District Court Judge Ed McLean; and the Board of Commissioners of Missoula County and Missoula County Commissioners Barbara Evans, Bill Carey and Jean Curtiss (collectively, "Defendants"); and

WHEREAS, the complaints alleged, among other things, that Defendants have failed to provide the public defender programs in Montana counties Butte-Silver Bow, Flathead, Glacier, Lake, Missoula, Ravalli, and Teton with the administrative and financial resources necessary to ensure that lawyers employed by those programs are capable of providing statutorily and constitutionally adequate legal representation to their indigent clients; and

WHEREAS, Defendants the Governor, the members of the Appellate Defender Commission, the Board of Commissioners of Missoula County and the Missoula County Commissioners filed motions to dismiss that were each denied in their entirety by the Court on July 24, 2002; and

WHEREAS, an order granting class certification was signed on June 26, 2002, certifying a class of plaintiffs to be maintained against the State and then-County Defendants Butte-Silver Bow, Flathead, Glacier, Lake, Missoula, Ravalli and Teton of all indigent persons who had or would have cases pending in the district courts of those counties and who relied upon those counties and the relevant county commissioners to provide them with defense counsel as of the date of the order; and

WHEREAS, Defendants filed answers to Plaintiffs' Complaint on August 13, 2002 and to Plaintiffs' Amended Complaint on January 24, 2003, and Missoula County Defendants filed an answer to Plaintiffs' Second Amended Complaint on January 26, 2004 that denied all liability with regard to Plaintiffs' claims and the remaining Defendants have yet to answer the Second Amended Complaint; and

WHEREAS, Plaintiffs conducted extensive discovery, including taking the depositions of over eighty witnesses, including current and former public defenders from each of the seven counties at issue, various state and county officials, and members of the Appellate Defender Commission; and

WHEREAS, a pre-trial scheduling order was signed by the Court on December 12, 2003; and

WHEREAS, Plaintiffs provided Defendants with Plaintiffs' expert witness disclosures on February 13, 2004, February 27, 2004 and March 8, 2004, a list of intended

trial witnesses on April 1, 2004, and a list of intended trial exhibits and deposition designations on April 2, 2004 in accordance with the pre-trial scheduling order; and

WHEREAS, Defendants provided Plaintiffs with Defendants' expert disclosures on March 26, 2004, a list of intended trial witnesses on April 1, 2004, and a list of intended trial exhibits on April 2, 2004; and

WHEREAS, the pre-trial scheduling order set a trial date of May 17, 2004; and

WHEREAS, the Parties agree that a properly funded state-wide public defender system with sufficient administrative and financial resources is necessary to ensure that indigent criminal defendants receive constitutionally and statutorily adequate legal representation; and

WHEREAS, the Parties are interested in resolving the issues alleged in the complaints in the above-captioned action ("Action"), but understand that the Montana State Legislature must be included in the formulation of any systemic state-wide system remedy; and

WHEREAS, the parties agree to hold this Action in abeyance to permit the Montana State Legislature to pass legislation during its 2005 legislative session that adequately addresses the indigent defense system;

IT IS HEREBY STIPULATED by the parties, through undersigned counsel, AND ORDERED THAT,

<u>The State-Wide Indigent Defense System</u>

1. Defendants, by and through their counsel, the Attorney General's Office, shall aggressively advocate with members of the Montana State Legislature and other interested parties, including the public and all other relevant individuals, both prior to and during the 2005 Montana State legislative session, for the enactment of legislation that provides a state-wide public defender system that provides representation to eligible persons in felony, misdemeanor, juvenile, dependency, mental health and appellate matters. Specifically, the Attorney General's Office, shall advocate for legislation that:

a. Creates a State Public Defender Commission (hereinafter "Commission") whose members are appointed by the different branches of government and the Montana State Bar Association. The legislation shall assign to the Commission those duties set forth in Mont. Code Ann. § 2-15-1020 (8) through (11) and responsibility for:

i. Hiring a Chief Public Defender and other appropriate administrators and supervisors whose salaries are commensurate with that of similarly situated chiefs, supervisors and administrators in the Prosecutions Services Bureau and the Appellate Services Bureau of the Attorney General's Office and otherwise consistent with the State Compensation Plan;

ii. Establishing regional public defender offices throughout the state with full-time attorney staff in those counties that are required by Mont. Code Ann.§ 7-4-2503(3)(a) to have full-time prosecutors and with contract attorneys in those countries without full-time prosecutors;

iii. Contracting with qualified attorneys to provide effective conflict representation;

iv. Ensuring that all attorney contracts envisioned by (ii) and (iii) above comply with NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services Parts I and III (1984), and that attorneys who do not appear on the statewide roster maintained pursuant to Mont. Code Ann. § 2-15-1020(10) do not represent the indigent;

v. Establishing an adequately staffed Office of the Chief Public Defender, which shall, at a minimum, have responsibilities for appellate defense; post-conviction relief and habeas corpus proceedings; capital defense; and statewide training, supervision and

technical assistance;

vi. Hiring or contracting with a sufficient number of attorneys to ensure that every attorney employed by or under contract to the Commission has a workload, including private case loads, that comports with national standards as delineated by the National Advisory Commission on Criminal Justice Standards and Goals, *Courts*, Standard 13.12, "Workload of Public Defenders," (1973) (hereinafter "NAC Standard"), and that no attorney representing the indigent accepts a workload that, by reason of its excessive size, interferes with the provision of adequate legal representation or leads to the breach of professional obligations;

vii. Hiring or contracting with a sufficient number of para-professional and support staff to ensure that every attorney, whether employed by or under contract with the Commission, has meaningful access to secretarial, clerical, investigative, social work and paralegal assistance in compliance with the standards set forth in NAC Standard 13.14, "Supporting Personnel and Facilities"; National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States (1976) (hereinafter "Guidelines for Legal Defense Systems in the United States") 4.1, "Task Allocation in the Trial Function: Specialists and Supporting Services";

viii. Establishing attorney, para-professional and support staff rates of compensation sufficient to attract and retain qualified full-time and contract personnel as required by the Guidelines for Legal Defense Systems in the United States 3.2; NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services III-10 and III-11; and NLADA Standards for the Administration of Assigned Counsel Systems 4.7.1 and 4.7.2;

ix. Procuring sufficient office space, office equipment and legal research tools to ensure that every attorney employed by or under contract with the Commission has the same access to necessary office space, office equipment (including telephones, fax machines, mail service, computers and copiers) and appropriate electronic legal research tools, as county prosecutors;

x. Promulgating, adopting or developing all necessary standards, policies, procedures and programs for full-time and contract personnel, including, but not limited to:

(1) Uniform standards for determining eligibility for defender services;

(2) Merit hiring procedures that ensure the non-partisan selection of qualified personnel, including the Chief Public Defender;

(3) Job descriptions and job qualifications;

(4) An attorney, para-professional and support staff training program consistent with, among other national standards, NLADA Defender Training and Development Standards (1997);

(5) Job performance standards modeled after the NLADA Performance Guidelines for Criminal Defense Representation (1995);

(6) A program of supervision, evaluation and monitoring of attorney, para-professional and support staff job performance to ensure compliance with the job performance standards and the provision of constitutional and statutorily adequate legal representation and consistent with Guidelines for Legal

Defense Systems in the United States 4.1 and 5.4;

(7) Standards for the determination of conflicts; and

(8) Standards for uniform data collection;

b. Ensures that the Chief Public Defender has responsibility for the day-to-day administration of the system, the state-wide implementation of the Commission's policies, procedures and standards, and the provision, through the Office of the Chief Public Defender, the regional offices and the contract attorneys, of vertical (pre-dispositional) representation in felony, misdemeanor, juvenile, dependency, mental health and appellate matters; and

c. Provides the Commission (and by implication the state-wide indigent defense system) with sufficient funding to execute its responsibilities in such a manner that attorneys employed by or under contract with the Commission have the resources necessary to provide constitutionally and statutorily adequate legal representation to their indigent clients.

2. Defendants, by and through their counsel, the Attorney General's Office, shall advocate for the placement of the indigent defense system described above within the State of Montana Department of Administration for budgetary and administrative purposes.

NLADA's Role

3. Defendants shall confer and consult with Plaintiffs' counsel and the NLADA prior to and during the 2005 legislative session, including when working with members of the Montana State legislature, legislative subcommittees, policy analysts, fiscal analysts, county governments, local judiciary, and all other relevant individuals.

4. Defendants shall not object to NLADA's assisting the members of the Montana State Legislature, legislative subcommittees, policy analysts and fiscal analysts prior to and during the 2005 legislative session.

5. Defendants may not use the fact of the NLADA's involvement with the legislative process to disqualify it from serving as Plaintiffs' expert witness in the event that a trial becomes necessary.

a trial becomes necessary.

6. The Parties may not introduce or use at trial for any purpose any written or oral statements or communications made by the NLADA in connection with the legislative process.

7. Costs associated with the participation of the NLADA in the legislative drafting and appropriations process shall initially be paid by Plaintiffs' counsel. Plaintiffs' counsel reserve the right to seek to recover such costs from Defendants at the conclusion of this litigation, and Defendants' counsel reserve all defenses to such cost recovery. The Parties agree to treat such costs as litigation costs in the event of such recovery.

Postponement of Trial

8. The Parties agree to adjourn the trial date in this Action from May 17, 2004 to May 31, 2005 unless Plaintiffs determine, prior to the commencement of the 2005 legislative session, that the Legislature's Law and Justice Interim Committee ("Interim Committee") intends to propose to the Montana State Legislature legislation inconsistent with Stipulation 1 above.

9. In the event that Plaintiffs' counsel determines that the bill proposed by the the Interim Committee prior to the commencement of the 2005 legislative session is inconsistent with Stipulation 1, trial on the issue of Defendants' liability shall commence at the earliest available trial date after the date of such determination, but in no event later than May 31, 2005.

10. In the event that the Interim Committee proposes legislation consistent with Stipulation 1, but the State fails to enact legislation by the close of the 2005 legislative session that Plaintiffs' counsel determines to be consistent with Stipulation 1, the Action will go to trial on May 31, 2005 on the issue of Defendants' liability.

11. In the event that the State enacts legislation that Plaintiffs' counsel determines to be consistent with subparagraphs (a) and (b) of Stipulation 1, but not subparagraph (c), this Action will go to trial on May 31, 2005 on the sole issue of the adequacy of funding.

12. Plaintiffs' Counsel shall notify Defendants' Counsel and the Court by [April 1, 2005], if they intend to seek a trial on May 31, 2005, as to liability or adequacy of funding.

13. Defendants shall not assert as a defense at any trial regarding liability issues that meaningful change has occurred in Montana's indigent defense program between May 17, 2004 and the trial date. No evidence as to the status of indigent defense programs in any county between May 17, 2004 and the trial date shall be admissible regarding liability issues at any trial. If the Court finds at a trial that Defendants were violating Plaintiffs' constitutional and statutory rights as of May 17, 2004, it may enter a judgment of liability against Defendants.

Discovery

14. No further discovery shall be taken except as provided in Stipulations 15 and through 17 below.

15. Plaintiffs shall take the depositions of Alice Kennedy, Colleen Ambrose, Margaret Borg, and Ann Mary Dussault by May 31, 2004. Depositions shall relate exclusively to facts in existence prior to May 17, 2004.

16. In the event that Plaintiffs notify Defendants in [April] 2005 of their intention to go to trial on the issue of liability, discovery shall be limited to (a) depositions of individuals who are designated by the parties between February and March 2004 as witnesses at trial but whose depositions have not yet been completed, and (b) depositions of certain of the clients upon whose files Plaintiffs' expert witnesses rely. Defendants shall bear the risk that the client witnesses they seek to depose are no longer available, for whatever reason, at the time Defendants seek to depose them. Defendants may not ask the Court to draw any adverse inferences on the basis of the unavailability of such witnesses. All depositions shall relate exclusively to facts in existence prior to May 17, 2004.

17. In the event that there is a trial on the sole issue of adequacy of the funding pursuant to Paragraph 11, Plaintiffs and Defendants shall be permitted to take deposition and

documentary discovery on that issue prior to trial. The parties shall simultaneously disclose lists of witnesses they intend to call at trial no later than [April 30, 2005]. Deposition discovery shall be completed no later than [May 20, 2005].

18. In the event there is a trial on any issue, the parties shall enter into a pre-trial stipulation [by May 1, 2005, or within forty-five (45) days of the trial date if it is earlier than May 31, 2005], of undisputed facts and to the authenticity of documents to be used as trial exhibits.

Miscellaneous

19. In the event that the State enacts legislation that Plaintiffs' counsel determines to be consistent with Stipulation 1, Defendants, by and through their counsel, the Attorney General's Office, shall continue aggressively to advocate with members of the Montana State Legislature and other interested parties, including the public and all other relevant individuals, for the continued existence and funding of the legislation consistent with Stipulation 1 for a period of not less than five (5) years.

20. Nothing in this Stipulation and Order of Postponement of Trial shall be construed as a waiver of any rights of Parties with respect to attorneys' fees and costs. In the event that the State enacts legislation that Plaintiffs' counsel determines to be consistent with Stipulation 1 in its entirety, this Court shall retain jurisdiction over any ensuing litigation over attorneys' fees and costs and over Defendants' continuing obligations pursuant to Stipulation 21. In the event that the State enacts legislation that Plaintiffs' counsel determines to be consistent with subparagraphs (a) and (b) of Stipulation 1 but not with subparagraph (c), as contemplated in Paragraph 11, the Court shall retain jurisdiction over any ensuing litigation over attorneys' fees and costs, including Plaintiffs' entitlement to fees expended on issues for which litigation is rendered unnecessary, and over Defendants' continuing obligations pursuant to Stipulation 21.

21. Upon resolution of the issues in this case, whether through legislation or through litigation, Plaintiffs reserve the right to seek attorneys' fees and costs. Defendants

will not use the fact that the Parties entered into this Stipulation or dismissed or withdrew the Action subsequent to the enactment of such legislation against Plaintiffs in any ensuing fee litigation. In accordance with the provisions of 42 U.S.C. § 1988 and the applicable case law, this Stipulation and Order creates a material alteration of the legal relationship of the Parties on the ultimate issues raised by this Action with a legally enforceable change in the Parties' positions; and Defendants will not contend otherwise in any ensuing litigation over attorneys' fees and costs.

22. This Stipulation and Order shall have no effect on any claims that may be made by or on the behalf of individual members of the plaintiff class for damages or in direct or collateral review of any criminal conviction or adjudication by way of appeal or writ of error, in any sentence review proceeding, in any post-conviction relief proceeding, or in any habeas corpus proceeding arising out of a criminal conviction or adjudication.

23. The preceding stipulations shall be binding not only upon all the Parties hereto, but also upon their affiliates, officers, employees, successors and representatives.

24. In the event that this Action proceeds to trial, this Stipulation and Order shall be considered settlement negotiations. As a result, nothing contained in this Stipulation and Order or in any document prepared in relation to it, shall be deemed an admission by any party and no statement, whether written or verbal, by any party related to the negotiation of this Stipulation and Order shall be admissible at trial except they shall be admissible at trial for the fact that the Stipulation and Order was entered into by the Parties.

25. The Parties reserve the right to seek judicial relief from this Court in the event of a breach of any of the preceding Stipulations by either Party.

Dated: May 7th, 2004

GOUGH, SHANAHAN, JOHNSON & WATERMAN

by /s/
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COUNSEL FOR DEFENDANTS

IT IS SO ORDERED:

Dated: Helena, Montana
May 7th 2004

THOMAS C. HONZEL
HONORABLE THOMAS HONZEL
Montana State District Court Judge