

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 22-0139

RHONDA LINDQUIST, and
OFFICE OF THE STATE PUBLIC DEFENDER,

Petitioners,

vs.

MONTANA THIRTEENTH JUDICIAL
DISTRICT COURT, HON. DONALD HARRIS,
Presiding,

Respondent.

BRIEF OF *AMICUS* MONTANA COUNTY ATTORNEY'S ASSOCIATION

APPEARANCES:

Timothy B. Strauch
Strauch Law Firm, PLLC
257 West Front Street, Ste. A
Missoula, MT 59802
T: (406) 532-2600
tstrauch@strauchlawfirm.com

*Attorney for Respondent 13th J.D. Court,
Hon. Donald Harris*

Peter F. Habein
Crowley Fleck PLLP
Suite 500
490 North 31st Street
P.O. Box 2529
Billings, MT 59103-2529
T: 406-252-3441
phabein@crowleyfleck.com

*Attorney for Petitioner Rhonda Lindquist
and Office of State Public Defender*

Austin Knudsen, *Montana Attorney General*
David M.S. Dewhirst, *Solicitor General*
Morgan J. Varty, *Ass't Attorney General*
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
T: 406-444-2026
david.dewhirst@mt.gov
morgan.varty@mt.gov

Emily Jones
Special Ass't Attorney General
115 N. Broadway, Suite 410
Billings, MT 59101
T: 406-384-7990
emily@joneslawmt.com

Attorneys for State of Montana

Alex Rate
Akilah Lane
ACLU of Montana Foundation, Inc.
P.O. Box 1968
Missoula, MT 59806
T: (406) 443-8590
ratea@aclumontana.org
lanea@aclumontana.org

Emma Andersson (CA 260637), *pro hac vice*
American Civil Liberties Union
Foundation
125 Broad Street
New York, MT 10004
(347) 931-6337
eandersson@aclu.org

*Attorneys for Amici ACLU of Montana
Foundation and The American Civil Liberties
Union Foundation*

L. Randall Bishop
L. Randall Bishop, AAL
27 Prairie Falcon Ct.
Kalispell MT 59901
Telephone: 406-670-9394
Email: rbishop@lrblawyers.com

*Attorney for Amicus Curiae Montana
Innocence Project*

Marty Lambert
Gallatin County Attorney
1709 W. College
Bozeman, MT 59715
marty.lambert@gallatin.mt.gov

*Attorney for Amicus Curiae Montana
County Attorney's Association*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	v
STATEMENT OF THE ISSUE	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	1
STANDARD OF REVIEW	4
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7

I. THIS COURT SHOULD UPHOLD THE DISTRICT COURT’S EXERCISE OF ITS CONTEMPT POWERS REGARDING THE OPD’S UNTIMELY ASSIGNMENT OF COUNSEL.

A. <u>The OPD did not seek either a stay or a review of the District Court’s first contempt order</u>	7
B. <u>The Legislature, and not the courts, is responsible for the funding of State agencies such as OPD</u>	8
C. <u>The district court’s contempt orders were a proper exercise of its contempt power</u>	10
i. The District Court’s statutory interpretations are correct.	10

TABLE OF CONTENTS (cont'd)

ii.	<i>Zlahn</i> is inapposite and should not serve as a standard for effective for assistance of counsel under the circumstances of this case.....	13
iii.	The District Court's reasoning is sound and its contempt order is not arbitrary or otherwise unlawful.	15
iv.	The OPD could meet the Court's three working days requirement.....	16
D.	<u>The case at issue is the special proceeding instituted by the District Judge, and not the individual criminal cases discussed in the special proceeding.....</u>	17
	CONCLUSION	19
	CERTIFICATE OF COMPLIANCE	19

TABLE OF AUTHORITIES

CASES

<i>Board of Commissioners of Flathead County v. Eleventh Judicial District Court</i> , 182 Mont. 463, 470, 597 P.2d 728 (1979)	10
<i>Fouts v. Montana Eighth Jud. Dist. Ct.</i> , 2022 MT 9, 407 Mont. 166, 502 P.3d 689	3, 16
<i>McCormick v. Brevig</i> , 2007 MT 195, 338 Mont. 370, 169 P.3d 352	19
<i>McLaughlin v. Montana State Legislature</i> , 2021 MT 178, 405 Mont. 1, 493 P.3d 980	9
<i>Meyer v. Jacobsen</i> , 2022 MT 93, ____ Mont. ____, ____ P.3d ____	4
<i>State ex rel. Judge v. Legislative Finance Committee and Its Members</i> , 168 Mont. 470, 477, 543 P.2d 1317 (1975)	9
<i>State v. Zlahn</i> , 2014 MT 224, 376 Mont. 245, 332 P.3d 247	13, 14
<i>Unidentified Police Officers 1 v. City of Billings</i> , 2019 MT 299, 398 Mont. 226, 454 P.3d 1205	4, 15
<i>Vintage Construction, Inc. v. Feighner</i> , 2017 MT 109, 387 Mont. 354, 394 P.3d 179	4, 12

MONTANA CONSTITUTION

Article III, Section 1	8, 9
------------------------------	------

STATUTES

§3-1-523, MCA	19
§47-1-104, MCA	<i>passim</i>

STATEMENT OF THE ISSUE

Did the District Court correctly find the State Office of the Public Defender and Rhonda Lindquist (OPD) in contempt of its orders?

STATEMENT OF THE CASE

This case began when the Thirteenth Judicial District Court, Department No. 2, created a special proceeding and issued an Order to Show Cause (OTSC) directed to the OPD. After a hearing the District Court entered a contempt order directed to the OPD. The OPD did not seek any review of the order. The OPD paid the fine as directed by the order.

The District Court then entered a second OTSC, followed by a second hearing and a second contempt order. After the second order was issued the OPD sought this Court's review through its filing of a petition seeking a writ of certiorari, or alternatively a writ of supervisory control.

STATEMENT OF THE FACTS

Montana's Thirteenth Judicial District Court Judges received an email dated July 31, 2021, from the Director of the Conflict Division of OPD's Region C. According to the Director the OPD had at that time 663 cases where no public defender had been assigned. HarrisApp005.

District Judge Harris, who presides over Department No. 2 of the 13th Jud.

Dist., was concerned about the OPD's failure to assign counsel for cases filed in his Court in a timely manner. Judge Harris's concerns led to his issuance of an OTSC, dated August 17, 2021. HarrisApp003-009.

The gravamen of the OPD's first written response was that its Billings Office was inadequately funded, overworked, and understaffed. *See* the OPD's Written Response of the Office of State Public Defender to Court's Order to Show Cause, filed September 13, 2021 ("The Billings office, between its public defender trial division and conflict division, is allocated a total of 31.5 attorney positions. The office currently has 8 full time vacancies. To adequately staff all cases in the Billings area, the office would need 43 full-time staff lawyers . . .", pg. 2); ("In short, the backlog of cases OPD is seeing results from chronically understaffed regional offices, struggling under excessive workloads, battling headwinds when trying to recruit and pay new lawyers to serve a challenging population of clients for substantially less financial reward than their peers", pg. 5). The Sept. 13, 2021, Written Response did not challenge Judge Harris's jurisdiction to enter a contempt order in the special proceeding, Thirteenth Jud. Dist. Cause No. SB 2021-1.

The District Court entered its first Order Finding the OPD in contempt on September 15, 2021. HarrisApp011-016. The Order, *inter alia*, required assignment of a public defender within three working days of the Court's order for appointment.

The OPD did not seek a stay, nor did it seek this Court's review of the September 15 Order. The OPD paid the \$15,500.00 fine as ordered by the District Court.

Two months after issuance of the first contempt order the District Court became convinced that, contrary to its September 2021 Order, the OPD was not assigning a public defender within three working days of the court's order of appointment. On November 15, 2021, the District Court entered its second OTSC. OPDApp078-080. The OPD filed a written response, OPDApp081-133.

In its second written response the OPD chose to contest the lawfulness of the District Court's first contempt order. The OPD also addressed, on an individual basis, each of 17 cases described by the District Court as cases where OPD had not timely assigned counsel.

By Order dated February 22, 2022, the District Court again found that the OPD was in contempt. OPDApp134-147.

STANDARD OF REVIEW

Review of a contempt order is limited to the contemnor's seeking a writ of certiorari or supervisory control to contest the lawfulness of the order. *Fouts v. Montana Eighth Jud. Dist. Ct.*, 2022 MT 9, ¶12, 407 Mont. 166, 502 P.3d 689. The scope of this Court's review of indirect civil contempt judgments for which there is no remedy of appeal is limited to the following:

[W]hether the court: (1) acted within its subject matter and personal jurisdiction; (2) acted within its statutory or common law authority based on substantial evidence; or (3) otherwise abused its discretion in finding the contemnor in contempt or imposing related coercive sanction resulting in prejudice to the contemnor.

Id. A court may not impose a coercive civil contempt sanction unless the contemnor has the power to perform the act at issue. *Id.*, ¶15.

A district court’s factual findings should be upheld where substantial evidence supports those findings. *Vintage Construction, Inc. v. Feighner*, 2017 MT 109, ¶14, 387 Mont. 354, 394 P.3d 179. Factual findings are clearly erroneous if the findings are 1) not supported by substantial evidence; 2) if the court misapprehended the effect of evidence; or 3) this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

A district court abuses its discretion when it “acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice”. *Unidentified Police Officers I v. City of Billings*, 2019 MT 299, ¶7, 398 Mont. 226, 454 P.3d 1205.

This Court reviews a trial court’s “interpretation and construction of a statute or rule of law” *de novo*. *Meyer v. Jacobsen*, 2022 MT 93, ¶5, ___ Mont. ___, ___ P.3d ___, quoting *Kluver v. PPL Mont., LLC*, 2012 MT 321, ¶19, 368 Mont. 101, 293 P.3d 817.

SUMMARY OF THE ARGUMENT

It is axiomatic that a defendant in a criminal case must be afforded all of his or her constitutional and statutory rights throughout the course of the case. A defendant in a criminal case relies on defense counsel's timely and effective representation to effectuate those rights.

Where the OPD's practices result in a diminution of the rights of any defendant, let alone a large number of defendants, it is the duty of the district court to correct such practices. Department No. 2 of the 13th Judicial District Court became aware of such OPD practices. The District Court provided the OPD with two separate opportunities to correct its deficient practices.

At first the OPD claimed it was inadequately funded. After a hearing, the District Court entered its first contempt order, which included a specific direction for the OPD to "assign public defenders to Department No. 2 cases within three (3) working days of being ordered to do so". HarrisApp015.

The OPD did not seek a stay or a review of the first contempt order. Instead, the OPD paid the fine ordered by District Court.

The District Court's concerns about timely assignment of counsel were not allayed, and two months after its first order, it issued a second OTSC. The OPD took a different tack in its response to the second OTSC. OPDApp081-133. The OPD

argued that the District Court's first contempt Order was unlawful. The OPD offered explanations as to each of the specific cases listed in the second OTSC.

The OPD also argued that, even if assignments of counsel had been untimely, the defendants suffered no prejudice due to the untimely assignments. The OPD essentially invited the District Court to simply trust the OPD to act in the best interests of its clients. This argument was and is untenable. The OPD should not be permitted to set its own standards as to assignment of counsel. Such a practice is especially problematic if it is to be judged based on the circumstances of each and every individual case. Such a practice would create a system where defendants' claims regarding the timely representation of counsel would have to be litigated across Montana in each specific case. Such a standard would create inconsistency among the different OPD Districts, confusion among OPD's clients, and conflict among the district courts.

The District Court found no merit to the arguments the OPD presented in response to the second OTSC, and it entered a second contempt order on February 22, 2022. The District Court's second order can be summed up by the District Court's finding that "[n]othing has changed between September 15th and November 15th, except that now the OPD believes it has no obligation to immediately assign counsel to represent indigent defendants after being ordered to do so". OPDApp145.

The District Court twice provided the OPD with opportunities to correct its practices of untimely assignment of counsel. When the District Court learned that the OPD's deficient practices were not corrected, it entered two contempt orders. Those orders should be affirmed by this Court and the OPD's Petition should be denied.

ARGUMENT

I. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S EXERCISE OF ITS CONTEMPT POWERS REGARDING THE OPD'S UNTIMELY ASSIGNMENT OF COUNSEL.

A. The OPD did not seek either a stay or a review of the District Court's first contempt order.

In its Order Re: Contempt and Sanctions, HarrisApp0111-016, the District Court found the OPD's funding arguments unpersuasive:

While the Court understands the OPD's explanation, it is no defense to the constitutional and statutory requirements that public defenders be immediately assigned to defendants when ordered to do so by a court.

Ord., HarrisApp013.

The District Court emphasized eight different aspects of a criminal case affected by the untimely assignment of counsel:

For example, failing to immediately assign public defenders could prejudice a defendant's right: (1) to substitute the judge within ten calendar days of arraignment; (2) to a prompt bond hearing; (3) to conduct a prompt investigation and preserve evidence; (4) to file pretrial motions; (5) to meaningfully prepare for and participate in an omnibus hearing which is typically conducted in Department No. 2 within 60 days of arraignment; (6)

to a speedy trial which is typically set in Department No. 2 within 120 days of arraignment; (7) to engage in early plea negotiations; and (8) to promptly engage in treatment and other rehabilitation programs.

Id. And most importantly, given later developments in this case, the District Court ordered as follows:

3. That the State Office of Public Defender shall assign public defenders to Department No. 2 cases within three (3) working days of being ordered to do so.

HarrisApp015. The OPD did not seek a stay nor did it seek review of the district Court's first contempt order.

B. The Legislature, and not the courts, is responsible for the funding of State agencies such as the OPD.

Although the OPD's second written response did not emphasize its inadequate funding, OPDApp081-133, it returned to those arguments in its Petition filed with this Court ("In addition to routine conflict management, OPD lacks adequate funding and staff to assign an attorney to every client within a few days of its appointment. . . . OPD's funding is inadequate to raise salaries to a level that would attract additional attorneys to these open position and to retain current staff"). Pet., pgs. 12-13. The OPD's funding arguments merit further discussion.

The doctrine of separation of powers is enumerated in Montana Constitution Article III, Section 1, which provides:

The power of the government of this state is divided into three distinct

branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

In *McLaughlin v. Montana State Legislature*, 2021 MT 178, 405 Mont. 1, 493 P.3d 980, this Court referred to decisions of the United States Supreme Court describing the separation of powers doctrine:

The Supreme Court stated in *Loving v. United States*, 517 U.S. 748, 757, 116 S. Ct. 1737, 1743, 135 L.Ed.2d 36 (1996), “it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.” Former Chief Justice Warren Burger wrote in his concurring opinion in *Nixon v. Fitzgerald*, 457 U.S. 731, 760-61, 102 S. Ct. 2690, 2707, 73 L.Ed.2d 349 (1982), that “the essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches.”

Id., ¶ 65.

Montana’s Legislature has the power over the “central prerogative” of State finance. *State ex rel. Judge v. Legislative Finance Committee and Its Members*, 168 Mont. 470, 477, 543 P.2d 1317 (1975)(“The power to appropriate is a long established, well-recognized power of the legislature”).

At the first show cause hearing the OPD invited the District Court to enter a ruling declaring that the OPD’s funding was inadequate. In keeping with the separation of powers doctrine the District Court declined to decide whether the OPD

was adequately funded. The District Court’s rulings remained within the proper “assigned sphere of responsibility” of Montana’s Judicial Branch, leaving it to the Legislature to decide the appropriate level of funding for the OPD. This Court should also respect the doctrine of separation of powers and avoid a ruling based on the OPD’s perceived need for additional money from the Legislature.

C. The district court’s contempt orders were a proper exercise of its contempt powers.

The proper function of Montana’s judicial system is based, in part, on the courts’ authority to order that certain acts be performed and that other acts not be performed. The power of contempt is a means to ensure such orders are obeyed. *See, e.g., Board of Commissioners of Flathead County v. Eleventh Judicial District Court*, 182 Mont. 463, 470, 597 P.2d 728 (1979)(“The commissioners concede that District Courts are clothed with all the power and authority necessary to render their jurisdiction effective”).

i. The District Court’s statutory interpretations are correct.

The District Court’s contempt orders interpreted a statute governing the OPD’s obligations to ensure timely representation of indigent criminal defendants.

Section 47-1-104, MCA, provides in pertinent part:

(3) When a court orders the assignment of a public defender, the appropriate office shall immediately assign a public defender qualified to provide the required services. The director shall establish protocols to ensure that the

offices make appropriate assignments in a timely manner.

The District Court found that “immediately” meant assignment must be made within three working days of the order appointing the OPD. Ord., HarrisApp015.

On November 15, 2021, the District Court entered its second OTSC, alerting the OPD that “[i]t appears that the OPD continues to violate Mont. Code Ann. § 47-1-104(3) and has repeatedly violated this Court’s Court’s [sic] order requiring the assignment of counsel within three working days”. OPDApp078. A show cause hearing was held on December 20, 2021. Thus, the OPD was given yet another opportunity to address the issues raised by the District Court.

The District Court entered its second Order Re: Contempt and Sanctions on February 2, 2022. OPDApp134-147. The District Court identified five separate arguments advanced by the OPD, *Id.* at 135, and after a thorough review of the facts and the law applying to each argument, found none of the arguments persuasive. *Id.*

It stands to reason that the adverb “immediately”, as set forth in §47-1-104, MCA, must be defined by reference to a specific number of days. To do otherwise would be to permit the OPD to assign counsel whenever it deemed it reasonable based on its perceived funding and resource inadequacies. Indeed, the OPD argued during the second OTSC hearing that “no hard and fast rule would apply. When pressed further if 90 days after arraignment would constitute the timely assignment

of counsel, the OPD again responded that no one rule or time period would be appropriate for all cases”. Ord. Re: Contempt, OPDApp135.

Given the OPD’s refusal to commit to a specific number of days in which to make assignment, there is no merit to the OPD’s contention, Pet., pgs. 8-9, that the District Court exceeded its authority by “inserting” the three working day rule into § 47-1-104, MCA. Again, to ensure the timely assignment of counsel, it was the District Court’s duty to prescribe a definite time period, and not permit the OPD to set its own rules as to the timing of assignment of counsel. Under the circumstances of this case the District Court’s determination that the assignment must be made within three business days is supported by substantial evidence, and is not clearly erroneous. *Vintage Construction, Inc. v. Feighner*, 2017 MT 109, ¶14, 387 Mont. 354, 394 P.3d 179.

Given that the constitutional protections at stake call for a rule prescribing a certain number of days in which to assign counsel, it is always possible to argue that the standard should be set at a different number of days. The District Court is entrusted with the power to establish the time period and it gave the OPD not just one but two hearings to present testimony and evidence as to precisely what the OPD thought that time period should be. Instead of seeking a ruling from the District Court that would set the number of days greater than three working days, the OPD merely

argued against setting any definite standard. There is no merit to the OPD's arguments for a standard based only on the possible prejudice that might befall a defendant through untimely assignment of counsel. The District Court's interpretation of § 47-1-104, MCA, is correct and should be affirmed by this Court.

ii. *Zlahn* is inapposite and should not serve as a standard for effective assistance of counsel under the circumstances of this case.

The OPD's second written response relied on *State v. Zlahn*, 2014 MT 224, 376 Mont. 245, 332 P.3d 247. OPDApp085-088. The OPD also cited *Zlahn* in its Petition filed with this Court. Pet., pg. 10. The OPD cites *Zlahn* in an attempt to excuse its untimely assignment of counsel on the basis that the OPD's assignments do not amount to plain error.

In *Zlahn* the timing of the assignment of Zlahn's counsel was not properly preserved as an issue in the district court, thus Zlahn sought this Court's plain error review. This Court noted that it invokes plain error review "sparingly", and on a case-by-case basis. *Id.*, ¶ 18. This Court held that, under the facts of Zlahn's case, plain error review was not warranted. Although the OPD "certainly could have moved more swiftly to provide Zlahn with counsel" the timing of the assignment of counsel did not result in "a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process". *Id.*, ¶20.

As was recognized by the District Court, Ord., OPDApp142-143, *Zlahn's* plain error standard is ill-suited for this case. In this case the assignment of counsel should be reduced to a formula or mechanism by which an agency with state-wide obligations routinely assigns counsel to defendants. The OPD makes thousands of such assignments in criminal cases every year. OPD Written Response, Sept. 13, pg. 3 (“In its last biennial report for the years 2019 and 2020, OPD reported that it had represented adults and children in more than 67,000 new cases in previous two years”).

Plain error review is a *post hoc* effort to identify possible error in a case. This Court has set a high threshold for conducting plain error review, given that such review arises only in cases where a defendant failed to make a proper objection or offer of proof, or otherwise did not make a proper record in the district court to preserve an issue for appellate review. Further, plain error review involves a detailed analysis of the facts and circumstances of a specific case. Given that the issue before this Court involves the timing of assignment of counsel in a multitude of cases, such analysis would prove both time-consuming and expensive.

This Court should refuse to adopt the OPD’s suggestions to employ *Zlahn's* plain error review standard to judge the issue of timely assignment of counsel under §47-1-104, MCA.

iii. The District Court's reasoning is sound and its contempt order is not arbitrary or otherwise unlawful.

The OPD contends that the District Court abused its discretion in entering its second contempt order directed at the OPD. Pet. at 6. The OPD argued that “OPD is not required to assign counsel within three days”. Pet. At 7. As set forth above, the District Court's first contempt order established the three working days standard and the OPD failed to seek review of that order. If this Court chooses to review the merits of the three business day standard, the testimony and evidence introduced in both show cause hearings support the imposition of that standard.

To convince this Court that the District Court's orders were arbitrary the OPD must show that the District Court “act[ed] arbitrarily, without employment of conscientious judgment, or exceed[ed] the bounds of reason, resulting in substantial injustice”. *Unidentified Police Officers 1 v. City of Billings*, 2019 MT 299, ¶7, 398 Mont. 226, 454 P.3d 1205. The OPD has failed to make any such showing in this case. The District Court acted conscientiously and carefully by giving the OPD ample notice of the District Court's concerns and more than sufficient time to prepare for the show cause hearings. During those hearings the OPD had the opportunity to make input to the District Court regarding the timing of assignment of counsel, as well as the opportunity to demonstrate its willingness to make adjustments or otherwise address the District Court's concerns. Given the

indefensible positions taken by the OPD in this case, and the gravity of the issues at hand, the District Court had good reason to issue both Orders, as well as the sanctions entered in both Orders.

iv. The OPD could meet the Court’s three working days requirement.

A court may not impose a contempt sanction upon a party “unless the subject act ‘is in the power of the contemnor to perform’”. *Fouts v. Montana Eighth Jud. Dist. Ct.*, 2022 MT 9, ¶15, 407 Mont. 166, 502 P.3d 689, quoting *Vanskyock v. Twentieth Jud. Dist. Ct.*, 2017 MT 99, ¶ 13, 387 Mont. 307, 393 P.3d 1068. The OPD argued that it was not possible for it to meet the District Court’s Order requiring assignment of counsel within three business days. Pet., pg. 12 (“[T]he District Court exceeded its authority when OPD presented undisputed evidence that it could not comply with the order”).

The OPD undercut this argument, however, in its Written Response dated Dec. 17, 2021, when it argued that the District Court was “elevat[ing] form over substance”, OPDApp084, as OPD’s counsel made contact with the client upon arrest, and “well before the court orders it”. *Id.* As the District Court pointed out, this particular OPD argument was inconsistent with its contention that assignment within three days was impossible:

Contradicting its position that it is beyond the OPD's power to immediately assign counsel, the OPD makes an alternative argument that it does immediately assign counsel even before being ordered to do so. OPD contends that is [sic] has complied with this Court's September 15th Order despite arguing it is unable to comply. OPD cannot have it both ways.

Ord., Feb. 2, 2022, OPDApp136.

The OPD's "impossible to perform" argument ineluctably follows from OPD's initial argument that it was inadequately funded and understaffed. It is fair to say that the OPD was unlikely to change that position during the course of this litigation, even if there existed within the agency objective evidence to the contrary. The District Court aptly characterized the argument as OPD's trying to have it both ways and properly rejected the argument. The District Court's determination to that effect should be upheld by this Court.

D. The case at issue is the special proceeding instituted by the District Judge, and not the individual criminal cases discussed in the special proceeding.

In its second contempt order, OPDApp134-147, the District Court reminded the OPD that the law of the case doctrine applied to its rulings in the first contempt order:

If the OPD thought the September 15th Order was issued without legal authority, as it now claims, the OPD should have stayed its enforcement while seeking a writ of certiorari. Mont. Code Ann. 3-1-523(1). Having failed to seek the Montana Supreme Court's review of this Court's contempt order, the September 15th Order became the law of the case. *State v. Carden*, 555 P.2d 738, 739-740 (Mont. 1976)(law of the case doctrine applies to final ruling of

a trial court in the same case).

Id. at 139.

The OPD's petition addressed the law of the case doctrine by claiming it had no application in this case as "[t]he court's two contempt orders pertained to completely different criminal cases, with different case histories, different defendants, and different procedural paths". Pet., pg. 16.

The OPD's arguments lack merit. The District Court's orders were entered in the special proceeding Cause No. SB 2021-1. The orders were not entered in the case of any of the individual defendants for whom the OPD was to assign counsel. It was the OPD, and not each individual defendant, that was served with the District Court's Orders to Show Cause.

The OPD's arguments to this Court regarding the law of the case doctrine sum up the OPD's suggested outcome to these proceedings. By citing to a number of specific cases the OPD apparently wants to judge for itself, and on a case-by-case basis, the time in which to assign counsel. Such a standard would not promote justice. Rather, adoption of the OPD's suggested standard would create confusion and inconsistency, as well as the inability to hold the OPD accountable for the timely assignment of counsel.

The law of the case doctrine provides that a legal decision made at one stage

of litigation which is not appealed when a party had the opportunity for appeal (or in this case to petition for certiorari or supervisory control) is the law of that case and the party that did not appeal has waived its rights to do for the course of that litigation. *McCormick v. Brevig*, 2007 MT 195, ¶38, 338 Mont. 370, 169 P.3d 352. *See also* §3-1-523(1), MCA (actions regarding contempt may be reviewed on a writ of certiorari).

On September 15, 2021, the District Court made a legal decision in this case, *viz.*, that the assignment of counsel under § 47-1-104, MCA, must take place within three working days. The OPD did not seek a stay of that Order, nor did it seek this Court's review of that Order, and thus that Order became the law of this case.

CONCLUSION

This Court should deny the OPD's Petition for Writ of Certiorari or alternative Writ of Supervisory Control.

DATED this 25th day of May, 2022.

/ s / Marty Lambert
Marty Lambert, Gallatin County Attorney
Attorney for *Amicus* MCAA

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a), M.R.App.P., I certify that this brief is printed with a proportionately-spaced Word for Windows Times New Roman typeface of fourteen points; is double-spaced; and contains 4,416 words, excluding the table of contents, table of citations, certificate of service, and certificate of compliance.

/ s / Marty Lambert
Marty Lambert
Gallatin County Attorney
Attorney for *Amicus* MCAA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following counsel of record by eservice on the 25th day of May, 2022:

Peter Habein
P.O. Box 2529
Billings, MT 59103
Representing Petitioner Lindquist and OPD
Service Method: eService

Timothy Strauch
257 W. Front Street, Suite A
Missoula, MT 59802
Representing Respondent 13th J.D. Court, Hon. Donald Harris
Service Method: eService

Emily Jones
Special Ass't Attorney General
115 N. Broadway, Suite 410
Billings, MT 59101
Representing Montana Attorney General
Service Method: eService

L.Randall Bishop
27 Prairie Falcon Court
Kalispell, MT 59901
Representing Montana Innocence Project
Service Method: eService

Austin Knudsen, *Montana Attorney General*
David M.S. Dewhirst, *Solicitor General*
Morgan J. Varty, *Ass't Attorney General*
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
david.dewhirst@mt.gov
morgan.varty@mt.gov

Alex Rate
Akilah Lane
ACLU of Montana Foundation, Inc.
P.O. Box 1968
Missoula, MT 59806
T: (406) 443-8590
ratea@aclumontana.org
lanea@aclumontana.org

Emma Andersson (CA 260637), *pro hac vice*
American Civil Liberties Union
Foundation
125 Broad Street
New York, MT 10004
(347) 931-6337
eandersson@aclu.org

Nikki Trautman Baszynski
Pro hac vice
215 E. 9th Street, Suite 601
Cincinnati, OH 45202
nbaszynski@ohiojpc.org

/s/ Marty Lambert
Marty Lambert
Attorney for *Amicus* MCAA

CERTIFICATE OF SERVICE

I, Martin D. Lambert, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 05-25-2022:

Peter F. Habein (Attorney)
PO Box 2529
Billings MT 59103
Representing: Rhonda Lindquist, Office of the State Public Defender
Service Method: eService

Timothy B. Strauch (Attorney)
257 W Front Street, Ste A
Missoula MT 59802
Representing: Donald L. Harris
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

L. Randall Bishop (Attorney)
27 Prairie Falcon Ct
Kalispell MT 59901
Representing: Montana Innocence Project
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: State of Montana
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: ACLU of Montana Foundation, Inc., American Civil Liberties Union
Service Method: eService

Akilah Maya Lane (Attorney)
2248 Deerfield Ln
Apt B
Helena MT 59601
Representing: ACLU of Montana Foundation, Inc., American Civil Liberties Union
Service Method: eService

Morgan Jacqueline Varty (Govt Attorney)
215 N Sanders St
P.O. Box 201401
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Jordan Rhodes Kilby (Attorney)
PO Box 16960
202 West Spruce Street
Missoula MT 59808
Representing: National Association For Public Defense
Service Method: eService

Emma Andersson (Interested Observer)
American Civil Liberties Union
125 Broad Street
New York NY 10004
Service Method: E-mail Delivery

Electronically Signed By: Martin D. Lambert
Dated: 05-25-2022