ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 09-0289

IN RE THE RULE ON SUBSTITUTION OF DISTRICT JUDGES

PUBLIC COMMENT BY THE OFFICE OF THE STATE PUBLIC DEFENDER

COMES NOW, Richard E. "Fritz" Gillespie, Chairman of the Public Defender Commission, William F. Hooks, Chief Public Defender, and Wade Zolynski, Chief Appellate Defender, and respectfully submits public comment on behalf of the Office of the State Public Defender (OPD) with regard to the proposed changes to Mont. Code Ann § 3-1-804 (hereafter, "judge substitution rule"). Said changes were proposed via petition (hereafter, "Petition") by the Montana Judges Association (hereafter, "MJA") and impact the substitution of district court judges in the State of Montana. Since 1903 Montana, like many Western states[1], has permitted the substitution of district judges. MJA's proposal would significantly change, and in some cases entirely eliminate, the current judge substitution rule. As outlined below, OPD opposes the tendered changes to the

[1] Alaska – Alaska Stat. § 22.20.022; Arizona – Ariz. R. Civ. P. 42(f) and Ariz. R. Crim. P. 10.2; California – Cal. Civ. Proc. Code 170.6; Idaho – Idaho R. Civ. P. 40(d) and Idaho Crim. R. 25; Illinois – Ill. Rev. Stat. ch. 38, § 114-5; Indiana – Ind. R. Trial P. 76 and Ind. R. Crim. P. 12; Minnesota – Minn. Stat. § 542.16, Minn. Stat. § 487.40, Minn. R. Civ. P. 63.03, and Minn. R. Crim. P. 24.03; Missouri – Mo. R. Civ. P. 51.05 and Mo. R. Crim. P. 30.12; Nevada – Nev. Rev. Stat. § 1.240; New Mexico – N.M. Stat. Ann. § 38-3-9; North Dakota – N.D. Cent. Code § 29-15-21; Oregon – Or. Rev. Stat. §§ 14.250-.270; South Dakota – S.D. Codified Laws Ann. §§ 15-12-20 to -37; Washington – Wash. Rev. Code. Ann. § 4.12.050; Wisconsin – Wis. Stat. Ann. § 801.58 and Wis. Stat. Ann. § 971.20;

judge substitution rule. OPD encourages this Court to recognize the importance of maintaining a judicial system that is, in appearance and in fact, impartial and unbiased. MJA's proposed discrimination based on poverty, age of majority, parental status, and mental illness when fundamental liberty interests are at stake will give citizens and other stakeholders a reason to distrust our court system and believe it is biased. It is inherently difficult to prove a biased state of mind, especially when the presiding judge asserts otherwise or fails to recognize a bias other observers do. The current judge substitution rule remains a reasonable and valid mode of maintaining an unbiased judicial system, or at least the appearance thereof; thereby balancing the competing interests of the bench, bar, and those whom the courts serve.

OPD's public comment will (I) discuss MJA's contention that abuse mandates a rule change, (II) show the current judge substitution rule is not abused, (III) show that OPD does not have a policy permitting automatic or blanket substitution, and (IV) detail how MJA's proposed changes amend other statutes and run grave risk of violating equal protection and due process.

I. MJA CONTENDS ABUSE OF THE RULE MANDATES ITS REVISION.

MJA's substitution committee contends abuse of the current judge substitution rule mandates its revision. Per MJA's Petition, there are "staggering statistics showing abuse of the Rule" that is "prevalent among the many districts

throughout the State of Montana[2]." In support of its demands, MJA attached a prior request made by Judges from the Eighth Judicial District that this Court considered and rejected on July 10, 2009[3]. In the 2009 comments relied upon as justification for the current Petition, Montana's judge substitution rule was called "an unnecessary and abusive abomination, blight, and corruption of Montana's justice system." JJ. Macek & Sandefur, at 1-2. A recurring theme in the 2009 comments was the Judges' perception of an undisputable long history of widespread and well-known abuses of the judge substitution rule that continues unfettered. *See, e.g.*, JJ. Macek & Sandefur, at 11. Frequently, there was rhetorical criticism of this Court, *e.g.*, at JJ. Macek & Sandefur, p. 6, for its "apparent, self-prevailing disregard of the [abuse] problem." MJA's embellished its claim essentially arguing this Court needs to cease its "[c]ontinuing magnanimous public sacrifice of the personal and professional integrity of Montana's district court judges to politically accommodate the Montana Bar in blatant disregard of widespread and well-known abuses of justice . . . ." JJ. Macek & Sandefur, at 10. The Judges dictated that "[i]t is high time for the Montana Supreme Court to abandon political expediency, quit playing meaningless lip service, and quit turning a blind-eye to the well-known, blatant, and widespread substitution practices in this district and State." JJ. Macek & Sandefur, at 15.

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[2] Petition for the Revision of Judge Substitution Rule to Remedy Abuse, hereafter Petition, at 3.

[3] *See In Re Revised Rules on Substitution of District Judges*; JJ. Macek & Sandefur, *Proposed Sub. Rule Revisions – Request for Abolishment of Rule or Alternative Revision to Remedy Abuse*, at 5 (June 19, 2009).

Neither the accusatory and intemperate language employed nor MJA's statistics support its plea for change.

II. THE CURRENT RULE IS NOT ABUSED.

Despite MJA's ardent contention that abuse of the rule mandates its revision, MJA's own data shows otherwise. According to Black's Law Dictionary "abuse" means "[a] departure from legal or reasonable use; misuse." Black's Law Dictionary 10 (9th ed. 2009). First, MJA contends the number of substitutions evidences the rule's abuse. This table illustrates the number of cases filed in Montana district courts in 2011 and 2012, the number of substitutions in those cases, *See* Petition, at 3, and the resulting percentage of cases in which a substitution occurred:

Year	Total D.C. Cases	No. of Subs.	%
2012	49,908	610	1.22%
2011	44,234	578	1.30%

Substitution rates of 1.30% and 1.22% do not constitute abuse. Indeed, substitution of a district judge did not occur in 98.78% of the 49,908 cases in 2012 and 98.7% of the 44,234 cases in 2011.

The same statistics broken down by judicial district remain unpersuasive[4]:

Jud. District	Opened | Sub |Percent 2011	Opened / Sub / Percent 2012
First	4425 | 24 | .5%	4902 | 35 | .7%
Second	1582 | 18 | 1.13%	1712 | 22 | 1.28 %
Third	889 | 3 | .3%	1001 | 1 | .1%
Fourth	5259| 29 | .55%	5980 |107 | 1.78%
Fifth	1016 | 5 | .49%	888 | 2 | .23%
Sixth	881 | 2 | .23%	874 | 5 | .57 %
Seventh	1090 | 39 | 3.58%	1259 | 36 | 2.86%
Eighth	4307 | 78 | 1.8%	4961 | 43 | .87%
Ninth	997 | 8 | .80%	1073 | 7 | .65 %
Tenth	725 | 2 | .28%	764 | 0 | .00%
Eleventh	4560 | 16 | .35%	5359 | 49 | .91 %
Twelfth	924 | 5 | .54 %	1095 | 5 | .46%
Thirteenth	6368 | 168| 2.67%	7996 | 144| 1.8%
Fourteenth	No Data	No Data
Fifteenth	554 | 2 | .36%	675 | 2 | .30%
Sixteenth	1073 | 1 | .09 %	1252 | 10 | .79%
Seventeenth	896 | 7 | .78%	905 | 8 | .88%
Eighteenth	3216 | 61 | 1.9 %	3523 | 31 | .88%
Nineteenth	1007 | 2 | .20%	1030 | 5 | .49%
Twentieth	1553 | 1 | .06%	1591 | 3 | .19%
Twenty-first	1653 | 17 | 1.03%	1651 | 15 | .91%
Twenty-second	907 | 1 | .11%	950 | 1 | .11%

As is apparent from the table above, 15 of Montana's 22 Judicial Districts experienced a substitution rate of less than one percent in 2011 and 2012. Even in the district experiencing the most substitutions (the Seventh Judicial District), the judge was not substituted in 1,051 of the 1,090 (96.42%) cases filed in 2011; and

[4] OPD used MJA's data attached to its Petition to determine the number of substitutions filed in 2011 and 2012. OPD does not have access to Full Court. OPD then used this Court's website to pull statistics on how many district court cases were filed per year in each judicial district and formed a resulting percentage. *See* http://courts.mt.gov/dcourt/stats/default.mcpx.

the judge was not substituted in 1,223 of the 1,259 (97.14%) cases filed in 2012. In the district with the lowest substitution rate in 2011 (the Twentieth Judicial District), there was one substitution but 99.94% of all cases proceeded without a substitution. While leaping to three substitutions in 2012, still 99.81% of the 1,591 cases in that district proceeded without substitution. In the district with the lowest substitution rate in 2012 (the Tenth Judicial District), 100% of all cases proceeded without a judge substitution.

Moreover, MJA's data provided for the Eighth Judicial District from 1995 to 2012 actually shows the substitution rate decreased. Between 1995 and 2001 the average was 144 substitutions per year. Between 2002 and 2008, the average was 126 substitutions per year; a decrease of 12.5%. There were 78 substitutions in 2011 for a decrease of 45.8% from the 1995-2001 average and a 38.1% decrease from 2002-2008 average. With only 43 substitutions in 2012, substitutions decreased by 70.1% from the 1995-2001 average and by 65.9% from the 2002-2008 average.

Therefore, MJA's statistical evidence does not support its contention that historical and current abuse of the rule mandates revision. Neither the State of Montana as a whole nor any judicial district in particular has "staggering statistics" showing that substitution is "prevalent" in Montana and that abuse of the rule is "undeniable." Montana's judge substitution rule is not "an unnecessary and

abusive abomination, blight, and corruption of Montana's justice system." As such, faulting this Court for "repeatedly brush[ing] aside these concerns to continue to politically placate the Bar in this State . . ." is unsupported. JJ. Macek & Sandefur, at 5. It should not come as a surprise that litigants wonder about and question the impartiality of the tribunal when members of the bench employ such intemperate language without evidence to support it. The current judge substitution rule remains a reasonable and valid mode of maintaining the appearance of an unbiased judicial system.

III. OPD DOES NOT HAVE A POLICY OF AUTOMATIC OR BLANKET SUBSTITUTION.

In addition to abuse by excessive use, MJA contends that members of the Montana Bar "improperly" exercise "blanket and routine substitutions of individual district judges . . ." JJ. Macek & Sandefur, at 11. This statement lacks support in the data MJA provided. MJA failed to provide a single example of an attorney who practices in such a manner. It could have used a "John Doe" with the number of substitutions filed by John. It did not. MJA, instead, chose to make its claim without any supporting evidence.

OPD employs extensive standards that are available for public and judicial review. *See* http://www.publicdefender.mt.gov/forms/pdf/Standards.pdf, hereafter "Standards." The Standards address the general duties of counsel including an "obligation to keep the client informed of the progress of the case" and providing

the client with "a general overview of the procedural progression of the case." Standards, at 24-27. The Standards then guide each step of the representation from counsel's interview (Standards, at 24) to trial (Standards, at 35), sentencing (Standards at 45), and appeal (Standards, at 46). These standards do not suggest that blanket or automatic substitutions of a district judge are proper. Nor do the standards endorse routine substitutions of individual judges. In fact, OPD management has, in the past, acted swiftly to address accusations of blanket, automatic, or routine judge substitutions. The Public Defender Commission has strongly insisted OPD managers consult with public defenders if a pattern of blanket or automatic substitutions seems to be developing. OPD management should not, however, improperly interfere with the attorney client relationship or attorney client privilege.

IV. MJA'S PROPOSAL WILL CONFLICT WITH A LEGISLATIVELY ENACTED STATUTE AND RAISES GRAVE EQUAL PROTECTION AND DUE PROCESS CONCERNS.

First, MJA's proposal to amend the judge substitution rule will conflict with § 25-1-404(1), a legislative enactment permitting waiver of fees for indigents appearing in Montana Courts. Next, MJA's proposal raises grave due process and equal protection concerns. MJA proposes indigents be denied district judge substitution unless they pay a $500 fee. Thus, MJA would reserve the judge substitution right for those with enough money to buy it, while denying the right to

indigents who cannot. However, once a right is established it cannot be executed in a manner that discriminates based on poverty. MJA's proposal also affirmatively denies judge substitutions to certain civil litigants – those in juvenile, dependent and neglect, and involuntary commitment cases. Substantive due process protects citizens from arbitrary government action. This Court should also decline MJA's invitation to discriminate based the age of majority, parental status, and mental illness.

A. Applying The $500 Filing Fee To Indigents Will Conflict With a Legislative Enactment and Raises Grave Due Process And Equal Protection Concerns.

Mont. Code Ann. § 3-1-804(3) currently provides:

> (3) In civil cases, the motion for substitution is not effective for any purpose unless the filing fee of $100 for a motion for substitution required by 25-1-201 is paid to the clerk of the district court. *No filing fee is required in criminal cases or by parties who have qualified for representation at public expense.*

Mont. Code Ann. § 3-1-804(3) (emphasis added). That section is currentlty consistent with Mont. Code Ann. § 25-1-404(1) which codifies the express permission of the Montana Legislature for indigent litigants to request a fee waiver. MJA proposes this Court strike the rule's current language. Order, at 2. In effect, MJA's proposal would repeal the Mont. Code Ann. § 25-1-404(1) expression of state policy on waiver of fees for indigents appearing in Montana's courts.

MJA further requests this Court amend the rule to increase the filing fee from $100 to $500. Order, at 2. Without reference, MJA's proposal would amend Mont. Code Ann. § 25-1-201(p) without legislative action. The rule as amended would require indigent criminal defendants and other OPD clients to pay a punitive $500 filing fee to move for the substitution of a district court judge. Doing so raises grave equal protection and due process concerns.

The Fourteenth Amendment to the United States Constitution and Article II, §§ 4 and 17 of the Montana Constitution provide for equal protection and due process. In *Griffin v. Illinois* the United States Supreme Court considered whether due process or equal protection had been violated by requiring indigent appellants to pay a fee for producing stenographic transcripts. *Griffin v. Illinois*, 351 U.S. 12, 16, 76 S.Ct. 585, 100 L.Ed. 891 (1956). The Court explained that "[b]oth equal protection and due process emphasize the central aim of our entire judicial system – all people charged with a crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court." *Griffin*, 351 U.S. at 17. In criminal cases a state can no more discriminate on account of poverty than on account of religion, race, or color. *Griffin*, 351 U.S. at 17. Indeed, "[p]roviding equal justice for poor and rich, weak and powerful alike is an age-old problem." *Griffin*, 351 U.S. at 16. "People have never ceased to hope and strive to move closer to that goal." *Griffin*, 351 U.S. at 16.

Whether the substitution rule is constitutionally based does not matter. The Federal Constitution does not require states to provide a right to appellate review at all, yet the Court held that once a state does grant that right it cannot discriminate against defendants based on their poverty. *Griffin*, 351 U.S. at 18. Here, instead of moving closer to the goal of equal justice "for poor and rich, weak and powerful alike" MJA unabashedly proposes this Court reserve the right to substitute a district judge for those with enough money to buy it. This Court must decline the invitation to do so.

Moreover, as this Court recognized in *Greely* "prosecutors' preselection of district judges in multiple judge districts is as old as the hills both in Montana and nationwide." *State ex. rel. Greely v. Dist. Ct. of the Fourth Judicial Dist.*, 180 Mont. 317, 325, 590 P.2d 1104, 1108 (1979). "Any rotation system for case filings in such district courts can easily be circumvented to enable filing before a particular judge." *State ex. rel. Greely*, 180 Mont. at 325, 590 P.2d at 1108. "The prosecutor controls the time of filing a criminal charge and thus controls selection of the district judge before whom the case is filed." *State ex. rel. Greely*, 180 Mont. at 325, 590 P.2d at 1108. Moreover, striking the last sentence of Mont. Code Ann. § 3-1-804(3) will invoke Mont. Code Ann. § 25-1-405 which would require the clerks of the district courts collect $500 from the county attorneys. County attorneys have many more resources available than indigent defendants.

Thus, the State will have another weapon available in its arsenal for tipping the forum unfavorably against indigent criminal defendants and other parties who have qualified for OPD representation in the civil cases. In addition to discriminating based on poverty in violation of *Griffin*, eliminating district court judge substitutions for those too poor to pay will leave indigent defendants without a power on par with the prosecution's for insuring a fair trial. *See State ex. rel. Greely*, 180 Mont. at 325, 590 P.2d at 1108.

B. Denying Parties In Certain Civil Cases – Dependent And Neglect, Juvenile, And Involuntary Commitment Proceedings -- The Ability To Substitute The District Judge Also Raises Grave Due Process And Equal Protection Concerns.

Next, MJA proposes this Court add language to the current rule affirmatively denying the right to substitute a district court judge in child abuse and neglect (hereafter, "DN"), youth court, and mental health commitment proceedings. Petition, at 4; Order, at 1. Again, this Court must decline the MJA's request to discriminate as doing so raises grave due process and equal protection concerns.

Juvenile Proceedings. Article II Section 15 of the Montana Constitution provides: "The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protections of such persons." This Court has recognized that Article II Section 15 was explicitly added "to recognize that

persons under the age of majority have the same protections from government and majoritarian abuses as do adults" and must be read in conjunction with Article II, Section 4's guarantee of equal protection. *In re S.L.M.*, 287 Mont. 23, 35, 951 P.2d 1365, 1372 (1997). Montana has a strong tradition of providing juveniles the same, if not more, protections as adults. That tradition must carry forward into the judge substitution realm. Otherwise, our justice system will discriminate based on the age of majority.

Additionally, juvenile proceedings routinely involve a loss of fundamental liberty and look more like a criminal proceeding than other civil cases. They have, over time, produced more punitive dispositions. Indeed, some juvenile dispositions convert into adult criminal sentences. *See* Mont. Code Ann. § 41-5-208 (permitting the juvenile court to transfer supervision from juvenile probation to adult probation); *See also* Mont. Code Ann. § 41-5-1431 (indicating that "if a youth is found to have violated a term of probation, the youth court may make any judgment of disposition that could have been made in the original case"); *See also* Mont. Code Ann. 41-5-1604(1)(a)-(b) (permitting, in certain circumstances, the juvenile court to impose a sentence with two components – a juvenile disposition and a stayed adult sentence). These considerations counsel in favor of equal treatment with regard to judge substitution, not against.

DN and Involuntary Commitment Proceedings. MJA's discriminatory judge substitution rule gains no additional luster when applied to DN or involuntary commitment cases. MJA's proposal would deny litigants in DN and involuntary commitment cases the right to substitute a district judge. Petition, at 4. The guarantee of due process has both a procedural and substantive component. *State v. Egdorf*, 2003 MT 264, ¶ 19, 317 Mont. 436, 77 P.3d 517. Substantive due process bars arbitrary government actions regardless of the procedures used to implement them and serves as a check on oppressive government action. *Englin v. Bd. of County Com'rs*, 2002 MT 115, ¶ 14, 310 Mont. 1, 48 P.3d 39.

DN and involuntary commitment cases, like criminal cases, involve fundamental liberty interests where respondents have no choice but to appear in a forum when the State acts. *See In Re A.S.*, 2004 MT 62, ¶ 12, 320 Mont. 268, 87 P.3d 408 ("It is well established in Montana's jurisprudence that a natural parent's right to care and custody of his or her child is a fundamental liberty interest which must be protected by fundamentally fair procedures."); *See also In Re the Mental Health of K.G.F.*, 2001 MT 140, 306 Mont. 1, 29 P.3d 485 (indicating a person involuntarily committed "must indefinitely bear the badge of inferiority of a once 'involuntarily committed' person with a proven mental disorder.") This Court has even held that some protections provided to criminal defendants do not go far enough to protect litigants in DN and involuntarily commitment cases. *See In Re*

A.S., ¶ 23 ("This is yet another instance in which the *Strickland* standard does not go far enough to protect the liberty interests of individuals, who . . . stand to forever lose their fundamental right to parent their child."); *See also In Re the Mental Health of K.G.F.*, ¶ 33 (concluding that the standard under *Strickland* for effective assistance of counsel "simply does not go far enough to protect the liberty interests" of those facing involuntary commitment.)

Given the fundamental liberty interests at stake, this Court must safeguard, from the citizen's point of view, our system's appearance of impartiality. MJA's request to discriminate fails to do so. Should MJA's proposal be adopted, judge substitution would be available if one parent seeks to interfere with another parent's child custody in a divorce or custody action, but not when the State seeks to interfere with child custody by filing a DN action. Additionally, while a litigant suing or defending a suit for money damages will maintain district judge substitution rights, the State will have forfeited that right for a litigant defending a delinquent youth petition or a petition for involuntary commitment to the Montana State Mental Hospital. How is it that where fundamental liberties are at stake the court system can provide its most vulnerable citizens less protections? The Court's paramount concern should be preventing such arbitrary government action, not making it express written policy.

MJA contended that DN, juvenile, and involuntary commitment cases should be excluded from the judge substitution rule because they are "time sensitive." Petition, at 4. This Court has said in the past that "[w]e recognize that the right of preemptory disqualification of district judges creates delays in the trial of both criminal and civil cases." *State ex. rel. Greely*, 180 Mont. at 324, 590 P.2d at 1108. "It causes calendaring and scheduling problems for district judges, the parties and their attorneys." *State ex. rel. Greely*, 180 Mont. at 324, 590 P.2d at 1108. "It interferes with the normal and routine operation of the district courts." *State ex. rel. Greely*, 180 Mont. at 324, 590 P.2d at 1108. Nevertheless, "[t]he right to a fair trial before an impartial judge is the cornerstone of the American and Montana court systems. *State ex. rel. Greely*, 180 Mont. at 325, 590 P.2d at 1108. Therefore, "[i]ts values transcend operational problems in the court system." *State ex. rel. Greely*, 180 Mont. at 325, 590 P.2d at 1108. MJA's "time sensitive" basis for excluding DN, juvenile, and involuntary commitment cases from the judge substitution rule remains as unpersuasive today as it did in 1979.

In sum, this Court must decline MJA's invitation to discriminate based on poverty, parental status, age of majority, or mental illness when it comes to judge substitution. Due process and equal protection insist on no less. MJA's contention that abuse of the rule exists cannot be supported on the data it brings forth. As a result, there is no real premise upon which to base a decision to discriminate,

especially when such fundamental liberty interests and the court system's goal of impartiality are at stake. The current judge substitution rule remains a reasonable and valid mode of maintaining the appearance of an unbiased judicial system.

CONCLUSION

This Court is respectively requested for the foregoing reasons to deny the MJA Petition in all respects so as to preserve the propriety, impartiality, and integrity of an unbiased justice system in Montana.

Respectfully submitted this 15th day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing OPD Comments to the Judge Substitution Rule to be emailed, hand-delivered, mailed, or e-mailed to:

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