



Exhibit No. 2  
Date 3-31-15  
American Civil Liberties Union  
of Montana  
Bill No. HB2  
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March 31, 2015

Dear Members of the House Appropriations Committee,

March 18<sup>th</sup> marks the 52nd anniversary of a landmark 1963 Supreme Court decision known as *Gideon vs. Wainwright*. In *Gideon*, the U.S. Supreme Court established that competent, effective legal representation is essential to anyone seeking a fair trial. With *Gideon*, The U.S. Supreme Court established that if an indigent person is brought before the court facing the possibility of jail time, they are entitled to competent counsel.

In writing the decision in *Gideon*, Justice Hugo Black wrote :

"In our adversary system of criminal justice any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.... Lawyers in criminal courts are necessities, not luxuries... Legal representation is essential to a fair trial. The right of a person charged with crime to counsel may not be deemed fundamental in some countries. But it is in ours."

Thus, it is recognized as our Constitutional obligation that we must ensure that everyone charged with an offense that might be punishable by incarceration has access to effective defense counsel.

Montana's efforts to address this constitutional imperative culminated in 2005 with the passage of SB 146. The Bill was passed unanimously by the Senate and received 89% of the House's approval. The 2005 law created the Office of Public Defender (OPD). With the passage of HB 146, the OPD was charged with the responsibility of representing those indigent people charged with a felony or a misdemeanor for which there is a possibility of incarceration. The OPD was also charged with the obligation to handle appellate defense; to represent parents and children in dependency and neglect cases; to represent clients in cases involving involuntary commitment; to represent juveniles and more. There was a general understanding that this state wide system would abide by the American Bar Association's Ten Principles of a Public Defender System including independence in selecting, funding and paying defense counsel; manageable caseloads; timely appointment; training; parity between defense counsel and the prosecution to make defense an equal partner in the justice system.

In the 11 years since its inception, the OPD has been chronically underfunded. To meet its constitutional and statutory mandate, in every year since 2005, the OPD has had to seek a supplemental authorization for funds in order to do what is expected of them.

The original estimates for the program in August of 2004 were \$20,141,021. The fiscal note of \$13,786,495 necessitated a \$5,363,042 supplemental for FY 2007.

2009 Biennium 19.5 M in FY 08 and 20.58M FY 2009 required 292,000 supplemental.  
2011 Biennium 20.474 M in FY 10 and 21,498M in FY 11, required 971,600 supplemental.  
2013 Biennium 23.4M in FY 12 and 26.130 FY 13 required 3.4 M supplemental  
2015 Biennium 29.768 M in FY 14 and 32M FY 15 required 1.7M supplemental.



Some early supplemental requests addressed simple space and equipment needs for the new Department. However, most supplemental requests reflect the large increase in demand for OPD services. Using dependency and neglect cases as a small example - these cases were initially budgeted for \$700,000 annually. Today, they account for roughly 15% of the total budget and cost in excess of \$3,000,000. This small example reflects continually increasing demand on the Program that can only be addressed by significant additional funding.

Currently, the Office of Public Defender suffers from unmanageable funding shortfalls which hinder its ability to meet its constitutional and statutory mandates. This shortfall also has a negative impact on our court system and the judicial process.

1. Courts are backlogged when hearings need to be delayed because public defenders have caseloads that are so demanding that they cannot keep up with the demands, expectations and professional obligations;
2. These delays cause waste judicial resources- judges, clerks, bailiffs, jurors.
3. Delays waste prosecutorial resources- county attorneys, witnesses, law enforcement.
4. Inadequate funding creates an uneven playing field with regard to access to investigators, social workers, expert witnesses and support staff.
5. This lack of funding and associated delays also costs County taxpayers more when County law enforcement is required to hold indigent detainees while they await trial.

I have been told one reason to fund OPD is because they don't have a plan. I have witnessed how this agency has been treated despairingly from session to session, having to grovel for supplementals for being intentionally underfunded and being not in control of the number of cases that come their way by the civil and criminal justice system. How do you plan when you are consistently denied what it is you say you need to better manage the agency growth? Last session, for example, they tried to address shortcomings in addressing unmet needs in their organizational model including infrastructure looking for:

1. Commission Support. Commission is all volunteer but requires significant agency resources distracting the Chief, Bill Hooks, and Administrator Harry Freebourn from their other enormous responsibilities. 3 FTE @ \$197K.
2. Deputy Director. The Chief's job responsibilities and demands of the position exceed any sustainable expectations to be filled by one employee. 1 FTE @ 107K.
3. Additional Felony Investigators. 2 FTE @ \$139K.
4. Additional Case Resource Workers. 6 FTE @ \$352K.

I have been told another reason not to grant OPD what they need is because the public defenders are getting paid more money than prosecutors and are raiding their ranks for high paid public defender jobs. Last session OPD lawyer wages were finally brought into something of comparable worth with prosecutors. The remainder of OPD work force is still needing significant upgrades.

What seems clearest is this legislature's resentment that this agency, and others, were rescued by the Governor's Office through SB 410 funding to meet the budget funding shortfalls.

We can continue to ignore our constitutional obligations or we can begin to address them in deliberate ways. Progress was made last session with better pay for the attorneys on staff but a deaf ear was turned to requests for additional FTE to address caseload and support staff needs. The

ACLU believes that dealing honestly with OPD caseloads is the real key to addressing the situation, key not just for OPD but for the entire justice system chain reaction of expenditures and delays.

As a taxpayer and citizen, I expect my elected officials to provide a system that meets our constitutional responsibilities and obligations, a system that provides timely professional representation, a system that works. Our Constitutional right to an adequate defense and the protection of liberty is at stake. I can't imagine any of us don't take that seriously.

For the coming biennium, OPD's original budget request was based on the best judgment from the OPD management team. It reflected the real indisputable needs of that office for them to get a reasonable chance at providing representation on a more level playing field for all those in need of their services.

### CONTRACT ATTORNEYS

For decades, now the contract defense attorney rate has been set at \$60 per hour. Quality contract attorneys are essential to handling conflict situations or representation in sparsely populated parts of the state. The report issued by American University recommended that state public defenders receive the same compensation as federal defenders, or \$125 per hour. To achieve that would require an additional \$5.7M annually.

When adequate counsel is not provided to indigent defendants, individual liberty goes from being a right to a privilege available only to those who can afford it. There ought not be two tiers of justice—one for those of means and another for those without. We believe that it is unconscionable and unconstitutional to continue leaving OPD's under-resourced offices taxed with unmanageable caseloads.

For the sake of justice and fulfilling the legislature's good faith commitment to build and adequately fund a statewide public defender system, I encourage you to think and act boldly regarding the OPD budget. Demonstrate courage and leadership in making right in this budget the systemic shortcomings of underfunding that have persisted since OPD's inception.

Respectfully,

Scott Crichton

Executive Director

American Civil Liberties Union of Montana

# ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

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## *Black Letter*

1 The public defense function, including the selection, funding, and payment of defense counsel, is independent.

2 Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

3 Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

5 Defense counsel's workload is controlled to permit the rendering of quality representation.

6 Defense counsel's ability, training, and experience match the complexity of the case.

7 The same attorney continuously represents the client until completion of the case.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

9 Defense counsel is provided with and required to attend continuing legal education.

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

