

IN THE SUPREME COURT OF THE STATE OF MONTANA  
CAUSE NO. \_\_\_\_\_

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RHONDA LINDQUIST and OFFICE OF STATE PUBLIC DEFENDER

Petitioner,

v.

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT

Respondent.

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On Appeal from the Montana Thirteenth Judicial District Court,  
Yellowstone County  
Cause No. SB-21-1, The Honorable Donald L. Harris Presiding

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OFFICE OF STATE PUBLIC DEFENDER'S  
PETITION FOR WRIT OF CERTIORARI

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## **STATEMENT OF ISSUE**

1. Did the District Court exceed its jurisdiction in interpreting § 47-1-104(3), MCA, as requiring the Montana Office of State Public Defender to assign permanent counsel within three working days of OPD's appointment?
2. Did the District Court abuse its discretion by issuing serial contempt orders with which OPD, for reasons beyond its control, cannot comply?

## **STATEMENT OF THE CASE**

OPD requests review of the Montana Thirteenth Judicial District Court, Department No. 2's February 2, 2022, order holding OPD in contempt.

## **STATEMENT OF FACTS**

OPD is governed by the Montana Public Defender Act ("Act"), § 47-1-101, MCA, *et seq.* OPD's purpose is "to provide effective assistance of counsel to indigent criminal defendants and other persons in civil cases who are entitled by law to assistance of counsel at public expense." § 47-1-102(1), MCA. OPD's director is Rhonda Lindquist. Each regional office is managed by a managing attorney. §§ 47-1-105, -2-215, MCA.

OPD employs deputy and assistant public defenders to whom it assigns individual defendants. § 47-1-201(3), MCA. OPD also hires outside contract attorneys in case of conflict or excessive caseload among OPD staff attorneys. § 47-1-121, MCA. A lack of institutional funding impairs OPD's ability to retain

attorneys. OPDApp058-059. This insufficient funding is outside OPD's control, and the governmental bodies that control OPD's budget are aware of its plight.

OPDApp059-060. Staff attorneys across Montana are offered a starting salary that is "far behind" OPD's competitors. OPDApp060-061. Additionally, OPD suffers from a particular shortage of applicants in some of its regional offices, such that, for example, it must hire Missoula-based attorneys to handle cases in Billings.

OPDApp061-062. OPD's attorneys are overburdened, and recent increases in crime in Billings have coincided with high turnover rates at OPD, further burdening the Billings regional office. OPDApp063.

OPD is appointed by courts to represent defendants. §§ 47-1-103(1), - 104(4), MCA. OPD utilizes case management software to assign cases to attorneys to represent defendants through the remainder of their cases.

OPDApp075. Managing attorneys conduct daily reviews of newly appointed cases. *Id.* Assignments to staff attorneys generally occur before a notice of assignment is filed with the court. *Id.* Once the maximum number of cases has been assigned to staff attorneys, any new cases are referred to OPD's Conflict Division.<sup>1</sup> OPDApp076. Once the Conflict Division is at maximum capacity, outside contract attorneys are contacted. *Id.*

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<sup>1</sup> The Conflict Division is a division of OPD for "circumstances in which, because of conflict of interest, the public defender division or the appellate defender division is unable to provide representation to a defendant." § 47-1-401, MCA.

Depending on the availability of Conflict Division and contract attorneys (each of whom need to perform their own conflict checks), the assignment process can take up to several weeks. Until a permanent attorney is assigned, OPD represents the defendant at all times through one or more capable staff attorneys. OPDApp077. While this permanent assignment process may sometimes take longer than OPD would prefer, OPD still ensures that defendants are represented by OPD attorneys at every point in the criminal process. *Id.*

In a separate special book proceeding on September 13, 2021, the Montana Thirteenth Judicial District Court, Department No. 2 (“District Court”) held a show-cause hearing to determine whether OPD and Lindquist should be held in contempt for allegedly not “immediately” (within “3 working days”) assigning attorneys to defendants in seventy-two cases. OPD explained (a) that there is no requirement that it assign permanent counsel within three working days of any court appointment and (b) even if OPD were so required, for reasons of finances, staffing, hiring, and overwhelming workload, it would be impossible for OPD to guarantee that permanent assignment of attorneys would occur within three days in every case. OPDApp031, 048.

The District Court agreed that OPD faces intractable financial, staffing, and workload challenges, going so far as to concede that it had “no clue” how to access any additional funds. OPDApp071. The District Court found OPD in contempt

nevertheless and ordered OPD to assign permanent attorneys within three days of OPD's appointment, which OPD already explained it simply did not have the capacity to do. The District Court further ordered OPD to pay a \$15,500 fine to Yellowstone County. OPD paid the fine, further depleting its limited resources.

OPD, of course, could not comply with the September 15, 2021, contempt order, as none of the barriers it demonstrated to the District Court had been removed. On November 15, 2021, the District Court ordered Lindquist to show cause why she should not be held in contempt for "disobeying" the September 15, 2021, order. OPDApp078-079. OPD explained, *inter alia*, that it had not "disobeyed" the District Court; rather, OPD had immediately assigned attorneys by providing counsel at all stages of the criminal process. OPDApp083-085. The District Court rejected OPD's timely assignment of counsel, classifying those assignments as "on-duty" counsel and instead insisting that only permanent counsel "to represent the defendant throughout the case" could satisfy § 47-1-104. OPDApp134-146. The District Court again found OPD in contempt and issued a fine of \$8,500. The District Court stayed that fine pending resolution of this petition. OPDApp155.

OPD requests that this Court accept its petition for certiorari and vacate the District Court's contempt order dated February 2, 2022.

## STANDARD OF REVIEW

A writ of certiorari is proper where there is no appeal remedy in the ordinary course of law and where the district court has acted in excess of its jurisdiction. *White v. Corbett*, 101 Mont. 1, 52 P.2d 156, 157 (Mont. 1935). When reviewing contempt proceedings, the Supreme Court is generally limited to determining whether the district court acted within its jurisdiction. § 27-25-102(2), MCA; *Cross Guns v. Mont. 8th Jud. Dist. Ct.*, 2017 MT 144, ¶ 8, 387 Mont. 525, 396 P.3d 133. Jurisdiction is interpreted broadly to include whether the district court acted within its authority under both substantive law and governing procedural law based on the facts and substantial evidence. *Fouts v. Mont. 8th Jud. Dist. Ct.*, 2022 MT 9, ¶ 11, 407 Mont. 166, 502 P.3d 689; *Bugli v. Ravalli Cty.*, 2019 MT 154, ¶ 19, 396 Mont. 271, 444 P.3d 399.

In the alternative, an abuse of discretion by a district court in a contempt proceeding is reviewable when a writ of certiorari is improper. *Jones v. Mont. 19th Jud. Dist. Ct.*, 2001 MT 276, ¶¶ 2, 15, 307 Mont. 305, 37 P.3d 682. Abuse of discretion is found where the court acted arbitrarily, unlawfully or tyrannically. *State ex rel. Middleton v. Dist. Ct.*, 85 Mont. 215, 217, 278 P. 122, 123 (Mont. 1929).

## ARGUMENT

The District Court exceeded its authority when it held OPD in contempt for failing to assign counsel within three days of OPD's appointment, as neither the District Court's three-day appointment timeline nor its distinction between "on-duty" and "assigned" counsel have any foundation in the Act. It is undisputed that OPD ensured these defendants were represented throughout their cases, which is all that Montana law requires.

Next, the District Court exceeded its authority by holding OPD in contempt where the undisputed facts demonstrate that it was impossible for OPD to comply with the District Court's order.

### **1. The District Court misinterpreted and misapplied established law.**

This Court has "long recognized that assertions of error in contempt proceedings that are not subject to review within the limited scope of certiorari review are nonetheless subject to review on supervisory control for an abuse of discretion." *Fouts*, ¶ 12; *Middleton*, 85 Mont. at 217 (finding supervisory control appropriate in a contempt case when the trial court acted tyrannically and "acted...arbitrarily" or "unlawfully"). "An abuse of discretion occurs if an exercise of discretion is based on a clearly erroneous finding of fact, erroneous interpretation or application of law, or is otherwise arbitrary, or lacking in

conscientious judgment, beyond the bounds of reason resulting in substantial injustice.” *Fouts*, ¶ 12 n. 13.

**A. OPD is not required to assign counsel within three days.**

The District Court ordered OPD to assign counsel within three days of its appointment and then held OPD in contempt when it “disobeyed” the court’s order. OPDApp139-141. The District Court grounded its order in § 47-1-104(3). Neither that statute nor any other requires an appointment within three days.

Section 47-1-104(3) provides in full:

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.

Though a court initially appoints OPD to a particular defendant, it is the director’s responsibility to establish protocols to ensure appropriate attorney assignments. *Id.*

The District Court concedes that § 47-1-104(3) “does not, as OPD points out, define the term ‘immediate.’” OPDApp141. The District Court instituted the three-day requirement based on its conclusion that three days was a “reasonable” interpretation of the word “immediate.” OPDApp140-141. Likely in recognition of the fact that this three-day standard appears nowhere in the Act, the court insisted that it “did not, as the OPD now claims, manufacture the three working day requirement out of thin air.” OPDApp140. Rather, the court located that

“requirement” in OPD’s **operational goals**, explaining that “OPD acknowledges that its operational goal is to assign counsel within three days of being ordered to do so.” OPDApp140.

It should go without saying that OPD’s internal “operational goals” have no legal effect and cannot be weaponized to impose a non-existent legal requirement on OPD as a predicate for contempt.<sup>2</sup> The Montana Public Defender Commission Practice Standards (“MPDCPS”) provide that it is a **goal** to provide incarcerated indigent defendants attorneys within three days. MPDCPS, Sec. III-2.<sup>3</sup> But the standard also provides that “[t]his standard does not create a duty of counsel to provide indigent legal representation to a person beyond those duties imposed by statutes and case law.” *Id.* (emphasis added).

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” § 1-2-101, MCA. Section 47-1-104(3) grants the director sole authority to “establish protocols to ensure that the offices make appropriate assignments in a timely manner.” Nothing in the Act suggests such assignments must be made within three working days, and the

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<sup>2</sup> The District Court did not specify its order as criminal or civil contempt, but the order bears characteristics of both. *See* § 3-1-501(3), MCA.

<sup>3</sup> <https://publicdefender.mt.gov/Resources/OPD-Practice-Standards/Practice-Standards-Index>

District Court exceeded its authority under § 1-2-101 when it arbitrarily declared the undefined term “immediate” to mean “within three working days.”

OPD strives to make assignments within three days, but that is not always possible. The District Court exceeded its authority when it pounced on OPD’s operational goal and contorted it into a legal requirement with which OPD must comply or face serial fines. This Court should reverse.

**B. There is no enforceable distinction between “on-duty” and “assigned” counsel.**

The purpose of the Act is to ensure “public defender services are delivered by qualified and competent counsel in a manner that is fair and consistent throughout the state[.]” § 47-1-102, MCA. As discussed above, § 47-1-104(3) permits a court to appoint OPD and then requires the director to “establish protocols to ensure that the offices make appropriate [attorney] assignments in a timely manner.”<sup>4</sup>

Despite this clear demarcation, the District Court arrogated to itself the power to direct how OPD assigns attorneys, relying on a distinction between “on-duty” and “assigned” attorneys that appears nowhere in the Act and then ruling

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<sup>4</sup> While this Court has not defined “timely” in assigning counsel, other jurisdictions have held that timeliness of assignment of counsel depends on the proceeding being “fundamentally unfair.” *See e.g. U.S. ex rel. Reid v. Richmond*, 295 F.2d 83, 88 (2nd Cir. 1961).

based on that distinction that only attorneys assigned “to represent the defendant throughout the case” comply with the court’s contempt order. OPDApp138-139.

The Act contains no language that would allow a court to infer a distinction between “on-duty” and “assigned” counsel, much less hold OPD in contempt for failing to abide by such a distinction. Instead, the District Court cited to *State v. Zlahn*, 2014 MT 22, ¶ 10, 376 Mont. 245, 332 P.3d 247, explaining that this Court “described OPD’s counsel who represented all defendants who appeared on the Court’s calendar that day for arraignment as the on-duty public defender.” Ex. 5, 3 n. 1. First, *Zlahn* does not support the District Court’s analysis because this Court explicitly held in *Zlahn* that OPD’s delay in assigning permanent counsel “did not give rise to a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process.” *Zlahn*, ¶ 20. Moreover, this Court’s “description” of certain OPD attorneys as “on-duty” does not constitute a distinction with legal significance to OPD under § 47-1-104.

Though the District Court did not use this precise terminology, the effect of its order is to require OPD to employ a “vertical” rather than “horizontal” staffing model. A “vertical” staffing model describes one attorney handling an entire case; a horizontal staffing model occurs where, “during various stages of the proceedings leading up to his conviction, petitioner was represented by different

attorneys from the public defender's office." *Greenfield v. Gunn*, 556 F.2d 935, 938 (9th Cir. 1977). A vertical model may well be more desirable, and OPD in fact strives for that model by way of its eventual assignment of a permanent attorney. Horizontal staffing models, however, are both legal and often necessary. As the Ninth Circuit has explained, "[t]his type of horizontal representation may at times be an inevitable result of workload and budget constraints imposed on a public defender's office." *Id.*

The Act explicitly grants the power to OPD's director to "establish protocols to ensure that the offices make appropriate assignments in a timely manner." § 47-1-104(3). The director has done precisely that, ensuring OPD first attempts to assign cases to staff attorneys, then to the Conflict Division if necessary, and then to contract counsel if necessary. But this process often – and in the case of assignment to contract counsel, almost invariably – takes longer than three days and sometimes much longer. That does not make it illegal.

The District Court acknowledged that OPD has public defenders present at all stages of the criminal process. OPDApp136. Indeed, this is the purpose of appointing OPD in the first place. Specifically, an "appointment [e]nsures that all defendants will be represented by counsel at their initial appearance before a court." *Rios v. Justice Court*, 2006 MT 256, ¶ 6, 334 Mont. 111, 148 P.3d 602. The District Court reasoned that OPD is only appointed as counsel once the district

court orders appointment under § 48-6-101(2). OPDApp136-137. Regardless of when assignment becomes necessary, however, it is undisputed that OPD provides attorneys at all relevant stages, even before appointment is noted by the court. The full benefit of public defender services has thus been provided.

The District Court exceeded its authority when it enshrined into its contempt order this Court's description of certain OPD attorneys as "on-duty" and then held further that such "on-duty" attorneys do not satisfy OPD's obligation to assign attorneys to defendants, even though the District Court conceded that the defendants were never without representation. This Court should reverse.

**2. The District Court exceeded its authority when it held OPD in contempt for "disobeying" an order with which OPD could not comply.**

The District Court's contempt order lacks foundation in law and should be reversed. Even assuming *arguendo* that the order was proper in the first instance, this Court should order that the District Court exceeded its authority when OPD presented undisputed evidence that it could not comply with the order.

OPD faces extraordinary hurdles in its pursuit to provide legal services to its clients. 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. Specifically, the Billings OPD has eight full-time vacancies in its office.

OPDApp006-007, 076. OPD's funding is inadequate to raise salaries to a level that would attract additional attorneys to these open positions and to retain current

staff. Indeed, OPD attorneys are some of the lowest paid attorneys in the state, making, on average, \$13,622 less than even other executive-agency attorneys.

OPDApp192-194.

The attorneys currently employed by OPD – including Conflict Division and contract counsel – are severely overburdened. *Id.* 19.7% of staff attorneys exceed expected full-time work hours in a year. *Id.*, 20. OPD also experiences annual attorney turnover rates of 23.9% (around 8% higher than other state agencies). *Id.*, 22. An internal audit found that excessive caseloads at OPD are a primary reason attorneys resign. These excessive caseloads negatively affect OPD’s ability to recruit new attorneys. OPDApp187-188.

Retention problems do not stop with staff attorneys. At the time of the District Court’s contempt order on November 15, 2021, OPD was only able to pay contract counsel \$56/hour, far below the market rate for Billings attorneys. OPDApp194-195. This rate has actually been **decreased** in recent years from \$62/hour. *Id.* Because of this paltry rate, OPD cannot hire the number of contract attorneys necessary to relieve the backlog of pending cases and instead must “beg” contract attorneys to take cases. OPDApp188.

Contempt is neither a remedy nor a proper sanction for circumstances acknowledged by the court to lay beyond the power of the OPD alone to alter. *Kismet Acquisition, LLC v. Diaz-Barba (In re Icenhower)*, 755 F.3d 1130, 1139

(9th Cir. 2014). The District Court rejected this truth, however, stating, “[t]hese constitutional guarantees and statutory mandates are not contingent upon the OPD’s success in securing an adequate budget or upon the OPD’s decision on how to allocate its existing funds.” OPDApp136. While constitutional rights are not contingent on OPD’s budget, OPD’s capacity to comply with the court’s contempt orders is.

This Court has already addressed situations where a defendant was held in contempt despite the inability to abide by a contempt order. In *McLean v. District Court*, 37 Mont. 485, 486, 97 P. 841, 841 (Mont. 1908), this Court ruled in response to a contempt order that the “inability to render obedience to such an order is a good defense to a charge of contempt for its violation, unless it appears that the person charged has voluntarily and contumaciously brought the disability upon himself.” Put another way, “[i]t seems hardly consonant with reason or law to punish a man for not doing that which he has not the ability to do.” *Nixon v. Nixon*, 15 Mont. 6, 8, 37 P. 839, 840 (Mont. 1894).

*Fouts* provides more recent precedent. There, a district court ordered the Montana Department of Public Health and Human Services (“MDPHHS”) to take custody of a criminal defendant. *Id.*, ¶ 2. MDPHHS advised the court that it did not have bed space for the defendant and could not accept custody of her. *Id.* The court then held a show-cause hearing and found MDPHHS in contempt. *Id.*, ¶ 3.

MDPHHS submitted unsworn facts regarding the reasons it could not admit the defendant, including finite resources. *Id.* Even though these facts were unsworn, the trial court did not dispute them in its findings of fact. *Id.*

Although it acknowledged that MDPHHS's unsworn testimony did not constitute evidence, this Court held "[n]onetheless, a court still may not impose a coercive civil sanction unless the subject act is in the power of the contemnor to perform." *Id.*, ¶ 15 (quotations omitted). Because there was no competent evidence bearing in either direction – i.e., “whether MDPHHS was able or unable to comply with the subject orders” – the contempt order was improper “whether viewed as an act beyond the court’s authority without substantial evidence for purposes of certiorari review, or an abuse of discretion within the court’s authority for purposes of supervisory control.” *Id.*

This Court’s reasoning in *Fouts* applies with even greater force here, where OPD submitted sworn and entirely unrefuted testimony that it could not comply with the District Court’s order to assign permanent counsel within three working days in every case. The District Court does not dispute that OPD lacked the ability to comply with the contempt order. OPDApp135-136. Yet the court conflated constitutional rights of criminal defendants with OPD’s ability to comply with the court’s contempt order to immediately assign attorneys in all cases. *See id.*

OPD shares the District Court’s commitment to the constitutional rights of Montana defendants, but that does not change the undisputed reality that OPD does not have the resources necessary to comply with the contempt order, to say nothing of the frequent situations where conflicts (rather than a lack of resources) require OPD to engage in the often lengthy process of locating suitable contract counsel. Furthermore, fining OPD for “disobeying” the order becomes a “Catch-22” absurdity when a lack of funding is the primary reason OPD could not comply with the order.

Contempt is not appropriate where the contemnor lacked the ability to comply with the order in the first instance. The District Court exceeded its jurisdiction when it held OPD in contempt for failing to follow an order the court knew OPD could not follow.

**3. Law of the case has no application here.**

The District Court cited “law of the case” as the basis for its assertion that OPD cannot challenge the basic legality of the contempt order. OPDApp139. This reasoning is wrong. The court’s two contempt orders pertained to completely different criminal cases, with different case histories, different defendants, and different procedural paths. There is no “law of the case” respecting the seventeen defendants affected by the most recent order, and there could not be because, until the December 20, 2021, hearing, OPD had not addressed these cases and had not

had the opportunity to show cause why it should not be held in contempt. OPD made that showing on December 20, 2021, establishing beyond doubt that it had discharged its statutory obligations to assign counsel “immediately” in all cases. Furthermore, law of the case has been rejected by this Court in similar circumstances. *See State v. Spady*, 2015 MT 218, 380 Mont. 179, 354 P.3d 590.

Although inapplicable, the District Court’s “law of the case” argument is nonetheless important as a clear demonstration of the court’s abuse of its contempt power. By imposing a “law of the case” in its second order, the court demonstrates that it does not matter what proof OPD presents. Rather, the court is set on the course it established in its first contempt order of serially holding OPD in contempt and thereby imposing the functional equivalent of a per diem penalty on OPD until OPD either complies with the court’s arbitrary interpretation of 47-1-104(3) (which OPD indisputably cannot do) or runs out of funds to pay the serial fines. *Fouts*, ¶ 16.

### **CONCLUSION**

The District Court’s February 2, 2022, contempt order should be reversed for several reasons as set forth above. The order contravenes Montana law in multiple respects; OPD would not have the ability to comply with it even if it were legal; and OPD has ensured that defendants to whom it has been appointed are

represented by counsel at all times. The District Court acted arbitrarily and in disregard of clear Montana law when it found to the contrary.

Respectfully submitted on March 18, 2022,

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## **CERTIFICATE OF COMPLIANCE**

I certify that this response is printed with proportionally spaced Times New Roman typeface of 14 points; is double-spaced except footnotes and block quotes; and contains 3,899 words or fewer excepting captions, signatures, tables, and certificates.

By: /s/ Peter F. Habein  
Peter F. Habein

## **CERTIFICATE OF SERVICE**

I, Peter Habein, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 03-18-2022:

Montana Thirteenth Judicial District Court (Respondent)  
217 N 27th Street  
PO box 35029  
Billings MT 59101  
Representing: Self-Represented  
Service Method: E-mail Delivery

Electronically signed by Tess Sorenson on behalf of Peter Habein  
Dated: 03-18-2022