IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 22-0139

RHONDA LINDQUIST and OFFICE OF STATE PUBLIC DEFENDER

Petitioners,

v.

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, HON. DONALD HARRIS

Respondents.

BRIEF OF *AMICI CURIAE* THE ACLU OF MONTANA FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, Cause N. SB-2021-1,
The Honorable Donald L. Harris Presiding.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union Foundation ("ACLU") and the state affiliate, American Civil Liberties Union Foundation of Montana ("ACLU-MT"), are non-partisan organizations committed to supporting and protecting civil liberties. *Amici* have a long, extensive history of advocating for effective representation of criminal defendants, ensuring that public defense systems effectively implement the right to counsel, and supporting those whose constitutional rights have been violated within the criminal justice system.

INTRODUCTION

"[B]y promoting the integrity and accuracy of the government's law enforcement operations, a robust public defender system not only protects the rights of indigent defendants, but also helps to increase public safety, to avoid the costs of wrongful convictions, and to protect the constitutional rights of all of [Montana's] residents. And where the public defender system fails to fulfill its mission due to inadequate funding, that failure not only undermines the constitutional rights of indigent defendants, but indirectly injures us all." *Carrasquillo v. Hampden Cnty. Dist. Cts*., 142 N.E.3d 28, 54 (2020).

ARGUMENT

I. Montana Has Long Resisted and Neglected its Obligation to Ensure that the Right to Counsel Exists for Everyone.

The current controversy arising out of Yellowstone County is emblematic of Montana's halfhearted commitment to upholding the constitutional right to counsel and reflects the longstanding fragility of our public defense system. This controversy is neither unique nor isolated. Amici urge the Court to consider this case within the larger context of Montana's checkered history of public defense.

A. The ACLU Had to Sue Montana for it to Establish the Office of Statewide Public Defender

Twentieth century public defense in Montana was a hodge-podge of county-administered programs utterly lacking in uniform quality, standards, or accountability. The counties designed and administered their own public defense programs and were reimbursed by the state for services rendered. The state, however, failed to set standards for the provision of services, failed to exercise any supervision to ensure that the counties' programs met constitutional standards, and failed to adequately fund the county programs. As far back as 1976, the National Center for Defense Management identified numerous deficiencies with Montana's county-based system.[1] In 1981, in an overwhelmingly bipartisan vote, the Montana

[1] National Center for Defense Management, a project of the National Legal Aid & Defender Association; *Montana Statewide Defender Systems Development Study*, 1976, p. 15.

Legislature passed a joint resolution finding that "the constitutional requirement of the effective assistance of counsel for persons accused of crimes had not been achieved consistently on a statewide basis."[2] Despite this knowledge, the Legislature failed to take any significant remedial action and, in the meantime, the problem only got worse.

On February 14, 2002, the ACLU filed suit against the State of Montana and seven of its counties alleging a failure to adequately fund and supervise county public defense programs. *White v. Martz*, Cause No. DV-2002-133 (Montana First Judicial District, Lewis and Clark County, 2002). The lawsuit alleged that the state had abdicated its constitutional duty to ensure effective counsel for the poor by delegating the design and administration of those programs to its counties, without sufficient funding or guidance. Due to the lack of state oversight, county programs were plagued by a number of deficiencies, including: a virtual absence of adversarial advocacy; high attorney caseloads; the inability of lawyers to meaningfully confer with their clients or to develop a defense; lack of investigatory and expert services; excessive plea bargaining and unnecessary pre-trial incarceration.

Ultimately, the parties entered into a settlement, agreeing that "a properly funded state-wide public defender system with sufficient administrative and

[2] https://courts.mt.gov/external/leg/bills/1981/senate/joint/SJR02.pdf

financial resources is necessary to ensure that indigent criminal defendants receive constitutionally and statutorily adequate legal representation." Stipulation and Order of Postponement of Trial, *White v. Martz*, Cause No. C DV-2002-133 (Montana First Judicial District, Lewis and Clark County, 2004).

In 2005, as a result of the settlement agreement, the Montana Legislature passed Senate Bill 145, the Montana Public Defender Act ("the Act"), and our modern system of public defense was born. The Act established a statewide public defender system staffed by "qualified and competent counsel" and supported by "adequate public funding." § 47-1-102, MCA. While the Act represented an enormous step towards Montana fulfilling its constitutional duty, in many respects its promises remain unmet.

B. Montana's Political Branches Undermined the Potential of the Public Defender Act by Failing to Adequately Fund the System.

Despite the settlement in *White* and passage of the Act, the *White* plaintiffs remained concerned that insufficient funding would thwart implementation of the new system. Memorandum and Order on Motions to Dismiss, *White v. Martz*, Cause No. C DV-2002-133 (Montana First Judicial District, Lewis and Clark County, 2006). Those concerns were prescient. The Office of the State Public Defender (hereinafter "OPD" or "agency") is a vast improvement over Montana's

old county-by-county approach, but it has been plagued by chronic underfunding since its beginning.

Nearly every biennium, OPD has had to seek "supplemental" funding from the Legislature outside of the typical appropriations process.[3] Supplemental funding is a legislative mechanism by which an agency that has overspent its budget can ask for additional funding to complete the fiscal year. This long-simmering crisis culminated in 2015, when the Legislature stripped away the agency's entire base budget in favor of one-time funding. As a result, in 2016 OPD projected a deficit of between $2.5 and $3.5 million for fiscal year 2017.[4] This deficit forced the agency to implement a draconian cost saving plan involving hiring freezes and rate reductions for contract attorneys.[5]

Today, Montana's public defenders routinely represent more defendants than the maximum caseloads recommended by the National Advisory Commission on Criminal Justice Standards and Goals,[6] which is the only national caseload standard for public defense that currently exists. In fiscal year 2019, for example,

[3] https://publicdefender.mt.gov/_docs/GovernorsReport/2021/Directors-Letter-FY-2021-Annual-Report.pdf
[4] https://www.mtpr.org/montana-news/2017-02-14/budget-cuts-will-cripple-montanas-already-overburdened-public-defenders-attorneys-say
[5] *Id;* https://www.greatfallstribune.com/story/news/crime/2018/06/11/budget-cuts-state-public-defenders-office-threaten-2019-shutdown/642076002/
[6] https://www.nlada.org/defender-standards/national-advisory-commission/black-letter

eight out of the fourteen OPD regions reported staff exceeding recommended caseloads.[7] Excessive caseloads are an insurmountable problem for public defenders, no matter how skilled or hardworking individual attorneys may be. As one expert has explained, "[w]hen caseloads are excessive, indigent defendants are at serious risk of harm. The predicament is much like a cardiologist who must complete 10 surgeries every day. At first the cardiologist will try to take the necessary time with each patient, extending the day to try to perform at a top level despite incredible time constraints. But eventually she will have no choice but to cut corners. The care of certain patients will be sacrificed to create more time for others."[8]

OPD has reported that there is an "increased backlog of open and active cases… leading to longer assignment times in parts of the State."[9] The pandemic has only exacerbated the situation, "as it has both expanded the number of individuals eligible for OPD representation while simultaneously increasing pressure on the Agency's ability to recruit and retain both [full-time employees] and contractors."[10] Recruitment and retention is a persistent and worsening

[7] *Performance Audit*; *Public Defender Workforce Management*, Office of the State Public Defender, September 2020, p. 21.
[8]https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_pub_def_2019_fall_caseloads.pdf
[9] https://publicdefender.mt.gov/_docs/GovernorsReport/2021/Directors-Letter-FY-2021-Annual-Report.pdf
[10] *Id.*

problem for OPD, as public defenders are paid many thousands of dollars less than other state attorneys in comparable roles. Office of State Public Defender's Petition for Writ of Certiorari, Cause No. OP 22-139, OPDApp.192-194.

On top of the challenges OPD faces representing its own clients, it has become increasingly difficult for OPD to find contract attorneys willing to take cases when OPD is conflicted out. Compensation rates for contract public defenders have stagnated in the last decade and failed to keep pace with rising costs of living. *Id.*, OPDApp.194-195. Recently, a group of private contract attorneys refused to take additional conflict cases from OPD because the state was paying them lower rates ($56/hour) than it pays attorneys in other counties.[11] This contract attorney rate has actually decreased from $62/hour. OPDApp. 194-195. Even in those counties with the highest hourly rate for contract attorneys, pay remains well below the market rate. For example, the rate paid to federal bar advocates under the Criminal Justice Act was $90 in 2005 and incrementally increased every 1 to 3 years to its current rate of $148.[12] This disparity disincentivizes attorneys from representing indigent clients in state court.

[11] *Id;* https://helenair.com/news/state-and-regional/govt-and-politics/group-of-contract-attorneys-refuse-new-assignments-in-pay-dispute/article_b0982e9b-7f6c-50c2-abf6-6efe1cfcbf8a.html
[12] *See* Guide to Judiciary Policy, Vol. 7: Defender Services § 230.16(A) (May 2019), *available at* https://www.uscourts.gov/sites/default/files/vol07a-ch02.pdf, add. 79-84.

Thus, since OPD's inception, the Legislature has persistently undermined its own creation: Montana's public defense system cannot achieve its promise without appropriate funding.

C. An Ever-Expanding Criminal Legal System Compounds the Problem of Insufficient Funding for Public Defense

Between 1980 and 2016, Montana's prison population increased by 416 percent.[13] As of 2019, there were 2,706 people in Montana state prisons, and in 2015 more than 2,000 additional people were held in county jails across the state.[14] In 2015, nearly one in five people entering Montana's prisons were admitted for a drug offense, 67 percent of which were possession offenses.[15] Between 2008 and 2018, admissions to the state's prisons increased by 24 percent, while releases from prison increased by only 18 percent.[16] The national average rate of state imprisonment dropped by 7 percent between 2000 and 2016, while Montana's rate of imprisonment increased by 6 percent.[17]

Hundreds of people—462 people in 2017—are incarcerated each year in Montana for technical or compliance violations of probation or parole.[18] Many are

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[13] https://50statesblueprint.aclu.org/states/montana/# (citing Bureau of Justice Statistics (BJS), Corrections Statistical Analysis Tool.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] ACLU of Montana, Set Up to Fail: Montana's Probation & Parole System, https://www.aclumontana.org/sites/default/files/field_documents/setuptofailmontanasprobationparolesystem.pdf, p. 6.

caught in the system as a result of an inability to pay fees and costs associated with bail and pretrial release programs, rather than any deliberate noncompliance with court orders. Put plainly, these individuals are incarcerated because they are poor.

The current crisis in Yellowstone County is therefore unsurprising. The system has buckled under pressure from years of underfunding and understaffing, coupled with a steady increase in the need for public defense, and a Legislature uninterested in zealously protecting the right to counsel. The court below understood that OPD is unable to immediately assign public defenders because of budget and funding issues, extremely high caseloads, and difficulty attracting and retaining attorneys. The crisis in Yellowstone is not an outlier: it is the latest and most public manifestation of a statewide system in long-term crisis.

II. This Court Can and Should Exercise its Authority to Protect the Right to Counsel in Montana

A. Only Systemic Solutions Can Remedy Systemic Constitutional Failures

This matter is before the Court because Montana's political branches of government have failed to ensure that all Montanans' right to counsel is protected. The parties are both in an impossible situation. OPD may not take more cases than its office can competently handle. If it does, it will create an ethical conflict: in order for one client to be effectively represented, another client's case must be neglected. *See,* Mont. R. Prof'l. Conduct. 1.3. Meanwhile, Judge Harris is trying to prevent indigent criminal defendants from going unrepresented and facing a grave

violation of their constitutional rights. This is not a crisis of the parties' making, and neither party has the power to address the underlying causes of systemic deficiencies throughout Montana. But this Court does have the power to ensure the right to counsel in Montana is a reality. This Court can order meaningful systemic remedies: it should seize this opportunity to protect the rights of Montanans and the integrity of the state's criminal legal system.

In jurisdictions across the country, courts have concluded that when public defense systems are failing, it is proper to order prospective systemic relief. These courts recognize that systemic constitutional crises cannot be resolved through retroactive case-by-case adjudication. And the United States Department of Justice ("DOJ") agrees. Faced with a longstanding systemic failure, this Court, too, should order relief commensurate with the widespread scope of the problem.

The Supreme Court of Idaho has twice acknowledged that systemic failures in public defense justify systemic remedies. In *Tucker v. State*, the court concluded that a putative class of indigent criminal defendants could challenge deficiencies in the public defense system and seek systemic, rather than individual, relief. 394 P.3d 54, 62-63 (Idaho 2017). Several years later, the court reaffirmed this conclusion. It held that systemic relief is available where systemic failures are proven by a preponderance of the evidence and that "structural evidence, such as statistics and national standards can [] be probative of the existence of systemic

denials of counsel and may suffice." *Tucker v. State,* 168 Idaho 570, 585 (Idaho 2021). Similarly, the highest court in New York concluded that prospective injunctive relief is available to remedy systemic violations of the right to counsel. *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010). The Pennsylvania Supreme Court has also "recognized the viability of a cause of action for prospective injunctive relief" for a failing public defense system. *Kuren v. Luzerne Cnty*, 146 A.3d 715, 749 (2016). *See also Carrasquillo*, 142 N.E.3d 28, 36 (faced with a crisis in a single county, the Massachusetts Supreme Judicial Court "outlin[ed] a process through which" the public defender in any county throughout the state "who oversees a court affected by [a public defender] shortage, may seek to trigger" a remedy).

In Washington, a federal district court concluded that systemic remedies are an appropriate response to a failing public defense system, explaining that "[w]here official government policies trample rights guaranteed by the Constitution, the courts have not hesitated to use their equitable powers to correct the underlying policies or systems." *Wilbur v. City of Mount Vernon*, No. 2:11-CV-1100, 2012 WL 600727 at *3 (W.D. Wash. Feb. 23, 2012). And indeed, the court in *Wilbur* later entered a continuing injunction against municipalities for systemic deprivations of the right to counsel. *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1133- 1137 (W.D. Wash. 2013).

DOJ agrees that courts should fashion holistic remedies when public defense systems are failing. DOJ has stated unequivocally that systemic remedies are "critical to protecting the fundamental right that *Gideon* recognized." *Tucker,* 394 P.3d 54 (Idaho 2017), U.S. *Amicus* Br. at ¶ 2.[19] Moreover, in DOJ's view, individual "[p]ost-conviction claims cannot provide systemic structural relief that will help fix the problem of under-funded and under resourced public defenders." *Kuren*, 146 A.3d 715 (2016), U.S. *Amicus* Br. at 20.[20] *See also Wilbur*, 989 F. Supp. 2d 1122, U.S. SOI at 1-4.[21] Consistent with these authorities, this Court should address widespread right to counsel violations with system-level interventions.

B. The Right to Counsel Requires States to Spend Money to Adequately Fund Public Defense.

Providing counsel to indigent defendants costs money, and federal and state constitutions require governments to spend it. When legislatures fail to adequately fund public defense systems, courts have a critical role to play in forcing the appropriation of funds necessary to uphold the Constitution. The Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and this Court's cases interpreting Article II, Section 24, require legislatures to act as is necessary,

[19] https://www.in.gov/publicdefender/files/Tucker-v.-State-of-Idaho-DOJ-Statement-of-Interest.pdf
[20] https://www.justice.gov/opa/file/769806/download
[21] https://www.justice.gov/sites/default/files/crt/legacy/2013/08/15/wilbursoi8-14-13.pdf

including by appropriating adequate funds, to ensure the right to counsel for indigent defendants. *See State v. Schneider*, 2008 MT 408, ¶ 17, 347 Mont. 215, 197 P.3d 1020 (concluding that "the right to counsel under the Montana Constitution is … consistent with the right provided by Sixth Amendment."). In *Gideon*, the Supreme Court held that states have an affirmative obligation to provide counsel to indigent defendants. 372 U.S. at 344. This is nothing less than a command that states, including Montana, spend the money necessary to pay for the defense of the many poor people who are criminally prosecuted.

States cannot shirk this command by prosecuting *so many* poor people that providing them with lawyers becomes too expensive. According to one estimate, near the time *Gideon* was decided, the indigency rate for state felony cases was 43%; by 2006, approximately 80% of people charged with crimes were poor.[22] This trend toward prosecuting increasing numbers of poor people does not render *Gideon* optional. So long as people experiencing poverty remain entrenched in the criminal legal system, *Gideon* requires that public defender and private counsel systems have enough resources to effectively defend them.

State supreme courts have acknowledged that the right to counsel requires states to expend the funding necessary to provide indigent defense counsel, and

[22] *See* Paul Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 Yale L.J., 2176, 2181 (2013), add. 123-51.

that courts must serve as a backstop to underfunded systems. *See, e.g.*, *Kuren v. Luzerne Cnty*, 637 Pa. 33, 94 (2016) (the level of funding provided has left the public defender's office unable to comply with *Gideon* thus violating the Sixth Amendment); *Hurrell-Harring*, 930 N.E. 2d at 224 (recognizing a Sixth Amendment claim for government's failure to provide counsel to indigent defendants at all critical stages due in part to inadequate funding); *Simmons v. State Pub. Defender*, 791 N.W.2d 69, 87 (Iowa 2010) (recognizing that a fee cap can undermine the right to counsel); *State v. Young*, 143 N.M. 1, 7 (2007) ("Defense counsels' compensation is inadequate . . . violating defendants' Sixth Amendment right to effective assistance of counsel.").

In *Kuren*, the Pennsylvania Supreme Court considered a claim for injunctive relief asserted by a county public defender's office and a class of defendants to whom the office could not provide representation due to inadequate funding. The complaint alleged that the county's failure to provide adequate funding to the public defender had resulted in widespread constructive denial of the right to counsel. Noting that the denial of the right was tied inexorably to the funding system itself, the court "recognized the viability of a cause of action for prospective injunctive relief seeking additional funding" for a failing public defense system. 637 Pa. at 90.

In *Hurrell-Harring*, the highest court in New York explained that "enforcement of a clear constitutional or statutory mandate is the proper work of the courts," even if the remedy necessary to enforce the right "would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities." 930 N.E.2d at 227. Notwithstanding these implications, courts have an "essential obligation to provide a remedy for violation of a fundamental constitutional right." *Id.* (citing *Marbury v. Madison*, 5 U.S. 137, 147 (1803)).

Similarly, a New York trial court held in *N.Y. Cnty Lawyers' Ass'n v. State*, that the state's failure to increase the rates paid to private indigent defense counsel violated the right to counsel because it caused the systemic denial of the right. 196 Misc. 2d 761, 762-63 (N.Y. Sup. Ct. 2003). As a remedy, the court declared the portions of the public defender statutes fixing the rates unconstitutional as applied and entered a permanent injunction raising the compensation rates so that they matched the rates paid to assigned counsel in federal courts until the legislature addressed the issue. *Id.* at 778. *See also Wilbur*, 989 F. Supp. 2d at 1131, 1134-35 (finding systemic flaws in municipal public defense systems and ordering injunctive relief including a reevaluation of existing public defense contacts and the hiring of a new public defense supervisor).

In short, providing the funding necessary to ensure representation of indigent

criminal defendants is nondiscretionary. The Sixth Amendment and Article II, Section 24 require state governments to adequately fund public defense.

C. This Court's Precedent Establishes that it May Review Legislative Funding Decisions and Determine Whether Funding Systems are Constitutionally Adequate.

This Court has previously concluded that it can intervene when the Legislature inadequately funds a system created to implement a constitutional right. In *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, the Court considered a case challenging the adequacy of the state's funding for Montana's constitutionally-required system of free quality public education. 2005 MT 69, 326 Mont. 304, 109 P.3d 257. In that case, the Court decided a number of issues, three of which are relevant here and demonstrate that this Court must ensure that the state's constitutionally-required system of public defense is adequate.

First, the Court held that the adequacy of the state's education funding system did not present a non-justiciable political question, even though one of the two constitutional provisions at issue was non-self-executing. *See* Article X, Section 1(3)). The Court held that "[a]s the final guardian and protector of the right to education, it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right." *Id.*, ¶ 19. Unlike the right to a "quality education," the right to counsel is wholly self-executing, making it even

clearer than it was in *Columbia Falls* that it is this Court's proper role to ensure that the state's public defense system is constitutionally adequate.

Second, even while "defer[ring] to the Legislature as to what constitutes 'quality'" under the state constitution, the Court articulated "what the Constitution demands of the Legislature and what the Legislature must do to fashion a constitutional education system." *Id.*, ¶¶ 22, 28. On this point, the Court directed that "[u]nless funding relates to needs such as academic standards, teacher pay, fixed costs, costs of special education, and performance standards, then the funding is not related to the cornerstones of a quality education." *Id*., ¶ 26. Here, the Court should similarly articulate what the Legislature must do to fund a constitutional public defense system. At a minimum, this Court should clarify that the Legislature must base its funding for the public defense system on (1) attorney "workload[s] [that are] controlled to permit the rendering of quality representation"[23] by each attorney for every assigned client, [24] and (2) a pay scale that ensures public defense providers are lawyers who have the necessary skill, knowledge, and experience to effectively

[23] ABA Ten Principles of a Public Defense Delivery System, Principle 5, https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

[24] Although OPD's funding is insufficient to represent all the indigent defendants who qualify for appointed counsel, the Legislature recognizes that the office cannot represent an unlimited number of clients. *See* § 47-1-105(b),(c), MCA (requiring that the Director of OSPD "shall establish… acceptable caseloads and workload monitoring protocols to ensure that public defender workloads are manageable," and "shall … establish policies and procedures for handling excess caseloads"); § 47-1-202(c), MCA (requiring the Public Defender Division Administrator to "establish procedures for managing caseloads").

serve their clients.[25] Unlike in *Columbia Falls,* the constitution does not call on the Legislature to define what "quality" right to counsel means—the contours of the right to counsel are more squarely within the Court's expertise than the contours of the right to a "quality education." Accordingly, the Court should articulate "what the Constitution demands of the Legislature" in this context. *Id.*, ¶ 28.

Third, the Court in *Columbia Falls* "address[ed] the educational product that the present school system provides," and concluded "that whatever legitimate definition of quality that the Legislature may devise, the educational product of the present school system is constitutionally deficient and that the Legislature currently fails to adequately fund Montana's public school system." *Id*., ¶ 28. The Court relied on evidence such as "school districts increasingly budgeting at or near their maximum budget authority; growing accreditation problems; many qualified educators leaving the state to take advantage of higher salaries and benefits offered elsewhere; [and] the cutting of programs." *Id.*, ¶ 29. Similarly, here the evidence demonstrates that current funding for the public defense system is inadequate. Office of State Public Defender's Petition for Writ of Certiorari, Cause No. OP 22-139, p. 12-13.

[25] ABA Ten Principles, Principle 6 ("Defense counsel's ability, training, and experience match the complexity of the case"); Principle 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.").

After concluding that the Legislature had failed to create an adequate system for prospective funding and was presently failing to adequately fund the state's education system, this court "referred the matter to the Legislature for reform of the system." *Stroebe v. State*, 2006 MT 19, ¶¶ 15-16, 331 Mont. 23, 127 P.3d 1051 (describing the Court's decision and order in *Columbia Falls*). And, in the wake of the *Columbia Falls* decision, the Legislature acted, adopting § 20-9-309, MCA (defining a basic system of free quality education and setting forth a funding formula). Given that the Court owes less deference to the Legislature on effectuating the right to counsel than the right to education, Amici respectfully urge this Court to similarly refer these funding inadequacies to the Legislature for reform.[26] In the event the Legislature still refused to act, this court could justifiably exercise its "[i]nherent judicial power to compel funding." *Butte-Silver Bow Loc. Gov't v. Olsen*, 228 Mont. 77, 80, 743 P.2d 564, 566 (1987); *see also Gallatin Cnty. v. Montana Eighteenth Jud. Dist. Ct.*, 281 Mont. 33, 42, 930 P.2d 680, 686 (1997) (affirming two-part test needed to compel funding: an emergency and failure of the established methods for providing funding).

[26] Amici recognize that the parties in *Columbia Falls* raised these issues directly and created an extensive record in the district court. The parties in this matter raise a more discrete legal question and have not developed the same type of record below. Nonetheless, Amici urge this Court to consider the broader issues that led to the current dispute. Waiting for these same issues to come before the Court in a different posture will merely delay the resolution of this longstanding statewide crisis and allow additional erosion of the right to counsel.

D. This Court Can Immediately Mitigate the Crisis and Protect Montanans' Right to Counsel

Amici assert that there is an urgent need to resolve the public defense crisis in Montana, but also recognize that a holistic solution cannot be implemented overnight. Nonetheless, this Court can use its rulemaking authority to immediately ensure that individuals' constitutional rights are upheld.

Article VII, Section 2(3) of the Montana constitution grants this Court the authority to "make rules governing … practice and procedure for all other courts." *See Coate v. Omholt* (1983), 203 Mont. 488, 504, 662 P.2d 591, 600 (stating that "without question, Art. VII, § 2(3) vests in the Supreme Court the authority to adopt rules for appellate procedure and trial and appellate procedures 'for all other courts.'"). Relying on this authority, the Court should issue an emergency rule for district courts and courts of limited jurisdiction that requires the dismissal of criminal charges without prejudice when the court orders assignment of counsel and the existing public defense system cannot immediately provide counsel who have the time and expertise to effectively represent the accused. *See e.g., Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228, 247-49 (2004); *Carrasquillo*, 142 N.E.3d 28 (reaffirming and adopting implementation plan for *Lavallee* remedy).

Finally, economic pressures cannot negate constitutional mandates. If Montana is unable or unwilling to adequately fund indigent defense, it cannot

continue to prosecute the same volume of criminal cases. Indeed, Amici assert that a sustainable public defense system likely requires a more modest criminal system in Montana. Montana's criminal code and the Municipal Code of Billings reflect an overreliance on criminalization.[27] On any given day, a review of the Yellowstone County jail roster reveals a stark image of the reality of incarceration in Montana.[28] For instance on May 19, 2022, there were approximately 530 individuals incarcerated at the Yellowstone County detention center.[29] Dozens of these individuals were incarcerated for non-violent misdemeanor offenses.[30]

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[27] *See e.g.,* Billings Municipal Code Sec. 3-202 ("Prohibited Acts"); Sec. 3-304(a)-(e) ("Topless, bottomless prohibited"), Sec. 18601-18605 (curfew provisions for minors); Sec. 18-701 (loitering or prowling), Sec. 18-702. (prostitution loitering), Sec. 18-906. (improper labeling and tracking of alcoholic kegs), Sec. 18-1001 et seq. (commercial solicitation, aggressive solicitation), Sec. 18-1104(a) (prohibited graffiti acts), Sec. 18-1110 (graffiti removal failure to comply), Sec. 18-1204 (social hosts failure to prevent underage drinking), Sec. 22-101 (painting, writing on sidewalks) Sec. 22-102 (spitting on sidewalks); Sec. 24-1002. – (failure to appear for traffic violation); Sec. 27-1704 (zoning violations). *See also* § 45-7-301, MCA (resisting arrest), § 45-8-101, MCA (disorderly conduct), § 45-8-113, MCA (creating a hazard), § 45-8-114, MCA (failure to yield party line), § 45-8-115, MCA (illegal posting of state and federal land), § 45-8-116 MCA (funeral picketing – penalties), § 45-8-201, et seq., MCA (obscenity), § 45-8-215, MCA (desecration of flags), § 45-9-102, MCA (criminal possession of dangerous drugs), § 45-9-107, MCA (criminal possession of precursors to dangerous drugs), § 45-9-110, MCA (criminal production or manufacture of dangerous drugs), § 45-9-115, MCA (criminal manufacture of imitation dangerous drug – penalty), § 45-9-121, MCA (criminal possession of toxic substance – penalty), § 45-9-127, MCA (carrying dangerous drugs on train – penalty), § 45-10-103, MCA (criminal possession of drug paraphernalia), § 45-10-104, MCA (Manufacture or delivery of drug paraphernalia), § 45-10-106, MCA (advertisement of drug paraphernalia).
[28] available at Welcome to Yellowstone County, MT - Detention Center Search Listing (yellowstonecountymt.gov)
[29] *Id.*
[30] *Id.*

Limiting the behaviors subject to criminal penalties would in turn result in the public defense system needing fewer resources to operate constitutionally.

CONCLUSION

Amici respectfully urge this Court to:

(1) Declare the that current system for public defense funding and the current funding levels are inadequate to enforce, protect, and fulfill the right to counsel;

(2) Refer the funding inadequacies to the Legislature for reform with instruction that funding must be tied to reasonable attorney workloads and a pay scale that ensures OPD can recruit and retain qualified lawyers; and

(3) Order supplemental briefing from the parties and all Amici in this matter seeking input on emergency rules this Court might promulgate, including requiring all district courts and courts of limited jurisdiction to dismiss criminal charges without prejudice when the existing public defense system cannot immediately provide counsel who have the time and expertise to effectively represent the accused.

Respectfully submitted this 25th day of May, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify this Opening Brief is printed with a proportionately spaced Times New Roman typeface in 14 point font, is double spaced, and the word count calculated by the word processing software does not exceed 4998 words, excluding the cover page, tables, and certificates.

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