

1 Ronald F. Waterman
GOUGH, SHANAHAN, JOHNSON & WATERMAN
2 33 South Last Chance Gulch, Suite 1
Helena, MT 59624-1715
3 (406) 442-8560
4 Beth Brenneman
AMERICAN CIVIL LIBERTIES UNION OF MONTANA
5 Robin L. Dahlberg
6 E. Vincent Warren
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
7 Julie A. North
8 CRAVATH, SWAINE & MOORE
9 Attorneys for Plaintiffs.

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10 MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

11 LARRY WHITE, CANDACE BERGMAN, DAVID
12 CHASE, MICHAEL SHIELDS, KENNETH
SELLARS, CAROL HOMEGUN, MICKEY
13 McDONOUGH, KENNETH INGRAHAM,
WINCHESTER WISEMAN, MICHELLE FORD,
14 ROBERT ARMSTRONG, GARY ACKERMANN,
DANIEL FINLEY, CHRIS KOWITZ, and JUSTIN
15 CLONINGER,
16 Plaintiffs,
17 v.
18 GOVERNOR JUDY MARTZ;
19 SUPREME COURT ADMINISTRATOR RICK
LEWIS;
20 APPELLATE DEFENDER COMMISSIONERS
21 TODD HILLIER, DOROTHY McCARTER,
BEVERLY KOLAR, MICHAEL SHERWOOD, and
22 RANDI HOOD;
23 the BOARDS OF COMMISSIONERS OF
MISSOULA, GLACIER, TETON, FLATHEAD,
24 LAKE, and RAVALLI COUNTIES;
25 BUTTE-SILVER BOW COUNTY CHIEF
EXECUTIVE JUDY JACOBSON;
26 MISSOULA COUNTY COMMISSIONERS
27 BARBARA EVANS, BILL CAREY, and JEAN
CURTISS;
28

No. C DV-2002-133

AMENDED
COMPLAINT

1 GLACIER COUNTY COMMISSIONERS ALLAN
2 LOWRY, WILLIAM ICENOGGLE, and RAYMOND
3 SALOIS;

4 TETON COUNTY COMMISSIONERS R.F. SAM
5 CARLSON, MARY SEXTON, and ARNIE GETTEL;

6 DISTRICT COURT JUDGE MARC BUYSKE;

7 FLATHEAD COUNTY COMMISSIONERS DALE
8 WILLIAMS, HOWARD GIPE, and ROBERT
9 WATNE;

10 LAKE COUNTY COMMISSIONERS MIKE
11 HUTCHIN, BARRY BAKER, and DAVE STIPE; and

12 RAVALLI COUNTY COMMISSIONERS JACK
13 ATTHOWE, ALAN THOMPSON, and BETTY
14 LUND;

15 Defendants.

16 Plaintiffs Larry White, Candace Bergman, David Chase, Michael Shields,
17 Kenneth Sellars, Carol Homegun, Mickey McDonough, Kenneth Ingraham, Winchester
18 Wiseman, Michelle Ford, Robert Armstrong, Gary Ackermann, Daniel Finley, Chris Kowitz,
19 and Justin Cloninger ("plaintiffs"), on behalf of themselves and all others similarly situated,
20 by and through the undersigned counsel, upon knowledge with respect to their own acts and
21 on information and belief as to other matters, allege as follows:

22 **I. INTRODUCTION**

23 1. Plaintiffs bring this civil rights class action to remedy Montana's failure to
24 provide constitutionally and statutorily adequate legal representation to indigent adults with
25 criminal cases pending in the district courts in Butte-Silver Bow, Missoula, Glacier, Teton,
26 Flathead, Lake, and Ravalli Counties (the "Counties"). This failure deprives, or threatens to
27 deprive, plaintiffs of rights guaranteed to them by the Sixth and Fourteenth Amendments to
28 the United States Constitution, Sections 4, 17, and 24 of Article II of the Montana
Constitution, and other provisions of state law.

1 2. The Bill of Rights of the United States Constitution guarantees the right of
2 the accused "to have the assistance of counsel for his defense". In 1963, the United States
3 Supreme Court held in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that the Sixth and
4 Fourteenth Amendments require states to provide counsel, free of cost, to indigent persons
5 charged with felony wrongdoing by the state. The Declaration of Rights of the Montana
6 Constitution, section 24, similarly guarantees the right of the accused "to appear and defend
7 in person and by counsel". The right to counsel requires effective assistance of competent
8 counsel. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *State v. Rose*, 187 Mont.
9 74, 86 (1980).

10 3. Montana has delegated partial responsibility for the provision of indigent
11 defense services to its 56 counties. Pursuant to state law, the counties design and administer
12 their own indigent defense programs. The State then reimburses the counties for attorney
13 time and certain costs incurred in the representation of indigent adults in district court.

14 4. By law, the State must set standards for the counties' provision of indigent
15 defense services. It has, however, failed to set such standards, or to exercise any supervision
16 to ensure that county indigent defense programs provide constitutionally and statutorily
17 adequate legal representation. Although the State has established minimum qualifications,
18 training programs, and minimum rates of pay, it does not require that the Counties hire
19 indigent defense providers on merit, train them in criminal defense, issue written practice
20 standards, or monitor or limit excessive workloads.

21 5. The State permits the Counties to underfund their indigent defense services to
22 the point where the lack of financial resources impedes the delivery of representation. The
23 State refuses to guarantee the counties full reimbursement of permissible expenses. Fearful
24 that they may have to assume unanticipated expenses, the Counties design indigent defense
25 budgets to minimize potential financial liability rather than to ensure adequate defense
26 representation. To keep costs low, they refuse to budget for necessary attorney staff, they
27 refuse to compensate indigent defense counsel adequately, and they refuse to provide
28

1 adequate funds for necessary support services such as investigators, expert witnesses,
2 paralegals, and secretarial assistance.

3 6. Because of the State's failure to supervise and fund indigent defense
4 adequately, none of the indigent defense programs in the Counties can engage in the type of
5 adversarial advocacy contemplated by the United States and Montana Constitutions.
6 Lacking time and training, counsel cannot confer with clients in a meaningful manner,
7 research relevant case law, review client files, conduct necessary pre-trial investigations,
8 secure necessary expert assistance, or prepare adequately for hearings and trials. When
9 counsel do file pre-trial motions or take cases to trial, judges often admonish them for taking
10 the court's time, and county or court officials deny them further assignments because of the
11 costs they incur.

12 7. Because of the State's failure to supervise and fund indigent defense
13 adequately, indigent clients suffer multiple deprivations of their constitutional and statutory
14 rights. Persons who might otherwise be eligible for bail remain in pre-trial incarceration
15 unnecessarily. They cannot challenge the evidence against them. Innocent persons plead
16 guilty. Those who have meritorious defenses cannot present them. They receive harsher
17 sentences than the facts of their case warrant. They do not learn of sentencing alternatives.
18 Indigent clients waive their due process rights, their right to a fair and speedy trial, and their
19 right to appeal their convictions.

20 8. Defendants have known for decades of the State's failure to set adequate
21 standards and provide the resources to meet them, and the consequent inability of the
22 Counties to provide constitutionally and statutorily adequate legal representation. Two 1976
23 statewide studies and a 1982 legislative report cited many of the same problems in providing
24 indigent defense services that persist today. Minor reforms enacted by the legislature, such
25 as the duty of the Appellate Defender Commission to support trial level indigent defense,
26 have never been implemented. Defendants' failure to remedy these inadequacies constitutes
27 deliberate indifference to the constitutional and statutory rights of plaintiffs and members of
28 the plaintiff class.

1 9. Pursuant to 42 U.S.C. § 1983; the Sixth and Fourteenth Amendments to the
2 United States Constitution; sections 4 (Individual Dignity), 17 (Due Process of Law) and 24
3 (Rights of the Accused) of Article II of the Montana Constitution; and sections 46-8-101
4 (Right to Counsel), 46-8-201 (Remuneration of Appointed Counsel), 46-8-202 (Public
5 Defender's Office), and 2-15-1020 (Appellate Defender Commission) of the Montana Code
6 Annotated, plaintiffs seek declaratory and injunctive relief to remedy deficiencies in the
7 indigent defense programs that provide representation to criminal defendants in the district
8 courts in the Defendant Counties.

9
10 **II. THE PARTIES**

11 **A. Plaintiffs**

12 1. Larry White (Butte-Silver Bow County)

13 10. Plaintiff Larry White is and at all times pertinent herein has been a citizen of
14 the United States and resident of Butte, Montana. He has pending criminal cases in the
15 Butte-Silver Bow County District Court and is incarcerated at the Butte-Silver Bow County
16 Temporary Jail located in Warm Springs, Montana. Mr. White is represented by a member
17 of the private bar who has contracted with the Chief Executive of Butte-Silver Bow County
18 to provide indigent defense services in that county.

19 11. Mr. White is 30 years old and suffers from chronic pain in his left leg that
20 requires constant pain management. He is charged with drug possession for allegedly
21 possessing morphine and valium pills, and with bail jumping. Because of the deficiencies in
22 the Butte-Silver Bow County indigent defense program, which include lack of sufficient
23 funding, sufficient attorney and professional staff, training, workload limits, adequate
24 contracting standards, adequate attorney qualification standards, and other indigent defense
25 policies and procedures, the Butte-Silver Bow County indigent defense program is not
26 providing him with the legal representation to which he is constitutionally and statutorily
27 entitled.

1 12. Mr. White was arrested in February 2001 and was incarcerated on \$17,500
2 bond. His attorney does not accept collect calls from the jail and has visited Mr. White in
3 jail only for a few minutes on two occasions. After over a month of incarceration, Mr.
4 White was released on bond, but his attorney failed to inform him of the date of his next
5 court appearance. After weeks without any contact from his attorney, Mr. White contacted
6 him and was told that he had missed a court date and that there was a warrant out for his
7 arrest. Although Mr. White's attorney promised to get the warrant vacated, the attorney
8 failed to do so, resulting in Mr. White's re-arrest. Mr. White spent approximately three
9 weeks in jail because his attorney failed to take steps to facilitate his immediate release.

10 13. Mr. White was subsequently re-arrested for missing another court date and
11 losing contact with his attorney. He is now incarcerated on \$100,000 bond. At the time of
12 the filing of this lawsuit, a year after he was first arrested, Mr. White and his attorney had
13 not had any substantive discussions about his case, and no steps had been taken to secure an
14 alternative to incarceration. Subsequent to the filing of this suit, Mr. White filed a motion
15 for new counsel, which the court granted on March 21, 2002.

16 2. Candace Bergman (Missoula County)

17 14. Plaintiff Candace Bergman is and at all times pertinent herein has been a
18 citizen of the United States and resident of Missoula, Montana. She has pending criminal
19 cases in the Missoula County District Court and is incarcerated at the Missoula County
20 Detention Facility. Ms. Bergman is represented by the Public Defender's Office in
21 Missoula.

22 15. Ms. Bergman is 35 years old and is charged with drug possession, obstruction
23 of justice, and lesser charges. Because of the deficiencies in the Missoula County indigent
24 defense program, which include lack of sufficient funding, sufficient attorney and
25 professional staff, training, workload limits, case management systems, and other indigent
26 defense policies and procedures, the Public Defender's Office is not providing Ms. Bergman
27 with the legal representation to which she is constitutionally and statutorily entitled.
28

1 16. Ms. Bergman has been incarcerated since September 14, 2001. She cannot
2 call her attorney because Missoula's Public Defender's Office has a policy of refusing to
3 accept collect calls from the county jail. In addition, because of overwhelming caseloads
4 and a lack of sufficient personnel, the Public Defender's Office does not promptly respond to
5 "kites" (requests for attorney contact) sent from incarcerated clients. For example,
6 Ms. Bergman sent as many as 15 kites before receiving a response from her public defender.
7 When finally meeting with Ms. Bergman more than a month after he promised to consult
8 with her, Ms. Bergman's public defender attempted to convey a proposed plea agreement to
9 her but neglected to bring a copy of the agreement for her to consider. As of January 16,
10 2002, her public defender had still not shown her a copy of the proposed plea agreement,
11 despite repeated requests to do so, and she and her public defender had never discussed the
12 facts of her case. Ms. Bergman's public defender had not conducted a factual or legal
13 investigation into the charges against her.

14 17. On February 7, 2002, Ms. Bergman's attorney resigned from the Public
15 Defender's Office. She was not assigned a new public defender for approximately one
16 month. On March 25, 2002, over six months since she was first incarcerated, Ms. Bergman
17 underwent pre-treatment screening for possible placement in a chemical dependency center
18 in Butte, Montana.

19 3. David Chase (Missoula County)

20 18. Plaintiff David Chase is and at all times pertinent herein has been a citizen of
21 the United States and a resident of Montana. He has a pending criminal case in the Missoula
22 County District Court and is incarcerated at the Missoula County Detention Facility. Mr.
23 Chase is being represented by the Public Defender's Office in Missoula.

24 19. Mr. Chase is 30 years old and is charged with one felony count of operation
25 of a clandestine laboratory and one misdemeanor count of criminal possession of drug
26 paraphernalia. Because of the deficiencies in the Missoula County indigent defense
27 program, which include lack of sufficient funding, sufficient attorney and professional staff,
28 training, workload limits, case management systems, and other indigent defense policies and

1 | procedures, the Public Defender's Office is not providing Mr. Chase with the legal
2 | representation to which he is constitutionally and statutorily entitled.

3 | 20. Mr. Chase has been incarcerated since his arrest on October 9, 2001. He
4 | cannot call his attorney because Missoula's Public Defender's Office has a policy of refusing
5 | to accept collect calls from the county jail. Over the next three months, Mr. Chase
6 | repeatedly wrote to his attorney asking to meet to discuss his case. She did not meet with
7 | him, responding by letter that she must prioritize her time and that correspondence by letter
8 | was preferable. Mr. Chase also raised potential grounds for seeking to suppress the search
9 | warrant used by the police to secure evidence in his case. His attorney informed him that she
10 | could not address this matter until she received the wiretap transcript that served as the basis
11 | for issuance of the warrant, but that ultimately it was her decision as to whether to file a
12 | motion to suppress. The prosecutor has since admitted that the wiretap transcript was
13 | inadvertently destroyed. Mr. Chase's attorney, however, still has not challenged the validity
14 | of the search warrant.

15 | 21. On approximately February 1, 2002, Mr. Chase's first attorney withdrew as
16 | counsel and was replaced by another attorney in the Public Defender's Office. Mr. Chase
17 | did not meet with his new attorney until a brief meeting six weeks later, and he still has not
18 | had the opportunity to have a meaningful discussion regarding the substance of his case with
19 | any attorney. He has had only two attorney visits during his approximately 170 days of
20 | pre-trial detention. As of March 26, 2002, Mr. Chase was undergoing screening for pre-trial
21 | supervision.

22 | 4. Michael Shields (Missoula County)

23 | 22. Plaintiff Michael Shields is and at all times pertinent herein has been a citizen
24 | of the United States and a resident of Missoula, Montana. He has a pending criminal case in
25 | the Missoula County District Court and is incarcerated at the Missoula County Detention
26 | Facility. Mr. Shields is being represented by the Public Defender's Office in Missoula.

27 | 23. Mr. Shields is 51 years old and is charged with one count of aggravated
28 | assault. Because of the deficiencies in the Missoula County indigent defense program,

1 | which include lack of sufficient funding, sufficient attorney and professional staff, training,
2 | workload limits, case management systems, and other indigent defense policies and
3 | procedures, the Public Defender's Office is not providing Mr. Shields with the legal
4 | representation to which he is constitutionally and statutorily entitled.

5 | 24. Mr. Shields has been incarcerated since August 29, 2001. He cannot call his
6 | attorney because Missoula's Public Defender's Office has a policy of refusing to accept
7 | collect calls from the county jail. He did not have any contact with his attorney for
8 | approximately one month following his arraignment. Additionally, his attorney never made a
9 | motion to reduce his \$50,000 bail. As of late December, Mr. Shields's attorney had not met
10 | or spoken with the alleged victim or conducted any other investigation in his case. Mr.
11 | Shields's attorney resigned from the Public Defender's Office in February 2002. He met
12 | with his new counsel on March 14, 2002. No action had been taken on his case in the prior
13 | two months. He has a trial date set for April 3, 2002.

14 | 5. Kenneth Sellars (Glacier County)

15 | 25. Plaintiff Kenneth Sellars is and at all times pertinent herein has been a citizen
16 | of the United States and resident of Browning, Montana. He has a pending criminal case in
17 | the Glacier County District Court and is incarcerated at the Glacier County Sheriff's
18 | Department. Mr. Sellars is represented by a member of the private bar who has been
19 | appointed by the District Court Judge for the Ninth Judicial District to provide indigent
20 | defense representation to Mr. Sellars.

21 | 26. Mr. Sellars is 35 years old and is charged with aggravated assault. Because of
22 | the deficiencies in the Glacier County indigent defense program, which include lack of
23 | sufficient funding, sufficient attorney and professional staff, training, workload limits, and
24 | adequate indigent defense policies and procedures, the Glacier County indigent defense
25 | program is not providing him with the legal representation to which he is constitutionally
26 | and statutorily entitled.

27 | 27. Mr. Sellars has been incarcerated since September 28, 2001. He made his
28 | initial appearance in District Court on October 3, 2001, at which time he was appointed

1 counsel by the court. Although he called his appointed counsel immediately, Mr. Sellars's
2 attorney did not speak with him until approximately two weeks later. At that time, Mr.
3 Sellars provided his attorney with the names of two witnesses who he believes may possess
4 exculpatory evidence, and his attorney promised to contact these witnesses and arrange for a
5 polygraph test with the county attorney. Mr. Sellars's attorney, however, never contacted the
6 witnesses or arranged for a polygraph test. Frustrated by his attorney's failure to take steps
7 reasonably calculated to exonerate him, Mr. Sellars instructed one witness to contact his
8 attorney directly. The witness called Mr. Sellars's attorney, who did not interview her but
9 instead instructed her to write him a letter, which she did. Mr. Sellars's attorney again
10 promised to confer with this witness but failed to do so.

11 28. In early December 2001, Mr. Sellars's attorney passed away. Mr. Sellars
12 learned of his attorney's death not from a Glacier County official but from an inmate at the
13 Glacier County Sheriff's Department. Approximately one month passed before Mr. Sellars
14 was informed that he had been appointed new counsel. He has spoken briefly with his new
15 counsel approximately three times. Each time his attorney made clear that he had not had
16 time to read the case file or work on the case in any meaningful way. Despite Mr. Sellars's
17 requests, his new attorney has not contacted the potential defense witnesses, has declined to
18 arrange for a polygraph test, and has refused to file a speedy trial motion. At the time this
19 lawsuit was filed, Mr. Sellars's attorney had not conducted an investigation into his case,
20 informed him of the status of his case, or discussed the preparation of a defense. On
21 February 20, 2002, Mr. Sellars accepted a one-year deferred prosecution agreement.

22 6. Carol Homegun (Glacier County)

23 29. Plaintiff Carol Homegun is and at all times pertinent herein has been a citizen
24 of the United States and resident of Browning, Montana. She has a pending criminal case in
25 the Glacier County District Court. Ms. Homegun is represented by a member of the private
26 bar who has been appointed by the District Court Judge for the Ninth Judicial District to
27 provide indigent defense representation to Ms. Homegun.
28

1 30. Ms. Homegun is 40 years old and is charged with one felony count of driving
2 under the influence of alcohol and one misdemeanor count of driving with a suspended or
3 revoked driver's license. Because of the deficiencies in the Glacier County indigent defense
4 program, which include lack of sufficient funding, sufficient attorney and professional staff,
5 training, workload limits, and adequate indigent defense policies and procedures, the Glacier
6 County indigent defense program is not providing her with the legal representation to which
7 she is constitutionally and statutorily entitled.

8 31. Ms. Homegun was arrested on April 18, 2001 on an alleged fourth offense
9 felony DUI charge. Although Ms. Homegun questioned the validity of at least one of her
10 prior convictions, her attorney repeatedly refused to assist her investigation into this matter.
11 Her attorney also failed to submit a scheduled motion to suppress physical evidence and an
12 alleged confession. In addition, Ms. Homegun's attorney failed to return her phone calls,
13 keep her abreast of any progress in the case, or prepare her for trial. During June and July of
14 2001, Ms. Homegun unsuccessfully attempted to reach her attorney by telephone on average
15 of three to four times per week. On one rare occasion when she did reach him, he told her
16 that she was wasting his time and money and proceeded to hang up on her. Subsequent to
17 this call, she did not have any contact with her attorney for approximately two months.

18 32. Ms. Homegun's attorney failed to inform her of two October 2001 court
19 appearances, resulting in issuance of a bench warrant for her arrest. Ms. Homegun's
20 attorney failed to rectify the matter as promised, and the bench warrant remains outstanding.
21 Ms. Homegun had no contact with her attorney from October 2001 until his death in early
22 December 2001. She was appointed new counsel on December 21, 2001. Her trial date is
23 set for July 29, 2002.

24 7. Mickey McDonough (Glacier County)

25 33. Plaintiff Mickey McDonough is and at all times pertinent herein has been a
26 citizen of the United States and resident of Cut Bank, Montana. He has a pending criminal
27 case in the Glacier County District Court. Mr. McDonough is represented by a member of
28

1 the private bar who has been appointed by the District Court Judge for the Ninth Judicial
2 District to provide indigent defense representation to Mr. McDonough.

3 34. Mr. McDonough is 26 years old and is charged with one count of felony
4 assault with a weapon and one count of misdemeanor partner assault. Because of the
5 deficiencies in the Glacier County indigent defense program, which include lack of sufficient
6 funding, sufficient attorney and professional staff, training, workload limits, and adequate
7 indigent defense policies and procedures, the Glacier County indigent defense program is not
8 providing him with the legal representation to which he is constitutionally and statutorily
9 entitled.

10 35. Mr. McDonough was arrested on January 9, 2002. He has only met with his
11 attorney once outside of court. He has not had a meaningful discussion with his attorney
12 about his version of the events surrounding his arrest or the nature of the charges he is
13 facing. Although the only complaining witness has moved out of state and is unlikely to
14 testify, Mr. McDonough's attorney has failed to attempt to have the charges dismissed. Mr.
15 McDonough's attorney also has failed to pursue a potentially exculpatory witness statement.

16 8. Kenneth Ingraham (Glacier County)

17 36. Plaintiff Kenneth Ingraham is and at all times pertinent herein has been a
18 citizen of the United States and a resident of Browning, Montana. He has one pending
19 criminal case in the Glacier County District Court and one in the Pondera County District
20 Court and is incarcerated at the Glacier County Sheriff's Department. Mr. Ingraham is
21 represented in his pending case in Glacier County by a member of the private bar who has
22 been appointed by the District Court Judge for the Ninth Judicial District to provide indigent
23 defense representation to Mr. Ingraham.

24 37. Mr. Ingraham is 36 years old and is charged in Glacier County with a
25 probation violation for drug use, failure to report to his probation officer, failure to report
26 arrests, failure to complete a chemical dependency program, and failure to "be a good
27 citizen". Because of the deficiencies in the Glacier County indigent defense program, which
28 include lack of sufficient funding, sufficient attorney and professional staff, training,

1 workload limits, and adequate indigent defense policies and procedures, the Glacier County
2 indigent defense program is not providing him with the legal representation to which he is
3 constitutionally and statutorily entitled.

4 38. Mr. Ingraham was arrested on February 20, 2002, for the probation violation.
5 Upon his arrival at the Glacier County Sheriff's Department, Mr. Ingraham was interrogated
6 by a law enforcement official from Pondera County, who informed him of a pending felony
7 theft charge in Pondera County.

8 39. Mr. Ingraham was not assigned or contacted by an attorney for approximately
9 four weeks after his arrest in Glacier County. He has only spoken briefly with his attorney
10 by telephone on two occasions. During their first conversation on March 18, 2002, Mr.
11 Ingraham informed his attorney about the pending charge and notice to appear in Pondera,
12 which his attorney told him should not cause him any concern. One week later, as a result of
13 his attorney's advice to ignore this matter, Mr. Ingraham received a bench warrant from
14 Pondera County for missing a court appearance, which had occurred while he was detained
15 in Glacier County. Mr. Ingraham now faces a \$25,000 bond in Pondera on that bench
16 warrant. When he informed his Glacier County attorney about this warrant, his attorney
17 again told him not to worry about it. When Mr. Ingraham became insistent that his attorney
18 help him with this matter, his attorney told him not to call him anymore.

19 9. Winchester Wiseman (Teton County)

20 40. Plaintiff Winchester Wiseman is and at all times pertinent herein has been a
21 citizen of the United States and resident of Fort Shaw, Montana. He has pending criminal
22 cases in the Teton County District Court, the Cascade County District Court, and the Ravalli
23 County District Court. Mr. Wiseman is represented in his pending case in Teton County by
24 a member of the private bar who has been appointed by the District Court Judge for the
25 Ninth Judicial District to provide indigent defense representation to Mr. Wiseman.

26 41. Mr. Wiseman is 21 years old and is charged in Teton County with criminal
27 possession of a dangerous substance, criminal operation of a clandestine laboratory, and
28 lesser charges. Because of the deficiencies in the Teton County indigent defense program,

1 | which include lack of sufficient funding, sufficient attorney and professional staff, training,
2 | workload limits, and adequate indigent defense policies and procedures, the Teton County
3 | indigent defense program is not providing him with the legal representation to which he is
4 | constitutionally and statutorily entitled.

5 | 42. At the time this lawsuit was filed, Mr. Wiseman had spoken with his attorney
6 | only once for a few minutes in five weeks. During these five weeks, his attorney did not
7 | provide him with a copy of the charges against him or with any discovery material. His
8 | attorney also did not inform him that his omnibus hearing had occurred, nor did she inform
9 | him of the status of his case or the date of his next court appearance. Although Mr.
10 | Wiseman's attorney mentioned that the search warrant issued against Mr. Wiseman may
11 | have been invalid, she failed to discuss with Mr. Wiseman the possibility of bringing an
12 | appropriate evidentiary motion. Because he could not call his attorney from the Cascade
13 | County Detention Center, Mr. Wiseman did not have a meaningful opportunity to discuss
14 | the facts of his case with her, ask questions about the nature and ramifications of the charges
15 | against him, or prepare his defense.

16 | 43. Since this lawsuit was filed, Mr. Wiseman has been released on bond. His
17 | attorney subsequently met with him and asked him to permit her to withdraw as his counsel.
18 | Approximately one week ago, Mr. Wiseman called the Teton County Courthouse to inquire
19 | about the status of his case. He was informed that he has been assigned new counsel. Not
20 | having heard from his attorney, Mr. Wiseman contacted him. His new attorney informed
21 | Mr. Wiseman that he does not yet have the case file. Mr. Wiseman is not aware of any
22 | upcoming court appearances in Teton County District Court. To date, he still has not had a
23 | meaningful conversation with an attorney about his case, or the preparation of his defense.

24 | 10. Michelle Ford (Flathead County)

25 | 44. Plaintiff Michelle Ford is and at all times pertinent herein has been a citizen
26 | of the United States and resident of Kalispell, Montana. She has a pending criminal case in
27 | the Flathead County District Court and is incarcerated at the Flathead County Detention
28 | Center. Ms. Ford is represented by a member of the private bar who has contracted with the

1 Board of Commissioners of Flathead County to provide indigent defense services in that
2 county.

3 45. Ms. Ford is 23 years old and has no prior arrests. She is charged with
4 conspiracy to commit deliberate homicide, theft, tampering with evidence, and conspiracy to
5 commit a deceptive practice. Because of the deficiencies in the Flathead County indigent
6 defense program, which include lack of sufficient funding, sufficient attorney and
7 professional staff, training, workload limits, adequate contracting standards, adequate
8 attorney qualification standards, and other indigent defense policies and procedures, the
9 Flathead County indigent defense program is not providing her with the legal representation
10 to which she is constitutionally and statutorily entitled.

11 46. Ms. Ford was assigned an attorney who is on the rotation to receive homicide
12 cases despite the fact that he has never tried a homicide case to completion. Although she
13 has been incarcerated since July 10, 2001, at the time this lawsuit was filed Ms. Ford had
14 met with her attorney only three times, and had never discussed the facts of her case or the
15 evidence against her. On August 9, 2001, her attorney postponed her arraignment pending a
16 psychological evaluation, but did not arrange for a meeting with a psychiatrist until October
17 2001. Because of the lengthy postponement, at the time this lawsuit was filed, Ms. Ford has
18 yet to be formally confronted with the charges against her.

19 47. Ms. Ford is believed to be suffering from Fetal Alcohol Effect—brain
20 damage that can cause developmental delays and impair one's judgment and ability to think
21 and act independently. At the time this lawsuit was filed, her attorney has failed to pursue
22 offers to have Ms. Ford tested for Fetal Alcohol Effect by statewide experts in genetics. Nor
23 had he conducted factual and legal investigations into her case and had neither sought nor
24 retained adequate expert services on her behalf. Approximately two weeks subsequent to the
25 filing of this lawsuit, Ms. Ford was arraigned on her pending charges. In addition,
26 approximately one month subsequent to the filing of this lawsuit, Ms. Ford's attorney filed
27 an application with Flathead County for funding to have Ms. Ford examined for Fetal
28 Alcohol Effect. To date, this application is outstanding.

1 11. Robert Armstrong (Flathead County)

2 48. Plaintiff Robert Armstrong is and at all times pertinent herein has been a
3 citizen of the United States and a resident of Montana. He has two pending criminal cases in
4 the Flathead County District Court and is incarcerated at the Flathead County Detention
5 Center. Mr. Armstrong is represented by two members of the private bar who have
6 contracted with the Board of Commissioners of Flathead County to provide indigent defense
7 services in that county. He is represented by a different lawyer on each case.

8 49. In Mr. Armstrong's first case, he is charged with one count of driving under
9 the influence of alcohol ("DUI"), and in the second case, one count of bail jumping.
10 Because of the deficiencies in the Flathead County indigent defense program, which include
11 lack of sufficient funding, sufficient attorney and professional staff, training, workload
12 limits, adequate contracting standards, adequate attorney qualification standards, and other
13 indigent defense policies and procedures, the Flathead County indigent defense program is
14 not providing him with the legal representation to which he is constitutionally and statutorily
15 entitled.

16 50. Mr. Armstrong was arrested on the DUI case and later released on his own
17 recognizance on November 13, 2001. On November 29, 2001, he called the Flathead
18 County District Court to confirm the time of his arraignment the next day. The court
19 informed him that the arraignment was scheduled earlier that day and he already had missed
20 it. He called his attorney and told him of his mistake. Although his attorney indicated he
21 would inform the court of the misunderstanding, he failed to do so. His attorney also failed
22 to inform Mr. Armstrong that a bench warrant had been issued for his arrest. During the
23 following week, Mr. Armstrong attempted to contact his attorney on several occasions to
24 determine whether a new arraignment date had been scheduled, but his attorney was not
25 available. He eventually was arrested on the warrant, charged with bail jumping, and
26 incarcerated.

27 51. Mr. Armstrong is being represented by a second attorney for his bail jumping
28 charge. Mr. Armstrong's first attorney has indicated that he will be a witness in his bail

1 jumping trial. Despite this conflict, this attorney still represents Mr. Armstrong in his DUI
2 case.

3 12. Gary Ackermann (Lake County)

4 52. Plaintiff Gary Ackermann is and at all times pertinent herein has been a
5 citizen of the United States and resident of Pablo, Montana. He has a pending criminal case
6 in the Lake County District Court. Mr. Ackermann is represented by a member of the
7 private bar who has contracted with the Board of Commissioners of Lake County to provide
8 indigent defense services in that county.

9 53. Mr. Ackermann is 32 years old and is charged with assault. Because of the
10 deficiencies in the Lake County indigent defense program, which include lack of sufficient
11 funding, sufficient attorney and professional staff, training, workload limits, adequate
12 contracting standards, adequate attorney qualification standards, and other indigent defense
13 policies and procedures, the Lake County indigent defense program is not providing Mr.
14 Ackermann with the legal representation to which he is constitutionally and statutorily
15 entitled.

16 54. Mr. Ackermann submitted six requests to see his attorney during a twenty-day
17 period leading up to a court appearance. His attorney did not respond and only met with Mr.
18 Ackermann once—five minutes prior to the court proceeding. Although the alleged assault
19 victim has recanted her accusation, at the time this lawsuit was filed Mr. Ackermann's
20 attorney had not investigated the circumstances surrounding the allegation and its
21 withdrawal. In addition, Mr. Ackermann's attorney has failed to inform him of scheduled
22 court dates, including one scheduled for March 14, 2002. He only learned of this scheduled
23 hearing when the Lake County Attorney's Office called his wife to inform her.

24 13. Daniel Finley (Lake County)

25 55. Plaintiff Daniel Finley is and at all times pertinent herein has been a citizen of
26 the United States and a resident of Pablo, Montana. He has pending criminal cases in the
27 Lake County District Court. Mr. Finley is represented by a member of the private bar who
28

1 has contracted with the Board of Commissioners of Lake County to provide indigent defense
2 services in that county.

3 56. Mr. Finley is 43 years old and is facing one count of assault with a weapon in
4 one case and one count of intimidation in a second case. Because of the deficiencies in the
5 Lake County indigent defense program, which include lack of sufficient funding, sufficient,
6 attorney and professional staff, training, workload limits, adequate contracting standards,
7 adequate attorney qualification standards, and other indigent defense policies and
8 procedures, the Lake County indigent defense program is not providing Mr. Finely with the
9 legal representation to which he is constitutionally and statutorily entitled.

10 57. Mr. Finley has been incarcerated since his arrest on approximately January
11 13, 2002, on charges of intimidation and assault with a weapon. He has had no meaningful
12 discussions with his attorney. In addition, Mr. Finley's attorney has failed to pursue vital
13 leads in the case. Despite Mr. Finley's repeated denials and requests for investigation
14 regarding the assault with a weapon charge, his attorney did not speak to any witnesses or
15 conduct any other investigation into the alleged incident. Nor did he speak with the alleged
16 victim. The Lake County Attorney, however, voluntarily dropped the assault charge on
17 March 19, 2002, when Mr. Finley's accuser recanted the allegation in a conversation with
18 the County Attorney's office.

19 14. Chris Kowitz (Ravalli County)

20 58. Plaintiff Chris Kowitz is and at all times pertinent herein has been a citizen of
21 the United States and resident of Montana. He has a pending criminal case in the Ravalli
22 County District Court and is incarcerated at the Ravalli County Detention Center. Mr.
23 Kowitz is represented by a Missoula law firm that has contracted with the Board of
24 Commissioners of Ravalli County to provide indigent defense services in that county.

25 59. Mr. Kowitz is charged with forgery. Because of the deficiencies in the
26 Ravalli County indigent defense program, which include lack of sufficient funding,
27 sufficient attorney and professional staff, training, workload limits, adequate contracting
28 standards, adequate attorney qualification standards, and other indigent defense policies and

1 | procedures, the Ravalli County indigent defense program is not providing Mr. Kowitz with
2 | the legal representation to which he is constitutionally and statutorily entitled.

3 | 60. Mr. Kowitz was arrested in the fall of 2001 and was incarcerated due to a
4 | failure to pay a bond. His attorney did not take Mr. Kowitz's calls and never visited him in
5 | jail. Ultimately, Mr. Kowitz was released on bond, but his attorney failed to inform him of
6 | the date of his next court appearance on January 15, despite his regular calls to his attorneys
7 | office over a period of months. Still uninformed of his court date, Mr. Kowitz was
8 | rearrested on January 25 under a bench warrant issued following his failure to appear in
9 | court, and incarcerated on \$50,000 bond. Since his last incarceration, Mr. Kowitz attempted
10 | to contact his attorney nearly every day in order to inquire about the status of his case. At
11 | the time this lawsuit was filed, his attorney has not responded, conducted an investigation
12 | into his case, informed him of the status of his case, or discussed the preparation of a
13 | defense. Subsequent to the filing of this lawsuit, the Ravalli County Attorney offered Mr.
14 | Kowitz the option of taking an open plea. Mr. Kowitz accepted this offer on March 25,
15 | 2002.

16 | 15. Justin Cloninger (Ravalli County)

17 | 61. Plaintiff Justin Cloninger is and at all times pertinent herein has been a
18 | citizen of the United States and resident of Montana. He has a pending criminal case in the
19 | Ravalli County District Court and is incarcerated at the Ravalli County Detention Center.
20 | Mr. Cloninger is represented by a Missoula law firm that has contracted with the Board of
21 | Commissioners of Ravalli County to provide indigent defense services in that county.

22 | 62. Mr. Cloninger is 20 years old and is charged with one count of theft. Because
23 | of the deficiencies in the Ravalli County indigent defense program, which include lack of
24 | sufficient funding, sufficient attorney and professional staff, training, workload limits,
25 | adequate contracting standards, adequate attorney qualification standards, and other indigent
26 | defense policies and procedures, the Ravalli County indigent defense program is not
27 | providing him with the legal representation to which he is constitutionally and statutorily
28 | entitled.

1 63. Mr. Cloninger was arrested on February 4, 2002. He did not have any
2 meaningful opportunity to discuss the nature or status of his case with his attorney for
3 approximately seven weeks after his arrest. Although Mr. Cloninger gave his attorney the
4 name of individuals willing to support his request for bail reduction, his attorney made no
5 attempt to contact these individuals prior to the hearing on his unsuccessful motion for bail
6 reduction. His attorney also has refused to act on his repeated requests to seek a plea
7 agreement, telling Mr. Cloninger on one occasion that he was too busy to pursue a deal.

8 **B. Defendants**

9 1. State Defendants

10 64. Defendant Judy Martz is Governor of the State of Montana. Defendant
11 Governor is charged with the protection of the rights of the citizens of the state and must
12 ensure that the laws are faithfully executed. Art. VI, sec. 4(1), Mont. Const. Defendant
13 Governor has failed to take the steps necessary to protect the legal rights of indigent persons
14 charged with criminal wrongdoing in the district courts in the Defendant Counties. In
15 addition, she has failed to ensure that the laws guaranteeing indigents in those counties the
16 right to effective assistance of competent counsel are faithfully executed. She is sued in her
17 official capacity.

18 65. Defendant Rick Lewis ("Defendant Court Administrator") is the Supreme
19 Court Administrator for the State of Montana. Under state law, Defendant Court
20 Administrator is responsible for establishing procedures for the disbursement of funds to
21 counties for expenses associated with the defense of indigents with criminal cases before the
22 district courts, and for recording payments at a detailed level for budgeting and auditing
23 purposes. Section 3-5-902, MCA. Defendant Court Administrator has established and
24 implemented procedures that impede the provision of constitutionally adequate legal
25 representation. He is sued in his official capacity.

26 66. Defendants Todd Hillier, Dorothy McCarter, Beverly Kolar, Michael
27 Sherwood, and Randi Hood (collectively, "Defendant Appellate Commissioners") are
28 members of the Appellate Defender Commission, which was created in 1991. By state law,

1 the Commission must propose minimum standards with which all trial and appellate public
2 defenders are to comply. Section 2-15-1020(9), MCA. The Commission also must compile,
3 maintain, and distribute to all state judges and justices a current statewide roster of attorneys
4 eligible for appointment as indigent defense counsel. Section 2-15-1020(10), MCA.
5 Defendant Appellate Commissioners have failed to comply with either mandate. They are
6 sued in their official capacities.

7 2. County Defendants

8 a. *Butte-Silver Bow County*

9 67. Defendant Chief Executive Judy Jacobson is the chief executive in Butte-
10 Silver Bow County. She enters into fixed-price contracts with local attorneys to provide
11 indigent defense services to those charged with criminal wrongdoing in the district court.
12 She structures and administers these contracts in a manner that impedes the ability of the
13 attorneys to provide constitutionally and statutorily adequate legal representation to their
14 clients. Together with the State Defendants, she is responsible for ensuring that indigent
15 defendants receive constitutionally and statutorily adequate legal representation. She has
16 failed to take the steps necessary to ensure such representation. She is sued in her official
17 capacity.

18 68. The Butte-Silver Bow Chief Executive is referred to herein as the "Butte-
19 Silver Bow County Defendant".

20 b. *Missoula County*

21 69. Defendant Board of County Commissioners of Missoula County is the chief
22 executive authority in Missoula County. It is authorized under state law to establish a public
23 defender office and required to provide it with the resources "necessary to satisfy the legal
24 requirements in providing counsel for defendants unable to employ counsel." Section 46-8-
25 202, MCA. Defendant Board of Commissioners established a public defender office in
26 1985, but has failed to provide it with the resources necessary to enable it to provide
27 constitutionally and statutorily adequate legal representation to indigent adults with criminal
28 cases in the district court.

1 70. Defendants Barbara Evans, Bill Carey, and Jean Curtiss are the County
2 Commissioners of Missoula County. They have the jurisdiction and power to: (a) discharge
3 the duties of the chief executive authority of the county government, Section 7-5-2101,
4 MCA; (b) manage the county's business and concerns, *id.*; (c) make and enforce rules
5 necessary for the transaction of business, section 7-5-2101, MCA; and (d) adopt, approve,
6 and amend the county's budget, section 7-5-2320, MCA. Together with the State
7 Defendants, they are responsible for ensuring that indigent defendants receive
8 constitutionally and statutorily adequate legal representation. They have failed to take the
9 steps necessary to ensure that the county has a program that can provide such representation.
10 They are sued in their official capacities.

11 71. The Missoula Board of Commissioners and the Missoula County
12 Commissioners are referred to herein collectively as the "Missoula County Defendants".

13 c. *Glacier and Teton Counties*

14 72. Defendant Boards of Commissioners of Glacier and Teton Counties are the
15 chief executive authorities in Glacier and Teton Counties.

16 73. Defendants Allan Lowry, William Icenoggle, and Raymond Salois are the
17 County Commissioners of Glacier County.

18 74. Defendants R.F. Sam Carlson, Mary Sexton, and Arnie Gettel are the County
19 Commissioners of Teton County.

20 75. Defendant Marc Buyske is the District Court Judge in the Ninth Judicial
21 District with jurisdiction over Glacier and Teton Counties.

22 76. The Glacier and Teton Boards of Commissioners rely upon the District Court
23 Judge for the Ninth Judicial District to appoint counsel for indigent defendants on a case-by-
24 case basis. Section 46-8-201, MCA. They are responsible for determining the amount of
25 money available to the Judge for attorneys' fees and costs and for paying those expenses not
26 reimbursed by the State. Sections 3-5-901, 46-8-201, MCA. They have failed to make
27 available sufficient funds to enable indigent defense counsel to provide constitutionally and
28

1 | statutorily adequate legal representation to indigent adults with criminal cases in district
2 | court.

3 | 77. The Glacier and Teton County Commissioners have the jurisdiction and
4 | power to: (a) discharge the duties of the chief executive authority of the county government,
5 | section 7-5-2101, MCA; (b) manage their counties' business and concerns, *id.*; (c) make and
6 | enforce rules necessary for the transaction of business, section 7-5-2101, MCA; and
7 | (d) adopt, approve, and amend their counties' budget, Section 7-5-2320, MCA. Together
8 | with the State Defendants, they are responsible for ensuring indigent defendants receive
9 | constitutionally and statutorily adequate legal representation. They have failed to take the
10 | steps necessary to ensure such representation. They are sued in their official capacities.

11 | 78. The District Court Judge is responsible for ensuring that indigent felony
12 | defendants who need counsel are assigned attorneys, section 46-8-101, MCA, and that those
13 | attorneys receive adequate compensation, Section 46-8-201, MCA. He has failed to take the
14 | steps necessary to ensure that the indigent defense counsel in the counties over which he has
15 | jurisdiction receive the financial resources necessary to provide constitutionally and
16 | statutorily adequate legal representation to their clients with cases in the district court. He is
17 | sued in his official capacity as an administrator of the indigent defense programs in Glacier
18 | and Teton Counties.

19 | 79. The Glacier and Teton Boards of Commissioners, the individual
20 | commissioners, and the District Court Judge are referred to herein collectively as the
21 | "Glacier and Teton County Defendants".

22 | d. *Flathead County*

23 | 80. Defendant Board of County Commissioners of Flathead County is the chief
24 | executive authority in Flathead County. By and through its individual commissioners, it
25 | enters into fixed-price contracts with local attorneys to provide indigent defense services to
26 | those charged with criminal wrongdoing in district court. The Defendant Board of
27 | Commissioners structures and administers these contracts in a manner that impedes the
28 |

1 ability of the attorneys to provide constitutionally and statutorily adequate legal
2 representation to indigent adults with criminal cases in the district court.

3 81. Defendants Dale Williams, Howard Gipe, and Robert Watne are the County
4 Commissioners of Flathead County. They have the jurisdiction and power to: (a) discharge
5 the duties of the chief executive authority of the county government, section 7-5-2101,
6 MCA; (b) manage the county's business and concerns, *id.*; (c) make and enforce rules
7 necessary for the transaction of business, section 7-5-2101, MCA; and (d) adopt, approve,
8 and amend the county's budget, Section 7-5-2320, MCA. Together with the State
9 Defendants, they are responsible for ensuring that indigent defendants receive
10 constitutionally and statutorily adequate legal representation. They have failed to take the
11 steps necessary to ensure that the County a program that can provide such representation.
12 They are sued in their official capacities. Section 3-5-901, MCA.

13 82. The Flathead Board of Commissioners and the Flathead County
14 Commissioners are referred to herein collectively as the "Flathead County Defendants".

15 e. *Lake County*

16 83. Defendant Board of County Commissioners of Lake County is the chief
17 executive authority in Lake County. By and through its individual commissioners, it enters
18 into fixed-price contracts with local attorneys to provide indigent defense services to those
19 charged with criminal wrongdoing in district court. The Defendant Board of Commissioners
20 structures and administers these contracts in a manner that impedes the ability of the
21 attorneys to provide constitutionally and statutorily adequate legal representation to indigent
22 adults with criminal cases in the district court.

23 84. Defendants Mike Hutchin, Barry Baker, and Dave Stipe are the County
24 Commissioners of Lake County. They have the jurisdiction and power to: (a) discharge the
25 duties of the chief executive authority of the county government, section 7-5-2101, MCA;
26 (b) manage the county's business and concerns, *id.*; (c) make and enforce rules necessary for
27 the transaction of business, section 7-5-2101, MCA; and (d) adopt, approve, and amend the
28 county's budget, Section 7-5-2320, MCA. Together with the State Defendants, they are

1 responsible for ensuring that indigent defendants receive constitutionally and statutorily
2 adequate legal representation. They have failed to take the steps necessary to ensure that the
3 County has a program that can provide such representation. They are sued in their official
4 capacities.

5 85. The Lake Board of Commissioners and the Lake County Commissioners are
6 referred to herein collectively as the "Lake County Defendants".

7 f. *Ravalli County*

8 86. Defendant Board of County Commissioners of Ravalli County is the chief
9 executive authority in Ravalli County. By and through its individual Commissioners, it
10 enters into fixed-price contracts with local attorneys to provide indigent defense services to
11 those charged with criminal wrongdoing in district court. The Defendant Board of
12 Commissioners structures and administers these contracts in a manner that impedes the
13 ability of the attorneys to provide constitutionally and statutorily adequate legal
14 representation to their clients.

15 87. Defendants Jack Atthowe, Alan Thompson, and Betty Lund are the County
16 Commissioners of Ravalli County. They have the jurisdiction and power to: (a) discharge
17 the duties of the chief executive authority of the county government, section 7-5-2101,
18 MCA; (b) manage the county's business and concerns, *id.*; (c) make and enforce rules
19 necessary for the transaction of business, section 7-5-2101, MCA; and (d) adopt, approve
20 and amend the county's budget. Section 7-5-2320, MCA. Together with the State
21 Defendants, they are responsible for ensuring that indigent defendants receive
22 constitutionally and statutorily adequate legal representation. They have failed to take the
23 steps necessary to ensure that the County has a program that can provide such representation.
24 They are sued in their official capacities.

25 88. The Ravalli Board of Commissioners and the Ravalli County Commissioners
26 are referred to herein collectively as the "Ravalli County Defendants".

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28

1 **III. JURISDICTION AND VENUE**

2 89. This Court has jurisdiction over this action pursuant to
3 sections 3-5-302(1) (original jurisdiction) and 3-5-312 (jurisdiction of judges coextensive
4 with the state), MCA.

5 90. This Court has personal jurisdiction over the defendants pursuant to Mont. R.
6 Civ. P. 4(B) (jurisdiction of persons) and Art. II, 18, Mont. Const. (state subject to suit).
7 Defendants are public officials found in the state of Montana and committed the wrongs
8 giving rise to this action within this state.

9 91. Venue is proper pursuant to sections 25-2-125 (against public officers or their
10 agents), 25-2-126 (against state, county, and political subdivisions), and 25-2-117 (multiple
11 defendants), MCA.

12
13 **IV. CLASS ACTION**

14 92. Plaintiffs bring this action as a class action against the State Defendants, with
15 seven subclasses against the County Defendants, pursuant to Mont. R. Civ. P. 23.

16 93. The proposed class to be maintained against the State Defendants consists of
17 all indigent persons who have or will have criminal cases pending in the district courts in the
18 Counties and who rely or will rely upon the Counties to provide them with defense counsel.
19 The representatives of this class are Larry White, Candace Bergman, David Chase, Michael
20 Shields, Kenneth Sellars, Carol Homegun, Mickey McDonough, Kenneth Ingraham,
21 Winchester Wiseman, Michelle Ford, Robert Armstrong, Gary Ackermann, Daniel Finley,
22 Chris Kowitz, and Justin Cloninger.

23 94. The plaintiff class is so numerous that joinder of all members is impractical.
24 At any point in time, several hundred adults with criminal cases pending in the district courts
25 rely on indigent defense counsel in the Counties for legal representation.

1 95. There are questions of law and fact common to the members of the plaintiff
2 class, including, but not limited to:

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- 4 (a) Whether the State has an obligation under the Sixth and Fourteenth
5 Amendments to the United States Constitution, the Montana
6 Constitution, and other provisions of state law to provide adequate
7 legal counsel to indigents charged with felony wrongdoing;
- 8 (b) Whether in delegating to the Counties its constitutional and statutory
9 obligation, the State has failed to ensure that the indigent defense
10 programs provide adequate representation to indigent persons;
- 11 (c) Whether the State funds indigent defense in a manner that impedes the
12 delivery of constitutionally and statutorily adequate legal
13 representation;
- 14 (d) Whether the State's failure to supervise and to promulgate policies
15 and guidelines required by state law impedes the delivery of
16 constitutionally and statutorily adequate legal representation;
- 17 (e) Whether the State's failure to adequately fund, supervise, and
18 administer the indigent defense programs in the Counties violates the
19 rights of the plaintiff class under the United States Constitution, the
20 Montana Constitution, and other provisions of state law.

21 96. The claims of the class representatives are typical of the claims of the
22 putative class members, and by pursuing their own interests, the class representatives will
23 advance the interests of the absent class members.

24 97. The class representatives will fairly and adequately protect the interests of the
25 class. There are no conflicts of interest between the class representatives and absent class
26 members, and the class representatives will vigorously prosecute the suit on behalf of the
27 class.

28 98. The State Defendants have consistently acted and refused to act in ways
generally applicable to the class. Thus, final declaratory and injunctive relief with respect to
the class as a whole will be appropriate.

99. The proposed subclasses to be maintained against the County Defendants are
as follows:

- (a) A subclass consisting of all indigent persons who have or will have
criminal cases pending in the district court in Butte-Silver Bow
County and who rely or will rely upon the Chief Executive of Butte-

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Silver Bow County to provide them with defense counsel. The representative of this subclass is Larry White.

- (b) A subclass consisting of all indigent persons who have or will have criminal cases pending in the district court in Missoula County and who rely or will rely upon the Missoula County Board of Commissioners and the Missoula County Commissioners individually to provide them with defense counsel. The representatives of this subclass are Candace Bergman, David Chase, and Michael Shields.
- (c) A subclass consisting of all indigent persons who have or will have criminal cases pending in the district courts in Glacier County and who rely or will rely upon the Glacier County Board of Commissioners, the Glacier County Commissioners individually, and the Ninth Judicial District Judge to provide them with defense counsel. The representatives of this subclass are Kenneth Sellars, Carol Homegun, Mickey McDonough, and Kenneth Ingraham.
- (d) A subclass consisting of all indigent persons who have or will have criminal cases pending in the district courts in Teton County and who rely or will rely upon the Teton County Board of Commissioners, the Teton County Commissioners individually, and the Ninth Judicial District Judge to provide them with defense counsel. The representative of this subclass is Winchester Wiseman.
- (e) A subclass consisting of all indigent persons who have or will have criminal cases pending in the district court in Flathead County and who rely or will rely upon the Flathead County Board of Commissioners and the Flathead County Commissioners individually to provide them with defense counsel. The representatives of this subclass are Michelle Ford and Robert Armstrong.
- (f) A subclass consisting of all indigent persons who have or will have criminal cases pending in the district court in Lake County and who rely or will rely upon the Lake County Board of Commissioners and the Lake County Commissioners individually to provide them with defense counsel. The representatives of this subclass are Gary Ackermann and Daniel Finley.
- (g) A subclass consisting of all indigent persons who have or will have criminal cases pending in the district court in Ravalli County and who rely or will rely upon the Ravalli County Board of Commissioners and the Ravalli County Commissioners individually to provide them with defense counsel. The representatives of this subclass are Chris Kowitz and Justin Cloninger.

100. Each proposed subclass is sufficiently large and fluid to make joinder of all subclass members impracticable.

1 101. There are several questions of law and fact common to the members of each
2 proposed subclass, including, but not limited to:

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- 4 (a) Whether each County Defendant funds indigent defense in a manner
5 that impedes the delivery of constitutionally and statutorily adequate
6 legal representation;
- 7 (b) Whether each County Defendant's failure to supervise and to
8 promulgate policies and guidelines impedes the delivery of
9 constitutionally and statutorily adequate legal representation;
- 10 (c) Whether each County Defendant's failure to adequately fund,
11 supervise, and administer its indigent defense program violates the
12 rights of each plaintiff subclass under the United States Constitution,
13 the Montana Constitution, and other provisions of state law.

14 102. The claims of the subclass representatives are typical of the claims of the
15 corresponding putative subclass members, and by pursuing their own interests, the subclass
16 representatives will advance the interests of their respective absent subclass members.

17 103. There are no conflicts of interest between any subclass representatives and
18 their respective absent subclass members, and each subclass representative will vigorously
19 prosecute this lawsuit on behalf of his or her subclass

20 104. As set forth below, the respective County Defendants have acted and refused
21 to act in ways generally applicable to each corresponding subclass. Thus, final declaratory
22 and injunctive relief with respect to each subclass as a whole will be appropriate.

23

24 **V. THE STATE'S DELEGATION OF ITS INDIGENT DEFENSE DUTY TO**
25 **THE COUNTIES**

26 105. The constitutional and statutory obligation to provide effective assistance of
27 competent counsel rests with the State. State Defendants, however, have abdicated this duty
28 by the manner in which they have delegated to County Defendants the task of providing
indigent defense services.

106. State Defendants' procedures for funding indigent defense impede the
provision of adequate legal representation. Each county initially funds indigent defense
services in its district court. The State then reimburses counties for indigent defense

1 expenses. The State, however, does not guarantee full reimbursement for indigent defense
2 expenses. On information and belief, the State's refusal to guarantee full reimbursement for
3 indigent defense expenses results in Defendant Counties' underfunding indigent defense and
4 informally discouraging expenditures on even basic tools of legal representation.

5 107. State Defendants exercise no supervision over the county indigent defense
6 programs. They also have failed to establish, require, or enforce any practice standards or
7 guidelines for the provision of non-capital indigent defense. Absent such standards, neither
8 the State nor County Defendants can ensure that indigent defendants receive constitutionally
9 and statutorily adequate representation.

10 **A. The Defendant Counties' Indigent Defense Programs**

11 108. The State has delegated to the counties the provision of indigent defense
12 services in each of its 56 counties' district courts. The district courts are courts of original
13 jurisdiction with authority to hear felonies, certain misdemeanors (those arising at the same
14 time and out of the same transaction as a felony, resulting from the reduction in charge from
15 a felony, or found to be a lesser-included offense of a felony), juvenile delinquency and
16 dependency matters, and appeals from misdemeanors disposed of by the State's courts of
17 limited jurisdiction, the justice and municipal courts. Sections 3-5-302, 303, MCA.

18 109. County Defendants provide indigent defense services through three methods:
19 public defender offices, counsel appointed by judges on a case-by-case basis, and fixed-price
20 contracts with private attorneys. Each group of County Defendants has designed programs
21 with deficiencies that stem directly from the State Defendants' failure to provide the
22 supervision and resources necessary for constitutionally and statutorily adequate legal
23 representation.

24 1. Missoula County

25 110. Pursuant to section 46-8-202, MCA, each county may, at its discretion,
26 develop a public defender office. If it does so, it must provide for the appointment of a
27 salaried public defender and such "assistant public defenders as may be necessary to satisfy
28 the legal requirements in providing counsel for defendants unable to employ counsel".

1 Missoula County Defendants have chosen to provide indigent defense services through a
2 Public Defender's Office.

3 111. The Missoula Public Defender's Office represents indigents in adult criminal,
4 juvenile delinquency, abuse and neglect, guardianship, and mental health proceedings in
5 Missoula's district and justice courts. In fiscal year 2001, it had a staff of eight attorneys
6 (including a Chief Public Defender), one investigator, one social worker, one research
7 assistant (who is also an attorney, but does not appear in court), and two and one-half
8 clerical personnel.

9 2. Glacier and Teton Counties

10 112. Pursuant to section 46-8-104, MCA, counties may rely upon their local
11 district court judges to assign counsel to indigent defendants on a case-by-case basis.
12 Section 46-8-201, MCA, requires that attorneys not employed by a formal public defender
13 office be compensated an amount determined by a district court judge or justice of the
14 supreme court to be reasonable and be reimbursed for reasonable costs. Glacier and Teton
15 County Defendants have chosen to rely upon the District Court Judge for the Ninth Judicial
16 District to appoint counsel to provide indigent defense services on a case-by-case basis.

17 113. The District Court Judge for the Ninth Judicial District has delegated
18 appointment of indigent defense counsel to the justice courts.

19 3. Butte-Silver Bow, Flathead, Lake, and Ravalli Counties

20 114. County Defendants from Butte-Silver Bow, Flathead, Lake, and Ravalli
21 Counties do not have public defender's offices, nor do they rely on judicially appointed
22 counsel. Instead, they contract with one or more members of the private bar to represent, for
23 a fixed fee, all indigents assigned to that attorney during the contract period. Attorneys are
24 permitted to maintain private practices throughout the contract term.

25 115. The Butte-Silver Bow County Defendant awards four indigent defense
26 contracts to local attorneys to represent adults in Butte's district and justice courts. (In fiscal
27 year 2001, two attorneys split one of these four contracts).

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1 116. Flathead County Defendants award contract "units" for the representation of
2 adult indigents in Flathead District Court. In fiscal year 2001, Flathead County Defendants
3 awarded nine units to five attorneys. Three attorneys received multiple units. One received
4 three adult units and two received two adult units.

5 117. Lake County Defendants award two contracts for the representation of
6 indigents in the County's district and justice courts. One contract attorney provides
7 representation in one half of the County's adult felony cases and all of the misdemeanor,
8 juvenile, and mental health cases. The other contract attorney provides representation in the
9 remaining adult felony cases.

10 118. Ravalli County Defendants contract with two law firms to provide indigent
11 defense services. One firm, based in Missoula, provides indigent defense services in
12 Ravalli's district and justice courts, and the other provides legal representation in
13 conflict-of-interest cases.

14 **B. The State's Failure To Guarantee Funding for Indigent Defense**

15 119. The County Defendants are responsible for the formulation and
16 administration of the budgets for their indigent defense programs. Since 1985, the State,
17 through the District Court Criminal Reimbursement Program (DCCRP), has reimbursed the
18 counties for expenses associated with the provision of indigent defense services to adults
19 with criminal cases in the district courts. The counties remain responsible for funding all
20 other aspects of their indigent defense programs, including the representation of defendants
21 in misdemeanor cases and respondents in involuntary civil commitment proceedings.

22 120. The State currently relies on the motor vehicle licensing tax to fund the
23 DCCRP. Because the amount of tax collected varies from year to year, the State only
24 guarantees reimbursement to the extent that funding is available. Section 3-5-901(4)(b),
25 MCA. In accordance with guidelines issued by the Defendant Court Administrator, the State
26 initially reimburses each county 80% of its monthly expenses, and if, at the end of the year,
27 there is sufficient funding to reimburse each county 100%, the State pays the remaining 20%
28

1 of each monthly claim. If there is not enough funding, the counties are responsible for the
2 shortfall.

3 121. Pursuant to legislation enacted in the 2001 legislative session, the indigent
4 defense funding structure will change in fiscal year 2003, but not in any way that will
5 provide more financial certainty to the counties. While the money for indigent defense will
6 come from the State's general fund, the State will continue to refuse to guarantee full
7 reimbursement. The new statute specifically states that the State will only reimburse to the
8 extent funding is available and that "[i]f money appropriated for [indigent defense expenses]
9 is insufficient to fully fund those expenses, the county is responsible for payment of the
10 balance". Section 3-5-901(4)(b), MCA (effective July 1, 2002).

11 122. Because the State does not and will not guarantee full reimbursement, the
12 County Defendants currently budget, and on information and belief, will continue to budget,
13 for indigent defense in a manner designed to minimize their financial exposure, with little
14 regard for the amounts needed to administer an adequate defender program.

15 **C. The State's Failure To Set Standards for and Supervise the Counties'**
16 **Provision of Indigent Defense**

17 123. The State compounds its failure to fund indigent defense services adequately
18 by failing to set standards for and supervise the provision of those services. Lacking
19 appropriate guidance from the State, County Defendants have not devised adequate
20 procedures to assess the quality of indigent defense services. Absent such procedures,
21 neither the State nor the County Defendants can effectively ensure constitutionally or
22 statutorily adequate legal representation.
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1 124. National standards pertaining to the administration and provision of indigent
2 defense programs have been in existence for decades.¹ State and local entities across the
3 country have adopted many of these practice standards. Montana has none.

4 1. Failure To Adopt and Publicize Job Descriptions and Set Job
5 Qualifications

6 125. County Defendants hire, award contracts to, or appoint attorneys who have
7 neither the experience, inclination, nor resources to provide adequate legal representation to
8 indigent clients.

9 126. National standards for the administration of indigent defense services include
10 policies and procedures designed to ensure that counsel are competent advocates and
11 familiar with criminal law and procedure.² While the State requires that all county attorneys
12 must have practiced law for five years, *see, e.g.*, section 7-4-2701, MCA, and sets forth their
13 job responsibilities with some specificity, sections 7-4-2711, -2717, MCA, it has not issued
14 written job descriptions and job qualifications for indigent defense counsel in non-capital
15 cases.

16 127. Pursuant to section 2-5-1020, MCA, the Defendant Appellate Commissioners
17 are required to compile and keep current a statewide roster of attorneys eligible for
18 appointment by an appropriate court as trial and appellate counsel for indigent defendants.

19
20 ¹ *See, e.g.*, American Bar Association (“ABA”) Standards for Criminal Justice:
21 Prosecution Function and Defense Function (1993); ABA Standards for Criminal Justice:
22 Providing Defense Services (1992); National Legal Aid and Defender Association
23 (“NLADA”) Performance Guidelines for Criminal Defense Representation (1995);
24 NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal
25 Defense Services (1984); NLADA Standards for the Administration of Assigned Counsel
26 Systems (1989); NLADA Guidelines for Legal Defense Systems in the United States
27 (1976); President’s National Advisory Commission on Criminal Justice Standards and
28 Goals, Report of the Task Force on the Courts (1973).

25 ² *See, e.g.*, ABA Standards for Criminal Justice: Providing Defense Services,
26 Standards 5-2.2, 5-3.3(b)(vi); NLADA Guidelines for Legal Defense Systems in the
27 United States, Guidelines 2.3, 5.9; NLADA Guidelines for Negotiating and Awarding
28 Governmental Contracts for Criminal Defense Services, Guideline III-7; NLADA
Standards for the Administration of Assigned Counsel Systems, Standard 4.1.1(a);
National Conference of Commissioners on Uniform State Laws, Model Public Defender
Act § 5.

1 The Defendant Commissioners have failed to do so, and State Defendants do not require
2 County Defendants to maintain such a roster.

3 128. Only two Defendant Counties have written job qualifications. Ravalli County
4 requires its contract attorneys to have two years of indigent defense experience. The
5 Missoula Public Defender's Office requires attorneys to have two years of legal experience,
6 but not necessarily in the area of criminal law. No Defendant County requires its attorneys
7 to have trial or appellate experience.

8 129. No Defendant County has adequate written hiring, appointment, or
9 contracting standards for indigent defense counsel. None of the County Defendants hires,
10 appoints, or contracts pursuant to objective, publicized criteria.

11 130. Lacking identifiable, objective, published hiring and job qualifications, the
12 County Defendants hire, appoint, or contract for attorneys not because they are competent,
13 but instead because they are willing to underbid their services, they will not challenge the
14 county attorney by advocating vigorously for their clients, or they will not impede the local
15 judges' ability to move their cases forward expeditiously. Consequently, many indigent
16 defense counsel lack the qualifications and experience necessary to provide constitutionally
17 adequate legal representation.

18 2. Failure To Establish Practice Standards

19 131. The national standards and professional rules of responsibility define
20 adequate assistance of counsel as requiring, among other things, that defense counsel:
21 (a) have adequate knowledge of the relevant areas of the law;³ (b) act with reasonable
22 diligence and promptness, avoiding unnecessary delay in the disposition of cases;⁴
23 (c) provide representation at every critical stage of their clients' proceedings;⁵ (d) conduct

24 ³ See, e.g., ABA Standards for Criminal Justice: Providing Defense Services,
25 Standards 5-1.5, 5-2.2; NLADA Performance Guidelines for Criminal Defense
Representation, Guideline 1.2; Montana Rules of Professional Conduct, Rule 1.1 (1985).

26 ⁴ See, e.g., ABA Standards for Criminal Justice: Prosecution and Defense
27 Function, Standards 4-1.3, 4-3.6.

28 ⁵ See, e.g., NLADA Performance Guidelines for Criminal Defense Representation,
Guideline 1.1.

1 reasonable factual and legal pre-trial investigations into the charges against their clients,
2 pursue available formal and informal discovery procedures, and use appropriate and
3 necessary experts;⁶ and (e) consult with their clients to elicit relevant information about the
4 case, to inform clients of their rights, and to enable clients to make informed decisions about
5 the direction of their cases.⁷

6 132. National standards further mandate that indigent defense programs subject
7 their attorneys to systematic supervision and evaluation based upon publicized practice
8 standards.⁸ Montana has no such standards or policies.

9 133. While county attorneys must report to and take direction from the State's
10 attorney general, Section 2-15-501, MCA, State Defendants have no written practice
11 standards for non-capital indigent defense counsel and no formal program of supervising and
12 monitoring counsel. Although Section 2-5-1020, MCA, requires the Defendant Appellate
13 Commissioners to propose to the Montana Supreme Court for its ratification minimum
14 practice standards to which all trial and appellate public defenders are to conform, the
15 Defendant Appellate Commissioners have not done so.

16 134. State Defendants do not require County Defendants to set practice standards
17 or methods of evaluation, supervision, and monitoring to ensure the adequate assistance of
18 indigent defense counsel.

19 135. None of the County Defendants has issued standards or exercises either
20 formal or meaningful supervision of indigent defense counsel's performance. There are no
21 written standards or guidelines with respect to: the timing of indigent defense appointments,

22 ⁶ See, e.g., ABA Standards for Criminal Justice, Prosecution and Defense
23 Function, Standards 4-4.1, 4-4.4, 4-6.1; NLADA Performance Guidelines for Criminal
Defense Representation, Guidelines 4.1, 4.2, 4.3.

24 ⁷ See, e.g., ABA Standards for Criminal Justice: Prosecution Function and
25 Defense Function, Standards 4-3.1(a), 4-3.2, 4-3.8, 4-5.1, 4-5.2(b); NLADA Performance
26 Guidelines for Criminal Defense Representation, Guidelines 1.3(c), 2.2, 7.5; Montana
Rules of Professional Conduct, Rule 1.4.

27 ⁸ See, e.g., NLADA Guidelines for Negotiating and Awarding Governmental
28 Contracts for Criminal Defense Services, Guideline III-16; NLADA Standards for the
Administration of Assigned Counsel Systems, Standards 4.4, 4.4.1, 4.4.2; NLADA
Guidelines for Legal Defense Systems in the United States, Guidelines 5.4, 5.5.

1 practice responsibilities prior to a client's appearance in district court, conducting factual
2 and legal pre-trial investigation, the use of discovery or expert evidence, client consultation,
3 trial and hearing preparation, motion practice, or appeals.

4 136. Lacking basic standards for constitutionally adequate legal representation, or
5 any means of supervision, the County Defendants rely on overworked, underpaid,
6 inexperienced, untrained, understaffed, and often conflicted indigent defense counsel.

7 3. Failure To Train

8 137. County Defendants do not train new indigent defense counsel who start with
9 little or no prior criminal experience.

10 138. Current indigent defense counsel receive neither the time nor the resources to
11 continue legal education.

12 139. National standards require training, professional development, and continuing
13 legal education.⁹ Indigent defense counsel must acquire and maintain lawyering skills as
14 well as keep current with new developments in the complex and rapidly changing field of
15 criminal law.

16 140. While the State has created a special office, the county attorney training
17 coordinator, to provide training and technical assistance to county attorneys on a regular
18 basis, section 44-4-103, MCA, State Defendants have no equivalent program for indigent
19 defense counsel. State Defendants provide no orientation to newly hired indigent defense
20 counsel, no ongoing training to more experienced counsel, and no technical assistance to
21 counsel in need of such help.

22 141. State Defendants do not require the County Defendants to provide such
23 training or assistance.

24
25 ⁹See, e.g., ABA Standards for Criminal Justice: Providing Defense Services,
26 Standard 5-5.1; NLADA Standards for the Administration of Assigned Counsel Systems,
27 Standards 4.2, 4.3.2, 4.4.1; NLADA Guidelines for Legal Defense Systems in the United
28 States, Guidelines 5.6, 5.7, 5.8; President's National Advisory Commission on Criminal
Justice Standards and Goals, Report of the Task Force on the Courts, Standards 13.15,
13.16; National Conference of Commissioners on Uniform State Laws, Model Defender
Act § 10(e).

1 142. None of the Defendant Counties has a formalized training program for
2 indigent defense counsel. All Montana attorneys are required to attend 15 hours of
3 Continuing Legal Education ("CLE") courses annually, and the Montana Criminal Defense
4 Attorneys' Association offers two CLE course each year on criminal law or procedure.
5 None of the County Defendants requires their indigent defense counsel to attend these
6 seminars.

7 143. Two counties allocate money for training but to little effect. In fiscal year
8 2001, the Missoula County Defendants allocated \$4,000 for training. Former staff attorneys
9 report, however, that newly hired attorneys are trained "on the fly" and more experienced
10 attorneys receive little, if any, criminal law training.

11 144. Similarly, the Flathead County Defendants allocate \$1,000 annually for
12 continuing legal education and training for its contract attorneys. County Defendants do not
13 ensure that attorneys are aware of these resources. As a result, the money is rarely spent.

14 145. Of the approximately 35 attorneys regularly employed as indigent defense
15 counsel in the Defendant Counties as of January 1, 2002, only two or three have the
16 experience necessary to be certified as a capital defender. Pursuant to standards recently set
17 by the Montana Supreme Court, capital defenders must have had significant experience,
18 within the last five years, trying criminal cases to conclusion. At least one of those cases
19 must have been a capital case or a case involving charges of or equivalent to deliberate
20 homicide.

21 146. Lacking formal orientation, newly hired attorneys have no opportunity to
22 acquire and maintain the skills and legal knowledge necessary to put the prosecution's case
23 to the crucible of adversarial testing.

24 147. Lacking ongoing training by the State or counties, indigent defense counsel
25 have no formal opportunity to hone their skills and remain knowledgeable of significant
26 changes in the law without personally funding the substantial travel and registration
27 expenses required to participate in continuing education and training programs outside the
28 State.

1 4. Failure To Monitor Excessive Workloads

2 148. State and County Defendants' underfunding of indigent defense services
3 results in unmanageably large workloads for individual indigent defense counsel. Workload
4 affects the productivity and effectiveness of indigent defense counsel more directly than any
5 other variable.

6 149. National standards explicitly provide for the development of workload
7 standards. Indigent defense counsel should not carry a workload which "interferes with the
8 rendering of quality representation, endangers the client's interest in the speedy disposition
9 of charges, or may lead to the breach of professional obligations."¹⁰

10 150. The National Advisory Commission on Criminal Justice Standards and Goals
11 states that a single full-time indigent defense counsel can reasonably be expected to handle
12 no more than: (a) 150 felonies per year; or (b) 400 misdemeanors per year; or (c) 200
13 juvenile delinquency cases per year.¹¹

14 151. Workload limits may be lower for attorneys who work part-time, have limited
15 support services, must travel frequently or great distances to perform their jobs, or have
16 other job-related supervisory or administrative responsibilities.¹²

17 152. State Defendants have not set workload standards and do not require that the
18 County Defendants do so.

19 153. Neither the State nor the County Defendants maintain caseload data. None of
20 the Defendant Counties monitors the workloads of their indigent defense counsel to ensure
21 that they are manageable, and that the attorneys are devoting sufficient time to their cases.

22 ¹⁰ABA Standards for Criminal Justice: Prosecution Function and Defense
23 Function, Standard 4-1.3. *See generally* ABA Standards for Criminal Justice: Providing
24 Defense Services, Standard 5-5.3; NLADA Guidelines for Negotiating and Awarding
25 Government Contracts for Criminal Defense Services, Guideline III-12; NLADA
26 Standards for the Administration of Assigned Counsel Systems, Standard 4.1.2; NLADA
27 Guidelines for Legal Defense Systems in the United States, Guidelines 5.1, 5.2, 5.3;
28 President's National Advisory Commission on Criminal Justice Standards and Goals,
Report of the Task Force on the Courts, Standard 13.12.

¹¹ President's National Advisory Commission on Criminal Justice and Goals,
Report of the Task Force on the Courts, Standard 13.12.

¹² *See id.*, commentary.

1 While many attorneys record, on a monthly basis, the time they spend on individual cases,
2 neither the State nor the County Defendants have compiled this data to measure caseloads.

3 154. A review of these time records reveals, however, that in the absence of
4 standards and proper supervision, many indigent defense counsel in the Defendant Counties
5 maintain caseloads in excess of national standards. The excess caseloads impede counsel's
6 ability to provide constitutionally and statutorily adequate legal representation.

7 5. Failure To Compensate Attorneys Adequately

8 155. County Defendants do not allocate the funding necessary to compensate
9 indigent defense counsel adequately.

10 156. While state law sets the annual compensation for county attorneys and their
11 deputies, section 7-4-2503, MCA, it only requires that counties reimburse indigent defense
12 counsel "a reasonable compensation" for their time and "reasonable costs". Section 46-8-
13 201, MCA. State law does not identify the factors to be considered in defining "reasonable".

14 157. Defendant Court Administrator has stated that the State will reimburse
15 counties for the time expended by assigned counsel at a maximum rate of \$60 per hour, but
16 he has not established a minimum rate of compensation for contract attorneys or attorneys
17 employed by public defender's offices.

18 158. Without appropriate guidance from the State, County Defendants establish
19 rates of compensation that jeopardize the defense function. The Missoula Public Defender's
20 Office, for example, has a high rate of attrition, in part, because rates of compensation are so
21 low. The salaries of attorneys employed by the Missoula Public Defender's Office are
22 significantly less than those of attorneys employed by the County Attorney's office with
23 similar levels of experience and seniority.

24 159. The payment structure of the indigent defense contracts used by Butte-Silver
25 Bow, Flathead, Lake, and Ravalli County Defendants encourages defense counsel to plead
26 cases out early rather than spend the necessary time and resources developing appropriate
27 defenses. These contracts require attorneys, all of whom have private practices, to represent
28 all clients assigned to them by the district court judges for an annual fixed rate set at the

1 beginning of the contract term. Thus, the more cases an attorney is assigned and the more
2 time he spends on those cases, the lower his hourly rate of compensation under the contract
3 and the less time he has available for his private practice.

4 160. Many qualified attorneys cannot afford to forfeit their private practices
5 because the contracts do not pay them enough to both support themselves and meet their
6 office overhead. As a result, they have no choice but to compromise the quality of the
7 representation provided to their indigent clients.

8 161. Although some contracts state that attorneys will receive additional
9 compensation for extraordinary cases, there are no written guidelines defining additional
10 compensation or extraordinary cases. Moreover, in practice, courts rarely award such
11 compensation. In denying one such request, a Second Judicial Circuit District Court Judge
12 noted that were he to award additional compensation, there was "no guarantee of state
13 reimbursement". Report from District Judge Mark P. Sullivan to Chief Executive Jack
14 Lynch, dated May 2, 1994.

15 162. Unable to provide adequate compensation, Defendant Counties have
16 difficulty attracting qualified defense counsel, and many experienced attorneys are unwilling
17 to spend the time away from private practice necessary to represent indigent defendants
18 adequately.

19 6. Failure To Provide Support Services

20 163. In a further effort to minimize their financial exposure, County Defendants
21 underfund support services and resources necessary for competent criminal defense practice.

22 164. While guidelines issued by the Defendant Court Administrator state that
23 counties may seek reimbursement for the cost of photocopying, telephone, postage, fax
24 services, legal research (LEXIS and WestLaw), paralegal, secretarial services, and office
25 expenses, most Defendant Counties do not.

26 165. In fact, most Defendant Counties do not reimburse indigent defense counsel
27 for such expenses. With the exception of Flathead contract attorneys, all contract and
28

1 assigned counsel are expected to pay for such services out of their contract fee or their
2 hourly rate.

3 166. As a result, many indigent defense counsel go without such services. The
4 Lake County indigent defenders, for example, have no paralegals and no secretaries. County
5 Defendants have turned down requests for such assistance.

6 167. Administrators working under the direction of the Butte-Silver Bow County
7 Defendant have publicly acknowledged that they do not want to provide the County with a
8 formal public defender office because the County would have to provide it with the same
9 types of support staff and facilities as it provides the county attorney's office.

10 168. To obtain funding for expert and investigative services, defense counsel in
11 most Defendant Counties must apply to the district court judge. Few do, and then only
12 rarely.

13 169. The Ravalli contract, for example, requires defense counsel to keep
14 "[investigative and expert] costs to a minimum". None of the defense counsel requested
15 such services in either fiscal year 2000 or fiscal year 2001.

16 170. County Defendants and district court judges have let it be known that they
17 will deny requests for investigative and expert witness services to minimize County
18 expenses or that they will retaliate against attorneys who do incur such expenses.

19 171. Lacking support services or the funds to provide them, indigent defense
20 counsel must subsidize these expenses out of their own pockets, take time away from
21 representing indigent clients to tend to clerical tasks or perform investigations, rely solely on
22 police detective work, or forego legal research and factual investigations necessary for
23 constitutionally and statutorily adequate legal representation.

24 7. Failure To Adopt Conflict of Interest Policies and Identify Conflicts

25 172. The ABA Model Rules of Professional Conduct caution attorneys from
26 representing clients who have conflicting interests or whose interests conflict with the
27 attorneys' own interests. ABA Model Rules of Professional Conduct, Rule 1.7.

28

1 173. State Defendants have not issued, and do not require the County Defendants
2 to issue, formal policies defining or governing conflicts of interests.

3 174. None of the Defendant Counties has such policies, or any reliable method of
4 identifying conflicts.

5 175. None of the Defendant Counties that contract with or appoint attorneys to
6 provides indigent defense services prohibits the appointment of local prosecutors as defense
7 counsel.

8 176. Lacking formal conflict of interest policies, indigent defense counsel attempt
9 to screen conflicts by using unreliable sources such as individual or institutional memory, or
10 the clients themselves. Consequently, conflicts are identified late in the judicial process, if
11 at all, depriving clients of their constitutional right to conflict-free representation.

12
13 **VI. HARM TO PLAINTIFFS: FAILURE TO TAKE BASIC STEPS**
14 **TO PROVIDE ADEQUATE LEGAL REPRESENTATION**

15 177. Hampered by a lack of experience, excessive workloads, inadequate
16 compensation, the lack of support services, and the absence of meaningful administrative
17 oversight and technical assistance, indigent defense counsel in the Defendant Counties do
18 not or are unable to perform even the most basic tasks necessary to provide adequate
19 representation to their clients. They do not act as an adversarial check upon the prosecution
20 function.

21 178. Because few defense counsel screen their individual cases for conflicts, many
22 have represented clients with conflicting interests without informing the clients of the
23 conflict or seeking a knowing and voluntary waiver.

24 179. Most defense counsel do not meet and confer with their clients in a
25 meaningful manner prior to critical stages in their clients' criminal proceedings. They do not
26 visit clients in jail and are unavailable by phone. They limit their client contact to a few
27 minutes in the courthouse immediately prior to a court appearance.

28

1 180. Without adequate client contact, defense counsel cannot and do not
2 adequately argue against pretrial incarceration or the imposition of bail. Because their
3 counsel fail to advocate effectively against detention or the imposition of bail, or seek
4 repeated continuances, clients are detained unnecessarily or for prolonged periods of time
5 before trial.

6 181. Many defense counsel do not adequately investigate the charges against their
7 clients. Most rely upon the information in the county attorney's files to make an assessment
8 of their clients' cases. They do not meet with or subpoena witnesses, visit the scene of the
9 crime, or examine evidence. They rarely apply to the district court for, or use, independent
10 investigative resources.

11 182. Most indigent defense counsel do not conduct appropriate discovery or make
12 necessary pre-trial motions. They rarely make discovery motions or challenge the
13 sufficiency of the documents they are permitted to review.

14 183. The trial rate in the Defendant Counties is well below the national average.
15 While the Department of Justice's Bureau of Justice Statistics reports that approximately 6%
16 of all felony cases in state court go to trial,¹³ most Defendant Counties have trial rates of
17 between one and four percent. Indigent defense counsel who represent their clients
18 zealously or take too many cases to trial are penalized professionally.

19 184. Those indigent defense counsel who do take cases to trial do not adequately
20 prepare. They rarely use expert witnesses. Nor do they request, and in most cases cannot
21 obtain, independent verification of testing and forensic work conducted by the state criminal
22 laboratory.

23 185. Innocent clients and clients with meritorious defenses are compelled to plead
24 guilty. They waive their rights to a trial and other due process protections without a
25 sufficient understanding of the protections they are waiving.

26
27
28 ¹³ Bureau of Justice Statistics Bulletin: Felony Sentences in State Courts, 1998, at
8-9 (October 2001).

1 186. Because their counsel do not gather or prepare mitigating evidence, clients
2 receive harsher sentences than the facts might warrant. Some take "open" pleas on the
3 advice of counsel that often result in punishment that is disproportionate to the crimes
4 charged.

5 187. Although sentencing alternatives exist, many indigent defense counsel have
6 neither the time nor the ability to explore them.

7 188. Many indigent defense counsel do not know of provisions in the law that
8 allow the accused to preserve his or her right to appeal a plea of guilty. The few counsel
9 who are aware of these provisions do not pursue them during plea negotiations and do not
10 inform their clients of this right.

11 189. None of the indigent defense counsel adequately informs clients of their post-
12 conviction rights. The filing of notices of appeals is discouraged.

13 190. The inability of indigent defense counsel to perform these functions has far-
14 reaching and often dire consequences for clients. Without adequate guidance from counsel,
15 they are unable to make informed decisions about their defense.

16
17 **VII. PATTERN AND PRACTICE OF DELIBERATE INDIFFERENCE**

18 191. Defendants have known of the deficiencies in the Defendant Counties'
19 indigent defense programs for many years. Their failure to remedy these deficiencies
20 constitutes deliberate indifference to the rights of the individuals who must rely upon the
21 program for legal representation.

22 192. In December 1976 the National Center for Defense Management
23 (NCDM) received a grant from the United States Department of Justice to study and issue a
24 report on the condition of indigent defense in Montana. This 25-year-old report identified
25 many of the deficiencies alleged in this Complaint and counseled the State and its officers to
26 correct them. Specifically, NCDM found, among other things, that:

- 27 (a) Counties attempted to hold down spending in such a way that
28 adversely affected the quality of indigent representation;

- 1 (b) Judges' and county commissioners' control of indigent defense
2 counsels' compensation jeopardized the independence of the defense
3 function;
- 3 (c) A lack of support services, including investigators and adequate law
4 libraries, hampered the right to counsel;
- 4 (d) Neither the State nor counties offered formal orientation or training
5 for inexperienced attorneys; and
- 5 (e) The State neglected to collect uniform indigent defense caseload and
6 expenditure data, making it impossible to determine whether adequate
7 indigent defense services were being provided in the most cost-
8 effective way.

8 Twenty-five years later these same deficiencies persist.

9
10 193. Also in 1976, the Montana Council on Criminal Justice Standards and Goals
11 recommended that the State organize, finance, and administer a public defender system and a
12 coordinated assigned counsel system. The Council recommended that the State create an
13 office of the public defender and that local government create full-time public defender
14 positions. The Council also recommended that the State compile and maintain a list of
15 private attorneys eligible to receive indigent defense appointments. Twenty-five years later,
16 the State and County Defendants have failed to implement these reforms.

17 194. In April 1981, the 47th Montana Legislature, in a joint resolution, found that
18 "the constitutional requirement of the effective assistance of counsel for persons accused of
19 crimes has not been achieved consistently on a statewide basis". In December 1982, the
20 Joint Subcommittee on Judiciary recommended the creation of a "Public Defense
21 Coordinator" to train, provide technical and research assistance to, and collect caseload data
22 of indigent defense counsel. Twenty years later, the State Defendants have failed to
23 implement any of these reforms.

24 195. In March 2001, the American Bar Association invited various Montana
25 organizations to apply for a catalyst grant to foster systemic improvements in the area of
26 indigent defense. The grants ranged from \$50,000 to \$100,000. Among the suggested
27 reform efforts to be funded under the grants were: (1) increasing the resources available for
28 indigent defense services; (2) establishing performance and compensation standards for

1 attorneys in non-capital cases; (3) expanding training for indigent defense service providers;
2 and (4) increasing public defender salaries.

3 196. Among the organizations specifically invited to apply for the grants were
4 Defendant Flathead Commissioners, Defendant Missoula Commissioners, Defendant Butte-
5 Silver Bow Commissioners, and Defendant Supreme Court Administrator. None of the
6 invitees submitted an application to receive a grant.

7 197. During the last several years, Defendants have received numerous complaints
8 about the need of indigent defense programs for additional funding and administrative
9 resources and about the manner in which the lack of such resources affects the ability of
10 indigent defense counsel to perform their jobs properly. They have also received complaints
11 from current and former indigent defense clients about inadequacies in the legal
12 representation provided by their attorneys. Defendants have largely ignored these
13 complaints. By continuously failing to address reports and complaints of severe deficiencies
14 in the manner in which they provide legal representation to indigent criminal defendants,
15 Defendants have demonstrated deliberate indifference to plaintiffs' constitutional and
16 statutory rights.

17

18 **VIII. PLAINTIFFS LACK AN ADEQUATE REMEDY AT LAW**

19 198. Plaintiffs and members of the plaintiff class have suffered irreparable harm or
20 are at imminent and serious risk of suffering such harm because of Defendants' failure to
21 remedy the financial and administrative deficiencies that plague the indigent defense
22 programs in the Defendant Counties. There is no adequate remedy at law to address these
23 deficiencies or the consequent deprivation of adequate counsel.

24

25 **IX. CAUSES OF ACTION**

26

Count One

27 United States Constitution Sixth and Fourteenth Amendments, and 42 U.S.C. § 1983
(Right to Counsel and Due Process)
28 (All Defendants)

1 199. All other paragraphs of this complaint are incorporated herein by reference.

2 200. Defendants' failure to provide plaintiffs and members of the plaintiff class
3 with adequate legal representation violates plaintiffs' rights under the Sixth and Fourteenth
4 Amendments to the United States Constitution, including, but not limited to, their rights to
5 effective assistance of counsel and due process.

6
7 **Count Two**
8 Montana Constitution, Art. II, sections 4, 17, and 24, and section 46-8-101, MCA
9 (Right to Counsel)
10 (All Defendants)

11 201. All other paragraphs of this complaint are incorporated herein by reference.

12 202. Defendants' failure to provide plaintiffs and members of the plaintiff class
13 with adequate legal representation violates plaintiffs' rights under Mont. Const. Art. II,
14 sections 4, 17, and 24, and section 46-8-101, MCA, including their rights to counsel, due
15 process, and individual dignity.

16
17 **Count Three**
18 Section 46-8-201, MCA
19 (Remuneration of Appointed Counsel)
20 (All Defendants)

21 203. All other paragraphs of this complaint are incorporated herein by reference.

22 204. Defendants' failure to provide plaintiffs and members of the plaintiff class
23 with adequate legal representation violates plaintiffs' rights under section 46-8-201, MCA,
24 which requires, among other things, that Defendants reimburse indigent defense counsel a
25 reasonable amount for time expended in the representation of a client and for reasonable
26 costs incurred in connection with the representation of a client.

27
28 **Count Four**
Section 46-8-202, MCA
(Public Defender's Office)
(Missoula County Defendant)

205. All other paragraphs of this complaint are incorporated herein by reference.

206. Defendants' failure to provide plaintiffs and members of the plaintiff class
with adequate legal representation violates plaintiffs' rights under section 46-8-202, MCA,

1 | which requires, among other things, that counties with public defender offices provide those
2 | offices with the resources necessary to satisfy the legal requirements in providing counsel for
3 | defendants unable to employ counsel.

4 |
5 | **Count Five**
6 | Sections 2-15-1020(9) and (10), MCA
7 | (Appellate Defender Commission)
8 | (State Defendants)

9 | 207. All other paragraphs of this complaint are incorporated herein by reference.

10 | 208. By failing to ensure that the State's Appellate Defender Commission propose
11 | to the Montana Supreme Court minimum standards to which all trial and appellate public
12 | defenders, including locally appointed private counsel, shall conform, State Defendants have
13 | violated the rights of plaintiffs and members of the plaintiff class under section 2-15-
14 | 1020(9), MCA.

15 | 209. By failing to ensure that the State's Appellate Defender Commission keep
16 | current, and supply to all justices and judges in the state, a statewide roster of competent
17 | attorneys eligible for appointment, State Defendants have violated the rights of plaintiffs and
18 | members of the plaintiff class under section 2-15-1020(10), MCA.

19 | **X. PRAYER FOR RELIEF**

20 | WHEREFORE, plaintiffs respectfully request the following relief:

- 21 | (a) The certification of this action as a class action, pursuant to Mont. R.
22 | Civ. P. 23.
- 23 | (b) A declaration that plaintiffs' rights are being violated.
- 24 | (c) The issuance of preliminary and permanent injunctions requiring
25 | Defendants to provide indigent defense programs consistent with the
26 | Sixth and Fourteenth Amendments of the United States Constitution;
27 | 42 U.S.C. § 1983; Art. II, sections 3, 17, and 24 of the Montana
28 | Constitution; and sections 2-5-1020(9) and (10), 46-8-101, 46-8-201,
and 46-8-202, MCA.
- (d) The award to plaintiffs of costs and attorneys' fees under 42 U.S.C. § 1988.

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(e) The granting of such other and further relief as this court deems necessary or proper.

Respectfully submitted, this 1st day of April, 2002.

GOUGH, SHANAHAN, JOHNSON & WATERMAN

by Ronald F. Waterman
Ronald F. Waterman

OF COUNSEL:

BETH BRENNEMAN
ACLU OF MONTANA
Power Block West, Suite 4E
Helena, MT 59601
(406) 443-8590

ROBIN L. DAHLBERG
E. VINCENT WARREN
AMERICAN CIVIL LIBERTIES UNION FDN.
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2602

JULIE A. NORTH
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within and foregoing was mailed, with postage fully prepaid thereon, at Helena, Montana, on the 1st day of April, 2002, and directed to the following:

Brian Morris
Civil Services Bureau
Attorney General of Montana
P.O. Box 201401
Helena, MT 59620-1401

Hon. Dorothy McCarter, Chair
Commission of Appellate Defenders
228 Broadway
Helena, MT 59601

Rick Lewis, Court Administrator
P.O. Box 203002
Room 315, Justice Building
Helena, MT 59620

Judy Jacobson, Chief Executive
c/o Robert McCarthy
County Attorney
Butte-Silver Bow County
155 West Granite
Butte, MT 59701

1 Mr. Brian Morris
for Hon. Marc G. Buyske
2 District Judge
P.O. Box 822
3 Shelby, MT 59474

4 Mr. George Corn
Ravalli County Attorney
5 205 Bedford Street
Courthouse Box 5008
6 Hamilton, MT 59840

7 Mr. Robert J. Long
Lake County Attorney
8 106 - 4th Avenue E.
Polson, MT 59860
9

10 Mr. Fred Van Valkenburg
11 Missoula County Attorney
200 West Broadway
12 Missoula, MT 59802-4292

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28

Mr. Jonathan Smith
Flathead County Attorney's Office
P.O. Box 1516
Kalispell, MT 59901-1516

Mr. Joe Coble
Teton County Attorney
P.O. Box 899
Choteau, MT 59422-0899

Mr. Larry Epstein
Glacier County Attorney
P.O. Box 428
Cut Bank, MT 59427

Ronald F. Watson