



**Montana Legislative Services Division**  
**Legal Services Office**

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TO: Task Force on State Public Defender Operations

FROM: Julie Johnson, Legal Services Office

RE: Appointment of Public Defender (11, 12, B)

DATE: May 11, 2016

At the February 2016 meeting, I was asked two interrelated questions regarding the appointment of counsel where the initial charge against a defendant is one for which incarceration is not a possibility, but later the court considers finding the defendant in criminal contempt and jail time is possible.

The questions presented and brief answers to those questions are as follows:

Question 1: If a person is not entitled to receive a court-appointed counsel for charges because there is no penalty of jail time for the charge, what if that person is later charged with criminal contempt of court?

Answer: If a court orders a show cause hearing in order to determine whether a defendant should be found in criminal contempt, the defendant is entitled to counsel. If that person is indigent, the court will appoint OPD to defend the defendant.

Question 2: If the person is entitled to counsel for the contempt charge, under what law?

Answer: A person is entitled to counsel under the 6th Amendment to U.S. Constitution and Article II, section 24, of the Montana Constitution any time a person is charged with a crime for which incarceration is a penalty. Criminal contempt carries the possible penalty of jail time.

A defendant in a criminal action is not entitled to receive court-appointed counsel if the charges filed against that person do not carry jail time as a possible penalty. However, if the defendant disobeys the court or commits an action listed in 3-1-501(1), MCA<sup>1</sup>, a court can later hold the defendant in contempt and order jail time to be served under §3-1-501, MCA.

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<sup>1</sup> Other actions identified in § 3-1-501(1), MCA include: a breach of the peace, boisterous conduct, or violent disturbance tending to interrupt the due course of a trial or other judicial proceeding, disobedience of any lawful judgment, order, or process of the court and misbehavior in office or other willful neglect or violation of duty by an attorney, and deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding.

Section 3-1-501(3), MCA, discusses the penalty for criminal contempt:

**3-1-501. What acts or omissions are contempts -- civil and criminal contempt. . . .**

(3) A contempt may be either civil or criminal. A contempt is civil if the sanction imposed seeks to force the contemnor's compliance with a court order. A contempt is criminal if the court's purpose in imposing the penalty is to punish the contemnor for a specific act and to vindicate the authority of the court. If the penalty imposed is incarceration, a fine, or both, the contempt is civil if the contemnor can end the incarceration or avoid the fine by complying with a court order and is criminal if the contemnor cannot end the incarceration or avoid the fine by complying with a court order. If the court's purpose in imposing the sanction is to attempt to compel the contemnor's performance of an act, the court shall impose the sanction under 3-1-520 and may not impose a sanction under 45-7-309.

If a court orders the defendant to show cause why that person should not be held in criminal contempt, the defendant is entitled to a public defender (if he or she qualifies as indigent) at the proceedings on the contempt charge.

In Argersinger v. Hamlin, 407 U.S. 25 (1972), the United States Supreme Court held that the right to counsel extends to an indigent person facing prosecution of any charge that carries the possibility of incarceration, even if the sentence is suspended.

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