CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL

Summary

The following is a summary of the constitutional and statutory provisions requiring appointed counsel in Montana. The primary piece of legislation, the Montana Public Defender Act, is located in Title 47.

I. The Right to Effective Appointed Counsel in Criminal Cases

The United States and Montana Constitutions require appointed counsel for indigent defendants in criminal prosecutions where jail time or suspended jail time is or can be imposed.

Montana has codified the constitutional right to appointed counsel in criminal cases in Title 47, Montana's Public Defender Act.

Once a prosecution commences, appointed counsel must remain appointed through any "critical stage" of the proceedings, unless the defendant knowingly and voluntarily waives the right to counsel.

Appointed counsel in criminal cases must be effective. A defendant's conviction can be set aside for ineffective assistance of counsel. As a result, Montana has a constitutional obligation to provide effective representation through OPD in all cases.

The Montana Rules of Professional Conduct and the American Bar Association's Standards for Criminal Justice help inform and guide the conduct of all attorneys.

II. The Right to Effective Appointed Counsel in Civil Cases

Statutory and constitutional provisions also require appointed counsel in a broad array of civil cases.

Parents and Children in Dependent/Neglect Cases. Montana law permits the State to remove children from the home and terminate the parent-child relationship. Both the Montana Supreme Court and the U.S. Supreme Court have interpreted their constitutions to require the appointment of counsel for parents in dependent/neglect cases. Montana codified this constitutional right in the Montana Public Defender Act and in Title 41.

Appointed counsel in dependent/neglect cases must be effective. In fact, the Montana Supreme Court holds counsel to an even higher standard of effectiveness than in criminal cases.

The Montana Public Defender Act expanded the right to counsel to children in dependent/ neglect cases.

Involuntary Adoption Proceedings. Montana law permits a private party to terminate parental rights and subsequently adopt the child or children. The Montana Supreme Court recently determined that Montana's constitution requires counsel be appointed for indigent parents in these cases. The Montana Public Defender Act (Title 47) has no mechanism for the appointment of counsel to represent these parents. However, district courts have been ordering OPD to assign counsel and some are denying OPD's motions to rescind appointments.

Juvenile Proceedings. Juveniles involved in Youth Court proceedings have a constitutional right to appointed counsel, and Montana has codified that right in statute. Additionally, the Montana Constitution specifically guarantees juveniles the same rights as adults.

Involuntary Commitment Cases. The State can petition to involuntarily commit persons suffering from a mental disorder. Both the U.S. and Montana constitutions require appointment of counsel in these cases. Montana codified this constitutional right in Title 53 and in the Montana Public Defender Act which requires appointed counsel for indigent persons or in the interest of justice.

The constitutional right to an attorney in involuntary commitment cases requires the attorney be effective. The Montana Supreme Court holds counsel to an even higher standard of effectiveness than in criminal cases.

Developmental Disability Cases. The State can petition for the involuntary commitment of developmentally disabled individuals. Montana law indicates that these individuals are entitled to the same rights provided to individuals in involuntary commitment cases, including effective appointed counsel.

Additionally, the parent or guardian of the developmentally disabled person has a statutory right to appointed counsel.

Other Non-Criminal Cases. In addition to the above, a statutory right to appointed counsel exists (1) in a proceeding to determine paternity, (2) for a petitioner in a post-conviction relief proceeding, (3) for a petitioner in a habeas corpus proceeding, (4) for an individual subject to involuntary commitment due to alcoholism, (5) for a witness in a grand jury proceeding, (6) for a minor who petitions for a waiver of parental consent for an abortion, and (7) for persons subject to guardianship or conservatorship proceedings.

III. Effective Appointed Counsel on Appeal

In all the case types discussed above, the Montana and U.S. Constitutions require appointed counsel for indigent persons on direct appeal. Montana codified this constitutional right in the Montana Public Defender Act. The right to appointed counsel on appeal requires the attorney be effective.

IV. All Appointed Counsel Must Be Free of Conflicts of Interest

The constitutional right to appointed counsel requires the attorney be free of conflicts of interest. The existence of an actual conflict of interest can invalidate a conviction and require a new trial. A conflict of interest can occur when a court appointed attorney has an excessive caseload.

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CONSTITUTIONAL DUTIES OF THE OFFICE OF THE STATE PUBLIC DEFENDER

State and federal constitutional provisions guarantee the right to the assistance of counsel to persons involved in criminal and civil cases. These constitutional provisions may require that an attorney be appointed to represent the person, at state expense, typically because that person is financially unable to hire an attorney.

The Montana Public Defender Act, enacted in 2005 and set out in Title 47 of the Montana Code, codified the right to counsel in criminal and civil cases. Title 47 also establishes the mechanism by which courts may order the Office of the State Public Defender (OPD) to assign attorneys to represent persons who have a right to the assistance of counsel.

The constitutional guarantee of the right to counsel has been held to require the *effective* assistance of counsel. This guarantee applies to every criminal prosecution, without regard to whether counsel is retained or appointed.[1] OPD has a duty, rooted in the constitution, to provide its clients with effective representation.

I. THE RIGHT TO THE ASSISTANCE OF COUNSEL AT PUBLIC EXPENSE IN CRIMINAL CASES

A. Scope of the Right to Counsel in Criminal Proceedings.

The Sixth Amendment to the United States Constitution guarantees the right to the assistance of an attorney in criminal cases: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Article II, § 24 of the Montana Constitution also expressly guarantees the right to an attorney in criminal cases: "[i]n all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel[.]"

In Gideon v. Wainwright, a landmark 1963 decision, the U.S. Supreme Court held that under the Sixth Amendment, a person who is financially unable to hire an attorney has a right to have counsel appointed at state expense. "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[2]

In a separate decision, the Supreme Court also held that the right to the assistance of counsel for persons unable to retain a private attorney exists at the direct appeal stage.[3]

The Gideon ruling applied to cases in which the accused was charged with a felony offense (a crime punishable by a year or more in prison). In Argersinger v. Hamlin, the Court extended the right to appointed counsel for persons who could not afford counsel, and who were charged with a misdemeanor offense (a crime punishable by up to a year in jail) in any case that actually leads to imprisonment.[4] The Court recognized that problems associated with misdemeanor offenses often require the presence of counsel. "'[T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation.'"[5]

In a 1979 decision in Scott v. Illinois, the Court narrowed the scope of the *Argersinger* rule, and held that the right to appointed counsel for indigent defendants in misdemeanor cases applied only to those cases in which jail time was actually imposed.[6]

In a 2002 decision in Alabama v. Shelton, the U.S. Supreme Court clarified the *Argersinger – Scott* rule. The Court held that if the state did not afford an indigent defendant the assistance of counsel in his defense, the Sixth Amendment did not permit the state court to activate a suspended sentence of imprisonment upon the defendant's violation of the terms of probation.[7]

The Montana Supreme Court has adopted and applied the rules announced in the *Gideon* line of cases.[8] The constitutional right to counsel at state expense in criminal cases has also been codified. Sec. 47-1-104(4), MCA provides that a court may order the office of the public defender to assign counsel in cases in which a person is charged with a felony or a misdemeanor for which there is a possibility of incarceration, if the person is financially unable to retain private counsel, and on direct appeal. Sec. 46-8-101(3), MCA provides that if a judge determines that incarceration is not an option for a person charged with a misdemeanor offense, the court need not order that a public defender be assigned.

B. Assertion and Attachment of the Right to Counsel.

The constitutional right to the assistance of counsel does not depend upon a request by the accused person.[9] This right attaches when a prosecution commences, either by way of formal charge, preliminary hearing, information, or arraignment.[10]

Once the right to counsel attaches, the accused is entitled to the presence of appointed counsel during any "critical stage." "Critical stages" are "proceedings between an individual and agents of the State (whether 'formal or informal, in court or out,') … that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or …

meeting his adversary.'"[11] Events which may constitute critical stages for which counsel should be present include:

-custodial interrogations;[12]
-preliminary hearings;[13]
-lineups and show-ups;[14]
-plea negotiations;[15]
-arraignments;[16]
-during the pre-trial period between arraignment until the trial;[17]
-hearings on the accused's competency or fitness to be prosecuted;[18]
-entry of a guilty plea;[19]
-trials;[20]
-sentencing proceedings;[21]
-criminal contempt proceedings;[22]
-direct appeals;[23]
-probation revocation proceedings;[24]
-proceedings before the Sentence Review Division of the Montana Supreme Court.[25]

C. Waiver of the Right to Counsel in Criminal Cases.

A person accused of a criminal offense may waive the right to counsel and plead guilty. Waiver of the right to counsel must be a "knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances." A trial judge, before accepting a guilty plea from an unrepresented and uncounseled defendant, must inform the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.[26]

An accused person may relinquish, or waive, the right to counsel and opt to present his or her own defense.[27]

II. THE RIGHT TO COUNSEL MEANS THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

It has long been recognized that "the right to counsel is the right to the effective assistance of counsel."[28] Mere formal appointment of an attorney for a person too poor to hire an attorney does not satisfy the constitutional guarantee of effective representation. "[T]he assistance must be effective to give true meaning to that right and to the right to a fair trial."[29] The Montana Supreme Court recently reiterated that "[a]bsent effective assistance of counsel, the right to counsel is 'nothing more than a procedural formality.'" [30]

According to the U.S. Supreme Court, "[t]hat a person who happens to be a lawyer is present at trial alongside the accused, . . . is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, . . . who plays the role necessary to ensure that the trial is fair."[31]

In sum, the state and federal constitutional guarantees of the right to counsel require effective assistance of counsel at critical stages of a criminal proceeding,[32] including pre-trial, trial and sentencing stages, on direct appeal,[33] and in sentence review proceedings.[34] OPD thus has an obligation to provide effective representation in all cases, and thereby give meaningful effect to the clients' constitutional rights under the Sixth Amendment and Article II of the Montana Constitution.

How is "effective" representation defined? This is a critically important consideration. A defendant may be able to get his or her conviction reversed, or get a sentence vacated, if he or she can demonstrate that the attorney assigned to the case provided *ineffective* representation, in violation of the constitutional right to counsel. In Strickland v. Washington, the seminal case on issues of ineffective assistance claims, the U.S. Supreme Court announced a two-part test.[35]

The first prong of the test is performance-based. The defendant must show that counsel's performance was deficient. The Strickland Court held that "the proper standard for attorney performance is reasonably effective assistance." Stated another way, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[36]

The American Bar Association developed standards which define the responsibilities of defense counsel in criminal cases. The Strickland Court recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable[.][37] The U.S. Supreme Court more recently acknowledged that while the ABA Standards are "are 'only guides,' . . . and not 'inexorable commands,' . . . these standards may be valuable measures of the prevailing professional norms of effective representation[.]"[38] Thus, these Standards serve as useful benchmarks for OPD to help define what constitutes "reasonably effective assistance" as required by the Sixth Amendment and Article II, § 24 of the Montana Constitution.

Several standards define an attorney's obligations in working with the client. See, ABA *Standards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed.,

1993)(referred to here as "ABA Standards").[39] ABA Standard 4-1.3(a) urges counsel to act with diligence and promptness in representing a client. Standard 4-3.1(a) imposes a duty on counsel to "seek to establish a relationship of trust and confidence with the accused" and to "discuss the objectives of the representation[.]" Standard 4.3-2 addresses the duty to interview the client. "As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused."

Defense attorneys fundamentally have a duty to protect the rights of the accused. ABA Standard 4-3.6 provides that "[d]efense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges."

ABA standards which relate to guilty pleas are particularly important in defining standards of effective representation. A plea of guilty is constitutionally valid only to the extent it is voluntary and intelligent.[40] Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel.[41] The Montana Supreme Court held in a 2013 decision that " '[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it.'"[42]

The U.S. Supreme Court noted in 2012, in Missouri v. Frye, that ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. "[P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."[43] Thus, "[w]ithout effective counsel during plea negotiations, criminal defendants would be denied effective representation at what has increasingly become the most critical point of the criminal justice process for a defendant."[44]

"Reasonably effective" representation requires an adequate investigation of a case, even if the accused admits guilt or states an intent to plead guilty. ABA Standard 4-4.1(a) imposes on counsel a duty to "conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities." Notably, this duty to investigate "**exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty**." (emphasis added). ABA *Standard for*

Criminal Justice, Pleas of Guilty, Standard 14-3.2 (3d ed. 1999) likewise mandates an appropriate investigation.[45]

The Montana Supreme Court adopted this principle in Bone v. State. There, counsel knew that Bone expressed remorse for his role in two deliberate homicides. Counsel also knew that Bone was taking medication prescribed by a psychiatrist. Counsel, however, did not investigate the effects of the medication, in part based on Bone's expressions of remorse. Bone pleaded guilty to two homicide charges, but later challenged his pleas on the claim that his attorney's failure to investigate constituted ineffective representation. Citing the duty to investigate as stated in ABA Standard 4-4.1, the state court held that Bone's remorse and apparent lack of distinct physical symptoms from the medication did not excuse counsel from investigating the effects of the medication. "Counsel's failure to investigate the nature, effects, and amounts of Bone's medication constitutes deficient representation under the Strickland test for ineffective assistance of counsel."[46]

Defense attorneys may properly advise the accused only after conducting an appropriate investigation. ABA Standard 4-5.1(a) provides: "After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome."

An attorney should not recommend to a client the acceptance of a plea offer unless and until appropriate investigation has been completed. The ABA standards note that an appropriate investigation may be "quite limited in certain cases – for example, where a highly favorable pre-[charge] plea is offered, and the pleas offered after [charges are filed] are likely to carry significantly more severe sentences."[47] The 2015 edition of the Criminal Justice Standards states that "[d]efense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest."[48]

ABA Standard 4-5.2(a) recognizes that certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include: (i) what pleas to enter; (ii) whether to accept a plea agreement; (iii) whether to waive jury trial; (iv) whether to testify in his or her own behalf; and (v) whether to appeal.[49]

An ABA Standard specifically addresses an attorney's obligation to avoid excessive workloads. Standard 4-1.3(e) states that defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations. The Montana Supreme Court agreed with this standard, in State v. Couture.[50]

III. THE CONSTITUTIONAL RIGHT TO COUNSEL INCLUDES THE RIGHT TO THE ASSISTANCE OF COUNSEL FREE OF A CONFLICT OF INTEREST.

The constitutional guarantee of the right to counsel mandates that the representation afforded to indigent persons be free of conflict. "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."[51] The Montana Supreme Court has noted that "the Sixth Amendment right to counsel contemplates the assistance of an attorney devoted 'solely to the interests of his client.' . . . The duty of loyalty is 'perhaps the most basic of counsel's duties.'"[52] According to the Court in Strickland, the right to the effective assistance of counsel is impaired when defense counsel operates under a conflict of interest because "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties."[53]

OPD supervisors and attorneys must be cognizant of the possibility of impermissible conflicts of interest, and take appropriate steps to avoid conflicts, so as to ensure effective representation of persons in a manner consistent with the constitutional guarantees of the right to counsel.

An attorney may have an impermissible conflict if he or she represents persons who have conflicting interests. The Montana Supreme Court recently noted that the problem lies in what the conflict prevents the attorney from doing. "[A] conflict may . . . prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another."[54]

A conflict of interest may also be created by an excessive caseload. Here, too, an attorney's duty of loyalty is jeopardized, as the attorney may be prevented from providing effective representation to each of his or her assigned clients. A Colorado state appellate court recently observed that "a conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing."[55] Other state courts have reached the same conclusion.[56]

The existence of a conflict of interest can serve as a basis on which to invalidate a conviction. A person may show that his or her constitutional right to the effective assistance of counsel was violated if the attorney (1) was actively representing conflicting interests and (2) the conflict had an adverse effect on specific aspects of counsel's performance.[57]

IV. THE SCOPE OF THE RIGHT TO THE ASSISTANCE OF COUNSEL IN NON-CRIMINAL CASES.

State statutes which establish a broad array of civil cases grant persons involved in those cases the right to be represented by an attorney. Title 47 of the Montana Code creates the mechanism by which state courts may fulfill the rights to counsel by ordering OPD to assign attorneys in these cases. In several of these case types, a constitutional right to the assistance of counsel is codified in Title 47.

A. Dependent/Neglect Cases Pursuant to Title 41

Sec. 41-3-422, MCA authorizes a county attorney, attorney general, or an attorney hired by the county to file a petition in court, in cases in which the state alleges that a child is abused or neglected. The state may ask in the petition that the court grant the state a wide range of authority, from providing emergency services to temporary legal custody of the child to termination of the parent-child legal relationship. Sec. 41-3-425, MCA provides that parents and children have a right to an attorney in these proceedings.[58]

Sec. 47-1-104(4)(a)(iii), MCA provides the mechanism by which a parent's right to an attorney granted in Title 41 cases is realized. This statute authorizes the court in which the petition is filed to order OPD to assign an attorney "for a parent, guardian, or other person with physical or legal custody of a child or youth in any removal, placement, or termination proceeding pursuant 41-3-422 and as required under the federal Indian Child Welfare Act, as provided in 41-3-425[.]"

The parents' right to counsel in these cases has a constitutional basis. Courts have long recognized that a natural parent's right to the care and custody of his or her child is a "fundamental liberty interest" that must be protected by fundamentally fair procedures.[59] The U.S. Supreme Court explained the need to protect the rights of parents:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State

> moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.[60]

In 1993, in In re A.S.A., the Montana Supreme Court held that these fundamentally fair procedures, contained in the Due Process Clause of the Montana Constitution,[61] "guarantee[] an indigent parent the right to court-appointed counsel in proceedings brought to terminate parental rights."[62] The right to the assistance of counsel is a necessary component of the need to provide fundamentally fair procedures. "Fairness requires that a parent, like the State, be represented by counsel at parental termination proceedings. Without representation, a parent would not have an equal opportunity to present evidence and scrutinize the State's evidence."[63]

The Court noted the critical need to provide attorneys to parents who are too poor to hire counsel in cases in which they face the potential termination of the parent-child relationship.

> The potential for unfairness is especially likely when an indigent parent is involved. Indigent parents often have a limited education and are unfamiliar with legal proceedings. If an indigent parent is unrepresented at the termination proceedings, the risk is substantial that the parent will lose her child due to intimidation, inarticulateness, or confusion.[64]

In 2004, the Montana Supreme Court determined that a parent's right to counsel includes the right to the *effective* assistance of counsel. In In re A.S., the Court explained:

> it seems self-evident that the right to counsel carries with it a concomitant requirement that such counsel be effective. In the absence of effective, competent counsel, the right to counsel is reduced to nothing more than a procedural formality. That is, if there is no requirement that the counsel a parent receives be effective, then the mere act of appointing counsel is meaningless.[65]

The A.S. Court declined to apply the same *Strickland* test that is used to assess whether counsel provided effective assistance in criminal cases. In its stead, the Court adopted benchmark, non-exclusive guidelines to be used to assess counsel's effectiveness in parental rights termination cases:

> (1) Training and experience. Specifically, whether counsel has experience and training in representing parents in matters and proceedings under Title 41, Chapter 3, Part 6, Montana Code Annotated, and whether counsel has a verifiably competent

understanding of the statutory and case law involving Title 41, Chapter 3, Montana Code Annotated, and of termination proceedings brought under Title 41, Chapter 3, Part 6, Montana Code Annotated; and

(2) Advocacy. This inquiry includes whether counsel has adequately investigated the case; whether counsel has timely and sufficiently met with the parent and has researched the applicable law; whether counsel has prepared for the termination hearing by interviewing the State's witnesses and by discovering and reviewing documentary evidence that might be introduced; and whether counsel has demonstrated that he or she possesses trial skills, including making appropriate objections, producing evidence and calling and cross-examining witnesses and experts.[66]

This constitutional right to the effective assistance of counsel discussed in In re A.S. applied in the stage in which termination proceedings were pending. The Supreme Court in 2010 expanded the right of an indigent parent to the assistance of counsel, to include the adjudication stage, which occurs much earlier in the case. In In Re J.J.L., the Court held that an adjudication hearing under sec. 41-3-437, MCA is a "critical stage" in termination proceedings and invokes the same due process rights that are essential during the termination proceeding.[67]

The J.J.L. Court explained that when it decided In re A.S. in 2004, the right to counsel had not been attached to other stages of parental rights termination proceedings. However, the legislature expanded the right to counsel in these cases. "In 2005, the Montana legislature granted indigent parents a statutory right to appointed counsel in all abuse and neglect proceedings involving any petition filed pursuant to § 41-3-422, MCA. Section 41-3-425, MCA."[68]

The 2005 legislation which expanded the right to counsel for parents in Title 41 cases was contained in the bill which created the Montana Public Defender Act and the Office of the State Public Defender. This legislation also expanded the right to counsel to include children in cases initiated by a petition filed pursuant to sec. 41-3-422, MCA.[69] Sec. 47-1-104(b)(i), MCA authorizes the court to order OPD to assign counsel in cases "as provided for in 41-3-425."

In sum, the creation of the statewide public defender agency permitted the expansion of the right to counsel to parents and to children, at state expense.

B. Involuntary Adoption Proceedings.

Title 42, chapter 2, part 6, MCA, allows certain private parties to file a petition to involuntarily terminate parental rights to a child on specified grounds, when the proceedings also involve the

subsequent adoption of the child. The Montana Supreme Court recently analogized these "involuntary adoption" cases to Title 41 parental rights termination cases, and held that Montana's constitutional right to equal protection "requires that counsel be appointed for indigent parents in termination proceedings brought under the Adoption Act." [70]

Title 47 does not provide a statutory mechanism by which a court may order OPD to assign counsel to represent parents in these Title 42 involuntary adoption cases. District courts in the state have begun ordering OPD to assign counsel in these cases and are denying OPD's motions to rescind appointments.

C. Juvenile Proceedings.

Juveniles who become involved in Youth Court proceedings have a statutory right to counsel.[71] Sec. 47-1-104(4)(b)(ii), MCA authorizes Youth Court to order OPD to assign counsel for juveniles.[72] The right to counsel is based on constitutional due process considerations. In a 1967 decision, In re Gault,[73] the U.S. Supreme Court held that under the constitutional due process guarantees, juveniles are entitled to appointment of counsel in youth court proceedings. Additionally, Article II, § 15 of the Montana Constitution guarantees persons under 18 years of age the same rights as adults, unless specifically precluded.

D. Involuntary Commitment Cases.

Sec. 53-21-116, MCA provides that if a person alleged to be suffering from a mental disorder and requiring commitment "is indigent or if in the court's discretion assignment of counsel is in the best interest of justice, the judge shall order the office of state public defender, provided for in 47-1-201, to immediately assign counsel to represent the person at either the hearing or the trial, or both." Sec. 47-1-104(4)(a)(viii), MCA authorizes the court to order OPD to assign counsel to represent "a respondent in a proceeding for involuntary commitment for a mental disorder, as provided in 53-21-116."

In a 2001 decision, In re Matter of Mental Health of K.G.F., the Montana Supreme Court held that the Title 53 statutory rights to counsel "explicitly and implicitly garner protection under both the federal and the Montana constitutions."[74] Thus, there is a constitutional basis for the appointment of counsel in these cases. As noted, the right to counsel means the right to the effective assistance of counsel.

The K.G.F. Court declined to apply in commitment cases the same Sixth Amendment-based *Strickland* standard that is used to assess whether counsel provided effective assistance in criminal cases. The K.G.F. Court adopted five "critical areas" "to better define the scope of

effective representation in involuntary commitment proceedings, under Article II, Section 17, of the Montana Constitution": 1) appointment of competent counsel; 2) counsel's initial investigation; 3) counsel's interview with the client; 4) the patient-respondent's right to remain silent; and 5) counsel's role as an advocate for the patient-respondent.[75]

E. Developmental Disability Cases.

Sec. 53-20-112, MCA provides that a person alleged to be developmentally disabled has all the rights accorded to a person who suffers from a mental disorder and who is subject to involuntary commitment proceedings. Thus, the person alleged to be developmentally disabled has the same constitutional right to the effective assistance of an attorney as a person alleged to suffer from a mental disorder.

Sec. 47-1-104(4)(b)(v), MCA authorizes the court to order OPD to assign counsel to represent "a respondent in a proceeding for involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112."

Further, the parent or guardian of the person alleged to be developmentally disabled has a right to the assistance of counsel in a commitment hearing, under sec. 53-20-112, MCA, and the court may order OPD to assign counsel under sec. 47-1-104, MCA.

F. Other Non-Criminal Cases.

Other non-criminal cases in which a person has a statutory right to be represented by counsel, and in which a court may order OPD to assign counsel under Title 47, include a party in a proceeding to determine paternity;[76] for a petitioner in a proceeding for postconviction relief;[77] for a petitioner in a habeas corpus proceeding;[78] for a respondent in a proceeding for involuntary commitment due to alcoholism;[79] for a witness in a grand jury proceeding; [80] for a minor who petitions for a waiver of parental consent for an abortion; [81]and, for persons who are subject to guardianship or conservatorship proceedings.[82]

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[1] Evitts v. Lucey, 469 U.S. 387, 395-96 (1985).

[2] Gideon v. Wainwright, 372 U.S. 335, 344 (1963). The Gideon Court held that the Sixth Amendment protections apply to states through the Fourteenth Amendment.

[3] Douglas v. California, 372 U.S. 353, 357 (1963)("there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'").

[4] Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). The Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."

[5] Argersinger v. Hamlin, 407 U.S. 25, 33 (1972).

[6] The Court held that "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." Scott v. Illinois, 440 U.S. 367, 373-74 (1979).

[7] Alabama v. Shelton, 535 U.S. 654, 662 (2002).

[8] See, for example, State v. Craig, 274 Mont. 140, 906 P.2d 683, 688 (1995); State v. Buck, 2006 MT 81, ¶ 33, 331 Mont. 517, 134 P.3d 53; State v. Hansen, 273 Mont. 321, 903 P.2d 194 (1995); State v. Hanna, 2014 MT 346, 377 Mont. 418, 341 P.3d 629; State v. Swan, 199 Mont. 459, 467, 649 P.2d 1297, 1301-1302 (1982)(direct appeal).

[9] Brewer v. Williams, 430 US 387, 404 (1977) ("[T]he right to counsel does not depend upon a request by the defendant."); Carnley v. Cochran, 369 U.S. 506, 513 (1962) ("[W]here the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.")

[10] Rothgery v. Gillespie County, 554 U.S. 191, 198 (2008); State v. Buck, 2006 MT 81, ¶ 33, 331 Mont. 517, 134 P.3d 53; State v. Scheffer, 2010 MT 73, ¶ 16, 355 Mont. 523, 230 P.3d 462.

[11] Rothgery v. Gillespie County, 554 U.S. 191, 212 n. 15 (2008). The Montana Supreme Court defined a critical stage in a proceeding as "any step of the proceeding where there is potential substantial prejudice to the defendant." State v. Robbins, 218 Mont. 107, 111, 708 P.2d 227, 231 (1985).

[12] Rothgery v. Gillespie County, 554 U.S. 191, 212 n. 15 (2008). The Montana Supreme Court defined a critical stage in a proceeding as "any step of the proceeding where there is potential substantial prejudice to the defendant." State v. Robbins, 218 Mont. 107, 111, 708 P.2d 227, 231 (1985).

[13] Coleman v. Alabama, 399 U.S. 1, 9-10 (1970).

[14] Coleman v. Alabama, 399 U.S. 1, 9-10 (1970).

[15] Lafler v. Cooper, 566 U.S. ___, 132 S.Ct. 1376, 1388 (2012); Missouri v. Frye, 566 U.S. ___, 132 S. Ct. 1399, 1407 (2012); Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 (2010).

[16] Hamilton v. Alabama, 368 U.S. 52 (1961). The term "arraignment" means "the formal act of calling the defendant into open court to enter a plea answering a charge." Sec. 46-1-202(2), MCA.

[17] Brewer v. Williams, 430 U.S. 387, 398-399 (1977); Powell v. Alabama, 387 U.S. 45, 57 (1932).

[18] Sturgis v. Goldsmith, 796 F.2d 1103, 1109 (9th Cir. Ariz. 1986).

[19] Iowa v. Tovar**,** 541 U.S. 77, 81 (2004).

[20] Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); Argersinger v. Hamlin, 407 U.S. 25, 37, 40 (1972).

[21] Glover v. United States, 531 U.S. 198, 203-204 (2001); Mempa v. Rhay, 389 U.S. 128 (1967); and Wiggins v. Smith, 539 U.S. 510, 538 (2003).

[22] Miller v. State, 2011 Mont. LEXIS 280 (original proceeding).

[23] Douglas v. California, 372 U.S. 353, 357 (1963); State v. Swan, 199 Mont. 459, 467, 649 P.2d 1297, 1301-1302 (1982).

[24]Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

[25] Ranta v. State, 1998 MT 95, 288 Mont. 391, 958 P.2d 670 (pursuant to Article II, §24 of the Montana Constitution.)

[26] Brady v. United States, 397 U.S. 742 (1970); Iowa v. Tovar, 541 U.S. 77 (2004).

[27] Faretta v. California, 422 U.S. 806 (1975); State v. Colt, 255 Mont. 399, 843 P.2d 747 (1992). A court may order that counsel be assigned to represent an accused who is competent enough to stand trial but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. Indiana v. Edwards, 554 U.S. 164 (2008).

[28] This axiom has been expressed in McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); State v. Johnson, 221 Mont. 384, 719 P.2d 771 (1986); and, State v. Craig, 274 Mont. 140, 906 P.2d 683, 688 (1995).

[29] State v. Jones, 278 Mont. 121, 125, 923 P.2d 560, 562-63 (1996). See also, Avery v. Alabama, 308 U.S. 444, 446 (1940).

[30] Avery v. Batista, 2014 MT 266, ¶25, 376 Mont. 404, 336 P.3d 924.

[31] Strickland v. Washington, 466 U.S. 668, 685 (1984).

[32] Lafler v. Cooper, 566 U.S. ___, 132 S.Ct. 1376, 1385 (2012).

[33] Evitts v. Lucey, 469 U.S. 387, 396 (1985) (due process requires effective assistance of counsel during first appeal as of right); Hans v. State, 283 Mont. 379, 942 P.2d 674 (1997)(A defendant has a right to the assistance of counsel on a first appeal. The right to counsel on appeal includes the right to effective assistance of counsel.)

[34] A criminal defendant has the right to effective assistance of counsel at a sentence review hearing. Avery v. Batista, 2014 MT 266, ¶ 25, 376 Mont. 404, 336 P.3d 924.

[35] The Montana Supreme Court adopted the two-part test in State v. Boyer, 215 Mont. 143, 695 P.2d 829 (1985).

[36] 466 U.S. at 687, 688.

[37] 466 U.S. at 688.

[38] Padilla v. Kentucky, 559 U.S. 356, 366-67 (2010); see also, Missouri v. Frye, 566 U.S., ___, 132 S.Ct. 1399, 1408 (2012)(ABA standards "can be important guides").

[39] In February 2015, the ABA approved a fourth edition of the defense standards. Unless otherwise noted, this Memo will address the 3rd edition of the Standards, as these are the Standards which courts have analyzed and applied.

[40] State v. Lone Elk, 2005 MT 56, ¶ 13, 326 Mont. 214, 108 P.3d 500; Bousley v. United States, 523 U.S. 614, 618, (1998).

[41] Hill v. Lockhart, 474 U.S. 52 (1985).

[42] Rose v. State, 2013 MT 161, ¶21, 370 Mont. 398, 304 P.3d 387, quoting Lafler v. Cooper, 566 U.S. ___, 132 S.Ct. 1376, 1387 (2012); see also, Padilla v. Kentucky, 559 U.S. 356, 364 (2010).

[43] Missouri v. Frye, 566 U.S., ___, 132 S. Ct. 1399, 1407 (2012).

[44] Rose v. State, 2013 MT 161, ¶21, 370 Mont. 398, 304 P.3d 387, citing Missouri v. Frye, 566 U.S., ___, 132 S.Ct. 1399, at 1407.

[45] This Standard provides:

> (b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.

[46] Bone v. State, 284 Mont. 293, 307-308, 944 P.2d 734, 742-43 (1997).

[47] Comment, ABA Standards for Criminal Justice Pleas of Guilty (ABA, 3d. ed. 1999), Standard 14-3.2, at 123.

[48] Standard 4-6.1(b), ABA *Standards for Criminal Justice: Prosecution Function and Defense Function* (4th ed., 2015) provides:

> (b) In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.

[49] The United States Supreme Court agrees that these are the client's decisions. See, Jones v. Barnes, 463 U.S. 745 (1983).

[50] 2010 MT 201, ¶ 76, 357 Mont. 398, 240 P.3d 987. The ABA's *Ten Principles of a Public Defense Delivery System,* Principle 5 with Commentary (Feb. 2002) imposed a similar requirement:

> **Defense counsel's workload is controlled to permit the rendering of quality representation.** Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

[51] Wood v. Georgia, 450 U.S. 261, 272 (1981).

[52] State v. Jones, 278 Mont. 121, 125, 923 P.2d 560, 562-63 (1996).

[53] Strickland v. Washington, 466 U.S. 668, 692 (1984).

[54] In re Neuhardt, 2014 MT 88, ¶ 25, 374 Mont. 379, 321 P.3d 833.

[55] People v. Roberts, 321 P.3d 581, 589 (Colo. Ct. App. 2013).

[56] See, In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1135 (Fla. 1990)("When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created."); In re Edward S., 92 Cal. Rptr. 3d 725, 746-747 (Cal. App. 1st Dist. 2009).

[57] Cuyler v. Sullivan, 446 U.S. 335, 346 (1980); State v. Wereman, 273 Mont. 245, 902 P.2d 1009 (1995).

[58] Sec. 41-3-425, MCA provides, in relevant part:

> **41-3-425. Right to counsel**. (1) Any party involved in a petition filed pursuant to 41-3-422 has the right to counsel in all proceedings held pursuant to the petition.
>
> (2) Except as provided in subsections (3) and (4), the court shall immediately appoint the office of state public defender to assign counsel for:
>
> (a) any indigent parent, guardian, or other person having legal custody of a child or youth in a removal, placement, or termination proceeding pursuant to 41-3-422, pending a determination of eligibility pursuant to 47-1-111;
>
> (b) any child or youth involved in a proceeding under a petition filed pursuant to 41-3-422 when a guardian ad litem is not appointed for the child or youth; and
>
> (c) any party entitled to counsel at public expense under the federal Indian Child Welfare Act.
>
> (3) When appropriate, the court may appoint the office of state public defender to assign counsel for any child or youth involved in a proceeding under a petition filed pursuant to 41-3-422 when a guardian ad litem is appointed for the child or youth.

[59] Santosky v. Kramer, 455 U.S. 745, 753-54 (1982); In Matter of R.B., 217 Mont. 99, 102-03, 703 P.2d 846, 848 (1985).

[60] Santosky, 455 U.S. at 753-54.

[61] The Due Process Clause, found in Article II, § 17 of the Montana Constitution, provides: ""No person shall be deprived of life, liberty, or property without due process of law."

[62] 258 Mont. 194, 198, 852 P.2d 127, 130 (1993).

[63] 258 Mont., at 198, 852 P.2d at 129.

[64] 258 Mont., at 198, 852 P.2d, at 129 (The Montana Court quoted from the U.S. Supreme Court's decision in Santosky v. Kramer).

[65] In re A.S., 2004 MT 62, ¶ 20, 320 Mont. 268, 87 P.3d 408.
[66] In re A.S., 2004 MT 62, ¶ 26.

[67] 2010 MT 4, ¶ 17, 355 Mont. 23, 223 P.3d 921.

[68] 2010 MT 4, ¶ 16, 355 Mont. 23, 223 P.3d 921.

[69] See, Sec. 15, Chap. 449, L. 2005; SB 146 (2005).

[70] In the Matter of Adoption of A.W.S., 2014 Mont. 322, ¶ 26, 377 Mont. 234, 339 P3d 414.

[71] Sec. 41-5-1413, MCA provides:

> **41-5-1413. Right to counsel -- assignment of counsel**. In all proceedings following the filing of a petition alleging that a youth is a delinquent youth or youth in need of intervention, the youth and the parents or guardian of the youth must be advised by the court or, in the absence of the court, by its representative that the youth may be represented by counsel at all stages of the proceedings. If counsel is not retained or if it appears that counsel will not be retained for the youth, the court shall order the office of state public defender, provided for in 47-1-201, to assign counsel for the youth pursuant to the Montana Public Defender Act, Title 47, chapter 1, unless the right to counsel is waived by the youth and the parents or guardian. Neither the youth nor the youth's parents or guardian may waive the right to counsel after a petition has been filed if commitment to the department for a period of more than 6 months may result from adjudication.

[72] This statute provides, in part: "[a] court may order an office to assign counsel in cases in which a person is entitled by law to the assistance of counsel at public expense regardless of the person's financial ability to retain private counsel, as follows: for a youth in a proceeding under the Montana Youth Court Act alleging a youth is delinquent or in need of intervention, as provided in 41-5-1413, and in a prosecution under the Extended Jurisdiction Prosecution Act, as provided in 41-5-1607;..."

[73] In re Gault, 387 U.S. 1, 41 (1967) ("the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an

institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.")

[74] In re Mental Health of K.G.F., 2001 MT 140, ¶ 27, 306 Mont. 1, 29 P.3d 485; In re Mental Health of C.R.C., 2009 MT 125, ¶ 15, 350 Mont. 211, 207 P.3d 289.

[75] 2001 MT 140, ¶¶ 70-86. The Court added, "[i]n turn, the due process afforded individuals under the foregoing standards must serve to protect the fundamental individual liberty interests of dignity and integrity as identified under Title 53, Chapter 21, and Article II, Sections 4 and 10, of the Montana Constitution.

[76] Secs. 40-6-119, 47-1-104(4(a)(ii), MCA.

[77] Secs. 46-21-201, 47-1-104(4)(a)(v), MCA.

[78] Secs. 46-22-101, 47-1-104(4)(a)(vi), MCA.

[79] 53-24-302 (9), MCA (This statute provides in part, that "If the court believes that the person needs the assistance of counsel, the court shall order the office of state public defender, provided for in 47-1-201, to assign counsel for the person regardless of the person's wishes."); 47-1-104(4)(a)(ix), MCA.

[80] Secs. 46-4-304, 47-1-104(4)(a)x), MCA.

[81] Sec. 50-20-509(2), MCA.

[82] Sec. 50-20-509(2), MCA.