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December 8, 2015

Task Force on State Public Defender Operations
c/o Mr. Dave Bohyer
LSD Director
Helena, MT

Re: Response to Richard Hickel, Assistant City Attorney of Kalispell, Letter to OPD Task Force

Dear Mr. Bohyer and members of the OPD Task Force,

I have reviewed a copy of Richard (Rich) Hickel's letter to you (a copy of which is attached hereto), wherein he disparages the work of OPD and seeks to reduce the amount of resources available to this important agency. Rich uses one my cases to support his letter, while I worked at OPD in the Kalispell Municipal Court. Though Rich does not cite the case name and number, he states his version of that case on page 2 of his letter. There are only two possible cases to which Rich is referring. Below is my response to Rich's letter with other general comments concerning the issue of OPD funding and resources.

The first possible case to which Rich is referring is City of Kalispell v. Kelsey Herriges, TK-13-2831, wherein I filed a Motion to Dismiss (a copy of which is attached hereto). There, I obtained through discovery the officer's in-car video (which had audio-video recording of the stop and encounter). This evidence showed several officers exceeding the scope of the reason for their stopping my client--which was for an expired registration. After stopping my client, two of the officers (Chad Fetveit and Chad Zimmerman) discussed--outside the presence of my client--that they would remove my client from her vehicle and question her about drugs being in her car. They had no probable cause or particularized suspicion to conduct this investigation, but they did it anyway.

After Fetveit removed my client from the privacy of her car and asked her about drugs in the car, she denied having any drugs. When she so denied, Fetveit pressed my client about her

giving consent for him to search her car. She refused. When she refused, he accused her of having a “guilty mind” because she did not give consent. My client maintained her position. After more pressure from Fetveit, my client asked to speak with her mom (because Herriges is a young person and inexperienced). The officer said no and continued to press my client for consent to search. Finally, after several minutes of this, KPD police released her when she would not give them what they wanted.

It so happened that when my Motion to Dismiss was set for hearing, Rich informed me that he was dismissing the case against my client because, as Rich said, the officers involved supposedly could not remember anything about the stop and investigation: even though it was recorded on audio and video and there were 3 officers on scene. Notably, police never made any reports of this encounter with my client. To my knowledge, the police responsible for the violation of my client’s rights were never reprimanded for this, and I feel certain Rich did nothing to remedy this wrong. Rich simply swept the police violations under the rug by dismissing the action.

The other possible case to which Rich is referring concerns my client Casey Metayer. In one of her cases, I filed a Motion to Dismiss “in furtherance of justice” similarly to the Kelsey Herriges matter. In that case, KPD police stopped Metayer late at night in a hotel parking lot for an expired registration. The police in-car video did not have audio recording, but it showed several police surrounding Metayer’s vehicle for a lengthy period of time—much longer than it takes to issue a traffic citation. Under Montana statute, such a lengthy stop is unlawful. The video shows officers shining their flashlights in her vehicle, sticking their faces through open windows, looking deeply into her car, and opening her vehicle doors. If there was a person in some other location attempting suicide, these police appeared to be more concerned about staying with Metayer. Too, no records were created or produced by the City in discovery to show that police called dispatch concerning a suicidal person, thus justifying the lengthy stop. Eventually, the officers cited her for a traffic violation and released her.

Police never wrote any reports about what was taking place between her and the officers, so defense did not know why officers had stopped Metayer for so long. Police are trained to document important events regarding their stops and searches, but here, there was nothing. Seeing the police’ actions here, I filed the Motion to Dismiss for their violating my client’s right to be free from unreasonable searches and seizures and privacy.

When the City Attorney responded to my motion, he did not cite the “real” reason for the lengthy stop. So, the matter went to hearing to discover the facts. After hearing the officer’s testimony in court, I withdrew my motion and informed the court that defense had no knowledge (based on no audio and reports) of the reason the officers detained her for so long. Since my client did not attend the hearing, I had no way to rebut the officer’s testimony. At the hearing, I noted for the Court that the City Attorney did not put this reason (of a suicide issue) in his response to my motion. Had Rich done so, I could have taken steps to investigate this in discovery. The Court acknowledged my concern and told Rich in open court that the City Attorneys should attempt to make the facts clear and known for the defense so we can avoid unnecessary hearings.

As a matter of important note too, Metayer happens to be the same client whom KPD police stopped for a traffic citation and after arresting her took her to KPD booking station. While she was in KPD custody, the booking video-audio recording revealed the arresting officer informing my client that the real reason they arrested her was not for the traffic citation (expired registration), but rather to conduct a drug investigation concerning another person. This stop and arrest were pretextual and invaded my client's right to be free from unreasonable searches and seizures and privacy. I filed a Motion to Suppress and Dismiss for this reason (to my knowledge, that motion has not been heard and ruled on to date).

So, in either case, whether Rich is referring to Herriges or Metayer, it is the City's lack of diligence and adherence to the laws and constitution of our State and nation that caused OPD to spend time to address the issues concerning the rights of our clients.

I (like other OPD attorneys) file defense motions when issues arise. On many occasions while I worked with OPD, courts granted my defense motions, many of which concerned police conducting searches and seizures unlawfully, coercing people to consent or give evidence, and stopping/arresting citizens unlawfully and under pretext. These motions and orders are a matter of public record. Rich mentions none of them in his letter to you.

Notably, the City Attorneys in Kalispell never filed motions for sanctions against me or other OPD attorneys for filing "frivolous motions"; never filed a complaint with the Office of Disciplinary Counsel for filing "frivolous motions"; and never made any complaints to OPD while the cases were pending concerning "frivolous motions". Those venues and opportunities are, obviously, the most appropriate places to make such accusations—so they can be litigated and addressed on the merits.

Rich's condemnation of OPD is appalling. Rich does not seem to understand how important the role of a defense attorney is in a free society. In truth, there would be less need for OPD attorneys if certain police and prosecutors had more respect for the rights of our people and laws that limit police and prosecutorial power. It is Rich's letter against OPD that highlights the need for OPD staff and attorneys who are willing and ready to protect the public from police intrusion every time the issues arise. This is the reason OPD must be adequately funded and operated.

Sincerely,

A handwritten signature in black ink, appearing to read 'Timothy N. Baldwin', with a stylized flourish extending to the right.

Timothy N. Baldwin

Cc: Office of State Public Defender (OPD)
Attn: Nick Aemisegger, Reg. 1 Supervisor
1205 S. Main St
Kalispell MT 59901

Richard Hickel's Letter to OPD Task Force

The City of Kalispell

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November 6, 2015

Task Force on State Public Defender Operations
c/o Mr. Dave Bohyer
LSD Director
Helena, MT

COPY

RE: City of Kalispell's experience with the OPD, Region 1

Dear Mr. Bohyer and members of the OPD Task Force:

As the Adjutant City Attorney for the City of Kalispell, I wish to submit my written comments to the Task Force Committee regarding our local experience with the Office of the Public Defender (OPD). I regret that I will be unable to personally appear before the Committee at the December meeting since I will be out of the state at the time scheduled for the meeting. For background, I am an active member of the State Bar of Montana. I have been engaged in the practice of law in this state since 1987. I have been employed with the Kalispell City Attorney's Office for approximately 18 years. In the past, I have also served as a prosecutor in the Valley County Attorney's Office in Glasgow and in the Flathead County Attorney's Office. My legal experience includes the prosecution of both felony and misdemeanor crimes.

Like all city departments, our office begins the budget process with a zero-based budget. Once funds are authorized, we are expected to live within our means. The Office of the Kalispell City Attorney is able to provide for one full-time staff attorney assigned to the prosecution of misdemeanor matters in Kalispell Municipal Court. While serving as the Kalispell City Prosecutor this past summer, my active caseload ranged from between 900 to 1000 open, active cases at any given time. The Office of the Public Defender had three staff attorneys assigned to the Kalispell Municipal Court and has contracted with at least five private attorneys to handle conflict matters in Kalispell Municipal Court. In addition, keep in mind that there are a number of defendants who are able to retain private counsel and many who opt to represent themselves. Needless to say, it requires an enormous effort for our Prosecutor to effectively manage our active caseload. While we would like to devote additional staffing to prosecutions, it is simply not feasible at this time given the limited financial resources available to our City for this purpose.

Over my years as prosecutor, I have worked with many very good and ethical criminal defense attorneys. I recognize the important role they play in bringing about an efficient and fair criminal justice system. For instance, in the event a continuance was sought in a case set for trial, defense counsel would make it a point to contact this office and advise us of that fact so we could call off the police officer or civilian witness and not inconvenience them to come in for court on a day off or miss work for several hours in the day. When a case is handled by conscientious and capable counsel, the criminal justice system works well not only for the defendant, but also serves an educational function for those of us who work in law enforcement.

By contrast, in dealing with the OPD, we feel that we are in a David and Goliath situation regarding available time and resources. In October, an attorney from the local OPD office appeared for a scheduled trial and at that time informed the Municipal Court Judge that a continuance was needed in a trial because his client was incarcerated in another state. An officer of the Kalispell Police Department (KPD) was present for trial while off shift. The OPD attorney was aware of the fact his client was unavailable and could have filed a motion to continue or advised our office of the need for a continuance, but he chose not to do so, wasting both time and limited city resources.

In addition, we are frequently receiving frivolous pretrial motion filings from the OPD. Prior to the creation of the OPD, these were very rare. For example, in May an attorney from the OPD filed a Motion to Dismiss a criminal charge and brief. In it, he alleged that the KPD officer took "too long" to complete a traffic stop as evidenced by the dash cam video which was provided in discovery. The OPD attorney wrote these so-called "facts" in his brief:

"The video shows several officers from the City of Kalispell conducting an investigation beyond the scope of the reason for the stop, intruding on her constitutional rights to be free from unreasonable searches and seizures and right to privacy, and keeping her detained from an unreasonable amount of time. The interests of justice demands that this action be dismissed due to the unlawful and unethical actions of the officers."

The truth is that the officers were attempting to assist the driver in locating a friend who she believed was in the area and was possibly suicidal. It was evident that the OPD attorney had not even questioned his client regarding the matter before writing an inflammatory and malicious attack on the KPD officer. In other cases, it was repeatedly alleged that it was an "unlawful search" for an officer to access a driver's registration or license database to determine whether the owner of a moving vehicle had valid driving privileges. This practice has been long-settled by our courts in favor of law enforcement. While we could provide many more examples, these serve to illustrate that it is not a lack of resources that is the problem. It is how the OPD misdirects its resources and the lack of professionalism or adherence to fundamental ethical standards that is the problem. Thank you.

Sincerely,
Richard M. Hickel
Adjutant Kalispell City Attorney

Motion to Dismiss

City of Kalispell v. Kelsey Herriges

TK-13-2831

1 Timothy Baldwin
2 Assistant Public Defender
3 Office of State Public Defender
4 1205 S. Main St.
5 Kalispell, MT 59901
6 (406) 751-6080

COPY

7 Attorney for Defendant

8 IN THE CITY OF KALISPELL MUNICIPAL COURT, FLATHEAD COUNTY,
9 STATE OF MONTANA,
10 BEFORE THE HONORABLE LORI A. ADAMS

11 CITY OF KALISPELL,

Case No: TK-13-2831

12 Plaintiff,

OPPOSED MOTION TO DISMISS WITH
PREJUDICE; SUPPORTING BRIEF; AND
REQUEST FOR HEARING

13 vs.

14 Kelsey Herriges,

15 Defendant.

16 COMES NOW the Defendant, by and through, the undersigned attorney, Timothy
17 Baldwin, and hereby files this motion to dismiss with prejudice pursuant to Sections 46-13-
18 401(1), MCA, because the interest of justice demands it. Defendant offers the following facts
19 and brief in support of his motion and requests a hearing on the same.

20 FACTS

21 The City of Kalispell provided the Defendant with discovery, including a citation and
22 in-car video. A true and accurate copy of the in-car video is attached hereto as **Exhibit A**. The
23 Defendant is using this discovery in support of this motion. The officer states that the reason
24 he stopped the Defendant was because her registration was expired. The in-car video shows the
25 officer stopping the Defendant and what transpired afterwards. The video shows several
26 officers from the City of Kalispell conducting an investigation beyond the scope of the reason
for the stop, intruding on her constitutional rights to be free from unreasonable searches and
seizures and right to privacy, and intimidating the Defendant to comply unlawful officer

1 commands. The interest of justice demands that this action be dismissed due to the unlawful
2 and unethical actions of the officer(s).

3 BRIEF

4 Section 46-13-401(1), MCA states,

5
6 The court may, either on its own motion or upon the application of the
7 prosecuting attorney and **in furtherance of justice**, order a complaint,
8 information, or indictment to be dismissed. However, the court may not order a
9 dismissal of a complaint, information, or indictment, or a count contained in a
10 complaint, information, or indictment, charging a felony, unless good cause for
11 dismissal is shown and the reasons for the dismissal are set forth in an order
12 entered upon the minutes.

13 (emphasis added). In considering when the “furtherance of justice” applies, the court should
14 consider the Defendant’s constitutional rights in this case and determine whether the
15 officers violated her rights. The Montana Supreme Court has stated concerning this judicial
16 power,

17 In *State Ex Rel. Anderson v. Gile*, 172 P.2d 583 (1946) the Supreme Court
18 discussed the predecessor to 46-13-401(1), MCA:

19 The legislature has not attempted to define the phrase 'in furtherance of
20 justice' hence it is *left for judicial discretion exercised in view of the*
21 *constitutional rights of the defendant and the interests of society to*
22 *determine what particular grounds warrant the dismissal of a pending*
23 *criminal action.* Id. at 586.

24 *State v. Dengel*, 1996 Mont. Dist. LEXIS 555 (Mont. Dist. Ct. 1996) (emphasis added); *see*
25 *also State ex rel. Fletcher v. Dist. Court*, 260 Mont. 410 (Mont. 1993) (finding that where
26 outrageous government conduct was found, the court would have had good cause to dismiss
the charges in furtherance of justice), citing *Schwichtenberg*, 772 P.2d at 856. Moreover, the
government’s conduct need not be technically illegal for the court to find good cause to
dismiss charges against a defendant. The Montana Supreme Court noted,

While there is no technical violation of law, using the available complaint process
to charge defendant, subject him to arrest, and require that he post bond, knowing
that there was not enough evidence to convict constitutes that type of conduct
which is not diligent, not fair, and under these circumstances constitutes
outrageous government conduct warranting dismissal in the furtherance of justice.

1 *State v. Dengel*, 1996 Mont. Dist. LEXIS 555, 6-7 (Mont. Dist. Ct. 1996). The Defendant
2 submits that the officers violated the Defendant's constitutional rights and as such,
3 dismissing this case would further the interest of justice; namely, to correct the
4 unconstitutional and unethical actions against the citizens in the City of Kalispell.

5 The Montana Constitution provides a greater right to privacy and broader protection
6 than the Fourth Amendment in cases involving searches of a person and seizures of his
7 personal property. *State v. Cooney*, 2006 MT 318, ¶10, 335 Mont. 55, 149 P.3d 554.
8 Warrantless searches are per se unreasonable, with few exceptions. *State v. Lanegan*, 2004
9 MT 134, ¶16, 321 Mont. 349, 91 P.3d 578. (citations omitted). The burden is on the
10 prosecutor to show that an investigatory stop was justified. *State v. Angeline*, 1998 MT 139,
11 ¶20, 289 Mont. 222, 961 P.3d 1251; see also *State v. Flemings*, 2008 MT 229 (Mont. 2008)
12 (“Where a defendant challenges the legality of an investigative stop, the State must establish
13 that a particularized suspicion for the stop existed by showing objective data from which an
14 experienced officer could make certain inferences which resulted in a suspicion that the
15 occupant of the stopped vehicle is, has been or is about to be engaged in wrongdoing”).
16 Montana law allows a police officer to stop a person or vehicle only when the officer has a
17 “particularized suspicion that the person or occupant of the vehicle has committed, is
18 committing, or is about to commit an offense.” See U.S. Const. amend. IV; Mont. Const. art.
19 II, §§10-11; M.C.A. §46-5-401 (2013). For a peace officer to have particularized suspicion
20 justifying an investigatory stop, the officer must be possessed of (1) objective data from
21 which the officer can make certain reasonable inferences and (2) a resulting suspicion that
22 the person to be stopped has committed, is committing, or is about to commit an offense.
23 *Brown v. State*, 2009 MT 64, ¶ 20, 349 Mont. 408, 203 P.3d 842. Whether particularized
24 suspicion warrants an investigatory stop “is a question of fact that the district court
25 determines from the totality of the circumstances confronting the officer *at the time of the*
26 *stop.*” *State v. Kaufman*, 2002 MT 294, ¶11, 313 Mont. 1, 59 P.3d 1166 (emphasis added).
Section 46-5-403, MCA also states that a “stop authorized by 46-5-401 or 46-6-411 may not
last longer than is necessary to effectuate the purpose of the stop.” The officers in this case
violated these constitutional and statutory limitations to their power.

1 Here, Officer Fetveit stopped the Defendant on October 13, 2013 at approximately
2 15:40 in the City of Kalispell. The Defendant handed the officer documentation upon his
3 request. The officer asked if there are any weapons any vehicle, to which the Defendant
4 responds, no. The officer returned to his vehicle after receiving the same from the Defendant.
5 The officer corresponded with dispatch and requested a 10-29 (check for wanted) on the
6 Defendant. Dispatch returned with no warrants or reasons for detention. The officer then
7 checked the Defendant's insurance and license status with dispatch. At about 15:44, two other
8 KPD officers arrived. The audio recording reveals that Officer Fetveit told Officer Zimmerman
9 that the male passenger indicated a "furtive movement" with his backpack when he
10 approached the Defendant. However, this officer's concern did not form any particularized
11 suspicion to expand the investigation from a traffic stop to a drug investigation. Officer Fetveit
12 then states to Officer Zimmerman that he was going to ask the Defendant to search her vehicle
13 and suggested to Officer Zimmerman that he remove the male passenger from the vehicle
14 while he talked to the Defendant. No warrants or probable cause existed at this time to make
15 such a plan of action against the Defendant and male passenger.

14 Then, Officer Zimmerman approached the passenger side and began talking to the male
15 passenger. Another KPD officer approached the driver side door and remained there
16 throughout Officer Fetveit and Officer Zimmerman's actions against the Defendant and male
17 passenger. Officer Zimmerman then asked dispatch to run information on the passenger's
18 name. Officer Fetveit asked Officer Zimmerman, "are you getting the same...?" Dispatch
19 informed the officers that the male passenger had no warrants, had no driver license but had a
20 Montana identification card. Officer Fetveit then told Officer Zimmerman that he was going to
21 remove the Defendant from her vehicle to question her, even though he had no probable cause
22 to do so and this exceeded the scope of the reason he stopped her. Officer Fetveit did just that:
23 he ordered her to stop out of her vehicle, and she complied. Officer Zimmerman did and said
24 nothing to Officer Fetveit to stop or alter his plans to investigate a drug crime without
25 particularized suspicion or probable cause, even though Officer Zimmerman is an experienced
26 officer and should have known there was no lawful basis for such an investigation.

After he commanded the Defendant to exit her vehicle, Officer Fetveit inquired about
the male passenger, asking, "why is he so nervous?" The Defendant provided a response,
which is unintelligible on the audio recording. Officer Fetveit then asked if there is anything in

1 the vehicle illegal. The Defendant responded, no. Officer Fetveit refuted her statement and
2 stated he believed there were illegal substances in the vehicle. The Defendant continued to
3 deny this accusation. Officer Fetveit stated at some point during his accusations against the
4 Defendant, “do you have a severed head in the back of your car?” No, the Defendant said. The
5 officer continued, “so unless you have a pound of cocaine in the back of the car...” The
6 Defendant continued to refuse to give him permission to search her vehicle, and denied any
7 illegal activity. Officer Fetveit then stated, “so is there something I need to be concerned
8 about?” The Defendant informed him there was nothing to be concerned about. Officer Fetveit
9 responded, “so guilty minded or innocent minded?--is what I’m concerned about here.” The
10 Defendant continued to refuse consent, but the officer continued to press the Defendant to
11 consent and informed her that he believed she had something to hide because she did not give
12 him consent to search her vehicle. The Defendant maintained her position not to consent,
13 despite Officer Fetveit’s accusations and pressure tactics.

14 Meanwhile, the other two KPD officers were hovering around both sides of her vehicle
15 where the male occupant was and in between the Defendant and her vehicle. At some point,
16 the Defendant told Officer Fetveit that she wanted to call her mom. While the Defendant was
17 an adult at this time, she was only 20 years old and felt she needed her mom’s assistance in this
18 situation. Officer Fetveit refused to let her call her mom. The Defendant continued to refuse to
19 give consent. Eventually, Officer Fetveit allowed her to leave—because by law he had no basis
20 to continue holding her. As the Defendant was leaving, Officer Fetveit approached her vehicle
21 again and began looking inside her vehicle in the backseat and then through the driver’s side
22 door. He saw nothing illegal in the vehicle. Notably, Officer Fetveit stated none of these events
23 on the back of his citation, nor did he list any of the other officers who were on scene with him
24 as Witnesses on the citation.

25 The KPD officers had no particularized suspicion or probable cause to expand the
26 scope of the investigation from a “minor” traffic stop to a drug investigation of the Defendant
and passenger. Officer Fetveit had no cause to remove the Defendant her vehicle to conduct a
criminal investigation of her and/or the passenger relative to a drug investigation. Based on
what Officers Fetveit and Zimmerman discussed on scene, Officer Fetveit did not see the
Defendant do anything “furtive” but instead, claimed the passenger did something “furtive”
with his backpack—a personal item belonging to him and not at all in the possession of the

1 Defendant. Despite this fact, Officer Fetveit focused his pressure tactics on the Defendant, a
2 young woman, and tried to force and compel her to give consent to search her vehicle. When
3 she refused to cave to his pressure tactics, Officer Fetveit accused her of having a “guilty
4 mind” because she did not consent. To Officer Fetveit, if a citizen refuses to give consent,
5 there is only one conclusion that follows: she is guilty of criminal activity. In the face of these
6 pressure tactics by Officer Fetveit and the other officers who were surrounding both sides of
7 the Defendant’s vehicle, the Defendant insisted that she was not going to consent. Even though
8 the Defendant refused consent repeatedly, Officer Fetveit did not back down. Eventually, the
9 Defendant asked to call her mom. Officer Fetveit refused to let her but pressured her to give
10 him consent to search her vehicle. After not being able to compel consent from the Defendant,
11 Officer Fetveit let her go because he did not have probable cause to detain her further or arrest
12 her, nor did he have probable cause to do the same to the male passenger. As the Defendant
13 was getting back into her vehicle, Officer Fetveit took another opportunity to intrude the
14 privacy interests of the Defendant by looking throughout the Defendant’s vehicle even though
15 two other officers had been doing the same from the time of their arrival.

14 The interest of justice requires this case be dismissed because the officers’ pressure
15 tactics to compel consent to search her vehicle violated the Defendant’s constitutional rights to
16 be free from unreasonable searches and seizures, not to consent, not to self-incriminate, and
17 privacy. The Court has a responsibility to correct such police power abuse, and good cause
18 exists in this case to so correct the officers in this case and the City of Kalispell.

19 WHEREFORE, the Defendant moves the Court to find that the City of Kalispell
20 violated the Defendant’s right to be free from unreasonable searches and seizures, right not to
21 consent, right not to self-incriminate, and right of privacy and accordingly to dismiss the
22 charges in this case in furtherance of justice.

23 DATED this 4th day of May, 2015.

24 OFFICE OF STATE PUBLIC DEFENDER

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26 _____
Timothy Baldwin

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by hand deliver to the Kalispell City Attorney at 312 First Avenue East, Kalispell, MT 59901 , on May 4th, 2015.

Office of State Public Defender