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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO, Plaintiff, vs. MATTHEW WELLS, Defendant.	**Criminal Case No. CR-04-04183** **POST-HEARING MEMORANDUM IN OPPOSITION TO THIRD-PARTY ATTEMPT TO TERMINATE APPOINTMENT OF ASSOCIATE COUNSEL ASSISTING PUBLIC DEFENDER**

The Accused, Matthew Wells, through one of his Court-appointed lawyers, Tim Gresback, submits this Memorandum in opposition to the Latah County Commissioners' third-party attempt to terminate the appointment of associate counsel assisting the Public Defender.

I. INTRODUCTION

"Alas! The advocates of the poor are few, and their reward is ruin." Sampson, William, Memoirs (London 1832) at 19.

II. PROCEDURAL BACKGROUND

Matthew Wells was charged with First Degree Murder. Charles Kovis, one of Latah County's Public Defenders, was appointed to represent him. Due to the serious, voluminous, and complex nature of this case, Charles Kovis requested the District Court to appoint co-counsel to assist him at public expense. The request was granted. Thereafter, the Latah County Commissioners hired a Lewiston law firm to intervene and to terminate the appointment of the co-counsel assisting the Public Defender. On January 28, 2005, the Court held a hearing. Evidence was presented. The Court then requested final arguments be submitted in writing.

III. FACTUAL BACKGROUND

The evidence presented at the January 28 hearing was overwhelmingly uncontradicted. Matthew Wells is accused of First Degree Murder and faces a mandatory sentence of life in prison under I.C. § 18-8004. The obligations for the legal team for Mr. Wells are extraordinary. The team must marshal the facts arising from 650 witnesses disclosed by the State in its official witness list, as well as the voluminous discovery estimated, at the time of hearing, at nearly 4,000 pages. Since the hearing, the State has continued to disclose voluminous discovery. We estimate, when printed, the discovery at the time of this writing is 9,700 pages, not including the entire Grand Jury Testimony. <1> The Grand Jury proceedings involved 72 witnesses. The discovery increases almost daily. It cost over $700 to simply print out the incredible number of investigatory photos taken by the police and other state agents. The prosecution estimates an eight week trial. <2>

<1> We apologize to the Court in advance if the Court feels it is inappropriate to refer to evidence arising after the hearing. We conclude the Court would want to know that the State's discovery train shows no sign of slowing down. If anything, it is only picking up steam. Since the January 28, 2005, hearing, the State has disclosed hundreds of additional documents, CD-ROMs, and video and audio cassettes.

<2> At Matthew Wells's arraignment on December 6, 2004, the parties contemplated a six week trial. At the Joinder hearing held January 28, 2005, immediately following the hearing on the instant issues, other lawyers informed the Court that the most accurate estimate for the length of the trial is eight weeks.

Scott Chapman, an experienced trial attorney often appointed by judges to represent the accused poor in murder cases, testified that he would never try a First Degree Murder case alone. He also stated, contrary to the assertions made in the County's written Reply, at page 7, that he was not the only defense lawyer working on *State v. Robinette*, Nez Perce County Case CR-2001-2646. He testified that had that case gone to trial, he would have procured co-counsel to try the case, as he has done in all of his other murder cases – for example, when he tried a murder case with now Judge Jay Gaskill. Finally, Mr. Chapman provided his expert opinion that under the specific facts of this case, Matthew Wells will not receive effective assistance of counsel with only one lawyer.

Expert testimony at the hearing established that experienced attorneys retained privately to defend a citizen make, on average, between $175 and $225 per hour. The prevailing rate for lawyers who accept a Court's invitation to protect the poor is $70 per hour. Court appointments at $70 per hour in murder cases are losing propositions financially, but lawyers accept such appointments to serve the public interest.

Expert testimony also established that although an investigator can be an integral part of a legal team, an investigator cannot fill the need for another lawyer. As explained at hearing, an investigator is to lawyers what a nurse is to brain surgeons undertaking a lengthy intricate operation. Although indispensable to the defense legal team, an investigator does not supplant the constitutional necessity for two lawyers in this case.

Evidence at the hearing demonstrated that in larger counties in Idaho, with established public defender offices, a poor person accused of noncapital First Degree Murder will have two lawyers as a matter of course. Also, in some smaller counties, certain public defenders are known as "dump trucks." Due to financial problems, lack of ability, or religious reasons, dump trucks fail miserably to

defend the accused poor. The Idaho Association of Criminal Defense Lawyers is trying to raise the competency of indigent defenders by, among other things, presenting seminars and training throughout the state.

Chuck Kovis, the uncontradicted testimony established, is no dump truck. He has defended 9,000 accused poor citizens since 1992. He was heralded as the "Most Valuable Player" in the state for distinguished service to his poor clients. In his 9,000 cases representing the accused poor since 1992, this is the most complex and voluminous case assigned to him; it is the first time he has asked any court for co-counsel. In order to devote himself to the defense of Matthew Wells, Mr. Kovis is now declining almost all private work. To protect the rights of his indigent clients appointed to him, he does work, in addition to business hours, almost every Sunday. He did take a long-awaited and previously scheduled vacation in December of 2004. However, in January, 2005, Mr. Kovis worked 76 hours on the defense of Mr. Wells and 164.8 hours overall for indigent clients. <3> His contract with Latah County pays him $6,481.25 monthly. Thus, in January Mr. Kovis earned $39.33 per hour for indigent defense. The County, under its contract with Mr. Kovis, will pay approximately $50,000 more to Mr. Kovis over the next nine months, not only to defend Mr. Wells in this estimated eight-week trial, but also to defend all the other indigents appointed to him, since he continues to be appointed by judges to other indigent criminal cases despite the size of this case. Mr. Kovis seeks no additional compensation for himself, but requests co-counsel only to prevent the violation of Mr. Wells's constitutional rights. At no time did Charles Kovis mislead the Court and suggest that his request was warranted because the defense of Mr. Wells involved the death penalty. The request for co-counsel was submitted because of the serious, complex, and

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<3> The January, 2005, Public Defender hour compilation is attached.

voluminous nature of the case. <4> All this is still as true as it was the day the Court granted the request. In fact, since the hearing on January 28, 2005, the State has continued to disclose additional discovery almost on a daily basis.

IV. ARGUMENT

A. THIRD PARTIES LACK STANDING TO INTERVENE IN CRIMINAL CASES.

As a fundamental, preliminary threshold issue, the Court must decide whether a third party has legal standing to intervene in a criminal case. If the County has no legal standing to intervene in this case, there is no need to address the rest of the County's arguments. There is no precedent in Idaho law or elsewhere that allows third-party intervention in a criminal case; rather, Idaho law and nationwide precedent counsel overwhelmingly against third-party intervention in a criminal case.

In its Motion to Intervene, the County cites no Idaho court rule, statute, or Idaho precedent allowing third-party intervention in criminal cases. The public policy reason for not conferring standing to third parties in criminal cases was articulated by the Colorado Supreme Court when the Corrections Department sought to intervene in a criminal action because the agency felt the sentence of a judge would be fiscally disastrous. *People v. Ham*, 734 P.2d 623 (Colo. 1987). In rejecting the attempt of the non-prosecutorial governmental agency to have standing in a criminal case, the *Ham* court stated:

> These issues should not be permitted to encumber the criminal process, which is fashioned to provide a speedy and just resolution of issues totally different in character from the fiscal impact of a sentence on the operating budget of a department of government.

<4> In their initial Memorandum the Commissioners suggest Charles Kovis may have been "confused" as to whether the State was seeking the death penalty and as a result sought co-counsel because he may have thought the case was capital. Actually, Charles Kovis knew at the time he requested co-counsel that death would not be pursued. He was not confused, nor did he inform the Court he requested co-counsel because the case was capital. He did, however, inform the Court of co-counsel's experience in capital cases to assure the Court that co-counsel was worthy of the Court's appointment in such a voluminous, lengthy, and serious case.

Id at 626. Similarly, the Latah Commissioners' fiscal concerns should not encumber this criminal proceeding. Colorado is only one of many states to reject third-party standing in criminal cases. *See e.g. Central South Carolina Chapter, Society of Professional Journalists v. United States District Court for the District of South Carolina*, 551 F.2d 559, 563-564 (4th Cir. 1977); *Gannett Pacific Corp. v. Richardson*, 580 P.2d 49, 58 (Haw. 1978); *State v. Simants*, 236 N.W.2d 794, 798 (Neb. 1975); *State v. Bianchi*, 593 P.2d 1330 (Wash. 1979). Our research unveils no case in the country granting a third-party standing to contest a trial court's decision to appoint co-counsel. <5>

It is likely that this is not the first time county commissioners in Idaho have been unhappy about the cost of indigent defense in a particular homicide prosecution. However, the reason we have no reported cases litigating such financial issues is that no Idaho district judge, to our knowledge, has previously granted a county the right to intervene in a criminal case.

The power to decide the needs for counsel of the indigent accused rests exclusively with the judicial branch. *Armstrong v. State*, 642 So.2d 730, 737 (Fla. 1994) ("Appointment of multiple counsel to represent an indigent defendant is within the discretion of the trial judge and is based on a determination of the complexity of a given case.").

Throughout the history of Idaho, district judges by and large have done an outstanding job balancing the constitutional rights of the accused against the fiscal interests of counties. It is emphatically the province of the judicial branch – and not the County – to determine the ultimate litigation needs of an indigent. By granting intervention rights to the County, without any legal

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<5> At first blush, *County of Seminole v. Waddell*, cited by the Commissioners, seems to provide precedent for third-party intervention in criminal cases. However, in Florida at the time of that case, the State could petition an appellate court to contest the reasonableness of court-appointed lawyers' attorney fees. The action under that unique procedure was brought against the judge to contest the amount of fees, not whether the Court had the exclusive power to appoint the attorney in the first place. *County of Seminole v. Waddell*, 382 So.2d 357 (5th Dist. App. Fla. 1980). Idaho lacks such a procedure. Similarly, *In the Matter of the Payment of Witness Fees in State v. Brenizer*, 524 N.W.2d 389 (Wis. 1994), is also distinguishable. The issue in that case was not whether a third party should be allowed to intervene in a criminal case; rather, the sole issue in *Brenizer* concerned sovereign immunity.

authority to do so, the Court would abdicate its constitutional role in our separation of powers – something no other Idaho judge thus far has been willing to do.

Sometimes we gain clarity in addressing fundamental threshold issues, such as standing, by looking at the end game. Suppose a county is allowed to intervene but disagrees with the Court's decision on the merits. Surely if a third party is properly allowed into litigation it must have a right to appeal a decision with which it disagrees. The Idaho Appellate Rules, however, strictly and explicitly prescribe the types of orders from which appeals can be taken in criminal cases. Into none of the eight possible criminal types of appellate round holes can the third-party square peg be driven. No appellate redress is provided to a third-party in criminal cases because Idaho law contemplates no third party standing at all.

The *Butters* case, from which the County quotes extensively in attempting to create a novel Idaho criminal third-party intervention right, was a civil case involving a zoning ordinance. *Butters v. Hauser*, 131 Idaho 498, 960 P.2d 181 (1998). The Idaho Rules of Civil Procedure provide explicit conditions in Rule 24 under which a third party may intervene in a civil case. The County in this criminal case cites no concomitant rule, statute or precedent. *Butters* does not support the creation of a novel third-party right to intervene in a criminal case. Instead, our law is similar to the law in our neighbor state of Washington. As the Washington Supreme Court held in rejecting third-party standing, there is no Washington State rule, statute, or precedent that allowed third-party intervention in criminal cases. *State v. Bianchi*, 593 P.2d 1330 (Wash. 1979).

The wisdom courts have shown in rejecting third-party standing in criminal cases is illustrated by analyzing the havoc that will be created if third parties intervene in criminal cases. Under our civil system of justice, for example, a party to a contract, like Charles Kovis, has a host of rights and remedies available to enforce contractual provisions, such as: summary judgment, depositions, and

a constitutional right to a trial by jury. If allowed successfully to intervene in this criminal case to enforce its interpretation of contractual obligations, the County will have accomplished a quick end-run around the civil judicial process. Our criminal system of adjudication will not tolerate such a maneuver.

Because third-party intervention is improper, the Court need not even address the additional issues. However, even if these issues are addressed, the Court should not accept the County's unorthodox invitation to terminate the appointment.

B. THE CONSTITUTIONAL RIGHT OF MATTHEW WELLS TO EFFECTIVE REPRESENTATION MANDATES ADDITIONAL COUNSEL UNDER THE COMPELLING FACTS OF THIS CASE.

Constitutional protections for Americans have evolved over time. Prior to *Gideon v. Wainwright*, the accused poor had no right at all to court-appointed representation under the Sixth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963). Today, a poor citizen accused of First Degree Murder in a capital case is entitled automatically to two lawyers under I.C.R. 44.3. Whether a noncapital accused is entitled to state resources for a defense has been left to the sound discretion of the trial court on a case-by-case basis. *See e.g. Armstrong v. State*, 642 So.2d 730 (Fla. 1994) (cited *supra*); *DePasquale v. State*, 803 P.2d 218 (Nev. 1990); *Gardner v. State*, 733 S.W.2d 195 (Tex. Crim. App. 1987); *State v. Porter*, 130 Idaho 772, 948 P.2d 127 (1997). The Idaho Supreme Court has approved of the procedure whereby the court-appointed lawyer seeks needed resources from the trial judge under seal. *State v. Row*, 131 Idaho 303, 311, 955 P.2d 1082, 1090 (Idaho 1998). The Public Defender used the very same method in this case.

In determining the needs of indigents, "[i]t is incumbent upon the trial court to inquire into the needs of the defendant and the circumstances of the case." *State v. Olin*, 103 Idaho 391, 395, 648 P.2d 203, 207 (1982). When the circumstances of a criminal defense are particularly complex, additional resources must be provided to the poor to meet the demands of the right to counsel.

Pierce v. United States, 402 A.2d 1237, 1242 (D.C. App. 1979). Courts, not county commissioners, determine the litigation needs of indigents. *See, e.g., Pena v. Minidoka County*, 133 Idaho 222, 984 P.2d 710 (1999); *State v. Bianchi*, 593 P.2d 1330 (Wash. 1979) (cited *supra*). Noncapital First Degree Murder cases – and sometimes even non-murder criminal cases – can become so legally and factually complicated that additional court-appointed counsel is constitutionally mandated. *State v. Shape*, 517 N.W.2d 650, 654 (S.D. 1994) ("Given the complexities involved in this case, the enormous amount of material to be reviewed, and the vast disparity between the meager resources for [the defendant] as opposed to the limitless resources employed by the state, the trial court's denial of [defendant's motion for appointment of co-counsel] was an abuse of discretion…").

This case, because of its voluminous nature and complexity, cannot be adequately defended by a single lawyer. The trial is estimated to last eight weeks; the State lists 650 trial witnesses; the discovery, still growing, is over 9,700 pages. Seventy-two witnesses testified before the Grand Jury. It is hard to imagine a more difficult case for a single lawyer to defend – even if the lawyer is talented and dedicated.

Latah County has strong precedent for appointing additional counsel in complex prosecutions involving murder allegations. For example, in *State v. Abitz*, Sonja Abitz was accused of the noncapital crime of Accessory to First Degree Murder. *State v. Abitz*, Latah County Case Number CR-00-00263. The discovery was voluminous, the prosecution had two trial lawyers and the trial was scheduled to last several weeks. Her court-appointed attorney requested, under seal, that the district judge appoint additional counsel. The request was granted. We challenge the Commissioners to cite a complex noncapital Latah County First Degree Murder case in which a judge has forced a single lawyer to try the case alone.

Latah County district judges are not unique in protecting our noncapital indigent citizens with

two lawyers. In a noncapital murder case now pending in another Idaho county, District Judge James May appointed associate counsel for the accused, at county expense, to assist the Public Defender. *State v. Johnson*, Blaine County Criminal Case Number CR-03-18200.

In its Reply filed January 24, 2005, the County cites numerous cases from Nez Perce and Latah counties involving death which were defended by a single lawyer, in order to support the proposition that Matthew Wells needs only one lawyer. The testimony of Scott Chapman established, contrary to the County's Reply at page 7, that he was not the only defense lawyer in *State v. Robinette*, Nez Perce County Case Number CR-2001-2646, and that, had the case gone to trial, he would have procured associate trial counsel. The Commissioners cite no First Degree Murder case that was defended by a single lawyer at trial. The Commissioners cite no First Degree Murder case, defended by a single lawyer, in which the accused was acquitted. The other cases cited by the Commissioners – for example, the successful defense by Charles Kovis of a misdemeanor case in *State v. Johnson*, Latah County Case Number CR-99-01893 – shed little light on the constitutional mandates of the right to counsel in a case as complex as this. <6>

District judges are very well situated to assess the need for additional counsel, as well as the reasonableness of such cost. The associate lawyer appointed in this case has not been given a blank check to defend Matthew Wells. Instead, under the terms of his appointment by Judge Bradbury, prior to remuneration, an accounting must be presented to Judge Bradbury "outlining each and every expenditure so this Court can then determine the reasonableness of each request." This method has served our State well in the past and will continue to do so.

When judges exercise discretion to determine the constitutional needs of the accused poor,

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<6> Charles Kovis may be subject to professional discipline if he tries to defend Matthew Wells alone. The Idaho Rules of Professional Conduct prohibit a lawyer from undertaking representation that the lawyer cannot competently complete. *See I.R.C.P.* 1.1 ("A lawyer shall provide competent representation to client."). Charles Kovis cannot provide competent representation to Matthew Wells alone.

they can and do simultaneously protect the financial interests of the County. For example, whereas County Commissioners may try to limit indigent defense to protect a short-term County budget, a district judge realizes that when an indigent defendant in a complex case is provided an adequate defense, the likelihood of reversal and retrial is substantially decreased. District judges who protect the indigent accused with adequate resources on the front end simultaneously save counties money, and victims from grief, by immunizing guilty verdicts from successful collateral attacks.

C. TOP-NOTCH ATTORNEYS UNDERSTAND THE NECESSITY AND POWER OF TWO LAWYERS AT COMPLEX TRIALS.

Two are better than one. This is especially true when it comes to attorneys and long trials. Our friends from the Lewiston law firm, in the very courtroom in which this hearing was held, finished a tough trial only weeks ago. Numerous witnesses were called – about 23; the trial took about seven judicial days. Our friends from the Lewiston law firm represented the City of Lewiston. Two lawyers tried the case for the City. We trust our friends would inform their client that their fee for two trial lawyers was necessary to advance the cause of the litigation. *Beier v. City of Lewiston*, United States District Court, Case No. CIV-99-244-N-EJL (trial finished at the Latah County Courthouse; Michael McNichols and Bentley Stromberg, trial attorneys for the City of Lewiston). The two lawyers, as shown in documents filed in that litigation (copy attached), charged $125 and $110 per hour, respectively. That civil case, however, was not eight weeks long. Neither side listed 650 witnesses. The verdict did not determine whether a man should spend the rest of his life in prison. It dealt with money. We criticize our Lewiston friends not one whit for their outstanding and successful legal work at trial with two lawyers; but while two lawyers might be a litigation luxury for the City of Lewiston, they become a constitutional necessity under the compelling facts of this case. What's good for the municipal goose is indispensable to this indigent gander. <7>

<7> We also note that two lawyers from our friends in the Lewiston law firm have specifically appeared in this case on

D. THE "TRAIN-WRECK" APPROACH ADVOCATED BY THE COUNTY IS SHORT-SIGHTED.

In its Reply, at page 5, the County quotes a California case to suggest that the right "to court-appointed counsel does not include the right to require the court to appoint more than one attorney, except in a situation where the record clearly shows that the first appointed attorney is not adequately representing the accused." *Ng v. Superior Court*, 52 Cal.App. 4th 1010, 1022 (4th Dist. 1997). We call this the "train-wreck" approach because it suggests that the court sit passively, watch a citizen's constitutional rights be violated, and only then take action after the Sixth-Amendment train has derailed and wrecked. We suggest that the Court has a constitutional obligation to be proactive and protect constitutional rights. We also suggest that the Judge can trust an officer of the court when he says this case is too mammoth for one lawyer.

Under the compelling circumstances of this case, Matthew Wells is entitled to two attorneys as a matter of law. <8> The factual record is compelling and uncontradicted. New discovery from the State continues almost daily. Our experience suggests the State will, accordingly, add to its witness list. The State has so far disclosed 650 trial witnesses and more than 9,700 pages of reports, and the trial will take eight weeks. Uncontradicted evidence must be accepted as true unless wholly incredible. *Airstream v. C.I.T.*, 115 Idaho 569, 570, 768 P.2d 1302, 1303 (Idaho 1998). Similarly, the expert testimony presented, with the well-grounded foundation of years of experience, was likewise uncontradicted: absent associate counsel, Matthew Wells will not receive

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behalf of the Latah County Commissioners. Again, we do not criticize our friends for assigning two lawyers to a relatively simple issue. It appears our friends from the Lewiston law firm understand how the competency and productivity of a legal team are enhanced when lawyers divide tasks, for example, where one does research and another makes courtoom presentations. Sometimes, as here, cases are so serious and voluminous that two lawyers are not a litigation luxury, but a constitutional necessity.

<8> Absent co-counsel, Matthew Wells will be deprived of a host of constitutional rights, including the right to counsel guaranteed under the Sixth Amendment to the U.S. Constitution and under Article I, Sec. 13 of the Idaho Constitution. In addition, without adequate counsel, his rights to equal protection, due process, freedom from cruel and unusual punishment, a speedy trial, and adequate resources will be violated. These rights are provided to him by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections Six, Seven, and Thirteen of the Idaho Constitution; by I.C. § 19-3501; 19-106; I.C.R. 48; and by I.C. § 19-852.

effective assistance of counsel. The County's failure to present contrary expert opinion is understandable because we can imagine no experienced defense attorney who has won a First Degree Murder trial ever opining that one lawyer could adequately defend Matthew Wells.

The County's train-wreck approach recommends that the Court sit idly by while the trial becomes manifestly unfair, a mistrial becomes necessary, the defense attorney has a nervous breakdown, or the case gets overturned on appeal. Appellate scrutiny is inordinately more demanding when the request for associate counsel is made, as here, prior to trial. Whereas an appellate court will analyze the failure to appoint associate counsel in a complex First Degree Murder case under an abuse of discretion standard which has real teeth (*See United States v. Gonzalez*, 113 F.3d 1026, 1028 [9th Cir. Ct.App. 1997]), the failure to request associate counsel is assessed under the almost unprovable standard for ineffective assistance of counsel of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *See also State v. Porter*, 130 Idaho 772, 792, 948 P.2d 127, 142 (1997) (cited *supra*) (trial attorney's failure to request associate counsel is not grounds for ineffective assistance of counsel under *Strickland* because attorney never made request prior to trial). ("In hindsight, we recognize that, in the present case, only one defense attorney may have been overwhelmed by the prosecution's manpower.")

The train-wreck approach is cynical. It rejects the word of an experienced Public Defender, who has admirably defended 9,000 accused poor citizens, that he cannot constitutionally defend Matthew Wells alone. We feel our system should not cause him to have a breakdown in order to prove his point. <9> "Hobbling a willing public servant such as the public defender would be admirable if mere efficiency of disposition was the goal. However, we should avoid the false economy of the assembly line which elevates efficiency over justice." *State v. Elisondo*, 757 P.2d

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<9> As expert testimony established at hearing, a nervous breakdown is a legitimate concern for overworked attorneys on murder cases. *See, e.g., State v. Manley*, 2004 WL 2930890 (ID Ct.App. 2004).

675, 689 (Idaho 1988) (Bistline, J. concurring).

E. THE COUNTY COMMISSIONERS ARE BENDING OVER BACKWARD TO FUND THE PROSECUTION, BUT REFUSE LIKE TREATMENT FOR THE DEFENSE.

Although the County has hired a private Lewiston law firm to vigorously prevent Matthew Wells from having the assistance of associate counsel at public expense, the Commissioners are making Herculean efforts to fund a zealous prosecution. As reported in the February 2nd, 2005, edition of the Moscow-Pullman Daily News, the County Prosecutor has “exceeded” his budget due to the extraordinary costs of this case (article attached). The Commissioners, however, contrary to the position they have taken regarding the Public Defender, do not criticize the Prosecutor for failing to anticipate the highly extraordinary financial burdens of this case, nor do they suggest to the Prosecutor that additional help is only available at his own expense. Instead, as the article shows, a Commissioner promises to find whatever funding is necessary to properly fund the prosecution. <10> By contrast, an indigent man sitting in the Latah County jail, charged with murder, usually has no political allies on the County Commission. Our system demands that an insulated and courageous judicial branch protect the rights of the powerless, even when the public and the elected legislative powers are unwilling to do so. <11>

F. THE COUNTY HAS CHANGED ITS POSITION.

The fundamental position of the County has changed. In its written Reply, filed January 24, 2005, the County dedicated a lengthy portion of its brief to contending that Matthew Wells is not

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<10> Interestingly, I.C. § 19-860 provides that “[s]o far as possible, the compensation paid to such public defenders shall not be less than the compensation paid to the county prosecutor.”

<11> If the Court finds the submission of a post-hearing newspaper article inappropriate because such facts were not introduced at hearing, we apologize. We submit it for these reasons: the article sheds much light and is highly relevant; the article was written after the hearing; the Court is trying to decide the appointment issue quickly without extended litigation; the timesheets submitted by the County at the hearing were not formally admitted into evidence and an informal approach to evidentiary matters has been demonstrated; and, the Court has already commented that the media coverage has been responsible, thus giving the article presumptive accuracy.

constitutionally entitled to two lawyers. For example, the Reply provides:

> HOMICIDE CASES ARE OFTEN HANDLED BY A SINGLE DEFENSE ATTORNEY
>
> It is true the charge of First Degree Murder is very serious and that Mr. Wells should be defended vigorously. However, <u>there is no reason Mr. Kovis cannot do so without associate counsel</u>.

Reply at page 7 (emphasis added).

At hearing, however, the County changed its position – and understandably so. Perhaps when the County drafted the Reply, its lawyers were unaware that the case involved 650 State witnesses, 9,700 pages of police reports and other documents, and an eight-week trial. Apparently, the County now concedes that Matthew Wells should have two lawyers. Accordingly, the County has shifted its position and now contends that the necessary associate counsel, assuming one does not magically volunteer, should be paid by the Public Defender. This position is also untenable.

G. THE PUBLIC DEFENDER CONTRACT DOES NOT PROHIBIT THE APPOINTMENT OF ASSOCIATE COUNSEL AT PUBLIC EXPENSE.

Assuming for a moment that the County's contractual rights could supersede the constitutional requirements of the right to counsel, it is illustrative to examine what exactly the Public Defender contract, in fact, provides. The County ignores the actual terms of the contract and instead makes arguments about what the Commissioners wish the contract said. The contract itself is attached.

WHAT THE CONTRACT DOES SAY:

> *Charles Kovis will receive $6,481.25 per month to defend all of the indigent cases assigned to him (page 1, part 3.A.1.);
> *Over its two-year term, Charles Kovis will receive $154,000.00 (page 1, part .A.1.);
> *If a poor citizen is charged with capital murder, the County shall provide co-counsel (page 4, part 4.L.);
> *If additional litigation assistance, such as experts or "<u>other expenses</u>," are needed to fulfill defense obligations, Charles Kovis can seek the approval of such expenses from the District Judge (page 2, part 3.C.) (emphasis added);
> *Charles Kovis will not get paid any additional money personally for fulfilling

his role as Public Defender (page 2, part 3.A.1.).

WHAT THE CONTRACT DOES NOT SAY (but the Commissioners wish it did):

> *Although the County will pay for an additional attorney in capital cases, under no circumstances will the Public Defender seek an additional attorney at public expense in noncapital cases;
> *The Public Defender agrees to defend all noncapital First Degree Murder cases alone;
> *The County shall not pay for another lawyer to defend indigents if a complex case arises and a second lawyer is constitutionally required to defend an indigent accused;
> *If more than one lawyer is necessary to defend a noncapital indigent, it is the sole responsibility of the Public Defender to pay the second lawyer's fee, even if it consumes or exceeds the $6,481.25 per month paid to the Public Defender;
> *In noncapital cases where two lawyers are necessary, the Public Defender shall pay the costs of the necessary additional lawyer from his own pocket, even if the Public Defender has to mortgage his house or declare bankruptcy as a result.

The County's reading of the contract, it seems to us, goes like this: If we explicitly guarantee associate counsel in capital cases, we must automatically be off the hook for additional counsel in noncapital cases. Such reasoning is flawed. This is an example of *expressio unius est exclusio alterius*, defined by Black's Law Dictionary as:

> A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative…[however], far from being a rule, it is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds.

Black's Law Dictionary (8th ed. 2004).

Had the County desired a term forbidding an application for co-counsel (assuming it could lawfully do so), it could have clearly so stated in the contract. Had the County desired a term that the Public Defender must defend all noncapital cases alone (assuming it could lawfully do so), it could have demanded such an explicit term. Contracts are interpreted by the words in them, not by the words we wish were in them.

H. EVEN IF THE PUBLIC DEFENDER CONTRACT DID EXPLICITLY PROHIBIT THE APPOINTMENT OF ASSOCIATE COUNSEL IN NONCAPITAL CASES – A POINT NOT AT ALL CONCEDED – SUCH A TERM COULD NOT BE ENFORCED BECAUSE IT WOULD BE CONTRARY TO PUBLIC POLICY.

Contracts that have the effect of violating the law cannot be enforced. *Hyta v. Finley*, 137 Idaho 755, 758, 53 P.3d 338, 341 (2002). A county, for example, that contractually demands a Public Defender to forego expert witnesses could never enforce such a term if an indigent's constitutional rights demanded expert testimony. Thus, even if the instant contract were to explicitly prohibit the appointment of associate counsel at public expense (which it does not), such a term could not be enforced. In addition, the Public Defender contract has elements akin to an adhesion contract; a Court should review it with a skeptical eye. The Prosecutor is the legal officer for the County Commissioners under I.C. § 31-2604(3). Whereas the Commissioners have hired a Lewiston law firm in this case purportedly to avoid a conflict of interest, the Public Defender contract itself was negotiated by the Prosecutor. <12> The Prosecutor cannot demand and obtain terms of a contract on behalf of a county that deprive an accused of the constitutional right to counsel. Stated another way, a Prosecutor should not be able to assure himself a weaker courtroom adversary by cleverly negotiating a contract.

I. CONCLUSION.

Charles Kovis now earns $39 an hour as a Latah County Public Defender. He does not complain about such low compensation because his remuneration is secondary to his professional journey as a lawyer to defend the rights of the poor. His request for associate counsel was not

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<12> As mentioned, the County Commissioners do not criticize the prosecutor for failing to anticipate the costs of this highly unusual case. Assuming the contract outlaws co-counsel (which it does not), such a term would be unconscionable to enforce on the Public Defender. The execution of contract terms that result in injustice due to highly unanticipated circumstances cannot be enforced. "[A] bargain was said to be unconscionable in an action at law if it was 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.'" Black's Law Dictionary (8th ed. 2004).

made to increase his compensation. Additional counsel was requested only because a citizen now behind bars in the Latah County Jail, presumed innocent, cannot get a fair trial in this extraordinarily voluminous and complex case without the assistance of another lawyer. The Court was correct when it initially appointed co-counsel and since that time nothing has changed, except, perhaps, that the burdens for the defense have become even greater and more clearly defined. The motion to terminate the appointment of associate counsel at public expense should be denied.

February 7, 2005.

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TIM GRESBACK
Co-Counsel for the Accused

CERTIFICATE OF SERVICE

On February 7, 2005, I mailed this Memorandum to Bentley Stromberg and Sonyalee Nutsch, Attorneys for Latah County Commissioners, at Clements, Brown & McNichols, P.O. Box 1510, Lewiston, ID 83501.

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LISA A. BAUSCH