

James Park Taylor
Attorney at Law

[REDACTED]
Missoula, MT 59804
[REDACTED]

May 23, 2017

Dear Public Defender Commission:

I am writing to apply for the newly created position of Director of the Office of State Public Defender. The Public Defender system stands at a critical juncture. The Legislature and the Governor have given the system an opportunity to resolve ongoing issues, and I believe this is the last chance for the system to succeed. OPD needs strong leadership, and I can provide that leadership. I submit these application materials as evidence of my qualifications for the position of Director.

Background

I have been a practicing attorney for almost 37 years. I was born in Billings, graduated from West High School in 1974, and graduated from Carroll College in 1977 with a Bachelor's Degree in Political Science. I obtained my Juris Doctor, with honors, from the University of Montana School of Law in 1980. During my 37 years of practice, I have always had a strong interest in indigent defense. I was a part-time contract public defender in Missoula County during the early 1980's, have done CJA work in the federal courts, and have also done private criminal defense. I practiced primarily in Missoula until 1996, at which time I went to work for the Confederated Salish and Kootenai Tribes, as the Managing Attorney for the Tribal Defenders Office. When I was first hired by the Tribes, the office only did criminal defense. After I was there a few years, our department was combined with the Tribes' civil legal aid office, and I was placed in charge of the combined department. We had to deal with significant financial issues when the two departments were combined.

In 1998, I was the first attorney recognized by the Montana Association of Criminal Defense Lawyers (MACDL) as Criminal Defense Attorney of the Year for the work I did with the Tribes. I received the Frank Haswell award from the State Bar of Montana twice, first in 2003 and again in 2004, for articles I wrote on US actions related to combating terrorism. I am a member of the National Association of Criminal Defense Lawyers, the International Association of Penal Lawyers, the American Bar Association, the International Bar Association, and a Life member of the Montana Association of Criminal Defense Lawyers. I have sought out and been successful in leadership positions in many organizations. I served on the Ethics Advisory Committee of the National Association of Criminal Defense Lawyers from 2000-2001. From 2000-2005, I served as the Secretary/Treasurer, Vice-President, and President of MACDL. MACDL was involved in the process that led to the creation of the current public defender system in 2005, although not directly as a part of the *White v. Martz* litigation.

Letter to Montana Public Defender Commission

Page Two

Commission Duties

In 2005 I was appointed to the Public Defender Commission and served as the first Chair until 2008. As Chair I was very involved in the creation and structuring of the new system, and reviewing systems in place in other states as possible models. I appeared several times to advocate for funding for the system at the Legislature, along with other appearances before the Interim Law and Justice Commission. One of my tasks on the Commission, working with Commissioner Mike Sherwood, was to create the Standards for the OPD and contract attorneys. I am familiar with the budgeting process for OPD, and have been involved with that process from the preparation of the proposed budget for the Governor through the negotiations with the Governor's Budget Director, to the Legislative appropriations process. In 2008, I was responsible for bringing in American University to come to Montana to study and report on issues the OPD system was experiencing. I stepped down as Chair of the Commission in 2008, because I moved to China, but remained on the Commission as a member. I resigned from the Commission in 2011.

Teaching/Policy/International Criminal Defense Experience

In 2005 I accepted a position with the University of Montana School of Law as a Visiting Clinical Supervisor. In addition to my clinical work, I taught short courses on the US Response to Terrorism, and International Criminal Law. I also taught a course on Public Interest Lawyering. In 2007, I accepted a position with the Maureen and Mike Mansfield Center, and moved to China in 2008 to work on a joint project with the Mansfield Center and International Bridges to Justice (IBJ), an NGO based in Switzerland that is focused on the elimination of torture on a global basis through the enhancement and enforcement of the right to counsel. I was sent to China to oversee criminal defense clinical legal education programming in eight Chinese universities. After I had been in China a few months, I was named Acting Country Director for IBJ, and held both positions simultaneously until late in the fall of 2009. While serving as Acting Country Director, I was responsible for the IBJ offices in Beijing and Xi'an, and responsible for negotiating, opening, and supervising a new IBJ office in Wuhan. I had overall responsibility for all of IBJ's China operation, including designing and creating trainings, fiscal responsibility for their activities in China, responsibility for hiring and supervising both national staff, international staff, and legal interns. I regularly met with a variety of university and government officials to discuss both policy and project implementation issues as part of my work. In late fall of 2009 I became the Asia Training Director for IBJ, designing and conducting both live and online training for criminal defense lawyers. A detailed description of the trainings I created and participated in during my time in China is available in my CV. Our trainings were primarily focused on criminal defense, but we also trained academics, prosecutors, judges, and police. As part of my work in China, I drafted and obtained a variety of grants from public and private sources. In all positions I held in China, I was responsible for grant and financial reporting for IBJ activities.

I have trained criminal defense lawyers in the US, China, India, and Georgia. I have also lectured and trained lawyers on other topics in Afghanistan, England, Hungary, Ireland, Italy, the United Arab Emirates, and Vietnam. The specifics of those trainings are in my attached CV.

Letter to Montana Public Defender Commission

Page Three

International Criminal Defense Experience (cont'd)

I am submitting this application from Ghana, where I am currently working on a European Union funded project to assess the capacity of the Ghanaian Legal Aid system, and to help design training for their attorneys to assist victims of official corruption. The Legal Aid system here provides both civil and criminal assistance for indigent Ghanaian citizens.

Other International Legal Experience

On my return from China in 2010, I went back into private practice, doing criminal defense and international consulting. I was also working with the University of Montana drafting new grant applications for proposed international programs. I was named to the roster of Fulbright Specialists in 2008, and did two placements as a Fulbright Specialist, one in 2011 in Hungary at the University of Pecs, and a second in 2014 at Can Tho University in the Mekong Delta of Vietnam. From 2011 to 2012, I worked periodically in Afghanistan on a project with the Ministry of Agriculture, Irrigation, and Livestock to build institutional capacity for their first in-house legal department.

Recent Experience with OPD Oversight

In 2013, I accepted a position as Legal Director of the ACLU of Montana. I was actively involved in a variety of civil litigation, including a successful attempt to enjoin the lethal injection protocol in Montana. My duties at the ACLU included supervising employees and legal interns. I was responsible for recruiting and maintaining relationships with a panel of pro bono attorneys. A significant part of my duties at the ACLU was to monitor the progress and the issues of the Public Defender system. I regularly attended Commission meetings, meetings of the Interim Law and Justice Committee, Legislative hearings, and the meetings of the Task Force on State Public Defender Operations. Because of this, I am very familiar with both the budgetary and strategic issues facing the agency.

I have been involved in strategic planning with international and state based organizations, on both a large and small scale. I have had the unique opportunity to observe and understand Montana's indigent defense system from its inception, to study other indigent defense systems in the US, and the indigent systems in place in Montana's federal and tribal courts. I have had the opportunity to be involved in indigent defense reforms in other countries as well. I understand the challenges facing Montana's system, and believe I can help guide the system to become what it was intended to be.

Recommendations

There are a number of challenges that need to be addressed by the OPD system. The most important of those challenges include:

- *Resources.* The system has always been under-resourced. Crafting a real strategic plan for the agency, with achievable goals and accurately reported data, is critical to obtaining the needed resources. Planning for the 2019 Legislature, and the strategy to work with the Interim Law and Justice Committee, must begin immediately.

Letter to Montana Public Defender Commission
Page Four

Recommendations (cont'd)

One of the strategies the agency should consider is development of a pro bono outreach program with the private bar, especially the larger firms. OPD can offer unique opportunities to large firms to provide training and courtroom experience for new associates, a valuable commodity. This will also help satisfy the firms' pro bono requirements for practicing law in Montana. In times when caseloads radically exceed capacity, the answer for the agency cannot be to keep adding cases to its FTE lawyers. Alternatives must be developed. Other strategies such as participatory defense need to be understood and explored.

- *Quality.* Maintaining the highest possible client-based standards of practice. The practice standards for the agency need revision, and I would favor modifying them to have both mandatory and advisory standards. In addition, there must be enforcement of those standards, through a variety of mechanisms, for both in-house and contract attorneys.
- *Communications.* A communications strategy must be developed and implemented for the agency. The agency must become more transparent. Communicating the mission of the agency to the public, and to stakeholders (especially legislators), must become a daily part of the work of the agency. OPD is one of only two state agencies with no communications person, or communications strategy. OPD will not survive if its message is not effectively communicated.
- *Developing external funding sources.* There is a need to obtain external funding for an independent workload study, including proposals for handling excess caseloads. The caseload standards the agency has developed have not meant much for the line attorneys who regularly exceed maximum recommended caseloads. The standards must mean something, and must be enforced. There will be instances when standards are exceeded, but carrying excessive caseloads cannot continue to be a standard operating procedure for the agency. The lack of another alternative has been damaging to clients, in-house attorneys, investigators, classified staff, and contract attorneys.
- *Contract and Conflict Attorneys.* Better relations must be developed with contract and conflict attorneys. OPD could not operate without the support of these individuals. Better lines of communication need to be opened, and a strategy developed to increase the hourly rate.
- *Investigators and Classified Staff.* Adequate funding for investigators and classified staff needs to be addressed. The funding level for these groups is inadequate, and increases turnover.
- *Innovation.* OPD needs to become a source of innovation. The implementation of pilot projects for holistic defense is a good start, but all the Regions should be encouraged to develop new ideas and local relationships to create other pilot projects as well.
- *Indian Country.* OPD needs to create and maintain ongoing relationships with the Tribal nations in Montana, and with urban Indian populations. OPD needs to understand and evaluate its role and the role of other criminal justice agencies in the over-incarceration of Native Americans. OPD must also enhance its training for attorneys that handle ICWA cases.

Letter to Montana Public Defender Commission
Page Five

- *Collaboration.* OPD needs to develop collaborative relationships with universities, state colleges, tribal colleges, and private colleges. These institutions can assist with the design and implementation for pilot projects, and with other work of the agency. Educational internship programs should be developed for all the regions.

My background, my experience in criminal defense, my experience as a Commissioner, my experience in Indian Country, my teaching experience, my policy and international criminal defense experience, and my recent experience with OPD oversight combine to provide me with the necessary tools that will be needed to move the organization forward and to help it succeed. If selected as Director, I would welcome the challenges that await me.

Thank you for the opportunity to submit this application for your consideration. I have attached my CV, and a writing sample. The writing sample is a law review article I wrote about the history of indigent defense in Montana. I would be glad to answer any questions the Commission may have. I am hopeful that I will make all my flight connections from Ghana to the US, and arrive back in Montana in time for the Commission's next meeting on June 1st.

Sincerely,



James Park Taylor
Attorney at Law

James Park Taylor

Attorney at Law

Curriculum Vitae

[REDACTED]
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Email: jptaylor50@gmail.com
Phone: [REDACTED]

Present Position

Consultant

Working with the Ghanaian Legal Aid system to design and implement a training program for Legal Aid Lawyers representing victims of official corruption. The program is funded by the European Union. This is a short-term consultancy.

Current Academic Affiliations

Mansfield Fellow
The Maureen and Mike Mansfield Center
Mansfield Library, 4th Floor
The University of Montana
Missoula, MT 59812

Prior Positions/Affiliations

Member, Fulbright Specialist Peer Review Committee (Law)
Institute of International Education
Council for the International Exchange of Scholars
1400 K Street, NW, Suite 700
Washington, D.C. 20005-2403
2014-2015

Director, Mansfield Legal Reform Initiation
The Maureen and Mike Mansfield Center
The University of Montana
Missoula, MT 59812
August 2007-July 2013

Prior Positions/Affiliations (cont'd)

Coordinator of International Opportunities
The University of Montana School of Law
The University of Montana
Missoula, MT 59812
July 2010-July 2013

Visiting Scholar
International Programs
The University of Montana
Missoula, MT 59812
July 2008-July 2013

International Positions

Fulbright Specialist, School of Law, Can Tho University, Can Tho, Vietnam. Feb.-March, 2014
Responsibilities included: Review of clinical legal education curriculum, teaching methodology, course material, lectures and materials on clinical teaching methodology. Ongoing consultation and training concerning improvements to the CTU/CLE program.

International Consultant- Kabul, Afghanistan, January 2011- July 2012
Responsibilities included: Over a period of sixteen months, made four trips to Afghanistan, to assist the Ministry of Agriculture, Irrigation, and Livestock in Afghanistan training new legal staff, assessing the legal needs and capacity of their legal department, making recommendations for further development for their legal department, and assisted in research and drafting proposed legislation related to rangelands and other issues. This project was funded by both the Canadian International Development Agency, and the UK Department for International Development.

Fulbright Specialist- University of Pecs, Pecs, Hungary, March 2011
Responsibilities included: delivering a series of lectures on the Rights of Native Americans under United States law, United States policy on indefinite detention of the Guantanamo detainees, the use of military commission trials for the Guantanamo detainees, International Financial Crime, Terrorist Financing, the United States Criminal Justice System, China's Criminal Justice System, and the Globalization of Crime, meeting with University officials on proposed projects and university collaboration.

International Positions (cont'd)

Asia Training Director, International Bridges to Justice (IBJ), Beijing, China Nov. 2009- June 2010

(Position held through contract with the Mansfield Center at the University of Montana)

Responsibilities included: recruiting and meeting with current and prospective partners from the private, NGO, and governments sectors, preparing partnership agreements for existing and developing projects, grant writing and reporting, budget responsibilities, designing, creating, and implementing live and distance learning training programs for Chinese lawyers, judges, and prosecutors on criminal justice issues. IBJ is an international NGO based in Switzerland with active programs around the globe. (IBJ's mission is to end the use of torture by law enforcement agencies through the development of a robust right to counsel in all criminal cases) Worked with multiple international government agencies, and private foundations, in securing and maintaining program funding.

Acting Country Director, China Program, IBJ, Beijing, China, December 2008-November 2009

(Position held through contract with the Mansfield Center at the University of Montana)

Responsibilities included: developing ongoing relationships with government officials, NGOs, and private law firms to facilitate new and existing programs, designing and conducting training for Chinese lawyers, judges, prosecutors and police officers on criminal justice issues, negotiations with new university, government, and private partner institutions, project development, grant writing, reporting, and budget responsibilities; recruiting and coordinating international volunteers, coordination with international program office, staff supervision, hiring, promotion and related personnel issues. Responsible for three program offices in China, Beijing, Xi'an, and Wuhan. Negotiated the establishment of the Wuhan office. Responsible for the recruitment of all foreign experts for all training programs. Worked with multiple international government agencies, and private foundations, in securing and maintaining program funding.

Director, Criminal Clinical Education Project, IBJ, Beijing, China, Oct. 2008- November 2009

(Position held through contract with the Mansfield Center at the University of Montana)

Responsibilities included: designing and conducting training for Chinese clinical legal educators, assisting with choosing new partner schools, regular meetings with CCCLE representatives, ongoing meetings and collaboration with Chinese clinical legal educators; personnel supervision, grant reporting and budget responsibilities, recruiting and coordinating US experts for clinical training. Helped coordinate the growth of the clinical legal education program from four universities to sixteen. Participating universities included China University of Political Science and Law (Beijing), China University of Political Science and Law- Criminal Justice College (Beijing), Chinese Academy of Social Sciences (Beijing), Beijing Normal University, Renmin University (Beijing), Northwest University of Political Science and Law (Xi'an), China Youth University of Political Science (Beijing), Northeast Agricultural University (Harbin), Jilin University, East China University of Political Science and Law (Shanghai), Nanjing University, Wuhan University, Guangxi University (Nanning), Sichuan University (Chengdu), and Qinghai University of Nationalities (Xining), Lanzhou University. Worked with international government agencies and private foundations, to obtain funding.

International Positions (cont'd)

Education

B.A., Political Science, Carroll College, Helena, MT, May 1977

J.D., cum laude, University of Montana School of Law, Missoula, MT, June 1980

Legal Organization Affiliations

Montana Association of Criminal Defense Lawyers, Life Member, International Association of Penal Lawyers; National Association of Criminal Defense Lawyers, American Bar Association, International Bar Association, Racial Justice Training Institute at the Shriver Center on Poverty Law

Prior Legal Affiliations

Member, Montana Public Defender Commission, (2005-2011), Chair, Montana Public Defender Commission, 2005-2008; Ethics Advisory Committee, National Association of Criminal Defense Lawyers; Secretary-Treasurer, Montana Association of Criminal Defense Lawyers (2000-2001); Vice-President, Montana Association of Criminal Defense Lawyers (2001-2003); President, Montana Association of Criminal Defense Lawyers (2003-2005).

Honors and Awards

Named to Fulbright Senior Specialist Roster (2008); Frank Haswell Award (2004)- presented by the State Bar of Montana; Frank Haswell Award (2003)- presented by the State Bar of Montana; Tribal Council Award (1999)- presented by the Tribal Council of the Confederated Salish and Kootenai Tribes; Criminal Defense Lawyer of the Year (1998)- presented by the Montana Association of Criminal Defense Lawyers.

Legal Experience

Legal Director
ACLU of Montana
Missoula, MT
August 2013- May 2017

Responsible for all ACLU civil rights litigation and investigations in the State of Montana, involving federal, state, and local statutes, administrative rules, and judicial rulings. Responsible for identifying, recruiting, organizing and maintaining pro bono relationships with national law firms, statewide law firms, and local law firms. Responsible for organizing pro bono attorneys. Responsible for case screening, routine and major litigation, and litigation updates. Responsible for overall supervision of legal department, including staff attorney, paralegal, and supervision of legal interns. Areas of litigation and investigation included racial justice issues, voting rights, women's rights, prisoners' rights, LGBT rights, rights of immigrants, education as a civil right, and criminal justice reform, including indigent defense, rights of mentally ill inmates, jail reform, and death penalty reform. Racial justice issues have included health care, voting rights, public defender reform, tribal governance, education training, discrimination, Indian Civil Rights Act, and Indian Child Welfare Act. As part of the project, have recently traveled to all seven reservations in Montana, working with tribal leaders, and working with the Rocky Mountain Tribal Leaders Council. In 2016, attended and completed the Racial Justice Training Institute at the Shriver Center on Poverty Law. Recent court cases have included obtaining a federal consent decree against the Wolf Point School Board for unlawful discriminatory voting practices (*Jackson v. Wolf Point School Board*, March 2014), a statewide injunction against the current death penalty protocol in Montana (*Smith v. Batista*, October 2015), a federal court judgment striking down the Montana constitutional provision prohibiting same sex marriage (*Rolando v. Fox*, November 2014), and a statewide injunction against the immediate enforcement of CI-116, Marsy's Law (*MCAA v. State of Montana*, January 2017).

Taylor Law Offices: Provided criminal and civil legal services to private and public clients for transactions and litigation. Provided international consulting services in the areas of clinical legal education, and legal reform. July 2010 to July 2013.

Managing Attorney: Tribal Defenders Office, Confederated Salish and Kootenai Tribes, Pablo, Montana, April 1996 to August 2005

Responsibility for multi-lawyer office; design and oversight of merging public defender office with legal aid office; personnel supervision, hiring, development and retention of staff; grant writing, reporting, and budget responsibilities; recruiting and coordinating volunteers, supervision of clinical law students

Private Legal Practice: September 1980 to March 1996.

Practice included criminal defense, in-house counsel for statewide recycling company, oil and gas title law, general civil practice, administrative law and medical malpractice.

Teaching Experience

Visiting Instructor, *Voting Rights in Indian Country*, Summer 2015, School of Law, University of Montana.

Visiting Instructor, *Indian Civil Rights Act*, Summer 2014, School of Law, University of Montana.

Visiting Clinical Supervisor, Summer 2012, School of Law, University of Montana
Courses: *Clinical Seminar*; Coordinator, Summer Indian Law Program.

Visiting Clinical Supervisor, Summer 2011, School of Law, University of Montana
Courses: *Clinical Seminar*; Coordinator, Summer Indian Law Program.

Mansfield Center, University of Montana, January 2011-May, 2011 Courses:
Terrorism and Counterterrorism.

Visiting Clinical Supervisor, 2005-2007, School Of Law, University of Montana
Courses: *Clinical Seminar*, *The United States' Response to Terrorism*, *International Criminal Law* (with Bruce Zagaris), *Public Interest Lawyering*.

Adjunct Faculty, August 1991-May 1995; Legal Assistant Program, University of Montana, College of Technology, Missoula Campus.

Courses: *Legal Ethics*, *Environmental Law*, *Contracts*.

Continuing Legal Education Programs Presented- International Programs

AFGHANISTAN: *Advanced Rangeland Law*, Ministry of Agriculture, Kabul, Afghanistan, March 2011; *Visual Legal Analysis*, Ministry of Agriculture, Kabul, Afghanistan, March 2011; *Principles of Legal Development*, Ministry of Agriculture, Kabul, Afghanistan, January, 2011; *Principles of Legislative Drafting*, Ministry of Agriculture, Kabul, Afghanistan, January, 2011; *Legislative Review and Revision*, Ministry of Agriculture, Kabul, Afghanistan, January, 2011; *Case Management*, Ministry of Agriculture, Kabul, Afghanistan, January, 2011; *Rangeland Law*, Ministry of Agriculture, Kabul, Afghanistan, January, 2011; *The Interface between Criminal Law and Natural Resource Law*, Ministry of Agriculture, Kabul, Afghanistan, January, 2011

CHINA: Facilitator, *Modern Investigative Techniques for Law Enforcement*, Shenyang, Liaoning Province, China, April, 2010; *The Use of Social Investigative Reports in Juvenile Cases in the United States*, Dezhou, Shandong Province, China, April, 2010; *Dealing with the Difficult Client*, Shangquan Law Firm, Beijing China, April 2010; Facilitator, *Modern Investigative Techniques for Law Enforcement*, Liaocheng, Shandong Province, China, Winter, 2010; *A History of International Bridges to Justice in China*, Wuhan Law School, Wuhan, Hubei Province, China, September 2009; Beijing Region Clinical Training, Conference Organizer and presenter, Beijing, China, October 2009; *Teaching and Learning Legal Ethics*, Beijing, China, October 2009; Conference Organizer and presenter, *Criminal Clinical Legal Education Training*, Harbin, Heilongjiang Province, China, Summer, 2009; *New criminal clinics: a review of the different models for clinics, the necessary steps to create a clinic, and advice from established clinics*, Harbin, Heilongjiang Province, China, Summer, 2009;

Continuing Legal Education Programs Presented- International Programs (cont'd)

China: *Using Powerpoint effectively in the classroom*, Harbin, Heilongjiang Province, China, Summer, 2009; *Interactive classroom teaching techniques, Using Video to Create Reflection*, Harbin, Heilongjiang Province, China, Summer, 2009; Facilitator, *Modern Investigative Techniques for Law Enforcement*, Ulanhot, Inner Mongolia Province, China, Summer, 2009; *Critical Thinking and Case Analysis*, Xinjiang Criminal Defense Training, Summer, 2009, Urumqi, Xinjiang Province, China; *Creating Lesson Plans for a Criminal Defense Clinic*, presented in conjunction with the Committee of Chinese Clinical Legal Educators at: China University of Political Science and Law, Beijing, China, May 23, 2009; Qinghai University of Nationalities, Xining, China, April 25, 2009, Sichuan University, Chengdu, China, April 23, 2009; East China University of Political Science and Law, April 3, 2009; Guangxi University, March 31- April 1, 2009, Nanning, China; *Mitigation Evidence in Juvenile Cases*, Conference on Juvenile Justice Reform, November 29, 2008, Beijing, China; *Legal Aid Reform: Lessons from Montana*, Improving Criminal Defense Skills: The Need for Practice Guidelines and Certification Requirements in China, November 1, Beijing, China; *Theme and Theory in a Juvenile Case*, Criminal Legal Aid Advocacy Training, Xi'an, Shaanxi Province, China, October 28, 2008; *Analyzing the Juvenile Confession*, Criminal Legal Aid Advocacy Training, Xi'an, Shaanxi Province, China, October 29, 2008; *Presentation of Evidence in the Juvenile Case*, Xi'an, Shaanxi Province, China, October 2008; *The United States Indigent Defense System*, Conference on Criminal Defense, Beijing, China, October 17, 2008; *Military Commissions and Fair Trials: Like Water and Oil?*, Antiterrorism and Security International Symposium, Southwest University of Political Science and Law, Chongqing, China, April 2007

ENGLAND: *United States Policy on Torture*, the Association of Law Teachers Annual Conference, University of East Anglia, Norwich, United Kingdom, April 9, 2006; *Clinical Education at the University of Montana*, the Association of Law Teachers Annual Conference, University of East Anglia, Norwich, United Kingdom, April 9, 2006

GEORGIA: *Clinical Evaluation and Training*, Tbilisi, Georgia, December, 2010

HUNGARY: *Balancing Security and Civil Liberties: Legal Issues in America's Fight Against Terrorism*, December 2007, the University of Pecs, Pecs, Hungary

INDIA: *New Delhi Criminal Defense Training Workshop*, International Bridges to Justice, New Delhi, India, July, 2008

IRELAND: *Judicial Review of Enemy Combatants*, International Bar Association Conference on Transnational Crime, Dublin, Ireland, June, 2004

ITALY: *United States Policy on Torture*, International Bar Association Conference on Transnational Crime, Milan, Italy, June, 2005

UAE: *First Afghanistan Legal Clinics Workshop*, April, 2009, Dubai, United Arab Emirates

Continuing Legal Education Programs Presented- International Programs (cont'd)

VIETNAM: *Clinical Education Seminar*, March, 2012, Judicial Academy, Hanoi, Vietnam; *Clinical Education In the United States*, March, 2012, Maison du Droit, Hanoi Law University, Hanoi, Vietnam; *The Foreign Corrupt Practices Act and the UK Anti-Bribery Act of 2010*, American Chamber of Commerce, Hanoi, Vietnam; *Clinical Education Training and Assessment*, March, 2012, Can Tho University, Can Tho, Vietnam

Continuing Education Programs Presented- Selected Domestic Programs

Implicit Bias and Structuralized Racism in Montana, Confederated Salish and Kootenai Tribes, Pablo, MT, January 2017; *Discharge upgrades and the Tragedy of Bad Paper from the Vietnam War*, Alexander Blewett III School of Law at the University of Montana, Missoula, MT, January 2017; *Hot Topics in Indigent Defense*, Montana Office of the Public Defender Annual Training Conference, Bozeman, MT, October 2016; *Voting Rights in Indian Country*, YWCA, Missoula, MT, May 2016; *Rights and Responsibilities of Tribes and Indian Parents under Indian Education Funding Statutes, as amended by the Every Student Succeeds Act*, Salish Kootenai College, April 2016; *Voting Rights in Indian Country- MOLLI course*, University of Montana, April 2016; *Rights and Responsibilities of Tribes and Indian Parents under Indian Education Funding Statutes*, University of Montana School of Law, Missoula, MT, December 2015; *Brady v. Maryland and its Application to the Tribal Courts*, Blackfeet Appellate Court, Browning, MT, August 2015; *Crawford v. Washington and its Application to the Tribal Courts*, Blackfeet Appellate Court, Browning, MT, August 2015; *Rights and Responsibilities of Tribes and Indian Parents under Indian Education Funding Statutes*, Crow Agency, MT, July 2015; *Rights and Responsibilities of Tribes and Indian Parents under Indian Education Funding Statutes*, Lame Deer, MT, December 2014; *Rights and Responsibilities of Tribes and Indian Parents under Indian Education Funding Statutes*, Rocky Boys Agency, MT, October, 2014; *Rights and Responsibilities of Tribes and Indian Parents under Indian Education Funding Statutes*, Fort Belknap Agency, MT, October 2014; *Rights and Responsibilities of Tribes and Indian Parents under Indian Education Funding Statutes*, Wolf Point, MT, October 2014; *Rights and Responsibilities of Tribes and Indian Parents under Indian Education Funding Statutes*, Polson, MT, September, 2014; *Traditional Dispute Resolution and the Indian Civil Rights Act*, Polson, MT, July 2014; *Ethics for Tribal Governance & Judicial Systems*, Polson, MT, July 2014; *Moderator- Human Trafficking in Indian Country*, Missoula, Montana, April 2014; *Current Ethical Issues in Criminal Defense Practice*, Chico Hot Springs, Montana, March, 2013; *Communicating with the Difficult Client*, Office of the Public Defender Trial Skills Boot Camp, Lubrecht Station, Montana, August, 2010; *Theme and Theory in Criminal Cases*, Office of the Public Defender Trial Skills Boot Camp, Lubrecht Station, Montana, August, 2010; *Facilitator, Ninth Circuit Defenders & U.S. Attorneys Retreat*, Bigfork, Montana, June 2010; *Criminal Jurisdiction on the Flathead Reservation: PL 280 and Retrocession*, Polson, Montana, August, 2008; *Uighurs at Guantanamo: The United States Runs out the Clock*, University of Montana Symposium on Central and South Asia, Missoula, Montana, April, 2008;

Continuing Education Programs Presented- Selected Domestic Programs

Conducting a Professionally Responsible Criminal Defense Practice: What Would Alberto Gonzales Do?, 2nd Annual Montana Public Defender Training, Livingston, Montana, October, 2007; *The Military Commissions Act of 2006: One Step Forward and Ten Steps Back*, Civil Rights and the War on Terror: A Public Symposium, The University of Montana School of Law, April 2007; *The Military Commissions Act of 2006: One Step Forward or Two Steps Back?*, Montana ACLU, Helena, Montana, March 2007; *Ineffective Assistance of Counsel*, The Absolute Criminal Litigators Conference, Professional Education Systems Institute (PESI), LLC, Las Vegas, Nevada, April, 2006; *Representing the Difficult Client*, The Absolute Criminal Litigators Conference, PESI, LLC, Las Vegas, Nevada, April, 2005; *How to Represent the Trial Lawyer in a Contempt Proceeding*, The Absolute Criminal Litigators Conference, PESI, LLC, Las Vegas, Nevada, April, 2005; *Ethical Dilemmas in Criminal Cases*, The Absolute Criminal Litigators Conference, PESI, LLC, Las Vegas, Nevada, April, 2005; *Judicially Compelled Disclosure of Information from Criminal Defense Counsel*, Montana Commission on Courts of Limited Jurisdiction, Butte, Montana, April, 2004; *The Law of Contempt*, Montana Association of Criminal Defense Lawyers, Chico Hot Springs, Montana, March, 2004; *Practical Ethical Issues in a Criminal Defense Practice*, Montana Association of Criminal Defense Lawyers, Chico Hot Springs, Montana, February, 2002; *Client Perjury and the Presentation of False Evidence*, Criminal Defense Seminar, State Bar of Montana, Billings, Montana, December, 1992; *Ethics and Professional Responsibility in Pretrial Litigation*, Alaska Bar Association & ALPS, Fairbanks, Juneau, Anchorage, Alaska, July, 1992

Colloquia

United States' Policy on Torture, The University of Montana School of Law, February, 2006

Selected Published Materials

Financing Terrorism: Afghanistan and the Haqqani, 28 Int'l Enforcement Law Reporter 19 (Oct. 2012) (with Prof. Istvan Gal Laszlo); *Time for New Strategy in Afghanistan*, Op-Ed to The Missoulian, September 12, 2011; *Bringing Law Clinics to China*, 34-JUL Mont. Law 22, July, 2009; *Counterflowing in Manila*, 34-MAR Mont. Law 20, March, 2009; *Criminal Defense in China*, 34-JAN Mont. Lawyer 5, January, 2009; *Justice Comes to Guantanamo: Boumediene v. Bush*, International Enforcement Law Reporter (August 2008); *Protecting Liberty: Court decision on detainees is a victory for the Rule of Law*, Op-Ed to The Missoulian, June 24, 2008; *Bespeaking Justice: A History of Indigent Defense in Montana*, 68 Mont. L. Rev. 363 (Summer 2007); *Lighting a Single Candle: The International Convention for the Protection of All Persons Against Enforced Disappearances*, International Enforcement Law Reporter (IELR) (June 2007); Book Review, *Creating Language Crimes*, Roger Shuy, Oxford University Press, *The Champion* (May 2007); *U.S. Detention Policy Post-Hamdani: Interesting Times Lie Ahead*, 22 Int'l Enforcement Law Reporter 11 (Nov. 2006); *Hamdan Redux: Formulating a Congressional Response*, 22 Int'l Enforcement Law Reporter 10 (Oct. 2006); *U.S. Supreme Court Deals Setback to Bush Administration on Military Commissions*, 22 Int'l Enforcement Law Reporter 9 (Sept. 2006); *Dancing with the Scavenger's Daughter: Torture, Rendition, and the United States*, 30-JUL Mont. Law. 10, June, 2005;

Selected Published Materials (cont'd)

Singularity: We Have Met the Enemy and He is Us, 29-APR Mont. Law. 8, April, 2004; *Event Horizon: The Constitution Approaches Guantanamo*, 29-MAR Mont. Law. 8, March, 2004; Contributor to *International Terrorism: Legal Challenges and Responses, A Report of the International Bar Association's Task Force on International Terrorism*, October, 2003; *Upholding Justice in the Age of Terrorism: Examining a President's Right to Detain and Try Prisoners*, 28-NOV Mont. Law 6, Nov., 2002

Articles in Progress

Criminalizing separatism: An emerging international trend- International Enforcement Law Reporter

Pro bono work

Pro bono work has been focused on the rights of veterans. Most recent case involved obtaining a discharge upgrade for a Vietnam era veteran experiencing acute and severe PTSD.

Admitted to Practice

Montana Supreme Court- June 1980
United States District Court, District of Montana- June 1980
Ninth Circuit Court of Appeals- March 1983
Flathead Tribal Court- April 1996
Flathead Appellate Court- April 1996

Languages

Mandarin- (very) limited
Spanish- (very basic)
English- native speaker

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Articles

***363** BESPEAKING JUSTICE: A HISTORY OF INDIGENT DEFENSE IN MONTANA

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I. Introduction

In 2005, the Montana Legislature enacted the Montana Public Defender Act (the Act), [\[FN1\]](#) groundbreaking legislation that put Montana in the forefront of a nationwide movement to reform indigent defense. The Act comprehensively altered how indigent defense services are provided in every state court in Montana; no other state has ever enacted an indigent defense system of such breadth and scope. The Act went into effect in 2006, 142 years after Montana became a territory.

The history of indigent criminal defense in Montana over those 142 years is not one story, but many. It is the story of statutory and constitutional provisions and the case law that developed construing those provisions; it is the story of the systems we have developed to implement our indigent defense policies; and it is the human story of how we treat those accused of a crime. This Article will tell part of all of these stories, offering a history of how Montana has provided counsel to indigent adults accused of ***364** crimes, analyzing the new Montana Public Defender Act, and identifying unresolved indigent defense issues. [\[FN2\]](#)

II. Constitutions, Statutes, and Case Law

A. Montana Law

Montana became a territory on May 26, 1864. [\[FN3\]](#) Until December 12, 1864, Montana functioned under the Organic Act and the Idaho Territorial Statutes. [\[FN4\]](#) Montana's Organic Act did not address the right to counsel except to state “[t]hat the constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory of Montana as elsewhere within the United States.” [\[FN5\]](#)

The first Montana Territorial Legislature met in Bannack beginning on December 12, 1864, and enacted a Penal Code. An indigent accused person arrested in Montana in 1865 and charged with a felony crime was entitled to counsel at the public's expense, even though the U.S. Constitution did not require a state or territory to appoint counsel for the indigent defendant and even ***365** though Montana would not have a constitution for another twenty-five years.

A defendant going to court in 1865 would have had the benefit of section 132 of the Penal Code:

If any person about to be arraigned upon an indictment for a felony, be without counsel to conduct his defence, and he be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not

exceeding two, who shall have free access to the prisoner, at all reasonable hours. [\[FN6\]](#) The accused was allowed to take depositions in the same manner as in civil cases in the event that a witness would be unavailable at trial. [\[FN7\]](#) Change of venue was allowed if “the prosecutor has an undue influence over the minds of the inhabitants of the county where the indictment or information shall be pending” among other reasons. [\[FN8\]](#) The accused was allowed twice the number of challenges during voir dire as was the prosecution. [\[FN9\]](#) If the prosecutor sought an indictment by grand jury, but “not a true bill” was returned on a misdemeanor charge, the grand jury had the option of requiring that the prosecutor pay the costs of the proceedings. [\[FN10\]](#) The prosecutor also had to pay costs if he brought a misdemeanor prosecution that was later found by the magistrate not to be supported by probable cause. [\[FN11\]](#) Finally, if the accused was acquitted at a jury trial, the jury then met to decide whether the costs of the trial would be borne by the county or paid directly by the prosecutor. [\[FN12\]](#)

After the First Territorial Legislature met, Montana's Territorial statutes continued to require the appointment of counsel for the accused in felony prosecutions. Territorial statutes relating to indigent defense can be broken down into several parts. There were statutes designed to enumerate the rights of the accused, [\[FN13\]](#) statutes designed to ensure the accused was made aware of his right to counsel, [\[FN14\]](#) statutes designed to ensure that counsel was ³⁶⁶appointed for the indigent accused, [\[FN15\]](#) and eventually statutes to determine compensation for counsel. [\[FN16\]](#)

In 1871, Montana's Seventh Legislative Session enacted the Criminal Practice Act [\[FN17\]](#) that again provided for counsel at public expense for those accused of serious crimes.

If any person about to be arraigned upon an indictment for felony, be without counsel to conduct his defence, and he be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two, who shall have free access to the prisoner, at all reasonable hours. [\[FN18\]](#) During preliminary examination, a magistrate was required to inform the accused of his right to the assistance of counsel, to reasonable time to obtain counsel, and to the assistance of court-appointed counsel if he was without funds to hire an attorney. [\[FN19\]](#) The right to counsel was an enumerated right of the accused. [\[FN20\]](#) The Territorial Legislature reenacted these statutes without change in 1879 and 1887. [\[FN21\]](#)

In 1881, the Territorial Legislature adopted the first statute relating to the compensation of court-appointed counsel. [\[FN22\]](#) Counsel was entitled to reasonable payment for his services by the county, “not to exceed in any capital case the sum of fifty dollars; in other cases of felony a sum not exceeding twenty-five dollars; and in other cases a sum not exceeding ten dollars.” [\[FN23\]](#) The Territorial Legislature also reenacted this statute without change in 1887. [\[FN24\]](#) The amount of compensation was left unchanged by the Territorial Legislature in 1895; [\[FN25\]](#) however, the Legislature increased the maximum fees in 1903 to \$100 for a capital case, \$50 ³⁶⁷for a felony, and \$25 for all other cases. [\[FN26\]](#) These statutory maximums remained the law of the land for another forty-six years, until the Montana Legislature removed the dollar limitations in 1949. [\[FN27\]](#)

The Territory of Montana first attempted to adopt a constitution in 1866. No one knows where that document went, nor do we know its contents. [\[FN28\]](#) Another unsuccessful attempt to adopt a Montana constitution occurred in 1884. [\[FN29\]](#) The text of the proposed 1884 Constitution included a constitutional provision guaranteeing the right to counsel: Article I, section 16 provided “[t]hat in criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel . . .” [\[FN30\]](#)

Montana eventually adopted a constitution in 1889. The 1889 Constitution included the same “right to counsel” language found in the proposed 1884 Constitution, with the addition of one word, “all”: “That in all criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel . . .” [\[FN31\]](#) There was very little debate in the 1889 Constitutional Convention directly about the right to counsel; however, the matter was discussed in a debate about the use of depositions in criminal cases. Delegate Joseph K. Toole of Helena, quoting Judge Frank H. Woody, had this to say:

How often shall the accused have counsel, and where? If he once have counsel, is the constitution satisfied? If he has counsel before the examining court, may counsel be denied him before the jury? If once before a jury he have counsel, may he be deprived of counsel on the second trial? How often may the accused have the right of trial by jury, [sic] If once a jury be impaneled in his case, is the constitutional guaranty at an end? May he be denied that tribunal afterwards? If the jury bring no verdict and are discharged, or if the verdict be set aside, may that constitutional “bulwark” be from that time abandoned as having done its office, and the State proceed to judgment by a simpler and more summary process? How often shall the accused have the right to compulsory process to force the attendance***368** of his witnesses? May the process be denied him if once invoked? These questions answer themselves. No power in the Government can rob him of counsel in a “criminal prosecution” at any one of a hundred trials of the same cause. The jury must come a hundred times; if there be as many trials; and in all of them the compulsory process must go for his witnesses; and at every trial the witnesses against him must meet him “face to face”, that he may look for the hundredth time upon the witness while he swears, and every jury may see the manner of the swearing. [\[FN32\]](#) Some minor stylistic changes were made to the right to counsel statutes by the 1895 Territorial Legislature, [\[FN33\]](#) and additional language was added to bolster the rights of the accused. If the accused was arrested and unable to inform his counsel, the court had to order a local peace officer to immediately take a message to counsel for the accused. [\[FN34\]](#) The right to have counsel notified by a peace officer continued until its repeal in 1967 with the enactment of the new Criminal Procedure Code. [\[FN35\]](#) Montana's right to counsel statutes were reenacted without change in 1907, 1921, 1935, and 1947. [\[FN36\]](#)

The first significant revision of Montana's right to counsel statutes occurred in 1967, with the adoption of the Criminal Procedure Code. [\[FN37\]](#) This Code was a product of the Montana Criminal Law Commission, created by the 1963 Legislature, and chaired by Associate Justice Wesley Castles of the Montana Supreme Court. [\[FN38\]](#)

The 1967 Code attempted to comprehensively address the issue of the right to counsel. The 1967 Code required that a defendant charged with a felony be informed of his right to counsel at his initial appearance instead of at arraignment as had been the practice since the Bannack Code of 1864. The 1967 Code required at initial appearance that a magistrate inform the accused of not ***369** only his right to counsel, [\[FN39\]](#) but also of his right to court-appointed counsel if charged with a felony. [\[FN40\]](#) The indigent accused was told that he had a right to court-appointed counsel; however, it was only a court of record that had statutory authority to appoint counsel. [\[FN41\]](#) The idea behind requiring the appointment of counsel by a court of record was to ensure both that competent counsel was appointed and that counsel was adequately compensated. [\[FN42\]](#)

At the time the 1967 Code was adopted, neither the U.S. Supreme Court nor the Montana Supreme Court required that counsel be appointed for misdemeanor offenses. [\[FN43\]](#) The 1967 Code allowed defendants to waive counsel, except for persons under the age of eighteen charged with a felony. [\[FN44\]](#) Once counsel was appointed, the appointment continued through direct appeal. [\[FN45\]](#) The 1967 Code required that court-appointed counsel be paid “such sum as a district court or justice of the state supreme court certifies to be a reasonable compensation therefore and shall be reimbursed for reasonable costs incurred in the criminal proceeding.” [\[FN46\]](#) Payment was made by the county where the prosecution took place. [\[FN47\]](#) The 1967 Code gave courts of record discretionary authority***370** to appoint counsel for any defendant in a post-conviction proceeding who was unable to retain counsel. [\[FN48\]](#) Finally, the 1967 Code authorized counties to establish a public defender office and to staff it with a “salaried public defender and such assistant public defenders as may be necessary to satisfy the legal requirements in providing counsel for defendants unable to employ counsel.” [\[FN49\]](#) Any county that took advantage of this provision also got to pay for the new office. Not surprisingly it was almost twenty years after the 1967 Code until the first full-time public defender office was established. [\[FN50\]](#)

Montana's 1972 Constitution made no substantive changes to the provisions governing the right to counsel. Article

II, section 24 provides: “In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel.” At the 1972 Constitutional Convention, only one proposal on the right to counsel came out of the Bill of Rights Committee, [\[FN51\]](#) and that proposal was to readopt the provisions of the 1889 Constitution. [\[FN52\]](#) The Bill of Rights Committee's comments were brief.

The committee voted unanimously to retain the former Article II, Section 16 unchanged. The committee felt it was an admirable statement of the fundamental procedural rights of an accused. No delegate proposals were received on this provision. [\[FN53\]](#) *371 There was virtually no floor debate over the right to counsel at the 1972 Constitutional Convention. [\[FN54\]](#)

It was 1981 before the next significant changes occurred to Montana's right to counsel statutes. The 1981 Legislature enacted a system requiring indigent defendants to repay the costs of court-appointed counsel. [\[FN55\]](#) This statute excluded consideration of the assets of friends and relatives of the accused, and consideration of whether the accused had sufficient resources to post bond. The standard was whether he was “financially unable to obtain representation without substantial hardship in providing necessities to himself or his family.” [\[FN56\]](#) The accused was required to submit a financial statement, subject to the penalties of false swearing for any misstatements. [\[FN57\]](#)

If the accused was convicted, the sentencing court had discretion to require that he repay the costs of his appointed counsel. The compensation and costs had to be reasonable, and the defendant had to be able to pay the costs. [\[FN58\]](#) The accused could not be charged with “expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of the law.” [\[FN59\]](#) The defendant had the right to petition the court to forego repayment of fees and costs as long as he was not in “contumacious” default. [\[FN60\]](#) A failure to repay attorney fees and costs could subject the defendant to proceedings for civil contempt. [\[FN61\]](#) It could also cause a revocation of a suspended or deferred sentence. [\[FN62\]](#)

The 1985 Legislature amended the statute to require that any payments received from a defendant for attorney fees and costs be disbursed to the entity that initially incurred the costs of providing the attorney. [\[FN63\]](#) The 1987 Legislature further amended the statute, and required that a minor charged with a crime, and his *372 parents, had to submit verified financial statements demonstrating their collective inability to retain counsel. [\[FN64\]](#)

1991 again brought widespread change to Montana's statutory scheme to implement the right to counsel. The 1991 Legislature made a number of stylistic and substantive changes. Until 1991, counsel had to be appointed for an indigent individual charged with a felony. This was somewhat inconsistent with federal case law, as the U.S. Supreme Court had ruled in 1972 that counsel was to be provided for any indigent person charged with a felony or misdemeanor punishable by jail time. [\[FN65\]](#) The 1991 Legislature expanded the statutory right to counsel to extend to any indigent individual accused of any crime, as long as the court retained the possibility of imprisonment as a sentencing option. [\[FN66\]](#)

The 1991 Legislature allowed persons under the age of eighteen to waive counsel. [\[FN67\]](#) The new language stated that the right to counsel could be waived, provided the court “ascertain[] that the waiver is made knowingly, voluntarily, and intelligently.” [\[FN68\]](#)

The 1991 Legislature also codified the U.S. Supreme Court's *Anders v. California* [\[FN69\]](#) decision regarding the duty of a court-appointed attorney who wants to withdraw from an appeal. [\[FN70\]](#) The statute was again amended in 2003 to further detail counsel's duty under those circumstances. [\[FN71\]](#)

The 1991 Legislature made the accused's financial eligibility statement inadmissible in all civil and criminal matters, except for impeachment purposes or in a subsequent case for perjury or false swearing. [\[FN72\]](#) The 1991 Legislature repealed language stating that a defendant could not be charged with the costs of providing a constitutionally required

jury trial or costs of incarceration. [\[FN73\]](#)

The 1991 Legislature also created the first criminal defense office with statewide impact: the Office of the Appellate Defender. [\[FN74\]](#) The Office of the Appellate Defender was designed to assume responsibility for petitions for post-conviction relief for indigent*373 individuals alleging ineffective assistance of counsel. The office was supervised by the Appellate Defender Commission. [\[FN75\]](#) The Governor appointed the commission's five members, and “charged [them] with developing a system of indigent appellate defense services, proposing minimum standards for all trial and appellate public defenders, keeping a roster of attorneys eligible for appointment as trial and appellate defense counsel for indigent defendants, and establishing the qualifications, duties, and priorities for the appellant defender.” [\[FN76\]](#) Although originally designed to be in existence for only two years, the commission was in existence for fifteen years, until the 2005 Legislature repealed the Appellate Defender Act, effective July 1, 2006. [\[FN77\]](#)

In 2001, as part of the state assumption of district court costs, the Legislature redirected funds paid by the defendant for his court-appointed attorney. Instead of going to the entity responsible for the prosecution, the monies went to the state general fund. [\[FN78\]](#)

The Montana Legislature has provided counsel to indigent criminal defendants in two other instances: extradition proceedings, and, more recently, in post-conviction relief matters. The 1973 Legislature enacted the Uniform Criminal Extradition Act (UCEA). [\[FN79\]](#) Under the UCEA, any person arrested on an extradition warrant must be taken “forthwith” before a court of record and informed of the charge and of his right to “demand and procure legal counsel.” [\[FN80\]](#)

As part of the Criminal Procedure Code adopted in 1967, Montana adopted a version of the Uniform Post Conviction Act. [\[FN81\]](#) At that time, however, there was no statutory right to counsel in post-conviction proceedings. It was not until 1991 that language was included to require appointed counsel in any case in which a hearing was necessary, or when “the interests of justice” required the appointment of counsel and the petitioner qualified as indigent.*374 [\[FN82\]](#) In 1997 the statutes were amended again to require the appointment of counsel for the indigent post-conviction petitioner if a sentence of death had been imposed, regardless of whether a hearing was required. [\[FN83\]](#) The post-conviction statutes were again amended in 2005 to reflect the adoption of the new statewide public defender system. [\[FN84\]](#)

B. The Federal Right to Counsel

The Sixth Amendment to the U.S. Constitution guarantees that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” [\[FN85\]](#) In the federal system, however, this has not always meant the accused had a right to counsel paid by the government in a criminal prosecution. Instead, for almost 180 years, the right to counsel was considered a “fielder's choice”: if the accused could secure and pay for an attorney, then he had the “right” to counsel. [\[FN86\]](#)

Even in capital cases, it was not until 1932 that the U.S. Supreme Court ruled in *Powell v. Alabama* [\[FN87\]](#) that there was a right to counsel “in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense.” *Powell*, a state prosecution, was not based on the Sixth Amendment, but was premised on the right to due process. In the context of the facts of *Powell*, a fair hearing could not be obtained without court-appointed counsel. [\[FN88\]](#)

[W]e are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is *375 incapable

adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, "that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel. [FN89] In federal cases, the right to counsel was expanded in 1938 when the Court decided *Johnson v. Zerbst*. [FN90] In *Johnson*, the Court held that indigent defendants in federal court were entitled to court-appointed counsel in any felony prosecution. [FN91] *Johnson* was based on the Sixth Amendment right to counsel. [FN92] Six years after deciding *Powell*, the Court significantly limited its impact when it issued *Avery v. Alabama*. [FN93] In *Avery*, the defendant was arrested on March 21, 1938, and charged with capital murder. [FN94] He had two attorneys appointed for him that morning, and went to trial three days later on March 24, 1938. [FN95] His attorneys moved for a continuance, alleging that they did not have sufficient time to prepare for the case: one of the defendant's attorneys was in trial on March 21, had to attend court on another matter on March 22, and was unable to meet with his client until March 23, one day before trial. [FN96] The circuit court made no ruling on the motion for continuance, and the trial began as scheduled on March 24. [FN97] The defendant was convicted and sentenced to death. [FN98]

Distinguishing *Powell v. Alabama* on its facts, the Court affirmed the death sentence, holding that three days to prepare for *376 trial did not create a lack of effective assistance of counsel. [FN99] *Powell* did not mandate a particular amount of time to prepare for trial, only that counsel for the accused cannot be appointed on the morning of the trial in a complex death penalty case. The Montana Supreme Court would not reach the same conclusion under Montana's constitutional and statutory rights to counsel. [FN100]

The U.S. Supreme Court backed even farther away from *Johnson* just a few years later in *Betts v. Brady*. [FN101] *Betts*, a non-capital case, made it clear that the *Johnson v. Zerbst* rationale did not apply to felony state court proceedings in the absence of exceptional factual circumstances such as those found in *Powell v. Alabama*. [FN102]

In 1963, the Court extended defendants' right to court-appointed counsel under the Sixth Amendment to all state court felony prosecutions in *Gideon v. Wainwright*. [FN103] The same year, the Court decided *White v. Maryland*. [FN104] In *White*, the Court ruled that the right to counsel under *Gideon* attached no later than the preliminary hearing stage. [FN105]

Gideon did not require the appointment of counsel in all cases, however, only in felony prosecutions. [FN106] A Sixth Amendment right to counsel for indigents accused of misdemeanors in state court was not recognized until *Argersinger v. Hamlin* in *377 1972. [FN107] In 1984, the Court ruled that the right to counsel meant the right to "effective assistance of counsel" in *Strickland v. Washington*. [FN108]

Most recently, in 2002, the Supreme Court held in *Alabama v. Shelton* [FN109] that, in a state misdemeanor prosecution, the indigent accused was entitled to court-appointed counsel even if the sentence imposed was suspended. [FN110] Up until *Shelton*, several states, including Montana, [FN111] refused to provide counsel to a defendant in that situation. [FN112]

III. Identifying Indigent Defense Problems in Montana Courts

The overall state of indigent defense in the U.S. has been one of high hopes and poor performance. Performance issues are linked directly to funding issues. When the U.S. Supreme Court decided *Powell v. Alabama*, [FN113] *Gideon v. Wainwright*, [FN114] *Argersinger v. Hamlin*, [FN115] *Ake v. Oklahoma*, [FN116] and *Alabama v. Shelton*, [FN117]

the Court announced its opinions on facets of the right to counsel for those charged with crimes. The Court did not address, however, the source of funding for these attorneys, investigators, expert witnesses, training, support staff, and everything *378 else necessary to fulfill the promise of Gideon. [\[FN118\]](#) Therein lies the rub.

Historically, there has been little opposition in Montana's criminal justice system to the accused being represented by counsel. The issue is, and always has been, who will pay for that representation. From the beginning in Montana, the burden was ostensibly on the county in which the prosecution took place, but in reality, much of the burden fell on the private bar. From 1864 until 1903, the maximum fee that an appointed attorney could collect for the defense of a capital crime in state court in Montana was \$50. From 1903 until 1949, the maximum fee appointed defense counsel could charge in a capital case was \$100. [\[FN119\]](#)

It has been no secret that the quality of indigent defense in Montana has varied widely from one jurisdiction to another, and has even varied widely over time within the same jurisdiction. The first published study of indigent defense in Montana was a cursory one, prepared in 1965 by the American Bar Association as part of a study of the indigent systems in all fifty states. [\[FN120\]](#)

Recognizing problems with the system, in 1976 the Montana Board of Crime Control awarded a grant to the National Center for Defense Management to prepare the Montana Statewide Defender Systems Development Study (NCDM Study). The NCDM Study was initiated at the behest of the Montana Legal Services Corporation, [\[FN121\]](#) and reviewed the delivery of indigent criminal defense services in five areas, Yellowstone, Missoula, Lake, and *379 Flathead Counties, and the southeastern counties within the Sixteenth Judicial District. [\[FN122\]](#)

Yellowstone County was the largest area studied, with a population of 97,300. [\[FN123\]](#) Indigent defense in Yellowstone County was conducted at the time by five part-time public defenders. [\[FN124\]](#) Three of the attorneys handled all the appointed felony work for a flat fee of \$1,500 each per month, one attorney handled the juvenile cases for a flat fee of \$1,200 per month, and the final attorney handled all the mental health commitments for a flat fee of \$800 per month. [\[FN125\]](#) There was no additional compensation for costs or investigation. [\[FN126\]](#) No additional fees were paid in the event of a trial or appeal. [\[FN127\]](#) In the event of a conflict that could not be handled by the contract attorneys, a private attorney was appointed at an hourly rate of between \$25 and \$50. [\[FN128\]](#) The NCDM Study characterized the local consensus about the Yellowstone County system as, “[it] works well enough to avoid embarrassing mistakes or deficiencies but does not meet the standards of private practice.” [\[FN129\]](#)

Flathead County had a system developed by the local district court judges, also using part-time contract attorneys. [\[FN130\]](#) One of the three attorneys was named chief defender and received an annual salary of \$15,000, while the other two were paid \$12,000 per year. [\[FN131\]](#) During 1975, their compensation averaged approximately \$11 per hour for time spent on indigent defense work. [\[FN132\]](#) Some additional monies were also available to them for expenses, and they received an additional flat sum of \$500 in the event of an appeal. [\[FN133\]](#)

Indigent defense in the Sixteenth Judicial District in 1976 was done exclusively by appointed attorneys. [\[FN134\]](#) All private attorneys*380 in the district, with the exception of prosecutors, were on the list. [\[FN135\]](#) The district judges at the time agreed that most of the attorneys they appointed had “little or no experience in criminal law.” [\[FN136\]](#) The attorneys were very reluctant to take cases since their practices did not include a significant amount of criminal law, the appointed cases interfered with their private practice, and most cases typically involved a fee dispute. [\[FN137\]](#)

The NCDM Study identified numerous deficiencies in how Montana's indigent defense services were delivered, and made the following recommendations:

- That the Legislature create “The Montana Defender Corporation”;

- That the Montana Public Defender Corporation enter into full-time contracts with attorneys in each of the Districts for handling cases;
- That a central office be established to handle indigent criminal appeals and supportive research;
- That one or more specialized trial attorneys be maintained by the State for complicated cases;
- That a list of available assigned counsel be maintained to draw from in case of co-defendant conflicts or overload;
- That community support be mobilized by circuit defenders;
- That sufficient support services be provided; and
- That orientation, training and continued legal education be provided to defenders and panel attorneys. [\[FN138\]](#)

The 1977 Montana Legislature failed to implement any of the study's recommendations.

The Montana Legislature's Joint Sub-Committee on Judiciary conducted another study on indigent defense in 1982. [\[FN139\]](#) The 1982 Report considered two alternatives to improve indigent defense services. [\[FN140\]](#) The first was to create a statewide public defender system that divided the entire state into districts, with full-time *381 deputy public defenders in each. [\[FN141\]](#) The statewide system would have been overseen by a nine-member public defender commission. [\[FN142\]](#) The 1982 Report rejected this option as being too costly to implement. [\[FN143\]](#)

The second option considered in the 1982 Report was to create the position of “Public Defense Coordinator.” [\[FN144\]](#) The duties of the Coordinator would have been to conduct indigent criminal defense training, to help plan how defense services would be provided in the future, to act as a clearinghouse for criminal defense information, to collect information on indigent defense costs and caseloads, and to apply for federal grants to advance the cause for indigent defense in Montana. [\[FN145\]](#) The Public Defense Coordinator program had a projected cost of less than 6% of the cost of a statewide system. [\[FN146\]](#) Senate Bill 5 incorporating the Public Defense Coordinator option was introduced in the 1983 Legislature by Senator Joe Mazurek. The bill received a “do not pass” recommendation from the Senate Judiciary Committee, and failed on first reading. [\[FN147\]](#)

In 2003, a legislative effort was made to create a statewide public defender system with the introduction of Senate Bill 218. [\[FN148\]](#) As drafted, however, the bill only addressed district court criminal matters, and therefore only a portion of the problem. Both the local jurisdictions and the larger reform interests wanted a comprehensive solution to the ongoing problems with Montana's system, and no one could agree on a funding mechanism for the bill. [\[FN149\]](#) The bill ultimately died in committee. [\[FN150\]](#)

The landscape changed, however, when the American Civil Liberties Union's class action civil rights lawsuit gathered steam *382 in Lewis and Clark County. [\[FN151\]](#) *White v. Martz* initially named Governor Martz, the Supreme Court Administrator, the members of the Appellate Defender Commission, and seven counties as defendants, alleging violations of the Sixth and Fourteenth amendments to the U.S. Constitution, as well as violations of [sections 4, 17, and 24 of Article II of the Montana Constitution](#). [\[FN152\]](#) The suit focused on the State's failure to set and enforce standards for indigent defense practice, failure to adequately fund indigent defense, failure to adequately train indigent defense counsel, failure to set and monitor caseload standards, and failure to adopt and implement conflict of interest policies. [\[FN153\]](#)

In the summer of 2004, as part of the *White v. Martz* litigation, the National Legal Aid and Defender Association (NLADA) undertook a study. [\[FN154\]](#) The NLADA report was prepared at a time when the national legal community was coming to a stark realization about how poorly Montana's indigent defense systems were working. The report

identified numerous deficiencies in the defense system that mirrored the ACLU's allegations in *White v. Martz*. [\[FN155\]](#) In addition, the NLADA Report criticized the system for not being “sufficiently independent and free from undue political interference.” [\[FN156\]](#)

The NLADA report focused on the state's failure to comply with the American Bar Association's (ABA) Ten Principles of a *383 Public Defense Delivery System. These ten principles were adopted by the ABA as a guideline for how indigent defense services should be delivered. [\[FN157\]](#) The ten principles are,

1. “The public defense function, including the selection, funding and payment of defense counsel is independent” from other agencies in the criminal justice system and free from undue political interference. The public defense system should be overseen by a nonpartisan board, not the judicial system, and public defenders should be hired on the basis of merit.

2. “Where the caseload is sufficiently high, the public defense delivery system consists of both a public defender office and the active participation of the private bar.” Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure to ensure uniform quality statewide.

3. “Clients are screened for eligibility” and assigned a public defender as soon as possible after client's arrest, detention or request for a lawyer, usually within 24 hours.

4. Defense counsel must be allowed adequate time and a confidential meeting space to meet with the client.

5. Defense counsel's workload is limited to allow for ethical, quality representation. National standards should never be exceeded, and limited support staff or a defender's nonrepresentational duties may further reduce the caseload limits.

6. “Defense counsel's ability, training and experience match the complexity of the case.”

7. “The same attorney continuously represents the client” through all stages of the proceeding. Effective lawyering is impossible in an assembly line system of indigent defense.

8. “There is parity between defense counsel and the prosecution with respect to resources There should be parity of workload, salaries and other resources (such as benefits, technology, facilities . . . support staff . . . investigators and access to forensic services and experts).” *384 Further, defense counsel is included and treated as an equal partner in the criminal justice system.

9. “Defense counsel is provided with and required to attend continuing legal education.”

10. “Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted performance standards.” [\[FN158\]](#)

The NLADA report concluded that Montana did not effectively meet any of the ten principles, citing numerous issues with both organized and appointed indigent defense systems. [\[FN159\]](#)

In response to the *White v. Martz* litigation, Attorney General Mike McGrath signed a stipulation staying the litigation pending the 2005 Montana Legislative Session. [\[FN160\]](#) The matter was taken under study by the Montana Legislature's Law and Justice Interim Committee (LJIC). [\[FN161\]](#) The LJIC, and a subcommittee that focused exclusively on indigent defense, studied the matter over ten months, and, on September 8, 2004, unanimously recommended that the Legislature adopt a comprehensive statewide public defender system that incorporated all of the ABA's Ten Principles of a Public Defense Delivery System. [\[FN162\]](#)

Marking the fortieth anniversary of the Gideon decision, the ABA also issued a report in 2004 about the state of indigent defense in the United States, entitled *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*. [\[FN163\]](#) The ABA Report made a number of findings about the state of indigent defense services:

- Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction. • Funding for indigent defense services is shamefully inadequate.
 - Lawyers who provide representation in indigent defense systems sometimes violate their professional duties by failing to furnish competent representation.
- *385** • Lawyers are not provided in numerous proceedings in which a right to counsel exists in accordance with the Constitution and/or state law. Too often, prosecutors seek to obtain waivers of counsel and guilty pleas from unrepresented accused persons, while judges accept and sometimes even encourage waivers of counsel that are not knowing, voluntary, intelligent, and on the record.
- Judges and elected officials often exercise undue influence over indigent defense attorneys, threatening the professional independence of the defense function.
 - Indigent defense systems frequently lack basic oversight and accountability, impairing the provision of uniform, quality services.
 - Efforts to reform indigent defense systems have been most successful when they involve multi-faceted approaches and representatives from a broad spectrum of interests.
 - The organized bar too often has failed to provide the requisite leadership in the indigent defense area.
 - Model approaches to providing quality indigent defense services exist in this country, but these models are not adequately funded and cannot be replicated elsewhere absent sufficient financial support. [\[FN164\]](#)

IV. Crafting a Response

The bill proposed by LJIC was introduced in Montana's 2005 Legislature. [\[FN165\]](#) Given the scope of the bill, its legislative history is remarkable. It received a unanimous “do pass” recommendation from the Senate Judiciary Committee on February 14, 2005. [\[FN166\]](#) On second reading in the Senate, an attempt was made to amend the bill to require that the new Office of the Public Defender be located in Butte. The motion failed on a vote of 24-26, but would return again before the end of the session. [\[FN167\]](#) The bill then passed second reading on a unanimous vote and was referred to the Senate Finance and Claims Committee.

The bill passed the Finance and Claims Committee with some amendments on a vote of 17-2. [\[FN168\]](#) The full Senate unanimously approved the amended bill on second reading, and passed it on third reading on a vote of 48-0. [\[FN169\]](#) After some amendments in the House, the bill went to a Free Conference Committee, and in the ***386** Free Conference Committee the idea resurfaced to mandate that the Office of the Public Defender be located in Butte. [\[FN170\]](#) The Free Conference Committee amended the bill to require the Office to be located in Butte, and the final bill passed the Senate on a vote of 50-0 and the House on a vote of 89-11. [\[FN171\]](#)

The Montana Public Defender Act was enacted in 2005. [\[FN172\]](#) The Act is a radical departure from Montana's past, and is the most forward-looking piece of indigent defense legislation passed to-date in the United States. The stated purposes of the Act are to

- (1) establish a statewide public defender system to provide effective assistance of counsel to indigent criminal defendants and other persons in civil cases who are entitled by law to assistance of counsel at public expense;
- (2) ensure that the system is free from undue political interference and conflicts of interest;
- (3) provide that public defender services are delivered by qualified and competent counsel in a manner that is fair and consistent throughout the state;
- (4) establish a system that utilizes state employees, contracted services, or other methods of providing services in a manner that is responsive to and respectful of regional and community needs and interests; and
- (5) ensure that adequate public funding of the statewide public defender system is provided and managed in a fiscally responsible manner. [\[FN173\]](#)

The Act is comprehensive. It creates a unitary system of indigent defense for all Montana courts: justice courts, city courts, municipal courts, district courts, and the Montana Supreme Court. [\[FN174\]](#) Not only does the system comprehensively cover all Montana courts, [\[FN175\]](#) it also covers virtually all areas in which an attorney may be appointed and is not limited to criminal cases. [\[FN176\]](#) *387 The only appointed work not being done by the new Office of the *388 State Public Defender (OSPD) is that public defenders may not be appointed as special advocates or guardians ad litem either under the Youth Court Act or in an abuse and neglect proceeding. [\[FN177\]](#)

OSPD is run by the Chief Public Defender, [\[FN178\]](#) and overseen by an eleven-member Public Defender Commission. The Governor appointed the commission members based on specified areas of expertise and nomination by the State Bar of Montana, the Montana Supreme Court, the House Speaker, the Senate President, or the general public. [\[FN179\]](#) The commission is charged with approving a strategic plan for the delivery of indigent defense services, and developing practice and training standards for public defenders. [\[FN180\]](#) *389 The approved strategic plan separates the State into eleven regions that combine existing judicial districts. [\[FN181\]](#) The commission has already adopted the Standards for Counsel Representing Individuals pursuant to the Montana Public Defender Act (Standards), [\[FN182\]](#) and is currently training its employees and contract attorneys on their implementation. The Standards call for parity in resources and compensation between the defense and prosecution, [\[FN183\]](#) and are intended to be a guide for full-time public defenders and contract attorneys providing indigent defense services. They are not intended to establish a specific standard of care for either a claim of ineffective assistance of counsel or a claim for legal malpractice. [\[FN184\]](#) The Standards are derived from numerous sources. As a baseline, the commission looked to the standards developed by the Montana's Appellate Defender Commission. Working from that framework, the commission adopted a number of standards from those developed by the Georgia Public Defender Standards Council, [\[FN185\]](#) as well as from North Carolina [\[FN186\]](#) and Iowa. [\[FN187\]](#) In addition, the commission drafted and adopted a number of original standards.

*390 The Standards make a number of radical changes to how indigent defense services are provided in Montana. The changes begin with initial contact with the client. For clients in custody prior to initial appearance, the Standards require that attorneys meet with clients for at least fifteen minutes prior to their first court appearance. [\[FN188\]](#) This does not mean that counsel will appear on all cases at initial appearance, but it does mean that everyone in custody should have the opportunity to briefly talk to a lawyer before going to court.

The next significant change is in the appointment process. If a request is made for counsel, the court will appoint OSPD to represent the client. This is done before a determination of indigency is made. [\[FN189\]](#) OSPD determines indigence, not the court. The client's indigency questionnaire is not admissible in court except "when offered for impeachment purposes or in a subsequent prosecution of the applicant for perjury or false swearing." [\[FN190\]](#) In fact, the court cannot challenge OSPD's determination of indigence. Only OSPD or the prosecution can contest the issue. [\[FN191\]](#)

OSPD can determine that the client is indigent under either of two alternative bases. First, a client is indigent if his gross household income is at or below 133% of the current federal poverty guidelines. [\[FN192\]](#) Second, regardless of the client's household income, a client is indigent if “the disposable income and assets of the applicant and the members of the applicant's household are insufficient to retain competent private counsel without substantial hardship to the applicant or the members of the applicant's household.” [\[FN193\]](#) OSPD cannot require public defenders or contract attorneys to perform the indigence determination, but must use other employees or methods. [\[FN194\]](#) If OSPD determines that the client is not indigent, the client has a right to appeal the decision to the appointing court. [\[FN195\]](#)

The Standards mandate that counsel does not let the client languish in jail. If the client appears for initial appearance and is incarcerated, counsel from OSPD is to make contact with the client*[391](#) within three working days. [\[FN196\]](#) Counsel is required to maintain regular contact with clients, “at least weekly unless otherwise agreed between the client and counsel.” [\[FN197\]](#) “Counsel [is to] provide continuous and uninterrupted representation” of the client through the trial court level; however, absent exceptional circumstances, all appeals are now handled by the Office of the Appellate Defender. [\[FN198\]](#) The Office of the Appellate Defender is responsible for investigating and pursuing claims of ineffective assistance of counsel. [\[FN199\]](#)

Initial specific caseload standards have been adopted, and workload standards are currently under review. [\[FN200\]](#) The Standards provide a detailed methodology for identifying and determining conflicts of interest in an effort to avoid conflicts. [\[FN201\]](#) The Standards cover most aspects of criminal defense practice, including client interviews, [\[FN202\]](#) pretrial release, [\[FN203\]](#) preliminary hearings, [\[FN204\]](#) investigation, [\[FN205\]](#) discovery, [\[FN206\]](#) “develop[ing] a theory of the case,” [\[FN207\]](#) pretrial motions, [\[FN208\]](#) plea negotiations, [\[FN209\]](#) trial preparation, [\[FN210\]](#) all phases of trial, [\[FN211\]](#) and sentencing. [\[FN212\]](#) The Standards also address counsel's responsibilities when acting as standby counsel. [\[FN213\]](#)

The Standards have been adopted and are currently undergoing codification for the following: appellate advocacy, sentence review, post-conviction proceedings, representation in Youth Court, *[392](#) representation in an involuntary mental health commitment, [\[FN214\]](#) representation in an involuntary commitment based on serious developmental disability, representation of a minor voluntarily committed to a mental health facility, representation of parents in dependent and neglect proceedings, [\[FN215\]](#) representation of a respondent in a guardianship or conservatorship proceeding, representation in proceedings under the Uniform Parentage Act, representation of parents or a guardian for the involuntary commitment of a developmentally disabled person, and representation of a respondent in a proceeding for involuntary commitment for alcoholism. [\[FN216\]](#)

Training is a critical component of the new system. The Act mandates that the Chief Public Defender appoint a statewide training coordinator. [\[FN217\]](#) The training coordinator will:

- a) coordinate training to public defenders in current aspects of criminal and civil law involving public defense;
- b) assist in the development and dissemination of standards, procedures, and policies that will ensure that public defender services are provided consistently throughout the state;
- c) consolidate information on important aspects of public defense and provide for a collection of official opinions, legal briefs, and other relevant information;
- d) provide assistance with research or briefs and provide other technical assistance requested by a public defender;
- e) apply for and assist in the disbursement of federal funds or other grant money to aid the statewide public defender system; and
- f) perform other duties assigned by the chief public defender. [\[FN218\]](#)

In the first six months of the new public defender system, OSPD has conducted a leadership conference for the newly hired regional public defenders, a statewide seminar for all new OSPD employees and contract attorneys, a statewide seminar for all OSPD investigators, a “boot camp” for new criminal defense attorneys, training for juvenile defenders, and training for mental ³⁹³ health commitments. [\[FN219\]](#) Training will be ongoing, and will be delivered through a variety of methods including in-person seminars, videoconferencing, and various media available for dissemination to the regional offices. [\[FN220\]](#) Recognizing that there have been cultural issues in the past between non-Native American attorneys and Native American clients, OSPD's first statewide training included a presentation on increasing cultural competencies in representing Native American clients. [\[FN221\]](#)

Finally, the Public Defender Commission and the Chief Public Defender continue to solicit public comment on an ongoing basis, seeking dialogue with the general public and with all segments of the criminal justice system. [\[FN222\]](#) For Montana's new system to survive, broad-based support is critical.

V. Indigent Defense in Montana's Federal Courts

In 1964, Congress enacted the Criminal Justice Act, providing federal funds to pay attorneys representing indigent criminal defendants in federal court. [\[FN223\]](#) Two years before (in 1962) NLADA created the National Defender Project using a Ford Foundation grant. [\[FN224\]](#) The National Defender Project helped fund some of the first organized federal defender systems in several cities around the United States. [\[FN225\]](#) In 1971 Congress authorized districts to create federal public defender systems. [\[FN226\]](#)

³⁹⁴ Until 1991, all indigent defendants in federal courts in Montana were appointed attorneys from the private bar. The first statewide indigent criminal defense system for federal courts in Montana had its genesis in 1991 when then Chief Judge for the District of Montana, Paul G. Hatfield, directed U.S. Magistrate Robert M. Holter to investigate the idea of an organized federal defender system for the District of Montana. [\[FN227\]](#) Montana's federal judges chose to establish a Community Defender Organization, a private not-for-profit corporation which became the Federal Defenders of Montana. [\[FN228\]](#)

The newly formed organization began accepting appointments in 1993, establishing offices in Great Falls and Billings, and later that same year in Helena. A Missoula office was added in 1998. [\[FN229\]](#) The Federal Defenders of Montana currently employs ten full-time attorneys to handle approximately two-thirds of the appointed criminal cases in the District of Montana. [\[FN230\]](#)

Criminal Justice Act panel attorneys are responsible for the remaining one-third of the indigent defense cases. [\[FN231\]](#) These cases involve conflicts of interest, or are cases over and above what can reasonably be handled by staff attorneys. In 1993, the Federal Defenders of Montana closed sixty cases. [\[FN232\]](#) In 2005, they closed 682 cases, an increase of over 1000% in twelve years. [\[FN233\]](#)

VI. The Montana Defender Project

No discussion of indigent defense in Montana would be complete without mentioning the Montana Defender Project. Montana, with its vast spaces and small population was an unlikely candidate to obtain funding for a Defender Project. A number of circumstances, however, created a synchronicity that allowed the Defender Project to begin. In 1962, NLADA received a \$2.6 million grant from the Ford Foundation to create the National Defender³⁹⁵ Project to “create offices for the defense of indigent clients.” [\[FN234\]](#) A year later, the U.S. Supreme Court, in *Gideon v. Wainwright*, guaranteed the right to counsel to indigent citizens accused of a felony. [\[FN235\]](#) William J. Jameson, U.S. District Judge for the District of Montana, joined the Advisory Council of the NLADA in 1964. [\[FN236\]](#) It was Judge Jameson who first had the idea of the Defender Project for Montana.

Judge Jameson contacted then Dean Robert E. Sullivan at The University of Montana School of Law, and encouraged him to apply for an NLADA Defender Project grant in 1965. [\[FN237\]](#) The Montana Defender Project was designed to provide a variety of legal assistance, including,

- 1) Direct assistance by law students in the defense of indigents who are accused of felonies or misdemeanors;
- 2) Direct assistance by law students in the defense of indigent Indian defendants and a study in depth of the mechanics of reform of procedure in Indian tribal courts;
- 3) Direct assistance to inmates of correctional institutions and post-conviction remedies;
- 4) The inauguration of a state-wide program of legal aid in criminal matters at all levels of jurisdiction and the coordination of efforts by local bar associations to establish similar programs in the larger metropolitan areas of the state.
- 5) The gathering of statistical information for the purpose of securing reform in criminal law and procedure and the education of those involved in the process of criminal administration in order to provide adequacy of representation. [\[FN238\]](#)

The application placed a significant emphasis on the seven Indian reservations in Montana and enrolled tribal members residing off reservation. Based in large part on the impact of the grant on the legal needs of Montana's tribal members, [\[FN239\]](#) the Director of *396 NLADA recommended that the grant be approved. [\[FN240\]](#) The three-year grant was awarded, and in 1966 Dean Sullivan hired William F. Crowley, a deputy prosecutor from Lewis and Clark County, to be the first Director of the Project. [\[FN241\]](#)

A year after the Defender Project began operations, the Director of NLADA visited Montana to see how the Project was working. He gave the Defender Project a glowing assessment. [\[FN242\]](#) The Defender Project used law student interns to achieve its goals and objectives. Interns conducted interviews with inmates at the Montana State Prison, investigated cases, offered direct assistance in the tribal courts and, eventually, in the state and federal courts in Montana.

Ron Waterman was one of the first student directors of the Defender Project. [\[FN243\]](#) He remembers his first visit to the state hospital at Warm Springs to visit a client who had been sent there from the state prison:

There's one case that stands out in my mind. This fellow right now would probably have been defined as someone suffering from bipolar disease. He was incapable of modifying his conduct to a degree that was acceptable in society. And so he would act out in one way or another, small petty thefts, but mostly it was just simply acting out, get arrested, get charged with a crime, and go to Deer Lodge. In Deer Lodge they recognized that this fellow really wasn't, *397 if you will, "a criminal": he was mentally ill. They would bounce him out of Deer Lodge at that time and they would send him over to Warm Springs. And actually in the Defender Project, I was the second attorney to do the same thing for him. He'd go over to Warm Springs, and in Warm Springs they didn't have any defined forensic unit to deal with an individual who was not sent there on a commitment but had been sent over from the prison. So as a consequence they put him in pretty much a lockdown status. This was in the late 60s when Warm Springs was as close to a snake pit as you could ever get to . . . They'd put him in a padded cell. And I can remember going over and meeting with my client on the first occasion to get some of the essential facts to complete the application for the writ of habeas corpus that we were going to file in federal court. They brought him in to a padded cell, literally a room with padded walls, a padded ceiling, and padded floor. And he was in a straight jacket. His arms were locked behind his back in a long sleeved jacket, and because this was a confinement room there were no tables or chairs, we sat on the floor. I completed the interview of him sitting on the floor. And that sort of always stuck with me. . . . It was eye-opening to say the least. I can remember sitting there and interviewing this fellow, this client. He seemed at that time to be perfectly lucid one way or another and was very, very competent. He had been through this system, this sort of revolving door before, it was

familiar to him. He simply wanted out. And so we prepared and filed a petition for habeas corpus, and as I recall we never even had to go to hearing. . . . With the filing of the petition saying it was inappropriate to hold him in this type of confinement, the county basically rolled over and agreed that he could be released, and he was released. He went through that revolving door. I think I handled him through the second of three times through the revolving door. Ultimately his conduct got him in trouble with somebody up in Great Falls and he was killed, which was sort of predictable as well. It underscored, and left with me, a tremendous impression about the inadequacies of the prison system. [\[FN244\]](#)

During its first three years, while operating under the NLADA grant, the Defender Project focused much of its efforts on assistance to tribal members. [\[FN245\]](#)

The Montana Defender Project's primary efforts toward guaranteeing the rights of the indigent Indian defendant in courts other than the tribal courts have been centered in a full-time summer program in the federal district court for the eastern district of Montana. Of the seven Indian Reservations in Montana, five are located in this judicial district, and the overwhelming majority of Indian offenses are committed there. [\[FN246\]](#) *398 During the summer of 1967, one Defender Project law student worked at the Fort Peck Reservation, two students worked at the Blackfeet Reservation, and two worked at the Crow Reservation. [\[FN247\]](#) Some of the procedures developed by the Defender Project became national models. [\[FN248\]](#)

Crowley had only been at the Law School for two years when Governor Forest Anderson requested that Crowley act as his counsel in Helena during the 1969 Legislative Session. [\[FN249\]](#) Professor David J. Patterson took over the Defender Project in his absence. [\[FN250\]](#) After the session, Crowley was again asked by Governor Anderson to assist with the reorganization of state government, and due to other academic commitments, was never able to return full-time to the Defender Project. [\[FN251\]](#)

After the NLADA three-year grant expired, the Defender Project was kept running for several years with a variety of funding sources. [\[FN252\]](#) Under the tutelage of Professors Crowley and Patterson, the Defender Project was very active, pursuing post-conviction matters, actions to remove detainers, representation of inmates at sentence review, and trial and appellate work. [\[FN253\]](#) From 1966 until 1978, the Defender Project filed and argued no fewer than eleven cases before the Montana Supreme Court. [\[FN254\]](#)

In structure, the Defender Project had two or more student interns during the summer, who then became student directors during the school year. For many years, all third-year students had a least a few cases through the Defender Project. [\[FN255\]](#) The Defender*399 Project was responsible for the first student practice rule in 1966, which allowed third-year law students to assist inmates in preparing post-conviction petitions. [\[FN256\]](#) A 1969 student practice rule allowed third-year law students to prosecute in justice court and police courts with attorney supervision. [\[FN257\]](#) Finally, the 1975 practice rule allowed students to practice in all Montana courts under the supervision of a licensed attorney. [\[FN258\]](#) The Defender Project was the forerunner of the clinical program at The University of Montana School of Law. [\[FN259\]](#)

The first Defender Project student to benefit from the 1975 Student Practice Rule was Donald W. Molloy, a third-year law student at the time, and now Chief Judge for the District of Montana. As a law student, Molloy did initial appearances and felony sentencings in the Third Judicial District Court before Judge Boyd. [\[FN260\]](#) Molloy was also the first law student to argue before the Montana Supreme Court in *State v. McElveen*. [\[FN261\]](#) McElveen was arrested in February 1978. The Defender Project investigated his felony-theft conviction.

His claim was ineffective assistance of counsel both for failure to investigate and for the attorney's trial conduct. A petition for post-conviction relief was filed directly in the Montana Supreme Court. [\[FN262\]](#) The case was argued in November 1975 and the Court reversed McElveen's conviction on December 30, 1975. [\[FN263\]](#)

Molloy learned several lessons from McElveen, including an appreciation for Shakespeare:

He was a very interesting guy because he quoted Shakespeare all the time. His favorite Shakespearian drama was *The Merchant of Venice*, and he would always be quoting and ask me if I had read about Portia, and if I had read about this, that or the other thing. And frankly I hadn't and wasn't much interested in it. Since then *400 over the years I have read particularly *The Merchant of Venice*, and understand what he was saying, that sometimes it's not only the letter of the law but also the spirit of the law that has to be taken into account. It's been something that's struck me, particularly in the sentencing regime before Booker when I was forced to follow the literal letter of the law in sentencing people. In so doing I was not even close to what my understanding of justice was. It was funny how that play has come to mean much more to me now than it ever did when I was at the Defenders. [\[FN264\]](#) Molloy also learned the lesson familiar to all practitioners of indigent criminal defense: "No good deed goes unpunished." After McElveen's conviction was overturned, the case was sent back to Lake County for retrial. On investigation, it was learned that the property at issue was worth less than the felony limit of \$150. McElveen had already served more than six months. He chose to plead guilty to a misdemeanor charge and receive a sentence of time served. [\[FN265\]](#) When McElveen was released from the Lake County Jail, he contacted Molloy's wife:

He called my wife and threatened her. He wanted money, because he didn't have any money to live on. He called looking for me and she said I was over at the Law School. He threatened her, scared her so bad, she packed up my kids and drove over to the flag football field. She isn't that kind of person, and she was scared out of her wits. And so I got a hold of him and explained to him that he wouldn't exactly want to have me on the other side of him. And that was the end of our relationship. [\[FN266\]](#) One case from the Defender Project followed Molloy into his law practice:

One of the criminal cases that I handled when I was practicing criminal law was a direct consequence of my involvement with the Montana Defender Project. And in fact I represented that guy longer than the period I've been on the federal bench: Harold "Chico" Armstrong. Harold "Chico" Armstrong was convicted down in Billings of murder and said he didn't do it. I represented him on his appeal as a law student, and we wrote a way-too-long brief . . . and his conviction was affirmed. I graduate, go down to work for Judge Battin and the next thing you know there's a habeas corpus petition . . . and its Chico Armstrong. It was Rusty Smith that had that case, and I was aware of it because Judge Battin asked me about it. There's a lawyer down in Hamilton, Gail Goheen, who took the case and got an emergency room doctor from Hamilton to review the case and have the habeas *401 corpus petition in front of Judge Smith. And this doctor was able to take the autopsy that had been done in Billings and basically tear it apart to the point that there was a serious question of whether or not, according to Judge Smith, that he was guilty. So Judge Smith ordered him retried.

By that time I'm finished working at Battin's and I'm over with Judge Anderson at Anderson, Berger, Sinclair and Murphy. And lo and behold its Judge Wilson, "Chico Armstrong wants you to represent him." . . . I represented him along with Mike Whelan and that case went to trial and then he was convicted.

Chuck Bradley tried the case for the county attorney's office. We had gone through all of the evidence, all the FBI evidence, there was something like 164 items of evidence, and if you looked at the reports, and I went through and just laboriously looked at every report, it would say "spot of blood." Now Bradley was saying that was blood from the victim. This was before DNA. The FBI report would say "could be human, could be animal." But when you piled all this stuff up it looked pretty awful.

But we were making, I thought, pretty good headway until one thing happened in the course of the trial. When Armstrong was playing poker with these guys he checked his gun at the bar. And so Bradley has the gun that he says was the one that was checked at the bar. And Armstrong's on the stand and Bradley brings the gun out and says "Is this

your gun?" Now instead of saying yes or no, Armstrong says "Can I see it?" And of course the jury's all sitting there, he's on the witness stand, and up to this point I thought things were going OK for us. So Judge Wilson says yes he can see the gun. Bradley hands it to him, and it's a six shooter and he holds it up and looks at it, and then spins the cylinder and listens up to his ear, and he says "That's my gun." And after that I think he was toast. He was convicted. [\[FN267\]](#)

Molloy continued to represent Chico Armstrong for many years as the case went back up to the Montana Supreme Court on appeal, and then into the federal courts on a petition for habeas corpus. [\[FN268\]](#)

The 1975 U.S. Supreme Court decision, *Bounds v. Smith*, [\[FN269\]](#) changed the direction of the Defender Project. In *Bounds*, the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." [\[FN270\]](#) In response to the *Bounds* decision, *Ratzlaff v. Zanto* was filed before Judge Battin in the federal *402 district court in Billings. [\[FN271\]](#) The plaintiffs alleged that the State of Montana had not complied with the requirement of *Bounds*. *Ratzlaff* was resolved in 1977 when the State of Montana agreed to provide a law library at the state prison, and entered into a contract with The University of Montana School of Law, through the Defender Project, to provide legal services to inmates in civil rights claims. [\[FN272\]](#)

John McDonald became Director of the Montana Defender Project in 1977. [\[FN273\]](#) Jeff Renz replaced him in 1993. [\[FN274\]](#) The beginning of the end of the Defender Project occurred in 1996, when the U.S. Supreme Court decided *Lewis v. Casey*. [\[FN275\]](#) In *Lewis*, the Court significantly restricted its ruling in *Bounds*. In an opinion written by Justice Scalia, the Court held "Bounds did not create an abstract, freestanding right to a law library or legal assistance," and "an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance is subpar in some theoretical sense." [\[FN276\]](#) The Court required a showing that the prisoner "go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." [\[FN277\]](#)

Once the State of Montana understood the import of *Lewis*, it chose not to renew the contract with The University of Montana School of Law concerning the Defender Project. The last contract expired in 1998, and with the loss of the contract the School of *403 Law disbanded the Defender Project. [\[FN278\]](#) Molloy expressed his regrets over the demise of the Montana Defender Project.

I think it was a mistake for the Legislature to take away the funding for the Montana Defender Project. I think [the students] served a great public service in screening and explaining and working with people who have legitimate claims. 30% of our work here, 30% of the filings in the federal court in Montana are pro se litigation, and most of that comes out of the Montana State Prison. That was not the case when the Defender Project was around. The same statistic holds true at the Ninth Circuit. Almost a third of the work there is pro se litigation. Now there's a lot more of theirs that does not involve prisoners, but there's a lot that does involve prisoners. So when you relegate the importance of the criminal justice system you get to the point, and I'm not saying this in a totally pejorative sense, but it's like Hannah Arendt and her writings about the banality of evil. You just become oblivious about the consequences of processing and locking up and not actually focusing on what are the underlying issues that give rise to these problems. . . . I thought that the Montana Defender Project served a really, really legitimate purpose, and I benefited greatly from being a part of it. [\[FN279\]](#)

The Defender Project had an enormous impact on all facets of Montana's criminal justice system. [\[FN280\]](#) Many prominent members of Montana's legal community were student directors of the Defender Project, including Molloy, Hon. Greg Todd (district court judge for the Thirteenth Judicial District), Hon. Diane Barz (former district court judge for the Thirteenth Judicial District), Glacier County Attorney Larry Epstein, Neil Ugrin (partner in the firm of Ugrin, Alexander, Zadick and Higgins), Stuart Kellner (partner in the firm of Hughes, Kellner, Sullivan and Alke), John *404 Maynard (partner in the firm of Crowley, Haughey, Hanson, Toole, and Dietrich), and Ron Waterman (partner in the

firm of Gough, Shanahan, Johnson and Waterman). The history of indigent defense in Montana is intertwined with the history of the Defender Project.

VII. “Change Is the Law of Life” [\[FN281\]](#)

A. The Past

Montana has always had impressive statutes and constitutional provisions that textually mandate effective assistance of counsel for indigent defendants. The issue has been resource allocation to those tasks. Montana has had tremendous successes with indigent defense, and it has had shameful failures.

One case that illustrates the critical importance of resources is *State v. Spotted Hawk*. [\[FN282\]](#) Spotted Hawk, decided 107 years ago, is still good law in Montana. Spotted Hawk, Little Whirlwind, and Whirlwind (David Stanley), all members of the Northern Cheyenne Tribe, were convicted of the murder of John Hoover. John Hoover was a sheepherder working on a ranch near what was then the Tongue River Indian Reservation. Stanley was arrested for the murder of Hoover, and confessed that he alone had killed Hoover. Unsatisfied with the arrest of a single individual, the authorities pressed the issue until Stanley implicated Spotted Hawk and Little Whirlwind as his accomplices. Spotted Hawk was arrested and tried in 1897. [\[FN283\]](#)

Spotted Hawk's attorneys, C.L. Merrill and George W. Farr, put up a vigorous defense, beginning with a motion for a change of venue. [\[FN284\]](#) They introduced evidence that Stanley had confessed multiple times to being solely responsible for Hoover's death, introduced credible alibi evidence, and offered testimony indicating that Stanley was not worthy of belief, all to no avail. [\[FN285\]](#) Spotted *405 Hawk was arrested, tried, and convicted in 1897; a successful appeal followed that concluded in 1899. [\[FN286\]](#)

Spotted Hawk's appeal was argued by former U.S. Senator Wilbur F. Sanders, and the conviction was reversed based on a failure to grant a motion to change venue. The facts recited by the court clearly establish why it was incumbent on the trial judge to grant the change of venue. [\[FN287\]](#)

*406 On remand, the trial court had the option to retry Spotted Hawk or dismiss the charges. On his deathbed, Stanley recanted his statements implicating Spotted Hawk and Little Whirlwind. Stanley's wife came forward and acknowledged that he had also confessed to her his sole responsibility for the death of Hoover. All charges were dismissed, and Spotted Hawk was freed. [\[FN288\]](#)

One may question how three court-appointed attorneys (two in Miles City and one in Helena), operating on an eventual payment of \$50 to be split three ways, [\[FN289\]](#) were able to accomplish such a task. The answer is simple; they were not all court-appointed attorneys. The two local attorneys, C.L. Merrill and George W. Farr, were court-appointed. The appellate attorney, Wilbur F. Sanders, was hired through the financial assistance of the Indian Rights Association of Philadelphia. [\[FN290\]](#) For the appeal alone, Sanders*407 was paid an amount ten times that paid to Merrill and Farr for defending the case through sentencing. [\[FN291\]](#)

It was the infusion of funds at the right time that allowed justice to prevail in that case. [\[FN292\]](#) Resources almost always tell the tale in indigent defense. Contrast the result for Spotted Hawk's co-defendant, Little Whirlwind, who was represented at trial by George R. Milburn. [\[FN293\]](#) Millburn, a Miles City attorney, was court-appointed. He had previously “spearheaded an effort by citizens of southeastern Montana Territory to remove the Northern Cheyennes from their reservation and to reopen its valuable grazing lands to the public domain.” [\[FN294\]](#) Millburn did not file a bill of exceptions, and failed to perfect and appeal the venue issue that resulted in Spotted Hawk's exoneration. Little Whirlwind's appeal failed and his conviction was affirmed. [\[FN295\]](#)

B. The Present

Resources again tell the tale in the recent case of Jimmy Ray Bromgard. Bromgard was released after spending over fifteen years in the Montana State Prison for sexual offenses he did not commit. Bromgard's court-appointed counsel did not conduct sufficient pre-trial investigation, file pre-trial motions, challenge the State's flimsy forensic evidence, try to suppress Bromgard's identification, give an opening statement at trial, prepare a closing statement for trial, or properly pursue or preserve Bromgard's appellate rights. [\[FN296\]](#)

Bromgard was freed due to the tireless effort of his court-appointed appellate counsel, William Hooks of Helena. Hooks took ***408** Bromgard's case to the Montana Supreme Court three times. [\[FN297\]](#) Even though he lost all three times, he never gave up the case or his client's cause. He was able to associate the Innocence Project [\[FN298\]](#) with the defense, and ultimately, with its assistance and resources, exonerate Jimmy Ray Bromgard. [\[FN299\]](#) The legal history of Jimmy Ray Bromgard includes both the worst and the best of Montana's former system of indigent defense.

Although indigent defense in Montana has come a long way since 1864, other issues remain, including the continuing lack of resources. There is also the issue of how Montana's Indian citizens fare in Montana's criminal justice system. Native Americans comprise approximately 6.4% of Montana's population. [\[FN300\]](#) In Montana's state prisons, however, they comprise 16.7% of the male population and 25.9% of the female population. [\[FN301\]](#) As significant as these racial disparities appear, in reality they underrepresent the problem. Most crimes prosecuted against Native Americans in Montana are not prosecuted in state courts; they are either prosecuted in tribal courts [\[FN302\]](#) or in federal courts. Native Americans convicted in tribal and federal courts are often sentenced to tribal or federal prisons, not the state prison system. [\[FN303\]](#)

***409** Tribal courts in Montana provide a unique blend of traditional Native practices filtered through Anglo concepts of due process. The protections of the Bill of Rights, including the Sixth Amendment to the Constitution, do not apply in tribal courts. [\[FN304\]](#) The Indian Civil Rights Act determines the rights of tribal members prosecuted in a tribal court. [\[FN305\]](#)

There are also problems with taking tribal court criminal proceedings and recognizing them for other purposes outside the tribal setting. As a result, in the tribal courts there is no right to court-appointed counsel under the Indian Civil Rights Act for those indigent individuals charged with crimes. In the seven tribal court systems in Montana, only the Flathead Tribal Court provides counsel. [\[FN306\]](#) Some of the other tribal jurisdictions offer lay advocates, but some cannot afford even lay advocates.

Tribes have the right to establish their court systems, and provide counsel or not as they deem appropriate. If the consequences of uncounseled convictions were only tribal consequences then this may be equitable. The reality is, however, that there are now both state and federal consequences to uncounseled tribal court convictions, and most tribal governments simply do not have the resources to provide counsel to those charged with crimes.

Under *State v. Spotted Eagle*, [\[FN307\]](#) uncounseled tribal court convictions for driving under the influence of alcohol (DUI) can be used as a basis to file a subsequent felony DUI prosecution in state court in Montana. [\[FN308\]](#) Uncounseled tribal court convictions can now also be used in federal court as a basis to file several federal felony charges. [\[FN309\]](#) In 2005, Senator John McCain introduced an amendment to the Violence against Women Act that allows uncounseled tribal court convictions to be the basis of a subsequent federal felony prosecution. [\[FN310\]](#)

***410** Congress has also recently passed the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act). [\[FN311\]](#) The Adam Walsh Act creates a federal sex offender registry that, in part, requires registration for those convicted in tribal court of specified sexual offenses; failing to register is a federal felony offense. The Adam Walsh Act requires registration even if the tribal court conviction was obtained without the assistance of counsel.

C. The Future

Where indigent defense will go in the future in Montana is an open question. Many of the leaders in Montana's criminal justice community are optimistic, while others are skeptical.

Although complimentary of the indigent defense systems now in place in Montana, Molloy expressed his regrets that many members of the local bar no longer participate in indigent criminal defense and therefore do not see what is occurring in the criminal justice system.

First of all, they don't know what's going on with the policy of our law. And secondly, particularly when the sentencing guidelines were mandatory, it would astound you how unfair occasionally the application of that was. I think that only when you have people who are leaders in the community, the country club people, who understand the unfairness of it, are you ever going to get a reasoned debate about what is the purpose of the criminal justice system. What are we trying to do? Are we going to be enlightened like the nineteenth century and at least try to make some effort at rehabilitation of people, or are we going to continue to lock people up? And since I've been on the bench, as you know, there were 68,000 people in the federal prison system in 1996. There are over 200,000 now. We lock up more people than any nation in the world. We've *411 got over two million people in state, federal and local jails. And our schools are running out of money. We have more problems because we don't have the kinds of things we need for education. For at least my perspective, there's a cause and effect relationship. When you don't have opportunity you resort to other things. When you resort to other things, generally, the quick buck means you're going to get involved in criminal activity and it just becomes a vicious cycle [\[FN312\]](#)

Randi Hood, Montana's first Chief Public Defender, has already faced numerous obstacles in setting up a statewide indigent defense system. She remains optimistic given what she has seen in her thirty-plus years as a public defender.

In 1977 you were totally on your own. When I got asked to be a public defender I had no idea what I was doing. There were older attorneys that made themselves available to question, but it was almost like learning how to do it by doing it. We were totally on our own; there was nobody else to rely upon. There was nobody to say "Here's what you ought to do," or "Here's standards for what ought to be done." And that's been true all the way through. Now it's different. There are people to rely upon, there's more resources, there's standards that say "Here's how you do this." Those are the big differences The first day I showed up at Administration [to start as Montana's first Chief Public Defender] all I had was a desk. I didn't have a telephone or a computer. And I sort of sat there thinking, "What now?" There were some nay-sayers around me who would say "You're never going to find the attorneys to populate the system the way you want to do it," or "You're never going to be able to get this system up and running in a mere eight months." There were times I had a couple of doubts about those things, but it's worked.

I think that we will be even better off in five years. We will have shown that this system can really fight for people, we will have made prosecutors more honest. I don't mean that they lie, but that they really look at their cases before they file them because they know that they are going to be up against somebody who's going to question what's been done, if it should be questioned. . . . We really consider this a new day for criminal defense work in Montana. [\[FN313\]](#)

James B. Wheelis, Chief Appellate Defender, has been a private attorney, a district judge, a legal services attorney, a prosecutor, and an appellate attorney in the Attorney General's office. From his perspective, indigent defense reforms have been central to the progressive evolution of our legal system.

*412 Now there's more of a demand that there be coherent standards, more money, everything's being pushed towards a standard that really replicates what a person with an ample bank account would be able to purchase as far as representation. There are still real limits on money and time and all the rest of it, but the difference is

incredible. . . . If it weren't for the public defender system then really significant rights in the culture would go untended. When you look at the major cases that have defined personal rights, they're not brought on behalf of exemplary people. *Gideon v. Wainwright*, for instance, who was the petitioner in that case? It wasn't someone who was a Boy Scout leader. . . . What I have seen is that if the [public defenders] weren't there then the system basically went to hell because there was no back pressure. The inherent bullying that the system has, that is, the pressure to get things done, the irritation with the people who are obstacles, goes unchecked and it tends to get worse and worse. . . . I think *Gideon v. Wainwright*, *Miranda*, and so on have saved the legal system. It's a bitter pill for people in power often, but it's basically made them perform. [\[FN314\]](#)

Chief Justice of the Montana Supreme Court, Karla Gray, shares Ms. Hood's optimism about the future of indigent defense in Montana:

I'm very hopeful. I'm very optimistic. The only caution that I concern myself with is appropriate resourcing from the Legislature. Having gone through a "not terrific" couple of sessions on those when indigent defense was ostensibly under the Court after State assumption, I know the rigors of trying to get adequate resourcing and that's my only caution. I think that the new system is visionary. I think the legislators that were the chief architects were visionary. I think it is a model that, as you know, is being looked at in other states as something they could take and then re-tweak in other jurisdictions. I think the Montana system is sort of state of the art at the moment, and the resourcing and the funding will be the making or breaking of it as is true of all these kinds of major sea changes. But I'm very optimistic. . . . We're going to have a system of indigent defense that will not only provide for the needs of those entitled to court-appointed counsel in those categories of cases, but a system to really be proud of. . . . The Legislature should be very proud of what they did with that bill. The Commission ended up being constituted of an extraordinarily talented group of people in my view, really interested in this area. The selection of Randi [Hood] and then Jim [Wheelis] were just outstanding choices. So I just keep wishing it well and knowing that it will be well. [\[FN315\]](#) *413 Anthony Gallagher, Executive Director of the Federal Defenders of Montana, shares both Chief Justice Gray's fiscal concerns and her optimism about indigent defense in Montana:

I think that the future of indigent defense is always subject to our funding source. . . . It's always a fight to make sure that we are adequately funded and that our panel attorneys are adequately paid and that there are resources available to panel attorneys that protect the rights of our clients. That's the one fear I have with the Montana state system. I think that in theory it's excellent, in theory it's going to work out very well. But if decisions have to be made because of money, because of the lack of money, or because of pressure from the Legislature that certain expenditures should not be made, then I think that the promise of *Gideon* will not be fulfilled. Whether it be state, federal, or tribal, the attorneys who accept court appointments are not there because they're going to become famous, and they're certainly not going to become rich. Those folks seek a higher level of professional satisfaction, representing the people who most need legal representation. They have a core desire to protect the poor, and these lawyers shield against the infringement of our protections. And in reality they protect everybody.

I think there was an early 1990s study by the Center for State Courts that found the emergence of a corps of attorneys dedicated to indigent defense is the most important contemporary development in the American legal system, and I think that's true for Montana. Despite a common perception that government-funded criminal lawyers are an obstacle to the path of law enforcement efforts, in truth what we do is make the police and the prosecution do it right. We fight daily to uphold the Constitution--I think that is what we really do even though the public doesn't see it. People who are dedicated to this function maintain the public's confidence and the nation's commitment to equal justice under the law. In some small way, we, those who do this on a regular basis, act as the conscience of the nation. We ensure the successful operation of the constitutionally-based adversary system of justice by which both criminal laws and the fundamental rights of all are enforced. [\[FN316\]](#)

VIII. Da Capo al Fine

One hundred forty-two years of the history of indigent defense in Montana have been written since Montana became a territory. Significant progress has been made, and many challenges remain to be resolved. Policy decisions need to be made on an ongoing basis about the funding of Montana's system of indigent defense. The new system must now implement the practice standards that have been promulgated and build a larger support base. The indigent*414 defense system, the State Bar, the Montana Legislature, and the courts must consider the cause of the disproportionate incarceration of Montana's Native American citizens. Both the Montana Legislature and Congress must consider the propriety of continuing to use uncounseled tribal court convictions to enhance state and federal prosecutions. These issues and more remain.

The cause of indigent defense is not a struggle that can be fought once and won; it is the continuing struggle to seek justice. Delegate Joseph K. Toole at Montana's 1889 Constitutional Convention understood the ongoing nature of the task. To his question, "How often shall the accused have counsel, and where?" [\[FN317\]](#) it is hoped that we will continue to respond, "This question answers itself."

[\[FN1\]](#). Visiting clinical supervisor at The University of Montana School of Law. The author is a past president of the Montana Association of Criminal Defense Lawyers, and currently serves as Chairman of the Montana Public Defender Commission.

[\[FN1\]](#). Ch. 449, 2005 Mont. Laws 1564-1632.

[\[FN2\]](#). The history of juvenile defense in Montana deserves separate treatment, as does the history of the defense of those involuntarily committed.

[\[FN3\]](#). The Organic Act, Pub. L. No. 38-95, § 1, 13 Stat. 85, 86 (1864).

[\[FN4\]](#). Jesse B. Roote, *The Courts and Lawyers of Montana*, in Helen Fitzgerald Sanders, *A History of Montana* vol. 1, 579, 582 (Lewis Publ. Co. 1913). Prior to the enactment of Montana's Organic Act there had been both criminal and civil trials in Montana. The first criminal trial occurred over two hundred years ago in what is now Missoula County, when the Lewis and Clark expedition held a trial by military tribunal. A soldier accompanying them was charged with insubordination, "found guilty and whipped." *Id.* at 584. The first civil trial also took place in Missoula County.

The first lawsuit ever commenced in Missoula County, or in fact in Montana, was commenced and tried at Hell's Gate, in the month of March 1862, before Henry Brooks, justice of the peace. The proceedings were under the laws of the Washington Territory. A Frenchman called "Tin Cup Joe"--other name forgotten-- accused Baron O'Keefe with beating one of his horses with a fork handle and then pushing him into a hole, thereby causing his death, and claimed damages in the sum of \$40, and sued O'Keefe to recover that amount. The place of trial was in Bolte's saloon. A jury of six was empanelled and sworn to try the cause.... As the trial progressed the proceedings became less harmonious until it ultimately culminated in a lot of unpleasantness between the defendant and the writer, who was acting as attorney for the plaintiff. During the unpleasantness the friends of the respective parties lent a hand, and it was far from being a select or private affair. While the unpleasantness was in progress the court and a portion of the jury had fled for dear life, and when harmony was restored they were nowhere to be found. After considerable search the court and the jury were captured and the trial proceeded.

Id. (quoting Frank H. Woody, *A History of Missoula County and City* 4 (W.E. Ellsworth ed., Democrat-Messenger 1877)). The jury held for the plaintiff. *Id.*

[FN5]. 13 Stat. at 86.

[FN6]. 1864 Laws of Mont. Territory 237.

[FN7]. Id. at 238.

[FN8]. Id. 238-39.

[FN9]. Id. at 240.

[FN10]. Id. at 255-56.

[FN11]. Id. at 256.

[FN12]. 1864 Laws of Mont. Territory 256.

[FN13]. 1872 Laws of Mont. Territory 204.

[FN14]. Id.

[FN15]. Id. at 220.

[FN16]. 1881 Laws of Mont. Territory 12.

[FN17]. See Andrew P. Morriss, “This [State Will Soon Have Plenty of Laws](#)”--Lessons from One Hundred Years of Codification in Montana, [56 Mont. L. Rev. 359 \(1995\)](#) (discussing the trials and tribulations of the Montana Territorial Legislature and its enactment and reenactment of statutes).

[FN18]. 1872 Laws of Mont. Territory 220.

[FN19]. Id. at 204, 220. The law required magistrates to appoint counsel for the indigent, such as at a preliminary examination. The law also required appointment of counsel for individuals facing arraignment on felony charges. Id.

[FN20]. Id. at 190.

[FN21]. Id. at 220 (reenacted by 1879 Laws of Mont. Territory 402; 1887 Laws of Mont. Territory 440); 1871 Laws of Mont. Territory 204 (reenacted by 1879 Laws of Mont. Territory 383; 1887 Laws of Mont. Territory 421); 1871 Laws of Mont. Territory 190 (reenacted by 1879 Laws of Mont. Territory 365; 1887 Laws of Mont. Territory 404).

[FN22]. 1881 Laws of Mont. Territory 12-13.

[FN23]. Id.

[FN24]. 1887 Laws of Mont. Territory 441.

[FN25]. Codes & Stats. Mont. § 1892 (1895).

[FN26]. Ch. 33, 1903 Mont. Laws 46-47.

[FN27]. Rev. Code Mont. § 9189 (1907).

[FN28]. Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide 2* (Greenwood Press 2001).

[FN29]. *Id.* at 2-3.

[FN30]. Mont. Const. art. I, § 16 (1884) (not ratified). Of course, the Preamble also acknowledged, “the goodness of the Great Legislator of the Universe.” *Id.* at Preamble.

[FN31]. Constitutional Convention of 1889 at 167, 181, 254 (State Publ. Co. 1921) (emphasis added). According to the transcripts of the 1889 Convention, the amendment was offered by Delegate Joseph K. Toole, an attorney from Helena, so that “it will conform to the language used in the amendment to the Constitution of the United States.” *Id.* at 167.

[FN32]. *Id.* at 257.

[FN33]. Codes & Stats. Mont. § 1335, at 943, § 1670, at 978, § 1891, at 1011 (1895).

[FN34]. *Id.* § 1671, at 978.

[FN35]. Rev. Code Mont. § 9078 (1907); Rev. Code Mont. § 11774 (1921); Rev. Code Mont. § 11774 (1935); Rev. Code Mont. § 94-6102 (1947).

[FN36]. Right to Counsel: Rev. Code Mont. § 8915 (1907); Rev. Code Mont. § 11611 (1921); Rev. Code Mont. § 11611 (1935); Rev. Code Mont. § 94-4806 (1947). Magistrate to inform accused of right to counsel: Rev. Code Mont. § 9077 (1907); Rev. Code Mont. § 11773 (1921); Rev. Code Mont. § 11773 (1935); Rev. Code Mont. § 94-6101 (1947). Right to court-appointed counsel for the indigent: Rev. Code Mont. § 9188 (1907); Rev. Code Mont. § 11886 (1921); Rev. Code Mont. § 11886 (1935); Rev. Code Mont. § 94-6512 (1947).

[FN37]. Ch. 196, 1967 Mont. Laws 353.

[FN38]. 1963 Mont. Laws 202; Mont. Crim. L. Commn., Rec. Series 237 (1957-1973).

[FN39]. Rev. Code Mont. § 95-902(b) (1967).

[FN40]. *Id.* at -902(c).

[FN41]. Rev. Code Mont. § 95-1001 (1947). The U.S. Supreme Court had already held that the indigent accused had the right to counsel at a preliminary examination. [White v. Md., 373 U.S. 59 \(1963\)](#). Montana's new statute in 1967 did not keep pace with the state of constitutional law. See Sam E. Haddon, *Preliminary Hearing Is a Critical Stage of the Proceeding at which the Indigent Defendant Is Required to Have the Assistance of Counsel*, 25 Mont. L. Rev. 174 (1963).

[FN42]. Comments of Charles F. Moses, Feb. 5, 1965, Mont. Crim. L. Commn., Rec. Series 237 (1957-1973).

[FN43]. Chapter 196, 1967 Montana Laws 379 provided discretionary authority for a court to appoint counsel “in the interests of justice” for those charged with misdemeanors. Any court of record had similar discretionary authority to appoint counsel in a post-conviction matter. *Id.* at 380.

[\[FN44\]](#). Id. at 379.

[\[FN45\]](#). Id. at 380.

[\[FN46\]](#). Id.

[\[FN47\]](#). Id. The Legislature shifted responsibility for the costs of paying court-appointed counsel quite often. The 1973 Legislature made exceptions for proceedings involving only city ordinance violations, requiring the city to pay for those public defender expenses. Ch. 186, 1973 Mont. Laws 329. The 1974 Legislature made another exception for arrests made by fish and game officers and agents of the Montana Department of Justice, requiring those agencies to pay for related public defender expenses. Ch. 15, 1974 Mont. Laws 16. The 1985 Legislature made the general rule that the costs of court-appointed counsel went either to the county bringing the prosecution, or the Montana Department of Commerce, and modified the other exceptions. Ch. 680, 1985 Mont. Laws 1505-10. The 1991 Legislature deleted the reference to the Department of Commerce, and replaced it with a reference to the State. Ch. 704, 1991 Mont. Laws 2509. The 1993 Legislature removed the reference to the district court, allowing a justice of the peace, city court judge, or municipal court judge to also have the authority to certify the reasonableness of a fee. Ch. 262, 1993 Mont. Laws 709.

[\[FN48\]](#). Ch. 196, 1967 Mont. Laws 380. An earlier draft of this statute gave the same authority to a court of record “if the requesting crook desires counsel and is unable to employ counsel.” Mont. Crim. L. Commn., Rec. Series 237 (1957-1973) (emphasis added).

[\[FN49\]](#). Ch. 196, 1967 Mont. Laws 3-80.

[\[FN50\]](#). The 1985 Legislature shifted part of the costs of a county public defender office to the state as part of the state assumption of district court costs. Ch. 680, 1985 Mont. Laws 1505, 1509. The 2001 and 2003 Legislatures made similar changes. Ch. 585, 2001 Mont. Laws 3063; Ch. 583, 2003 Mont. Laws 2442. The 2005 Legislature repealed the authority for counties to establish public defender offices with the enactment of the Public Defender Act, Ch. 449, 2005 Mont. Laws 1564. At the time the statewide public defender system was enacted in 2005, there were six county public defender systems in Montana: Missoula County, Lewis and Clark County, Gallatin County, Yellowstone County, Cascade County, and Deer Lodge County.

[\[FN51\]](#). Delegate proposal 18, submitted by Delegates Jerome J. Cate, Bob Campbell, and Richard J. Champoux, also discussed the right to counsel. Montana Constitutional Convention, 1971-1972 vol. 1, 105 (Mary Worden et al. eds., Mont. Legis. 1979). Delegate proposal 18 would have significantly expanded the right to counsel for indigent Montanans: “Right to Counsel. An indigent person shall have the right to counsel in administrative or court proceedings in which the State, or any subdivision thereof, is an adverse party.” Id. The proposal died in the Bill of Rights Committee on a vote of 11-0. Id. at vol. 2, 647, 658-59.

[\[FN52\]](#). Id. at 641.

[\[FN53\]](#). Id.

[\[FN54\]](#). Montana Constitutional Convention, 1971-1972 at vol. 5, 1776.

[\[FN55\]](#). Ch. 415, 1981 Mont. Laws 721.

[\[FN56\]](#). Id.

[\[FN57\]](#). Id. at 722.

[\[FN58\]](#). Id.

[\[FN59\]](#). Id.

[\[FN60\]](#). Id.

[\[FN61\]](#). Ch. 415, 1981 Mont. Laws 722.

[\[FN62\]](#). Id. at 723.

[\[FN63\]](#). Ch. 180, 1985 Mont. Laws 1509 (amending [Mont. Code Ann. § 46-8-114 \(1983\)](#)).

[\[FN64\]](#). Ch. 479, 1987 Mont. Laws 1181-82.

[\[FN65\]](#). [Argersinger v. Hamlin, 407 U.S. 25, 37 \(1972\)](#).

[\[FN66\]](#). Ch. 800, 1991 Mont. Laws 3035.

[\[FN67\]](#). Id.

[\[FN68\]](#). Id.

[\[FN69\]](#). [Anders v. Cal., 386 U.S. 738 \(1967\)](#).

[\[FN70\]](#). [Id. at 744; Mont. Code Ann. § 46-8-103 \(2001\)](#).

[\[FN71\]](#). [Mont. Code Ann. § 46-8-103 \(2003\)](#).

[\[FN72\]](#). Ch. 800, 1991 Mont. Laws 3035.

[\[FN73\]](#). Id. at 3036.

[\[FN74\]](#). Id. at 2891.

[\[FN75\]](#). Id. at 2892.

[\[FN76\]](#). [Mont. Code Ann. § 2-15-1020 \(2005\)](#); Admin. R. Mont. 2.1.101 (2001).

[\[FN77\]](#). Ch. 323, 1993 Mont. Laws 991-92 (repealing the termination date of the Appellate Defender Act); Ch. 449, 2005 Mont. Laws 1564 (repealing the Appellate Defender Act and transferring those functions into a branch of the Office of the Public Defender).

[\[FN78\]](#). Ch. 257, 2001 Mont. Laws 258; Ch. 585, 2001 Mont. Laws 3081.

[\[FN79\]](#). Ch. 513, 1973 Mont. Laws 1405; [Mont. Code Ann. § 46-30-101](#) to - 413 (2005).

[\[FN80\]](#). Ch. 513, 1971 Mont. Laws 1408 (codified as Rev. Code Mont. § 95-3110 (1947); recodified as [Mont. Code Ann. § 46-30-217\(1\) \(2005\)](#)).

[FN81]. Ch. 196, 1967 Mont. Laws 379-80.

[FN82]. Ch. 800, 1981 Mont. Laws 3035.

[FN83]. Ch. 378, 1997 Mont. Laws 1766-67.

[FN84]. Ch. 449, 2005 Mont. Laws 1615-16.

[FN85]. U.S. Const. amend. VI.

[FN86]. John P. Comer, *The Forging of the Federal Indigent Code 196* (Principia Press of Trinity U. 1966).

[FN87]. Powell v. Ala., 287 U.S. 45, 71 (1932).

[FN88]. *Id.* Powell, one of the Scottsboro cases, involved the trials of several African-Americans charged with the rape of two white girls. *Id.* at 51, 49. No trial counsel was appointed for the Powell defendants until the morning of their one-day trial. *Id.* at 49. At the conclusion of the trial, the Scottsboro Boys were, predictably, convicted and sentenced to death. *Id.* at 57.

[FN89]. *Id.* at 71-72 (citation omitted).

[FN90]. Johnson v. Zerbst, 304 U.S. 458 (1938).

[FN91]. Id. at 468.

[FN92]. Id. at 467-68.

[FN93]. Avery v. Ala., 308 U.S. 444 (1940).

[FN94]. Id. at 447.

[FN95]. *Id.*

[FN96]. *Id.* at 447-48.

[FN97]. *Id.* at 448.

[FN98]. *Id.* at 448-49.

[FN99]. Avery, 308 U.S. at 445-46, 453. Avery has not been overruled. In fact, the U.S. Supreme Court cited Avery with approval as recently as 1984 in U.S. v. Cronin, 466 U.S. 648, 654 n. 9 (1984).

[FN100]. In a non-capital case, the Montana Supreme Court reached an entirely different conclusion on remarkably similar facts. In *State v. Blakeslee*, the defendant was charged with statutory rape of his step-daughter. *State v. Blakeslee, 306 P.2d 1103, 1104 (Mont. 1957).* On March 21, 1957, three days before trial, Blakeslee's retained counsel withdrew from the case and the court appointed local attorney M.K. Daniels to represent him. *Id.* Daniels immediately moved to continue the trial as he had a trial already scheduled for March 22, 1957. *Id.* The presiding judge, William Taylor, denied the motion, and the case proceeded to trial on March 24, resulting in Blakeslee's conviction. *Id.* at 1103-04. On appeal, Justice Davis ruled that forcing Blakeslee and his counsel to trial with only three days to prepare

denied Blakeslee the right to counsel under Article III, section 16 of the Montana Constitution of 1889. *Id.* at 1104-05. “Mr. Daniels' appointment was made purposeless by compelling him to go to trial on March 24, 1957, and that in fact the defendant was denied the aid of counsel upon that trial which took up on only the third day after Mr. Daniels was appointed to defend him.” *Id.* at 1105. The Montana Supreme Court did not discuss the *Avery v. Alabama* decision.

[FN101]. [Betts v. Brady, 316 U.S. 455 \(1942\)](#).

[FN102]. [Id. at 463-64](#).

[FN103]. [Gideon v. Wainwright, 372 U.S. 335, 342-45 \(1963\)](#).

[FN104]. [White v. Md., 373 U.S. 59 \(1963\)](#). For a discussion of the *White* decision in Montana, see Haddon, *supra* n. 41.

[FN105]. [White, 373 U.S. at 60](#).

[FN106]. [Gideon, 372 U.S. at 339](#).

[FN107]. [Argersinger v. Hamlin, 407 U.S. 25, 36-37 \(1972\)](#); *Contra* [Scott v. Ill., 440 U.S. 367, 373-74 \(1979\)](#) (ruling that a state court defendant did not have the right to counsel if the only possible punishment was a fine).

[FN108]. [Strickland v. Wash., 466 U.S. 668, 686 \(1984\)](#) (quoting [McCann v. Richardson, 397 U.S. 759, 771 n. 14 \(1970\)](#)).

[FN109]. [Ala. v. Shelton, 535 U.S. 654 \(2002\)](#).

[FN110]. [Id. at 674](#).

[FN111]. [State v. Skurdal, 767 P.2d 304, 308 \(Mont. 1988\)](#) (stating the right to counsel for a misdemeanor is discretionary with the trial judge).

[FN112]. Montana statutes have not kept pace with federal constitutional jurisprudence. For example, [Mont. Code Ann. § 46-8-101\(2\) \(2005\)](#) provides that a court only needs to appoint counsel “[i]f the defendant desires assigned counsel because of financial inability to retain private counsel and the offense charged is a felony or the offense is a misdemeanor and incarceration is a sentencing option if the defendant is convicted” (emphasis added). *Shelton* requires appointment of counsel even if only a suspended or deferred sentence is imposed. [Shelton, 535 U.S. at 674](#). The only time counsel is not required is when the sentencing court is going to impose only a fine or other penalties that do not include incarceration or the prospect of incarceration. *Id.*

[FN113]. [Powell v. Ala., 287 U.S. 45 \(1932\)](#).

[FN114]. [Gideon v. Wainwright, 372 U.S. 335 \(1963\)](#).

[FN115]. [Argersinger v. Hamlin, 407 U.S. 25 \(1972\)](#).

[FN116]. [Ake v. Okla., 470 U.S. 68 \(1985\)](#).

[FN117]. [Shelton, 535 U.S. 654](#).

[FN118]. [Gideon, 372 U.S. at 339, 345.](#)

[FN119]. [Huntington v. Yellowstone Co., 257 P. 1041, 1042-43 \(Mont. 1927\).](#) The court had the authority, of course, to appoint more than one attorney on a capital case and pay each \$100 for the defense. [Id. at 1043.](#)

[FN120]. Lee Silverstein, ABA, Defense of the Poor in Criminal Cases in American State Courts: A Field Study and Report (ABA 1965). A more detailed discussion of Montana's indigent defense in the early 1960s was prepared by Professor Larry Elison. Larry M. Elison, Assigned Counsel in Montana: The Law and the Practice, 26 Mont. L. Rev. 1 (1964).

[FN121]. Ltr. from Neil Haight, Pres., Mont. Leg. Svcs. Assoc., to the Mont. Bd. of Crime Control (July 26, 1976), in Natl. Leg. Aid and Def. Assoc., Montana Statewide Defender Systems Development Study app. A (Natl. Ctr. Def. Mgt. 1976) [hereinafter NCDM Study]. Fred VanValkenberg, one of the Missoula County contract public defenders and a member of the Montana Legal Services Association Board of Trustees, was also instrumental in the preparation of the NCDM Study. Mr. VanValkenberg is now the Missoula County Attorney. Missoula Co. Atty.'s Off., <http://www.co.missoula.mt.us/cattorney/> (accessed Mar. 3, 2007).

[FN122]. NCDM Study, supra n. 121, at 4. At the time, the Sixteenth Judicial District encompassed Carter, Custer, Fallon, Garfield, Powder River, Prairie, and Rosebud Counties. Rev. Code Mont. § 93-301 (1947).

[FN123]. NCDM Study, supra n. 121, at 5.

[FN124]. Id.

[FN125]. Id.

[FN126]. Id.

[FN127]. Id. at 5-6

[FN128]. Id. at 5.

[FN129]. NCDM Study, supra n. 121, at 7.

[FN130]. Id. at 8.

[FN131]. Id.

[FN132]. Id.

[FN133]. Id.

[FN134]. Id. at 11.

[FN135]. NCDM Study, supra n. 121, at 11.

[FN136]. Id. at 12.

[FN137]. Id. at 12-14.

[FN138]. *Id.* at 1.

[FN139]. Jt. Sub-Comm. on Jud., The District Courts, Indigent Defense, and Prosecutorial Services in Montana: A Report to the Forty-Eighth Legislature (Mont. Leg. Council 1982) [hereinafter 1982 Report].

[FN140]. *Id.* at 19.

[FN141]. *Id.*

[FN142]. *Id.*

[FN143]. *Id.* The 1982 Report estimated the cost of the system for FY 1984 and 1985 to be \$4.4 million. *Id.*

[FN144]. 1982 Report, *supra* n. 139, at 19.

[FN145]. *Id.* at 19-20.

[FN146]. *Id.* at 20. The Fiscal Note for the proposed bill estimated the cost of the program over two fiscal years at \$248,907. *Id.*

[FN147]. Mont. Sen. J., 48th Leg., Reg. Sess. 70 (1983).

[FN148]. Mont. Sen. 218, 58th Leg., Reg. Sess. (2003) (available at <http://data.opi.mt.gov/bills/2003/billhtml/SB0218.htm> (accessed Mar. 3, 2007)).

[FN149]. L. & Just. Interim Comm., For the Defense: Enacting a Statewide Public Defender System in Montana: A Report to the 59th Legislature 6 (Dec. 2004) (available at http://leg.mt.gov/content/publications/committees/interim/2003_2004/law_justice/final_report.pdf [hereinafter LJIC Public Defender Report]).

[FN150]. Mont. Sen. 218, 58th Leg., Reg. Sess.

[FN151]. Pl.'s Amend. Compl. at 1, *White v. Martz*, 2006 Mont. Dist. Lexis 136 (Mont. 1st Jud. Dist. Jan. 25, 2006). The lead attorney on the complaint was Ronald F. Waterman, of the Helena law firm of Gough, Johnson, Shanahan & Waterman, and former student director of the Montana Defender Project. Gough, Shanahan, Johnson & Waterman, Ronald F. Waterman, <http://www.gsjw.com/attorneyprofiles/attorney.asp?id=2283> (accessed Mar. 3, 2007).

[FN152]. Pl.'s Amend. Compl. at 1-2, *White*, CDV-2002-133.

[FN153]. *Id.* at 2-4.

[FN154]. The Nat. Leg. Aid & Defender Assoc., Expert Report: An Assessment of Indigent Defense Services in Montana, Submitted in the Case *White v. Martz*, CDV-2002-133 (Aug. 4, 2004) [hereinafter NLADA Report]. At about the same time a separate report was prepared concerning the delivery of legal representation to juveniles in delinquency proceedings in Montana. This report identified many of the same deficiencies as the NLADA Report in *White v. Martz*, including inadequate funding and resources for juvenile defenders, inadequate training of juvenile defenders, and a lack of standards on how defense services are to be delivered for juveniles in delinquency proceedings. ABA Juv. Just. Ctr., Montana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings (Brock Albin et al. eds., Oct. 2003). See also Mary Sue Backus & Paul Marcus, The [Right to Counsel in Criminal Cases, A National](#)

[Crisis](#), 57 *Hastings L.J.* 1031 (2006); Robert L. Spangenberg & Marea L. Beeman, [Indigent Defense Systems in the United States](#), 58 *L. & Contemp. Probs.* 31 (1995).

[FN155]. NLADA Expert Report, supra n. 154, at 1-2.

[FN156]. *Id.* at 1.

[FN157]. ABA, Ten Principles of a Public Defense Delivery System, "Introduction," <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf> (accessed Mar. 3, 2007).

[FN158]. *Id.* at 1-3.

[FN159]. NLADA Report, supra n. 154, at 68 (citations omitted).

[FN160]. *Id.* at 7.

[FN161]. LJIC Public Defender Report, supra n. 149 (Sen. Duane Grimes (R-Clancy), LJIC chair; Rep. John Parker (D-Great Falls), LJIC vice-chair; Sheri S. Heffelfinger, LJIC research analyst; Valencia Lane, LJIC staff attorney; and Sen. Daniel McGee (R-Laurel), chair of the subcommittee on the public defender issue).

[FN162]. *Id.* at pt. 1.

[FN163]. ABA, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (ABA, 2004).

[FN164]. *Id.* at v.

[FN165]. Mont. Sen. 146, 59th Leg (Apr. 28, 2005).

[FN166]. *Id.*

[FN167]. *Id.*

[FN168]. *Id.*

[FN169]. *Id.*

[FN170]. Jennifer McKee, *Butte Gets Defender Agency*, *Helena Indep. Rec.* (Apr. 14, 2005) (available at http://www.helenair.com/articles/2005/04/14/leg_agencies/041405_01.txt).

[FN171]. Mont. Sen. 146, 59th Leg. (Apr. 28, 2005).

[FN172]. *Id.*

[FN173]. [Mont. Code Ann. § 47-1-102 \(2005\)](#).

[FN174]. *Id.* at -104.

[FN175]. Montana has 152 lower courts (eighty-one city courts, sixty-six justice courts, and five municipal courts). Mont. Cts., *Courts of Limited Jurisdiction*, <http://montanacourts.org/lcourt/default.asp> (accessed Feb. 21, 2007). There

are fifty-six district courts located in all fifty-six counties (twenty-two judicial districts with forty-three district judges). Id. at <http://www.montanacourts.org/dcourt/default.asp>. There are also the Montana Supreme Court and the Sentence Review Division of the Montana Supreme Court. Id. at <http://www.montanacourts.org/supreme/boards/srd.asp>.

[FN176]. [Mont. Code Ann. § 47-1-104\(4\)](#) provides:

(4) Beginning July 1, 2006, a court may order the office to assign counsel under this chapter in the following cases:

(a) in cases in which a person is entitled to assistance of counsel at public expense because of financial inability to retain private counsel, subject to a determination of indigence pursuant to 47-1-111, as follows:

(i) for a person charged with a felony or charged with a misdemeanor for which there is a possibility of incarceration, as provided in 46-8-101;

(ii) for a party in a proceeding to determine parentage under the Uniform Parentage Act, as provided in 40-6-119;

(iii) 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;

(iv) for an applicant for sentence review pursuant to Title 46, chapter 18, part 9;

(v) for a petitioner in a proceeding for postconviction relief, as provided in 46-21-201;

(vi) for a petitioner in a habeas corpus proceeding pursuant to Title 46, chapter 22;

(vii) for a parent or guardian in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112;

(viii) for a respondent in a proceeding for involuntary commitment for a mental disorder, as provided in 53-21-116;

(ix) for a respondent in a proceeding for the involuntary commitment of a person for alcoholism, as provided in 53-24-302; and

(x) for a witness in a criminal grand jury proceeding, as provided in 46-4-304.

(b) 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:

(i) as provided for in 41-3-425;

(ii) 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;

(iii) for a juvenile entitled to assigned counsel in a proceeding under the Interstate Compact on Juveniles, as provided in 41-6-101;

(iv) for a minor who petitions for a waiver of parental notification requirements under the Parental Notice of Abortion Act, as provided in 50-20-212;

(v) for a respondent in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112;

(vi) for a minor voluntarily committed to a mental health facility, as provided in 53-21-112;

(vii) for a person who is the subject of a petition for the appointment of a guardian or conservator in a proceeding under the provisions of the Uniform Probate Code in Title 72, chapter 5;

(viii) for a ward when the ward's guardian has filed a petition to require medical treatment for a mental disorder of the ward, as provided in 72-5-322; and

(c) for an eligible appellant in an appeal of a proceeding listed in this subsection (4).

[FN177]. Id. at -104(5)(a). This proscription only applies to full-time public defenders and not to contract attorneys. Id. at -104(5)(b).

[FN178]. Randi Hood was selected by the Public Defender Commission as Montana's first Chief Public Defender. Mont. Off. St. Pub. Defender, <http://publicdefender.mt.gov/aboutus.asp> (accessed Feb. 20, 2007). Ms. Hood, a 1975 graduate of The University of Montana School of Law, has devoted her professional career as an attorney to indigent defense.

Ms. Hood was named the 2004 Criminal Defense Lawyer of the Year by the Montana Association of Criminal Defense Lawyers. Carolyn Bright, Hood Named State's Top Public Defender, *Helena Indep. Rec.* (Mar. 10, 2005) (available at http://www.helenair.com/articles/2005/10/08/montana_top/a01100805_02.txt).

[FN179]. The commission members are

1. James Park Taylor, Chair (Missoula) (Author), appointed July 1, 2005, term ends July 1, 2008. Qualification: attorney nominated by State Bar, experienced in defense of juvenile delinquency and federal Indian Child Welfare Act.

2. Stephen Nardi, Vice-Chair (Kalispell), (reappointed) appointed July 1, 2006, term ends July 1, 2009. Qualification: attorney nominated by State Bar, experienced in felony defense with one year as full-time public defender.

3. Daniel Donovan (Great Falls), appointed July 1, 2005, term ends July 1, 2008. Qualification: attorney nominated by the Montana Supreme Court.

4. Mike Sherwood (Missoula), appointed July 1, 2005, term ends July 1, 2007. Qualification: attorney nominated by the Montana Supreme Court.

5. Wendy Holton (Helena), appointed July 1, 2005, term ends July 1, 2007. Qualification: attorney nominated by State Bar, who represents criminal defense lawyers.

6. Doug Kaercher (Havre), (reappointed) appointed July 1, 2006, term ends July 1, 2009. Qualification: public representative nominated by Senate President. Resigned January 1, 2007, to accept an appointment to the State Tax Appeal Board.

7. Caroline Fleming (Miles City), appointed July 1, 2005, term ends July 1, 2008. Qualification: public representative nominated by House Speaker.

8. Tara Veazey (Helena), appointed July 1, 2005, term ends July 1, 2007. Qualification: member of organization advocating on behalf of indigent persons.

9. Ivan Small (Poplar), appointed July 1, 2006, term ends July 1, 2009. Qualification: member of organization advocating on behalf of racial minorities.

10. Jennifer Hensley (Butte), appointed July 1, 2005, term ends July 1, 2008. Qualification: member of organization advocating on behalf of people with mental illness and developmental disabilities.

11. Betty Bichsel (Edgar), appointed July 1, 2005, term ends July 1, 2007. Qualification: employee of organization providing addictive behavior counseling.

Mont. Off. St. Pub. Defender, *supra* n. 178, at <http://publicdefender.mt.gov/members.asp>.

[FN180]. [Mont. Code Ann. § 47-1-105](#).

[FN181]. The regions break down as follows:

Region 1: The Eleventh, Nineteenth, and Twentieth Judicial Districts

Region 2: The Fourth and Twenty-first Judicial Districts

Region 3: The Eighth and the Ninth Judicial Districts

Region 4: The First and a portion of the Fifth Judicial Districts

Region 5: The Second, Third, and a portion of the Fifth Judicial Districts

Region 6: The Twelfth and the Seventeenth Judicial Districts

Region 7: The Tenth and the Fourteenth Judicial Districts

Region 8: The Sixth and the Eighteenth Judicial Districts

Region 9: The Thirteenth and Twenty-second Judicial Districts

Region 10: The Seventh and the Fifteenth Judicial Districts

Region 11: The Sixteenth Judicial District

The only regions that split judicial districts are Regions 4 and 5. Region 4 includes the First Judicial District and part of the Fifth Judicial District. Region 5 includes the Second and Third Judicial Districts, and a portion of the Fifth Judicial District. Regions were divided this way to follow how the public defender services for those areas had traditionally been provided. Mont. Off. St. Pub. Defender, *Strategic Plan*, http://www.publicdefender.mt.gov/forms/pdf/proposed_distriking_plan_revised.pdf (accessed Apr. 29, 2007).

[FN182]. Mont. Off. St. Pub. Defender, Standards for Counsel Representing Individuals Pursuant to the Montana Public Defender Act 1, [http:// publicdefender.mt.gov/standards.asp](http://publicdefender.mt.gov/standards.asp) (accessed Nov. 26, 2006) [hereinafter Standards].

[FN183]. *Id.* at 41-42.

[FN184]. *Id.* at 3.

[FN185]. Ga. Pub. Defender Stands. Council, Standards, [http:// www.gpdsc.com/cpdsystem-standards-main.htm](http://www.gpdsc.com/cpdsystem-standards-main.htm) (accessed Apr. 29, 2007).

[FN186]. N.C. Ct. Sys. Off. Indigent Def. Servs., Article 39B--Indigent Services Act, <http://www.ncids.org/>; select Indigent Defense Services Act (accessed Apr. 29, 2007).

[FN187]. See generally Iowa St. Pub. Defender, Rules and Statutes, “Administrative Rules,” <http://spd.iowa.gov/filegmt/viewcat.php?cid=3> (updated Feb. 7, 2007).

[FN188]. Standards, *supra* n. 182, at 1.

[FN189]. [Mont. Code Ann. § 46-8-101 \(2005\)](#).

[FN190]. *Id.* at § 47-1-111(2)(c).

[FN191]. [Rios v. Just. Ct., 148 P.3d 602, 604 \(Mont. 2006\)](#).

[FN192]. [Mont. Code Ann. § 47-1-111\(3\)\(a\)](#).

[FN193]. *Id.* at -111(3)(b).

[FN194]. *Id.* at -111(6)(e); Mont. Off. St. Pub. Defender, Admin. Policies 1-2, <http://www.publicdefender.mt.gov/docs/PolicyIndigency.pdf> (Dec. 6, 2006).

[FN195]. [Mont. Code Ann. § 47-1-111\(1\)\(d\)](#).

[FN196]. Mont. Off. St. Pub. Defender, Standards for Counsel Representing Individuals Pursuant to the Montana Public Defender Act 7, [http:// publicdefender.mt.gov/docs/Complete_Standards.pdf](http://publicdefender.mt.gov/docs/Complete_Standards.pdf) (accessed Nov. 26, 2006) [hereinafter Complete Standards].

[FN197]. *Id.* at 17.

[FN198]. *Id.* at 7.

[FN199]. James B. Wheelis was selected as the first Chief Appellate Defender under the new Public Defender Act. Mont. Off. St. Pub. Defender, Appellate Office, <http://publicdefender.mt.gov/maps/appellate.asp> (accessed Feb. 21, 2007).

[FN200]. Complete Standards, *supra* n. 196, at 21.

[FN201]. *Id.* at 8-16.

[\[FN202\]](#). Id. at 23-26.

[\[FN203\]](#). Id. at 26-27.

[\[FN204\]](#). Id. at 27.

[\[FN205\]](#). Id. at 27-28.

[\[FN206\]](#). Complete Standards, *supra* n. 196, at 28-29.

[\[FN207\]](#). Id. at 29.

[\[FN208\]](#). Id. at 29-30.

[\[FN209\]](#). Id. at 30-34.

[\[FN210\]](#). Id. at 34-35.

[\[FN211\]](#). Id. at 36-41.

[\[FN212\]](#). Complete Standards, *supra* n. 196, at 41-48.

[\[FN213\]](#). Id. at “Standards for Standby Counsel in Criminal Cases.”

[\[FN214\]](#). See generally [In re Mental Health of K.G.F., 29 P.3d 485 \(Mont. 2001\)](#) (ruling incorporated in the Standards discussing government representation in involuntary mental health commitments).

[\[FN215\]](#). See generally [In re A.S., 87 P.3d 408 \(Mont. 2004\)](#) (ruling incorporated in the Standards governing representation in dependency and neglect proceedings).

[\[FN216\]](#). Complete Standards, *supra* n. 196, at “Representation of a Person Who is the Subject of a Petition for the Appointment of a Guardian or Conservator”--“Representation of Persons in a Proceeding to Determine Parentage under the Uniform Parentage Act.”

[\[FN217\]](#). Mont. Off. St. Pub. Defender, Central Office, [http:// mt.gov/govt/statedir/agency/publicdefender.asp](http://mt.gov/govt/statedir/agency/publicdefender.asp) (accessed Feb. 21, 2007).

[\[FN218\]](#). [Mont. Code Ann. § 47-1-210\(3\) \(2005\)](#).

[\[FN219\]](#). Mont. Pub. Defenders, Training Information, [http:// publicdefender.mt.gov/training.asp](http://publicdefender.mt.gov/training.asp) (accessed May 5, 2007).

[\[FN220\]](#). Id.

[\[FN221\]](#). OSPD has begun a pilot program to improve communication with Native American clients in Great Falls. The initial project, funded with a federal grant, involves two native caseworkers who will be assisting the regional office. Pub. Defender Commn., Public Defender Commission Minutes July 31, 2006, <http://publicdefender.mt.gov/meetings/docs/minutesjuly312006.pdf>.

[FN222]. At the Commission's request, the Chief Public Defender sought approval by the Governor to create advisory councils in all eleven regions in Montana, but was unsuccessful in obtaining that approval. Pub. Defender Commn., Public Defender Commission Minutes Dec. 6, 2006, <http://publicdefender.mt.gov/meetings/docs/12062006minutes.pdf>. Advisory councils are authorized pursuant to [Mont. Code Ann. § 2-15-122](#).

[FN223]. Pub. L. No. 988-455, 78 Stat. 552 (1964) (codified at [18 U.S.C. § 3006A \(2000\)](#)).

[FN224]. Lawrence F. Small, *Journey with the Law: The Life of Judge William J. Jameson 149* (Rocky Mt. College Press 1984).

[FN225]. John J. Cleary, [Federal Defender Services: Serving the System or the Client?](#) 58 *L. & Contemp. Probs.* 65, 67-68 (1995).

[FN226]. Pub. L. No. 91-447, 84 Stat. 916, 919-20 (1970). The law authorizes districts to create either a federal public defender organization or a community defender organization. A federal public defender office is an organization organized under the U.S. federal courts and funded by them. A community defender organization is a free-standing corporation that receives federal monies through grants to provide indigent criminal defense services. *Id.*

[FN227]. E-mail from Anthony Gallagher, Exec. Dir. & C. Fed. Defender of Fed. Defenders of Mont., to Author, History of the Federal Defenders of Montana Attachment 1 (Sept. 29, 2006) (copy on file with Montana Law Review).

[FN228]. *Id.* at 1-2.

[FN229]. *Id.* at 5.

[FN230]. Interview with Anthony Gallagher, Exec. Dir. & C. Fed. Defender of Fed. Defenders of Mont. (Nov. 1, 2006) (recording on file with Author) [hereinafter Gallagher Interview].

[FN231]. 1982 Report, *supra* n. 139.

[FN232]. *Id.*

[FN233]. *Id.*

[FN234]. Ford Found., Early History, <http://www.fordfound.org/elibrary/documents/5020/008.cfm> (accessed Nov. 22, 2006); Small, *supra* n. 224 (stating the initial grant amount as \$2.3 million and indicating the amount of the grant was later increased to \$4.3 million).

[FN235]. [Gideon v. Wainwright](#), 372 U.S. 335, 343-45 (1963).

[FN236]. Small, *supra* n. 224, at 149.

[FN237]. App. from Dean Robert E. Sullivan, U. of Mont. Sch. of Law, Application to the National Defender Project of the National Legal Aid and Defender Association for a Grant-in-Aid to Establish the Montana Defender Project (Sept. 27, 1965) (copy on file with Montana Law Review).

[FN238]. *Id.* at 2-3.

[FN239].

The main reason we were able to get under this umbrella was that the Ford Foundation hadn't really sponsored anything having to do with the defense of the indigent Native Americans both in tribal courts, in federal courts, and in state courts. So that factor of the proposal probably was the thing that brought the whole thing through. The other wing of it was more of an educational thing. Actually the Ford Foundation was not that interested in subsidizing law school education, but we did have an element in the proposal to get out and help the tribal courts and tribal judges. They were federally sponsored but they had no assistance or help from anyone. That was how the Defender Project got started.

Interview with William F. Crowley, Former Dir. of the Defender Project (Sept. 22, 2006) (recording on file with Author) [hereinafter Crowley Interview].

[FN240]. Memo from Charles L. Decker, Dir., Natl. Defender Project of NLADA, Comments. of the Director on the Montana Defender Project Application 7 (Feb. 7, 1966).

[FN241]. Crowley Interview, supra n. 239.

[FN242].

To say that I enjoyed the full weekend of activities at your Law School is to put it modestly. The quality and enthusiasm of your law students are not excelled any place in the country as far as I know. To have the opportunity to work with them closely and personally as I did in Missoula is a source of additional inspiration to me.

I have had no experience in recent years that touched me as deeply as the conference with your Tribal Judges. The sincerity and common sense of the Judges are impressive. Their interest in their people and their constructive approach to their problems certainly warrant our cooperation.

Ltr. from Charles L. Decker, Dir., NLADA, to Dean Robert E. Sullivan, U. of Mont. Sch. of L. (Apr. 27, 1967) (copy on file with Montana Law Review).

[FN243]. Mr. Waterman was with the Defender Project from 1968-1969. Interview with Ron Waterman, Former Student Dir. of the Defender Project (Sept. 27, 2006) (recording on file with Author) [hereinafter Waterman Interview]. Crowley recalls that Ron Waterman was "a real civil rights enthusiast." Crowley Interview, supra n. 239.

[FN244]. Waterman Interview, supra n. 243.

[FN245]. William F. Crowley, Defender Project Outlined, 1 Mont. L. Forum No. 2, 5 (1967).

[FN246]. Id. at 8.

[FN247]. Dean Robert E. Sullivan, 13 University of Montana Law School News No. 2 (1967).

[FN248]. William A. Spoja, Students Exposed to Criminal Law, 2 Mont. L. Forum No. 2, 5 (1968).

[FN249]. Crowley Interview, supra n. 239.

[FN250]. Interview with David J. Patterson, Prof., U. of Mont. Sch. of Law (Sept. 28, 2006) (recording on file with Author) [hereinafter Patterson Interview].

[FN251]. Crowley Interview, supra n. 239. Crowley became the Evidence professor when Russell Smith took the federal bench. According to Crowley, when he took over the course, Russell Smith had been teaching Evidence "since the mind of man remembered not to the contrary." Id.

[FN252]. Id.

[FN253]. Patterson Interview, *supra* n. 250. The Montana Defender Project appeared in most of the district courts in Montana, the Montana Supreme Court, federal district courts in Montana, the Ninth Circuit Court of Appeals, and the U.S. Supreme Court.

[FN254]. [Gransberry v. State, 423 P.2d 853 \(Mont. 1967\)](#); [Morsette v. Ellsworth, 443 P.2d 28 \(Mont. 1968\)](#); [Spinler v. State, 446 P.2d 429 \(Mont. 1968\)](#); [Campus v. State, 483 P.2d 275 \(Mont. 1971\)](#); [State ex rel. McDonald v. Dist. Ct., 496 P.2d 78 \(Mont. 1972\)](#); [State v. Heinrich, 509 P.2d 288 \(Mont. 1973\)](#); [Sather v. Crist, 524 P.2d 785 \(Mont. 1974\)](#); [Fitzpatrick v. Crist, 528 P.2d 1322 \(Mont. 1974\)](#); [State v. McElveen, 544 P.2d 820 \(Mont. 1975\)](#); [Crist v. Boyd, 560 P.2d 531 \(Mont. 1976\)](#); [In re Davis, 587 P.2d 30 \(Mont. 1978\)](#).

[FN255]. Crowley Interview, *supra* n. 239.

[FN256]. Or. at 1, In the Matter of Furnishing Leg. Assist. to Indigent Prisoners (Mont. June 23, 1966) (copy on file with Montana Law Review).

[FN257]. Or. at 1-2, In the Matter of Furnishing Leg. Assist. to L. Enforcement Agencies (Mont. May 9, 1969) (copy on file with Montana Law Review).

[FN258]. Or. at 1-8, In the Matter of the Establish. of a Mont. Student Practice Rule, No. 12982 (Mont. Apr. 30, 1975). The Montana Supreme Court amended the Montana Student Practice Rule in 1991. Or. at 1-2, In the Matter of the Amend. of the Mont. Student Practice Rule, No. 12982 (Mont. Aug. 31, 1991).

[FN259]. Margaret A. (Peggy) Tonon, [Beauty and the Beast--Hybrid Prosecution Externships in a Non-Urban Setting, 74 Miss. L.J. 1043, 1049-50 \(2005\)](#).

[FN260]. Interview with Donald W. Molloy, C.J., U.S. Dist. Ct., Dist. of Mont. (Sept. 18, 2006) (recording on file with Author) [hereinafter Molloy Interview].

[FN261]. [State v. McElveen, 544 P.2d 820 \(Mont. 1975\)](#).

[FN262]. Molloy Interview, *supra* n. 260.

[FN263]. *Id.*

[FN264]. *Id.* (discussing [U.S. v. Booker, 543 U.S. 220 \(2005\)](#)).

[FN265]. Carolyn S. Ostby, Student Author, The Right to Effective Trial Counsel: *State v. McElveen*, 37 Mont. L. Rev. 387, 399 (1976).

[FN266]. Molloy Interview, *supra* n. 260.

[FN267]. *Id.*

[FN268]. *Id.*

[FN269]. [Bounds v. Smith, 430 U.S. 817 \(1977\)](#).

[FN270]. [Id. at 828](#).

[FN271]. Pl.'s Objections to Def.'s Rev. Plan, *Ratzlaff v. Zanto*, CV-77-59 (D. Mont. Sept. 26, 1977). The suit was filed by Missoula law firm Smith, Connor, VanValkenberg, and Larrivee. The firm's partners were Paul Smith, John P. Connor, Fred VanValkenberg, and Noel Larrivee. Id.

[FN272]. See Id.; Def.'s Rev. Plan, *Ratzlaff v. Zanto*, CV-77-59 (D. Mont. Sept. 14, 1977).

[FN273]. McDonald Appointed as Civil Rights Director, 11 Mont. L. Forum 1, 8 (1977). During Professor McDonald's tenure, the Montana Defender Project appeared as attorney of record in two cases before the Montana Supreme Court: *Parker v. Crist*, 621 P.2d 484 (Mont. 1980); *In re Brown*, 605 P.2d 185 (Mont. 1980).

[FN274]. During Professor Renz's tenure from 1993 to 1998, the Montana Defender Project appeared as attorney of record in twelve cases before the Montana Supreme Court: *State v. Christensen*, 877 P.2d 468 (Mont. 1994); *State v. Evans*, 899 P.2d 1073 (Mont. 1995); *State v. Docken*, 908 P.2d 213 (Mont. 1995); *State v. Rice*, 910 P.2d 245 (Mont. 1996); *State v. Hardy*, 926 P.2d 700 (Mont. 1996); *State v. Moorman*, 928 P.2d 145 (Mont. 1996); *State v. Finney*, 931 P.2d 1300 (Mont. 1997); *State v. Wilson*, 936 P.2d 316 (Mont. 1997); *State v. Barnhart*, 942 P.2d 718 (Mont. 1997); *State v. Chastain*, 947 P.2d 57 (Mont. 1997); *Worden v. Mont. Bd. of Pardons and Parole*, 962 P.2d 1157 (Mont. 1998); *State v. Redcrow*, 980 P.2d 622 (Mont. 1999).

[FN275]. *Lewis v. Casey*, 518 U.S. 341 (1996).

[FN276]. Id. at 343, 351.

[FN277]. Id. at 351.

[FN278]. Many of the Defender Project's activities, on a significantly smaller scale, are now conducted by the Criminal Defense Clinic at the School of Law. Professor Jeff Renz is the Clinical Supervisor for the Criminal Defense Clinic. U. of Mont. School of L., Criminal Defense Clinic, http://www.umt.edu/law/clinics/crim_defense.htm (accessed Jan. 8, 2007).

[FN279]. Molloy Interview, *supra* n. 260.

[FN280]. Two of the most significant pieces of civil litigation in the past fifteen years about Montana's criminal justice system prominently featured attorneys with connections to the Defender Project. Ron Waterman, a former student director of the Defender Project, was the lead plaintiff's attorney in the civil litigation that ensued over the 1991 riot at the Montana State Prison. Waterman Interview, *supra* n. 243. Among the lead defense attorneys in that case was John Maynard, a former student director of the Defender Project. Id. Ron Waterman was also the lead attorney for the ACLU in the *White v. Martz* litigation that led to the passage of the Montana Public Defender Act. Compl. at 1, *White v. Martz*, 2006 Mont. Dist. Lexis 136 (Mont. 1st Jud. Dist. Jan. 25, 2006). Among the defense attorneys in *White v. Martz* was Larry Epstein (Glacier County Attorney and student director of the Defender Project the same year as Donald Molloy), and Fred VanValkenberg (Missoula County Attorney, former Missoula County Public Defender, one of the attorneys in the *Ratzlaff* litigation, and longtime legislative proponent of indigent defense reform). Id.

[FN281]. "For time and the world do not stand still. Change is the law of life. And those who look only to the past or the present are certain to miss the future." John F. Kennedy, Speech, Address in the Assembly Hall at the Paulskirche in Frankfurt (Frankfurt, Germany, June 25, 1963) (transcript available at <http://www.presidency.ucsb.edu/ws/print.php?pid=9303>).

[FN282]. *State v. Spotted Hawk*, 55 P. 1026 (Mont. 1899).

[FN283]. Orlan J. Svingen, *The Case of Spotted Hawk and Little Whirlwind: An American Indian Dreyfus Affair*, 15 *W. Historical Q.* 281 (1984).

[FN284]. The motion was denied. *Id.* at 289-90.

[FN285]. [Spotted Hawk, 55 P. at 1031.](#)

[FN286]. *Id.* As is the custom for those who inform on others, David Stanley was only convicted of manslaughter, and received a five-year sentence. Stanley was never released from prison, however, as he died of tuberculosis on October 19, 1899. Svingen, *supra* n. 283, at 294.

[FN287].

That the people were greatly excited in all parts of the county; that cowboys and ranchmen to the number of 200 had left their homes, and gathered at a ranch, near the Cheyenne Indian agency; that these men were armed; that they had gathered together to force the Indian agent to surrender the murderer of Hoover, claiming that the murderer was a member of this tribe; that it was their intention, if the murderer was not surrendered, to go upon the reservation, and exterminate the tribe; that they, in furtherance of this object, gathered ammunition and rifles from Miles City and Eastern cities; that cartridges and rifles were sent to them from other parts of the county; that they were only persuaded from attacking the Indians by the civil authorities of the county; that the sheriff was compelled to leave deputies in charge of them to restrain them; that this condition arose from the fact that the people believed that the Cheyenne Indians killed Hoover; that bitterness against the Indians extended to all parts of the county, and existed at the time of the trial; that, at the time of the burial of Hoover, a large number of men took an oath that they would be present at the trial of Hoover's murderers, and, if they were acquitted, they would take the law into their own hands, and not allow them to leave the court room; that they would be avenged upon the court and counsel in case of acquittal; and that the excitement was so great that the military authorities sent several companies of soldiers to prevent an outbreak. It further recites that the papers in Custer county, all of general circulation, denounced the Indians, unduly exciting the inhabitants, and prejudicing them against the Indians, including the defendant; that about 40 families removed from the agency to Miles City, to get protection from the threatened danger, and remained there several weeks; and that, since the finding of the body of Hoover, there had been unfriendly talk against him, the people of Custer county holding him in utter contempt. In many respects these statements are strongly corroborated by the evidence of Huffman and Gibb, set out above; and there is nothing to contradict them except the affidavit of the county attorney, Porter, made upon information and belief, and that of Sheriff Gibb. The former specifically denies only one fact, even upon information and belief. It denies that any number of men took any vow or oath to be present at the trial and take the law into their own hands, or threatened to hang or do any injury to the court or counsel of the defendant. Sheriff Gibb states that it was never at any time necessary to put any cowboys or settlers in charge of deputies to keep them from attacking the Indians. Huffman found excitement in almost all parts of the county he visited. The people were talking of the murder and the Indian excitement wherever he stopped, with a few exceptions. There was strong prejudice in the minds of the people, and they were ready to stop work and go upon a movement against the Cheyennes if further trouble occurred. The settlers were generally arming themselves and getting ammunition. He saw arms and ammunition forwarded. Gibb found excitement near the agency. One man wanted to go and fight the Indians, because he thought the killing of Hoover and the stealing of cattle should be more speedily and adequately punished. This statement was made to him while the discussion of the possibility of getting a jury was had. While he says that he put no cowboys or settlers in charge of deputies, he does make it clear that he deemed the matter of so much importance, and the danger to the people so imminent from a threatened outbreak of the Indians, that he put near the agency four deputies from different parts of the county, with the purpose that they might warn the people of their particular localities of any coming danger. He himself spent five weeks' time either at the agency, or in going to or returning therefrom, in his attempt to secure the arrest of the Indians charged with the murder, and in looking out that the inhabitants were informed of any threatened danger. The newspaper clippings introduced at the hearing are of no value whatever as evidence of the facts and statements set forth in them; but, mindful of the hereditary enmity and antipathy existing between the whites and the Indians wherever they have lived in proximity

with each other in this Western country; mindful, also, of the fact, which is a matter of history, that there have during recent years been troubles between the whites and the Indians in various parts of the country,—the fact that these publications were made during a period of five weeks, extravagant and inflammatory in their character, would lead one to believe that the readers of them would be more or less excited by the statements contained in them. It is abundantly apparent, also, that an outbreak of hostilities between the whites and Indians was threatened at this time, over the murder of Hoover. We think that, upon the whole showing, whatever opinion might be entertained regarding the sources of information of the defendant upon which he bases his statements in his affidavit, sufficient appears therefrom to impel this court to the conclusion that the lower court should have granted the defendant's petition. If these statements of the defendant were not true, it could easily have been shown that they were not. They are not seriously controverted.

[Spotted Hawk, 55 P. at 1031-32.](#)

[FN288]. Svingen, supra n. 283, at 294.

[FN289]. Mont. Penal Code § 1892 (1895).

[FN290]. Svingen, supra n. 283, at 291.

[FN291]. Id. at 295; Ch. 33, 1903 Mont. Laws 46-47.

[FN292]. It was the infusion of funds that led to the reversal of the convictions in [Powell v. Alabama, 287 U.S. 45 \(1932\)](#). It was not the indigent defense system that provided Powell with an adequate appeal and argument before the Court. The indigent defense system had given Powell over. It was the International Labor Defense (the legal arm of the Communist Party) that paid for Powell's appeal and subsequent retrials. Michael J. Klarman, *Powell v. Alabama: The Supreme Court Confronts “Legal Lynchings”* in *Criminal Procedure Stories 1, 5-8* (Carol S. Steiker ed., Found. Press 2006).

[FN293]. Svingen, supra n. 283, at 292.

[FN294]. Id. at 292 n. 16.

[FN295]. [State v. Little Whirlwind, 56 P. 820 \(Mont. 1899\)](#). Little Whirlwind was eventually pardoned in 1901, due in large part to the efforts of the Indian Rights Association. Svingen, supra n. 283, at 294-95.

[FN296]. The Innocence Project, Jimmy Ray Bromgard, http://www.innocenceproject.org/case/display_profile.php?id=111 (accessed Jan. 8, 2006) [hereinafter Innocence Project, Bromgard].

[FN297]. [State v. Bromgard, 862 P.2d 1140 \(Mont. 1993\)](#); [State v. Bromgard 901 P.2d 611 \(Mont. 1995\)](#); [State v. Bromgard, 948 P.2d 182 \(Mont. 1997\)](#).

[FN298]. Innocence Project, About the Innocence Project, <http://www.innocenceproject.org/about> (accessed Jan. 8, 2007). The Innocence Project is a non-profit legal clinic at the Benjamin N. Cardozo School of Law. It only takes cases in which post-conviction DNA testing of evidence may conclusively prove innocence. There is an extensive screening process to determine eligibility of a claim of innocence. Id.

[FN299]. Id.

[FN300]. U.S. Census Bureau, State and County Quickfacts: Montana, <http://quickfacts.census.gov/qfd/states/30000.html> (June 8, 2006).

[FN301]. For the period of time between 1997 and 2006, Native American males admitted to Montana's prison system comprised between 15.1% and 18.4% of Montana's male prisoners. Brian Schweitzer & Mike Ferriter, Montana Department of Corrections Biennial Report H-5 (Dept. of Corrects. 2007) (copy on file with Montana Law Review). During that same period of time Native American females admitted comprised between 24.9% and 30% of Montana's female prisoners. *Id.* at I-5.

[FN302]. All misdemeanors committed on the seven reservations by enrolled tribal members are prosecuted in the tribal courts. “The tribe has exclusive jurisdiction over non-major crimes committed by Indians against Indians in Indian Country. Such crimes are specifically excepted from the jurisdiction conferred upon the federal courts by the General Crimes Act.” William C. Canby, *American Indian Law in a Nutshell* 170 (4th ed., West Group 2004) (referring to [18 U.S.C. § 1152 \(2000\)](#)).

[FN303]. All felonies committed on six of the seven reservations by enrolled tribal members are prosecuted in Federal court. The one exception is the Flathead Reservation where felony crimes committed by enrolled tribal members are prosecuted in state court under the auspices of Public Law 280. Mickale Carter, [Regulatory Jurisdiction on Indian Reservations in Montana, 5 Pub. Land L. Rev. 147, 157-58 \(1984\)](#) (providing explanation of jurisdictional authority created under Pub. L. No. 83-280, 67 Stat. 588 (1953)).

[FN304]. [U.S. v. Wheeler, 435 U.S. 313, 329-30 \(1978\)](#).

[FN305]. [25 U.S.C. § 1302 \(2000\)](#).

[FN306]. CSKT Ls. Codified, §§ 1-2-401(2), 2-2-504 (2000) (available at <http://www.CSKT.org/documents/laws-codified.pdf>).

[FN307]. [State v. Spotted Eagle, 71 P.3d 1239 \(Mont. 2003\)](#).

[FN308]. [Id. at 1245-46](#).

[FN309]. [Id. at 1244-45](#).

[FN310]. U.S. Sen. John McCain, McCain Introduces Safety to Indian Women Act, http://mccain.senate.gov/press_office/view_article.cfm?id=174 (accessed Apr. 30, 2007); [18 USC § 117 \(2000\)](#). The Safety to Indian Women Act provides:

(a) In general.--Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction --

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or

(2) an offense under chapter 110A, shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

(b) Domestic assault defined.--In this section, the term “domestic assault” means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.

[18 USC § 117](#) (emphasis added).

[FN311]. [Pub. L. No. 109-248, 120 Stat. 587, 602 \(2006\)](#).

[\[FN312\]](#). Molloy Interview, *supra* n. 260.

[\[FN313\]](#). Interview with Randi Hood, C. Pub. Defender for Mont. (Nov. 1, 2006) (recording on file with Author).

[\[FN314\]](#). Interview with James B. Wheelis, Chief App. Defender (Nov. 15, 2006) (recording on file with Author) (discussing [Gideon v. Wainwright](#), 372 U.S. 335 (1963); [Miranda v. Ariz.](#), 384 U.S. 436 (1966)).

[\[FN315\]](#). Interview with Karla Gray, C.J. of Mont. Sup. Ct. (Nov. 6, 2006) (recording on file with Author).

[\[FN316\]](#). Gallagher Interview, *supra* n. 230.

[\[FN317\]](#). *Supra* n. 32.

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68 MTLR 363

68 Mont. L. Rev. 363

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