



Steve Bullock  
Governor

# OFFICE OF THE APPELLATE DEFENDER STATE OF MONTANA

Chad Wright  
Chief Appellate Defender

Date: April 5, 2016

To: Montana Public Defender Commission

From: Chad Wright, Chief Appellate Defender

RE: Office of the Appellate Defender Report to the Commission

Currently, the Office of the Appellate Defender (OAD) consists of ten assistant appellate defenders, three support staff, and the Chief Appellate Defender. We are in the process of hiring an additional assistant appellate defender with the money approved by the Public Defender Commission at the December Commission meeting. I was appointed as Chief Appellate Defender at that meeting, worked some preliminary time to meet the staff in January, and then began full time on March 7, 2016. This is my first report to the Commission, and given my limited time in the office, I have not been able to gather and review enough information to confidently report to the Commission about the full set of challenges facing the OAD. The following are my observations of the current status of the OAD:

- 1. Staff Changes.** OAD recently hired Kimberly Harrison to replace administrative assistant Barbara Yerkes. Ms. Yerkes returned to Kalispell and took another position within the OPD before I started full time. Ms. Harrison has past legal law firm experience and is transitioning out of running her own small business.

In the hiring process, I determined that the OAD needs three administrative assistants just to support the attorneys. Representing clients on appeal is much different than representing those same clients at the district court level. Appellate attorneys are constantly filing briefs that need staff support for the labor intensive tasks that include meeting the quality standards set by the office and the stringent formatting requirements (electronic and conventional) set by the Montana Supreme Court. Three administrative assistants may be able to meet the review, editing and filing needs of thirteen attorneys. However, they could not meet the remaining demands of gathering the district court records, coordinating with court reporters for production of the transcripts and maintaining communication with our clients. I believe that the OAD should ask for resources for an additional administrative assistant whose job duties would be dedicated to these basic office functions.

- 2. Significant Cases.** Since the last Commission meeting, two notable cases are worth following up on:
  - a. On December 2, 2015, Assistant Appellate Defender Jennifer Hurley argued the case of *State v. Colburn* before the Montana Supreme Court. On February 23, 2016, the Court issued a decision reversing Mr. Colburn's conviction and remanding his

case back to the Honorable James A. Haynes for a new trial. In addition to giving Mr. Colburn another opportunity to prove his innocence, the case was significant for two reasons. First, it confirmed that defendants should have the opportunity to counter the State's use of questionable expert testimony with their own qualified defense experts. Second, it exposed how the Rape Shield Law was expanded beyond its original intent to prevent defendants from countering improper inferences made by the State and presenting valid defense theories. Jen Hurley's work on Mr. Colburn's behalf, both in the briefing and oral argument stages, was top notch and I know the entire office contributed to this very important decision.

- b. On March 31, 2016, the United States Supreme Court heard argument in *Betterman v. Montana*. Assistant Appellate Defender Koan Mercer, in conjunction with UCLA Supreme Court Clinic and the law firm of Munger, Tolles & Olson, LLP, participated in the preparatory arguments and appeared at counsel table during the argument. Fred A. Rowley, Jr. argued on behalf of Mr. Betterman that the speedy trial protections set forth in the Sixth Amendment applied to sentencing. After pleading guilty, Mr. Betterman sat fourteen months in a county jail before being sentenced. The Montana Supreme Court found that the delay was unacceptable, but concluded there was no prejudice to Mr. Betterman. The United States Supreme Court showed great interest in protecting Mr. Betterman's due process right to be sentenced in a timely manner. Koan reported that the argument went better than he expected.
3. **Office of Appellate Defender Structure.** The OAD structure reflects both the legislative directive that the office be located in Helena (§ 47-1-205, Mont. Code Ann.) and the realistic demands of attracting and retaining qualified attorneys. Thus, since its inception, the OAD expanded by placing attorneys outside of Helena. Currently, the longest tenured attorney, Lisa Korchinski, works from a home office in Bozeman because of the early lack of available office space. Three more attorneys, including Koan Mercer and Jen Hurley, share office space with OPD attorneys, case management specialist Marsha Parr, and law school interns in Missoula. Two other attorneys commute long distances to work in Helena.

After initially being resistant to multiple locations, I have found that the offices work well together with innovative remote communication techniques. The Montana Supreme Court is also rapidly moving to its electronic filing system. Flexible work options implemented by Wade Zolynski were big selling points during the interview process. Office turnover is a major contributor to the current backlog crisis (44 cases remain to be assigned – most having already received two extensions). Thus, flexibility will be needed to retain qualified attorneys. Even with electronic filing, a core unit of attorneys, the support staff and the Chief needs to remain in Helena. However, the Missoula office has proven that it can be a resource to the trial attorneys and provide a connection to the law school. I believe further sharing of office space in locations outside of Helena would be beneficial to both the appellate and trial offices within the OPD system.