

PUBLIC DEFENDER NEWS

CHIEF’S CORNER

“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.” With these words, the United States Supreme Court extended basic due process guarantees to juvenile delinquency proceedings. *In re Gault*, 387 U.S. 1, 13 (1967). In doing so, the Court essentially ratified a decision entered by the Montana Supreme Court forty years earlier, in *State ex rel. Palagi v. Freeman*, 81 Mont. 132, 262 Pac. 168 (1927).

A Cascade County probation officer filed a petition alleging that three boys were juvenile delinquents who had gone joy-riding, and whose parents were unable or unwilling to care for them. The only information presented to the court in support were reports prepared by the probation officer and presented to the court *ex parte*. Among the supposed transgressions, the probation officer reported that each boy “smokes cigarettes and is out nights.” A hearing was held, but no testimony was recorded, no findings were made, and no judgment was entered. A minute entry noted that each boy appeared (two of the three were represented by counsel) and entered a plea of guilty, and each was ordered committed to the Montana State Industrial School until he turned twenty-one.

After the boys made unsuccessful attempts to gain release by petitioning for writs of *habeas corpus*, they filed motions for new trials. Evidence presented at this hearing established that when the delinquency petitions were filed, the probation officer told the boys’ parents that they need not hire attorneys, that after the hearing the case would be turned over to a county “juvenile committee” and that the boys would not be sent to the industrial school and instead would probably receive a reprimand. Even so, on the morning of the hearing the parents of one boy hired counsel, and friends of another boy’s family arranged for another attorney to appear. The third boy was unrepresented. The results of that initial hearing were disastrous.



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SPECIAL POINTS OF INTEREST

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“Owing to the lack of time and the fact that general practitioners are not often called into such cases, neither the defendants nor their attorneys present knew the procedure to be followed, or had more than the vaguest idea of what was going on at the hearing, and relied upon the advice of the probation officer.” The attorneys entered guilty pleas for the boys, which they intended to be taken only as an admission they took the cars. No evidence was introduced on the statutory element of the ability of the parents to care for and control the boys. Despite the clear lack of due process in the proceedings that led to the orders of commitment, the district court denied the motions for new trial on two grounds: the boys had failed to show diligence in presenting the new evidence, and as there had been no trial, there could be no “new” trial.

The state supreme court found numerous defects in the lower court’s actions and reversed the orders of commitment. The applicable statutes required that a petition had to allege, in part that the parents were unable or unwilling to care for and discipline the child in question. The absence of these allegations rendered the petitions insufficient. Further, the presiding judge had admitted that no testimony was taken at the initial hearing to determine the parents’ fitness. At most, the committing court had only the *ex parte* reports of the probation officer. The Supreme Court held that allegations supporting a delinquency charge must be alleged in the petition and established by the evidence, with the right of cross-examination. These defects required that the commitment orders be reversed.

Years later, two Arizona teenagers were taken into custody after a neighbor complained that she had received a phone call in which the callers made “lewd or indecent remarks” which “were of the irritatingly offensive, adolescent, sex variety.” Following a hearing on the allegation, a state court determined that the boys were delinquent. The parents of one of the boys challenged the adequacy of the juvenile court proceedings, but the state supreme court rejected their arguments, concluding that due process rights were limited in juvenile proceedings. In this decision, the court declined to apply the Montana court’s decision in *Freeman*. See, *In re Gault*, 407 P.2d 760 (Ariz. 1965).

The U.S. Supreme Court subsequently reversed the Arizona court, and ensured that kids enjoy the right to fundamental

due process guarantees. “[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase ‘due process.’ Under our Constitution, the condition of being a boy does not justify a kangaroo court.” *In re Gault*, 387 US 1, 27-28 (1967).

In the 47 years since *Gault*, we have made progress in revising our youth court procedures to better reflect the fact that children merit special attention. “Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.” *Roper v. Simmons*, 543 U.S. 551, 570 (2005). “[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.” *Graham v. Florida*, 560 U.S. 48, 68 (2010). These decisions rest “not only on common sense--on what ‘any parent knows’--but on science and social science as well.” *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).

However, the Court limited the scope of its decision in *Gault* to the “delinquency” stage, and specifically declined to consider the procedures or constitutional rights applicable to the pre-judicial stages. 387 US., at 13. Therein lays a problem. In Montana, the right to counsel attaches only after a formal petition has been filed. Numerous referrals are resolved annually by means of informal proceedings, in which the right to counsel is not protected.

A resource is available to assist kids and families in understanding the consequences of juvenile proceedings. The *Juvenile Collateral Consequences Project* is an endeavor undertaken by the American Bar Association to document and analyze the significant hardships experienced by kids who come in contact with the juvenile justice system. It can be accessed at: <http://beforeyouplea.com/>. The website is a handy starting point, but questions from clients will always have to be researched independently.

Bill



APPELLATE NEWS

PRACTICE POINT: STATE V. PILLER ORAL ARGUMENT



Wade Zolynski,
Chief Appellate Defender

Do Ex Post Facto Prohibitions Prevent District Courts From Adding Conditions to Old Sentences?

In 2001 and 2003, the legislature amended Montana's revocation statute adding language that "[t]he provisions of this section apply to any offender whose suspended or deferred sentence is subject to revocation regardless of the date of the offender's conviction and regardless of the terms and conditions of the offender's

original sentence." M.C.A. § 46-18-203(9).

Relying in-part on the above amendment, the State sought to add 14 conditions to Mr. Piller's sentence upon revocation. One of the added conditions the State requested was sex offender treatment. At the time of his conviction (for sexual intercourse without consent in 1988), district courts were not permitted to add conditions upon revocation. Here, the district court revoked Mr. Piller's sentence and added the 14 conditions anyway.

Mr. Piller appealed claiming that "[t]he law in effect at the time an offense is committed controls as to the possible sentence for the offense, as well as the revocation of that sentence." *State v. Goff*, 2011 MT, ¶ 18. Mr. Piller argued that the retroactive amendment of the revocation statute implicated State and Federal ex post facto prohibitions. As a result, the district court could not add the 14 conditions to Mr. Piller's sentence.

The Supreme Court requested oral argument on the subject. The oral argument occurred on June 25. If you represent a defendant on revocation and the sentence is rather old, be aware that ex post facto prohibitions may prohibit the district court from adding conditions not previously imposed. If you have not filed a motion -- based on State and Federal law -- prohibiting added conditions, please consider doing so. Or, you can lodge an objection on the record at the time of disposition.

The state of the case law on ex post facto is more complicated than most. Should you have questions, please feel free to give Kristen Larson (arguing the case), Koan Mercer, or me a call at 444-9505.

KUDOS!

Bill Hooks



OPD attorneys and staff continue to serve their clients and the community with skill, courage and

resourcefulness. MCU attorney Jennifer Streano and Brian Smith from the Missoula office teamed up in defense of a woman charged with deliberate homicide based on the death of an infant. The attorneys litigated complex legal issues, including reverse 404(b) prior bad acts evidence and a Rule 702/*Daubert* issue. Kyle Belcher created a video presentation which Jennifer and Brian used during their closing argument. After a 2 1/2 week-long trial, the jury returned a verdict of not guilty on the charged offense and guilty on a defense-offered lesser offense of assault on a minor.

In Anaconda, the state dismissed a charge of incest against Dan Miller's client a day after opening arguments. As the jury had been sworn, the charge cannot be refiled.

Kaydee Snipes obtained a not guilty verdict in Region 6 for a client who was charged with criminal endangerment after he allegedly drove his car into a hospital. Jon King in Region 4 likewise won an acquittal on a charge of negligent endangerment, and Vince van der Hagen won an acquittal in Region 3 on a molestation charge.

Well done!

CONTRACTOR CORNER

Wendy Johnson

As many of you know, I took over as Contract Manager for Larry Murphy in January of this year. Since my arrival, I have been trying find my bearings and make some changes that will benefit both OPD and all of our much appreciated contractors. That being said, there are lots of things happening in the Central Office!

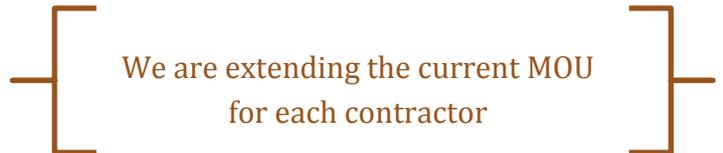


One of the first big changes that we are implementing is the way the Memorandum of Understanding (MOU) term runs. In the past, all contractors were on the same MOU cycle which ran from July 1, 2012 until June 30, 2014, regardless of the date on which the MOU was signed. We are rapidly approaching June 30, 2014, and there are currently over 250 contract attorneys, 25 contract investigators, and 70 mental health providers throughout the state who will be required to sign a new MOU and provide us with other renewal documentation as part of that process. In an effort to stagger the cycle out, and create less of an administrative nightmare here in the Central Office during fiscal year end, we are extending the current MOU for each contractor. I am also working with Kristina Neal, our Conflict Coordinator, to update the current Memorandum of Understanding and condense some of the other forms that our contractors need to complete in order to renew their MOU and would welcome any positive feedback and suggestions any of you may have

regarding the content of the MOU and process in general.

Another change that has been implemented, is that every expert that has been used by either a full time employee or a contract attorney in the past year is now in JustWare thanks to the hard work and dedication of my assistant Lynn MacMillan! There is a report you can run to find different types of experts and any contractor who is searching for an expert, please feel free to contact either Lynn or myself so that we can run the report for you. Also, if there are comments or feedback you may have about someone you have used, please let us know so that we can make sure that information makes it into JustWare and is available to everyone.

There will be additional changes taking place in the near



future, and I will be sure to keep you all in the loop as those changes become a reality. I have been working with Peter Ohman, to try to facilitate more training opportunities for all of our contractors, so watch your email for different things to come up.

On a more personal note, many of you don't know, but prior to coming on as Contract Manager I was both in private practice and I also worked as a public defender in Helena for several years. I know firsthand what a difficult, and often times, thankless job this can be. As such, I just want to say thank you for all the hard work you do because I'm sure you don't hear it enough. I plan on traveling fairly extensively in the coming months and hope to meet many of you as it would be nice to put some faces to names!

MARK YOUR CALENDARS!

The training department has been busy planning and delivering several live and virtual training events, including the annual support staff conference held earlier this spring in Helena.

Upcoming Lync CLE's include a DUI session on June 27 (2:45 to 4:00 p.m.), and mental health law on July 31 at the same time. The August session is tentatively scheduled for August 29, topic TBD. Several of the Lync sessions have been recorded and are available through the brief bank. Contact Peter Ohman for more information.

Other upcoming events include:

- July 10, Child Welfare Law and Practice, Bozeman (registration is closed)
- August 21-22, Investigator Training, Livingston
- September 9-11, Boot Camp, Lubrecht
- October 8-9, Annual Meeting and Attorney Training Conference, Missoula



THAT EXTRA MILE

Carleen Green

Working for OPD for the last 8 1/2 years has been quite an experience. Having worked for public defenders in other states and seeing the lack of resources that is so typical of public defense work really gave me an appreciation of what it takes to start an agency like this and continue to fight to get the resources needed to mount an effective defense.

Although I've always supported our agency mission, I've never had any personal experience with the criminal justice system. Well that unfortunately changed for me this year, as my son has gotten himself into some trouble in Hawaii on the island of Kauai and is currently incarcerated there awaiting trial. It has been a lot to deal with but his public defender has been in constant contact with me. I realize that he doesn't have to tell me a thing, he doesn't have to call me on his cell phone and let me talk to my son because the jail won't let any collect calls go out to the mainland, he doesn't have to look at

*My son is currently awaiting trial...
I am so grateful to be a part of an
agency where people really care...*

my son as a young man who made a mistake and needs him to go the extra mile, but he does it because he cares. He didn't have to meet with my husband and me when we went to Hawaii to see my son – he could have easily said “you're not my client.”

Why am I telling you all of this? It is because I am so grateful to be a part of an agency where people really care and



understand that sometimes people get into trouble because of mental illness, addiction, or any other number of reasons. In fact, the support of my co-workers here in Butte (including the “Montana Counsel” as my son's public defender fondly refers to them) has been phenomenal.

I know how much stress there is on all of OPD's attorneys, investigators and support staff and I also know how hard our Commission and upper management work to try to get the resources that we need. I just wanted all of you to know that what you do matters and there are family members of our clients who are terrified of what is going to happen to their loved one because they don't understand how the system works. I *do* understand how the system works and I'm still terrified, but just having a public defender for my son who cares about us and goes the extra mile in talking to me has made a big difference. Thank you all for the work you do for our clients and their families.

**“Remember that you are a lawyer;
be proud, do good.”**

—James Silkenat, ABA President, to the 2014 UM Law School graduating class

IMPROBABLE CAUSE: FINGERPRINTS, FISA, AND THE 4TH AMENDMENT

Mark Beck, Missoula

The Pacific Northwest Division of the International Association for Identification held their 50th Anniversary Educational Conference in Coeur d'Alene June 9 -13, 2014. We were fortunate to have Mr. Brandon Mayfield as the featured speaker. This marked the first time Mayfield has given such a presentation in the ten years since his arrest and federal lockdown in 2004.

A member of the Oregon State Bar and certified to practice in the Federal Court of the 9th Judicial District, Mayfield specializes in family and immigration law. In April and May of 2004, he was the victim of a religious persecution, an overzealous application of the Foreign Intelligence Surveillance Act (FISA) and the Patriot Act, and a faulty application of forensic science.

Mayfield outlined the history of search and seizure, probable cause, and warrant and warrantless intelligence gathering from the Fourth Amendment of the US Constitution through the various incarnations of the FISA, the Patriot Act, and the Protect America Act of 2007, which are establishing a progressive "ratcheting down" of civil liberties for American citizens.

Mayfield related his personal experience in detail. In March, 2004 a series of coordinated bombings on commuter trains in Madrid, Spain resulted in the deaths of 191 persons and the wounding of 2,000 others. Originally it was thought to be Al-Qaeda inspired, but this was later discounted. Spanish authorities located an abandoned stolen van in a city through which all the trains had passed. In the van was a blue plastic bag containing explosive detonators.

Several latent fingerprints were developed on the plastic bag. Through INTERPOL, Spanish Police

submitted digital images of the latents to the FBI for searching in the Integrated Automated Fingerprint Identification System (IAFIS). Brandon Mayfield was number 4 on the list of candidates to be investigated. He was a military veteran who had married an Egyptian citizen and converted to Islam. He had represented one of the Portland Seven, a group of American citizens accused of attempting to aid the Taliban in a child custody matter. He was the perfect suspect.

The FBI surreptitiously searched and bugged Mayfield's residence and law offices. They recorded private family conversations, copied his files and computer hard drives, searched his trash, and followed him, all under the shelter of FISA and the Patriot Act.

Meanwhile, an FBI latent print examiner matched latent print #17 from the plastic bag to Mayfield. This identification was verified by another examiner and a supervisor of the FBI's latent print unit. It was reported as a 15 point, "100% match"... an "absolute-incontrovertible match." The FBI issued their report of a match to the Spanish National Police, who

declared that without a doubt, the fingerprints did *not* match. Despite the FBI's repeated efforts, they could not convince the Spanish authorities that their identification was correct.

Lacking enough evidence to arrest on a criminal cause, the FBI decided to arrest Mayfield as a material witness. They initially refused to inform either Mayfield or his family why he was being detained or where he was being held. He was held in federal lockdown for two weeks, during which he was represented by the Federal Defender's Office. Eventually, the Spanish authorities identified the latent prints to an Algerian national and Mayfield was released.

Mayfield posed the question to us, did we believe that his arrest was the result of a fingerprint misidentification ...or... because of his religion? In fact, his reli-



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gion may have been a factor in the fingerprint error— there have been investigations of the fingerprint misidentification by the office of the inspector general and a special blue-ribbon panel. A discussion of conceptual, conformational, and cognitive bias in forensic science might be a future article (as well as analytical methodology and absolute reporting)... but, they are too big for this report.

Mayfield made parallels between his story and 1984...not the 1984 when from a sense of patriotism he enlisted in the U.S. Army, but the Orwellian 1984, where the government spies on its citizens, feeds and then takes advantage of their paranoia, controls information and attempts to influence thought, and punishes wrong thinking.

In 2013, when asked by Oregon Senator Ron Wyden if the NSA collects electronic data on U.S. citizens, Director James Clapper answered simply, “No Sir!” Through the Snowden leaks, we have learned quite the contrary. In fact, it is estimated that \$54 billion dollars per year is spent on domestic surveillance. We as Americans are becoming prisoners to our fear and we are tolerating the erosion of our civil liberties by a powerful and secretive government.

After his presentation, Mayfield graciously sat down with me for a one-on-one conversation.

He likened the religious persecution of Muslims to the six degrees of Kevin Bacon. It is guilt by association. If a person, who has attended your mosque, knows someone who knows someone who knows someone who may have known Osama Bin Laden’s driver, then

by association, you are a suspect.

In his personal practice, he has lost clients because “you’re that guy,” or “you are a Muslim and Muslims believe in mistreating women,” or his clients just do not have confidence in his ability to keep their privilege as he is still most likely under government surveillance.



Mayfield still has confidence in our judicial system; he is grateful to Judge Ann Aiken and his federal defenders. If it hadn’t been for them and the Spanish Police holding fast to their conclusion against FBI pressure, he would probably still be locked up.

As he had to depart to catch a flight, Mayfield referred to my previous article about Army Ranger J. C. Widdicombe. He said that it was very sad that our young men and women were returning from war with PTSD and other injuries. He was troubled by the current news from Iraq and praying that we would not have to send our troops back there.

Brandon Mayfield has a compelling story about our diminishing civil liberties, religious intolerance, and the misuse of forensic evidence and electronic data in our judicial system. I was honored to meet him and hear him speak. He has decided to take a stand during this time of crisis, in spite of the false arrest and detention that he has already experienced. As a forensic scientist, forensic investigator, and as a person, I will do my best to honor and follow his example.



TIPS AND TRICKS

EXCEL TIPS

Brenda Ingersoll, Accountant

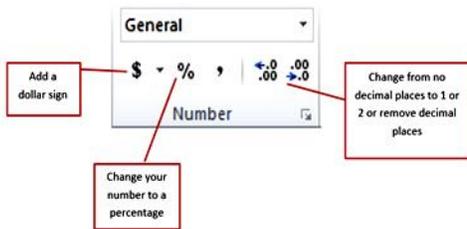
1. Use Keyboard Shortcuts

Shortcuts are essential to using Excel. These days it's not enough to know copy, paste and save; you need to know even more. Here are a few examples of easy keyboard shortcuts:

- Ctrl + 2: Bold
- Ctrl + 3: Italic
- Ctrl + 4: Underline
- Ctrl + 5: Strikethrough
- Shift + Ctrl + F: Font dropdown list
- Ctrl + 9: Hide rows
- Ctrl + 0: Hide columns
- Ctrl + Shift + (: Unhide rows
- Ctrl + Shift +): Unhide columns
- Shift + Space: Select entire row
- Ctrl + Space: Select entire column

2. Number formatting

You can change the look of your numbers quickly and easily on the **Home tab** under the **Numbers** section:



3. Cell reference

Column & Row Absolute	(\$A\$1)	Always references cell A1 when copying the formula
Column Absolute	(\$A1)	Always references column A and the next row when copying the formula
Row Absolute	(A\$1)	Always references row 1 and the next column when copying the formula
Nothing Absolute	(A1)	References the next column and row when copying the formula

SUPPORT STAFF TIP

Pepper Aden, Hamilton

When creating a new name record for a client in JustWare, if you know their address doesn't sound quite right, or if you just want to check to make sure it's a real mailing address:

Go to www.usps.com, click on zip code, type in the address you have been provided and it will come up with the proper mailing address (or let you know that it's not a mailing address).



This isn't completely fool proof but it is quick and simple and it does alleviate a considerable amount of returned mail, which saves the State a bit of money on postage.

AND THE AWARD GOES TO . . .

Congratulations to Trisha Henry, the recipient of the first Support Staff of the Month Award in May.



Trisha was nominated and is being recognized because of her "extraordinary dedication to a Region 11 Records Management Project" and because she "exemplifies the qualities needed for a support staff person...she goes above and beyond the call of duty."

The June Award went to Destiny Carter. Destiny was recognized because "she is a clear, empathic and respectful but forceful communicator...and gets results in whatever you ask of her." Destiny's peers were enthusiastic in noting that she is "competent, resourceful, and dependable."

Thank you all for your nominations! Please continue to recognize your support staff and [submit](#) your July nominations t by July 20.

ANOTHER GREAT SUPPORT STAFF CONFERENCE

Peter Ohman

OPD's Annual Support Staff Conference was held at the downtown Helena Holiday Inn April 30-May 1. Folks from every region attended the conference and seemed to enjoy the location, with the option of finding food, drink, and shopping right out the door on the walking mall. Trainings encompassed JustWare, the new eligibility determination process and various topics focused on legal matters.

Chief Bill Hooks was pleased to offer awards to the following employees for their exceptional performance over the last year:

♦ **Tara Winterrowd**,
Teamwork Award

Tara is always willing to offer help when someone is swamped and has covered for almost everyone in the Kalispell office at one time or another. She is also called on to do last minute transcripts. Tara is a huge asset to her office.

♦ **Katie Beckman**, *Outstanding Achievement*

Katie works in the Bozeman office. She was recognized for her excellent work on a difficult trial, including organizing 16,000+ pages of discovery. She's also set up meetings with the Soberlink provider to get more information; gone to HRDC to see what services they can provide to our clients and put those in a usable format for the attorneys; and is tracking DJ cases to determine what happens after the cases are closed.

♦ **Mary Brown**, *Excellence in Direct Legal Support*

The Anaconda attorneys have bragged to the attorneys in the Butte office about how much Mary does for them because she is highly organized and efficient. She is a leader among the Region 5 support staff, as well as the regional JustWare leader. Mary has been working with public defenders for over 30 years. She is dedicated to this agency and the work we do.

♦ **Anna Garza**, *Administrative Support Staff of the Year*



Anna has served as the Office Manager in Region 1 for almost 6 years. In all respects, she is a model employee—she is intelligent, efficient, organized, consistent and extremely reliable. Anna is one of those rare individuals who seems to know everyone, has a system for everything, and is constantly in motion, seamlessly transitioning from one task to the next. If Region 1 were a ship, Anna would be its rudder. You wouldn't necessarily see her, but she would always be there under the surface quietly directing the ship's path.

In addition, *Five Year Service Awards* were presented to Jason Kindsvatter, Jan Cates, Virginia Custis, Mary Roth, Anna Garza, Chris Kitch, Juanita Nystrom, Tara Winterrowd, Barbara Yerkes and Craig McKillop. Thanks for hanging in there!



Thanks to the eastern Montana contingent for trekking to Helena!



The taco bar was a big hit.

HELLO THERE!

Training Coordinator Peter Ohman has been making his way around the state. He made it to Kalispell and Lewistown last quarter. His home base is in Bozeman.



The Kalispell Crew



How many attorneys does it take to screw in a light bulb?

As many as you want to pay for!



A small but mighty group in Lewistown