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Governor

OFFICE OF THE APPELLATE DEFENDER STATE OF MONTANA

Chief Appellate Defender
Joslyn Hunt

December 20, 2010

To: Montana Public Defender Commission
From: Joslyn Hunt, Chief Appellate Defender
RE: Report to the Commission for the Period October 1 to December 20, 2010

UPDATES:

Caseloads: As the attached Exhibit 1 shows, the appellate office took in 12 cases in October and 19 cases in November. We closed 13 cases in October, so our case base dropped by one case. We closed five cases in November, so the small gain in caseload we saw in October grew again in November. As of December 20, we have taken in seven cases, so our case base in December is projected to grow again.

State v. 18th Judicial District, 2010 MT 263

The petition for a writ of supervisory control filed by the State challenged a pretrial ruling by the district court suppressing evidence in the prosecution against Shanara Anderson for deliberate homicide. A unanimous Court overruled *Just and Matt*, setting forth the following new procedure in their place. This new procedure as outlined by the Court includes:

- Upon receiving the discovery from the State, "it is up to the defendant to identify any of the State's evidence that she believes should be excluded as irrelevant (Rule 402), unfairly prejudicial (Rule 403), relevant only for an improper propensity inference (Rule 404), or inadmissible under some other rule, and to explain with argument and authority why the evidence should be excluded."
- The prosecutor is then required to respond to the defendant's objections and to demonstrate the admissibility of the evidence.
- The court should conduct a hearing and issue a written decision with appropriate findings of fact and conclusions of law.
- If the court determines the evidence is admissible, a defendant may request an instruction under Rule 105.
- If the prosecutor fails to disclose any evidence pursuant to these procedures, a defendant may request sanctions, including exclusion of the evidence.

The reasoning behind the above-delineated change is summarized as follows.

The Court stated that the district court's reliance on the notice requirements of *Just* and *Matt* were supported by "extant precedent." However, the problem was the precedent itself, which the Court then proceeded to change.

Namely, the Court believed the rules in *Just* and *Matt* were giving rise to needlessly technical requirements that wrongfully excluded evidence in some cases. The Court noted the *Just* and *Matt* rules did not foster the true purpose of Rule 404(b).

Notice:

The Court said the *Just* notice requirement created a battle for the prosecutor that he/she "should not have to fight." This is true, in the Court's mind, because a criminal defendant has the right to prepare a defense and the right to be informed of the charges against him. Hence, the defendant must have notice of the evidence the State intends to introduce at trial. The Court believes this "notice" is "largely accomplished through the discovery statute," which requires the prosecution to disclose the witnesses he/she intends to call and the evidence he/she intends to use.

Since the discovery statutes are more comprehensive than in the years of the *Just* decision—that is, since the prosecution now must disclose the evidence it may introduce at trial—the notice requirement outline in *Just* and *Matt* undercuts the need for a separate notice requirement for extrinsic evidence. Indeed, the Court felt the defendant was fully on notice of "most of the evidence at issue" in the writ, based on the affidavit of probable cause. Hence, the defendant had "ample opportunity" to object to the evidence without a separate notice.

According to the Court, the *Just* notice was problematic because "it put[] the prosecutor in the position of having to justify the admission of evidence in the absence of any objections by the defendant." Since this is not the case for motions to suppress, it should not be the case for extrinsic evidence. The Court felt that the *Just* and *Matt* approaches encouraged arguments and decisions based on form, rather than substance.

46-13-109, MCA:

The Court states that because *Just* and *Matt* are overruled, the Legislature should repeal this statute. In the meantime, however, the Court observes that "if the parties follow the [new] procedures . . . then the notice requirement of § 46-13-109(1), MCA, will have been satisfied in any event."