



# OFFICE OF THE APPELLATE DEFENDER STATE OF MONTANA

Steve Bullock  
Governor

Wade Zolynski  
Chief Appellate Defender

Date: February 24, 2014

To: Montana Public Defender Commission

From: Wade Zolynski, Chief Appellate Defender

RE: Office of the Appellate Defender Report to the Commission

The Office of the Appellate Defender (OAD) consists of 10 attorneys (the Chief and nine Assistant Appellate Defenders) and three support staff. One support staff member is in a modified position rather than an FTE position. OAD also contracts for services with private counsel. The Public Defender Commission (PDC) appointed me Chief Appellate Defender May 16, 2012. The following is my sixth report to the Commission:

## 1. The State of the Office of the Appellate Defender.

- a. **Turnover.** Attorney turnover slowed significantly in the first half of FY 14. OAD has lost one attorney, a 10% turnover. The departed attorney resigned during the first quarter. Compared to FY 12 (44%) and FY 13 (44%), 10% turnover is a significant improvement.

Turnover within OAD's support staff has also decreased in FY 14. OAD has lost one support staff member, a 33% turnover. Compared to FY 13 (150%), 33% turnover is a significant improvement.

It's possible that our decreased turnover is due, in-part, to OAD's team being comprised of mostly new employees who have not yet burned out. However, I am cautiously optimistic that OAD will experience lasting turnover relief. I believe the attorney pay increases this Commission successfully advocated for are having a positive impact and have reduced FY 14's turnover. I remain mindful that both attorneys and support staff within OAD continue to labor under heavy workloads, which if not reduced, will contribute to unnecessary future turnover.

- b. **New Cases Opened.** Over the first-half of FY 14, OAD opened 123 new cases (74 first quarter and 49 second quarter). To compare, OAD had opened 122 cases at this same point last fiscal year.

The table below delineates cases opened by month, quarter, and year (comparing FY 14 with FY 13):

<b>Month</b>	<b>Cases Opened FY 14</b>	<b>Cases Opened FY 13</b>
July	33	14
August	20	29
September	21	16
<b>First Qtr. Total</b>	<b>74</b>	<b>59</b>
October	19	19
November	21	16
December	9	28
<b>Second Qtr. Total</b>	<b>49</b>	<b>63</b>
<b>First Half Total</b>	<b>123</b>	<b>122</b>
January	23	30
February	(12 as of 2/11/14)	11
March	TBD	19
<b>Third Qtr. Total</b>	<b>TBD</b>	<b>60</b>
April	TBD	48
May	TBD	25
June	TBD	7
<b>Fourth Qtr. Total</b>	<b>TBD</b>	<b>80</b>
<b>FY 2014 Total</b>	<b>(158 as of 2/11/14)</b>	

The table below delineates new cases by type for FY 14 (through January):

Month	CR	DN	DJ	DG/DI	PCR	Writ
July	25	2	1	1 (DG)	4	0
August	15	1	1	3 (DI)	0	0
September	10	8	1	2 (DI)	0	0
October	16	2	0	0	1	0
November	11	7	1	2 (DI)	0	0
December	6	1	1	0	0	1
January	16	6	0	1 (DI)	0	0
February						
March						
April						
May						
June						
	99	27	5	9	5	1

CR = Criminal  
 DN = Dependent and Neglect  
 DJ = Juvenile  
 DG = Guardianship  
 DI = Involuntary Commitment  
 PCR = Post-conviction Relief

- c. **Currently Open Appellate Cases.** OAD currently has approximately 347 open cases. The 347 includes cases being handled by in-house appellate defenders as well as contract counsel. Due to a lack of adequate support staff resources, some of these cases have been decided but have not yet been manually closed in our case management system.
- d. **Case Weights.** The PDC adopted an appellate case weight system (CWS) at the last PDC meeting in October, 2013. The CWS quantifies the workload of assistant appellate defenders, and its purpose is to ensure caseloads permit ethical and effective assistance at the appellate level. The CWS indicates each attorney should handle 22 case weight units.

At the time of my last report, two seasoned appellate defenders had case weights significantly above the 22 units. Therefore, I stopped assigning cases to one seasoned attorney and significantly slowed assignment to another. As a result, the case weights for those two attorneys have come down as they clear existing cases.

Currently, four assistant appellate defenders (44%) are assigned case units above the 22 units. The attorney with the highest case units has 32.25 units (nearly 1.5 times 22 units). Two attorneys are at the 22 units. Three attorneys are below the 22 units. The three attorneys with case weights below 22 units are new hires with tenure of six months or less in the office. Attorney units range from a low of 10.5 units to a high of 32.25 units. Attorney case weights will increase in the near future as I have approximately 25 cases to assign.

2. **Combined Efforts with Program 1 (Trial Division).** OPD clients are best served when the appellate program and the trial program share information, brainstorm, and otherwise operate in unison on some matters. In order to foster such an exchange, I have presented (at “Boot Camp” and annual conferences) “Preservation Nation,” a one-hour training on preserving the record for appeal at the trial level. The appellate office has been receiving more inquiries from trial attorneys seeking assistance in preserving the record for appeal. For instance, Koan Mercer and I recently assisted a region with a motion filed in a DN case. We also hope to get involved with a juvenile justice issue at the trial level in the future.

Whether due to trainings such as mine or to other trainings offered by the OPD training coordinator, the past year has produced more and better preserved issues, thereby leading to better results for the agency’s clients at the appellate level. For examples of the positive results obtained, please see Section 5 of this report.

The appellate office appreciates and welcomes any opportunity to work together with the trial division and with OPD’s training coordinator. We are thankful to trial attorneys who, despite crushing caseloads in some regions, have exerted additional effort to preserve issues for appeal.

3. **Management Activity.**

- a. **Hiring.** Since my last report, I have promoted an administrative assistant to the position of Office Manager, and I have hired two additional administrative assistants.

**Laura Schultz – Office Manager.** Laura was promoted to Office Manager in January when our then Office Manager resigned.

**Pamela Rossi – Administrative Assistant.** Pamela began as an administrative assistant at the appellate office on January 20, 2014. Pamela’s most recent position was as an administrative assistant at the Helena School District. Prior to that, Pamela worked as a legal secretary at private law practices here in Helena.

**Tatiana Grotbo – Administrative Assistant.** Tatiana began as an administrative assistant at the appellate office on February 18, 2014. Most recently, Tatiana worked at the Legislative Audit Division. Previous to that, she worked as a legal secretary and receptionist at a law firm in Spokane, WA.

OAD lacks sufficient support staff causing me (as well as Assistant Appellate Defenders) to perform secretarial tasks in addition to providing legal representation. For instance, at times I answer OAD's main telephone line, prepare routine filings for Assistant Appellate Defenders, and format, copy, and bind briefs written by other attorneys. Assistant Appellate Defenders have at times typed their own correspondence and routine filings. Some have formatted and bound their own briefs.

I have rarely, if ever, heard a complaint. However, having attorneys performing secretarial tasks is not efficient, wastes money, and takes away time lawyers should be using to represent clients. With the addition of our one modified support staff employee, I hope some of these inefficiencies will be reduced. Stated plainly – OAD needs even more administrative assistants to competently and efficiently fulfill its mission.

- b. **Creating Written Office Policies and Practices.** Although constant turnover and increased caseloads have distracted me from creating formal written policies and practices, it will get done. Initially, I recruited OAD's two Attorney IIIs to assist me in brainstorming a list of topics for which a written policy or practice could be used. I met with my Attorney IIIs February 21, 2014. Then, I intend to seek input from the rest of the office. Finally, drafting policies will begin.

#### 4. **Appellate Office Move.**

On Wednesday, February 5, 2014, OAD moved from its location at 139 North Last Chance Gulch in Helena, to 555 Fuller Street in Helena. Thanks to Harry and his central services crew, Barb Kain, Kyle Belcher, John Coulthard, and Jeb Myren for their help.

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#### 5. **Appellate Wins and Cases of Interest.**

- a. **Reversals Obtained by Supreme Court Decision.**

***State v. Macy, 2014 MT 34.* A defendant cannot be held liable in restitution for extradition costs incurred while returning them to Montana for prosecution.** Assistant Appellate Defender Eileen Larkin represented Mr. Macy. Mr. Macy had escaped from the pre-release. Macy was apprehended in Idaho and was extradited to Montana to face escape charges. After Macy pled guilty, the district court sentenced him and ordered he pay restitution for the cost of his extradition to Montana. Citing *Brothers*, The Supreme Court reversed, holding

the plain language of 46-18-243(2)(a)(iii) does not authorize restitution to the State for Macy's extradition.

***State v. Burwell, 2013 MT 332. Lay witness's testimony was insufficient to prove that what the defendant gave the witness was marijuana.*** Assistant Appellate Defender Jacob Johnson represented Mr. Burwell. The Court held that testimony from a witness who claimed to have provided babysitting services for Burwell in exchange for marijuana, which she smoked, was insufficient evidence to support conviction. No testing had been completed because the witness had smoked it all. Further, the witness did not describe the effects of having smoked the marijuana, and no foundation existed supporting her experience in identifying marijuana. Justice Rice dissented.

***In re B.W., 2014 MT 27. "Common Scheme" does not itself make one liable in restitution for the acts of others.*** Assistant Appellate Defender Kristen Larson represented B.W. B.W., a youth, pled guilty to criminal mischief by common scheme. The State had alleged a number of kids vandalized property for a period of 10 days. B.W. entered an admission, but maintained his involvement was limited to 2 days. Therefore B.W. argued, he could not be held liable in restitution for the damage done by others. The district court rejected B.W.'s argument and ordered him to pay full restitution (\$78,702) jointly with co-defendants. On appeal B.W. argued that "common scheme" merely allows for aggregation of damages for the purposes of meeting the \$1,500 damage amount for a felony criminal mischief and that "common scheme" does not create liability for the acts of others. The Court agreed and reversed its prior, inconsistent holding in *K.E.G.*, 2013 MT 82. Liability for the acts of others requires the State to establish either accountability under 45-2-301 and -302 or to charge and prove conspiracy. (Note the Court has held that accountability does not need to be separately charged as it is not a separate offense.) As B.W. did not admit and the State did not establish the elements of accountability or conspiracy, B.W. is not liable for the damage caused by the other kids on other nights.

***State v. Tellegen, 2013 MT 337. A defendant cannot be convicted and sentenced for both burglary and theft where the burglary charge explicitly includes the theft charge as an element.*** Koan Mercer represented Mr. Tellegen. The State charged and convicted Tellegen with theft and burglary. The burglary charge explicitly included commission of the theft as an element. Tellegen's trial counsel did not object to Tellegen's conviction and sentence on both counts. The Court held that counsel's failure to object to sentencing on both counts amounted to ineffective assistance of counsel and vacated the concurrent theft conviction.

***In re B.J.T.H. & B.H.T.H., 2013 MT 366. Relinquishment without the required counseling is void.*** OAD contract counsel, Jeanne Walker, represented the mother. Mother argued that her relinquishment (and resulting termination) was invalid due to the lack of relinquishment counseling. Given the express

statement at 42-2-409(2) that a relinquishment prior to the required counseling is “void,” the Court held that Mother had not waived the issue by not objecting below. However, because there is a factual dispute between the district court’s order and Mother’s appellate assertions as to whether Mother in fact received the required three hours of counseling (or whether good cause existed to waive the counseling), the Court remanded to the district court to make a determination.

**b. Reversals and/or Remands Obtained by Attorney General Concession.**

***State v. Zwart, DA 13-0042. Obstructing a peace officer requires proof of actually having obstructed, impaired, or hindered the enforcement of the criminal law.*** Chief Appellate Defender Wade Zolynski represented Mr. Zwart. Zwart was convicted of obstructing a peace officer based upon his having provided the officer arresting him on DUI with a false name. On appeal, Zwart argued there was insufficient evidence to convict him of obstructing a peace officer because the particular officer involved knew both Zwart and the actual owner of the false name. Therefore, as the officer testified, his investigation was not obstructed in any way. The State conceded the issue, and the Court remanded for dismissal of the obstruction count.

***State v. Harlow, DA 13-0478 and DA 13-0479. Remand for oral pronouncement of revocation sentence.*** Assistant Appellate Defender Greg Hood represented Mr. Harlow. The district court held a hearing and found Harlow in violation of the conditions of his suspended sentences. The hearing then ended, and the district court subsequently issued a written sentencing order. Pursuant to a joint stipulation, the Court vacated the written sentencing order and remanded for the district court to orally pronounce the revocation sentences. While agreeing to this particular remand, the State maintained the possibility that an oral pronouncement might not always be required for imposition of a revocation sentence.

**c. Cases of Interest.**

***State v. Demontiney, DA 12-0453.*** Oral argument held January 29, 2014. Assistant Appellate Defender Eileen Larkin represented Ms. Demontiney. Wal Mart employees detained Demontiney on suspicion of shoplifting. Police arrived, arrested Demontiney, and transported her to jail without searching her purse incident to arrest. At the jail, officers conducted an “inventory search” of Demontiney’s purse as well as closed containers within it without obtaining a search warrant. Inside a plastic opaque sandwich container, officers found drugs and money. Demontiney challenged the search at the district court. On appeal, Eileen argued that given Montana’s heightened expectation of privacy, it is unreasonable to search her purse and the closed containers within it without a reason to believe the contents posed a danger. The justices were quite active during oral argument asking a lot of questions. We await the Court’s decision.