

# OFFICE OF THE APPELLATE DEFENDER

## REPORT TO THE MONTANA PUBLIC DEFENDER COMMISSION

**April 1 to June 1, 2010**

### UPDATES:

Arrivals: Garrett Norcott has joined the appellate team. He is originally from Montana but was practicing in Boston. He wanted to return to Montana, specifically, to do appellate work. Jacob Johnson and A.J. Miller have also joined the appellate team as volunteer interns. Jacob is working in Helena, while A.J. is working in Missoula. They all are welcome additions.

Caseloads: As the attached exhibit shows, we took in 15 cases in May. Hence, our case base is still growing. Of those 15 cases, three were assigned to us from the Montana Supreme Court. That practice is increasing in frequency and is a practice I have had discussions with others about. With the arrival of Garrett, Jacob, and A.J., I anticipate the appellate office will not have to contract out as much work in order to manage the increasing caseload. In addition, I have conducted interviews of several candidates, and I anticipate hiring two more appellate attorneys. These hirings will greatly assist with management of the increasing caseload, which in turn, will decrease the need to rely so heavily on contract attorneys.

Conflict Issue: We are still awaiting a decision in both of the cases where the per se conflict issue was raised (Sellers and St. Dennis). The briefing in St. Dennis is complete and it is set for oral argument on July 28, 2010, in the Courtroom of the Montana Supreme Court. Colin Stephens represents St. Dennis and Mark Mattioli and Sheri Sprigg represent the Attorney General's Office.

The argument is limited to the issue of whether OPD's representation of St. Dennis and co-defendant Dustin Strahan violated St. Dennis's rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article II, Section 24 of the Montana Constitution; and whether the district court erred in not granting St. Dennis a new trial based on *Brady* violations. Mr. Stephens will have 30 minutes for argument, while the State has 20 minutes.

Cost Saving Measures: Sarah Braden and I met with Chief Justice McGrath regarding proposed cost saving measures. The meeting went really well. Chief Justice McGrath requested that our cost saving measures be formalized in a letter. I will update the Commission once I have more information.

Commission Request:

At the prior PDC meeting, held April 23, 2010, in Billings, MT, Chairman Sherwood requested the ADO liaison, Lisa Korchinski, to gather information reflecting the number of appeals by the ADO raising plain error (issues not preserved below). Koan Mercer, Assistant Appellate Defender, was able to compile the following numbers to provide an approximate answer:

Of the 374 appeals briefed by ADO FTE attorneys from July 2006 through the end of May 2010,

|     |                |   |
|-----|----------------|---|
| 41  | (11% of total) | included an IAC claim                     |
| 46  | (12% of total) | included a plain error claim              |
| 37  | (10% of total) | included a <i>Lenihan</i> exception claim |
| 100 | (27% of total) | included one or more of the three claims  |

Of the 121 appeals briefed by ADO FTE attorneys from January 2009 through May 2010,

|    |       |  |
|----|-------|--|
| 18 | (15%) | included an IAC                          |
| 19 | (16%) | included a plain error                   |
| 10 | (8%)  | included a <i>Lenihan</i>                |
| 39 | (32%) | included one or more of the three claims |

Again, this account is only a rough approximation.

This approximation under reports the number of preservation failures in that it does not count cases where appellate counsel followed a theory that the issue was preserved only to be told later by the Court that it was not; and, in that it does not count failures to make objections to probation conditions that lack a factual nexus since those cannot be raised on appeal.

On the other hand, the numbers provided are over-inclusive in that not all IAC claims necessarily involve the failure to raise an issue; and, in that appellate counsel's assessment that the issue missed below was meritorious may be incorrect.

Also, these numbers do not include appeals contracted out by ADO.

With respect to outcomes and the Court's decisions in these cases, any numbers are going to be nearly meaningless because the Court's affirming of a conviction does not necessarily say anything about whether trial counsel failed to preserve an issue. For example, in denying an IAC claim, the Court often just skips straight to the prejudice prong and says that even if counsel made a mistake, it did not affect the trial outcome.

With that caveat, of the 100 cases involving either IAC, plain error, or *Lenihan*,

34 of the cases resulted in some sort of win

11 are still pending

55 were affirmed on all grounds.