



OFFICE OF THE STATE PUBLIC DEFENDER STATE OF MONTANA

Steve Bullock
Governor

Wade Zolynski
Chief Appellate Defender

Date: July 15, 2013
To: Montana Public Defender Commission
From: Wade Zolynski, Chief Appellate Defender
RE: Report to the Commission

The Commission appointed me Chief Appellate Defender May 16, 2012. Following the 2013 legislative session, the Office of the Appellate Defender (OAD) consists of a Chief Appellate Defender, 9 Assistant Appellate Defenders (1 added following the 2013 legislative session) and 3 support staff (one added after the 2013 legislature session, the position is currently vacant). We also contract for appellate services with private counsel. The following is my fourth report to the Commission:

1. **The State of the Office of the Appellate Defender.** OAD experienced a difficult fiscal year for these (and other) reasons:
 - a. **Turnover Remains Crippling.** This past year (FY 2013), we experienced 33% attorney turnover and 150% support staff turnover. The office employs two administrative staff to support the entire statewide office. OAD's long-time office manager left in August of 2012 (three months into my tenure as chief). Her replacement left in January, five months later. Then, OAD's legal secretary left in June. OAD's support staff held nearly all of OAD's institutional knowledge – how cases were opened and closed, how calendars were kept, how files were archived, how briefs were formatted, etc. None of this knowledge had been reduced to writing. As a result, I and the current office manager (who started in April) have worked under considerable pressure – teaching ourselves and each other as we go, learning from our repeated mistakes, and working significantly more than 40 hour work weeks. Additionally, I delegated some support staff tasks to assistant appellate defenders. This temporary operational disruption is not efficient, and therefore, not cost effective.

HOW HAVE I ATTEMPTED TO CURB TURNOVER? Having managed a significant number of attorneys and support staff previous to my appointment as Chief Appellate Defender, I recognize that many variables impact turnover. While most of our departing employees cite low pay and excessive workload as their number one reason for departing, I believe office morale can be a significant factor, even when it is not indicated in the exit interview. Sharing a common purpose and passion with one's colleagues contributes to morale, which in-turn,

impacts one's willingness to remain employed with a particular organization despite its challenges. Therefore, I have taken four steps to boost office morale. First, I involve my staff. I hold weekly staff meetings. I have asked employees what they think has caused turnover to be so high and what they would do if they were in the driver's seat. I use an interview committee to involve staff in the hiring process. I created a Writ Committee (comprised of the office's most experienced attorneys) to involve staff in analyzing whether a request for a writ from the trial side is meritorious. Second, I communicate openly, honestly, and frequently with staff. I inform staff what I as "management" am up to and how it will impact them. Third, the weekly staff meeting includes a "jam session" where we talk about what excites us -- public defender work. We discuss current and future case strategy, how to present arguments artfully and persuasively, and how we can shape legal trends. These first three steps focus on staff involvement in order to encourage participation in and ownership of the agency's future. My fourth step aimed at reducing turnover in our support staff was to reclassify two support staff positions (discussed below in detail).

- b. **Caseloads Have Increased by 20%.** During the same period that OAD experienced crippling turnover, it experienced a significant case increase. OAD estimates it will experience a 20% increase in new cases in FY 2013 (270 so far compared to 225 in FY 2012). Official numbers will be available once the agency closes its books and records for FY 2013.

Case counts for the 2nd and 3rd quarters of FY 2013 are below:

Month	No. of Cases Opened	Cases by Type
January	30	
February	11	
March	19	10 CR, 9 DN
April	48	29 DC, 15 DN, 3 DI, 1 DJ
May	25	17 DC, 7 DN, 1 DJ
June	7	6 DC, 1 DI
3 rd and 4 th quarter total	140	
FY 2013 total	270	

CR = Criminal
 DN = Dependent and Neglect
 DJ = Juvenile
 DI = Involuntary Commitment

- c. **OAD's Pay Increases Delayed.** Pay is lower here than in any other state agency. The 2013 legislature granted attorney pay ladder increases. OAD is not unionized, and therefore, attorney pay increases were technically possible for OAD on July 1, 2013. Due to a number of factors OAD delayed implementation of the pay increases. However, I cannot in good conscience delay OAD's pay increases beyond September 1, 2013. A realistic fear harbors in me that my

younger lawyers (who are buying houses, trying to buy houses, or in need of a car that is not in disrepair) will find work at another state agency. They are already good lawyers and are exhibiting an incredible amount of promise. At this moment there are two attorney positions open with the state right here in Helena. One at the AG's Appellate Bureau.

To be sure, OAD experienced a difficult year. However, there are reasons to feel energized entering FY 2014. Pay will increase for OAD attorneys. Increased pay should decrease turnover. The legislature added an additional Assistant Appellate Defender to help work on our increased cases. Decreased workload should also decrease turnover. We will have one additional support staff member, which is absolutely key as support staff are terribly overworked at OAD. Finally, as discussed above, I launched a campaign to increase morale by encouraging staff participation and ownership in OAD's future.

2. **Agency Management Activity.** Since my last report as Chief Appellate Defender, I have expanded our presence in Missoula, reclassified two support staff positions, hired four new employees, instituted a case weighting system for preliminary use and commission approval, participated in the 2013 legislative session, and helped organize a training focused on appellate advocacy.
 - a. **Expanded Presence in Missoula.** I recently expanded OAD's presence in Missoula with the hiring of an Assistant Appellate Defender at that location. We now house two attorneys in Missoula. Missoula is a popular place to live. With the staggering turnover OAD has experienced, I hope this move helps us recruit and retain talent.
 - b. **Reclassification of Support Staff Positions.** Reclassification of some support staff positions occurred in response to the 150% support staff turnover OAD experienced in FY 2013. I reclassified our Legal Secretary/Office Manager position to be an Administrative Assistant/Office Manager position. I also reclassified the Legal Secretary position. It is now an Administrative Assistant position. The reclassification better represents the work performed by support staff at OAD.
 - c. **New Hires.** Since the last commission meeting I have hired four employees:
 - i. Kelly Flaherty-Settle, Administrative Assistant/Office Manager in Helena. Kelly started in April. Previous to joining OAD, Kelly was an administrative law judge with the Tax Appeals Board. She joined us with management experience as well. Kelly received her B.A. from the University of Montana in 1980.
 - ii. Laura Schultz, Administrative Assistant in Helena. Laura started July 10. She comes to the appellate office from Butte City Court (assistant clerk of court) and was with the trial side of OPD (Butte) previous to Butte City

Court. In addition to her on-the-job experience, Laura holds a paralegal certificate.

- iii. David Dennis, Assistant Appellate Defender in Helena. David started July 8. He graduated from the University of Montana School of Law in 1992 with high honors. Most recently David lawyered at the Department of Environmental Quality in Helena. Additionally, David previously prosecuted as an Assistant United States Attorney in Great Falls, handling both trial and appellate level matters.
- iv. Gregory Hood, Assistant Appellate Defender in Missoula. Greg started July 8. He graduated from the University of Montana School of Law in 2005. Following graduation he clerked for a district court judge in Kalispell. Greg joined OPD's trial division in January 2007 where he remained until joining OAD. His experience includes both trial and appellate level representation.

OAD welcomes our new team members.

- d. **Appellate Case Weighting System.** In September 2012 I began researching appellate case weighting systems (ACWS). I studied National Legal Aid and Defender Standards, ABA Standards and case weighting systems in Idaho, Kentucky, Washington, Tennessee, Texas and Nebraska. From these models, I created an ACWS to collect OAD's workload data.

The ACWS (see attached worksheet) assigns work units based on case type (death or non-death), the number of pages of record involved, the type of brief filed (opening, reply, *Anders*), and a few other factors. Under the ACWS, an assistant appellate defender should complete no more than 22 units per year.

As a preliminary test of the ACWS's feasibility and functionality, I tracked cases assigned to assistant appellate defenders beginning July 1, 2012. As a result I have current case weights for each assistant appellate defender for FY 2013.

- e. **The Legislative Session.** I participated in the 2013 legislative session – it was my first. While the experience was a mixed bag of thrilling, stunning, and fascinating all at the same time, I am glad it's over. Without the commission's help, Harry's help, Bill's help, help from the Governor's Budget Office and my staff's help I would have lost my mind. Enough said.
- f. **Appellate Advocacy Training.** OAD has received specialized appellate training only once since OPD's creation. A lack of training impacts our ability to provide effective assistance of counsel and lowers morale. As a result, I contacted our training coordinator, Eric Olson, to plan and execute an appellate training. Eric did just that – OAD participated in a two day appellate advocacy seminar focused on appellate writing July 8 and 9. Sarah Thomas, the Appellate Defender from

Idaho's State Appellate Public Defender's Office, and a member of her staff participated as faculty. Sarah is faculty at NLADA's National Appellate Defender Training Program.

3. **The Chief Appellate Defender's Workload.** The Chief Appellate Defender's workload is much greater than one would expect at first blush. I do not have the equivalent of a Regional Deputy. I have the duties of Chief Appellate Defender -- budgeting, central office/agency meetings, legislative lobbying, shaping policy and procedure, reporting to the commission, etc. However, I also have duties more akin to a Regional Deputy (an individual caseload, pre-briefing litigation and case management, recruiting staff, hiring staff, terminating staff, one-on-one attorney and staff mentoring/management, quality control of office work product, etc.) The workload is too much for one person to sustain long-term. In order to achieve a reasonable workload I would suggest the following -- significantly reducing (one case at a time) or entirely eliminating the Chief Appellate Defender's caseload and creating a high level attorney position or positions that share administrative duties with the Chief Appellate Defender. These two steps would depressurize the Chief's office and spread institutional knowledge thereby promoting OAD's long-term sustainability even when the office experiences excessive turnover.

My current caseload includes three appellate cases (one large case and two smaller cases) that are currently in various stages of briefing or awaiting Supreme Court decision. I recently closed two large trial level cases I had remained lead counsel on after transferring from the trial division of OPD to OAD (one Deliberate Homicide and one Attempted Deliberate Homicide.)

4. **Important Pending Cases and Positive Outcomes.**

- a. Important Pending Cases.

State v. Dugan, Petition for Writ of Certiorari to the United States Supreme Court. Assistant Appellate Defender Kristen Larson originally orally argued *Dugan* before the Montana Supreme Court winning reversal. *State v. Dugan*, 2013 MT 38. The Montana Supreme Court, despite declaring a portion of Montana's privacy in communications statute unconstitutional (Mont. Code Ann. § 45-8-203), permitted the charge against Dugan to stand. Following the decision, Kristen reached out to UCLA Law School's Supreme Court Clinic requesting their input into a possible writ of certiorari. I reached out to the Executive Director of the Louisville Metro Public Defender Office in Louisville, KY (my former boss) on that same topic. Both indicated a writ of certiorari was advisable. Therefore, on June 27, 2013, Munger, Tolles & Olson, LLP in Los Angeles, CA, the UCLA Law School's Supreme Court Clinic, and the Office of the Appellate Defender filed a writ of certiorari with the United States Supreme Court. We will keep you updated on whether the Court grants cert. Huge kudos to Kristen for largely winning the case before the Montana Supreme Court and for boldly knocking on the United States Supreme Court's door.

State v. Aker (DA 11-0696). Briefing on *Aker* wrapped up in January. I handled this case on appeal. The Court classified the matter en banc (to be heard by the full court). Although the briefing is lengthy covering many issues, most troubling was the prosecution's assertion that the social status of Aker and his witnesses made them less credible. The prosecution argued the following in closing:

And keep in mind that idea, cuz we're all from different parts of society, from different social stratus [sic]. Think about those people. I don't want to disparage them anymore, but these are people who couldn't be asked to take the gum out their mouth when they were testifying, to change into jeans in the courtroom, to wear something other than sweats and sandals. In that group of people where you're unemployed and collecting unemployment or worker's comp, and you play video games all day . . . and that's why we can't let it go, and that's why we have to tell you that they're lying.

It is highly improper for an attorney in final argument to characterize the testimony of a witness as lies or the party or a witness himself as a liar, *State v. Musgrove*, 178 Mont. 162, 172, 585 P.2d 1246, 1253 (1978); *State v. Rodgers*, 257 Mont. 413, 417, 849 P.2d 1028, 1031 (1993); *State v. Arlington*, 265 Mont. 127, 157, 875 P.2d 307, 325 (1994), let alone comment on credibility in light of social status. We await the Court's decision.

b. Positive Outcomes.

State v. Dugan, 2013 MT 38. Decided by published Court opinion, February 19, 2013, opinion released March 29, 2013. Assistant Appellate Defender Kristen Larson handled this matter on appeal. The Montana Supreme Court held the district court had incorrectly applied the fighting words doctrine when denying Dugan's motion to dismiss. Dugan had spoken curse words as he hung-up the phone at the end of a frustrating conversation with a Bozeman victim services employee. Notably, the Court also determined that the prima facie evidence provision of the privacy in communications statute (Mont. Code Ann. § 45-8-213) was facially overbroad and struck that portion of the statute as unconstitutional.

J.J. v. 20th Judicial District, OP 13-0248. Assistant Appellate Defender Koan Mercer handled this writ of supervisory control. The district court transferred jurisdiction over a DN case to an out-of-state tribe despite biological father's objection. Koan argued that ICWA prohibited such a transfer of jurisdiction. The Montana Supreme Court agreed and reversed the district court.

State v. Yarlott, DA 12-0014. Decided by order on May 21, 2013. Assistant Appellate Defender Eileen Larkin argued this matter on appeal. *Yarlott* contended that the district court's order requiring him to pay costs of counsel

(pursuant to 46-18-113) and costs of prosecution (pursuant to 46-18-232) was unconstitutional. Yarlott also argued the district court failed to investigate his ability to pay (as required by statute) before ordering him to pay costs. The Court dismissed Yarlott's constitutional arguments without prejudice because trial counsel had failed to preserve the issue for appeal. However, the Court agreed that the trial judge had failed to properly investigate Yarlott's ability to pay, and as a result, remanded the matter to district court to determine his ability to pay.

State v. Lundberg, DA 12-0589, not final. In accordance with *Yarlott* and *State v. Moore*, 2012 MT 270N, the Attorney General's office conceded Assistant Appellate Defender Debbie Smith's argument that the district court failed to properly investigate Lundberg's ability to pay fines, fees, and costs. Other contested issues remain, and therefore, this matter is not final.

In re S.C., 2013 MT 140. Decided May 28, 2013. The Montana Supreme Court agreed with Assistant Appellate Defender Kristen Larson that a petition to extend an involuntary commitment cannot be filed after the original petition for commitment has expired. Therefore, the Court vacated a third extension of an involuntary commitment (conditional release) because the *first* extension had been requested five days late.

Case Weighting Worksheet – Direct Appeal

Client _____ DA _____ OPD _____

Attorney Assigned _____ Date _____

Type of Case (CR, DN, DI, DJ) _____

1. The record

DC Docs _____ + Transcripts _____ = _____ pages

- a. 501-1000 (+1) +__
- b. 1001-1500 (+2) +__
- c. 1501-2000 (+3) +__
- d. 2001-2500 (+4) +__
- e. 2501-3000 (+5) +__
- f. 3001-3500 (+6) +__
- g. 3501-4000 (+7) +__
- h. 4001-4500 (+8) +__
- i. 4501 – 5000 (+9) +__

_____ Initial case weight based on record

2. Presumed points for direct appeal briefing

- a. Open or *Anders*
 - i. Non death (+1) +__
 - ii. Death (+10) +__
- b. Reply
 - i. Non death (+.25) +__
 - ii. Death (+2.5) +__

_____ Added points for presumed briefing

3. Reduction in points when presumed briefing does not occur

- a. Voluntary Dismissal
 - i. Non death (-.75) -__
 - ii. Death (-7.5) -__
- b. No Reply
 - i. Non death (-.25) -__
 - ii. Death (-2.5) -__

_____ Case weight reduction

4. Case specific additions

- a. Complex Legal issue (+.25) +__
- b. Filing of additional motions (+.25) +__
- c. Oral argument (+.5) +__

_____ Added case weights

_____ Total case weight at closing

Case Weighting Worksheet – Writ, Habeas, Pet. Cert

Client _____ DA _____ OPD _____

Attorney Assigned _____ Date _____

Type of Case (CR, DN, DI, DJ) _____

1. The record. Only add units if case is new assignment for attorney. For instance, if the same attorney doing the petition for cert handled the direct appeal no additional points based on the record to that case's weight.

DC Docs _____ + Transcripts _____ = _____ pages

- a. 501-1000 (+1) + ____
- b. 1001-1500 (+2) + ____
- c. 1501-2000 (+3) + ____
- d. 2001-2500 (+4) + ____
- e. 2501-3000 (+5) + ____
- f. 3001-3500 (+6) + ____
- g. 3501-4000 (+7) + ____
- h. 4001-4500 (+8) + ____
- i. 4501 – 5000 (+9) + ____

_____ Initial case weight based on record

2. Points for non-direct appeal briefing

- a. Writ (+.5) + ____
- b. Habeas (+.5) + ____
- c. Petition for Cert to US Supreme (+.5) + ____
- d. Other (+.5) + ____

_____ Non-direct appeal case weight

3. Case specific work unit adjustment

- a. Complex Legal issue (+.25) + ____
- b. Filing of additional motions(+.25) + ____
- c. Oral argument (+.5) + ____

_____ Added case weights

_____ Total case weight at closing