



OFFICE OF THE APPELLATE DEFENDER STATE OF MONTANA

Steve Bullock
Governor

Wade Zolynski
Chief Appellate Defender

Date: August 1, 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 nine attorneys, three support staff, and the Chief Appellate Defender. 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 seventh report to the Commission:

1. **The State of the Office of the Appellate Defender.** OAD lacks staff and other funding necessary to effectively manage its workload. The sections below outline the problem – consistently increasing numbers of cases and excessive turn-over have combined to greatly increase the individual workload of OAD’s attorneys and staff. As a result, OAD has filed far more extensions on cases than before causing the appellate process to be unacceptably slow. The lag in appellate cases negatively impacts criminal appellants, victims, parents, and children. Subsections (a) through (h) (below) detail the problem and conclude with a plan for additional funding.

- a. **New Cases Increased in FY 14 and Have Nearly Doubled Over the Past Three Years.** We opened 275 new cases, compared to 262 new cases last fiscal year. *See* Appx. A. The FY 14 case increase is 5%. DN cases were up 18%. Over the past three years OAD has experienced a 42% case increase. Since the creation of the statewide system, OAD has experienced a 48.6% increase in cases. *See* Appx. B.

OAD’s caseload is largely inherited from others in the justice system, and we lack any real ability to avoid or mitigate the significant increases. Ultimately OPD’s cases originate each time a prosecutor’s office files a case against an indigent person. When a litigant expresses a desire to appeal OAD cannot refuse to file the notice of appeal. *See Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (indicating the defendant has “ultimate authority” to determine “whether to plead guilty, waive a jury trial, testify on his own behalf, or *take an appeal*”) (emphasis added).

OAD does take some steps to avoid working on cases we should not. We screen for indigence per Montana law, and we have filed motions to rescind appointments in FY 14. OAD also files *Anders* briefs and motions to withdraw

when cases are wholly without merit. Even the *Anders* process, however, requires significant attorney time as the full record must be reviewed and a written memorandum must be filed with the Supreme Court. Finally, where appropriate, OAD attorneys advise appellants to voluntarily withdraw appeals. The above mentioned mechanisms cannot be used to improperly dismiss or discard cases.

OPD’s trial division estimates it will open 31,900 new cases in FY 14. OAD received 275 new cases over that period. Thus, OAD’s rate of appeal is .86%.

On July 17, 2014, OAD had 301 open cases. OAD closed 281 cases in FY 14.

- b. **Turn-over is Excessively High.** OAD lost two attorneys in FY 14 for a 20% turnover rate. OAD experienced 44% turn-over in both FY 12 and FY 13. Thus, OAD has averaged 36% attorney turn-over per year the past three fiscal years. OAD experienced 33% turnover in support staff in FY 14. With 0% turn-over in FY 12 and 150% turn-over in FY 13, OAD has averaged 61% support staff turn-over per year since FY 12. We know, anecdotally, that OAD’s turn-over has always been high, but previous to FY 12 statistical data was not gathered. OAD’s turn-over trend continues just one month into FY 15. We have already lost one attorney and one support staff member. I have hired 11 (soon to be 13) employees when the office only employs 13.

Staff Type	3 Year Avg. Turnover
Attorney	36%
Support Staff	61%

Without question, OAD’s turnover is excessive, and it has increased workload. When an attorney departs an entire caseload must be given to the remaining attorneys. Often times, the hours the departing attorney spent on the case are lost and the newly assigned attorney must begin anew. As discussed below, OAD turn-over is linked to excessive workload and inadequate pay.

- c. **OAD’s Workload is Too High.** The increased cases, for which OAD has no real control, and the excessive turn-over have greatly increased individual workloads. OAD tracks attorney workload using its case weighting system (hereafter, “CWS”) which the PDC adopted in October of 2013. One of the purposes of the CWS is to ensure ethical, timely, and effective assistance of counsel at the appellate level. Per the CWS, each assistant appellate defender should handle 22 case weight units. Historically, an average appeal has been 1.6 units.

All assistant appellate defenders except two – one who is currently on medical leave and one who just began work – have case weights in excess of the 22 unit level. The highest level is 41.75; nearly twice what it should be. The average units assigned to those with excessive units is 29.8. Thus, on average each attorney is handling nearly five cases more than they should which necessitates the filing of additional extensions thereby delaying Montana’s appellate process.

Increased workload and a lack of competitive pay cause burnout in OAD staff and increases turn-over. Resigning staff often cite workload and pay as the reason for resignation. For instance, a recently departed attorney obtained employment with another state agency in Helena and received a \$22,000 per year increase in salary. The attorney also cited the increased workload as a reason for leaving.

- d. **OAD Staff Have Responded to Workload Increases by Increasing Hours Worked.** OAD Staff have worked hard to fulfill OAD’s statutory and constitutional obligations. In FY 14 OAD worked 1,604.50 hours of comp time (hours above 40 per week). Some staff have been unable use their earned comp time because workload is too high.

Employee Type	Comp Hours Accrued
Non-exempt (Support Staff)	303
Exempt (Attorneys)	1,294.50
Overtime Paid (Support Staff)	7
Total	1,604.50

I commend OAD staff for their dedication. However, the pressure of long hours contributes to burnout, which of course leads to turnover. The individual lives of OAD staff are at least as important as those we represent. Therefore, this trend of excessive work cannot continue.

- e. **Attorneys Seek More Extensions Than In Past Years, and More Extensions Than They Are Professionally Comfortable Requesting.** Despite OAD’s best efforts, increased workload over which OAD has no control has caused attorneys to seek more extensions than before. Historical data collected from the Montana Supreme Court shows OAD used to request two or three extensions before filing an opening brief. Today, attorneys at times request six, seven, and even eight extensions. Indeed, attorneys often have extended cases several times before starting substantive work on the matter. Overall the Montana Supreme Court and the Attorney General’s Office have been incredibly understanding of OAD’s plight; however, we have received orders informing us that “no further extensions will be granted.” *See Appx. C.* In one case an extension request was denied. *See Appx. D.* The Court’s orders spark anxiety in some OAD attorneys, but the Court is justified -- no case should require six to eight extensions before an opening brief is filed.
- f. **OAD’s Extensions Have Slowed Montana’s Appellate Process.** The Montana Supreme Court tracks and publicly reports “case processing measures” indicating the amount of time between the notice of appeal and the completion of briefing. This table illustrates the rate Montana’s appellate process has slowed since 2012, when the largest case increases began:

Case Type	Days From Notice of Appeal to Completion of Briefs in 2012	Days From Notice of Appeal to Completion of Briefs in 2014
Criminal	217	360 (65% Incr.)
DN	122	227 (86% Incr.)

While not all the lag can be attributed to OAD (some is caused by extensions obtained by court reporters and the Attorney General’s Office), much of it can. While OAD attorneys struggle under their excessive workload by filing extensions, criminal appellants (both adult and juvenile) sit incarcerated, sometimes wrongly, without legal advice. Moreover, victims of crime await some measure of closure, children and their parents remain separated, and abused children remain in the foster care system rather than being adopted into permanent homes.

- g. **Management’s Response to OAD’s Case Increase.** Although OAD’s case increases are largely outside my control, I have taken action with hopes of making OAD more efficient. First, I personally contact appellants to determine whether we should file an appeal at all. Generally, I take this step when the OPD trial attorney did not indicate what colorable claims, if any, exist for appeal. This scenario leads me to wonder if additional client counseling would be fruitful. During my conversation with the to-be appellant I offer counsel concerning the purpose of a direct appeal. When the to-be appellant’s objectives cannot be met by filing a direct appeal, I provide information regarding the route that should be taken (for instance, sentence review). However, should the to-be appellant persist in wishing to file an appeal, I cannot override that decision. *See Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (indicating the defendant has “ultimate authority” to determine “whether to plead guilty, waive a jury trial, testify on his own behalf, or *take an appeal*”) (emphasis added). I have occasionally averted the filing of an unnecessary notice of appeal. However, OAD only appeals .86% of OPD’s cases, and therefore, I do not believe we are filing a statistically significant number of unnecessary appeals.

Second, I have filed motions to rescind OAD’s appointment. Statutorily, OAD’s clients must meet the definition of indigence. *See* Mont. Code Ann. § 47-1-104; *See also* Mont. Code Ann. 47-1-111. OAD has, throughout its existence, filed motions to rescind our appointment when the individual is not indigent. I filed several such motions this fiscal year. I do not believe OAD represents a significant number of appellants who do not qualify for our services.

Next, attracting and retaining the right employees is central to OAD’s efficient operation. Indigent defense at the appellate level is not for everyone. Indeed many individuals cannot produce at the level necessary, and OAD does not have the resources available to employ unproductive employees. I have, when

necessary, instituted plans to guide employees to be more efficient and effective. These efforts to manage OAD's resources will continue in earnest.

- h. **OAD's Multi-Dimensional Problem, Requires a Multi-Dimensional Solution.** Efficient management alone will not solve OAD's predicament. The solution must be multi-dimensional as it does not rely solely on correcting one facet of the problem. Nor, is the most important facet even readily apparent. First, OAD should continue the management metrics it has employed. But, we must search for new management solutions. This facet presents difficulty because I, like the attorneys on the ground, am in triage mode far too often. I currently am responsible for 21 case weight units (essentially a full caseload) while simultaneously managing operations.

Where appropriate, I intend to engage other interested parties – the legislature, the Supreme Court, and the Governor's Office – through the use of a business plan. The business plan would (1) outline the agency's commitment to efficient and effective management, (2) focus on one or two concrete goals to be achieved, and (3) set the course necessary to achieve the goal(s). For instance, decreasing the number of extensions sought thereby reducing the lag in Montana's appellate process is a concrete goal worthy of a business plan. OAD's CWS should provide the data necessary to set the goal and chart the course. With added funding we would likely achieve success.

2. **Hiring and Departing.** Since my last report, I have hired one attorney, and I am currently recruiting another.

Jennifer Hurley. Jen returned to OAD in July. Her experience as a former trial and appellate law clerk in the federal system and as former OAD assistant appellate defender made the choice to welcome her back an easy one. We are pleased to have her.

Recruiting -- Assistant Appellate Defender. An assistant appellate defender recently resigned, predominately due to inadequate pay. I am currently in the recruiting phase.

3. **Creating Written Standards, Policies, and Procedures.** Progress in this area has been slow. Massive caseloads and other daily matters have, out of necessity, been given higher priority. I met with senior OAD lawyers in February where we strategized. I have also contacted other appellate defender offices around the country and made requests for their standards, policies, and procedures. While the process has been a slow one, its significance and importance is not lost on me.

4. **Appellate Wins and Cases of Interest.**

a. Wins and Concessions.

State v. Plouffe, 2014 MT 183. Assistant appellate defender Eileen Larkin. Treatment Court drug test results are confidential and cannot be disclosed to anyone outside Treatment Team; Defendant placed in classic penalty situation when probation officer Treatment Team Member disclosed test results to other officers and used positive UA test to question him and investigate new drug crime; Montana Treatment Courts to follow guidelines in “Key Components.” Judgment reversed and vacated.

State v. Broadwater, 2014 MT 185. Former assistant appellate defender Jonathan King. A crowded docket alone is not “good cause” to justify violation of the misdemeanor speedy trial statute. Judgment reversed and vacated.

State v. Simpson, 2014 MT 175. Former assistant appellate defender Nicholas Domitrovich. Restitution in theft by common scheme case reversed in part and remanded.

State v. Oldhorn, 2014 MT 161. Assistant appellate defender Lisa Korchinski. Statement/Miranda involuntary due to confusing immunity promise and deceptive police tactics.

State v. Shegrud, 2014 MT 63. Contract appellate counsel Jeanne Walker. Negligent endangerment instruction was required as lesser included offense of criminal endangerment. Reversed for new trial.

State v. Macy, 2014 MT 34. Assistant appellate defender Eileen Larkin. The State is not entitled to restitution for extradition costs because Idaho, not Montana, apprehended the escapee. Reversed and remanded to strike extradition costs.

In re B.W., 2014 MT 27. Assistant appellate defender Kristen Larson. “Common scheme” does not itself create liability in restitution for the acts of others. Reversed and remanded.

State v. Greene, DA 12-0783. Assistant appellate defender Kristen Larson. Attorney General conceded that the district court lacked statutory authority to include a sex offender tier level for the offense of failing to give notice of change of address and that the \$980 in various costs and fees should be stricken from the district court’s judgment.

b. **Cases of Interest.**

State v. Demontaine, 2014 MT 66. Assistant appellate defender Eileen Larkin. Oral argument occurred; however, the Court held this particular inventory search conducted at the jail was not unconstitutional.

State v. Piller, DA 12-0742. Assistant appellate defender Kristen Larson. Oral argument occurred June 25, 2014. The question presented is whether legislative amendments made to Montana's revocation statutes that permit a district court to add conditions to an ongoing active criminal sentence, without regard to the law at the time of the offense, violate ex post facto prohibitions.



OFFICE OF THE APPELLATE DEFENDER STATE OF MONTANA

Steve Bullock
Governor

Wade Zolynski
Chief Appellate Defender

Appendix A

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

Month	Cases Opened FY 14	Cases Opened FY 13
July	34	14
August	20	29
September	23	16
First Qtr. Total	77	59
October	19	19
November	21	16
December	9	28
Second Qtr. Total	49	63
First Half Total	126	122
January	23	30
February	26	11
March	6	19
Third Qtr. Total	55	60
April	31	48
May	37	25
June	26	7
Fourth Qtr. Total	94	80
Second Half Total	149	140
FY 2014 Total	275	262

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

Month	CR	DN	DJ	DG/DI	PCR	Writ
July	25	2 (5)	1	1 (DG)	4	1
August	15	1 (2)	1	3 (DI)	0	0
September	10	8 (0)	1	2 (DI)	0	2
October	16	2 (4)	0	0	1	0
November	11	7 (1)	1	2 (DI)	0	0
December	6	1 (1)	1	0	0	1
January	16	6 (13)	0	1 (DI)	0	0
February	15	8 (3)	1	2 (DI)		
March	4	0 (9)		1(DI)		1
April	15	12 (15)	2	1 (DI)	1	
May	19	17 (7)	0	1 (DI)	0	0
June	12	7		3 (DI)		4
	164	71 (60)	8	17	6	9

Total 275

Case Increase 5% (FY14)
 20% (FY 13)
 17% (FY 12)

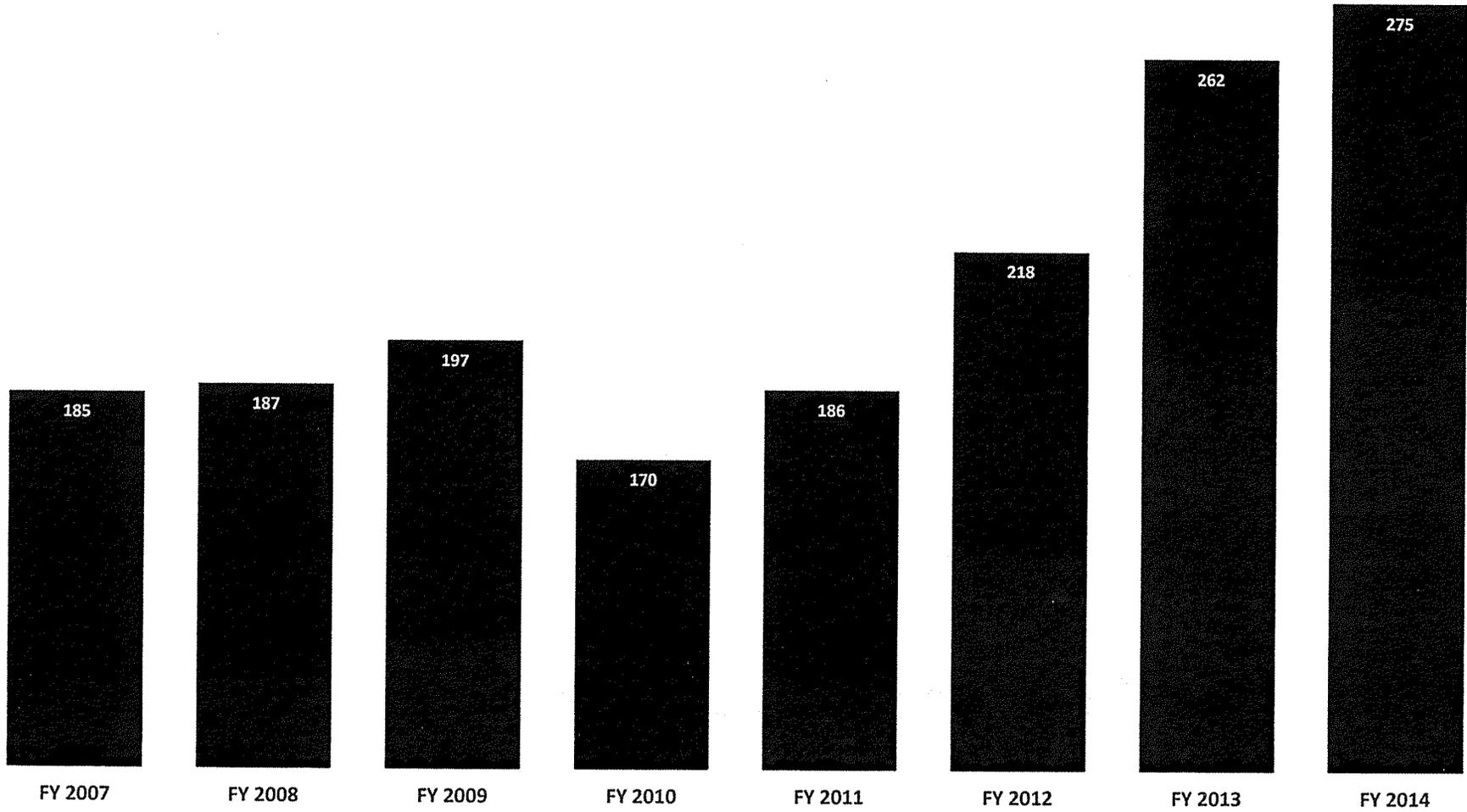
 42%

DN Case Incr. 18% (from FY 13 to FY 14)

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

Appendix B

FISCAL YEAR OPENED CASE COUNTS



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 13-0273

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DARRYL DISMASS HODGE,

Defendant and Appellant.

ORDER

Upon consideration of Appellant's motion for extension of time, and good cause appearing therefore,

IT IS HEREBY ORDERED that Appellant is granted an extension of time to and including February 26, 2014, within which to prepare, file, and serve its opening brief on appeal. No additional extensions will be granted.

DATED this 21st day of January, 2014.



CHIEF JUSTICE

FILED

JAN 21 2014

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORDER

ORIGINAL
February 11 2014

THE SUPREME COURT OF THE STATE OF MONTANA

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

No. DA 13-0202

STATE OF MONTANA,

Plaintiff and Appellee,

v.

PATRICK JAMES MARTINEAU,

Defendant and Appellant.

FILED

FEB 11 2014

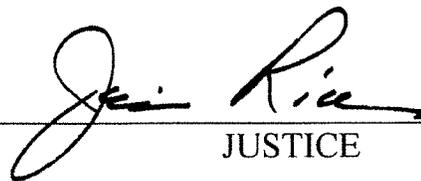
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORDER

Upon consideration of Appellant's motion for extension of time, and good cause appearing therefore,

IT IS HEREBY ORDERED that Appellant is granted an extension of time to and including March 19, 2014, within which to prepare, file, and serve its opening brief on appeal. *No further extensions will be granted.*

DATED this 11th day of February, 2014.


JUSTICE

ORDER

ORIGINAL

FILED

February 24 2014

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 13-0348

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL CLAUDE URZICEANU,

Defendant and Appellant.

FILED

FEB 24 2014

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORDER

Upon consideration of Appellant's motion for extension of time, and good cause appearing therefore,

IT IS HEREBY ORDERED that Appellant is granted an extension of time to and including March 31, 2014, within which to prepare, file, and serve its opening brief on appeal. No further extensions will be granted.

DATED this 24 day of February, 2014.



CHIEF JUSTICE

ORDER

FILED

October 25 2013

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 13-0215

IN THE MATTER OF:

D.D.M.,

ORDER

Youth and Appellant.

Upon consideration of Appellant's motion for extension of time, and good cause appearing therefore,

IT IS HEREBY ORDERED that Appellant is granted an extension of time to and including November 29, 2013, within which to prepare, file, and serve its opening brief on appeal. No further extensions will be granted.

DATED this 25th day of October, 2013.



Chief Justice

FILED

OCT 25 2013

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

FILED

April 29 2013

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 12-0618

IN THE MATTER OF:

B.W.,

ORIGINAL

A Youth.

ORDER

Upon consideration of Appellant's motion for extension of time, and good cause appearing therefore,

IT IS HEREBY ORDERED that Appellant is granted an extension of time to and including June 3, 2013, within which to prepare, file, and serve its opening brief on appeal. No further extensions will be granted.

DATED this 29th day of April, 2013.



CHIEF JUSTICE

FILED

APR 29 2013

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORDER

Appendix D

FILED

January 3 2014

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 13-0230

IN THE MATTER OF B.B.,

A Youth.

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ORDER

FILED

JAN -3 2014

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

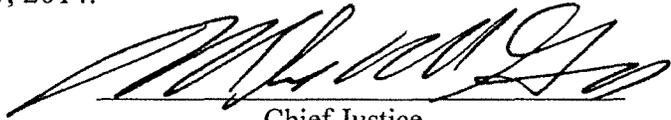
Counsel for the appellant youth has filed a request for a seventh, 30-day, extension of time in which to file the opening brief in this appeal.

IT IS ORDERED that the request for a 30-day extension of time is DENIED.

IT IS FURTHER ORDERED that counsel for the appellant youth shall file the opening brief in this appeal no later than Monday January 13, 2014. No further extensions will be granted.

The Clerk is directed to provide copies of this order to all counsel of record and to Wade Zolynski, Chief Appellate Defender.

DATED this 3rd day of January, 2014.



Chief Justice