



Steve Bullock
Governor

OFFICE OF THE APPELLATE DEFENDER STATE OF MONTANA

Wade Zolynski
Chief Appellate Defender

Date: October 31, 2014

To: Montana Public Defender Commission

From: Wade Zolynski, Chief Appellate Defender

RE: Office of the Appellate Defender Report to the Commission

Currently, 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 eighth report to the Commission:

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

- a. **New Cases Have Continued to Increase in FY 15.** Over the past three fiscal years (FY 12, 13, and 14) OAD experienced a 42% increase in caseload. FY 15 is off to the same start. We received one more case the first quarter of FY 15 than we had the first quarter of FY 14. Halfway through October of this FY, we have received as many cases as we had the entire month of October of FY 14. See Appendix A. OAD is currently working on cases that arrived in the office during FY 12, FY 13, FY 14 and FY 15.

DN cases have increased steeply. OAD's first quarter FY 15 DN cases are up 127% compared to FY 14 and 257% compared to FY 13. DN cases pose a significant problem. Children cannot be adopted until the appellate process is complete. Consequently, the rules of appellate procedure require DN cases to be completed with very little delay. In order to accommodate the quick turn-around, I contract out many of our DN cases because internal attorney caseloads prevent us from completing them quickly.

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's rate of appeal is .86%.

b. Turn-over is Excessively High.

Attorney Turnover. OAD lost two attorneys in FY 14 for a 20% turnover rate. Only one quarter into FY 15, we have lost two more attorneys for a 20% turnover rate this fiscal year. Both attorneys left due to lack of pay -- one transferred to another state agency and the other entered the private sector working for a bank. So far this biennium, OAD has lost 40% of its attorney workforce.

Support Staff Turnover. OAD experienced 33% turnover in support staff in FY 14. So far in FY 15 we have experienced 33% turnover. As a result, we have experienced 66% support staff turnover this biennium.

Staff Type	This Biennium
Attorney	40%
Support Staff	66%

Without question, OAD’s turnover is excessive. Resigning staff often cite workload and pay as the reasons for resignation. For instance, a recently departed attorney obtained employment with another state agency in Helena and received a \$25,000 per year increase in salary. That attorney also cited the increased workload as a reason for leaving. Another attorney recently left because a private sector employer paid him more than twice the salary he earned at OAD.

c. OAD’s Workload is Too High. The increased cases, over 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. 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 – both of them brand new hires – have case weights in excess of the 22 unit level. The highest level is 41; nearly twice what it should be. The average units assigned to those with excessive units is 28.6. The excessive workload causes OAD attorneys to request extensions, which in-turn delays the Montana Supreme Court’s appellate process.

d. 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. Recently, the office requested a ninth 30-day extension because a departing attorney had extended a case eight times previous to resigning. As a result, the newly assigned attorney needed an extension to review the record and draft an opening brief. Prior to the steep case increases that began in FY 2012, OAD historically only requested two or three extensions before filing an opening brief. The Supreme Court has indicated in

several cases that that “no further extensions will be granted.” In one case the Court denied an extension request.

- e. **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.)

- f. **Using Westlaw to Pull Tables of Authority and Tables of Contents.** One of the reasons OAD switched its electronic research provider to Westlaw Next was its ability to pull tables of authority and tables of contents for briefs. However, because Westlaw’s product does not recognize the specific way Montana’s Supreme Court requires citations to appear, the product has not functioned properly. In September, representatives from Westlaw’s Minneapolis office met with me and the members of OAD’s support staff to discuss a resolution. Westlaw has created an algorithm to recognize Montana’s long form citations. However, it does not yet recognize Montana’s short form citations. Westlaw has committed to correcting the short form citation problem, and Kyle Belcher from OAD has offered his assistance in interfacing with Westlaw’s technical representatives.

Despite this difficulty, Westlaw’s brief bank capabilities and its user-friendly search engine permit OAD to operate more efficiently than it otherwise would.

- g. **Management’s Message for the Upcoming Legislative Session.** I, with the PDC’s assistance, must craft a message to be deployed at the upcoming legislative session. OAD simply cannot refuse services to indigent clients who wish to directly appeal to the Montana Supreme Court; to do so would violate both statutory and constitutional mandates. *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). We are not filing unnecessary appeals – in FY 14 OAD only appealed .86% of OPD’s cases.

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.

Over the past several months, I have spoken to several legislators about OAD's business plan. I intend to increase this type of activity as the legislative session nears.

2. **Hiring.** Since my last report, I have hired three attorneys, and one support staff member. Following our last commission meeting on August 1, 2014, OAD received a modified (temporary) attorney position that is on loan to us from OPD's trial division.

James Reavis (Attorney). James joined OAD from OPD's trial division in Butte in mid-September. James worked two years at the trial level. James graduated from the University of Montana School of Law.

Haley Connell (Attorney). Haley joined OAD on October 6. Previous to OAD, Haley worked for a firm in Bozeman, and she clerked for Justice Wheat at the Montana Supreme Court. Haley graduated from the University of Montana School of Law.

Natalie Wicklund (Attorney). Natalie will join OAD on November 3, taking OAD's modified position that is on loan from OPD's trial division. Natalie currently works as a trial attorney at OPD's trial division in Butte. She graduated from Vermont Law School where she interned with the Vermont Appellate Defenders Office.

Barbara Yerkes (Administrative Assistant). Barb joined OAD in mid-September after working for five years at OPD's trial division in Kalispell.

3. **Chief Justice McGrath's Letter to the Governor's Budget Office in Support of OAD.** On August 6, 2014, Chief Justice McGrath penned a letter to the governor's budget office to express his "ongoing concern regarding the staff shortages in the Appellate Defender's Office, and the concomitant impacts these shortages have on [the Montana Supreme Court's] responsibility to process cases in a timely fashion." *McGrath's Letter*, at 1 (attached as Appendix B). Chief Justice McGrath noted the increase in appellate cases writing that, "Clearly, the case load increases are dramatic and impose serious consequences for the entire justice system in Montana." *McGrath's Letter*, at 1. Chief Justice McGrath continued writing that, "Not only is the office understaffed, but they experience a high vacancy rate because of turnover of existing staff. It is not unusual for an assistant appellate defender to take a new position in state government for a salary increase in excess of \$20,000." *McGrath's Letter*, at 2. The Chief Justice closed by requesting "an increase in the budget for this important agency" and noting that he is "satisfied these employees are hard-working diligent employees, but they do not have the adequate resources to conduct their duties in a timely fashion." *McGrath's Letter*, at 2.

Television stations in Helena and Missoula (and maybe others) reported on the Chief Justice's letter. The evening news included the story in their broadcast, and a written piece appeared on KXLH's website. *See* Appendix C.

4. **Boot Camp and Annual Conference Presentations.** Because the ground-work for an appeal occurs with a trial attorney preserving the record, communication between the trial and appellate offices is important. In order to foster that cooperative relationship, I normally present at OPD's Boot Camp for new trial attorneys. I presented "Preservation Nation" and coached a team of trial attorneys at this year's Boot Camp, September 9-11. At the Annual Conference in October, Koan Mercer and I presented on the process of appealing cases from courts of limited jurisdiction.
5. **Appellate Defender of the Year – Eileen Larkin.** At this year's annual conference I presented Eileen Larkin with the Appellate Defender of the Year award. Eileen earned the award due to her contributions to OAD and criminal law in Montana.
6. **Appellate Wins and Cases of Interest.**
 - a. Wins and Concession since the last commission meeting on August 1, 2014.

In re B.W.S., 2014 MT 198. Contract attorney Kathryn McEnery. While in practice Robert Olson was appointed to represent the CASA/GAL for B.W.S. and appeared in that capacity at the adjudication hearing. Mr. Olson withdrew from the case when he was elected as a district court judge. He then presided over the case as judge and eventually terminated Mom's rights. The Court held that Judge Olson was required to disqualify himself pursuant to 3-1-803(3) and remanded for a new termination hearing before a different judge. The Court rejected claims that the passage of more than 90 days between the adjudication hearing and the original show cause hearing and more than 20 days between the adjudication order and the dispositional hearing deprived the district court of jurisdiction over the case.

State v. Mittelstedter, 2014 MT 217N. Contract attorney Robin Meguire. Concession by AG. Back in 2005, Mittelstedter was sentenced to 3-years DoC concurrent to 15-years MSP suspended. In late 2007 the district court revoked him on both. On appeal the State conceded that the 3-year sentence had already discharged prior to their petition to revoke.

In re A.M., 2014 MT 221. Contract attorney Kathryn McEnery. The Court reversed A.M.'s involuntary commitment, holding that the district court had not obtained an intentional and knowing waiver of A.M.'s procedural rights as required by 53-21-119(1). Attempting to give guidance to the "increasing number of stipulations in involuntary commitment cases," the Court directed that a district court:

may not accept a stipulation to an involuntary commitment without first making an affirmative determination on the record—based upon the evidence presented,

including the representations of the respondent and/or his attorney and friend—that the person to be committed understands his procedural rights, and that he waives those rights intentionally and knowingly. In the alternative, if the respondent is not capable of making an intentional and knowing decision, the respondent’s counsel and friend must make a record in compliance with § 53-21-119(1), MCA.

***State v. Strom*, 2014 MT 234.** Former assistant appellate defender Nicholas Domitrovich. On appeal, the Court applied the *Mendenhall* test (“A person has been seized if, after viewing all the circumstances surrounding the incident, a reasonable person would not have believed that he or she was free to leave.”). Strom had argued for a test based upon what a reasonable person of the defendant’s age and knowledge would have believed—basically an analogy to the holding in *J.D.B.*, 131 S. Ct. 2394 (2011), that applied a reasonable juvenile standard when analyzing custody for *Miranda* purposes. [While the Court held that “rejection of the *Mendenhall* test is not warranted in this case,” anyone dealing with the debatable seizure of a young defendant should check out Nick’s briefing and advance the reasonable juvenile argument.]

Under *Mendenhall*, the Court held that there was a seizure. The Court observed that the officer’s first communication with the girls was to demand them to produce identification. He then took their documents and instructed them to wait while he ran them. Once the Court found a seizure, it then determined that the officer lacked particularized suspicion because his assessment of suspicious activity was not supported by objective data, and even if there was a need to id the driver for suspicion of underage driving, there was no reason to id Strom, the passenger.

***State v. Nauman*, 2014 MT 248.** Assistant appellate defender Lisa Korchinski. The district court (perhaps inadvertently) deviated from the appropriate disposition plea agreement by imposing a suspended MSP sentence rather than a suspended DOC. Because the district court did not give Nauman an opportunity to withdraw as required by 46-12-211(4), the Court remand with instructions for the district court to enter a new sentence consistent with the plea agreement or if not, allow Nauman to withdraw.

***In re N.A.*, 2014 MT 247.** Former assistant appellate defender David Dennis. This is the most recent in a series of cases addressing the procedure for stipulating to a civil commitment. Three members of the Court held that the district court had failed to follow the requirements at 53-21-119(1) for obtaining an intentional and knowing waiver of N.A.’s procedural rights. Critically, neither N.A. nor his attorney made any representations to the district court that N.A. understood his rights and the nature of the proceedings. The fourth vote to reverse came from Justice McKinnon, who agreed the record did not establish a knowing and intelligent waiver of procedural rights but who also interpreted the events as a commitment hearing rather than an attempted stipulation to commitment. For Justice McKinnon the commitment required reversal because at the commitment

hearing the State failed to present sufficient evidence of one of the 53-21-126 commitment criteria.

Chief Justice McGrath, joined by Justices Wheat and Baker, would have affirmed because N.A. was present in the courtroom and never appeared to disagree with the community commitment that was occurring.

State v. Rogers, 2014 MT 258N. Assistant appellate defender Eileen Larkin. State conceded two issues: (1) written judgment should be corrected to reflect stay of \$5,000 restitution granted during oral pronouncement, with instructions to clarify what state remedies Rogers was given time to exhaust before he has to pay restitution, and (2) sex offender registration must be stricken because theft is not a sex offense. State contested Rogers' challenge to the sex offender conditions on waiver/acquiesce grounds (no objection during theft sentencing hearing). Court agreed that "in light of unique circumstances of this case," remand was necessary so district court could reconsider whether challenged conditions should be imposed given the ultimate disposition of the reversed sex offense charge. (Note: Certified copies of the plea agreement and judgment were attached to the Reply Brief to show the "ultimate disposition.") Court also laid out the nexus test (nexus to offense or offender) for imposition of conditions on remand. The Court entered this as a non-cite because "it is manifest on the face of the briefs and record that the judgment is contrary to settled Montana law."

b. Cases of Interest.

State v. White, DA 13-0589. Assistant appellate defender Greg Hood. Oral argument to be heard October 29. The first issue is whether plain error requires reversal when a defendant is not present at a hearing in which he is found not competent to stand trial, committed to the Montana State Hospital, and then involuntarily medicated. The second issue is whether the conviction should be reversed because the defendant was never provided an initial appearance and informed of his certain constitutional rights.

State v. Ketterling, DA 14-0147. Assistant appellate defender Jennifer Hurley. This case raises whether an attorney can assert a mental disease or defect defense over the defendant's objection.

Appendix A

OFFICE OF THE APPELLATE DEFENDER STATE OF MONTANA



Steve Bullock
Governor

Wade Zolynski
Chief Appellate Defender

The table below delineates new cases opened by month, quarter, half year, and year, comparing FY 15 with FY 13 and FY 14:

Month	Cases Opened FY 15	Cases Opened FY 14	Cases Opened FY 13
July	22	34	14
August	23	20	29
September	33	23	16
1st QTR Total	78	77	59
October	18 (10.17.14)	19	19
November		21	16
December		9	28
2nd QTR Total		49	63
1st Half Total		126	122
January		23	30
February		26	11
March		6	19
3rd QTR Total		55	60
April		31	48
May		37	25
June		26	7
4th QTR Total		94	80
2nd Half Total		149	140
Totals		275	262

The table below delineates new cases by type for FY 15 (through September):

Month	CR	DN	DJ	DG/DI	PCR	Writ
July	8 (25)	11(2)(5)	1(1)	0(0)	0(4)	2(1)
August	14(15)	6(1)(2)	0(1)	1 DI(3)	1(1)	1(0)
September	23(10)	8(8) (0)	0(1)	1 DI(2)	0	1(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)	0	
March	4	0 (9)		1(DI)	1	1
April	15	12 (15)	2	1 (DI)	2	0
May	19	17 (7)	0	1 (DI)	0	0
June	12	7	0	3 (DI)	0	1
	164	71 (60)	8	17	9	5

Appendix B

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APPELLATE DEFENDER

THE SUPREME COURT OF MONTANA

MIKE McGRATH
CHIEF JUSTICE



JUSTICE BUILDING
215 NORTH SANDERS
PO BOX 203001
HELENA, MONTANA 59620-3001
TELEPHONE (406) 444-5490
FAX (406) 444-3274

August 6, 2014

~~Dan Villa, Director
Office of Budget and Program Planning
State Capitol, Room 277
Helena, MT 59620~~

Re: Office of the Appellate Defender

Dear Mr. Villa:

This letter is written because of my ongoing concern regarding the staff shortages in the Appellate Defender's office, and the concomitant impacts these shortages have on this Court's responsibility to process cases in a timely fashion.

Statistics kept by our Clerk of Court show that the average number of criminal appeals filed for the last several years has been around 200. In 2013, however, 265 criminal appeals were filed. Whereas, in the past, the Office of Appellate Defender obtained two or three extensions of time to file its opening brief in a criminal appeal, it now is not unusual for them to make a sixth or seventh request for an extension of time to file the opening brief on appeal.

The statistics for appeals of termination of parental rights are even more startling. In 2011, there were 38 such appeals. In 2012 and 2013, the numbers rose to 52 and 61, respectively. This year, as of August 5, we have already docketed 51 appeals of terminations of parental rights.

Clearly, the case load increases are dramatic and impose serious consequences for the entire justice system in Montana. The appeal numbers are up because the case filings in the district courts have similarly risen.

Mr. Villa
August 6, 2014
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Unfortunately, the Appellate Defender has additional problems. Not only is the office understaffed, but they experience a high vacancy rate because of turnover of existing staff. It is not unusual for an assistant appellate defender to take a new position in state government for a salary increase in excess of \$20,000. The staff is overworked and underpaid.

Please consider providing an increase in the budget for this important agency in your pending budget proposal for the next Legislature. I am satisfied these employees are hard-working, diligent employees, but they do not have adequate resources to conduct their duties in a timely fashion.

Thank you for your consideration.

Very Truly Yours,



Mike McGrath
Chief Justice

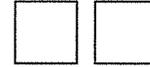
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c: ✓ Wade Zolynski, Chief Appellate Defender
Beth McLaughlin, Court Administrator
William Hooks, Chief Public Defender

Appendix C



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MONTANA NEWS(/CATEGORY/MONTANA-NEWS/)



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38 minutes 20 seconds ago by Sanjay Talwani (sanjay@kxlh.com)

Montana's Chief Justice: Increased caseload of public defenders has serious consequences

HELENA -- Montana's appellate public defenders have had a massive increase in their duties over the last few years - and that has "serious consequences" for the rest of Montana's court system, according to Montana Supreme Court Chief Justice Mike McGrath.

The office also suffers high turnover - 36% annually among its attorneys, and 61% among support staff. McGrath notes in his letter that lawyers typically leave for other state jobs with salaries about \$20,000 higher.

"The staff is overworked and underpaid," McGrath wrote.

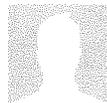
The office has 10 attorneys including Zolynski.

In his letter, McGrath asks Villa to consider increasing the budget of the Office of Public Defender in the governor's budget proposal to the 2015 Legislature.

A spokesman for Bullock said the governor allocated \$625,000 in discretionary funds to the office in the current biennium. He also said Villa is working with the defenders to come up with a proposal for the Legislature.

The Legislative Law and Justice Interim Committee meets Wednesday to discuss some issues, including possible legislation, related to the Office of the Public Defender and Office of the Appellate Defender.

COMMENTS



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