



Steve Bullock
Governor

OFFICE OF THE APPELLATE DEFENDER STATE OF MONTANA

Chad Wright
Chief Appellate Defender

Date: December 30, 2016

To: Montana Public Defender Commission

From: Chad Wright, Chief Appellate Defender

RE: Office of the Appellate Defender Report to the Commission

1. OAD status

After I was bragging about being fully staffed in the last quarterly report, OAD's office manager, Laura Schultz, left for a position with a private law firm in Helena. Our recent administrative assistant hire, Kimberly Harrison, agreed to move up to the office manager position. OAD then hired Gerri Lamphier to fill the administrative assistant position. Gerri came from the Student Assistance Foundation and is quickly learning the fast pace of supporting 12.5 appellate attorneys. Although OAD no longer formats electronic briefs for contract attorneys, Gerri's responsibilities will also include the brief printing and binding for contractors that OAD continues to do in-house to save costs.

2. Strategic Plan Goals

OAD reports on the following goals applicable to the OAD as identified in the Strategic Plan:

Goal 1.4.1: Develop Strategic Relationships with Stakeholders.

After oral argument in a false confession case on December 7, 2016, in an event initiated and arranged by Assistant Appellate Defender James Reavis, OAD met with members of the Montana Attorney General's appellate office staff, including the Solicitor, for a social get together. It provided a good opportunity to meet the new attorneys in the AGs appellate unit and compare the increasing workloads and challenges for both offices.

Goal 1.5: Develop Internship and Training Programs.

OAD's appellate intern from the Blewitt School of Law has completed initial briefing on an interesting issue regarding the use of tribal convictions to enhance domestic violence penalties under Montana state statutory law. Koan Mercer closed out the annual conference in Bozeman with a well-attended and lively Montana Supreme Court update.

Goal 2.2.2: Establish regular strategic planning meetings.

I have met regularly with Bill Hooks and Kristina Neal to establish a plan for the upcoming legislative session.

As with previous reports, the following sections report case outcomes consistent with the goals of the Strategic Plan.

3. Opened Cases and Filed Briefs

a. Opened/Closed Cases

For this quarter, 63 new appeal cases were opened in the office. Of those 15 were DN cases, which amounts to 24% of new cases received. During this quarter, OAD and contract attorneys closed 87 cases. Of these 87 cases, 26 involved DN appeals which amounts to 30% of appellate cases closed.

b. Filed Briefs

The attorneys in the OAD filed 17 opening briefs submitted on the merits, 10 reply briefs, 6 *Anders* briefs (where the attorney submitted that there were no meritorious issues) and 7 motions for voluntary dismissal, (where the client agreed to dismiss the appeal without filing a brief). In the 59 business days in this time period our support staff (which only included two people for the final part of the quarter) still kept up the pace of every other day editing, formatting and filing briefs in the Montana Supreme Court.

c. Case weighted information

The Commission approved a case weighting system for OAD, which takes into account the size of the district court record, the number of transcript pages and the types of briefs or extraordinary motions filed in the case. The goal is not to assign more than 22 work units to an attorney per fiscal year. My final review shows that five OAD attorneys exceeded that total last year. OAD continues to try to use the case weighting system to address the backlog while not creating excessive caseloads for OAD attorneys.

4. Positive Results

In the last quarter, FTE and contract attorneys obtained relief for their clients in the following cases:

- a. *State v. Suter*, Colin Stephens – contractor (State concession – illegal revocation)
- b. *State v. Holloway*, Lisa Korchinski (State concession – probation condition)
- c. *State v. White*, Alex Pyle (State concession – illegal sentence)
- d. *State v. Scharen*, James Reavis (stipulated remand – illegal parole eligibility restriction)
- e. *State v. Krebs*, Moses Okeyo (Court opinion – DUI prior convictions)
- f. *State v. Lawrence*, Alex Pyle (Court opinion – improper closing argument)

5. Significant Cases

In *State v. Krebs*, Moses Okeyo got his first reversal in an important published decision requiring the State to shoulder the burden of proving prior enhancing convictions in DUI cases. Krebs was

not challenging whether the prior conviction from North Dakota existed or was constitutionally valid. Instead, he said that it was impossible to tell what type of DUI conviction it was, thereby limiting its use to enhance his conviction to a felony DUI. The Montana Supreme Court held unequivocally that it is indeed the State's burden to prove that the prior conviction could be used to enhance the misdemeanor to a felony DUI. With faulty national electronic databases, such as the NCIC, *Krebs* can be used by criminal defendants to make sure that prior records in stacking offenses are treated like any other element of an offense that must be proven by the State.

In an opinion that just came out this week, *State v. Lawrence*, Alex Pyle obtained a reversal for a new trial based on the improper prosecutorial arguments. During closing argument, without objection, the prosecutor told jurors: "The presumption of innocence that you came into this trial with no longer exists at this point." A majority of the Court held that by undermining the fundamental principle about the presumption of innocence, the prosecutor had deprived the defendant of his fundamental right to a fair and impartial trial. In a concurring opinion, Justice Baker gave a thorough explanation of the concept of cumulative error because she felt that multiple errors in the trial warranted relief. Alex did a great job in *Lawrence* to tie the prosecutor's attack on the presumption of innocence on to how the attack impacted Mr. Lawrence's trial defense.

6. Budget

I want to correct my previous report on the OAD FY 2016 budget. I was working off of the FY 2016 budget of \$1,797,479 that I was provided when I started as the Chief Appellate Defender. In actuality, the FY 2016 legislative appropriation was \$1,610,717 with the Governor's office adding \$18,809. In FY 2106 Program 1 transferred \$31,575 to OAD and the Commission gave OAD \$44,835, both to help with hiring new attorneys for a supplemented budget total of \$1,705,936. Thus, I incorrectly reported that OAD had \$91,543 dollars remaining in its budget at the end of FY 2016, when OAD spent 100% of the appropriated amounts. I apologize for the erroneous report. The FY 2017 budget provided to me now reflects the amounts tied to the actual appropriation plus supplemental funds.