



Brian Schweitzer  
Governor

## OFFICE OF THE APPELLATE DEFENDER STATE OF MONTANA

Joslyn Hunt  
Chief Appellate Defender

January 19, 2011

To: Montana Public Defender Commission  
From: Joslyn Hunt, Chief Appellate Defender  
RE: Report to the Commission

The Office of the Appellate Defender has been busy, as usual, with a variety of tasks.

### **Staff**

Eileen Larkin and I handled a response to a writ of supervisory control filed by Diana Koch. Ms. Koch represented the Cost Containment Review Division (which apparently is not part of the Department of Corrections), arguing that it had the sole authority to fund or not fund therapeutic placements of juveniles. Ultimately, the Court determined the issue was moot, after Eileen, the prosecutor, and I responded. However, we made several arguments including separation of powers, plain language, and the fact that the Division is statutorily required to place at least \$1 million in a reserve fund each year. Mont. Code Ann. 41-5-132(2). We argued that since the Division has these reserve, contingency funds at its disposal, spending more funds in one district will not short another district because only approximately \$150,000 of the \$1 million had been spent the year prior.

Other interesting happenings include briefing by Lisa Korchinski on the Wagner case. Lisa is handling the second appeal. The first appeal (handled by Koan Mercer) resulted in a remand for an evidentiary hearing. The hearing was held and was hours long. Mr. Wagner was convicted again, and on his second appeal, it was discovered that the recording from the evidentiary hearing was corrupted. Lisa filed a motion to remand, to which the AG's office responded. Ultimately, the Court issued an Order denying the motion, stating that it did not appear absence of the transcript would rise to the level of a due process violation and that a transcript of the hearing "would be of limited value." Lisa is now briefing the case.

Koan Mercer is handling the Justine Winter homicide case that garnered much press when it was handled by private counsel at the trial level in Kalispell. He is also supervising the office's clinical student, John Wright, as he worked on an opening brief last semester. John is a third year law student and wrote an excellent brief on a postconviction case. This is the first year for the appellate clinic.

Garrett Norcott recently challenged a stop by officers who were out of their jurisdiction. He argued that they could only act under the authority of the citizen's arrest statute, and that the officers could not use criminal procedures expressly limited to peace officers. The Court disagreed. Justice Nelson authored a lengthy opinion attempting to clarify the jurisprudence in this area. Ultimately, the Court held that if an out-of-jurisdiction officer can make an arrest on grounds that are sufficient for a private citizen to make an arrest, then the officer can effectuate an arrest and use all of the criminal procedures available to other officers. See *State v. Updegraff*, 2011 MT 321.

Kristen Larson has joined the appellate office. She previously clerked at the Court for Justice Rice, who gave her a glowing recommendation. She is currently working on a First Amendment issue, and she has added much to our brainstorming sessions. We are very happy to have her as part of the team.

Jacob Johnson also has joined the appellate office. He just graduated from law school; however, he is familiar with the appellate office because he interned for the office two summers ago. During that summer he handled three opening briefs, and he has started right where he left off, already finishing two briefs. We are very happy to have him as part of the team too.

Jennifer Hurley continues to provide helpful insights to all of OPD with her federal case updates. She also has a keen ability to handle difficult client situations. One of her most recent cases poses an interesting issue where the district court corrected what previously was an illegal sentence. On re-sentencing, the district court did not credit the defendant for the time he served from imposition of the illegal sentence to imposition of the corrected sentence.

Chase Rosario has now twice raised a comparative negligence challenge. In both cases, the contributory negligence of the other parties was not taken into account, especially when restitution was ordered. We look forward to the responses and the Court's decisions in these cases.

Sarah Braden is, once again, working on saving the office thousands of dollars. She deserves an award. Previously, the appellate office has been prohibited from taking the district court files out of the building. The AG's office has always been allowed to take the file and have it at their desks for as long as needed. The appellate office, however, was required to copy the pages it needed, which is why the office began requesting the public defenders send the appellate office their files. Recently, however, Sarah approached Ed Smith and Chief Justice McGrath. We are in the process of developing a process that would allow us to take the files out of the building. Sarah and Angela will then scan the files, so the attorneys can have complete files at their disposal. This will eliminate copying and shipping costs. It does, however, place another task on the already-overburdened staff members for the appellate office, but it was something Sarah and Angela were willing to do to help the office and the attorneys.

Angela Stagg has provided invaluable assistance to the office. She continues to pursue her paralegal degree, but while doing so, works full time for the office. She and Sarah are the only two staff members for the office and they provide assistance for 16 attorneys (because they assist the contract attorneys with their briefs as well). This attorney to staff ratio is 8-to-1, as compared with a 3-to-1 ratio in other state agencies. I cannot thank them enough for their hard work and dedication.

Wendy Johnson started working for the appellate office in October and she has already been offered another position. Her last day was December 30. She accepted a position in Houston, Texas, at a law firm handling oil and gas leases. She noted that had she been able to receive comparable pay to the AG's office (or to any other state agency for that matter), it would have been easier for her to stay working for the appellate office. She will be missed, as she was a great trial attorney who had won many cases. She was also a great brief writer.

### **Posting**

Given Wendy's departure, I am—yet again—in the process of hiring. I am in a constant state of hiring. Turnover is incredibly inefficient. It burdens the entire office. The pay disparity has to be addressed. I am losing good people. I have been for years. It will not end, and this is something

I openly stated to the Legislature. It is only a matter of time before the entire office turns over, and that should not be the case. When asked about turnover at the AG's office, we were told that the appellate bureau at the AG's office is incredibly stable. I can only presume that such is true because the pay is approximately \$10,000 to \$15,000 higher for attorneys and staff at the AG's office. There simply is no reason the appellate office for the defense should be in a constant state of turnover, while the "appellate prosecutors" are in a state of incredible stability.

### **Caseload**

Our caseload continues to grow, as the attached spreadsheet indicates (Ex. 1). Everyone is working diligently. In looking at our case numbers, I have noted that over the past several months, the office has filed as many *Anders* briefs and voluntary dismissals as we have filed opening briefs. The Court's recent statistics confirm that fact. To address this, I am deploying the attached form (Ex. 2) to assist trial attorneys with the conversations they must have with their clients after sentencing. Eric Olson and I have also discussed a training targeting these client conversations and this training is currently being developed. Steve Eschenbacher and I will present the training.

### **Court Appointments**

In part, our caseload is growing because the Court has appointed us 10 times in the past five months. Through Sarah Braden's and Mori Woods's investigatory efforts, the office was able to successfully challenge one appointment on the basis that the individual exceeded the \$14,000 per year income threshold to qualify for public defender services.

Several of the Court appointments have been from private counsel who obtained a retainer to handle the case through trial and sentencing. The person was convicted and private counsel filed a motion to have OAD appointed given that the person was "now indigent." I understand that the Commission will be reviewing proposed legislation, and this so-called "case dumping" is an item of interest. I look forward to the Commission's input on this topic. This "case dumping" appears to be an ever-increasing occurrence throughout the agency.

### **Postconviction**

Also regarding legislation, it is proposed that a full time attorney be hired to handle the postconviction appointments the appellate office receives. As the Commission is aware, postconviction cases can span several years and can be quite costly. In fact, I just received the final bill on a postconviction case that began in 2007. That case, alone, cost the office several thousands of dollars.

Data is being analyzed to support the request for a full time attorney—such as the number of cases, the costs of those cases, and the comparison of whether contracting that service is more expensive than hiring a full time attorney. Kristina Neal will be involved, as this person would need to report to her within the conflict office. I would like the Commission's input on this proposal, and I am happy to provide whatever information may be necessary for the Commission to have meaningful discussion on this topic.

### **Management**

The management training OPD held in December was amazing. We received so many helpful suggestions. Julie Benson-Rosston really made us think. As part of her training, all managers are to meet with their staff to elicit management suggestions, including kudos and criticisms. I am holding that meeting on January 11, and I will update the Commission on the day of the Commission meeting as to how the January 11 meeting went, what follow-up I intend, and what

improvements I will make. The discussion I have with my staff during that January 11 meeting will be important, and I am looking forward to it.

### **Miscellaneous**

- I met with Greg DeWitt regarding information for capital cases on appeal. We had a good discussion, which I hope will diffuse some misperceptions that defendants in capital cases “get all of these appeals.” I explained to him that “all of these appeals” are remedies available under law and that defendants in capital cases are not trying to “capitalize” (no pun intended) on their situations.
- I met with Chief Justice McGrath and he confirmed, as Interim Chief Stenerson will elaborate on, that a petition for limited admission is available for individuals from other states who may have an interest in doing public defender work. This is an exciting prospect, especially if funding can be secured from other sources. I have utilized a similar format to this in posting volunteer intern positions (thanks to Jennifer Hurley). Jacob Johnson was actually one our first interns who responded. He came to us from Indiana University, since his school offered a stipend. I have had much interest each year from these volunteer postings, especially from people “back east” who want to experience Montana in the summer. I think we can offer an amazing experience for these people and, maybe, they will want to return just as Jacob did.
- It is my hope that this summer a specific appellate training will occur. The details for that training are still in the process of being ironed out.
- Also upcoming is a meeting with the appellate attorneys and staff regarding career ladders. It is my hope that our career ladder will mirror the AG’s, given that they do the same work. There should be equal pay for equal work, and as it stands now, everyone in the OAD is being paid approximately \$10,000 to \$15,000 less than people at the AG’s office.



## POST SENTENCING FORM

**\*To be filled out before you fill out the appellate referral form.**

**\*\*This needs to be signed by you and your client.**

- What do you want to achieve?
  - A. Appeal
    - Appealable issues: Motions; Trial errors; Illegal sentence, etc.
  - B. Sentence Review
    - Sentence reduction; Harsh or inequitable sentence
  - C. Postconviction Relief
    - Ineffective Assistance of Counsel; New evidence
  
- Did you plead guilty per written plea agreement?
  - Yes            Open            or            Binding
  - No
  
- Did you reserve your right to appeal pursuant to the plea agreement?
  - Yes
  - No
  
  - Do you want to withdraw guilty plea?
  - If yes, **do not appeal**. You have one (1) year to withdraw.
  
- Have you discussed Sentence Review with your attorney?
  - Yes
  - No

Exhibit 2

- Have you discussed Postconviction Relief options with your attorney?

- Yes
- No

- Are you claiming Ineffective Assistance of Counsel?

- Yes
- No

➤ If yes, IAC claims in large part are not record-based and are best pursued in a petition for postconviction relief.

- Has your attorney discussed with you what can and cannot be raised on appeal? Only matters that are preserved in the District Court Record can be appealed.

- Yes
- No

- Does your written judgment conform to the Oral Pronouncement of sentence?

- Yes
- No

\_\_\_\_\_  
(Client Name)

\_\_\_\_\_  
Date

\_\_\_\_\_  
(Attorney)

\_\_\_\_\_  
Date