



OFFICE OF THE STATE PUBLIC DEFENDER STATE OF MONTANA

Steve Bullock
Governor

Wade Zolynski
Chief Appellate Defender

February 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. The Office of the Appellate Defender consists of a Chief Appellate Defender, 8.5 Assistant Appellate Defenders and 2 support staff. The following is my third report to the Commission:

THE STATE OF THE OFFICE OF THE APPELLATE DEFENDER.

- Caseloads (see attached spreadsheet).** The office experienced a 17% increase in direct appeals for FY 2012. Cases continue to increase in FY 2013. During the first quarter of FY 2013 we received 63 new cases. During the second quarter of FY 2013 we received 67 new cases. Therefore, halfway through FY 2013 we have opened 130 new cases. To compare, at this point in FY 2012 we had opened 110 new cases. As such, the Office of the Appellate Defender has experienced an 18% (20 case) increase in the first half of FY 2013.

First half of FY 2013 appointments:

July	14 cases	(7 CR, 5 DN and 2 DI)
August	31 cases	(21 CR, 5 DN, 2 DI, 1 DJ and 2 PCR).
September	18 cases	(12 CR, 2 DJ, 1 DN, 1 DI and 2 PCR).
October	22 cases	(13 CR, 5 DN, 3 PCR and 1 DI)
November	16 cases	(11 CR, 3 DN and 2 DI)
December	29 cases	(23 CR, 5 DN and 1 Writ)
Totals	130	(87 CR, 24 DN, 8 DI, 3 DJ, 7 PCR and 1 Writ)

*KEY CR criminal
 DN dependent and neglect
 DI involuntary commitment
 DJ juvenile
 PCR post-conviction

2. Turnover and the Redistribution of Responsibility as a Result.

Second quarter FY 2013 Turnover. During the second quarter (October through December) of FY 2013 the office's legal secretary/office manager resigned to work for the Montana Supreme Court. Her pay increased from \$13.85 per hour to \$15.71 per hour (\$28,808 per year to \$32,676 per year). As a result the office currently functions with only one support staff member. She supports 9 in-house attorneys and approximately 10 contract attorneys. This workload is excessive. Further complicating matters, the remaining support staff member started with the office just five and one-half months ago. Thus, she is in training herself.

First Half of FY 2013 Turnover. Four of the office's 11 full-time employees have resigned during the first half of FY 2013. We lost two support staff members and two attorneys. As such the office has experienced 100% turnover in support staff this FY. The two support staff members resigned to join other state agencies. Both received increased pay while shedding office manager duties. One of the two departing attorneys resigned to join the Department of Commerce. He received a \$17,000 per year pay increase.

Redistribution of Responsibilities Due to Turnover and Workload. In order to curb the remaining support staff member's excessive workload, I have temporarily redistributed some responsibilities. For instance, I directed attorneys to complete their own motions and letters and to have both ready for mailing without support staff assistance. Previously, support staff drafted routine motions and letters for an attorney's signature. I also directed attorneys to obtain extensions of time on briefs due between January 28, 2013 and February 11, 2013. The extensions are necessary because one support staff member cannot format, cite check and pull the tables for all the office's briefs. I personally have been (1) answering the office's telephone to relieve our one remaining support staff member, (2) determining which transcripts to order for each new case coming into the office, (3) checking briefs for proper citation and format, (4) communicating with court reporters regarding late or nearly late transcripts and (5) preparing some requests for transcripts and notices of appeal. All of the above are routine office matters normally handled by support staff. It is not cost effective for the Chief Appellate Defender and assistant appellate defenders to be performing support staff duties.

Meeting with Chief Justice to Discuss Impacts on the Court Due to Our Turnover. On January 14, 2013, I met with Chief Justice Mike McGrath to discuss how our excessive turn-over and increased caseload will impact the Supreme Court. I informed the Chief Justice that I had directed my attorneys to delay filing briefs with the Supreme Court. I asked for the Chief Justice's understanding because most of the briefs will be written; however, we lack sufficient support staff to format, cite check, and pull tables for official filing. I

also indicated that if the current crisis of increased caseloads coupled with excessive turnover continue, then the office will consider a number of options to insure we are providing effective assistance of counsel.

3. **Case Count Audit.** My last commission report indicated the Office of the Appellate Defender had an ending balance of 386 open cases. I have since completed an audit to determine if the previously reported ending balances were accurate. I cross referenced every open case in our system with the Montana Supreme Court's website. I did this for all internal attorneys (FTEs) and all contract attorneys. My audit revealed that as of January 13, 2013, the total number of open cases in the Office of the Appellate Defender was 212, as opposed to 386. Therefore, the office had closed significantly more cases than originally reported. We may never be certain why the error occurred, however, it appears to coincide with the year (2010) that the Office of the Appellate Defender began using JustWare. Thus, either a JustWare error or an operator error had caused us to under report the number of cases closed.
4. **Case Weighting System.** In September I began researching the creation of an appellate case weighting system. I studied National Legal Aid and Defender Standards, ABA Standards and appellate case weighting systems in Washington, Tennessee, Texas and Nebraska. I have created a case weighting system that is in the process of being implemented. I intend to present the full case weighting system for suggestions, comments and changes at the next commission meeting.
5. **Recruitment.** Due to the departure discussed above, I am currently recruiting a Paralegal/Office Manager. It appears that low pay is going to be a barrier in hiring an experienced Paralegal/Office Manager. I have had discussions with two paralegals I know and encouraged them to apply. Both declined because moving to our agency would require they suffer a pay decrease.

BUDGET REPORT – 2013 LEGISLATIVE SESSION.

OPD made budget presentations to a joint subcommittee on January 16-17, 2013. I presented on behalf of the Office of the Appellate Defender.

Per the Public Defender Commission's plan and the Governor's approval, we requested an increase in the Office of the Appellate Defender's biennium budget from \$2,164,645 in 2013 to \$2,929,493 in 2015. The requested decision packages would (1) add an additional attorney, (2) add an additional support staff member, (3) make a modified attorney permanent, (4) add one half-time attorney to decrease manager workload, and (4) increase office pay. To justify our requests, I argued the appellate office's deficient pay and its ever-increasing caseload have resulted in a plague of turnover and inefficient operations. An inefficient appellate office causes inefficiencies in the Attorney General's

Office, the Montana Supreme Court, and the district courts throughout the state. As a result, I argued, funding the Office of the Appellate Defender appropriately will actually save Montana money. I made my argument with the following data:

1. **Pay.** I compared pay at the Office of the Appellate Defender with pay in the market as a whole and with that at other state agencies. The Office of the Appellate Defender pays much less than market and less than any other state agency. We start entry level attorneys \$27,628 less per year than market. Our high attorney pay is \$36,828 less per year than market. Additionally, every state agency pays its attorneys more. For example, the next lowest paying agency pays entry level attorneys \$8,616 per year more than the Office of the Appellate Defender. The Attorney General's Office pays entry level attorneys \$14,602 more per year than the Office of the Appellate Defender.

Why should the legislature care about pay in the Office of the Appellate Defender? The United States Department of Justice conducted a study of the country's statewide public defender systems in 2007. In 2007, Montana was second to last in turnover. The DOJ study concluded that statewide public defender systems with turnover of 10% or less had one thing in common – they paid staff at or above market rates. Our turnover is higher now than it was in 2007, and our pay is substantially below market. And, as discussed below, turnover costs money.

2. **Increased Caseload.** After discussing pay with the budget subcommittee, I discussed caseload increases. As this commission is aware, the Office of the Appellate Defender experienced a 17% (32 case) increase in appeals in FY 2012 and an 18% (20 case) increase in appeals during the first half of in FY 2013. These additional 52 cases would require two additional full-time attorneys. We are asking for one.
3. **Low Pay and Increased Caseloads have Combined to Plague the Office with Unacceptably High Turn-Over.** In FY 2012 the Office of the Appellate Defender experienced 44% attorney turnover and 0% support staff turnover. At the half-way point of FY 2013, we have experienced 22% attorney turnover and 100% support staff turnover. During my budget presentation, I compared turnover at the Office of the Appellate Defender with that in other state agencies. All state agencies combined have a 12.6% attorney turnover rate compared to our 44%.

Why should the legislature care about the Office of Appellate Defender's excessive turnover?

- a. **Turnover is Inefficient.** When an attorney resigns, his or her caseload must be reassigned to another attorney. The new attorney must read the entire record and draft his or her own brief; even if the previous attorney

already had done so (NOTE: the record on appeal can be several thousand pages long). This requires us to delay the filing of appellate briefs. Our delay ripples through the Attorney General's Office, the Montana Supreme Court, and district courts throughout the state. Due to our excessive turnover, 66% of my office attorneys handled 100% of the work, plus the 17% and 18% increases.

- b. Turnover is Expensive.** Most experts and studies agree that when an employee resigns it costs 100% to 150% of the departing employee's yearly salary. As such, during FY 2012 the Office of the Appellate Defender lost between \$209,388 and \$314,082 because of turnover. This loss nearly covers the entire funding increase we are currently requesting for the upcoming biennium.

Therefore, as I argued to the joint subcommittee considering our budget, the appellate office's startling low pay and its ever-increasing caseload have resulted in a plague of excessive turnover and inefficient operations. An inefficient appellate office causes inefficiencies in the Attorney General's Office, the Montana Supreme Court, and the district courts throughout the state. As a result, funding the Office of the Appellate Defender appropriately will actually save Montana money. I urged the committee to fund our requests in full.

The Associated Press covered this

story: http://www.bozemandailychronicle.com/ap_news/montana/article_ce7fdc73-1537-55b1-9071-029259f8503b.html?mode=story

PROPOSED NEW RULE OF APPELLATE PROCEDURE.

At my meeting with Chief Justice McGrath on January 14, 2013, I presented him with a new proposed rule of appellate procedure. This added rule would create an expedited appeal to the Montana Supreme Court when a minor is denied a judicial bypass to obtain an abortion without parental consent. The existing appellate rules for criminal and civil matters include time-lines not realistic for this time-sensitive issue. An initiative which passed on the November 2012 ballot became effective on January 1, 2013 and mandates the Office of the Public Defender represent minors seeking judicial bypass. Due to OPD's involvement at the trial court level, OPD must remain counsel of record through appeal. No additional funding has been provided to OPD or the Office of the Appellate Defender for handling this additional category of cases.

PENDING CASES AND POSITIVE OUTCOMES.

1. Pending Cases.

State v. Garding (DA 11-0763). Eileen Larkin and I (mostly Eileen) drafted this appeal. *Garding* originated in Fourth Judicial District Court, Missoula County, Judge John W. Larson presiding. There, a jury convicted Katie Garding of Vehicular Homicide While Under the Influence, Failure to Stop Immediately at an Accident Scene, and Driving Without a Valid Driver's License. Judge Larson sentenced Garding to 40 years at the Montana State Women's Prison, with none suspended. We argued Judge Larson erroneously (1) denied Garding the ability to cross examine a jail house informant regarding his PFO status, (2) precluded Garding's pathologist from offering his expert opinion concerning muscle tears to the deceased's calves (although the state's medical examiner was permitted to testify to the same), and (3) permitted a previously undisclosed expert for the prosecution to testify. Gwen Florio of the *Missoulian* covered the story - http://helenair.com/news/state-and-regional/stevensville-woman-seeks-new-trial-in-hit-and-run-death/article_9113d33c-64c1-11e2-b6f6-0019bb2963f4.html. We are awaiting the Attorney General's response brief. Jennifer Streano of OPD represented Garding at trial.

2. Outcomes.

State v. Lozon, 2012 MT 303. (Reversal by Supreme Court Opinion). December 21, 2012. Assistant appellate defender Lisa Korchinski represented Lozon on appeal. Two Ravalli County juries convicted Lozon of DUI – first in Hamilton city court and then in district court with the Honorable James A. Haynes presiding. At the second trial, Judge Haynes denied a defense motion to redact video footage to exclude administration of the PAST. The Supreme Court reversed stating “[t]he error that resulted here was the prompting of the inference that Lozon had failed the PAST . . . [t]herefore, the admission of the PAST evidence by video was prejudicial error.” Reed Mandelko of OPD represented Lozon at trial.

State v. Bledsoe, DA 12-0101 (Attorney General Concession). December 18, 2012. Assistant appellate defender Jacob Johnson obtained an Attorney General concession and a Supreme Court Order remanding this matter to the District Court (Judge John W. Larson) for a hearing on defendant's Motion to Suppress. Jake valiantly argued the matter should be dismissed outright rather than remanded so as not to permit the prosecution a “second bite at the apple.” The Court agreed Jake's “second bite at the apple argument has some facial appeal” but decided to simply remand. Joan Burbridge represented Bledsoe at trial.

State v. Oldhorn, DA 11-0709. November 7, 2012. Former assistant appellate defender Garrett Norcott represented Oldhorn on appeal after his deliberate homicide conviction. The Supreme Court remanded the matter back to district court for a hearing on Oldhorn's

motion to suppress his statements. Oldhorn argued he had been promised immunity in exchange for his statements – a promise the prosecution broke when they charged him. The district court, C.B. McNeil presiding, granted Oldhorn’s motion to suppress on remand and ordered a new trial. Ron Piper of OPD represented Oldhorn at trial and on remand. The prosecution recently filed its own notice of appeal contenting Judge McNeil’s order granting a new trial. The *Missoulian* reported on this matter. http://missoulian.com/news/local/convicted-lake-county-murderer-could-be-released-pending-appeal/article_6f170b9c-6e7f-11e2-be00-001a4bcf887a.html

HIGHLIGHTED CHIEF APPELLATE DEFENDER ACTIVITIES

1. **Legislature.** I have lobbied, attended hearings and sometimes testified at hearings on some of the following public defender bills: HB 92, HB 107, HB 103, HB 93, SB 53, SB 133 and HB 2 (budget).
2. **Case Weighting.** I am currently implementing a case weighting system.
3. **Standards, Policy and Procedure.** I am currently researching standards, policy and procedures for appellate offices in other states. Next, I will draft standards, policy and procedures for this office.
4. **Open Case Audit.** I performed an open case audit and discovered the office had closed significantly more appeals than originally reported.
5. **New Proposed Rule of Appellate Procedure.** If adopted the new rule will create an expedited appeal for minors who have been denied a judicial bypass in order to obtain an abortion without parental consent. I worked on this matter with the help of the ACLU of Montana and Kent Yalowitz, a partner at Arnold and Porter in New York City.

