



OFFICE OF THE APPELLATE DEFENDER STATE OF MONTANA

Steve Bullock
Governor

Wade Zolynski
Chief Appellate Defender

Date: October 2, 2015

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 10 assistant appellate defenders, three support staff, and the Chief Appellate Defender. OAD also contracts cases to outside contract counsel. The Public Defender Commission (Commission) appointed me Chief Appellate Defender May 16, 2012. The following is my final report to the Commission:

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

- a. **Cases Increased In FY 2015.** OAD finished FY 2015 with another increase in new cases – from 275 cases in FY 2014 to 293 cases in FY 2015 (a 6.55% increase). Criminal cases increased the most – from 164 cases in FY 2014 to 195 cases in FY 2015 (a 17% increase). OAD lacked the funds needed to contract criminal cases for a significant portion of FY 2015, and therefore, the increase placed significant caseload pressure on assistant appellate defenders and their staff. DN cases decreased from 71 in FY 2014 to 67 in FY 2015.

FY 2014 Total Cases	FY 2015 Total Cases
275	293

FY 2014 Criminal Cases	FY 2015 Criminal Cases
164	195

FY 2014 DN Cases	FY 2015 DN Cases
71	67

- b. **Cases Opened This Year (FY 2016).** As of September 29, 2016, OAD has opened 76 cases. Last year at his time OAD had received 78 cases.
- c. **Percentage of Program One Cases Appealed.** The percentage of Program One’s cases that OAD appealed in FY 2015 remained steady at .86%.

- d. **Cases Completed From Previous Fiscal Years.** Of the 262 cases OAD opened in FY 2013, 257 have been closed. All of the five remaining cases are PCR petitions. Of the 275 cases OAD opened in FY 2014, 245 have been closed. Of the 293 cases OAD opened in 2015, 18 have been closed. Thus, OAD is currently working on cases the office received over four fiscal years – FY 2013, FY 2014, FY 2015, and FY 2016.

FY 2013 Cases Opened	FY 2013 Cases Closed
262	257

FY 2014 Cases Opened	FY 2014 Cases Closed
275	245

FY 2015 Cases Opened	FY 2015 Cases Closed
293	18

- e. **Caseloads Are Excessive.** Every attorney on staff has case weights in excess of OAD’s established case weight system which calls for completion of 22 units per year. The average units currently being handled by attorneys in the office is 38. Three attorneys have units in excess of 40, with one attorney at 49.5. As a result, some attorneys are currently assigned two years of appellate work. As of September 29, 2015 OAD has 34 unassigned cases in which the record has been produced and a briefing deadline established.
- f. **OAD Is Unable To Timely Complete Its Cases.** As the number of new cases has increased, assistant appellate defender caseloads have grown and the appellate process in Montana has slowed. According to the Montana Supreme Court’s performance measures, the median days a criminal cases takes to get from notice of appeal to completed briefing has increased from 192 days in the first quarter of 2010 to 386 days in second quarter of 2015.
- g. **Turn-over Remained Steady At 20%.** OAD attorneys turned over at a rate of 20% in FY 2015 – equal to FY 2014 turn-over (down from 44% in FY’s 2012 and 2013). 33% of OAD’s support staff turned over in FY 2015. Thus far in FY 2016, OAD attorneys have turned over at a 20% rate, and zero support staff positions have turned over.
- h. **Level of Staffing Needed To Avoid Excessive Caseloads And To Timely Complete Appeals.** OAD’s case weighting system permits the program to offer an estimate on the level of staffing needed to ensure appropriate caseloads and to timely complete appeals. The average appeal is 1.5 units. OAD opened 293 cases in FY 2015. If OAD contracted 50% of its caseload, it would need 10 assistant appellate defenders (Note: OAD currently has 10 assistant appellate defenders). Historically, OAD has contracted much less than 50% of its caseload. Due to a lack of funding, OAD can neither hire additional assistant appellate defenders nor contract out additional cases. As a result, the completion of OAD

cases is delayed. This table illustrates (based on 293 cases) options concerning the percentage of cases to be contracted and the corresponding level of attorney staffing necessary at that level:

Percent of Cases Contracted	Asst. App. Defenders Necessary
15%	19
25%	17
50%	10 (current level)
75%	6

- i. **Immediate and Future Staffing Recommendations.** In order to relieve immediate pressure, the OAD needs at least two modified attorneys. The added staff will not cease the extensions of time currently necessary for attorneys to complete their work. Instead, these added attorneys would provide some measure of relief in an already overly stressed environment. For the future, the agency must move toward the staffing indicated by OAD’s case weighting system.
2. **New Hires.** OAD recently hired Alexander Pyle. Alex graduated from the University of California, Berkeley, School of Law in 2014. He recently completed a clerkship with Justice Baker at the Montana Supreme Court. Alex begins work October 5, 2015, and we look forward to working with him.
 3. **Positive Results.** OAD proved successful in numerous cases, including a recent week where the office prevailed in four cases. This list is not exclusive, but a sampling of cases with recent favorable outcomes:
 - a. *State v. Parrish*, Jennifer Hurley (by opinion)
 - b. *State v. Emerson*, Jennifer Hurley (by concession)
 - c. *State v. Vangilder*, David Dennis (initial) Jennifer Hurley (reply) (by opinion)
 - d. *In Re C.S.*, Kristen Larson (by concession)
 - e. *State v. St. Onge*, Koan Mercer (by concession)
 - f. *State v. Woodall*, Kristen Larson (by stipulation)
 - g. *State v. Ketterling*, Jennifer Hurley (by opinion)
 - h. *In Re T.J.G.* Jennifer Hurley (by stipulation)
 - i. *State v. Spady*, Koan Mercer (by opinion)
 4. **Oral Argument Set.** The Montana Supreme Court set oral argument in *State v. Colburn* for December 2, 2015. Assistant appellate defender Jennifer Hurley briefed the issues and will conduct the argument. The issue is whether the district court’s application of Montana’s rape shield statute excluded evidence relevant to the child victim’s motive to fabricate and relevant to an alternative source of the child’s sexual knowledge in violation of the defendant’s right to present a defense.
 5. **OAD’s United States Supreme Court Litigation.** OAD, in conjunction with the UCLA Supreme Court Clinic, filed a petition for certiorari in *State v. Betterman*. In *Betterman*,

the Montana Supreme Court reversed its prior precedent and held the right to a speedy trial does not continue through sentencing. Instead, the Montana Supreme Court ruled that due process protections govern through sentencing after trial or plea. There is a nationwide split in jurisdictions regarding this point of law; hence, the petition for certiorari. The Attorney General's Office waived its response to OAD's petition. However, in an encouraging turn of events, the United States Supreme Court ordered a response from Montana's Attorney General.

6. **My Resignation.** As you are all aware, I submitted my resignation to Chairman Gillespie a couple weeks ago. I will be joining the Federal Defender Office in Boston. It truly is a rare and amazing opportunity. I am simultaneously saddened and excited. I have been honored to serve this agency and its clients – first as a trial attorney, then as an assistant appellate defender (albeit briefly), and now as the Chief Appellate Defender. Our staff must be commended -- they work hard, often over long hours, and frequently for less pay. Despite the long odds (particularly on appeal) they protect the basic rights that are the fabric of this country. It really is remarkable.

If you haven't read Stephen B. Bright's, *The Electric Chair and The Chain Gang: Choices and Challenges For America's Future*, you must right away. I will never forget my first reading. I will leave you with two of my favorite passages:

“And what a difference you can make to those individuals whom you help. Last summer, one of my clients, Tony Amadeo, who had been condemned to die by Georgia when he was only eighteen years old, but whose death sentence was set aside due to racial discrimination, graduated summa cum laude from Mercer University. Do not let anyone tell you that you cannot make a difference as a lawyer.”

“Consider practicing law not in Washington, New York or the Bay Area, but in communities where there has never been a lawyer who would question the status quo, who would give African Americans the same representation as white people, who would give the poor the same representation as the rich. You can change that. Those communities are not hard to find. Get a map of any state in the Union. It will be full of them.”

Best of luck, and may the force be with you.