ORIGINAL FILED
January 21 2010
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT FOR THE STATE OF MONTANA

Supreme Court Nos. DA 09-0556 and DA 09-0605

STATE OF MONTANA
Plaintiff and Appellee,

v.

DONNIE MACK SELLERS,
Defendant and Appellant.

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APPELLANT'S PETITION TO REMOVE OFFICE OF THE STATE PUBLIC DEFENDER

Donnie Mack Sellers (Sellers), petitioned this Court on December 29, 2009, to remove the Office of the State Public Defender (OSPD), specifically the Office of the Appellate Defender (OAD) from his appeals. Sellers contends the OAD and other members of the OSPD have concurrent conflicts of interest regarding his appeals because he wishes to raise the issue of ineffective assistance of his trial counsel, David Stenerson (Stenerson), who is a full-time employee of the OSPD. Sellers believes the OAD will either fail to pursue or refuse to pursue claims of inefficacy against Stenerson because Stenerson and all other members of the OAD are all employees of the same organization, the OSPD. Sellers believes this situation is contrary to his right to be free from conflicted counsel and will result in a violation of that right, among other skullduggery.

Sellers has requested this Court immediately appoint an attorney with no

affiliation to the OSPD or the OAD. This would include any private attorney who has previously worked as a contract or conflict attorney. If this Court will not appoint a non-OSPD attorney, Sellers will request to proceed *pro se*. Present counsel is representing Sellers in the limited capacity of filing this Brief in Support of his Petition. Counsel was requested to perform this service by Chief Appellate Defender, Joslyn Hunt. Counsel advised Mrs. Hunt that he would represent Sellers in a *pro bono* capacity. As such he is receiving no financial compensation from either the State of Montana or the OSPD. Present counsel does act in a contract and conflict capacity for both the OSPD and the OAD on occasion, and is acting independently in the present situation with no supervision from Mrs. Hunt, OSPD or the OAD.

Sellers unequivocally asserts the presence of IAC issues, and counsel represents the record has sufficient evidence of IAC concerns to make the matter appropriate for direct appeal rather than post-conviction relief. Stenerson's inefficacy was the subject of several filings and hearings in 2009. (*See* DA 09-0605, Dkt. Nos. 55-61). It is also indisputable that Stenerson and attorneys for the OAD are both employees of the OSPD.

Currently both the OAD and OSPD operate under Standards established by the Montana Public Defender Commission (Commission), an entity created by the

Montana Legislature in Title 47 of the Montana Code. The Standards adopted by the Commission state that the OAD is a separate "firm" for the purposes of client representation. Based on this designation as a separate "firm," the Commission established that the OAD may represent a client in conflict with a client in any regional or local office, or in conflict with any contract attorney. In representing a former client or a trial division office, the OAD may take the position that a regional or local office attorney, or a contract attorney, did not provide the client constitutionally effective assistance of counsel. (*See* Standards, pg. 9).

Both the Commission and its Standards conclude such a situation is not a conflict because the OAD and the regional or divisional offices are separate "firms." That the Commission and the OSPD Standards proceed from the fallacy that the separate regions and the OAD are separate firms for the purposes of conflict consideration is the essential issue here. Unfortunately for the OSPD, the Commission, and the OAD, the belief that the separate firm theory is true, simply because the Commission and OSPD declare it to be so, is erroneous especially when the OSPD system is subjected to closer scrutiny.

If this Court interprets the Montana Rules of Professional Conduct as establishing a concurrent conflict of interest when one OSPD attorney handles an appeal involving a potential IAC claim regarding another OSPD attorney, then

Sellers has raised a "seemingly substantial" complaint regarding the OAD's continued representation on his appeals. Such a situation warrants a hearing and the appointment of outside counsel for that hearing. *See State v. Glick*, 2009 MT 44, ¶ 13; *State v. Gallagher*, 1998 MT 70, ¶¶ 14-15. Sellers also requests any further proceeding be before this Court rather than in Ravalli County as he insists he cannot get a fair hearing there and can prove such if afforded the opportunity.

The question of whether the OAD may effectively or professionally represent a client who was previously represented by an OSPD attorney, and who is now alleging on direct appeal that his OSPD attorney was ineffective, is a matter of first impression for this Court. Whether the situation is one which violates a defendant's right to conflict free counsel and effective representation of counsel, as well as the Rules of Professional Conduct is for this Court to decide. *In re Engle*, 2008 MT 215, ¶¶ 5-6, and Mont. Con. Art. VII, § 2(3).

OAD representation clients alleging claims of ineffective assistance of their OSPD attorney are best analyzed as a conflict directly through Rule 1.7 or through Rule 1.10's imputation. In the present situation, there would be a direct violation of the conflict prohibition in Rule 1.7 because the OAD's attorney's personal feelings of collegiality, desire to maintain the agency's reputation with the Legislature and the public, or fear of reprisal from his supervisor or ultimately the

chief public defender, Randi Hood, all create a significant risk that the OAD attorney's handling of the IAC claim would be restricted and the representation of the client compromised.

Further, OAD representation would violate Rule 1.10 because OSPD trial counsel has a Rule 1.7 conflict of interest in bringing an IAC claim against himself and that conflicted is imputed to other members of the OSPD "firm" including the OAD. Further, because the chief public defender exercises chief and exclusive control over both OSPD trial counsel and OAD appellate counsel. *See, In re Mara*, 2004 MT 8, 319 Mont. 213, 87 P.3d 384.

Rule 1.10(a) defines "firm" as including "lawyers employed in a legal services organization." The plain language of this definition encompasses two OSPD employees even where they work in different physical offices and have different managers. In Sellers's case, this definition would encompass Stenerson as trial counsel, and any member of the OAD office assigned to represent Sellers on his claims of ineffective assistance of counsel against Stenerson.

It is true that Rule 1.10(a) does allow firm members to represent a client where the original attorney's Rule 1.7 "prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."

This exception does not provide the loophole of OAD representation in this case. In Sellers's case, the conflict faces by Stenerson as trial counsel in an IAC claim is beyond a matter of simple personal interest. Claims of ineffective assistance by a public defender reflect poorly on the entire OSPD system, including the OAD. Further, it would be all but impossible to ascertain whether the conflict affected appellate counsel's representation. The task of proving this impossibility should not be placed on the defendant/appellant.

Other courts have recognized the inherent difficulty of trying to prove how a conflict of counsel adversely affects a criminal defendant. In *People v. Baxtrom*, 378 N.E.2d 182 (Ill. 1978), the Appellate Court of Illinois furthered a long established *per se* rule of prejudice in situations where criminal defendants were represented by conflicted counsel.

> Where the circumstances raise the possibility of restraint, the application of a *per se* rule has been felt to be warranted in recognition of the fact that in most cases it is nearly impossible for a court to discern, or for a defendant to prove, or for defense counsel to disprove, either the existence of subtle restraint in the counsel's representation or its consequent prejudicial impact....The task is no less difficult in attempting to assess the existence of restraint in defense counsel's exercise of his judgment, discretion, and in his use of defense tactics, where his commitments to other reasonably call into question his motivation for taking an act or failing to act in some defense matter. That inquiry must be made into counsel's motivation is itself a circumstance that ought never to be required.

Baxtrom, 378 N.E.2d at 553-554.

Other jurisdiction that have considered this issue have also imposed a *per se* bar against a public defender representing a client bringing an IAC claim against his trial counsel who was also a member of the public defender's office. *See*: *State v. Hill,* 566 S.W.2d 127 (Ark. 1978); *McCall v. Dist. Court*, 783 P.2d 1223 (Colo. 1989); *Angarano v. U.S.*, 329 A.2d 453 (D.C. 1974); *Adams v. State*, 380 So.2d 421 (Fla. 1980); *Ryan v. Thomas*, 409 S.E.2d 507 (Ga. 1991); *State v. Bell*, 447 A.2d 525 (N.J. 1982); *Commonwealth v. Moore*, 805 A.2d 1212 (Pa. 2002). The state of New Hampshire recently adopted a hybrid system of addressing these cases but held that an appellate defender is prohibited from representing a client who raises a valid IAC claim against another public defender. *See State v. Veale*, 919 A.2d 794, 799-800 (N.H. 2007).[1]

Other courts have adopted a case-by-case approach. *See: Cannon v. Mullin*, 383 F.3d 1152 (10th Cir. 2004); *People v. Banks*, 520 N.E.2d 617 (Ill. 1987); *Morales v. Bridgforth*, 100 P.3d 668 (N.M. 2004); *State v. Lentz*, 639 N.E.2d 784 (Ohio 1994); *Simpson v. State*, 769 A.2d 1257 (R.I. 2001).

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[1]New Hampshire's Chief Appellate Defender has recently written an article analyzing the *per se* and case-by-case approaches and concluded "the law should accept the cost of the *per se* rule in preference to the case-by-case approach's error, because the *per se* rule better accommodates the reality of a court system equipped with imperfect fact-finding tools." Christopher M. Johnson, *Not for Love or Money*, 78 Miss. L.J. 69, 101 (2008).

The American Bar Association suggests that where an appellate defender program is not wholly independent of the trial program, outside counsel should be appointed. *ABA Standards for Criminal Justice* 84 (3d Ed. 1992) available at (www.abanet.org/crimjust/standards/providing defense.pdf). The National Legal Aid and Defender Association similarly suggest outside counsel where a client was represented at trial by a member of the same public defender agency and "it is asserted by the client or appears arguable to the appellate attorney than trial counsel provided ineffective representation." *Standards and Evaluation Design for Appellate Defender Offices,* II.E.1.b (1980) available at (http://www.nlada.org/DMS/Documents/998926546.376/document_info).

The Sixth Amendment of the United States Constitution bestows "a right to counsel's undivided loyalty" to a criminal defendant. *State v. Christenson* (1991), 250 Mont. 351, 335, 820 P.2d 1303. This right "contemplates the assistance of an attorney devoted 'solely to the interests of his client.'" *State v. Jones* (1996), 278 Mont. 121, 125, 923 P.2d 560. The duty of loyalty underlies Rules 1.7 and 1.10 and extends to all law firms. *See Marra*, ¶¶ 6-10. This Court has previously held that Rule 1.7(b) prohibits civil defense counsel from submitting to a requirement that an insurer give prior approval of defense expense. *In re Rules*, 2000 MT 110, ¶ 51, 299 Mont. 321, 2 P.3d 806.

A case-by-case approach is not appropriate in Montana given the unique and highly centralized structure of the OSPD system (which encompasses the OAD). In Montana the OSPD run by the chief public defender, Ms. Hood. Ms. Hood reports to the Commission; everyone else reports to Ms. Hood. Pursuant to Mont. Code Ann. § 47-1-205, it is Ms. Hood's job to "hire and supervise a chief appellate defender to manage and supervise the office of appellate defender." Ms. Hood is also tasked with hiring or contracting with deputy public defenders and assistant public defenders. In Seller's situation the recipient of Seller's IAC claim, Stenerson, and the individual tasked with representing Sellers's claim against Stenerson, the OAD, both work for the same employer, both are ultimately managed by the same individual (Ms. Hood), and both are subject to supervision by Ms. Hood.

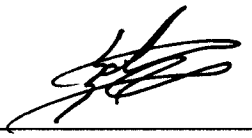
Given this structure, it is all but impossible to extricate a separate OAD "firm" from the OSPD. There is clearly a conflict of interest in the present case, and this Court should adopt a *per se* rule on such conflicts and, as a result, grant Sellers's Petition. The stakes are too high for the Court not to adopt a *per se* rule under the present OSPD scheme in Montana. Sellers wants to raise his IAC claim on direct appeal. Because it appears there is sufficient record for the IAC claim to proceed on direct appeal, Sellers would be prohibited from bringing an IAC claim

against Stenerson in post-conviction proceedings pursuant to Mont. Code Ann. § 46-21-105. That the OAD might not adequately argue his IAC claim against Stenerson out of conflict presents a insurmountable prejudice to Sellers because he could not then argue it on post-conviction relief. That he would likely lose this opportunity is a significant risk and he cannot simply assume that OAD counsel will not be unaffected by loyalty or fear of reprisal from the OSPD.

Finally, Mr. Sellers would also request, should this Court elect to remand this issue for consideration by the district court, that he request be heard by a court other than in the Twenty-First Judicial District.

Therefore, this Court should grant his Petition to Remove the OSPD and appoint appellate counsel who is conflict-free. **It should be noted that the State of Montana has been contacted regarding the Petition and does object to the removal of the Office of the State Public Defender.**

Respectfully submitted this 14th day of January, 2010.



Colin M. Stephens
SMITH & STEPHENS, P.C.
Attorney for Petitioner

CERTIFICATE OF SERVICE

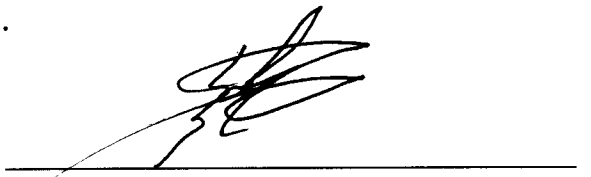
I, Colin M. Stephens, do hereby certify that I sent or caused to have sent, a true and correct copy of this Appellant's Petition to Remove Office of the State Public Defender to the following, via the means indicated:

Steve Bullock ..... U.S. Mail
Montana Attorney General
Mark Mattioli
Assistant Attorney General
215 N. Sanders
Helena, MT 69620-1401

George Corn ..... U.S. Mail
Ravalli County Attorney
205 Bedford
Hamilton, MT 59840

Donnie Mack Sellers ..... U.S. Mail
2155657
Crossroads Correctional Center
50 Crossroads Drive
Shelby, MT 59474

Dated this 19th day of January, 2010.



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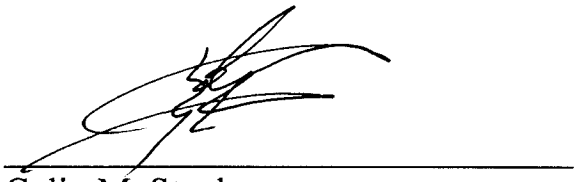
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(9), I hereby certify that this Appellant's Petition to Remove Office of the State Public Defender complies with all requirement of Mont. R. App. P. 11, in that it is prepared in a proportionally spaced Times New Roman 14 point typeface, is appropriately double space, and does exceed 4,000 words as calculated by my WordPerfect X3 software.

Respectfully submitted this 19th day of January, 2010.



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