**MEMORANDUM**

To: Joint Subcommittee on Judicial Branch, Law Enforcement, Justice, Section D

From: Tammy Plubell, Appellate Services Bureau Chief, State Attorney's Office, Department of Justice

Re: Information Supporting Request for One FTE

Date: February 6, 2023

I submit this memorandum to supplement the information I provided to the Joint Subcommittee on Judicial Branch, Law Enforcement, Justice, Section D on February 2, 2023.

It is the duty of the Montana Attorney General “to prosecute or defend all causes in the supreme court in which the state or any office of the state in the officer’s official capacity is a party or in which the state has an interest.” Mont. Code Ann. § 2-15-501. The Appellate Services Bureau (ASB) is part of the State’s Attorney’s Office within the Department of Justice and represents the State defending criminal convictions on direct appeal in the Montana Supreme Court or in civil postconviction proceedings in the Montana Supreme Court. ASB has no control over its caseload and has no discretion to decline any case. Its duty is to respond to every criminal appeal, and the civil appeals referenced above, filed in the Montana Supreme Court.

ASB occasionally initiates state appeals that are authorized by statute and circumstantially warranted. ASB also defends lawful convictions in federal court challenged through a federal petition for writ of habeas corpus. ASB also must respond to extraordinary writ requests and petitions for writ of habeas corpus in the

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Montana Supreme Court. Finally, ASB must respond to every appeal in dependency and neglect and involuntary commitment cases.

There are currently nine permanent attorneys within ASB, including the bureau chief, who manages the other attorneys and the day-to-day work of ASB while maintaining a regular case load. This number has been static for decades. There is currently one modified temporary attorney position set to expire in June 2023. The cost of that position is shared with the Department of Public Health and Human Services to handle primarily child dependency and neglect appeals. ASB has three paralegals, who provide paralegal services to the entire bureau.

In comparison, ASB's counterpart, the Office of the Appellate Defender (OAD) has 12.25 attorneys, *not* including the managing attorney. These attorneys do not generally handle child dependency and neglect appeals because those cases are handled by 7 or 8 contract attorneys. Also, the OAD often contracts out appeals of denial of postconviction relief. The OAD does not handle federal habeas cases. Additionally, ASB also handles appeals where the appellants have private counsel or the appellant is a pro se litigant. In those cases, the OAD is not involved.

In addition to its other responsibilities, ASB meets the statewide training needs of prosecutors and other criminal justice partners by: (1) providing bi-annual training to the Montana County Attorneys Association; (2) providing short, timely cases summaries of recent Montana Supreme Court decision to prosecutors so they can stay up to date and keep local law enforcement trained on current law; (3) providing training on dependency neglect statutes and case law; (4) supporting prosecutors statewide with challenging legal questions or emergencies by assisting with research or by offering feedback on the best course of action; (5) considering requests from prosecutors around the State to initiate a state appeal when authorized by statute; (6) drafting training manuals or memorandums for special areas of law; and (7) providing training to judges.

ASB faces the challenge of maintaining its reputation for competence, professionalism and diligence while handling increased caseloads with no corresponding increase in staffing. Although the modified position has greatly assisted ASB in meeting its demands, the position is not permanent. Thus, it is challenging to recruit for this modified position when applicants have no certainty

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in the permanency of the position. The modified position was created to address burgeoning caseloads when Appellate Services was lagging further and further behind. The modified position has now existed for over three years and has demonstrated that ASB needs a 10th attorney FTE.

The following statistics from the Montana Supreme Court from 2010 to 2022¹ demonstrate the dramatic increase in *criminal appeals*² beginning in 2011, and remaining steady since then:

2010:	143
2011:	211
2012:	189
2013:	263
2014:	222
2015:	261
2016:	236
2017:	223
2018:	207
2019:	222
2020:	170 (COVID)
2021:	193 (COVID)
2022:	201

These statistics only reflect *criminal* appeals. The statistics do not include the civil appeals, like dependency and neglect appeals or involuntary commitment appeals. These statistics support a conclusion that increased caseloads in the Montana Supreme Court alone have warranted another FTE for about a decade.

¹ These reports can be found at <https://courts.mt.gov/clerk/stats>.

² These statistics are criminal appeals only. The numbers do not reflect any of the civil appeals, such as dependency and neglect appeals, involuntary commitment appeals, or appeals of denial of postconviction relief, or writs, which ASB would have handled between 2010 and 2022.



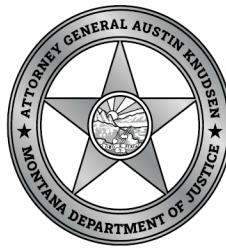
ASB has been tracking dependency and neglect statistics since 2012. It does not appear that the Montana Supreme Court separately tracks dependency and neglect statistics. The following statistics represents the number of dependency and neglect briefs that Appellate Services filed from 2012 through 2022:

2012:	23
2013:	35
2014:	28
2015:	33
2016:	13
2017:	30
2018:	36
2019:	30
2020:	22
2021:	25
2022:	17

Appellate Services does not request extensions of time in dependency and neglect appeals. These briefs are filed on or near the initial 30-day due date for the response brief. Because Appellate Services does not seek extensions in dependency and neglect appeals, this results in additional extensions in other ASB appeals.

When I became the Bureau Chief in October 2021, I was concerned about attorneys' caseloads and the length of time between an opening brief coming into our bureau and when ASB filed its response brief. For several years, ASB had consistently been falling further and further behind. The reason it has been possible for ASB to be less behind than it was three years ago is two-fold: (1) the addition of the 10th modified position; and (2) the COVID-19 pandemic, that slowed the flow of criminal cases through the system.

I also recognized that we needed to do more to capture and track the work of ASB. Accordingly, ASB developed a form for each attorney to document the work he or she completed in each month.³ At the end of the month, each attorney submits his or her monthly report to me, and I submit my monthly report to each attorney, because it is important for them to know that I am producing work. I use



these reports to prepare a monthly report to the Attorney General, which tracks ASB's oldest cases, the number of briefs assigned and the number of briefs filed for each month.

In 2021, I assigned 243 cases among the 10 appellate attorneys. In 2021, ASB attorneys collectively filed 208 briefs and participated in 2 oral arguments. In 2022, I assigned 185 cases among the appellate attorneys. ASB collectively filed 196 briefs but at least four of those briefing projects were extraordinarily large records and addressed numerous issues. Additionally, for parts of 2022 ASB was down an attorney. First one attorney moved out of state in March 2022, and second, another attorney retired in July 2022. Thus, we were short staffed for at least five months. In both instances, ASB replaced experienced appellate attorneys with attorneys who were new to appellate work. A new appellate attorney cannot produce work as quickly as an experienced attorney. In 2022, ASB attorneys also provided training to prosecutors seven times and met to consider state appeal requests 9 times.

I am happy to answer any other questions about ASB's work and the need for a 10th FTE or provide any additional data assuming it is available.

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