

APPLICATION FOR

DISTRICT COURT JUDGESHIP
Eighteenth Judicial District

A. PERSONAL INFORMATION

1. Full Name: Peter Bengt Ohman
 - a. What name do you commonly go by? Peter/Pete
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED]
Phone: [REDACTED]
4. Office Address: 502 South 19th Avenue, Suite 306, Bozeman, MT 59718
Phone: 406.444.5387
5. Length of residence in Montana: 29 years
6. Place of residence for the last five years:

Dates

City

State

2001 to Present

Bozeman

MT

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Franklin Academy H.S.	Malone, NY	1987	High School
Le Moyne College	Syracuse, NY	1991	Philosophy/English Minor Poli. Sci.
Lewis and Clark Law School	Portland, OR	1995	J.D., Certificate in Environmental Law

8. List any scholarships, awards, honors and citations that you have received:

2007 Excellence in Performance as a State of Montana Employee

9. Were you a member of the Law Review? If so, provide the title and citation of any article that was published and the subject area of the article.

Not a member of the Law Review

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
Montana Supreme Court	September 1995
U.S. District Court for the District of Montana	September 1995

11. Indicate your present employment. (List professional partners or associates, if any).

Public Defender Division Administrator, Office of State Public Defender (OPD), State of Montana

12. State the name, dates and addresses of law firms with which you have been associated in practice, governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
Peter Ohman: Attorney at Law	Sole Practitioner	10/95-5/97
Appalachian Research and Defense Fund of Kentucky	Attorney	5/97 – 7/98
Montana Department of Commerce	Attorney	7/98 – 6/2001
Peter Ohman: Attorney at Law	Sole Practitioner	9/2001 – 10/2003
Gallatin County Public Defender Office	Attorney/Chief Deputy	10/2003-6/2006
Office of State Public Defender	Regional Deputy Public Def.	6/2006-12/2014
Office of State Public Defender	Training Coordinator	1/2014-8/2017
Office of State Public Defender	Public Defender Division Administrator	8/2017 to Present

13. If you have not been employed continuously since completion of your formal education, describe what you were doing.

N/A

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

I currently manage the trial division in OPD. The division has approximately 230 employees including 160 attorneys. I have 12 direct reports 11 of whom are regional deputy public defenders. I am prohibited by statute from carrying a caseload. The areas of law where I am most involved in this position are providing advice in public defense related matters to our internal work force, assisting in HR issues with our administrative team, coordinating civil proceedings when claims are filed against the agency, and working on a host of other areas that touch on legal issues, including through my role as chair of the Montana Board of Crime Control and the numerous other boards and commissions on which I serve.

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

In my 25 years of practice I have represented clients in domestic, employment, consumer, antitrust, land use, social security, landlord-tenant, licensure, administrative, human rights, criminal, civil commitment, and juvenile proceedings.

I first lobbied in front of the Montana Legislature during the 1999 session. I have appeared before the Legislature every session since 2007.

I was an adjunct professor at Montana State University teaching Business Law in 2003.

16. If you specialize in any field of law, what is your specialty?

While in full-time practice at OPD, I developed a specialty in the field of juvenile defense. I found that field to be particularly compelling as there is no better time to try to make a difference in people's lives than when they are young, and have the ability to change their life's trajectory.

I also developed an expertise in constitutional law and more specifically defending the Bill of Rights and the rights set forth in Article II of the Montana Constitution, because at its core criminal defense is the defense of an individual's constitutional rights.

17. Do you regularly appear in court?

I have not appeared in court for several years because Montana Code Annotated § 47-1-202, prohibits me from carrying a caseload. However, during the 11 years I worked in the public defender's office, I estimate I appeared in court at thousands of hearings over the course of more than 2,000 days.

Up until 3 years ago, I also represented appellants before the Sentence Review Division of the Montana Supreme Court.

What percentage of your appearance in the last five years was in:

Federal court	_____	%
State or local courts of record	100	%
Administrative bodies	_____	%
Other	_____	%

- 0%, however, please see my response to question 17, above

- Again, please see my response to question 17 above.

- While I worked for the Department of Commerce, I appeared at multiple administrative hearings per month.

- | | | |
|----------|----|---|
| Civil | 20 | % |
| Criminal | 80 | % |
| Other | | % |

- HON. STEVEN FAGENSTROM
Cascade County Justice Court
415 2nd Avenue North
Great Falls, MT 59401

23. State the number of jury trials that you have tried to conclusion in the last ten years.

I have tried 2 jury trials in the last ten years, one deliberate homicide and the other two counts of assault with a weapon. One resulted in a guilty verdict the other my client was acquitted. I have tried approximately 20 jury trials over the course of my career, perhaps more.

24. State the number of non-jury trials that you have tried in the last ten years.

I apologize, but I do not remember how many bench trials I tried in the last ten years and cannot recall how many I might have tried over the course of my career. Suffice to say, I expect it was quite a few.

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, provide the same information regarding opposing counsel and the nature of the matter.

I have not litigated cases in the last two years. The following are counsel who I litigated cases against frequently when I was regularly appearing in court:

Eric Kitzmiller
Gallatin County Attorneys Office
1709 W College St #200
Bozeman, MT 59715
(406) 582-3745

Marty Lambert
Gallatin County Attorneys Office
1709 W College St #200
Bozeman, MT 59715
(406) 582-3745

Todd Whipple
Whipple Law Offices
251 Edelweiss, Suite 2
Bozeman, MT 59718

Ashley Whipple
Whipple Law Offices
251 Edelweiss, Suite 2
Bozeman, MT 59718

Brett Linneweber
Yellowstone County Attorney Office
217 N 27th Street
Billings, MT 59101
(406) 256-2870

The Judges before whom I appeared most often were:

Hon. Mike Salvagni
Retired

Hon. Holly Brown
(406) 582-2160

Hon. John Brown
(406) 582-2150

Hon. Nels Swandal
Retired

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

I have not been involved in adversary proceedings before administrative boards or commissions in the last five years. In my role as the Chair of the Montana Board of Crime Control, I have been involved in reviewing administrative decisions via the Board's involvement in proceedings arising from the Public Safety Officer Standards and Training Council.

While working for the Montana Department of Commerce in the late 1990s, I worked extensively as counsel and prosecutor for occupational licensing boards in innumerable contested matters.

27. If you have published any legal books or articles, other than Law Review articles, list them, giving citations, dates, and topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, state the topic, date, and group to which you spoke.

Annual OPD conference – October 2012: Maintaining Awareness of Youth Court Issues

National Juvenile Defense Center Summit – Scottsdale, Arizona – November 2013

Mental Disease or Defect – Ethical and Procedural Considerations – July 18, 2014
OPD

Practice Points and Updates for Youth Court Practice - November 12, 2015 - OPD

Introduction to the Chapter Method of Cross-Examination – August 12, 2015 - OPD

PREA – The Prison Rape Elimination Act – February 27, 2015 – OPD

Legislative Update – May 2015 - OPD

Mental Health and the Obligations of Counsel – April 21, 2016 - OPD

Youth Court Practice: Dealing with Difference – Gonzaga Law School – July 15, 2016

Redefining the Win in Public Defense – Ethics -September 14, 2016 - OPD

2017 Juvenile Training Immersion Program, Newport, Oregon, April 21-22, 2017

Legislative Update – May 2017 - OPD

Montana Courts of Limited Jurisdiction Conference, Billings, Montana - April 24, 2018

Montana District Court Judges Conference, Bozeman, Montana – May 9, 2018

Montana Public Safety Forum, Missoula, Montana, October 3, 2018

Office of State Public Defender Annual Conference, Missoula, MT – October 10, 2018

Montana Drug Courts Conference, Billings, Montana – October 22, 2018

OPD Support Staff Conference, Butte, Montana - May 2019

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member. Provide the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

Montana Bar Association 1995 to Present

National Association of Criminal Defense Lawyers

Montana Association of Criminal Defense Lawyers:

Secretary/Treasurer – 2015 to 2017

Vice-President - 2017 to 2019

President - 2019 to Present

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. State the title and date of any office that you have held in each organization. If you held any offices, describe briefly your activities in the organization.

Court Assessment Program/Court Improvement Project – CAP advisory committee
2014 to January 2020

Youth Justice Council – 2014 to 2018

Western Juvenile Defender Center Advisory Board – 2014 to Present

Montana Commission on Sentencing – Commissioner – August 2015 to October
2016

Forensic Science Division Advisory Board – September 2017 to Present

Montana Supreme Court Criminal Jury Instruction Committee - 2012 to November
2017

Montana Supreme Court Commission on Courts of Limited Jurisdiction – October
2017 to Present

Montana Board of Crime Control – October 2017

Chair: April 2019 to Present

National Association of Criminal Defense Lawyers Rural Defender Steering
Committee – December 2018 to Present

Criminal Justice Oversight Council – December 2019 to Present

National Association of Criminal Defense Lawyers: Justice for All Grant Advisory
Committee – 2020 to Present

30. Have you ever run for or held public office or sought a judicial appointment? If so, provide the details.

I have never run for or held public office or sought a judicial appointment.

31. Explain your philosophy of public involvement and practice of giving your time to community service.

While in high school I volunteered at a local nursing home visiting residents who otherwise did not have family or friends coming to see them. When living in Hazard, Kentucky, I visited and helped an elderly client who lived in an isolated area of Appalachia with groceries and other matters.

On my own time I have given clients rides when they have needed them, took a young man out to dinner before we put him on a bus to Texas, and donated jackets and clothes to folks who got out of jail in the winter so they had something warm to wear. Like many of us in Montana I have done small things for those in need in our community - efforts that go unnoticed to the greater population but are significant and meaningful to the people we are trying to help.

When I first moved to Bozeman in 1991, I volunteered at the Gallatin Valley Land Trust with Chris Boyd, before the organization became what it is today. I served on the Bozeman Bicycle Advisory Board in the mid-1990s, and more recently am a citizen member of the City of Bozeman Audit Committee.

The majority of my career has revolved around public service. The work I did in Kentucky was helping some of the poorest residents of our nation. Virtually all my female clients were victims of domestic violence. In the late 1990s I advocated for consumers under the Montana Unfair Trade Practices and Consumer Protection Act. In private practice and

through my career as a public defender I have worked to ensure the community has given its members an equal opportunity to defend themselves against the substantial power of the government.

E. PROFESSIONAL CONDUCT AND ETHICS

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No

33. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

No

34. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

While kayaking on the Alberton Gorge in 1995 my dogs got off their leads and chased and killed a sheep. I was issued a public nuisance citation, paid for the sheep, and my dogs were permanently enjoined from Mineral County.

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, provide the details.

No

36. Is there any circumstance or event in your personal or professional life that would, if brought to the attention of the Commission, Governor or Montana Supreme Court, affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No

F. BUSINESS AND FINANCIAL INFORMATION

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, provide the details, including dates.

No

38. If you are an officer, director, or otherwise engaged in the management of any business, provide the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

N/A

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, identify the source and the approximate percentage of your total income it constituted over the last five years.

No

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or that in any manner or for any reason might embarrass you? If so, please explain.

No

41. If appointed by the Governor, are you prepared to disclose the information required under 2-2-106, MCA (i.e., the name, address and type of your business; any present or past employer from which you currently receive benefits; any business or professional entity or trust in which you hold an interest; any entity in which you are an officer or director; and any real property, other than a personal residence, in which you hold an interest)?

Yes

42. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? XX Yes No

If not, please explain.

N/A

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?
 Yes XX No

If yes, please explain.

N/A

44. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, provide the details.

No

G. WRITING SKILLS

45. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. State if associates or others have generally performed your research and the writing of briefs.

I have researched many legal matters over the last five years primarily involving criminal law. Usually this arises from attorneys asking for guidance on an issue they are facing. For legislative matters I have examined case law and statutes from surrounding states and other sources to develop bill drafts or simply propose ideas for legislation.

In the past when I was in court regularly, I performed the majority of my research and writing on my own. However, I do not have a monopoly on knowledge, so I am always happy to receive input from mentors, peers, and occasionally interns.

46. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., explain the type and extent of writing that you have done.

Most of the legal writing I have done in the last five years has revolved around legislation.

I have drafted numerous bills, a number of which have become law. I have also provided content and editing suggestions to others involved in the legislative process.

47. Attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable. The writing sample should be as recent as possible.

48. What percentage of your practice for the last five years has involved research and legal writing?

Approximately 20 %

49. Are you competent in the use of Westlaw and/or Lexis?

I have a Lexis Advance account that I use regularly.

H. MISCELLANEOUS

50. Briefly describe your hobbies and other interests and activities.

Hobbies, interests, and activities track pretty closely with before and after children. Through the 2000s I was probably kayaking on the Gallatin a few days a week and heading off for weekends on rivers in Idaho and Montana when time permitted. In the winter I have been a pass-holder at Bridger, Big Sky, or Moonlight every year I have lived here. I also spent quite a bit of time at Bridger Creek in a failed effort to play consistent bogey golf. Currently, I run a few times a week, mountain bike about once a week, ski with the family at Bridger, kayak occasionally and golf even less so. My goal is to do all of foregoing more frequently in the future, but I expect that is wishful thinking if I am fortunate enough to get this appointment.

It goes without saying I prioritize spending time with my family. I am also an avid reader.

51. Describe the jobs that you have held during your lifetime.

My first job was working in a dress factory. I spent all day every day laying out very delicate sheets of fabric on a long table, and my co-worker Sam would cut the sheets with a cigarette hanging out of his mouth, fully ashed, but never landing on the fabric and ruining the same. I have waited tables – which I think everyone should do at least once every few years – worked in a deli, retail, construction, and taught skiing. My first job in Bozeman was as the fry cook at the airport in 1991. I worked in the marketing department at Bridger

Bowl selling ski packages during the 1991-1992 season. I was the off-site coordinator for the Sweet Pea festival in 1992, which at the end of the day involved ensuring the trash barrels did not overflow. Subsequently, I attended law school and worked as a law clerk for two lawyers during that time.

52. Identify the nature and extent of any pro bono work that you have personally performed during the last five years.

I have not performed pro bono legal work during the past five years other than volunteer work noted above and public service through my position with the State.

Of course, I support and recognize the need for attorneys to perform pro bone work and have done the same in earlier portions of my career.

53. In the space provided, explain how and why any event or person has influenced the way that you view our system of justice.

Having practiced law for 25 years I can not really say a single person or event has influenced my view of the justice system. Rather it has been a continuous evolution based on myriad experiences and observations from the many different positions I have held inside and outside government. An evolution that continues today and I expect will continue whether I end up on the bench or work in the field.

I do want to say my time acting as Chair of the Montana Board of Crime Control has broadened my understanding of the role of law enforcement in our State. I have listened and learned from the chief of police, sheriff, and director of the Department of Corrections

who sit on the Board. In fact, just recently hearing one of them refer to law enforcement as “peace officers” with an emphasis on keeping the peace, was a new way for me to think about the role our police play in society. This is just one of the many thoughts I have heard and pondered through the course of my career. Many more were relayed to me during times I have visited with clients in their living rooms, met them in the jail, heard legislators talk about bill drafts, listened to judges express reasons for sentence, considered colleagues’ thoughts on leadership, or bounced ideas around with my wife while sitting on the porch at the end of a long work week. All of these experiences and more have profoundly influenced the way I view and continue to critically think about our justice system.

54. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

Judicial temperament. Being a lawyer is hard, being a litigator is stressful. Every time I see a story about an attorney taking their own life in Montana, I wonder what we could have done as a profession to stop something like that from happening. Being the current supervisor of over 150 lawyers, the concern is an issue I worry about often.

One way to make the practice less stressful is to have a judge who treats the bar with respect and, when necessary, compassion. That is not to say the court should be informal and deferential to lawyers, rather judicial temperament is being calm in the face of strong

emotions, exercising the appropriate authority of the court, but also treating those before it with respect. After all, respect goes both ways.

I am also well aware of the workload the district court judges carry in Gallatin County. Despite what will undoubtedly be a difficult year for the general fund, I hope the Legislature will approve a fourth judge for the fastest growing county in Montana. Notwithstanding that, the person who assumes this seat will have to be prepared to work hard, make timely decisions, and manage their docket. Having worked with the judges in this district for well over ten years, I believe I know what needs to be done to move cases forward, issue decisions, and keep the system moving.

55. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

Initially one should identify the controlling law and apply it. If there is an established body of precedent as this question seems to presume, then stare decisis demands a trial court follow the same. I would say the Montana Supreme Court or the Legislature are the more appropriate bodies to deviate from established precedent, with the Legislature being the preferred vehicle.

In cases of ambiguity, the rules for statutory interpretation are fairly well defined. I would apply those in an effort to reach a common-sense interpretation of the law then apply the facts. If it is not clear the matter should be conclusively addressed pre-trial, then I would

always lean toward trial, as that is the best process we have for fairly adjudicating matters of contention and participants in our system deserve their day in court.

Having said all that, I will say that my default is individual rights. When there is government action taken against someone the first thought I would have is what is the impact that action has on the person's rights. Depending on the endless factors that could come into play, one would then proceed to determine the level of state interference that is warranted, if any.

When thinking about the phrase "flexibility in the law" - in the context of being a judge - I get uncomfortable. The preference would be clear law, facts that can be interpreted in a reasonable and justifiable way, and a rational outcome. Of course, having been involved in drafting laws where the meaning is clear to everyone in the room, but become much more muddled once they hit the books, I know things are not that simple. In those situation I would try to explain my thought process and decision in a way everyone can understand, and even if they did not agree at least would they know the court took the situation seriously and spent time considering each party's position.

56. In the space provided, state the reasons why you are seeking office as a district court judge.

In short, I want to ensure Gallatin County has a district court judge who reflects the values and aspirations of the community. Southwest Montana has changed considerably in the approximately three decades I have lived here. A judge who considers the needs of community safety with the rights of the accused; development with conservation; affordable housing with high-end construction; a clean environment with economic development, and many other juxtapositions, is the kind of person we want on the bench. Of course, all these are governed by the Constitution, statute and rule, and when the same clearly require a specific outcome then that is what it should be. However, where there is ambiguity or discretion for the court, each side has a story to tell. I want a judge who will listen to both those stories then make a decision that is fair and best for the community.

In broad terms, that is why I am seeking this office.

On a more practical level there is the court's docket. The Gallatin County district courts are overwhelmed. My understanding is if you are a civil attorney practicing in the 18th Judicial District it takes perhaps years to get a trial date. I would set a scheduling conference a reasonable period after the answer is filed and set a firm trial date at that time. I would advise the parties that if there are issues with discovery to bring them to my attention immediately so we can stay on schedule. On the criminal side I would encourage the use of mediation under § 46-1-501 et seq., and stack jury trials with a layer

of prepared cases so jurors are not called in only to be released at the last minute because the case settled or a development resulted in a need for a continuance. I would take other measure to make the court more efficient. Of course, I also understand the acute need for a fourth district court judge.

57. What items or events in your career have distinguished you or of which you are most proud?

While I understand this is not the role of a district court judge, the times I have been most proud of as a lawyer have been when I have been able to give voice to the most powerless and disadvantaged members of our society. In order to maintain a healthy social fabric all members of our community must feel they are worth something. When people come into contact with the court system that feeling of self-worth can quickly become eviscerated. Heartfelt thanks from clients for advocating strongly for them in court, or trying cases that had little chance of success, is something that does not necessarily evoke pride, but rather a humble satisfaction that at least I know I made someone feel society had not abandoned them.

On a more identifiable level I am proud of the statewide public defender system I have been involved with since its start in 2006. While there is still work to be done, our leadership team has brought the agency through this fiscal year within budget, secured much-needed salary increases for our staff, and secured federal funding to help with child

welfare issues that bedevil our State. I can only hope the current budget cycle does not undo the progress we have worked so hard to achieve.

58. Provide any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

I have represented a lot of people who have committed serious crimes. Crimes that have left life-long scars on their victims. I expect there are some people who would question why someone would advocate for those defendants. At the same time, I know there are many who recognize the need for our society to hold true to the right to counsel contained in the 6th Amendment.

59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

I think my range of experience is what sets me apart. I grew up in a small economically depressed town 8 miles from the Canadian border. I moved to Montana almost 30 years ago. For the first seven years of my legal career I practiced exclusively civil law. Subsequently I moved to primarily criminal defense. Now I do a mix of civil, criminal, and administrative law along with management of a large state agency. I have tried the most difficult cases to a jury, I have experienced physical manifestations of the stress associated with such activities, I have testified before innumerable legislative committees to improve the laws judges are duty-bound to enforce in a fair, equitable and sensible way. Throughout all that I have managed to keep my sense of humor about the vagaries of life

and the humility we need to get through the same. I am certainly hesitant about this position, as one should be given the weight of the seat, however, I would be honored to have the privilege of an appointment to the bench in Gallatin County.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 18th Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

July 2, 2020
(Date)

Pete Mc
(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Monday, July 6, 2020.

Mail the signed original to:

**Office of Court Administrator
c/o Lois Menzies
P.O. Box 203005
Helena, MT 59620-3005**

Send the electronic copy to: mtsupremecourt@mt.gov

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP

OFFICE OF STATE PUBLIC DEFENDER,

Petitioner,

v.

CASCADE COUNTY JUSTICE COURT,
CASCADE COUNTY,
THE HONORABLE STEVEN F. FAGENSTROM,

Respondent

PETITION FOR WRIT OF SUPERVISORY CONTROL

APPEARANCES:

RHONDA SCHAFFER

Director

PETER B. OHMAN

Public Defender Division

Administrator

Office of State Public Defender

502 South 19th, Suite 306

Bozeman, MT 59718

HONORABLE STEVEN

FAGENSTROM

Cascade County Justice Court

415 2nd Avenue North

Great Falls, MT 59401

MATTHEW McKITTRICK

Regional Public Defender

Office of State Public Defender

615 2nd Avenue North, 3rd Floor

Great Falls. MT 59401

RESPONDENT

PETITIONERS

The Office of State Public Defender (OPD), respectfully requests that this Court issue a writ of supervisory control.

I. STATEMENT OF ISSUE PRESENTED FOR REVIEW

This Court should exercise supervisory control to review a court of limited jurisdiction's decision to appoint an attorney at state taxpayer expense to an individual facing criminal charges who undisputedly did not qualify under the statutory standards for appointed counsel.

II. STATEMENT OF THE CASE AND FACTS

On August 28, 2018, Lisa McLaughlin was charged with 1st offense theft in Cascade County, Montana. Exhibit A. On December 10, 2018, the Honorable Steven Fagenstrom issued an Order Appointing Counsel, requiring the Office of State Public Defender (OPD) to provide counsel for the defendant. Ex. B. On January 2, 2019, OPD filed a Motion to Rescind Appointment of Public Defender, because the charge which the Defendant faced did not carry a penalty of incarceration. Ex. C. The Court granted the Motion to Rescind on January 3, 2018. Ex. D.

On January 22, 2019, the Court again issued an Order Appointing Counsel and directing OPD to provide an attorney to the Defendant. Ex. E. On January 28, 2019, OPD filed a Motion to Rescind Appointment of Public Defender, citing the

fact the subject charge did not carry a sentence of incarceration. Ex. F. The Court issued a written Order Denying Motion to Rescind on February 26, 2019. Ex. G.

III. SUMMARY OF THE ARGUMENT

Supervisory control should be exercised in this case. An ordinary appeal is not available because no statutory provision exists allowing an appointed public defender to appeal an order of appointment. The issue raised here is of statewide significance since it will affect the appointment and administration of the public defender system. The justice court's order runs counter to reforms enacted by the Montana Legislature which were designed to limit the use of OPD resources to only those people who qualify under the statutory standards. The legal error in this case is clear because the justice court had no statutory authority to order that OPD represent a defendant who did not qualify for taxpayer funded counsel.

The justice court's order that the defendant qualifies for court-appointed counsel despite the fact her first offense theft does not carry the possibility of incarceration is improper. There is no adequate remedy of appeal because the justice court appointed an attorney who continues to represent the defendant, and the appointment will continue to take away limited resources from those defendants entitled to counsel because they face charges that carry the possibility of incarceration.

IV. ARGUMENT

A. Standards for Writ of Supervisory Control

Supervisory control, available under Rule 14, Mont. R. App. P., is an extraordinary remedy which this Court exercises only when (1) urgency or emergency factors exist making the normal appeal process inadequate, (2) the case involves purely legal questions, and (3) one or more of the following circumstances exist: (a) the other court is proceeding under a mistake of law and is causing a gross injustice, (b) constitutional issues of state-wide importance are involved, or (c) the other court has granted or denied a motion for substitution of a judge in a criminal case. *Blodgett v. Orzech*, 2012 MT 134, ¶9, 365 Mont. 290, 280 P.3d 904.

B. Tax Payer Funded Counsel in Criminal Proceedings is Limited to Those Individuals Who Face the Possibility of Incarceration.

The Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee the right to the assistance of an attorney in a criminal proceeding. Montana Code Annotated § 47-1-104(4) lists the circumstances in which a court may order assignment of a public defender. Montana Code Annotated § 46-8-101(3), states if a court waives incarceration as a sentencing option, a public defender may not be assigned.

This Court and the United States Supreme Court have squarely addressed the issue raised in this writ: whether an individual has a right to court appointed counsel in the absence of a sentence of incarceration. Both courts held the right to counsel

does not attach. In *State v. Spotted Eagle*, 2003 MT 172, ¶¶16-19, 316 Mont. 370, 71 P.3d 239, this Court adopted the United States Supreme Court’s opinions in *Scott v. Illinois*, (1979) 440 U.S. 367 and *Nichols v. United States* (1994), 511 U.S. 738, recognizing, “an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.” *State v. Spotted Eagle*, ¶19; *see also*, *State v. Hansen*, 273 Mont. 321, 325, 903 P.2d 194, 196(1995)¹.

The precedent cited by the justice court in its written Order Denying Motion to Rescind, references case law supporting the right to counsel in Driving Under the Influence (DUI) cases. As this Court is well aware, DUI offenses carry a penalty of incarceration so the right to counsel attaches to such charges. The justice court cited a variety of cases supporting the right to counsel in DUIs, but did not refer to or distinguish *Scott*, *Nichols*, *Spotted Eagle*, or *Hansen*. As referenced above, those cases clearly demonstrate there is no right to counsel for an offense which does not entail incarceration.

The 2017 Montana Legislature passed House Bill 133. The bill took effect on July 1, 2017, and made significant changes to Montana’s criminal justice statutes.

¹ *Rejected on other grounds in, Alabama v. Shelton*, 535 U.S. 654, 660, 122 S. Ct. 1764, 1769, 152 L. Ed. 2d 888 (2002).

Of significance to this proceeding, HB 133 removed the possibility of jail time for a conviction of first offense theft, and replaced it with a fine of up to \$500.

Due to the changes made by HB 133, the defendant in the underlying proceeding does not face the possibility of incarceration based on the single charge of 1st offense theft. Because she cannot be sentenced to incarceration she does not have the right to court appointed counsel under Montana law and the United States Constitution.

V. CONCLUSION

Although well-intentioned, the justice court's order appointing OPD counsel to represent a criminal defendant who does not qualify is a mistake of law that would cause a gross injustice to OPD's constitutional and statutory mandates to serve indigent defendants. OPD has no right of appeal, and the issue is a pure legal question of statutory authority. *Office of State Pub. Def. v. Montana Eighteenth Judicial Dist. Court*, 2011 MT 97, ¶ 2, 360 Mont. 284, 255 P.3d 107. Alternatively, the caselaw cited in this Petition demonstrates supervisory control is appropriate because this matter involves a constitutional issue of statewide importance. *Orzech*, ¶ 9.

Based on the foregoing, counsel respectfully requests that this Court exercise supervisory control, and vacate the justice court's order appointing OPD to assign counsel for the defendant in Cascade County Justice Court cause number CR-265-2018-660.

DATED this ____ day of March, 2019.

Peter B. Ohman
Counsel for Petitioner