

IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. DA 09-0284

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STATE OF MONTANA, )  
)  
Plaintiff and Appellee, )  
)  
vs. )  
)  
ANTHONY ST. DENNIS )  
)  
Defendant and Appellant. )

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On Appeal From the Fourth Judicial District Court, the Honorable  
John Larson presiding, Cause No. DC-07-503

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**BRIEF OF AMICUS CURIAE**  
**AMERICAN CIVIL LIBERTIES UNION OF MONTANA FOUNDATION**

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**TABLE OF CONTENTS**

|   | <u>Page</u> |
|---|-------------|
| STATEMENT OF THE ISSUE .....  | 1           |
| STATEMENT OF THE FACTS.....   | 1           |
| ARGUMENT .....  | 12          |
| THE CONFLICT OF INTEREST BETWEEN ST. DENNIS AND<br>STRAHAN WAS NOT CURED BY APPOINTMENT OF PUBLIC<br>DEFENDERS FROM ANOTHER REGIONAL OFFICE WITHIN<br>THE PUBLIC DEFENDER SYSTEM..... | 12          |
| CONCLUSION .....  | 18          |
| CERTIFICATE OF SERVICE.....   | 19          |
| CERTIFICATE OF COMPLIANCE.....  | 20          |

## TABLE OF AUTHORITIES

| <b>Cases:</b>  | <b><u>Page</u></b> |
|--|--------------------|
| <i>Allen v. District Court</i> ,<br>519 P.2d 351 (Colo. 1974)..... | 16                 |
| <i>Cuyler v. Sullivan</i> ,<br>446 U.S. 335 (1980).....            | 12                 |
| <i>Duvall v. State</i> ,<br>923 A.2d 81 (2007).....                | 16                 |
| <i>Holloway v. Arkansas</i> ,<br>435 U.S. 475 (1978).....          | 13                 |
| <i>Simpson v. State</i> ,<br>769 A.2d 1257 (2001).....             | 16,17              |
| <i>Strickland v. Washington</i> ,<br>466 U.S. 228 (1984).....      | 12, 13             |
| <b>Montana Code Annotated:</b>                                     |                    |
| § 47-1-101 <i>et seq.</i> .....                                    | 1                  |
| § 47-1-104.....  | 1                  |
| § 47-1-105.....  | 1                  |
| § 47-1-202.....  | 1                  |
| § 47-1-215.....  | 1                  |
| § 47-1-215(2)(a).....  | 4                  |

**United States Constitution**

*Sixth Amendment*..... 12

## STATEMENT OF THE ISSUE

Whether the actual conflict of interest which precludes co-defendants from being represented by the attorneys in same public defender office is cured when one public defender is appointed by from one regional office and another public defender is appointed from another office?<sup>1</sup>

## STATEMENT OF THE FACTS

In 2005, the Montana legislature created a new statewide public defender system. Mont. Code Ann. § 47-1-101 *et seq.* A public defender commission (“Commission”) was established to oversee the new system. Mont. Code Ann§ 47-1-105. A chief public defender was designated to administer the new state agency, and regional offices were established where deputy public defenders would supervise public defender services for each region. Mont. Code Ann§ 47-1-202 and 215. The new system was designed to begin providing public defender services on July 1, 2006. Mont. Code Ann. § 47-1-104 (4).

From its inception, concerns about conflicts of interest plagued the new system. Initially, a conflicts coordinator was hired to report to the Commission on conflicts questions. In his report to the Commission based upon the first 150 days

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<sup>1</sup>The interest of Amicus Curiae, ACLU of MT Foundation, is limited to the conflicts issue in this case and so only that issue will be addressed.

of the operation of the new system, the conflicts coordinator stated, after evaluating similar systems in three other states: “The separation of conflicts attorneys, by contracting with outside counsel or by creating separate FTE [Full Time Equivalent] conflicts offices, from the regular public defender staff is the primary method of preserving client confidences.” Conflicts Coordinator Report to the Montana Public Defender Commission (December 6, 2006) at 7<sup>2</sup>. The Commission, however, decided to manage its conflicts “in-house” through their contracts manager. See December 6, 2006 Minutes of Commission at 6.<sup>3</sup>

Thereafter, the Commission adopted an administrative policy, stating:

When a case is determined to be a conflict of interest, the Regional Deputy Public Defender shall assign the case to a contract attorney whose name is maintained on the conflict attorney list or to a public defender employed outside his/her region.

Policy No. 116, “Conflict Cases”, Effective 5-11-07, attached to this brief as App. A. The Commission assumed that assigning a public defender from another region would satisfy conflicts problems.

In accordance with this policy, the Commission also adopted “Standards”

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<sup>2</sup>See Exhibit 1, Minutes of Public Defender Commission Meetings at <http://publicdefender.mt.gov/meetings/12062006.asp>.

<sup>3</sup><http://publicdefender.mt.gov/meetings/12062006.asp>.

that further detail the handling of conflicts cases.<sup>4</sup> An excerpt of the Commission standards is attached as App. B. Standard III(4)(B) states “[e]ach independent regional office, including any local office under its supervision, is a separate ‘firm’ for purposes of representing clients. Accordingly, a client with a conflict of interest with one regional office may be represented by another regional office.” App. B at 2. With respect to supervision, the regional directors were “solely responsible for providing guidance to and determining litigation strategy for attorneys assigned to their supervision.” Commission Standard III(4)(A); App B at 1.

On March 27, 2008, the district court inquired *sua sponte* into the possible conflict of interest with respect to the case *sub judice*. A copy of the transcript of this hearing is attached as App. C, and hereinafter referred to as 3/28/08 Tr. at \_\_\_\_\_. The defendants, St. Dennis and Strahan, were personally present at the hearing. App. C, 3/28/08 Tr. at 2. The public defenders of Appellant St. Dennis, Paulette Ferguson and Christopher Daly, and the public defender for co-defendant Dustin Strahan, Carolyn Gill, were also present at this hearing, as were Ed Sheehy, the

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<sup>4</sup>The current Standards may be found at: <http://publicdefender.mt.gov/forms/pdf/Standards.pdf> (it is assumed that these current standards are substantially similar if not identical to the standards in effect at the time (March 27, 2008) the district court considered possible conflicts in this case.

Regional Director for Region 2 of the public defender system (which includes Missoula where the incidents occurred) and Randi Hood, the Chief Public Defender. Lastly, Fred Van Valkenberg, the Missoula County Attorney, was at the hearing. App. C, 3/28/08 Tr. at 3-4.

Ed Sheehy identified himself at the outset as the Regional Director for Region 2 of the Office of State Public Defender and stated: “I am the individual that appointed both Ms. Ferguson and Mr. Daly for Mr. St. Dennis and then likewise appointed Carolyn Gill and Britt Cotter from Region 1 office at Kalispell as counsel for Mr. Strahan.” App. C, 3/28/08 Tr. at 3.

By appointing all of the public defenders in the case – for both Appellant St. Dennis and co-defendant Strahan, Mr. Sheehy recognized that his authority as regional director extended those cases arising in Region 2. He had not referred the conflict to the Regional Director of Region 1 to appoint the attorneys.

Under Mont. Code Ann. § 47-1-215 (2)(a), each regional director or as he is known in the legislation, each “deputy public defender,” is responsible for managing and supervising “all public defender services provided within the deputy public defender’s assigned region.” As such, the Region 1 (or “out-of-region”) attorneys (here, Carolyn Gill and Brigg Cotter) even though they were appointed from another district, were, by statute, under the supervision of Ed



Sheehy, the Region 2 director.

This supervision is exemplified in a letter written by Mr. Sheehy to Carolyn Gill during the course of the litigation and her representation of co-defendant Strahan. In a letter dated September 12, 2008, Mr. Sheehy writes to Ms. Gill, the public defender from Region 1, and effectively chastises her for the positions she was taking in the Strahan case. A copy of the letter is attached as App. D.<sup>5</sup> In his letter to Ms. Gill, Mr. Sheehy states the following:

I am writing this letter to you due to some major concerns I have about a position you were taking on Wednesday, September 10, 2008 in the hearing over the trial dates for your client and St. Dennis. My concern relates to the examination of the footwear, in the possession of the Missoula Police Department and the Montana Crime Lab.

Please correct me, if I'm wrong just as I understand it, you were objecting to the defendant's footwear, as well as the alleged victim's coveralls being sent to a footwear impression expert OPD<sup>6</sup> has, as an approved vendor (or expert) in Florida. This was because you took the position, primarily, that the footwear impressions, the dust, etc., on the alleged victim's coveralls would not be in the same condition as it now is, if it was shipped to Florida. I also gather you are

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<sup>5</sup>Counsel for Amicus was admittedly in a quandary as to how and whether to present this letter to the Court. It is not intended in any way to impugn any of the counsel involved, but merely to show how those in the public defender system approached their positions and responsibilities in this case. Also, the letter was not available to the district court when it considered the conflict *sua sponte*. Because the letter came after the conflicts hearing, it was not considered by district court in allowing the case to go forward and as such is outside of the formal record in this case. Nonetheless, counsel for Amicus did not want to be in the position of "covering up" the letter and felt the duty to bring it to the Court's attention.

<sup>6</sup>Office of Public Defender

questioning the chain of custody, if the evidence is sent to my staff attorney's expert.

Let me deal with the chain of custody issue first. On that, the practice and procedure, in Montana, is that once the evidence is turned over to a defendant's counsel, such counsel must stipulate to chain of custody from when the evidence was sent to the defense expert through it's[sic] return to the appropriate possessor of the same. In these cases, while you are representing a different client, *I need to tell you that I don't believe it would look good for you, as an OPD attorney, even from a different Region, raising an objection to chain of custody, when the expert the evidence is sent to an OPD expert. Please explain to me what your concerns are on chain of custody so we can try to work out an acceptable arrangement, on this matter, without your attacking other OPD attorneys or OPD expert.*

App. D at 1. This letter reveals a grave problem within the public defender system and undermines the representation that attorneys from different regions can be treated as from a separate firm. Mr. Sheehy states that "it would not look good, as an OPD attorney" to object to chain of custody, especially "when the expert the evidence is sent to is an OPD expert." This letter appears to chastise Ms. Gill for not following standard public defender protocol and challenging the vendor – expert– used by the public defender system.

Carolyn Gill responded to Mr. Sheehy's letter saying she was not challenging chain of custody, and disagreed strongly that she should not raise the issue in any event. She stated that she disagreed "because the parties involved work for or are employed by OPD and it would not 'look good' for me to attack

other OPD attorneys or experts. As we determined earlier with respect to these two cases, we are acting as separate offices and if I believe that it is in my client's best interest to object to some action taken by a co-defendant, which could potentially impact my case, I will not hesitate, either in this case or any future case, to object to that action." A copy of Ms. Gill's response letter, dated September 16, 2008, is attached as App. E. Ms. Gill goes on, nonetheless, to justify her actions to Mr. Sheehy and explain her position.<sup>7</sup>

These letters taken together show clearly and directly the inherent problem of having the conflicts attorney come from "within" the public defender system. They show that Mr. Sheehy considers the OPD [Office of Public Defender] as an entity whose procedures should not be questioned or challenged. Further, Mr. Sheehy thought one public defender should not criticize another public defender because "it doesn't look good."

When it held the conflicts hearing on March 27, 2008, the district court did not have the benefit of these letters as they were written almost six months after the March 27<sup>th</sup> hearing. At the hearing, the court inquired as to whether or not the St. Dennis-Strahan conflict was "one of the first cases." App. C, 3/28/08 Tr. at 5.

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<sup>7</sup>The evidence regarding footprints and shoes was a pivotal part of the case against St. Dennis. Strahan was granted use immunity to testify that St. Dennis was the person who did the kicking and stomping. *See* Strahan testimony at St. Dennis trial, January 7, 2009 Tr. at 745-791.

Mr. Sheehy and Ms. Hood then detailed numerous cases in which they were personally involved in which such conflicts arose and how public defenders from different regions were handling the conflicts case.

Mr. Sheehy described for the court some of safeguards that were in place between the two regional offices. A public defender from one region did not have the key to the office in another region. App. C, 3/28/08 Tr. at 6. Eric Olson was identified as the conflict manager who oversaw appointment of managers and Mr. Sheehy indicated that Mr. Olson would be the one approving the appointment of experts. App. C, 3/29/08 Tr. at 8.

The court then inquired whether there was informed consent or a waiver from the defendants. Mr. Sheehy indicated that waivers were obtained only when co-defendants were being represented from the same regional office, and not when a public defender is appointed from another regional office. App. C, 3/29/08 Tr. at 8-9.

The court then asked about the Federal public defender system and why that system was considered one law firm, but the Montana public defender system was not. Mr. Sheehy responded that he believed the difference lay in the Federal public defender system's status as a non-profit organization. Mr. Sheehy also pointed out that different form pleadings were used among the different public

defender regions, but he did state that the public defenders in his region “cannot go to Hamilton” because “a particular state senator has some problems with that.” App. C, 3/28/08 Tr. at 11.

The court then asked Ms. Hood and Mr. Sheehy whether there was some model they could use for conflicts. App. C, 3/28/08 Tr. at 13. Mr. Sheehy stated that he believed there wasn't a model because “this is the first statewide public defender system that has ever been created.” Id. Other states might have similar system, but were broken up and not “one statewide system.” Ms. Hood then stated to the court that the Commission had looked at having independent conflict offices, but rejected that option because if there were multiple defendants, there would have to be multiple offices. App. C, 3/28/08 Tr. at 14.

The district court did not issue a formal ruling on the conflicts issue, but allowed the representation to go forward. Ms. Gill asked at the end of the conflicts hearing on March 27, 2008, “I assume it's all right for us to continue working on the case” and the court responded “It is.” App. C, 3/28/08 Tr. at 24.

One more important development has occurred with respect to conflicts within the public defender system which Amicus believes should be brought to the Court's attention. The Commission retained consultants from American University to assess the new public defender system. The consultants had a great

depth of experience and knowledge with respect to public defender systems, and issued a final report in October 2009, based upon their review of public defender system in Montana from August 2008 through June 2009 (hereinafter referred to as the AU Report and attached as App. F).<sup>8</sup>

With respect to conflicts arising from representation within the public defender system, the AU Report stated:

As to the conflict issue at the trial level, it is strongly suggested that the contract lawyer retained in a conflict situation or staff lawyer from another Region does not resolve conflict, either in form or in substance. In practice, whether intended or not, the Agency is highly centralized. The Chief Defender exercise complete authority throughout the Agency subject only to the Commission, and she is not reluctant to exercise that authority.

Excerpt of AU report, App. F at 2. The AU report stated in no uncertain terms that, in the consultants' view, the public defender system was a single law firm, regardless of the creation of regions and regional directors. The report notes that the Commission standards attempted to address the conflicts problem by describing the regions as different entities and independent; the consultants stated, "But that is not the fact!" AU Report, n. 15, App. F at 4. The consultants go on to state, "While the Legislation authorizes the Commission to create up to 11

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<sup>8</sup>A copy of the entire final report may be obtained from the Public Defender Commission website at <http://publicdefender.mt.gov/AUeval.asp>.

Regions, neither the Regions nor the Appellate office are independent units in fact or in practice.” Id.

The AU Report notes that although there may be a “firewall” with respect to sharing confidential information among the public defenders, that is only one aspect of the conflict problem. The public defender agency has substantive oversight and supervision over all the attorneys in the system, as well as other contract attorneys. “The Regions are simply not independent,” the AU Report states. App. F at 4.

The AU consultants suggest the solution is to establish a trial and appellate office entirely separated from the public defender system. Id. It must be independent from the existing state defender agency. Where more than two defendants are charged, the trial judge should appoint a private lawyer without connection to the public defender system. Id.

In the case at bar, St. Dennis is claiming that his constitutional right to effective assistance of counsel was infringed because the actual conflict of interest between St. Dennis and Strahan was not cured by appointment of public defenders from two regional offices. In light of the actual conflict of interest between St. Dennis and Strahan, and the failure to cure that conflict, prejudice must be presumed and St. Dennis’s conviction reversed. Amicus further hopes that the

Court, in its capacity as overseer of the Montana State Bar, will use this opportunity to review conflicts within the public defender system.

## ARGUMENT

### **THE CONFLICT OF INTEREST BETWEEN ST. DENNIS AND STRAHAN WAS NOT CURED BY APPOINTMENT OF PUBLIC DEFENDERS FROM ANOTHER REGIONAL OFFICE WITHIN THE PUBLIC DEFENDER SYSTEM.**

The Sixth Amendment to the United States Constitution guarantees not just the right to counsel, but the right to effective assistance of counsel. Strickland v. Washington, 466 U.S.228, 686 (1984). The right is effective assistance of counsel is the right to “reasonably effective assistance.” Id. at 687-88. Thus, the United States Supreme Court has intentionally set a broad standard, but within this standard there remain certain absolutes and basic duties. The most basic of all duties is “a duty of loyalty, a duty to avoid conflicts of interest.” Strickland, citing Cuyler v. Sullivan, 446 U. S. 335, 346 (1980).

Although ordinarily prejudice to the defendant must be shown with respect to deficient performance by counsel, the Court in Strickland noted there are certain situations where prejudice is presumed. One type of actual ineffectiveness warranting a presumption of prejudice is “when counsel is burdened by an actual conflict of interest.” Strickland at 692. In cases where there is an actual conflict



of interest, counsel breaches, according to the United States Supreme Court, “the duty of loyalty, perhaps the most basic of counsel’s duties.” Id.

The Strickland Court provided a compelling rationale for presuming prejudice in cases of actual conflict of interest. Prejudice is presumed in such cases because “it is difficult to measure the precise effect on the defense of representation [that is] corrupted by conflicting interests.” In other words, prejudice is presumed because we simply cannot know to what degree the conflict of interest tainted defense counsel’s conduct. The United States Supreme Court explained well in Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978), why prejudice is presumed in actual conflicts of interest where there is joint representation of co-defendants:

But in the case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pre-trial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney’s failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it be difficult to judge intelligently the impact of a conflict on the attorney’s representation of a client. And to assess the impact of a conflict of interests on the attorney’s options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

Thus, in Holloway, the Court recognized certain conflicts of interests – those

pertaining to loyalty and trial strategy are so basic that they cannot be accurately assessed after the fact of trial. In such instances, prejudice is presumed.

In the case at bar, the parties were aware that an “actual conflict of interest” was present between the two co-defendants. This conflict was based in the first instance upon divided loyalties to the two co-defendants, who was the actual perpetrator of the crime and what were the roles of the two defendants. Strahan received use immunity and testified against St. Dennis. His testimony was critical and damning. The conflict between the two co-defendants was actual and apparent.

Another actual conflict of interest arose because of the conflict detailed in the AU Report. Under Rule 1.7, Montana Rules of Professional Responsibility, a lawyer may not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if “the representation of one client will be directly adverse to another client.” Rule 1.7(a)(1). Under Rule 1.10, lawyers associated in a “firm” are limited by Rule 1.7 as if they were the lawyer precluded directly under Rule 1.7. Thus, lawyers from the same law firm cannot do what a single lawyer in the firm cannot do. The AU report, drafted by the Public Defender Commission’s own consultants, recognized that the public defender system was one law firm and therefore tainted by an inherent conflict of

interest.

The AU Report stands for the proposition that the public defender system in Montana is one cohesive whole, supervised closely by one person, governed by the same policies and procedures, trained in the same way by the same personnel, and tied to the same contracts for investigators and experts. For all intents and purposes it is one administrative unit; one single entity with various branches. The different regions within the public defender system are not separate or distinct in any way from the overall public defender system. Each is accountable to the same person, under the same standards and principles.

Yet another conflict of interest, related to the rationale underlying Rules 1.7 and Rule 1.10, is the concern about a conflict of loyalties – loyalty to the client and loyalty to the employer. Each public defender is a state employee, a part of the statewide system and supported by a limited budget approved by the Montana legislature. Mr. Sheehy's letter reflects a concern that what one public defender does affects the reputation and operation of another public defender. The public defender system must look good to maintain its funding and avoid public criticism. Further, the reality is that given budgetary restrictions within the system, requiring additional experts or challenging the experts already under contract has a budgetary impact on an already strained public defender budget.

The question remains whether these conflicts were alleviated by assigning defense counsel from a separate public defender region to represent the two co-defendants. The AU Report and the letter from Mr. Sheehy to Ms. Gill indicate that the public defender system, indeed, is one law firm influenced strongly by loyalties to that firm and its appearance to the outside world. Mr. Sheehy was concerned that it would not “look good” if the experts on contract with the public defender system were challenged by Ms. Gill. Nor would it look good to impugn a fellow public defender or go against established chain of custody procedures.

Courts are generally divided as to whether or not a single public defender’s office constitutes a “law firm” or whether various offices within a public defender’s office constitute a single law firm. For example, in Duvall v. State, 923 A. 2d 81 (Md. 2007), the Maryland Court held that the public defender’s office in Montgomery County was one law firm for purposes of an ineffective assistance of counsel analysis. In Allen v. District Court, 519 P.2d 351 (1974), the Colorado Supreme Court held that “to avoid the appearance of impropriety” a public defender in the same office may not represent a co-defendant. In contrast, the Rhode Island Court in Simpson v. State, 769 A. 2d 1257, 1269 (2001), did not find an actual conflict of interest between public defender’s in the same office, but stated that a case-by-case inquiry must always be conducted to determine conflicts

between public defenders. Notably, the Simpson Court relied upon cases which had rejected the contention that a public defender “labors under conflicting loyalties between loyalty towards his client and loyalty toward his office.” 769 A. 2d at 1268. The AU Report and Mr. Sheehy’s letter give rise to a grave concern about divided loyalties and support the conclusion that the public defender system is a single law firm.

Amicus requests this Court to recognize the inherent conflicts of interest in the public defender system and not allow such conflicts to continue. The conflicts must be addressed to avoid injecting fundamental constitutional error into the numerous conflicts cases currently being handled by the public defender system. Trying to distinguish the various regions as different law firms is an artificial distinction that does not withstand the scrutiny of the Commission’s own consultants and is not supported by actual practice within the public defender system.

Amicus requests this Court to address this important ethical and constitutional issue before more errors are created in the numerous cases being prosecuted and defended throughout the State. Given its authority over ethical standards of the State Bar, this Court could readily require creation of a separate conflicts office that is not part of the integrated public defender system. A

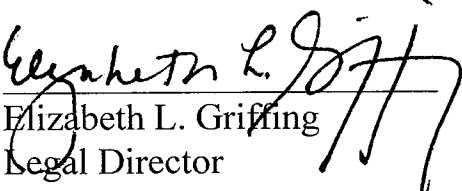
separate conflicts office, with authority over its own budget, that does not report either to the regional directors or to the chief public defender would alleviate many of the conflicts concerns. Ethical and constitutional standards require creation of such an office.

### CONCLUSION

An actual conflict of interest existed between St. Dennis and Strahan. This conflict was not cured by appointment of a public defender from a different region within the Montana public defender system. Prejudice is presumed in such cases and the conviction should be reversed.

Further, this Court should take this opportunity to address the conflicts within the public defender system and order the creation of a separate conflicts office within the public defender system.

Respectfully submitted this 11<sup>th</sup> day of January, 2010.

  
Elizabeth L. Griffing  
Legal Director  
ACLU of MT Foundation

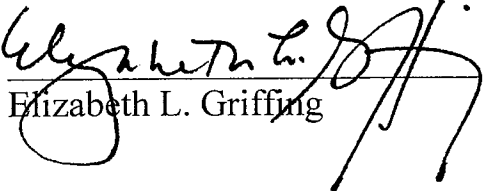
## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief of Amicus Curiae was served by United States Mail on the following parties:

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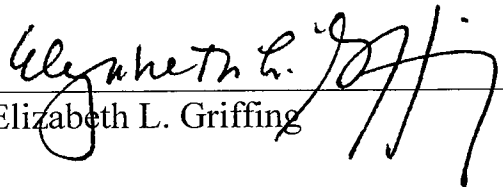
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DATED this 11<sup>th</sup> day of January, 2010.

  
Elizabeth L. Griffing

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27, Mont. R. App. Proc, I certify that this Amicus Brief is printed with a proportionately-spaced Times New Roman typeface of 14 points, is double spaced except for quoted and footnoted material, and does not exceed 5,000 words.

  
Elizabeth L. Griffing



# **APPENDIX A**

## Office of the State Public Defender Administrative Policies

|                                |                                   |
|--------------------------------|-----------------------------------|
| Subject: <b>Conflict Cases</b> | Policy No.: <b>116</b>            |
| Title: <b>47</b>               | Pages: <b>1</b>                   |
| Section: <b>1-202</b>          | Last Review Date: <b>02-20-09</b> |
| Effective Date: <b>5-11-07</b> | Revision Date: <b>04-29-09</b>    |

### 1.0 POLICY

The Office of the State Public Defender (OPD) has established the following procedures to ensure that when a case that is assigned to the office presents a conflict of interest for a public defender, the conflict is identified and handled appropriately and ethically.

### 2.0 PROCEDURE

2.1 When a case is determined to be a conflict of interest, the Regional Deputy Public Defender shall assign the case to a contract attorney whose name is maintained on the conflict attorney list or to a public defender employed outside his/her region.

2.2 The conflict attorney shall submit bills for the payment of attorney time to the Contract Manager. In reviewing bills, the Contract Manager shall:

2.2.1 Review the total hours of work claimed;

2.2.2 Review the work expended without reference to the charge or the parties involved;

2.2.3 Review any costs claimed, referencing any pre-approval requirements.

2.3 Costs, other than attorney fees, expected to be incurred by a conflict attorney, which exceed \$200, will be pre-approved by the Training Coordinator.

2.3.1 In determining the disposition of the pre-approval request, the Training Coordinator will not disclose any information about the case to the Contract Manager or the Chief Public Defender.

2.3.2 The review of requests for pre-approval of costs shall, in most cases, only investigate whether other options are available that are more cost-effective and just as good.

2.3.3 For pre-approval of costs that are extraordinary or questionable, the Training Coordinator may ask the Public Defender Commission's Contracts Process and Approvals Committee for assistance.

2.4 The Chief Public Defender, Contract Manager, and Training Coordinator will confer with each other about the availability of experts or other options relating to costs in cases without reference to the specifics of any case.

### 3.0 CLOSING

Questions about this policy should be directed to OPD at the following address:

Office of the State Public Defender, Administrative Service Division  
44 West Park  
Butte, MT 59701  
Phone 406-496-6080

# **APPENDIX B**

### 3. Duration of Representation:

**Goal: Once a case is assigned to an attorney, continuous and uninterrupted representation by the same attorney is the most effective method of representation.**

A. Counsel shall provide continuous and uninterrupted representation to eligible clients from time of entry into the case through final disposition in the trial court. The Appellate Defender's Office shall provide appellate representation before the Montana Supreme Court.

B. In the event that counsel is no longer employed by a public defender office or private counsel no longer does cases for the Office of the State Public Defender (OPD), either the Regional Deputy Public Defender or Contract Coordinator, in his or her discretion, may direct that counsel shall continue to represent the client through final disposition of the case at the rate of compensation for assigned counsel set forth in these Standards. Completion of a client's case shall not be required if counsel is unable to continue representation or is relocating to a residence outside the Region. These Standards shall not prohibit counsel from withdrawing from a case in which a court has recognized a conflict of interest for counsel or in which a client is found to be ineligible for indigent legal services.

C. In the event that a court should deem it appropriate to set an evidentiary hearing on a *pro se* petition for postconviction relief, the Office of the State Public Defender shall assign previously assigned counsel for the petitioner, unless the petition raises an issue of ineffective assistance of counsel. Ineffective assistance of counsel shall be handled by the Office of the Appellate Defender.

### 4. Conflicts of Interest::

**Goal: The duty of loyalty to the client is paramount.**

A. Organization of the State Public Defender System: The State Public Defender System is made up of eleven Regional Public Defender Offices, the Office of the Appellate Defender, and various local offices and contract attorneys. The Office of the Appellate Defender is independent from all trial division offices.

Each local office is under the direct supervision of a Regional Deputy Public Defender. The Regional Deputy Public Defenders are responsible for directing, coordinating, and evaluating the work of attorneys employed in the local office and any contract attorneys that are also assigned to his or her overall supervision. The Regional Deputy Public Defenders are solely responsible for providing guidance to and determining litigation strategy for attorneys assigned to their supervision.

Each regional office has its own support staff and investigators separate from those employed by any other independent office. Each regional office is physically separate from the others. No supervisor or staff from one independent office has access to files or premises of another independent office. However, a supervisor or staff from a regional office has access to the files and premises of a local office that is under that regional office's supervision. Each regional office has its own phone numbers, facsimile equipment, and computers. Although computer networks will be linked for purposes of reporting statistical information, confidential client information shall be separated by appropriate firewalls or other screening devices.

Neither the Chief Public Defender nor anyone assigned to the State Public Defender System administrative division exercises general control or influence over the handling of individual trial division or appellate division cases, has access to client files or client confidences, has keys to any independent office, or has unsupervised access to the premises of any independent office. The Chief Public Defender, the Training Officer, and the Contract Officer will take cases as assigned. The only other exception to this rule is for major litigation cases in which the State Public Defender's office may provide assistance through its Serious Crimes Litigation Unit. While the Office of the State Public Defender must sign off on all expenditures and coordinate in advance on some expenditures for expert witnesses, certain other investigative assistance, and equipment purchases, these requirements are only to ensure compliance with State disbursement procedures and promote sound fiscal practices; they do not dictate trial strategy, which remains the exclusive province of the Regional Public Defender's Office.

B. State Public Defender System Organization and Conflicts of Interest: Each independent regional office, including any local office under its supervision, is a separate "firm" for purposes of representing clients. Accordingly, a client with a conflict of interest with one regional office may be represented by another regional office. In such an event, the client shall be screened through appropriate devices and procedures from having contact with any confidential information concerning any other case in the conflicting region. A local office may not represent a client in conflict with a client of its regional parent office, or vice versa.

The Office of the Appellate Defender is also a separate "firm" for purposes of client representation. The Office of the Appellate Defender may represent a client in conflict with a client of any regional or local office, or in conflict with any contract attorney. In representing the former client or a trial division office, the Office of the Appellate Defender 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.

C. Examination for Potential Conflicts of Interest: Early detection of a potential conflict of interest is crucial to its appropriate resolution. As soon as is practicable following appointment to represent a client, a Regional Public Defender Office must examine its records to determine whether it may have a conflict of interest involving another current or former client, or otherwise. A Regional Public Defender Office must

promptly update this examination as it investigates the case and receives discovery, with particular attention paid to finding out if conflicts may exist with anticipated witnesses for the prosecution or defense. In the event that a potential conflict of interest develops, the matter shall be referred to the Training Coordinator, who shall be provided sufficient facts to decide the issue.

Clients and potential witnesses may also have information that will assist in uncovering possible conflicts of interest. Accordingly, each local public defender office should use standard questions for its client intake interviews and witness interviews that are designed to uncover conflicts on forms developed by the State Public Defender's Office.

In a situation in which a public defender's office makes an initial appearance on behalf of codefendants, the clients must be cautioned at the first opportunity not to disclose confidential information concerning the case until a determination can be made if a conflict exists.

D. Policy and Guidance on Potential Conflicts of Interest: It is the policy of the Office of the State Public Defender that all State Public Defender System offices will comply with all legal requirements and ethical guidelines relating to conflicts of interest in the representation of clients. The Rules of Professional Conduct are mandatory authority. To the extent that this Standard may be interpreted as inconsistent with the Rules, the latter controls.

The difficulty in developing case-specific policies is that it is impossible to formulate rules that will apply in every situation. The following guidance contains examples of situations where conflicts are likely to result and others that are probably not conflicts of interest. This is not an exclusive list; however, this list contains many situations expected to arise in cases. Any potential conflicts must be resolved on a case-by-case basis.

E. Codefendants: Public defender offices within a region will not represent codefendants except in rare situations when it is clear that each codefendant's interests are completely consistent with the others and each codefendant agrees. Even so, the better course of action is to represent only one codefendant. If possible, the regional public defender should keep one of the cases. If the public defender can make a choice of codefendants before obtaining privileged information from either one, the choice should be the codefendant with the most serious or difficult case. Otherwise, the local public defender should keep the first codefendant to which the office is appointed and make arrangements for other counsel for the other codefendant.

F. Simultaneous representation of a defendant and a potential prosecution witness or alleged victim: There will almost always be a conflict of interest in this situation. There may not be a conflict if the prosecution witness's credibility or the alleged victim's character is not at issue, and the prosecution witness' testimony is not a crucial factor in the defendant's case. This issue should always be referred to the Training Coordinator.

G. A former client is a potential prosecution witness or alleged victim: This is not a *per se* conflict of interest, but a conflict will often exist in this situation. There may not be a conflict of interest if the prosecution witness's credibility or the alleged victim's character is not at issue, and the prosecution witness's testimony is not a crucial factor in the defendant's case. In other cases, there may not be a conflict of interest if the local public defender's office has no privileged information about the former client that would be useful in representing the defendant.

H. Investigation reveals that another person may have committed the charged crime and that other person is a former client: This will almost always be a conflict of interest. This presents a conflict of interest if the local public defender's office has privileged information about the former client that would further the theory that the former client is the perpetrator.

I. An employee of the local public defender's office is a potential prosecution witness or an alleged victim: Either situation is a conflict of interest.

J. The defendant was convicted in a previous case while represented by the local public defender's office and has a colorable claim of ineffective assistance of counsel in that case: This presents a conflict of interest as long as the ineffective assistance claim is unresolved.

K. Situations that do not present *per se* conflicts of interest: The following are not *per se* conflicts of interest. However, if the particular situation actually degrades the quality of client representation or creates an appearance from which a reasonable person would doubt that a local public defender's office can exercise independent professional judgment on behalf of a client, a conflict would exist. The individual circumstances control. They include:

- a. A dispute between client and attorney or other member of the local public defender's office staff.
- b. A client refuses to follow an attorney's advice, unless it involves the commission of a future crime.
- c. A client files a grievance against the attorney with the attorney's supervisor or the Office of Disciplinary Counsel. A client should not be allowed to manipulate appointment of counsel by filing a frivolous grievance against an assigned attorney. However, a non-frivolous grievance may create a conflict of interest. A client complaint, even if not creating a conflict of interest, should usually justify the local public defender in changing assigned counsel as a matter of supervisory discretion.
- d. An alleged victim or potential prosecution witness has a friend or relative in the local public defender office.
- e. A witness for the defense is a present or former client, unless there is a reasonable possibility the testimony could turn adverse to the defendant or the theory of defense may implicate the present or former client.

- f. An employee of the public defender office is closely related by blood or marriage, is engaged to be married, or otherwise has a close relationship with an employee of a State, county, or city office that has prosecution, law enforcement, or child welfare responsibilities. Appropriate steps must be taken to disclose the relationship, ensure protection of privileged information, and reinforce confidence in the independent judgment and zealous representation of the public defender officer. A “close relationship” would include sharing a household and extended dating.
- g. An employee of the public defender office is a former employee of a State, county, or city office that has prosecution, law enforcement, or child welfare responsibilities. However, if the former employee of such office participated personally and substantially in a case, the public defender office would have a conflict of interest and be disqualified. If the former employee of such office did not participate personally and substantially in the case, a timely deployed “ethical wall” will prevent disqualification of the public defender office.
- h. An employee of the public defender office is a former employee of another public defender office or other law firm that represented clients in conflict with the public defender office where the employee is now employed. This situation sometimes occurs when Public Defender System employees transfer from one public Defender System office to another, and when personnel are hired from law firms that handle criminal or juvenile cases. Apply the same process as above.
- i. An employee of the prosecutor’s office is a former employee of the public defender’s office. Apply the same process as above.
- j. A public defender appears before a judge who is a former associate in the public defender office. In such cases, appearances before former associates are proper when there has been full disclosure.
- k. An employee of the public defender office is closely related by blood or marriage, or is engaged to be married, to a judge before which the public defender office appears, or otherwise has a close relationship with a judge before which the public defender office appears. A “close relationship” would include sharing a household or extended dating. Such a relationship must be disclosed in any case where the public defender office appears before the judge and each party given the opportunity to request recusal.
- l. A public defender has applied for or been offered a job in a state, county, or city office that has prosecution, law enforcement, or child welfare responsibilities, or is running for election as a prosecutor or law enforcement officer. In such cases, the Office of the State Public Defender may give the public defender and his or her supervisor guidance concerning campaign ethics laws, the public defender’s caseload, and other matters to ensure client and public confidence in the continued zealous advocacy by the public defender and the public defender office.
- m. A public defender has applied for appointment to a judgeship.

App. B-5



L. Action after identifying a possible conflict of interest: There is no one-size-fits-all solution here, either. However, there are a couple “must do’s” and several “maybe should do’s” when a possible conflict is uncovered. They include:

- a. Seek advice from supervisors and others: A “must do.” The first source of advice should be the office supervisor. An office staff meeting is a good vehicle for hashing out these issues. In addition, the Training Coordinator of the Office of the State Public Defender is available to help answer questions of professional ethics.
- b. Full disclosure to the client: Another “must do,” even if the attorney does not think there is an actual conflict. If the situation doesn’t present a real conflict, the attorney should explain that to the client and obtain his or her acknowledgment that continued representation is appropriate. If the client doesn’t agree and wants the attorney removed, or isn’t mentally competent, the attorney can then make a decision on how to proceed. But, attorney must never withhold information from the client about any potential conflict. The attorney should document the disclosure and the client’s response. The attorney should inform the client of his or her right to file a grievance of the issue and the right to raise the issue to the court.
- c. Request for waiver from the defendant or other current client: If there is an actual conflict of interest, the client may want to waive the conflict and retain the attorney after full disclosure of the conflict and what it means to continued representation by counsel. The attorney should document the disclosure and any waiver on the forms provided by the Office of the State Public Defender. The attorney should use sound judgment in deciding whether to ask a current client to waive a conflict. Some conflicts are so serious that the attorney should move to withdraw, even though the client likes the attorney so much that he or she would be willing to waive anything.
- d. Request for waiver from a prior client: If, for example, a prior client is a witness or an alleged victim in a current case, the attorney can ask him or her to waive a conflict. This would most likely involve consent for disclosure of privileged information or use of the conviction for which a public defender office represented the prior client as impeachment or character attack. Again, the attorney should use sound judgment in deciding whether to ask for such a waiver, as some conflicts are so serious that waiver will not remove the appearance of impropriety. *See also Montana Rules of Professional Conduct*, Rules 1.9 (Duties to Former Clients), 4.3 (Dealing with Unrepresented Person). Again, the attorney should document the disclosure and any waiver.
- e. Building an “ethical wall”: In rare cases, an “ethical wall” may cure a conflict of interest. This type of procedure will always be used when an attorney from another Region comes into a new Region, either to handle a conflict matter or as part of the Serious Crimes Litigation Unit. An “ethical wall” will screen the attorney from information except that necessary for his case. The “ethical wall” shall screen the attorney from

both hard copies of other files, as well as any electronic information concerning the other clients, whether in the case management software, email, or other electronic data.

- f. Disclosure to the court and prosecutor: If the attorney is confident that the situation doesn't present an actual conflict, the client agrees, and the attorney documented the client disclosure and acknowledgment, then the attorney may not need to disclose the situation to the court and prosecutor. The attorney may not want to inform others if doing so might tip trial strategy, compromise privileged information, reveal attorney work product, or cause undue invasion of someone's privacy. However, if the attorney's instincts indicate that it is too big of an issue to keep under wraps, or might come back to haunt him or her, then it's time to bring in the judge and opposing counsel. Certainly, any actual conflict of interest should be brought to all parties' attention, even if the client is willing to waive it.
- g. Making a record: If the matter is disclosed to the court and prosecutor, the attorney must make sure there is a record of it with all parties present. The client's on-the-record waiver or agreement that there is no actual conflict of interest, after full disclosure that is also on the record, will close the door on almost any controversy. If the attorney's position is that there is no conflict, the attorney will be required to elaborate; a simple denial of a conflict is insufficient.
- h. Moving to withdraw: If there is an actual conflict and there is no waiver, the office must withdraw. If multiple current clients are in conflict, the attorney may be able to keep one of the cases if he or she identified the conflict early enough. If so, the attorney should try to keep the most serious or difficult case. If that is not feasible, then the attorney should try to keep the first client in the door. Often, however, the conflicts among current clients aren't discovered until the office is well into its representation of all. If so, the office usually must withdraw from all cases. If the attorney must move to withdraw, keep in mind that, as a general rule, the attorney doesn't have to reveal the factual basis for the conflict. The attorney should resist requests to reveal anything more than is necessary to articulate the conflict and must protect privileged information.
- i. Resolve close cases in favor of the most conservative action: If an attorney's instincts indicate something is a potential conflict, then it probably is. If an attorney is uncertain whether a situation presents an actual conflict, then it likely does. If an attorney is ambivalent about telling the court about a possible conflict that he or she thinks was resolved, then the attorney probably should.

M. Joint Defense Agreements: In the event of a multiple defendant case involving a public defender office, or a contract attorney, and any outside counsel, the following guidelines should apply to any joint defense agreements entered into. A joint

defense agreement should be in writing, signed by all counsel and clients after consultation, and should provide the following:

- a. The agreement must not create any kind of an attorney-client relationship between co-defendants;
- b. Information that is shared under the agreement is privileged;
- c. Anyone who withdraws from the agreement remains bound by confidentiality as to any information obtained through the joint defense agreement;
- d. All parties agree that in the event one withdraws to cooperate with the government, any potential conflict of interest is waived by all parties. Anyone who withdraws from the agreement shall provide notice to all other parties prior to withdrawing, and return all documents provided pursuant to the agreement prior to withdrawing. A log should be kept of all meetings attended under the joint defense agreement, as well as any information and documents shared pursuant to the agreement;
- e. In the event that any defendant in the agreement testifies at trial, he or she agrees to waive the confidentiality provisions of the joint defense agreement to allow any other remaining party to the agreement to cross-examine him or her on the basis of information he or she has shared through the joint defense agreement;
- f. The agreement must recite a procedure for withdrawing from the agreement;
- g. All documents provided pursuant to the joint defense agreement must be returned upon the termination of the agreement.

#### **5. Conflict Cases:**

A. When a case is determined to be a conflict of interest, the Regional Deputy Public Defender shall assign the case to a private attorney whose name is maintained on the conflict attorney list.

B. The conflict attorney shall submit bills for the payment of attorney time to the Contracts Manager. In reviewing bills, the Contract Manager shall:

- a. Review the total hours of work claimed;
- b. Review the work expended without reference to the charge or the parties involved;
- c. Review any costs claimed, referencing any pre-approval requirements.

C. Costs, other than attorney fees, expected to be incurred by a conflict attorney which exceed \$200, will be pre-approved by the Training Coordinator.

- a. In determining pre-approval, the Training Coordinator will not disclose any information about the case to the Contracts Manager or the Chief Public Defender.
- b. The review of pre-approval costs shall, in most cases, only question if other options are available that are more cost-effective and just as good.

D. The Chief Public Defender, Contracts Manager, and Training Coordinator will confer with each other about the availability of experts or other options relating to costs in cases without reference to the specifics of any case.

#### **IV. ADMINISTRATION OF DEFENDER SERVICES**

##### **1. Attorney-Client Communication:**

**Goal: Regular and confidential communication between attorneys and clients is a necessary part of effective representation.**

A. Effective representation of an accused client requires prompt and effective communication with the client. This communication includes personal and telephone contacts with a client in custody.

B. To ensure the privacy essential for confidential communication between counsel, public defender staff, and client, adequate facilities should be available for private discussions in jails, prisons, courthouses, healthcare facilities, and other places where accused clients must confer with counsel.

C. Personnel of jails, prisons, custodial institutions, and healthcare facilities should be prohibited from examining or otherwise interfering with any communication or correspondence between client, defense counsel, or public defender staff relating to legal action arising out of charges or incarceration.

D. Each jail or detention facility should make available an unmonitored and unrecorded toll-free telephone for purposes of allowing indigent clients to contact and confer with counsel and public defender staff on at least a daily basis. Counsel should be allowed personal contact with an incarcerated client at any time upon counsel's request.

E. A public defender office policy, contract for indigent defense services, and individual assignments of counsel shall include a requirement that a client in custody must speak with counsel either in person or by telephone at least weekly, unless otherwise agreed between the client and counsel.

F. The Regional Public Defender Offices shall take appropriate action to ensure these standards are implemented.

##### **2. Delivery of Services:**

**Goal: Counsel shall strive for excellence in the representation of the indigent client.**

A. Counsel representing indigent clients should be free from political influence and should be subject to judicial supervision only in the same manner and to the same

# APPENDIX C

MONTANA FOURTH JUDICIAL DISTRICT COURT  
MISSOULA COUNTY

Cause No. DC-07-503

Cause No. DC-07-504

STATE OF MONTANA

STATE OF MONTANA,

Plaintiff,

Plaintiff,

v.

v.

ANTHONY ROY ST. DENNIS,

DUSTIN ARTHUR STRAHAN,

Defendant.

Defendant.

Missoula County Courthouse  
Missoula, Montana  
March 27, 2008

TRANSCRIPT

OF

PROCEEDINGS

Honorable John W. Larson, District Court Judge

Reported by Ceresse S. Parker, RMR, CRR, Official Court  
Reporter and Notary Public, State of Montana, residing  
in Missoula, Montana.

*App. C*

APPEARANCES

MR. FRED R. VAN VALKENBURG, Esq., County Attorney,  
Missoula County Attorney's Office, Missoula County  
Courthouse, 200 West Broadway Street, Missoula,  
Montana, 59802-4292,

appeared as counsel for Plaintiff State of Montana.

MS. PAULETTE C. FERGUSON, Esq., Deputy Public Defender,  
Office of the State Public Defender, 610 Woody Street,  
Missoula, Montana, 59802,

appeared as counsel for Defendant Anthony Roy  
St. Dennis.

MR. CHRISTOPHER J. DALY, Esq., Deputy Public Defender,  
Office of the State Public Defender, 610 Woody Street,  
Missoula, Montana, 59802,

appeared as counsel for Defendant Anthony Roy  
St. Dennis.

MS. CAROLYN S. GILL, Esq., Deputy Public Defender,  
Office of the State Public Defender, 248 Third Avenue  
East, Kalispell, Montana, 59901,

appeared as counsel for Defendant Dustin Arthur  
Strahan.

1

1                                    MARCH 27, 2008

2

3        BE IT REMEMBERED that the above-entitled matter

4 came on for hearing on the 27th day of March, 2008, in

5 the courtroom of the courthouse, Missoula, Missoula

6 County, Montana, before the Honorable JOHN W. LARSON,

7 District Court Judge.

8        MR. FRED R. VAN VALKENBURG, County Attorney,

9 appeared as counsel for Plaintiff State of Montana.

10        MS. PAULETTE C. FERGUSON, Deputy Public Defender,

11 appeared as counsel for Defendant Anthony Roy St.

12 Dennis.

13        MR. CHRISTOPHER J. DALY, Deputy Public Defender,

14 appeared as counsel for Defendant Anthony Roy St.

15 Dennis.

16        MS. CAROLYN S. GILL, Deputy Public Defender,

17 appeared as counsel for Defendant Dustin Arthur

18 Strahan.

19        WHEREUPON, the following proceedings were had and

20 taken, to-wit:

21

22                THE COURT: So I have -- the logistics in

23 this courtroom, I'm going to let Mr. Van Valkenburg --

24 I think that's your table, Mr. Van Valkenburg, but let

25 people arrange their files and everything, how they

2

1 want to, for a moment and maybe I'll take five minutes

2 and let -- the state's at this table. The defense is

3 at this table. I know we have two defendants. They

4 are in the courtroom, but they're not going to be at

5 table. So I'm going to let --

6                MR. VAN VALKENBURG: Judge, I'm the only one

7 appearing with respect to the state in this matter. So

8 I can stand at the lectern. You can have both tables

9 for your --

10                THE COURT: Okay. That's fine. That's

11 fine. That's fine. So do you want to have your

12 equipment there, though, still?

13                MR. VAN VALKENBURG: Oh, I think they can

14 shut it down.

15                THE COURT: Okay. So I'll give you five

16 minutes to do that.

17                MR. VAN VALKENBURG: Okay.

18                THE COURT: Is that a fair amount of time to

19 do that?

20                So each defense counsel can be at the table,

21 one of the tables. I guess you've picked yours, Ms.

22 Ferguson, so I'm -- counsel from out of town can get

23 the other table as soon as it's available.

24                We'll be in recess for five minutes.

25                (Whereupon, a discussion took place off the

3

1 record, and then the following proceedings took place

2 after said recess.)

3                THE COURT: We're in the courtroom on the

4 record. DC-07-503, *State v. Anthony Roy St. Dennis.*

5 DC-07-504, *State v. Dustin Arthur Strahan.* Mr. Van

6 Valkenburg for the state. Will counsel please state

7 their appearances for the record?

8                MS. FERGUSON: I'm Paulette Ferguson. I'm

9 counsel for the defendant, Anthony St. Dennis.

10                MR. DALY: Christopher Daly. I'm also

11 counsel for the defendant, Anthony St. Dennis.

12                MS. GILL: Carolyn Gill. Counsel for Dustin

13 Strahan.

14                THE COURT: Mr. Sheehy?

15                MR. SHEEHY: Your Honor, I'm the -- Ed

16 Sheehy. I'm the Regional Deputy Public Defender in

17 Region 2 of the Office of State Public Defender, and I

18 am the individual that appointed both Ms. Ferguson and

19 Mr. Daly for Mr. St. Dennis and then likewise appointed

20 Carolyn Gill and Britt Cotter from the Region 1 office

21 at Kalispell as counsel for Mr. Strahan.

22                THE COURT: And you've provided a letter to

23 the Court, and I appreciate that.

24                MR. SHEEHY: I did.

25                THE COURT: And Ms. Hood is also present,

4

1 the State Public Defender.

2                MS. HOOD: That's correct. Randi Hood.

3 State Public Defender.

4                THE COURT: Now I raised this issue. It's

5 certainly the first time it's come up since the State

6 Public Defender system has been established, to my

7 knowledge.

8                The Rules of Professional Conduct apply to

9 both criminal and civil proceedings, and these issues,

10 if they were undertaken with one of the private law

11 firms that has offices around the state, clearly would

12 be precluded.

13                I understand the policy and I've read the

14 policy that's been adopted by the State Public Defender

15 office, and you've now given me some more insight into

16 actually what happened, Mr. Sheehy. As I understand

17 it, you're the one that made the determination there

18 was a conflict?

19                MR. SHEEHY: I did, Your Honor, and I'm the

20 one that makes those determinations, as do all regional

21 defenders in each different region in the state.

22                THE COURT: Doesn't the statute specifically

23 reference the State Public Defender as making that

24 determination?

25                MR. SHEEHY: I don't believe it does, Your



5

1 Honor, and I believe that she has the authority to  
 2 delegate that to her regional defenders and that is  
 3 what the Public Defender Commission authorized.  
 4 THE COURT: Now as we get into this  
 5 process -- and I'm not sure it's -- maybe I'll ask for  
 6 a little more information from you or Ms. Hood. Is  
 7 this one of the first cases that this has happened in?  
 8 MR. SHEEHY: No, it is not, Your Honor. I  
 9 am currently handling at least one homicide case out of  
 10 Billings, due to my homicide experience. That was a  
 11 case that was filed back in 2004.  
 12 I also, prior to that, handled a  
 13 multiple-count, sexual-offense case against an  
 14 individual in Billings that pled out last summer and it  
 15 was a -- a conflict case for the -- the Billings office  
 16 and I'm the one that handled that.  
 17 Likewise, there has been recently, in the  
 18 fall of '07, multiple charges against some prison  
 19 inmates for a minor riot at Montana State Prison. I  
 20 ended up handling one of those cases, and Ms. Hood is  
 21 handling one of those cases, and other attorneys from  
 22 the state system are handling those cases.  
 23 Finally, we have current cases against  
 24 several Grizzly football players --  
 25 THE COURT: Right. I'm aware of that case.

6

1 MR. SHEEHY: -- and I'm handling one of  
 2 those, Ms. Hood is handling one of those, and one of  
 3 those cases that she's handling is in front of this  
 4 Court.  
 5 There also is an attorney from the Polson  
 6 office, again Region 1, Tim Goen, who is handling  
 7 Michael Shelton that's in front of Judge McLean.  
 8 THE COURT: So are there then, since there's  
 9 been a number of these, actual written protocols on how  
 10 these conflicts are handled by the various public  
 11 defenders when they get into a situation like this?  
 12 MR. SHEEHY: There are, Your Honor, in that  
 13 Ms. Gill, who's representing Mr. Strahan, has no access  
 14 to our office building. She doesn't have a key. She  
 15 has no access to any files in the -- in the building  
 16 and she has no access to any information that Mr. Daly  
 17 or Ms. Ferguson have.  
 18 They, likewise, have no access to her office  
 19 in Kalispell. That's where she keeps her -- Ms. Gill  
 20 keeps her file, as does Mr. Cotter, who is in Polson,  
 21 and they likewise have no access to those files. They  
 22 can be in the building during public hours --  
 23 THE COURT: So when she comes down, Ms. Gill  
 24 comes down to do some work here, she can have access to  
 25 your office?

7

1 MR. SHEEHY: She can -- if we've got room  
 2 available, she can bring her laptop, and she can work  
 3 in the office.  
 4 THE COURT: And use the phone.  
 5 MR. SHEEHY: And use the phone.  
 6 THE COURT: And as far as if any of these  
 7 cases have gone to trial or if this one does go to  
 8 trial, as far as working with the jury pool and having  
 9 resources to, as I recall when I was a lawyer, look at  
 10 the list and talk to people about the list, how is that  
 11 going to work?  
 12 MR. SHEEHY: Your Honor, in terms of looking  
 13 at the list, and I don't believe that's a -- a conflict  
 14 issue, because we have done this routinely throughout  
 15 the system, as -- like in the cases that -- that I've  
 16 been involved in, where I did one, in fact, up in  
 17 Polson where I had the Polson office look at the jury  
 18 list, but I don't believe that gets into conflict  
 19 situations because that's not any attorney/client  
 20 privilege information. All they're providing me is  
 21 what information they may know about the individuals  
 22 that reside in their community.  
 23 THE COURT: With regard to the cases, is  
 24 there then a third party that oversees -- in the public  
 25 defender system that oversees how the two offices are

8

1 interacting or handles any special issues that come up?  
 2 MR. SHEEHY: Yes, there is, Your Honor, in  
 3 that we have a conflict manager who's Eric Olson. He's  
 4 our training coordinator, and he's the one that  
 5 generally oversees all those matters.  
 6 As an example, I believe Ms. Gill has sought  
 7 appointment of some experts. I don't want to get into  
 8 what -- what type of experts. I don't see any of that.  
 9 That all goes directly to Mr. Olson. He's the one that  
 10 approves it. The bills don't even come to my office.  
 11 They go directly to the Butte office where the  
 12 accountants simply pay the bills.  
 13 THE COURT: The Rules of Professional  
 14 Conduct speak to informed consent. What's the process  
 15 about informed consent and disclosure?  
 16 MR. SHEEHY: Your Honor, we have that  
 17 process where we may have a situation where I determine  
 18 that there is no conflict, but there may still be a  
 19 question in that we may be involved in two people and  
 20 that has happened in several cases in this county.  
 21 And so what happens in those instances, we  
 22 will have clients sign a waiver whereby we tell them we  
 23 are representing so-and-so or have represented. That's  
 24 generally where it happens. And we ask them do they  
 25 have a problem in light of that.

9

1 If the person has a problem, then I conflict  
2 a case out and that's what happens throughout the  
3 state. If they don't have a problem, then we ask them  
4 to execute a -- a waiver of any potential conflict.

5 THE COURT: And has that happened in these  
6 cases?

7 MR. SHEEHY: It has not, Your Honor, because  
8 the -- the cases arose at a point that I knew  
9 immediately that there was a conflict, and so there's  
10 no need to do that written waiver, because they are in  
11 different law firms.

12 THE COURT: Because of both of our  
13 histories, you understand that the Federal Public  
14 Defender system, which is the other public defender  
15 system in the state, does not follow that -- this  
16 approach that the State Public Defender office is  
17 evidently following.

18 MR. SHEEHY: And that's correct, Your Honor,  
19 and the reason that's the case is that that is a  
20 nonprofit corporation, and Tony Gallagher, the Chief  
21 Federal Defender, then basically has all of the federal  
22 defenders working with him in one statewide law firm.  
23 And that's why different offices within the federal  
24 defender's system cannot represent co-defendants,  
25 because it is one law firm under the way they were

11

1 you know, we're only sharing in brief banks legal  
2 information. Any briefs that have the information  
3 about the -- the client or any motions, those are --  
4 that information is deleted in terms of what's put in a  
5 -- in a brief bank. So there -- there is no sharing of  
6 individual information.

7 THE COURT: As far as this coming up in any  
8 court or you filing briefs in any other court, what's  
9 the history there, Mr. Sheehy?

10 MR. SHEEHY: Your Honor, the history in  
11 every other court, including all the judges I've been  
12 in front of in Billings and elsewhere throughout this  
13 state, has been that there's no problem with it  
14 whatsoever.

15 The only thing we can't do is like my  
16 Missoula attorneys cannot go to Hamilton and handle  
17 cases in Hamilton. I have a particular state senator  
18 that has some problems with that.

19 THE COURT: Mr. Van Valkenburg, at the  
20 earlier hearing, you had some concerns. You've -- I  
21 think you got a copy of the correspondence that was  
22 provided. I believe you mentioned the waiver issue at  
23 that time. I don't know if you have any concerns or  
24 issues or questions at this time.

25 MR. VAN VALKENBURG: Judge, I -- I, since

10

1 incorporated as a nonprofit corporation.

2 THE COURT: But doesn't the State Public  
3 Defender office have common brief banks, common  
4 resources, such as experts that they have identified,  
5 and common forms and pleadings that they also utilize  
6 and implement?

7 MR. SHEEHY: No, Your Honor, we do not have,  
8 first of all, common forms of pleadings, because this  
9 is the only, other than Ravalli County, the only  
10 jurisdiction in the State of Montana that uses.

11 acknowledgment of rights forms for entry of not guilty  
12 pleas. No other jurisdiction in Montana does that.

13 Other jurisdictions in Montana do not have  
14 omnibus forms. I did a lot of criminal defense work in  
15 Lewis and Clark County. They don't have omnibus forms.  
16 You have a so-called omnibus hearing that really is  
17 just a discussion between the parties and the judge.

18 I likewise have done work in Blaine County  
19 where Judge McKeon has a 15-page omnibus form that you  
20 can't file in writing. You go on the record, and he  
21 goes through it with the parties in court.

22 So, I mean, the -- the process in every  
23 jurisdiction is entirely different, which is unlike the  
24 -- the federal system.

25 The other thing about the brief banks is,

12

1 the last discussion of this matter on the record, have  
2 been assured by both Ms. Gill and Ms. Ferguson that  
3 their actions in representing their clients are  
4 consistent with what Mr. Sheehy has just described to  
5 the Court in terms of their inability to access any  
6 potential confidential information in each other's  
7 respective files. I think that they are acting wholly  
8 independently on behalf of their respective clients.

9 I don't know of anything other than the fact  
10 that they are both employees of the state public  
11 employee -- State Public Defender system that would in  
12 any way indicate that there is any conflict involved in  
13 terms of their representation of these defendants.

14 I was hoping that pursuant to the Court's  
15 directive the State Public Defender would file a legal  
16 memorandum with the Court indicating that there might  
17 be some other jurisdictions, other states, that  
18 employed a similar system that they relied upon.

19 Their reference to their standards that they  
20 have adopted is something of use but I think it's --  
21 it's unfortunately something that really doesn't carry  
22 the weight the of law or precedent, and as a result I  
23 don't really have any research or information to  
24 indicate that it is not an acceptable system.

25 I -- I thought if -- if a legal memorandum

13

1 was filed I might file a reply at that time. But since  
 2 I -- I didn't receive one, I didn't do any independent  
 3 research myself.  
 4 THE COURT: So, Mr. Sheehy or Ms. Hood, is  
 5 there a model that this state's approach to conflicts  
 6 is based upon, and has it been ruled, this similar  
 7 approach, been ruled upon by any other state?  
 8 MR. SHEEHY: Your Honor, I have the model,  
 9 the annotations, the Rules of Professional Conduct.  
 10 Those are in Mr. Olson's office. I have them with me  
 11 today. There is nothing in there other than there are  
 12 some comments about what constitutes a law firm under  
 13 the definition --  
 14 THE COURT: Right. And I've -- I've got  
 15 those. I'm asking, though, when you set yours up, did  
 16 you look to New York? Did you look to some other state  
 17 that had already implemented a system and -- and try to  
 18 utilize that?  
 19 MR. SHEEHY: No, Your Honor, because Montana  
 20 is breaking new ground, because this is the first  
 21 statewide public defender system that has ever been  
 22 created.  
 23 In other states, they are broken up, and it  
 24 is not a statewide system and there is one, I think,  
 25 that -- that they were trying to start in Georgia but

14

1 it's my understanding that they've gone bankrupt.  
 2 THE COURT: Ms. Hood.  
 3 MS. HOOD: Excuse me.  
 4 Your Honor, Mr. Sheehy is correct. There is  
 5 no other system that is really the same as the Montana  
 6 system. Louisiana has one quite similar, but it's in  
 7 its infancy.  
 8 What the Public Defender Commission looked  
 9 at was some states that have independent conflict  
 10 offices where a case like this would go; but the  
 11 problem with that was that if the public defender  
 12 office took the first defendant, and there were three  
 13 of them, both of them went to the conflict office and  
 14 were handled by people in the conflict office, despite  
 15 the fact that there may have been a conflict between  
 16 those two people.  
 17 That it was sort of a never-ending option of  
 18 having to have multiple offices, as many offices as you  
 19 had defendants, and that was ultimately, I think, if I  
 20 can speak for the Public Defender Commission, why they  
 21 adopted this independent-firm concept with the 11  
 22 regions.  
 23 Mr. Sheehy was certainly correct that we are  
 24 doing this all around the state, probably twice as much  
 25 as he described to the Court that I'm aware of, without

15

1 any difficulties.  
 2 Our case management system that we have put  
 3 out throughout the state, we spent a long time with the  
 4 people who own and who we bought it from to insure that  
 5 walls were built in that system within a region and  
 6 between regions so there could be no access except on  
 7 nonprivate -- you know, other regions can access only  
 8 the names of clients in other regions, nothing further.  
 9 And so the whole structure has been built around those  
 10 kind of walls between regions, and so far we've not had  
 11 any difficulties.  
 12 We also deal with very professional  
 13 attorneys who are not going to sell their client out by  
 14 -- by violating their ethics.  
 15 THE COURT: There is -- I was able to dig up  
 16 a couple cases. Actually my law clerk was. I haven't  
 17 looked at them closely enough to see if -- how similar  
 18 or how dissimilar those systems were.  
 19 One is *State v. Bellucci*, 410 A.2d 666, a  
 20 1980 case; there's *People v. Wilkins*, 268 N.E.2d 756;  
 21 and a Florida case, which kind of gives the judge an  
 22 option, *Babb v. Edwards*, 412 So.2d 859. I think what  
 23 I'll do is let counsel look at those cases, and tell me  
 24 what they agree or disagree with what's happening there  
 25 and how it's being applied here.

16

1 And I certainly realize this is  
 2 extraordinary, but I'd rather do this at the front end  
 3 of things, and I'd give each side two weeks, unless  
 4 that causes some conflict with their schedules, but  
 5 simultaneous briefs on it and then a simultaneous reply  
 6 two weeks afterwards.  
 7 MR. VAN VALKENBURG: That's fine with me,  
 8 Judge.  
 9 THE COURT: Is that agreeable, Mr. Sheehy?  
 10 MR. SHEEHY: Well, Your Honor, I haven't  
 11 looked at those cases.  
 12 THE COURT: Right, and I'm -- and I'm giving  
 13 you full -- I'm going to let you look at them, number  
 14 one, and then you get to comment, however you will. It  
 15 can be a very short brief --  
 16 MR. SHEEHY: And I didn't write down the  
 17 citations.  
 18 THE COURT: And I'll make sure that they're  
 19 e-mailed to you and to Mr. Van Valkenburg --  
 20 MR. SHEEHY: Okay.  
 21 THE COURT: -- and let you look at those and  
 22 maybe you've come across some other case.  
 23 MR. SHEEHY: Your Honor --  
 24 THE COURT: But as I understand it, there's  
 25 no Montana Supreme Court opinion, and as you, I think,

17

1 were trying to indicate, there was nothing in the Rules  
 2 of Professional Conduct about this issue and certainly  
 3 the definition of "firm" hasn't been amended to take  
 4 into consideration --

5 MR. SHEEHY: No, and the Montana Supreme  
 6 Court did not adopt the comments from the ABA  
 7 standards. I mean it's only in those comments.

8 I will tell the Court, Your Honor, that I --  
 9 because I've done a lot of work in front of the  
 10 Commission on Practice, I do get a lot -- asked a lot  
 11 of questions, not about individual attorneys, by ODC  
 12 and they have never raised a question about this  
 13 whatsoever with me, nor has Betsy Brandborg, the ethics  
 14 bar counsel, and she's fully aware of what we're doing,

15 THE COURT: And I appreciate that, and I  
 16 appreciate your patience, and I appreciate the Public  
 17 Defender coming here.

18 As far as the logistics of these two cases,  
 19 which I think is also on the table today, Counsel, how  
 20 are we -- what is the best way to proceed? And I don't  
 21 need to meddle in that arrangement if you have -- can  
 22 sit down and work it out amongst yourselves or have  
 23 worked it out amongst yourselves as to how we schedule  
 24 things and where we go from here.

25 I know I've responded to a motion to expand

18

1 some deadlines and extend some deadlines, and I'm happy  
 2 to do that, but I'm wondering if everything else is  
 3 going to be without difficulty.

4 Ms. Ferguson?

5 MS. FERGUSON: Your Honor, one of the things  
 6 today having to do with the omnibus memorandum, we  
 7 still do not have the results of the mental health  
 8 evaluation that was being done. We feel that that is  
 9 absolutely imperative before we respond on the omnibus.  
 10 So we're asking for another three weeks. I did ask Mr.  
 11 Van Valkenburg about that this morning.

12 And then my intention is to have a meeting  
 13 with Mr. Van Valkenburg to see about discovery that may  
 14 be outstanding yet. We think that there might be some,  
 15 and we know that we will have a couple motions that we  
 16 will be filing.

17 THE COURT: And Ms. Gill?

18 MR. VAN VALKENBURG: And, Judge, may I  
 19 respond --

20 THE COURT: Go ahead. Sure.

21 MR. VAN VALKENBURG: -- before you move --

22 THE COURT: Okay.

23 MR. VAN VALKENBURG: -- to the next case?

24 THE COURT: Sure.

25 MR. VAN VALKENBURG: I don't think that

19

1 there is any out -- outstanding discovery but I do  
 2 think it would be helpful if Ms. Ferguson and I sit  
 3 down, go through exactly what she has, what I have, and  
 4 compare those and make sure that that's not the -- that  
 5 there is no outstanding discovery.

6 I would like to do that next week. I -- I  
 7 don't want to delay that for three weeks or something  
 8 of that nature and so I -- I would propose that Ms.  
 9 Ferguson and I get together and get that done so that  
 10 by the time the omnibus form is filed that that issue  
 11 is resolved.

12 Is that acceptable to you, Ms. Ferguson?

13 MS. FERGUSON: Yes, it is.

14 MR. VAN VALKENBURG: All right.

15 The second comment that I wanted to make  
 16 with respect to Mr. St. Dennis's case is that it is --  
 17 I believe it is currently set for trial on May 2nd, and  
 18 based on what Ms. Ferguson just told the Court, that  
 19 she needs three more weeks to file the omnibus, that  
 20 there may, you know, be motions and all that, is that I  
 21 think essentially the defense is asking that that trial  
 22 date be vacated and I would like the Court to confirm  
 23 that and -- and essentially set another trial  
 24 scheduling conference sometime shortly after the  
 25 omnibus form is filed with the Court.

20

1 MS. FERGUSON: And I would agree with what  
 2 Mr. Van Valkenburg said. A May 2nd date is just too  
 3 soon for us.

4 THE COURT: So you'll move -- you're  
 5 requesting another date then. Is that right, Ms.  
 6 Ferguson?

7 MS. FERGUSON: Yes, Your Honor. I think  
 8 when we made the last court appearance I, in fact, told  
 9 the Court I thought a May 2nd date was too soon. So,  
 10 yes, we're asking for a different date other than May  
 11 2nd.

12 THE COURT: So looking -- I've got some  
 13 opportunity, I guess, in June: June 20, June 27. Are  
 14 either of those dates problematic?

15 MS. FERGUSON: Your Honor, I think that  
 16 that's still pushing.

17 THE COURT: So if I look at August 1st, Mr.  
 18 Van Valkenburg?

19 MR. VAN VALKENBURG: In general I think  
 20 that's fine, Judge. I would like to have the  
 21 opportunity to check my personal schedule. I have  
 22 scheduled some vacation time in late July, and it may  
 23 lap over into the first week of August, and I can't  
 24 remember that right now.

25 THE COURT: So we've got another date of the

21

1 15th. Do you think that would be safer then, the 15th  
 2 of August?  
 3 MR. VAN VALKENBURG: The 15th I know would  
 4 be fine from my perspective.  
 5 MS. FERGUSON: That's fine with us.  
 6 THE COURT: So the 15th of August, 9:00 a.m.  
 7 Final pre-trial on the 17th of July. And I think I've  
 8 moved that back to the 10th of July. The 10th of July  
 9 for final pre-trial at 10:30.  
 10 Anything else in *St. Dennis* from either  
 11 counsel?  
 12 MS. FERGUSON: No, sir.  
 13 MR. VAN VALKENBURG: I don't think so,  
 14 Judge.  
 15 THE COURT: Ms. Gill in *Strahan*.  
 16 MS. GILL: With respect to *Strahan*, I guess  
 17 we've got an omnibus hearing coming up on. I believe  
 18 it's April 13th.  
 19 THE COURT: And -- and I -- again I -- what  
 20 I prefer is if you meet with Mr. Van Valkenburg and  
 21 work out any scheduling or briefing issues. I don't go  
 22 through the 15-page-on-the-line approach, but it's a  
 23 good idea perhaps.  
 24 MS. GILL: Right.  
 25 THE COURT: So I just generally allow

22

1 counsel to set a meeting and if you get it -- and want  
 2 it done by then. If you think you need more time, then  
 3 now is the time to talk about it.  
 4 MS. GILL: Okay. Well, we've had several  
 5 meetings with Mr. Van Valkenburg, and we were taking  
 6 some steps towards possibly resolving the case.  
 7 However, we're not there yet and there's a chance that  
 8 it may not -- we may not be able to resolve the case.  
 9 However, it appears to be something that's a real  
 10 possibility.  
 11 If -- if we are going to resolve the case, I  
 12 think we'll know it by the omnibus hearing date and --  
 13 THE COURT: So that's a fair time. You  
 14 don't need additional time.  
 15 MS. GILL: We will need additional time if  
 16 -- if we're not able to resolve it or we decide to go  
 17 to trial.  
 18 THE COURT: But -- but to resolve it, do you  
 19 think it's fair to look at the 15th --  
 20 MS. GILL: Well --  
 21 THE COURT: -- which is the middle of April?  
 22 It's not really a hearing date that's mine. My hearing  
 23 date would probably -- my next hearing date actually  
 24 probably would be the 24th so --  
 25 MS. GILL: Okay. And we're trying to get

23

1 some things done, and I'm waiting for an evaluation to  
 2 come in, too, and part of what we're doing depends on  
 3 that coming in. I'm trying to get that in by this --  
 4 actually by tomorrow.  
 5 If that doesn't happen, then there's a  
 6 chance that we're going to need more time. But at this  
 7 point I think I'd rather just leave it on the current  
 8 schedule, and if we need more time, then we'll ask for  
 9 it.  
 10 THE COURT: Okay. So I mean I am obviously  
 11 doing some things that day, but I'd obviously hear if  
 12 there's progress or not on the 15th at any time that  
 13 would be workable. If you want to be here at 1:30 in  
 14 the afternoon, or if you like the morning drive down,  
 15 and it will be a little lighter then. So if you want  
 16 it at 9:00, I'll do it at 9:00. If you want it at  
 17 1:30, I'll do it at 1:30.  
 18 MS. GILL: What day is the 15th?  
 19 THE COURT: The 15th is a Tuesday.  
 20 MS. GILL: Tuesday? Probably the 1:00. The  
 21 1:30.  
 22 THE COURT: One-thirty on the 15th. Mr. Van  
 23 Valkenburg?  
 24 MR. VAN VALKENBURG: That's fine with me,  
 25 Judge.

24

1 THE COURT: So we'll do that.  
 2 MS. GILL: The other -- the other concern I  
 3 have, Your Honor, is given -- I don't know what's in  
 4 those cases either. But given the stance of this,  
 5 that -- I don't know if there's a possibility that we  
 6 may be conflicted out. I assume that it's all right  
 7 for us to continue working on the case.  
 8 THE COURT: It is.  
 9 MS. GILL: All right.  
 10 THE COURT: Any other matters in this case?  
 11 You've got your meetings all worked out, you think?  
 12 MR. VAN VALKENBURG: I think so, Judge.  
 13 THE COURT: Very well. So our next hearing  
 14 date in *Strahan* on the 15th of April at 1:30 p.m. I  
 15 don't have any other hearings set for *St. Dennis* until  
 16 the 10th of July at 10:30, but I'm available if you  
 17 need other hearings.  
 18 Thank you very much. We're adjourned.  
 19 We're in recess, I mean, until 1:30.  
 20 (Whereupon, the foregoing proceedings which  
 21 took place March 27, 2008, were concluded.)  
 22  
 23  
 24  
 25

CERTIFICATE

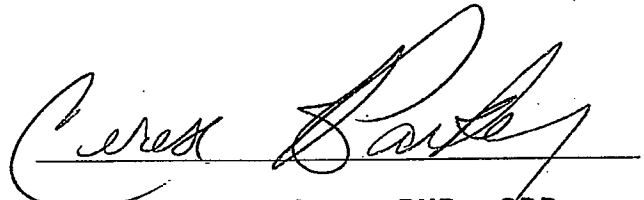
STATE OF MONTANA                    )  
  :        ss.  
County of Missoula                 )

I, Cerese S. Parker, RMR, CRR, Official Court Reporter and Notary Public for the State of Montana, residing in Missoula, Montana, do hereby certify:

That I was duly authorized to and did report the proceedings had in this matter;

That the foregoing pages of this matter constitute a true and accurate transcript.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on this the 16th day of April, 2008.



Cerese S. Parker, RMR, CRR  
Official Court Reporter  
Notary Public  
State of Montana  
Residing in Missoula, Montana  
My commission expires:  
February 22, 2012



# APPENDIX D

# OFFICE OF STATE PUBLIC DEFENDER



RANDI HOOD  
CHIEF PUBLIC DEFENDER

EDMUND F. SHEEHY, JR.  
REGION 2 DEPUTY PUBLIC DEFENDER

## STATE OF MONTANA

Phone: (406) 523-5140  
Fax: (406) 523-5141

610 Woody St.  
MISSOULA, MT 59802

September 12, 2008

Carolyn Gill, Esq.  
Assistant Public Defender  
248 Third Avenue E  
Kalispell, MT 59901

Re: Strahan Homicide Case

Dear Carolyn:

I am writing this letter to you due to some major concerns I have about a position you were taking on Wednesday, September 10, 2008, in the hearing over the trial dates for your client and St. Dennis. My concern relates to the examination of the footwear, in the possession of the Missoula Police Department and the Montana Crime Lab.

Please correct me, if I'm wrong, just as I understand it, you were objecting to the defendant's footwear, as well as the alleged victim's coveralls being sent to a footwear impression expert OPD has, as an approved vendor (or expert) in Florida. This was because you took the position, primarily, that the footwear impressions, the dust, etc., on the alleged victim's coveralls would not be in the same condition as it now is, if it was shipped to Florida. I also gather you are questioning the chain of custody, if the evidence, is sent to my staff attorney's expert.

Let me deal with the chain of custody issue first. On that, the practice and procedure, in Montana, is that once the evidence is turned over to a defendant's counsel, such counsel must stipulate to chain of custody from when the evidence was sent to the defense expert through it's return to the appropriate possessor of the same. In these cases, while you are representing a different client, I need to tell you that I don't believe it would look good for you, as an OPD attorney, even from a different Region, raising an objection to chain of custody, when the expert the evidence is sent to is an OPD expert. Please explain to me what your concerns are on chain of custody so we can try to work out an acceptable arrangement, on this matter, without your attacking other OPD attorneys or an OPD expert.

As for the impressions on the coveralls (Item No. 4 on Crime Lab Report), I believe we may be able to stipulate to not shipping the coveralls, as from reading the Crime Lab Report, and having a copy of the Crime Lab's Evidence Handling Manual (Chapter 15 thereof, which your investigators were given a copy of at the training on 9/8 and 9/9/08), I believe these comparisons were all done by photographs of the evidence. (Copy of Chapter 15 enclosed). In light of that, I believe we can agree to not send the coveralls to our expert (you

"AN EQUAL OPPORTUNITY EMPLOYER"

*Anthony St. Dennis*

*App. D*



Carolyn Gill  
September 12, 2008  
Page 2

might also note that the Mr. Bodziak is one of the reference people noted on this chapter), unless he says he needs to see them and we could send them, to him, after your November trial..

Finally, we would agree to not send Strahan's shoes to our expert. We are not interested in his shoes, only St. Dennis'.

Please let me know, if the foregoing will take care on your objections to sending the evidence to Bodziak, in Florida, as his having to come here will come out of OPD's budget and be more expensive than his doing his work in Florida.

Very truly yours,



Edmund F. Sheehy, Jr.  
Regional Deputy Public Defender

cc: John Putikka, Esq.  
Randi Hood, Esq.  
Paulette Ferguson, Esq.  
Chris Daly, Esq.

App D-1

# APPENDIX E

Carolyn Gill  
Office of the Public Defender  
248 3<sup>rd</sup> Avenue East  
Kalispell, Montana 59901  
Tel: (406) 751-6087  
e-mail: cgill@mt.gov

September 16, 2008

Edmund F. Sheehy, Jr.  
Regional Deputy Public Defender  
Office of the Public Defender  
610 Woody Street  
Missoula, Montana 59802

Dear Ed:

Thank you for your letter dated September 12, 2008 which raises concerns in connection with rulings made by the Court regarding evidentiary issues pertinent to both the Strahan and St Dennis cases.

Specifically, you allege that I raised a chain of custody issue regarding the evidence that you wish to be examined by your expert. Let me make it clear that I never raised any chain of custody concerns. This issue was introduced either by Judge Larsen or by the State. Although I do not have any concerns regarding chain of custody, I disagree with your position that I should not raise this issue because the parties involved work for or are employed by OPD and it would not "look good" for me to attack other OPD attorneys or experts. As we determined earlier with respect to these two cases, we are acting as separate offices and if I believe that it is in my client's best interest to object to some action taken by a co-defendant, which could potentially negatively impact my case, I will not hesitate, either in this case or in any future case, to object to that action.

The objection that I raised at the hearing was to moving or transporting the shoes and the clothing, which contains the original footprint impressions. Clearly, every time that clothing is moved, the dirt impressions could be disturbed. Even if a photograph has been taken of the coveralls, this does not preclude the possibility that an expert might find it essential to his analysis to view the original impressions, particularly in this case where the impressions were left on cloth or, for example, if the photographs prove inadequate for analytical purposes.

RECEIVED

SEP 18 2008

MISSOULA PD

*Anthony St Dennis*

APP. E

It is also my opinion that the shoes have already been tainted to some degree for purposes of impression analysis and other types of forensic analyses, by being handled and moved by police and lab personnel. However, I do not object to St. Dennis' shoes being sent to your expert. As you surmised, I would not be willing to have Strahan's shoes transported. Have you consulted with Bodziak to find out exactly what he requires to conduct his analysis? It seems that you are of the opinion that impression analysis can be accomplished photographically. If so, photographs of the shoes might suffice.

Please feel free to contact me at any time, including by e-mail or telephone.

Sincerely,



Carolyn Gill  
Public Defender

cc: John Putikka, ESQ.  
Randi Hood, Esq.  
Paulette Ferguson, Esq.  
Chris Daly, Esq.  
Britt Cotter, Esq.

# APPENDIX F

Commission standards and policies, job descriptions of attorneys and supervisors, and career advancement opportunities, applicable court decisions and statutory law. A component should also include the role and importance of motion practice and trial demonstrations -- first, by experienced lawyers and then by the new lawyer with a trainer.

#### 4. Continuing Legal Education

Regarding continuing legal education, staff and contract lawyers should be surveyed to determine what they need. Programs should be planned, scheduled, and published for the year in advance to encourage staff and contract lawyers to set aside time for their attendance. Contract lawyers should not have to pay fees to attend and their expenses should be reimbursed.

#### E. Dealing with Conflict of Interest Situations

Under the law and the ethics of the legal profession, lawyers may not represent clients where there is a potential conflict of interest between the lawyer and the client. The rule extends to a law firm as well as to individual lawyers. That is, the conflict is not resolved by having each conflicting client represented by different lawyers within the firm.

The public defender lawyer is in the same position as a lawyer in private practice in conflict situations. Providing representation where there is a conflict is so serious a problem that it may cause a conviction to be reversed even if there is no direct evidence that the error was harmful to any client. Of course, where lawyers knowingly or should have known, they are providing representation in a conflicting situation, they are also subject to professional discipline and civil liability may arise.

Conflict situations may arise in a number of situations. Some more frequently encountered examples include:

- situations where two or more persons are charged with the same offense and they have conflicting defenses;
- in a sentencing hearing, or in plea negotiation where one client is allegedly more culpable than the other;
- where one defendant has confessed, and another has not;
- In an appeal or post conviction proceeding by a defender office where the trial lawyer was on the defender staff or was a contract lawyer and an issue is presented as to the competency of trial representation, the staff appellate or post conviction lawyer is in a conflict situation. Although the appellate lawyer is not the trial lawyer, the conflict is not resolved because the appellate lawyer is in a different section of the Agency from the trial lawyer. They both report to the same Agency head.

Some would argue that all multiple defendant cases present a conflict and each defendant should have presented to him/her the possibility of cooperating with the prosecution. If defendants proceed to trial, unity of defenses may strengthen the defense. However, such unity sometimes breaks down in trial if not before. Conflict possibilities are not limited to multiple defendant cases, or even to the criminal side of the law. The point is the conflict issue is a frequently encountered problem. It must be immediately identified, quickly and effectively resolved. At the appellate stage the conflict potential appears to be entirely ignored.

The Montana solution to the conflict issue at the trial stage appears to be to appoint a lawyer from another regional office or, more likely, to appoint contract lawyers in the conflict situations. In the appellate situation, the Appellate Division appears to continue to provide representation even though an allegation of ineffective trial representation has been or may be made regarding the Defender staff or contract lawyer.

In the context of the Montana Defender Agency, we see the question taking a twofold thrust.

First: in the multiple defendant situation where a staff defender represents one defendant in a conflict situation, is the conflict resolved by the appointment of a contract lawyer or a staff lawyer from another region for the other defendants?

Second: where a defendant has been convicted when represented by a staff defender or a contract lawyer, may that defendant be represented by the appellate office of the Defender Agency when there is an allegation that the defendant's trial counsel was ineffective, i.e. incompetent?

As to the conflict issue at the trial level, it is strongly suggested that the contract lawyer retained in a conflict situation or staff lawyer from another Region does not resolve the conflict, either in form or substance. In practice, whether intended or not, the Agency is highly centralized. The Chief Defender exercises complete authority throughout the Agency subject only to the Commission, and she is not reluctant to exercise that authority. Regions are not independent entities; the enabling legislation confers authority upon and responsibility for everything and anything that relates to representation of the indigent to the Chief Public Defender. The contract lawyer division also is within the entire responsibility of the Chief Defender. The only restraint is the Commission's ability to remove the Chief Director. The Director has exclusive control over all staff and all cases undertaken by the Agency.

For example, under the Montana OPD organizational structure, the contract manager is hired and supervised by and is responsible to the Chief Defender. The Regional Deputy Defenders are hired by, supervised by and responsible to the Chief Defender. The Training Coordinator, who participates in identifying conflicts, has that same situation;

moreover, the selection, evaluation, and appointment and retention of all contract lawyers are the responsibility of the Chief Defender, along with the Regional Deputies and the Contract Manager. Indeed, the Contract Manager, as well as the Regional Deputies, review, approve, modify or reject fee petitions filed by all contract lawyers. Where expenditure in excess of \$200.00 may be required, the contract lawyer must obtain approval for the expenditure from the Contract Manager, the Training Coordinator and the Chief Defender. The contract lawyer's rate of compensation and total compensation for services are determined by the Defender Agency. The Chief Defender, with or without the advice of the Regional Defender and Contract Manager, may control case assignments to contract lawyers and has the authority to decide what lawyers make the contract lawyer list and who remains or is stricken from that list. Moreover, all payment of funds must be made through and by the authority of the central auditing section in the central Agency Office. That auditing department is under the authority of the Chief Administrator who is hired by and responsible to the Chief Defender.

In regard to the second situation -- appellate cases involving allegations of ineffective counsel -- some have argued that in all appellate cases a lawyer who represents the appellant must be entirely unconnected to the trial lawyer. The appellate lawyer, however, must always consider an ineffective trial lawyer argument, particularly under the current law of waiver.

Effective July 1, 2006, the OPD retained a conflict attorney. He was hired by and responsible to the Commission, not to the Defender Director or any other staff supervisor. His position was entirely different and separate from the Contract Manager's. His office was his own, not an Agency office. He presented a report to the Commission, dated October 13, 2006, that addressed the problems we have discussed above except for the appeal situation and other post conviction representation. The report suggested that the solution at the trial level is for the Commission to maintain a "Conflicts Coordinator" who reports directly to the Commission and is independent of the Defender Administration. He reached this conclusion after examining how state programs in Colorado, Iowa and Georgia addressed the trial conflicts problem. We agree with his recommended approach.

However, we were told that the Chief Defender strongly opposed the recommendations submitted in his October report and insisted that the conflict situation be handled within the Defender Agency, under her supervision. As a result, the Commission ended the term of the independent Conflict Office, effective December 31, 2006 and lodged ultimate responsibility for all conflict cases with the Chief Defender. Now, a Regional Director, the Training Coordinator and the Contract Manager decide the conflict issue, with the Contract Manager assigning the conflict case to a lawyer on the contract lawyer list or a staff lawyer from another region. Supervision remains within the Agency hierarchy.

We were told that the Agency imposes a "fire wall" between the Contract Manager staff



and the Conflict lawyer. However, the "fire wall" at best only bars the sharing of confidential information – which is only one aspect of the conflict problem. The Agency hierarchy still has substantive oversight and supervision over the contract conflict lawyers. The Contracts Manager, the Training Coordinator and the Region's Deputy Defender remain under the total control of the Chief Defender for all other purposes. All three are employees at will -- hired, fired, disciplined, etc. -- by the Chief Defender. The Regions are simply not independent. The potential conflict with appellate and post conviction matters is also totally ignored.

The appropriate solution is to establish a trial and appellate office entirely separated from the Defender Agency. That office must be independent from the existing state defender agency. In a few cases where more than two defendants are charged, the trial judge should appoint a private lawyer who is without any connection to the Defender Agency, either as a staff attorney or a contract lawyer. It would be best to have state funds separate from state defender accounts pay for those appointed lawyers. However, if state funds are not available, funds will have to come from the county. This solution would return control over conflict lawyers to the trial judge in the very few cases in which such conflicts arise and cannot be handled by the recommended independent conflict office. While this proposed solution would, unfortunately, in a limited way defeat one of the objectives of the 2005 Defender Legislation, it would be a far better option than the current practice. The independent alternative office, however, is the better solution as long as the private bar involvement remains.<sup>15</sup>

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<sup>15</sup> Commission Standards III, 5A and 5B address the conflict problem but authorize appointment of conflict lawyers from the Defender Agency staff who are in a different Region or a contract lawyer. Briefly, the Regions are described in this standard as independent entities and create the illusion that each Region operates independently. The Appellate Office is similarly described as an independent office. But that is not the fact! While the Legislation authorizes the Commission to create up to 11 Regions, neither the Regions nor the Appellate office are independent units in fact or in practice. The Defender Legislation very clearly and unequivocally vests complete supervisory authority of the entire system with the Chief Defender. The Chief Defender is the sole person responsible to the Commission. As noted above, the Chief Defender by legislation has the authority to hire, fire, discipline, etc. all staff. That includes the Appellate Director, the Contract Manager, and the Regional Defender Directors. Furthermore, all staff is employees at will. The authority of the Chief Defender over the staff is unlimited, except as to general principles applicable to any public employee. The Standards statement, "Neither the Chief Public Defender (or anyone else in administration) exercises general control or influence over the handling of individual trial divisions or appellate division cases, has access to client files..." is simply not the fact in practice or under the provisions of the 2005 Defender Act. While the Chief Defender may not get involved in any particular case, she has the authority to do so. Moreover, this Defender Director made it very clear to the study team that she emphatically exercises that control to hire, fire, discipline staff at any level. One of our concerns has been that there is not sufficient delegation by the Chief Defender. Her response to that concern has been that she has the responsibility; therefore, she must be involved. It is inconsistent to assert independence for the Regions in terms of conflict matters, but, at the same time, complete authority by the Chief Defender and administrative office over all matters in the Regions and in the selection and retention of contract lawyers.