EXHIBIT 1
DATE 01-06-2011
HB

OFFICE OF THE STATE PUBLIC DEFENDER

Presentation

TO A JOINT COMMITTEE OF THE HOUSE AND SENATE JUDICIARY

and

THE SECTION D APPROPRIATION SUBCOMMITTEE

January 2011

What is the public purpose being addressed and what makes it important?

Mission: The mission of the Office of the State Public Defender is to ensure equal access to justice for the State's indigent and to provide appellate representation to indigent clients.

The agency helps clients understand their legal rights in a very complex legal environment.

Footnote: see appendix for detailed mission statement

What is the public purpose being addressed and what makes it important?

The agency began providing services to clients on July 1, 2006 (FY 2007). Prior to that date services were provided by counties and cities. The agency has been in operation about 4 ½ years.

The agency was formed to address certain legal issues brought forth by the American Civil Liberties Union (ACLU).

What is authorized and how?

The agency operates under Title 47, the Montana Public Defender Act.

A person's right to legal counsel is required by both the US and Montana Constitutions.

Footnote: refer to the MCA for the complete rendition of Title 47

Supervision of the Agency

The agency is supervised by the Montana Public Defender Commission (an 11-member committee nominated by various groups and appointed by the Governor).

Daily operations are managed by the Chief Public Defender and the Chief Appellate Defender.

Programs

The agency has two programs:

Program 1: The Public Defender Program

Program 2: The Appellate Defender Program

Public Defender Program

To serve its clients the public defender program has offices in 11 regions throughout the state.

These offices serve clients in all 56 district courts, 152 courts of limited jurisdiction, and about 20 specialty courts (DUI, family, drug, mental health).

The offices received 27,660 new cases during FY 2010. The four year average is about 26,900 new cases per year.

The average new case growth rate is 2.7%.

Public Defender Program

The Public Defender Program provides legal services to individuals that qualify under Title 47 including:

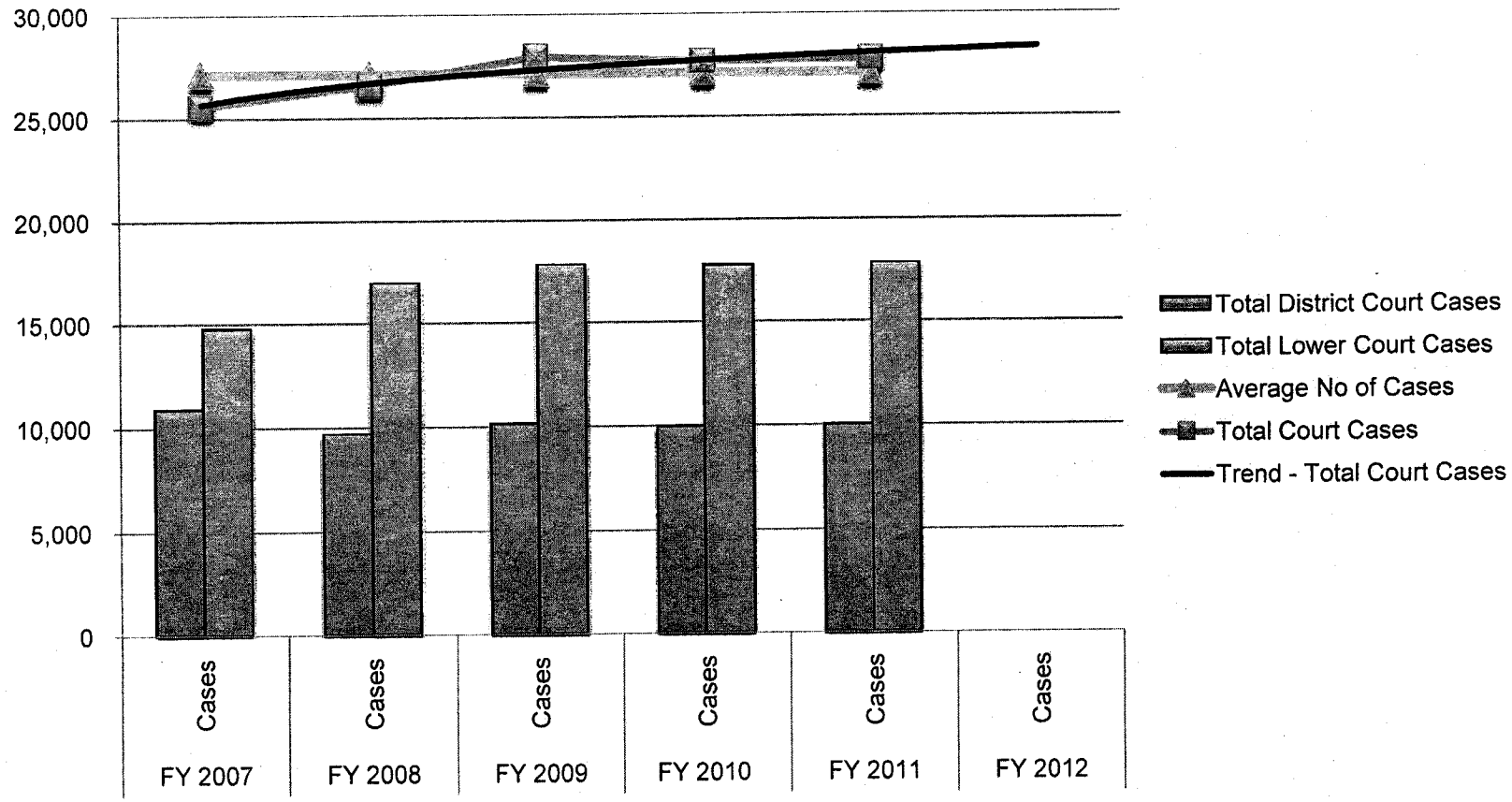
- Persons determined to be indigent in criminal cases and parents or children involved in dependent/neglect cases
- Respondents in proceedings for involuntary commitment
- Persons who are the subject of a petition for the appointment of a guardian
- Youths in youth court

Public Defender Program

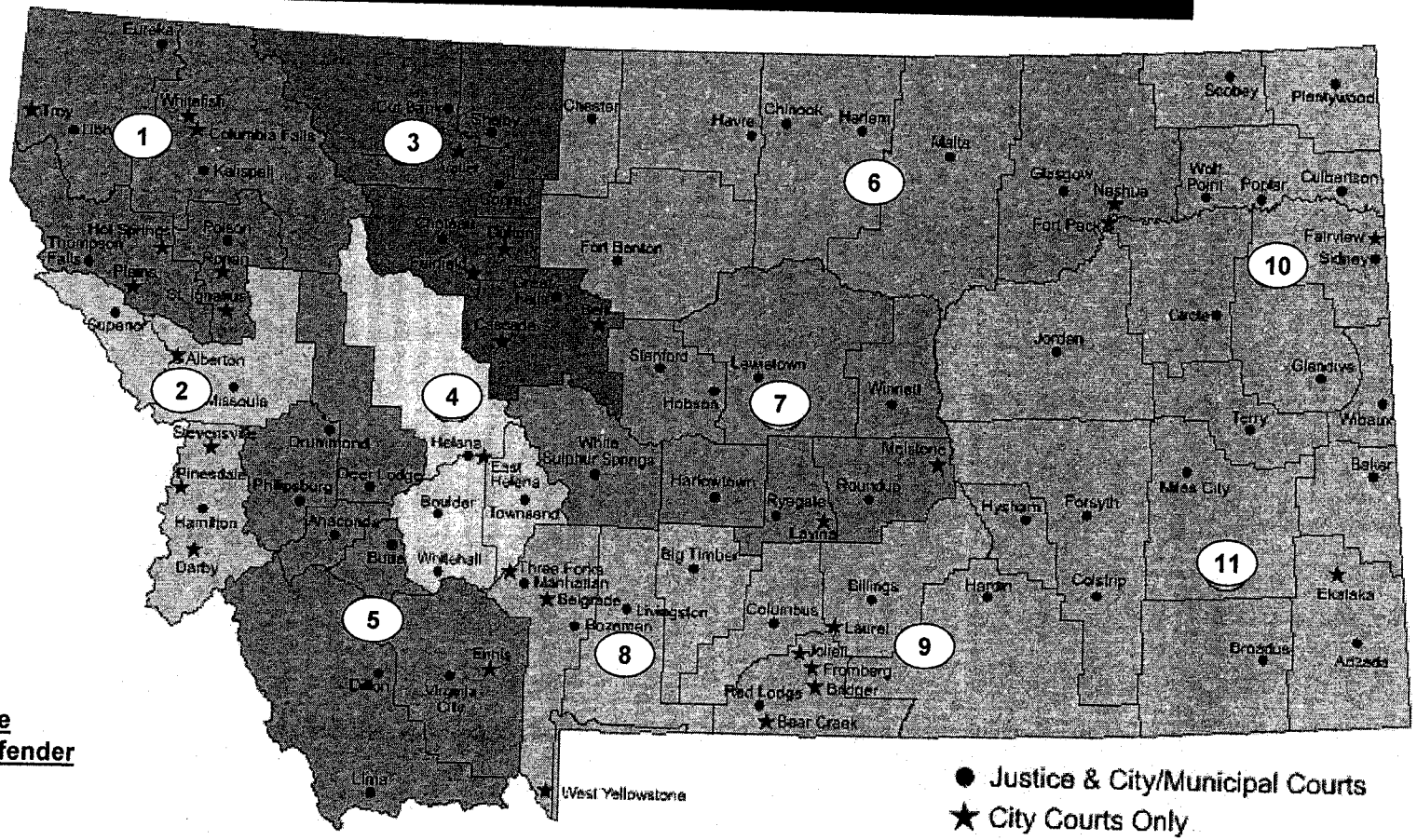
To serve its clients the program has 183.75 authorized FTE and uses over 220 contract attorneys, contract investigators, and mental health consultants.

The program also contains the central office function with 16.75 authorized FTE.

New Cases by Court by Fiscal Year



MAP OF REGIONS – SEE THE APPENDIX FOR MORE DETAILS ON EACH REGION



Central Office
Appellate Defender
Charts

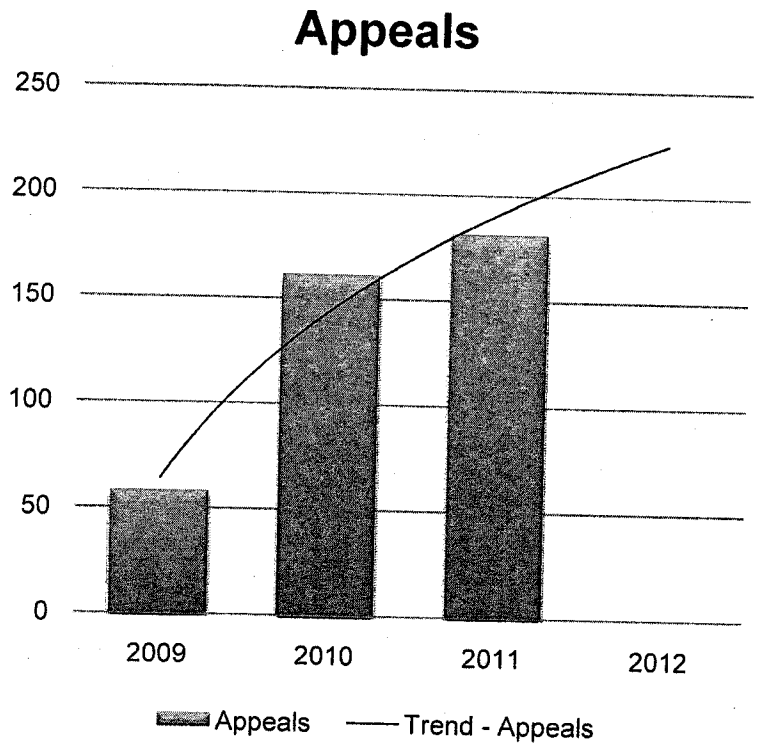
Appellate Defender Program

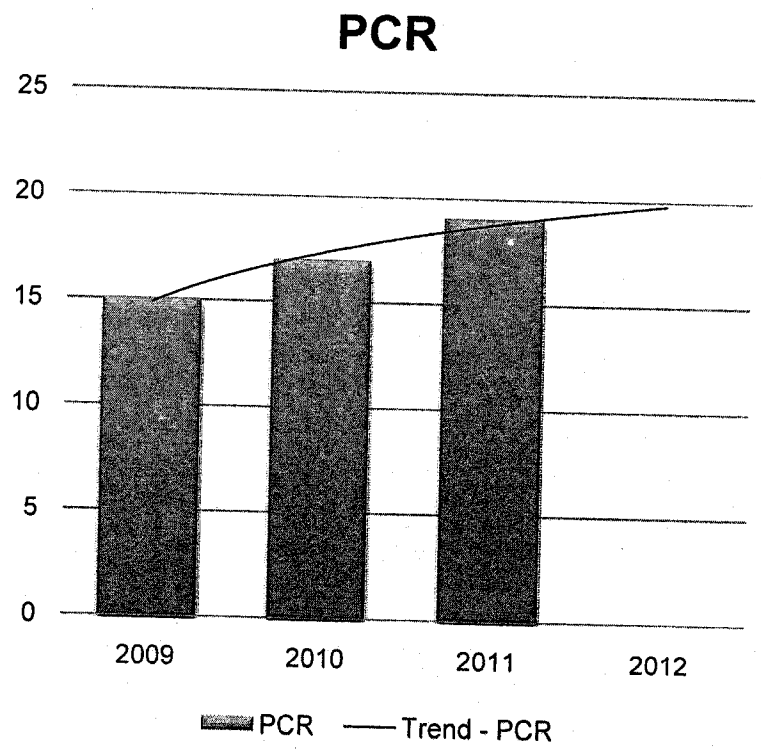
The Appellate Defender Program provides appellate services to individuals eligible for public defender services under Title 47 and petitioners in post conviction relief (PCR) proceedings. The program serves the Supreme Court.

During FY 2010 the program opened 9 writs and closed 8; opened 4 PCRs and closed 2; and opened 170 appeals and closed 67. The base in each type of work continues to increase.

The program has 9.00 authorized FTE and uses about 6 contract attorneys.

Appellate Cases w/ Trend





Outcomes:
Historical Financial and Operating Trends

The agency has expended between $19.4 and $20.5 million for each fiscal year over the past four years.

The Legislative Audit Division in its audit report of the agency's records for FY 2009/2010 noted no audit findings.

The agency has only added 8 new FTE over the past four years.

During the past four years the state's courts have assessed over $618,000 in fees to over 1,600 clients. The agency has collected $136,090 during the same time period.

Funding - Public Defender Program

	FY07	FY08	FY09	FY10	FY11
Payroll	$9.5	$10.6	$11.1	$11.7	$12.2
Op exp	9.1	8.4	8.5	7.7	7.3
Totals	$18.6	$19.0	$19.6	$19.4	$19.5
FTE	184.50	184.50	184.50	191.50	191.50

Dollar amounts in millions. Dollars and FTE include central services functions.

FY 07 – 10 are actual information and FY 2011 is an estimate.

Funding – Appellate Defender Program

	FY07	FY08	FY09	FY10	FY11
Payroll	$0.4	$0.5	$0.6	$0.6	$0.6
Op exp	0.4	0.3	0.3	0.4	0.4
Totals	$0.8	$0.8	$0.9	$1.0	$1.0
FTE	8.00	8.00	8.00	9.00	9.00

Dollar amounts in millions.

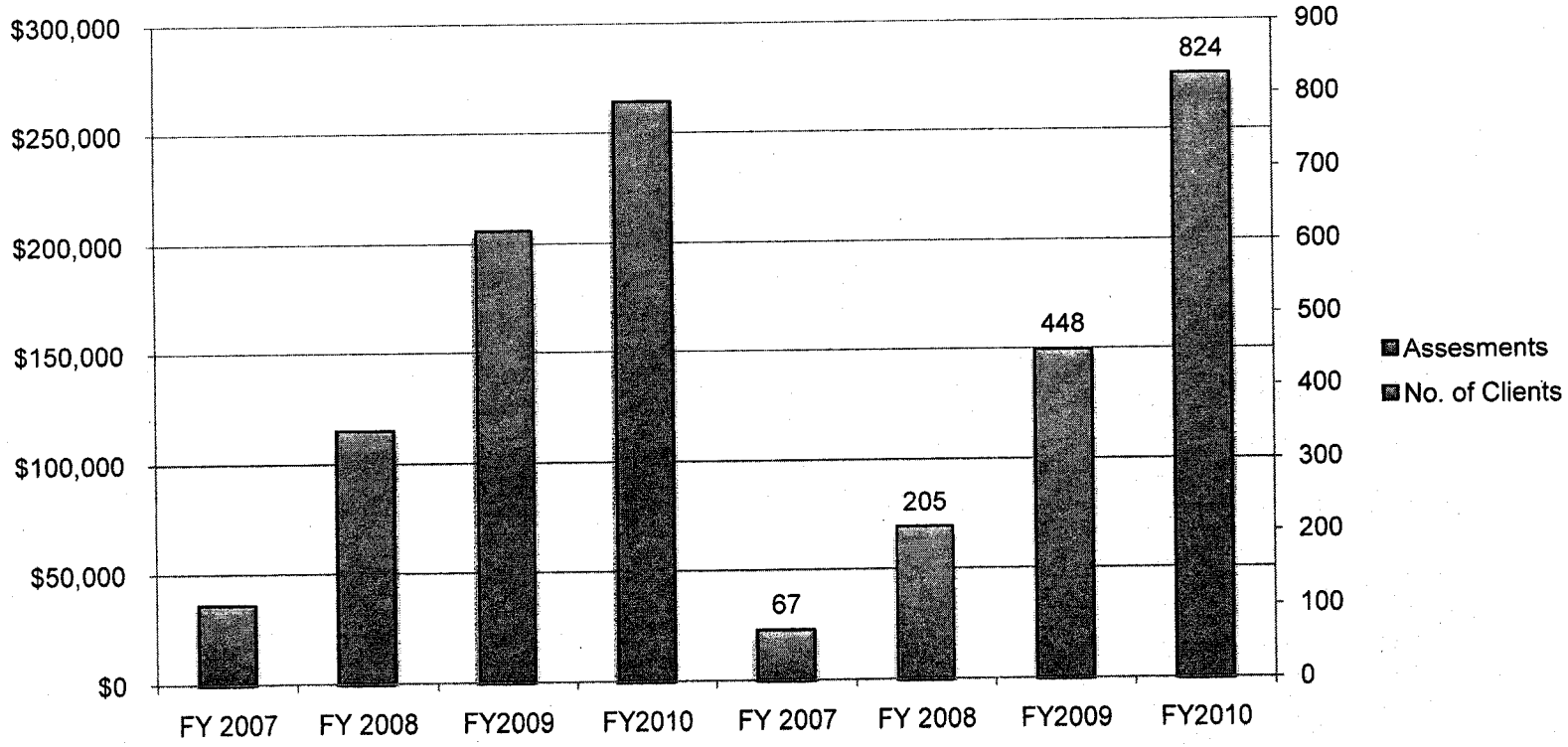
FY 07 – 10 are actual information and FY 2011 is an estimate.

Financial and FTE Trends

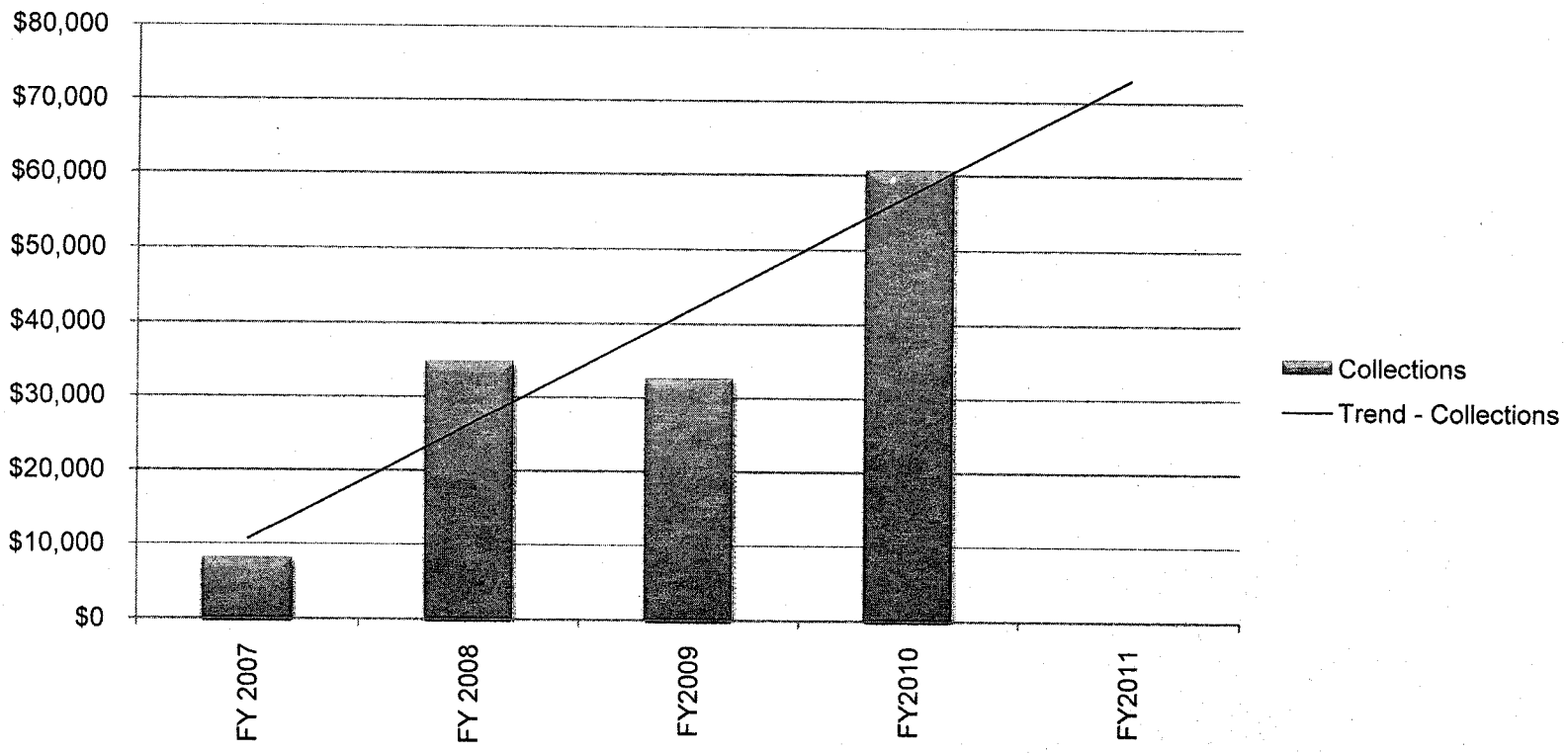
Top information combines both programs

	FY07	FY08	FY09	FY10
Payroll	$9.9	$11.1	$11.7	$12.3
Contract Attorney	6.2	5.6	5.7	4.9
Contract Other	1.2	0.9	0.9	0.8
Other	2.1	2.2	2.2	2.4
Totals	**$19.4**	**$19.8**	**$20.5**	**$20.4**
Percent Increase		**2.1%**	**3.5%**	**0.0%**
Central Office	$1.7	$2.0	$1.9	$1.8
Regions	16.9	17.0	17.7	17.6
Appellate	0.8	0.8	0.9	1.0
FTE	**192.5**	**192.5**	**192.5**	**200.5**

Judgments and Assessments



Collection of Assessments



Outstanding Assessments as of 6/30/2010

Total unpaid assessment balance as of 6/30/2010: $481,939

The agency has collected over $136,000 through 6/30/2010 or 22% of the total.

Total number of clients with unpaid assessment balances as of 6/30/2010: 1,433 (some are making payments)

Agency Legislation – 2011 Session

HB 96: Fees charged to certain cases

Sponsor: Representative Mike Menahan

HB 97: Separate the Appellate Program from the Public Defender Program

Sponsor: Representative Mike Menahan

LC 1817: Access to jails

Sponsor: Senator Tom Facey

Other Legislation – 2011 Session

HB 3: Supplemental funding

Sponsor: Representative Robert Mehlhoff

SB 50: Reduce jail time for certain crimes

Sponsor: Senator Steve Gallus

Agency 2013 Budget Overview

The agency is requesting 16.00 new FTE and an increase of $4.1 million over the current biennium base budget.

The agency's annual expenditures would increase from $20.4 million during FY 2010 to $21.8 million. This is of $1.4 million per fiscal year or $2.8 million for the biennium.

<u>The new FTE are as follows:</u>

Central Services: 2.00 (accounts receivable and records management)

Public Defender: 12.00 (7 attorney, 4 support, 1 investigator)

Appellate Defender: 2.00 (1 attorney & 1 support)

2013 Biennium – Decision Packages

ADDITIONAL FTE TO SUPPORT CASELOAD – PROGRAM 1

8.00 new FTE (3 attorney, 1 investigator, and 4 support FTE)

$509,521 for FY 12 and $483,601 for FY 13 (includes benefits and insurance)

- This is to make permanent any temporary positions that the agency uses to provide services to its clients as per present law requirements and to allow for future adjustments in workload.

2013 Biennium – Decision Packages

ACCOUNTS RECEIVABLE TECHNICIAN – PROGRAM 1

1.00 new FTE

$37,885 for FY 12 and $34,712 for FY 13 (includes benefits and insurance)

- This position will account for and report on client fee transactions and be funded by the collection of those fees.

2013 Biennium – Decision Packages

COMPUTERS/SERVERS/PRINTERS – PROGRAM 1

$153,473 for FY 2012 and $196,808 for FY 2013

- The agency was on a 4-year replacement cycle for computers but adopted a 5-year program during FY 2010 due to funding issues. It also has needs for copier and server replacements as follows:

	FY 2012		FY 2013	
	Qty	Total	Qty	Total
• Computers	63	$94,000	97	$145,000
• Servers	2	$29,000	2	$29,000
• Copiers	4	$30,000	3	$23,000

2013 Biennium – Decision Packages

RECORDS MANAGEMENT FUNCTION – PROGRAM 1

- 1.00 new FTE
- $46,229 in FY 2011 and $43,031 in FY 2013 to fulfill this function on an ongoing basis. The salary includes benefits and insurance.
- The agency is required by state law to maintain files as per rules set by the Secretary of State. The agency averages about 26,900 new client cases per year coming into the system and must maintain records according to the approved retention schedule. The agency has federal funds to do the initial set up of the records management system and begin a paperless project.

2013 Biennium – Decision Package to Address the American University Report

[redacted]

REDUCE CASELOADS FOR AGENCY MANAGERS – PROGRAM 1

- 4.00 new attorney FTE with benefits and insurance.
- $331,862 for FY 2012 and $315,629 for FY 2013.
- The American University report recommends that the agency reduce caseloads for attorneys that manage. The Chief Public Defender and the Commission have developed a policy that places a caseload limit by region size.

2013 Biennium – Decision Packages

ADDITIONAL FTE TO SUPPORT CASELOAD - PROGRAM 2

2.00 new FTE (1 attorney and 1 support position)

$137,500 for FY 2012 and $130,982 for FY 2013 (includes benefits and insurance)

- This is to make permanent any temporary positions that the agency uses to provide services to its clients as per present law requirements and to allow for future adjustments in workload.

Agency Issues

- Growing caseloads – average 2.8% per year
- Recruitment and retention of qualified attorneys
- Growing number of courts to serve
- ACLU lawsuit
- Contract attorney hourly rate not increased in many years

Appendix – more detail information

Detailed Mission Statement – page 23

Detailed Region Information – page 36

Agency's Funding History – page 48

Mission Statement

¶ 1 The primary mission of the statewide public defender system is to provide effective assistance of counsel to indigent persons accused of crime and other persons in civil cases who are entitled by law to the assistance of counsel at public expense. *M.C.A. 47-1-102(1).* This mission, arising out of fundamental principles on which our constitutions of the United States and the State of Montana are founded, was the obligation of the State of Montana long before the enactment of the Montana Public Defender Act in 2005.

¶ 2 In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense. The implementation of this Sixth Amendment right traveled an arduous course before reaching *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963), where the United States Supreme Court unanimously held that state courts are required under the Sixth Amendment to provide counsel in felony cases for defendants who are financially unable to retain private attorneys. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), held that, without a knowing and intelligent waiver, no person may be imprisoned for any offense, whether petty, misdemeanor or felony, unless represented by counsel at trial.

¶ 3 The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that in proceedings for determining delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or counsel will be appointed to represent the child if they cannot afford counsel. *In re Gault*, 387 U.S. 1, 41 (1967). In Montana, minors have the same right to counsel as adults. *Mont. Const. Art. II, 15* (1972).

Mission Statement (continued)

¶ 4 It is sufficient here to say that the right to counsel attaches at the critical stages of the criminal justice process. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 212[FN16] (2008), noted that critical stages are defined as ... proceedings between an individual and agents of the State (whether formal or informal, in court or out, see *United States v. Wade,* 388 U.S. 218, 226, ... (1967)) that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or ... meeting his adversary, *United States v. Ash,* 413 U.S. 300, 312-313 (1973) ....@[1] As footnoted, a critical stage may happen earlier in a case but without doubt a defendant's initial appearance before a judicial officer is a critical stage that triggers the Sixth Amendment right to counsel. *Rothgery*, 554 U.S. at 213.

¶ 5 A defendant is guaranteed the right to assistance of counsel in criminal cases by our *Mont. Const. Art. II, 17* and *24* (1972). *State v. Rardon*, 305 Mont. 78, 78-79 (2001); *State v. Colt*, 255 Mont. 399, 403 (1992), citing *State v. Enright*, 233 Mont. 225, 228 (1988). Due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and *Art. II, 17*, of the Montana Constitution requires the assistance of counsel in situations other than criminal cases where fundamental liberty interests are at stake. The Montana Supreme Court has cited U.S. Supreme Court cases in discussions about fundamental fairness calling for the assistance of an attorney so the individual can meaningfully participate and the procedure is fundamentally fair[2].

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[1] Other critical stages where the right to counsel attaches include post-arrest interrogation, *Brewer v. Williams*, 430 U.S. 387, 399-401 (1977); *Miranda v. Arizona*, 384 U.S. 436, 479-81 (1966); line-ups, *United States v. Wade*, 388 U.S. 218, 236-37 (1967); other identification procedures, *e.g.*, one person showup, *Moore v. Illinois*, 434 U.S. 220, 231-32 (1977); initial appearance, *Michigan v. Jackson*, 475 U.S. 625, 629[FN3] (1986); arraignments, *Hamilton v. Alabama*, 368 U.S. 52, 53 (1961); preliminary hearing, *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970); plea negotiations, *Brady v. United States*, 397 U.S. 742, 748 (1970) and *McMann v. Richardson*, 397 U.S. 759, 769-70 (1970); and direct appeals, *Douglas v. California*, 372 U.S. 353, 356-57 (1963).

Mission Statement (continued)

¶ 6 Situations in which the right to the assistance of an attorney was deemed essential to fundamental fairness were codified before the statewide public defender system was created. Those situations are now catalogued in *M.C.A. 47-1-104(4)(b)*.

¶ 7 Reasonably effective assistance is the standard for performance any time counsel appears on behalf of an accused, *i.e.*, the representation must come within an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984)[3]. Montana follows the *Strickland* objective standard of reasonableness when evaluating ineffective assistance claims in criminal cases. *Whitlow v. State*, 343 Mont. 90, 93-94 (2008). For the civil cases listed in *M.C.A. 47-1-104(4)*, standards used to evaluate claims of legal malpractice and the *Strickland* test simply do not go far enough to protect the liberty interests of individuals who may or may not have broken any law but who may indefinitely bear a social stigma. *In re A.S.*, 320 Mont. 268, 273-75 (2004), quoting from *In re Mental Health of K.G.F.*, 306 Mont. 1, 7, 33 (2001).

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[2] For examples, see *In re A.F.-C.*, 307 Mont. 358, 368-70 (2001), citing *Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25 & 32-33 (1981); *In re A.R.A.*, 277 Mont. 66, 70-71 (1996), citing *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *In re A.S.A.*, 258 Mont. 194, 198 (1993), and *Matter of R.B.*, 217 Mont. 99, 102-03 (1985), citing *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) (a natural parent's right to the care and custody of his or her child is a fundamental liberty interest that must be protected by fundamentally fair procedures). Also see Professor Mary Helen McNeal's law review article, *Toward a Civil Gideon under the Montana Constitution: Parental Rights as the Starting Point*, 66 Mont. L. Rev. 81 (Winter 2005), for an extensive examination of *Mont. Const. Art. II, 16* (administration of justice), *Art. II, 4* (dignity and equal protection), *Art. II, 17* (due process), and *Art. II, □34* (unenumerated rights) clauses as cornerstones for the development of a civil Gideon in Montana.

Mission Statement (continued)

¶ 8 Providing effective assistance of counsel at critical stages in the types of cases delineated in *M.C.A. 47-1-104(4)* has not been optional or negotiable for a long time. The enactment of the Montana Public Defender Act in 2005 consolidated the delivery of the assistance of counsel in those cases through the statewide public defender system rather than through a hodgepodge of programs.

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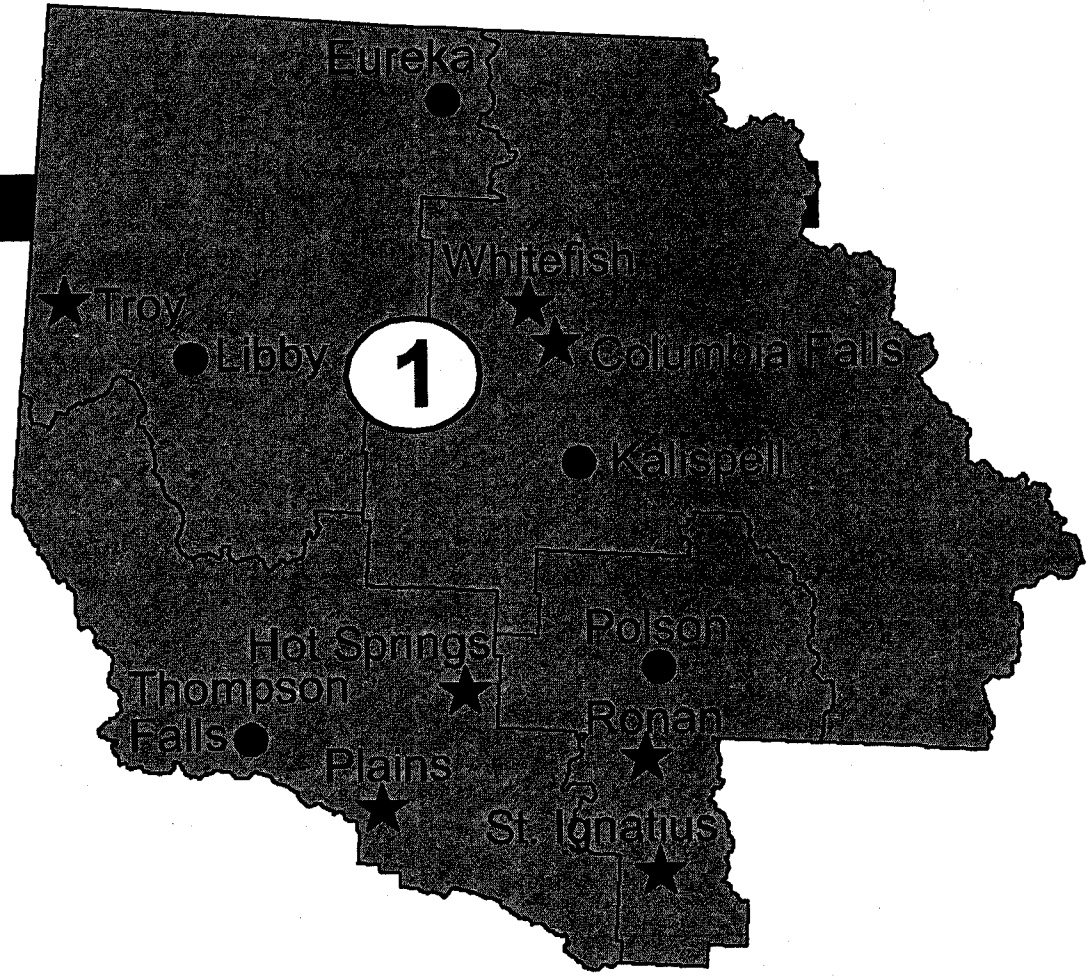
[3] *Strickland*, 466 U.S. at 688-89: ... Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See *Cuyler v. Sullivan, supra.*, 446 U.S. [335] at 346, 90 S.Ct. at 1717 [(1980)]. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See *Powell v. Alabama*, 287 U.S. [45] at 68-69, 53 S.Ct. at 63-64 [(1932)].

"These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) (The Defense Function), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. (*Citation omitted*). Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. ..."

Region 1 – Kalispell

Attorneys: 16
Support Staff: 7
Investigators: 2
Contract Attorneys: 23
FYE 2010 Cases Opened: 4,285
District Courts: 4
Lower Courts : 16
Sq. Miles: 12,967

Return to Map of Regions

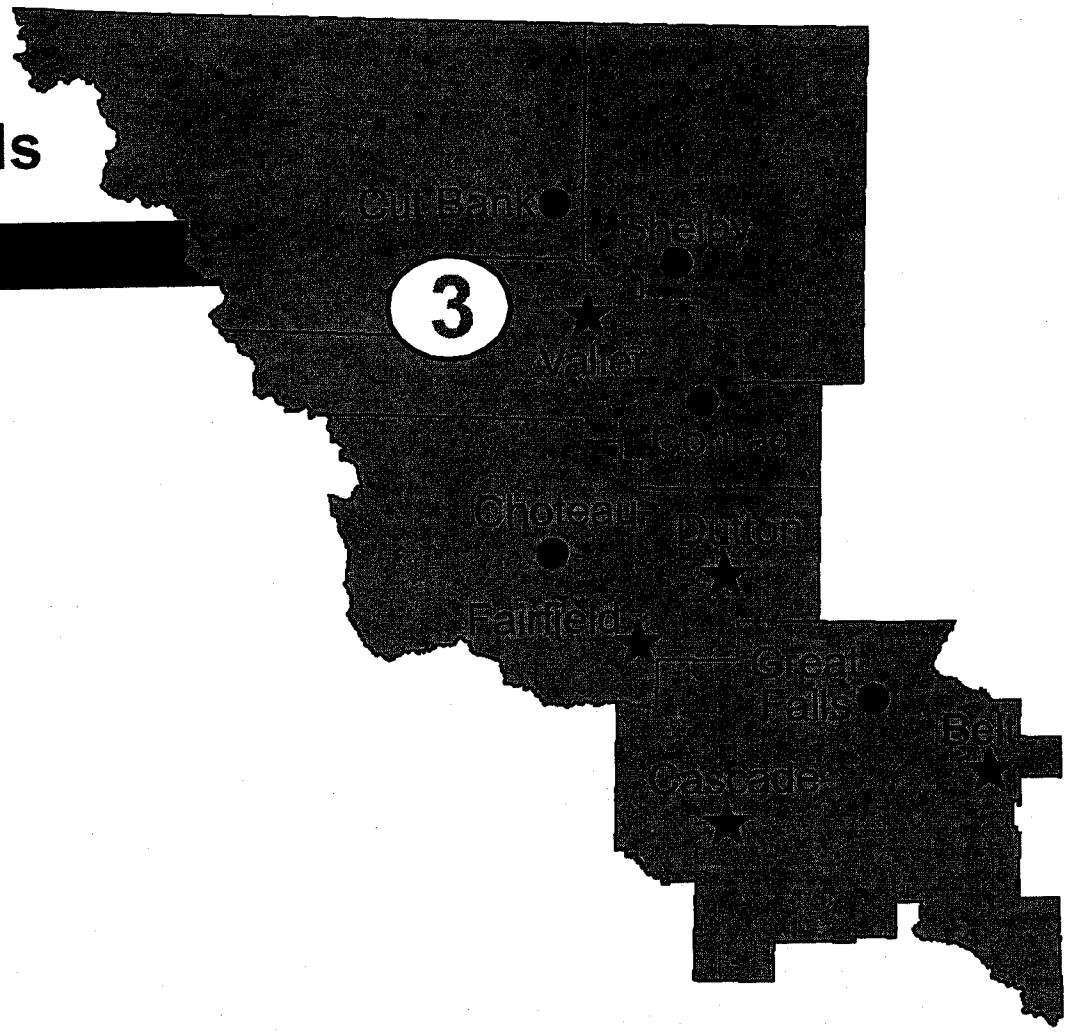


Region 2 – Missoula

Attorneys: 22.50
Support Staff: 10
Investigators: 3
Contract Attorneys: 39
FYE 2010 Cases Opened: 4,826
District Courts: 3
Lower Courts: 10
Sq. Miles: 6,212

Return to Map of Regions

Region 3 – Great Falls



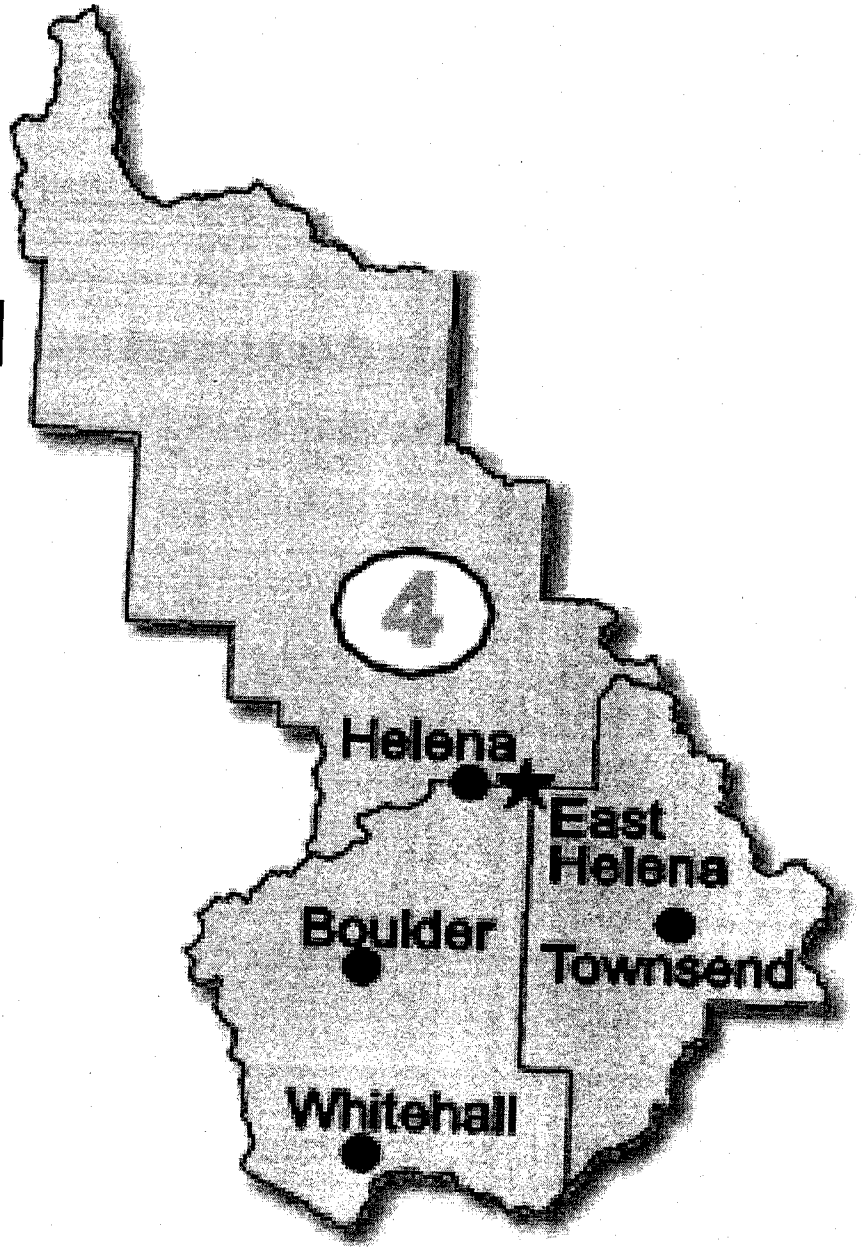
Attorneys: 11
Support Staff: 5
Investigators: 4
Contract Attorneys: 24
FYE 2010 Cases Opened: 2,802
District Courts: 5
Lower Courts: 16
Sq, Miles: 11,501

Return to Map of Regions

Region 4 – Helena

Attorneys: 9.50
Support Staff: 4
Investigators: 0
Contract Attorneys: 8
FYE 2010 Cases Opened: 2,857
District Courts: 3
Lower Courts: 8
Sq. Miles: 6,309

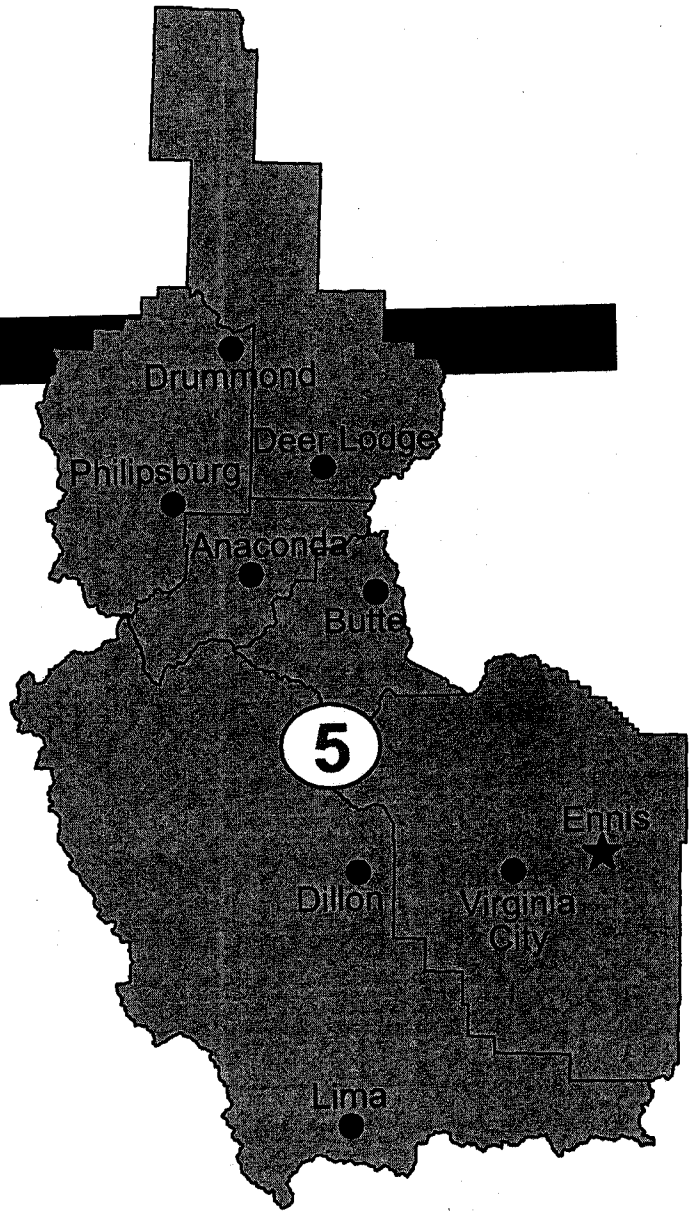
Return to Map of Regions



Region 5 – Butte

Attorneys: 9
Support Staff: 4
Investigators: 2
Contract Attorneys: 5
FYE 2010 Cases Opened: 1,630
District Courts: 6
Lower Courts: 14
Sq. Miles: 14,638

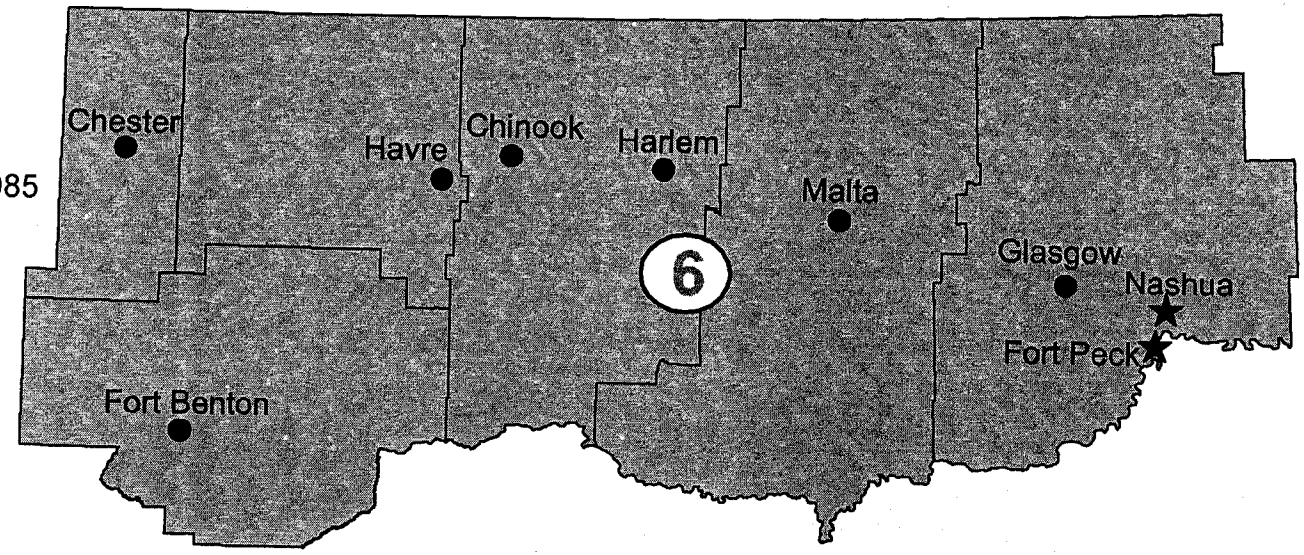
Return to Map of Regions



Region 6 – Havre

Attorneys: 2
Support Staff: 1
Investigators: 1
Contract Attorneys: 9
FYE 2010 Cases Opened: 985
District Courts: 6
Lower Courts: 16
Sq. Miles: 22,586

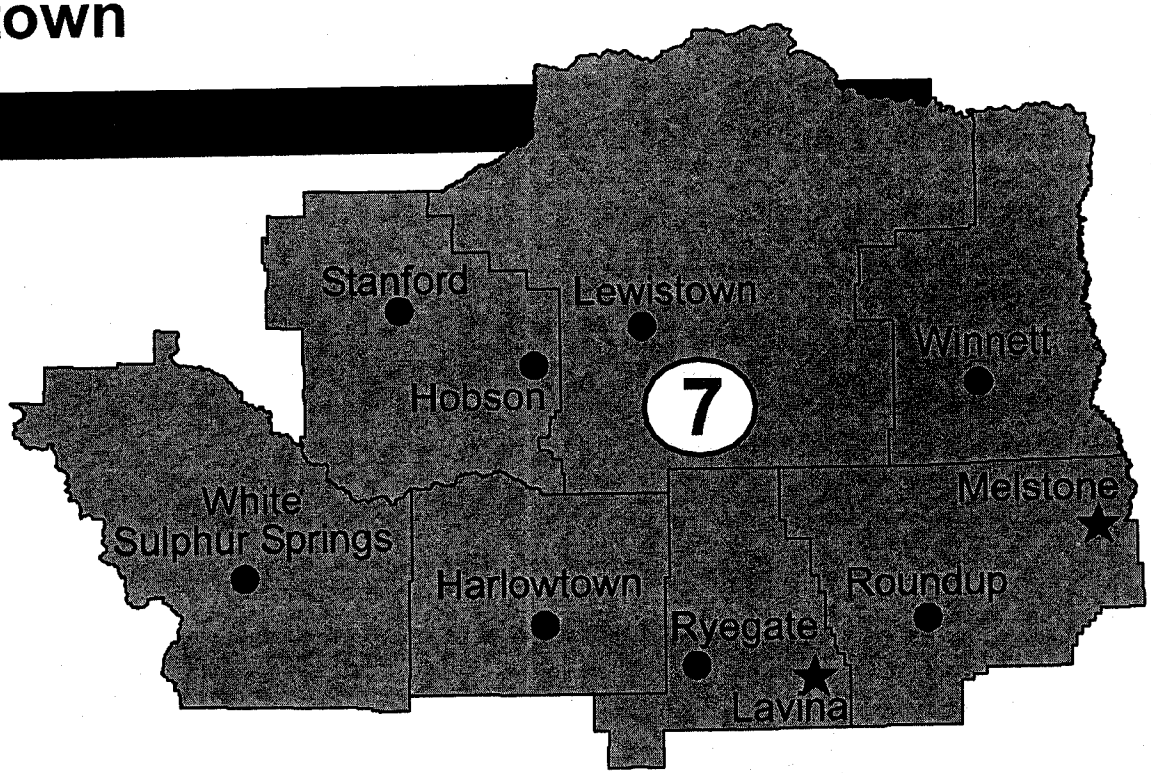
Return to Map of Regions



Region 7 – Lewistown

Attorneys: 1
Support Staff: 1.50
Investigators: 0
Contract Attorneys: 16
FYE 2010 Cases Opened: 417
District Courts: 7
Lower Courts: 17
Sq. Miles: 14,720

Return to Map of Regions

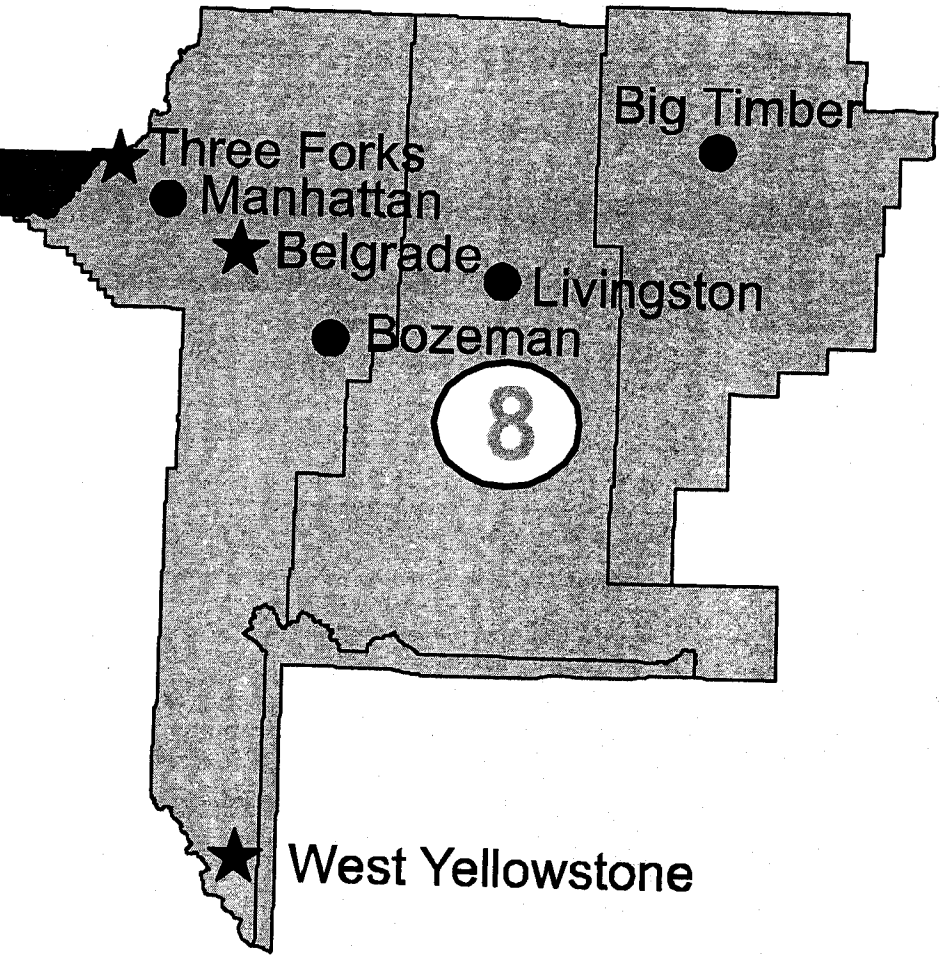


Region 8 – Bozeman

[redacted]

Attorneys: 11
Support Staff: 5.50
Investigators: 2
Contract Attorneys: 22
FYE 2010 Cases Opened: 2,250
District Courts: 3
Lower Courts: 14
Sq. Miles: 7,263

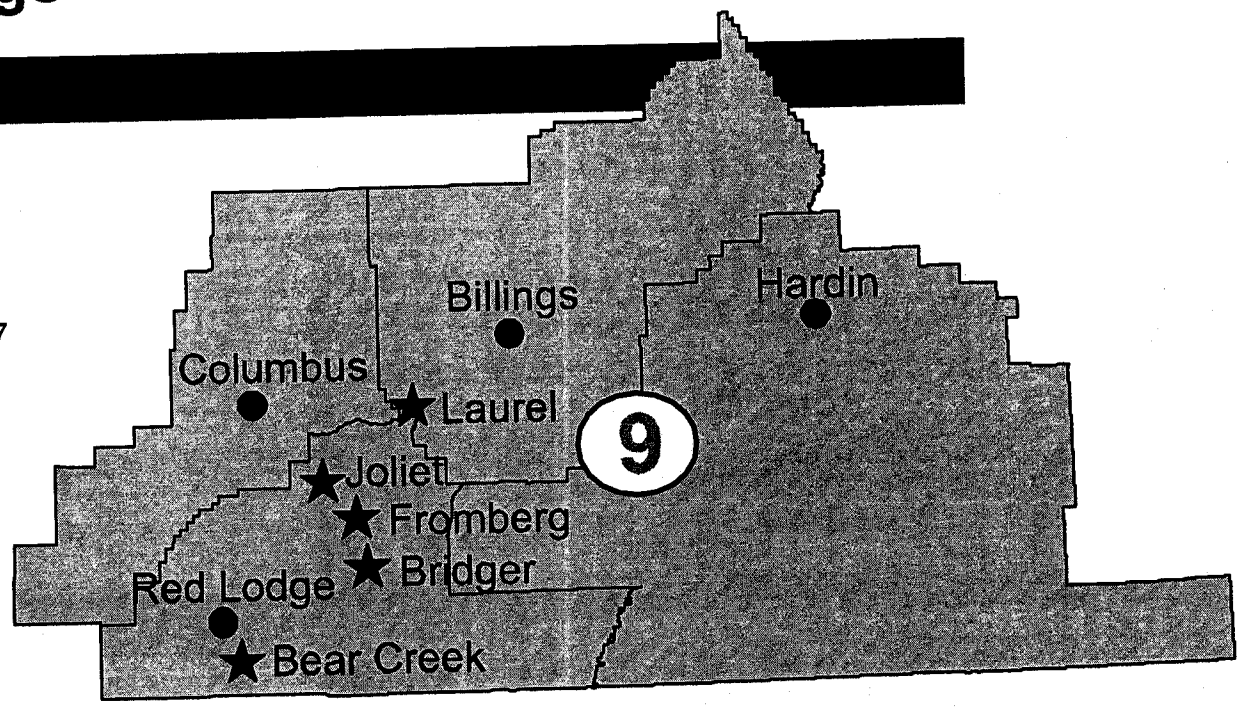
Return to Map of Regions



Region 9 – Billings

Attorneys: 16.75
Support Staff: 9
Investigators: 3
Contract Attorneys: 36
FYE 2010 Cases Opened: 6,387
District Courts: 4
Lower Courts: 13
Sq. Miles: 11,473

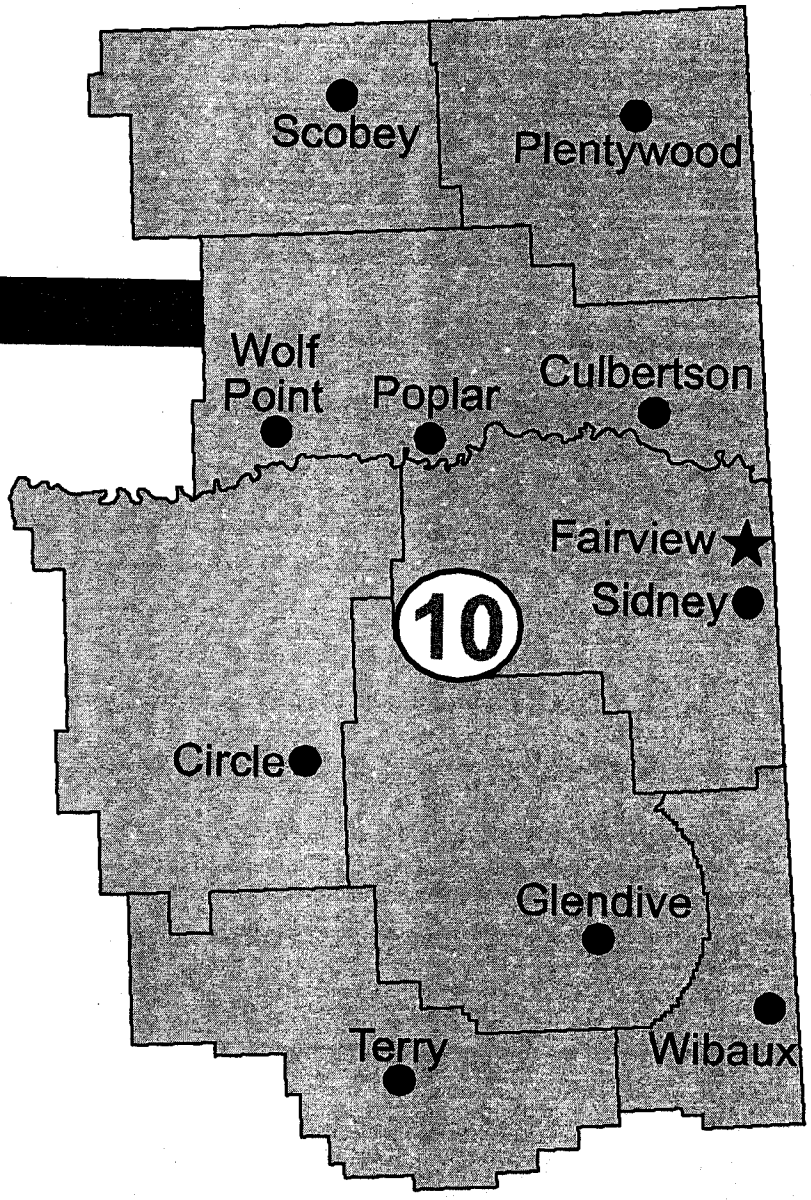
Return to Map of Regions



Region 10 – Glendive

Attorneys: 2
Support Staff: 1
Investigators: 0
Contract Attorneys: 9
FYE 2010 Cases Opened: 647
District Courts: 8
Lower Courts: 19
Sq. Miles: 15,184

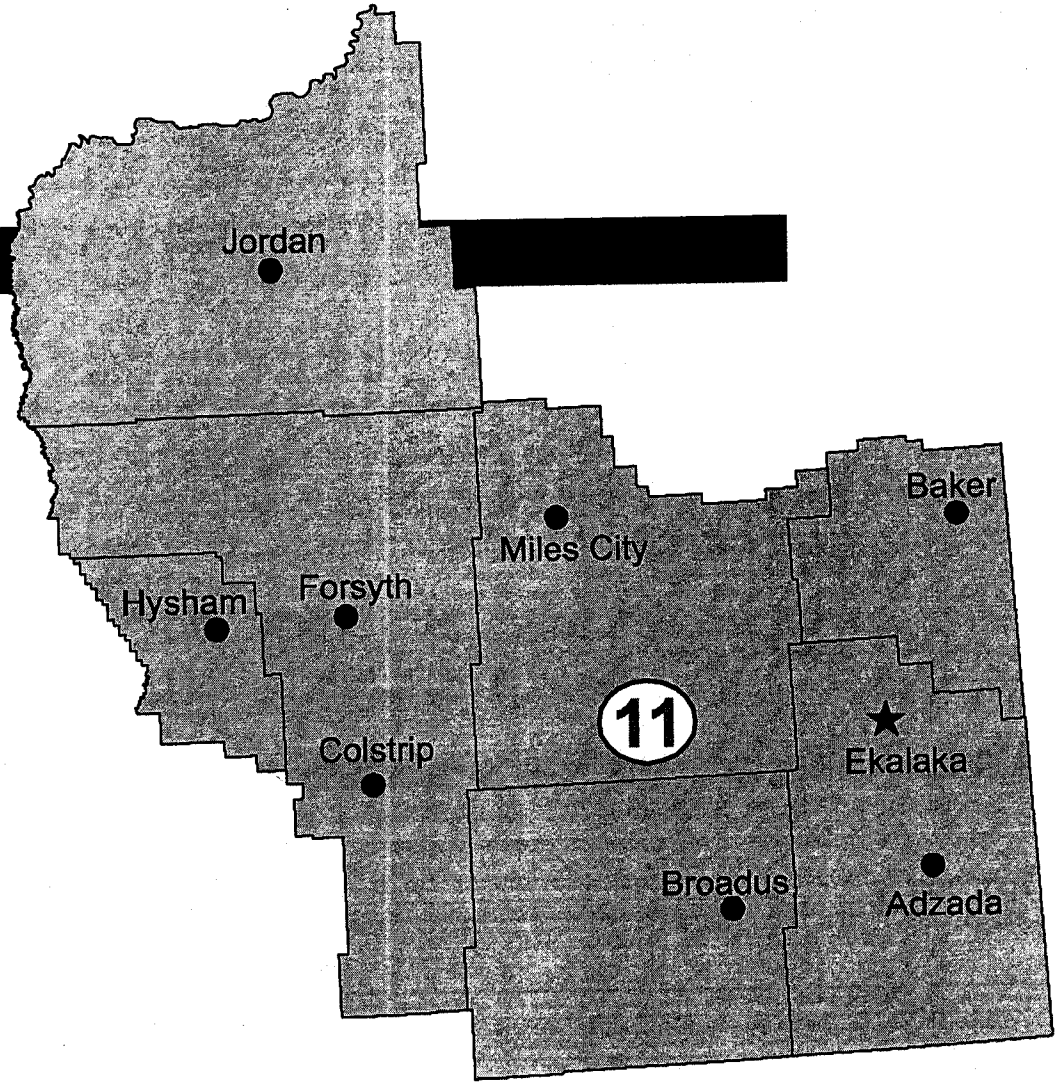
Return to Map of Regions



Region 11 – Miles City

Attorneys: 2
Support Staff: 1
Investigators: 1
Contract Attorneys: 19
FYE 2010 Cases Opened: 574
District Courts: 7
Lower Courts: 14
Sq. Miles: 22,700

Return to Map of Regions



Central Office & Appellate Defender

Central Office - Butte

Attorneys: 4
Support Staff: 12.75

Major Crimes Unit – Helena

Attorneys: 4
Support Staff: 1

Return to Map of Regions

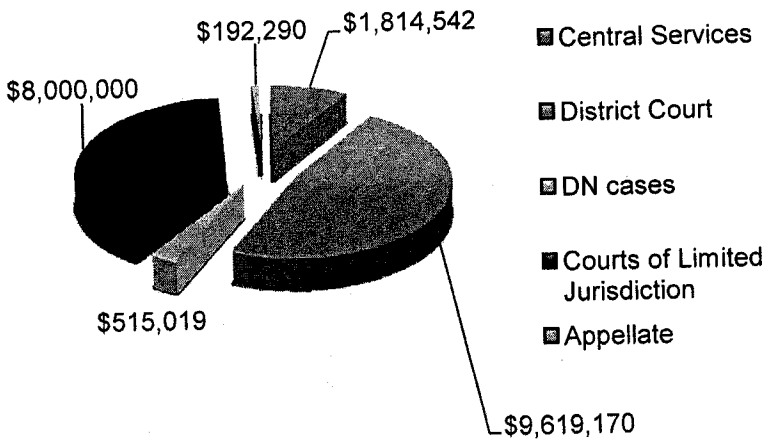
Appellate - Helena

Attorneys: 6
Support Staff: 2
Supreme Court: 1

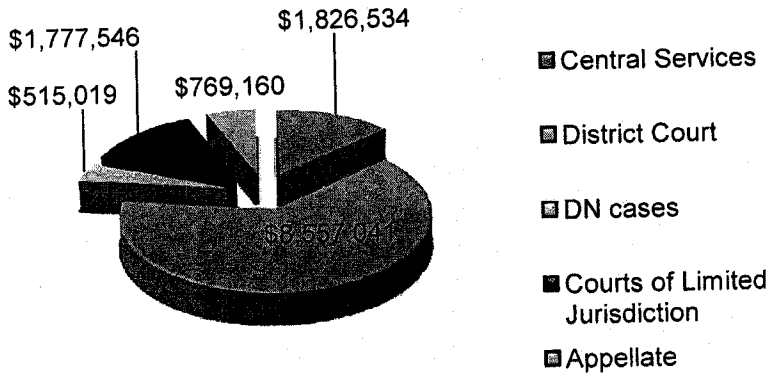
Return to Map of Regions

Original Funding Estimates

Original Program Estimates August 9, 2004

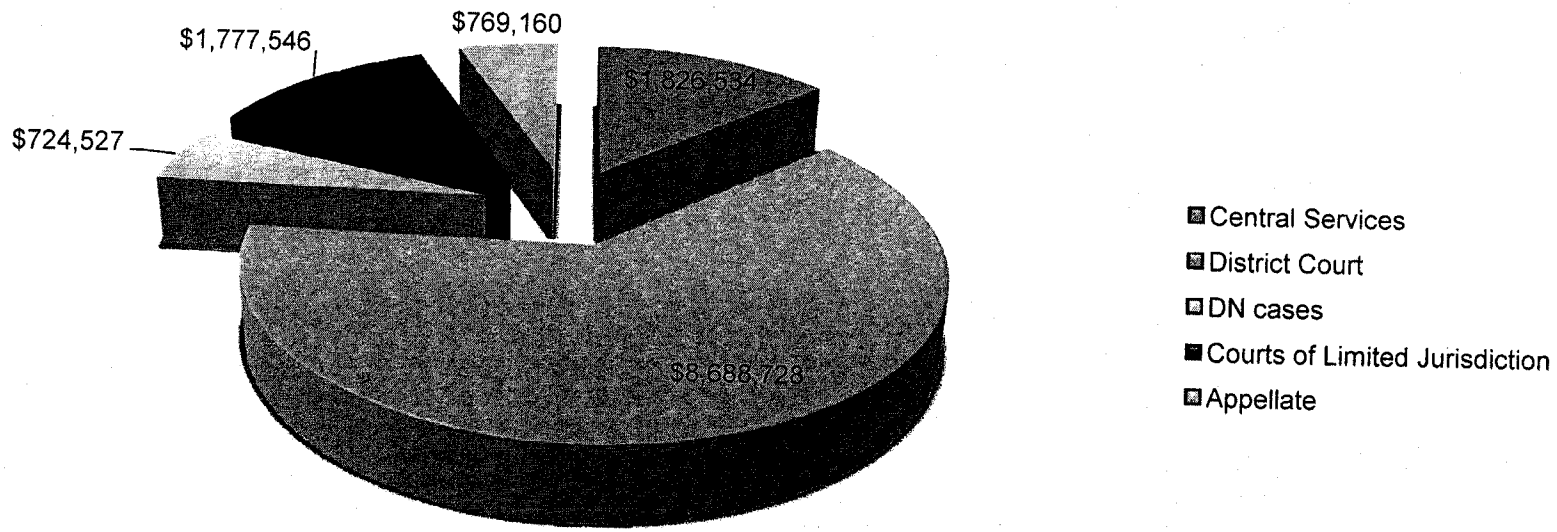


Original Program Estimates September 8, 2004



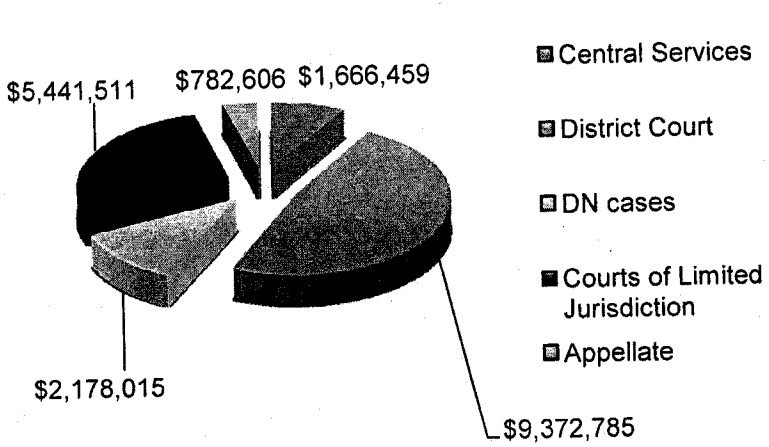
Original Funding Estimates

Original Program Estimates
Fiscal Note

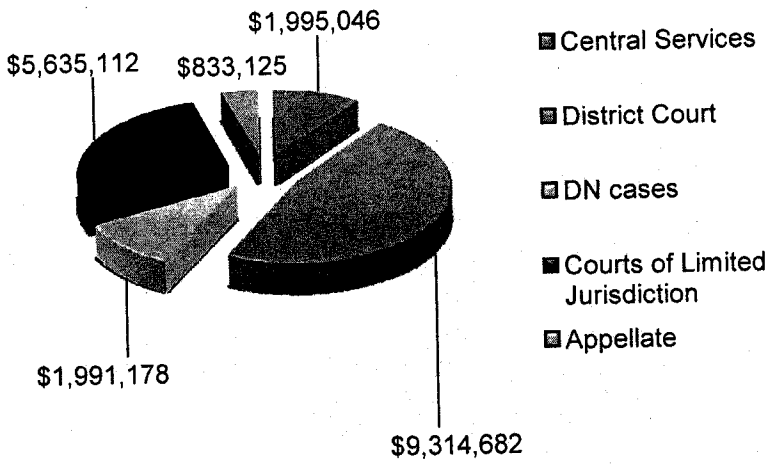


Actual Expenditures

Actual Expenditures FY 2007

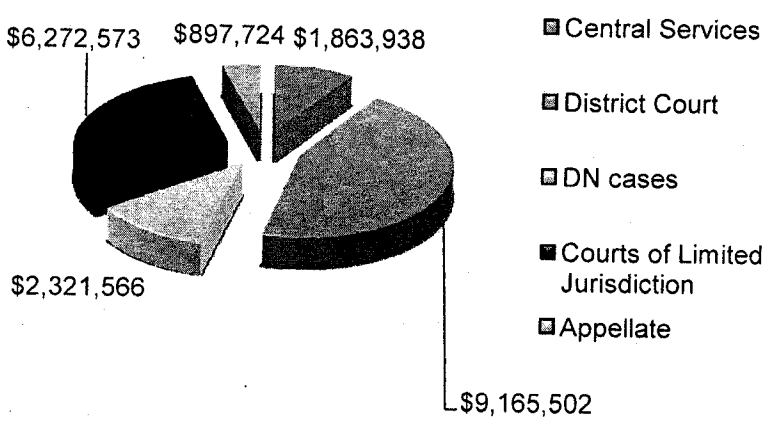
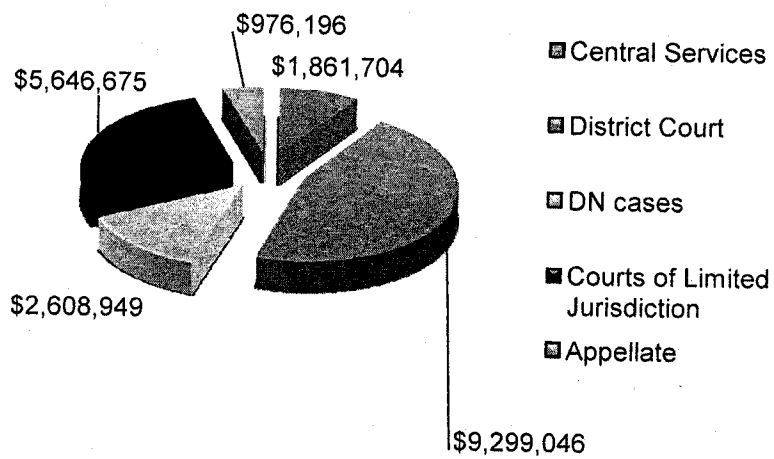


Actual Expenditures FY 2008



Actual Expenditures

Actual Expenditures FY 2009



Actual Expenditures FY 2010