

**Recent Developments Impacting  
The Criminal Law Practitioner**

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## 2010

### 1) *State v. Charlie*, 2010 MT 195, 357 Mont. 355, 239 P.3d 934

Police pulled over the defendant for failing to stop at a stop sign. Officers contacted the defendant's probation officer who approved a search of the defendant's vehicle. Police found marijuana in the vehicle. The videotape of the stop was misplaced for six months. The tape was discovered and a telephonic conference was held without the defendant's presence. The Montana Supreme Court found that the telephonic conference was a "critical stage" of the proceeding. The Court does a limited overrule of *State v. Matt's* (2008 MT 444, 347 Mont. 530, 199 P.3d. 244) imposing a presumption of prejudice when the defendant is excluded from a critical state of the proceedings. Instead, the Court places the burden of persuasion on the State that the violation was harmless "based on the record and given the interests the right of presence was designed to protect." In this case, the State persuaded the Court that "there [was] no reasonable possibility that [the defendant's] absence from the . . . telephonic conference caused him prejudice, and that his exclusion constituted harmless error." The Court also conducted an *Ariegwe* analysis and found that the 270 day delay in bringing the defendant to trial did not violate his right to a speedy trial. Affirmed.

### 2) *State v. Couture*, 2010 MT 201, 357 Mont. 398, 240 P.3d 987

At trial, the defendant was convicted of deliberate homicide and tampering with evidence. The defendant was arrested on May 17, 2004 but his trial did not occur until November 27, 2006, 924 days following his initial arrest. The Montana Supreme Court found that the 924 day delay was presumptively prejudicial for speedy trial analysis. However, the defendant often stated that he accepted the need for continuances and pretrial delay and this "weighed lightly" in the defendant's favor. The Court found that the pretrial incarceration of the defendant was not oppressive. Although the defendant's anxiety from the pretrial delay was severe, the Court found that the trial court's decision that it was "largely of his own making" was not clearly erroneous and weighed in favor of the State. The Court also found that the defendant's ability to present a defense was not impaired by the pretrial delay and that "many of the continuances were sought, and granted, for purposes of defense preparations." Finally, the Court found 462 days of the delay were attributable to the defendant and that this substantial portion weighed heavily against the defendant. Affirmed.

### 3) *State v. Wersweaver*, 2010 MT 198, 357 Mont. 384, 239 P.3d 952

At trial, the defendant was convicted, as a persistent felony offender, of felony possession of dangerous drugs and for felony conspiracy to possess with intent to distribute. Prior to his conviction, he moved to Montana, absconding from his probation in California. The District Court concluded that there was no doubt that the defendant was "heavily involved in the methamphetamine trade at a time when [he] was absconding from felony probation" and that therefore he was "not entitled to any consideration under the alternative sentencing authority of the statutes." On appeal, the defendant contended that the District Court failed to apply § 46-18-225 of the Montana Code Annotated, which provides guidelines for sentencing nonviolent offenders, and that he received ineffective assistance of counsel because his attorney failed to object. The Montana Supreme Court found that the criteria set forth by 46-18-225 were "designed to prevent incarceration of offenders who do not have a significant criminal history, have a justification for their offense, are unlikely to reoffend, and are not a threat to public

safety” and that the defendant did not fit that profile. The Court also found that the defendant’s attorney was not ineffective as he “urged the District Court to not designate his client a persistent felony offender, and to sentence him under the alternative sentencing provisions” and “brought § 46-18-225(2), MCA, to the attention of the District Court in his sentencing memorandum.” Affirmed.

4) *State v. Happel*, 2010 MT 200, 357 Mont. 390, 240 P.3d 1016

The defendant pled guilty to the crimes of criminal endangerment and felony theft after accepting a plea agreement in which the State dismissed two tampering charges and lowered the charge of assault with a weapon to a charge of criminal endangerment. At the change of plea hearing, the defendant stated he understood the plea agreement was not binding on the court and he was satisfied with his defense attorney’s advice and services. Prior to his sentencing hearing, the defendant sent to the Court a self-represented motion to appoint new counsel and withdraw his guilty pleas. The District Court stated that there were no “seemingly substantial complaints” raised by the defendant and denied his motion. The Court sentenced the defendant in alignment with the terms of the plea agreement. The defendant appealed stating that the Court did not make an “adequate inquiry” regarding his motion. The Montana Supreme Court found that the record “directly refuted [the defendant’s] factual assertions, permitting the District Court to make a ‘seemingly substantial’ determination without further input or inquiry.” Affirmed.

5) *State v. Christiansen*, 2010 MT 197, 357 Mont. 379, 239 P.3d 949

The defendant was convicted of driving under the influence (DUI) following his second jury trial, the first of which resulted in a hung jury. The defendant appealed stating that the District Court's instruction on “actual physical control” at his second trial was confusing to the jury and prejudicially affected his substantial rights to a fair trial. The District Court judge rejected both counsels’ proposed jury instructions on “actual physical control” (including the proposed model instruction) and instead relied on an instruction from previous case, *State v. Ruona*, 133 Mont. 243, 248, 321 P.2d 615, 618 (1958). The Montana Supreme Court found that the model instruction “more clearly, concisely and accurately stated the law as developed by our judicial interpretation since *Ruona*” and that the use of the other instruction prejudicially affected the defendant’s substantial right to a fair trial. Reversed and remanded.

6) *State v. Parrish*, 2010 MT 196, 357 Mont. 375, 239 P.3d 957

A jury convicted the defendant of two counts of sexual intercourse without consent and two counts of sexual assault. The defendant appealed to the Montana Supreme Court which affirmed his judgment. Three years after his judgment, he moved the District Court to amend the judgment and remove the requirement that he complete Phase II sex offender treatment before becoming eligible for parole. The defendant argued that the disclosures required by Phase II treatment violated his constitutional rights (Fifth Amendment right against self-incrimination, due process, and equal protection) as it required him to admit to crimes which he contends he never committed in order to complete the program. The District Court denied his motion because it was time-barred. (Any motion must be made within 120 days after judgment.) The Supreme Court reasoned that Section 46-21-101 of the Montana Code Annotated allows “a defendant who claims that a sentence was imposed in violation of the constitution . . . may petition the court to vacate, set aside, or correct the sentence.” According to Section 46-21-102 a defendant may file a petition for relief any time within one year of the date the conviction becomes final. A

conviction becomes final when the time for an appeal to the Supreme Court expires. The time for appeal to the Montana Supreme Court is 60 days. The Court found that the defendant's motion to amend was "essentially a petition for post-conviction relief" and was made over 60 days plus one year following his judgment, and, thus, was untimely. Affirmed.

7) *State v. Belanus*, 2010 MT 204, 357 Mont. 364, 240 P.3d 1021

The defendant was convicted in District Court of sexual intercourse without consent involving the infliction of bodily injury, aggravated kidnapping, burglary, tampering with or fabricating physical evidence, and misdemeanor theft. The defendant appealed, raising two issues. First he contended that his right to defend against the charges was infringed by the application of Section 45-2-203 of the Montana Code Annotated, which disallows consideration of voluntary intoxication in relation to a defendant's mental state. Second, he contended that the District Court abused its discretion by allowing a recording of a telephone call between himself and the victim to be played to the jury. Considering the first issue, the Supreme Court upheld § 45-2-203, MCA (2007), which states: "A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense. . .," citing also to *State v. Egelhoff*, 272 Mont. 114, 900 P.2d 260 (1995). The Court found that the unlike in *Egelhoff*, the jury in the defendant's trial was not precluded from taking into consideration the defendant's voluntary intoxication. On the second issue the Court found that the defendant "fail[ed] to explain how the evidence posed a danger of 'unfair prejudice' or how this danger substantially outweighed the probative value of the evidence." Affirmed.

8) *State v. Sartain*, 2010 MT 213, 357 Mont. 483, 241 P.3d 1032

The defendant was convicted of burglary by the District Court. On appeal, the defendant raised two issues. First, the defendant contended that the District Court erred in denying his motion to dismiss for lack of a speedy trial. Second, he contended that his "counsel's failure to challenge a show-up identification, challenge a warrantless arrest, move to suppress defendant's statements following arrest, and object to certain remarks of the prosecutor made during trial and in closing argument constitute ineffective assistance of counsel reviewable on direct appeal." The Montana Supreme Court analyzed the first issue using the four-factor speedy trial balancing test from *State v. Ariegwe*. 2007 MT 204, ¶ 119, 338 Mont. 442, 167 P.3d 815. Under the third *Ariegwe* factor the Court held that the defendant's responses to the delay weighed in favor of the State as the defendant waited four months after discovering the trial date before he objected to its late date. Regarding the fourth *Ariegwe* factor, the Court held that the defendant's pretrial incarceration was not unduly oppressive ("[The defendant's] incarceration at MSP was due, in primary part, to his status as a parolee on his previous sentence at the time of his arrest in this case"), that evidence supported the trial court's finding that the defendant's anxiety and concern were not aggravated by delay ([The defendant's] actions in not promptly raising concerns about the trial delay and the lack of an evidentiary connection between [his] anxiety and the delay supports the court's conclusion"), and that evidence supported the trial court's finding that delay did not impair the defense ("the delay in setting trial was intended to give [the defendant] a greater opportunity to call his witnesses, thus *benefiting* the defense"). On the second issue the Court found that the defendant's claims of ineffective assistance of counsel would have been better raised by a petition for post-conviction relief and, thus, could not be reviewed on direct

appeal. (However, the Court dismissed them without prejudice to raising them in a post-conviction proceeding.) Affirmed.

9) *State v. Allen*, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045

The defendant was convicted of two counts of assault with a weapon and one count of criminal endangerment by the District Court. The defendant appealed, alleging that the District Court erred by denying his challenge for cause of a prospective juror, denying his motion to suppress recorded telephone conversations between himself and a confidential informant, and denying his request for a jury instruction on accomplice testimony. On the first issue the Montana Supreme Court found that the prosecution failed to rehabilitate a juror after he made statements implicating that he would find for the prosecution if the trial lasted more than two days, was personally and professionally acquainted with the police officers testifying, and had already decided he was against the defendant based on media coverage of the case. On the second issue the Court overruled *State v. Coleman* as the precedent case allowing warrantless participant recordings of telephone conversations. 189 Mont. 492, 616 P.2d 1090 (1980). Instead, the Court reinterpreted the issue in line with *State v. Goetz*. 2008 MT 296, 345 Mont. 421, 191 P.3d 489. The Court found that the defendant had a subjective expectation of privacy in his telephone call, that “society is willing to recognize as reasonable the expectation that private cell-phone conversations are not being surreptitiously monitored and recorded by government agents,” and that the consent warrant exception did not apply as both parties were “present” for the conversation and both had not consented, thus, the search was unreasonable (not justified by a narrowly tailored, compelling state interest or subject to adequate procedural safeguards) and “violative of Sections 10 and 11 of the Montana Constitution.” On the third issue the Court found that the District Court erred in denying the defendant’s request for a jury instruction on accomplice testimony stating that the instruction was proper in accordance with *State v. Hall* because (1) the accomplice gave direct testimony, (2) the defendant requested the instruction, (3) the instruction was not inconsistent with the defendant’s claim of innocence. 2003 MT 253, 317 Mont. 356, 77 P.3d 239. Reversed and remanded.

Justice Nelson filed a specially concurring opinion stating that he agreed with the Court as to Issues one and three, and on issue two he agree that the warrantless recording of the defendant and the confidential informant violated Article II, Sections 10 and 11 of the Montana Constitution, however, he stated that he believes this decision, as well as the *Goetz* decision, “do not fully rectify the constitutional violation.” He argued that to suppress the actual telephone recording, but to allow the confidential informant’s testimony regarding the conversation, created an anomaly in which less reliable evidence was admissible and that the Court upheld, while simultaneously undermining, the defendant’s constitutional rights. Justice Nelson stated that “not only should the illegal recording of the [D]efendant’s conversation be excluded, but so should any testimony about the contents of the recording.” He paralleled this notion with the suppression of the fruit of an illegal search, as well as any testimony regarding the fruit. He further argued that “using an agent to acquire a suspect’s verbalized thoughts by means of an in-person stratagem is a ‘search’ requiring a warrant.” Finally, Justice Nelson argued that the *Katz* “expectation” test (looking to the expectations of the accused person and those of society, as opposed to the acts of the government, to determine whether a search has occurred) is circular and fundamentally flawed. He stated that a better test would apply “a plain interpretation of the word ‘search.’”

Justice Rice filed an opinion concurring in part and dissenting in part. Like Justice Nelson, Justice Rice agreed with the Court on issues one and three, however, Justice Rice dissented from issue two. Justice Rice argues that Montana jurisprudence has consistently held that “the Montana Constitution, including the right to privacy, does not protect defendants from electronic recordings of their conversations when one party to the conversation consents.” Justice Rice also argued that the Montana Constitutional Convention delegates “did not intend the right to privacy to extend to telephone conversations involving the consent of one party.”

10) *State v. Ankeny*, 2010 MT 224, 358 Mont. 32, 243 P.3d 391

In District Court, the defendant was convicted by a jury of felony Partner or Family Member Assault. The defendant appealed stating that the State failed to present sufficient evidence that he and the alleged victim were “partners,” that the District Court erred in admitting expert testimony that domestic violence victims commonly recant, and that his trial counsel did not provide effective assistance. On the first issue the Montana Supreme Court found that “although both the alleged victim and the defendant testified that this was their ‘first date,’ there was sufficient evidence presented at trial to show that [the two] were in a ‘dating or ongoing relationship’ and were, indeed, partners as provided by Montana Code Annotated 45-4-206 (b).” The Court stated that the sufficient evidence included a “hickey” on the alleged victim’s neck, previous statements made by the defendant and the alleged victim (including the alleged victim’s referral to the defendant as her boyfriend), and testimony of the alleged victim’s former boyfriend. On the second issue the Court found that the expert’s testimony was not offered to “bolster” the alleged victim’s testimony and, rather, “provided the jury with an explanation for the inconsistencies in [the alleged victim’s] testimony, that the alleged victim’s statements were not hearsay because she was subject to cross-examination, and that the defendant waived the argument that the expert did not qualify as an expert in the field of domestic violence by his “acquiescence at trial.” On issue three the Court found that the defendant’s claim of ineffective counsel was based on matters outside the record and were “best suited for review in a postconviction proceeding. On this issue the Court dismissed without prejudice. Affirmed.

11) *State v. Brooks*, 2010 MT 226, 358 Mont. 51, 243 P.3d 405

The defendant was originally convicted of felony driving under the influence (DUI). (He had more than three prior DUI convictions.) The State sought enhanced punishment against the defendant as a persistent felony offender (PFO) due to a previous assault with a weapon conviction. He was sentenced by the District Court to five years in prison with all five suspended for the DUI charge with a 13-month commitment to a Department of Corrections (DOC) alcohol-treatment program and ten years in prison with five years suspended under the State’s PFO sentencing statute. He appealed and the Montana Supreme Court “dismissed the appeal as wholly frivolous.” He then moved the District Court to clarify his sentence as he believed that the Montana State Prison (MSP) and DOC were attempting to illegally extend his sentence. The District Court amended the defendant’s sentence to replace the treatment program with a general 13-month commitment to DOC and added that upon completion of an approved treatment program, the defendant would serve the remainder of the commitment on probation. He then filed a petition for a writ of habeas corpus to the Court to challenge the amended sentence. The Court remanded the case to the District Court stating that the amended sentence was “ambiguous.” The District Court sentenced the defendant exclusively under the PFO statute to ten years at MSP with five suspended and recommended that the DOC place him in an

alcohol-treatment program prior to releasing him on parole. He appealed again, arguing that the sentence violated the prohibition on double jeopardy under the Montana Constitution and that the District Court erred by not holding a hearing to determine the truth of allegations on which the defendant's PFO status was predicated. On the first issue the Court found that the felony DUI sentence and the PFO sentence were not "predicated on the same act and," thus, did not violate the double jeopardy clause of the Montana Constitution. On the second issue the Court, citing *State v. Gallagher* found that the District Court did not need to hold a hearing on the defendant's challenge to his prior felony conviction because he made his request for a hearing for the first time on appeal which was too late. 2005 MT 336, ¶¶ 30-33, 330 Mont. 65, 125 P.3d 1141. Affirmed.

12) *State v. Manywhitehorses*, 2010 MT 225, 358 Mont. 46, 243 P.3d 412

The defendant was convicted by the District Court of negligent homicide and tampering with physical evidence. On appeal, she argued that the prosecutor's conduct at sentencing breached the State's contractual obligations under the plea agreement. More specifically, she argued that, at the sentencing hearing, the prosecutor improperly presented evidence that her son's death resulted from deliberate homicide, rather than the negligent homicide charge to which she pled guilty in alignment with the plea agreement. She further argued that the prosecutor used the tampering charge to present evidence of deliberate homicide. The State argued that "[t]he sum total of [its] promises to [the defendant was] that if she pled guilty to negligent homicide and tampering with evidence, [the State] would recommend a 20-year sentence on the tampering with evidence conviction," and, thus, the plea agreement was not breached. The Montana Supreme Court found that the "[t]he plea agreement contained no sentencing recommendation promises with respect to [the defendant's] conviction for negligent homicide." The Court also stated that all the evidence presented by the State at the sentencing hearing was "directly relevant to [the defendant's] history and the incidents leading up to [her son's] death. The Court held that the State did not breach the plea agreement. Affirmed.

13) *State v. Spotted Eagle*, 2010 MT 222, 358 Mont. 22, 243 P.3d 402

The defendant was convicted by a jury in District Court of Partner or Family Member Assault (PFMA), 3rd or subsequent offense, a felony, and Failure of Disorderly Person to Disperse, a misdemeanor. He appealed the PFMA conviction arguing that the District Court erred in allowing jury instructions which asserted a new theory not charged in the Information. The instructions stated that a reasonable apprehension of bodily injury in a partner or family member was all that was necessary for the jury to convict the defendant. Specifically, the defendant argued that the amendment to the instructions was of substance and, thus, was untimely under § 46-11-205 of the Montana Code Annotated and that it violated his right to due process. The State argued that the amendment was to form and not substance, that a different offense was not charged, and that the defendant's rights were not substantially prejudiced. The Montana Supreme Court found that the District Court erred in allowing the instructions as they "amended not the form, but the substance of the charge against [the defendant]." The Court stated that the "reasonable apprehension of bodily injury" language fell under a different section of the statute under which the defendant was originally charged and, thus, should have been added to the charge against him at least five days prior to trial. The Court held that because the amendment was "untimely" and "improper" the jury should not have been given the instructions. Reversed and remanded for a new trial.

14) *State v. Yuhas*, 2010 MT 223, 358 Mont. 27, 243 P.3d 409

Following a bench trial, the defendant was convicted in District Court of stalking his recently-divorced girlfriend's son. He appealed arguing that there was not sufficient evidence presented at trial to support his conviction. The Montana Supreme Court found that the record provided sufficient evidence that the son of the defendant's girlfriend suffered substantial emotional stress as he described himself as being "'really scared and intimidated' after [the defendant] appeared at [his] football practices and bonfire," and that physical manifestations or life changes were not required to show he had suffered substantial emotional distress. The Court also found that the defendant's actions occurred more than once and, thus, the requirement that the acts occur repeatedly was satisfied. The Court found that the record provided sufficient evidence that the defendant was attempting to intimidate and/or harass his girlfriend's son and that her son was intimidated or harassed. The Court held that "there [was] sufficient evidence in the record from which a rational trier of fact could have found beyond a reasonable doubt that [the defendant] committed the offense of stalking." Affirmed.

15) *State v. Molenda*, 2010 MT 215, 358 Mont. 1, 243 P.3d 387

The defendant was charged with accountability to criminal endangerment. The District Court denied the defendant's proposed jury instruction treating assault as a lesser included offense of criminal endangerment. The defendant entered a plea agreement and was sentenced to three years in prison with all but ten days suspended. Section 46-1-202(9)(a) of the Montana Code Annotated requires proof of the same or less than all the facts required to establish the commission of the offense charged. The Montana Supreme Court has previously found "the 'facts' in subsection (a) of § 46-1-202(9) . . . refers to the statutory elements of the charged offense and not to the individual facts of the case." *State v. Beavers*, 1999 MT 260, ¶ 30, 296 Mont. 340, 987 P.2d 371. The Court concluded that the statutory elements of an assault are not the same or less than those required for criminal endangerment. The Court stated that "assault requires '[causing] bodily injury to another' and criminal endangerment [requires a] '[creation of] a substantial risk of death or serious bodily injury to another.'" The Court stated further that while "[the defendant] may have completed an assault while creating a substantial risk of serious bodily injury to another, the law does not require that [the defendant] actually cause 'bodily injury to another' in order to find him guilty of criminal endangerment." The Court has previously held that "an offense is a lesser included offense under [[46-1-202(9)(c)] if it differs from the offense charged only 'by way of a less serious injury or a less serious risk or a lesser kind of culpability.'" *State v. Fuqua*, 2000 MT 273, ¶ 24, 302 Mont. 99, 13 P.3d 34. The Court abrogated *State v. Fisch* by stating that "properly interpreted, subsection (c) provides that if the only difference between the two offenses is one of degree (be it risk, injury, culpability, or any combination thereof) then it can be a lesser included offense. If there are other differences between the two offenses (other than differences of degree) then it cannot qualify as a lesser included offense." 266 Mont. 520, 523, 881 P.2d 626, 628 (1994). The Court concluded by stating that "the difference between the elements of risk and injury is qualitative, not merely a matter of degree" and held that assault is not a lesser included offense of criminal endangerment. Affirmed.

16) *State v. Reichmand*, 2010 MT 228, 358 Mont. 68, 243 P.3d 423

The defendant was convicted after a jury trial of two counts of criminal distribution of dangerous drugs. The defendant appealed stating that the District Court erred in not granting his motion for a new trial based on the retroactive application of the holding in *State v. Goetz*. The Montana Supreme Court held in *State v. Egelhoff* that Montana would adopt retroactive rules from *Griffith* (“[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.” *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987).) and *Teague* (“[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.” *Teague v. Lane*, 489 U.S. 288, 300-301, 109 S.Ct. 1060, 1070, 103 L.Ed.2d 334 (1989).) *State v. Egelhoff*, 272 Mont. 114, 900 P.2d 260 (1995). The Court also held in *Egelhoff* “that these new rules would apply retroactively to cases still subject to final decision on direct review as of the date of the opinion.” The Court concluded that the *Egelhoff* requirements were satisfied as *Goetz* announced a new rule and the defendant’s case was “pending on direct review, not yet final, and thus ‘similarly situated’” and thus the District Court erred in determining that *Goetz* was not retroactively applicable to the defendant’s case. The Court then discussed whether the District Court’s error was prejudicial to the defendant. The Court used the “cumulative evidence” test from *State v. Van Kirk*. 2001 MT 184, 306 Mont. 215, 32 P.3d 735. The Court first concluded that the error in the defendant’s case was a trial error (an error occurring during the presentation of the case to the jury). The Court then concluded that the “audiotape recordings of two separate drug transactions, made by wiring a confidential informant, [were] inadmissible under *Goetz* and thus ‘tainted,’” which required the State to show 1) “the fact-finder was presented with admissible evidence that proved the same facts as the tainted evidence proved” and 2) “the quality of the tainted evidence was such that there was no reasonable possibility that it might have contributed to the defendant’s conviction” under *Van Kirk*. The Court stated that the jury was presented with admissible evidence that proved the same facts, however, the State did not reach the “high bar” set in *Van Kirk* that there was “no reasonable possibility that the tainted evidence might have contributed to the conviction.” Reversed and remanded for a new trial.

Chief Justice McGrath filed a concurring opinion. He agreed with the outcome of the Court, however, he reached his conclusion using Section 46–20–701(2)(a) of the Montana Code Annotated. Chief Justice McGrath stated that the “statute provides that a claim of error affecting constitutional rights may be ‘noticed on appeal’ even if there was no objection in the district court if the error was prejudicial to the defendant’s guilt or punishment and the ‘right asserted in the claim did not exist at the time of the trial and has been determined to be retroactive in its application.’ He concluded that, first, “the *Goetz* decision was based upon the right of privacy and the search and seizure protections of Article II, Sections 10 and 11, of the Montana Constitution and thus meets the requirement that the issue affects constitutional rights,” second, the fact that warrantless electronic surveillance evidence was admitted and used at trial should be a sufficient prima facie showing that it was prejudicial to the finding of [the defendant’s] guilt, and, third, “the rights determined by *Goetz* did not exist at the time of [the defendant’s] trial, and *Goetz* has now been determined to be retroactive.”

Justice Rice filed a dissenting opinion. He argued that the Court incorrectly analyzed the issue using the harmless error analysis instead of a plain error analysis. He stated, “The law is clear that retroactive application of a new constitutional rule does not relieve a defendant’s obligation to preserve the issue for appeal—even under the plain error statute.” Justice Rice stated further that “under plain error, it is the defendant who permitted the error to occur by

failing to object, not the State, and the defendant thus bears the burden of demonstrating a need for review which overcomes that error. Further, the harmless error standard of review is a lesser standard than plain error, and is contrary to the plain language of the statute and the clearly expressed intent of the Legislature. Harmless error requires reversal merely when there is a ‘reasonable possibility’ that ‘inadmissible evidence might have contributed to a conviction.’” He concluded that the admission of the electronic recordings in the defendant’s case did not “result in a manifest miscarriage of justice, unsettle the fundamental fairness of [the defendant’s] trial, or compromise the integrity of the judicial process against him.”

17) *State v. St. Dennis*, 2010 MT 229, 358 Mont. 88, 244 P.3d 292

The defendant was convicted of deliberate homicide. He appealed arguing that the District Court erred when it ruled that the Montana Office of Public Defender (OPD) did not violate the defendant’s constitutional rights by representing both the defendant and his co-defendant and that the District Court abused its discretion when it denied the defendant’s requests for immunity for a proposed witness and when it denied the defendant’s motion for a new trial. On the first issue, the Montana Supreme Court held that “the organization and operation of the OPD—provided all protocols are faithfully and strictly followed—does not, in itself, create an actual conflict of interest.” The Court further stated that there was no evidence that OPD’s safeguards failed in this case. On the second issue, the Court quoted language from Section 46–20–701(1) of the Montana Code Annotated stating “A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial.” The Court concluded that, because the defendant did not call the witness or make an offer of proof regarding the witness’s proposed testimony, the Court could “only speculate as to the contents of [the witness’s] intended testimony and ha[d] no way of knowing whether the District Court’s denial of immunity and the resulting absence of [the witness’s] testimony prejudiced [the defendant].” The Court held that the defendant failed to establish prejudicial error. On the third issue, the defendant argued that the State’s failure to notify the defendant about witness interviews conducted on the last day of trial (after the cases-in-chief of both parties) violated his constitutional due process rights and was a violation of the *Brady* test. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Court concluded that the defendant “failed to demonstrate that had these interview transcripts been presented earlier, there was a reasonable probability that the jury verdict would have been different. This being so, these statements were not material within the meaning of *Brady*.” The Court held that the District Court did not abuse its discretion by denying the defendant’s motion for a new trial. Affirmed.

Justice Nelson filed a dissenting opinion as to the first issue. He rejected the Court’s conclusion that “the conflicts in this case were alleviated by assigning defense counsel from separate public defender regions to represent the two defendants.” He argued that “distinguishing the various regions as different ‘firms’ is an artificial distinction that is not supported by actual practice within the public defender system.”

18) *State v. Hafner*, 2010 MT 233, 358 Mont. 137, 243 P.3d 435

The defendant was convicted of driving under the influence, (his fifth conviction for DUI) a felony, and careless driving. He appealed arguing that the District Court erred in denying his motion to suppress evidence of his refusal to submit to sobriety breath tests and in denying him credit towards an imposed fine for the days he served in pretrial detention. On the first

issue, the Montana Supreme Court concluded that the “objective facts” available to the arresting officer (the vehicle in the ditch, the defendant’s repeated, futile attempts to reverse the vehicle out of the ditch, the strong smell of alcohol from the vehicle and the defendant, the defendant’s glassy and bloodshot eyes, the defendant’s slurred speech, the defendant’s inability to follow the simple instruction given by the officer to exit the vehicle through the passenger side door, the defendant’s inability to maintain his balance after exiting the car, and the appearance that the defendant had urinated in his pants) were sufficient to provide probable cause for the arrest of the defendant even with a lack of field sobriety test results. The Court held that the District Court did not err in denying the defendant’s motion to suppress evidence based on an unlawful arrest. On the second issue, the Court stated that Section 46-18-403(2) of the Montana Code Annotated reads in pertinent part, “A person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of the offense **may** be allowed a credit for each day of incarceration prior to conviction, except that the amount allowed or credited may not exceed the amount of the fine.” The Court held that credit was no longer required (as it was under this section prior to an amendment by the Legislature in 2005) and that the District Court did not err in denying the defendant credit towards his fine. Affirmed.

19) *Weer v. State*, 2010 MT 232, 358 Mont. 130, 244 P.3d 311

The defendant appealed an order of the District Court denying his petition for reinstatement of his driver's license and driving privileges following his refusal to take a preliminary breath alcohol test after he was cited for driving under the influence (DUI). The Montana Supreme Court stated that the facts surrounding the initial stop of the defendant (the defendant was driving on a “straight, flat stretch of two-lane highway,” the defendant was on the road at 12:44 am on a Saturday morning, while the officer was watching, the defendant swerved twice towards the double-yellow centerline and once drove onto the centerline, the defendant did not provide any reason as to why he swerved, and the officers testimony that weaving on a straight road is an “indicator that the driver is potentially impaired or distracted, or there is a mechanical problem with the vehicle,” that “there is a greater probability of impaired drivers on the road during the early morning hours on a Saturday,” and that he stopped the defendant because he was “concerned [the defendant] would collide with another vehicle and potentially hurt himself or somebody else”) provided the officer with particularized suspicion to stop the vehicle. The Court also held that, although the District Court cited a non-citable decision that should not have been relied upon as authority, the passing reference “d[id] not render its decision reversible.” Affirmed.

20) *State v. Larson*, 2010 MT 236, 358 Mont. 156, 243 P.3d 1130

The defendant was convicted in District Court of driving under the influence of alcohol or drugs (DUI). He appealed on several grounds. First, he argued that the District Court erred in determining that there was particularized suspicion to conduct an investigatory stop of his vehicle. Second, he argued that the District Court erred in determining that there was particularized suspicion to conduct field sobriety tests. Third, he argued that he was entitled to *Miranda* warnings during the roadside DUI investigation. Fourth, he argued that the District Court committed reversible error in admitting opinion testimony from two law enforcement officers regarding the effect of marijuana on his ability to drive safely. Fifth, and finally, he argued that the District Court erred in refusing his proposed jury instruction. On the first issue, the Montana Supreme Court found that the facts (that the defendant screeched his tires and

revved his engine continually, while crossing a busy intersection in plain view of two officers who already had the light bars of their vehicles activated and that one officer subsequently observed that the defendant's truck had a potential mud flap violation) "when taken together with rational inferences, reasonably warranted the stop." On the second issue, the Court concluded that the defendant's wide turn onto a side street which caused his truck to cross into the oncoming traffic lane, his slow, slurred speech, his delayed reaction time, and his admittance that he had been drinking earlier in the day, considered together, provided the officer with "particularized suspicion that [the defendant] was impaired, and filed sobriety tests were justified." On the third issue, the Court concluded that the defendant's roadside detainment was a reasonable DUI investigation, and no *Miranda* warnings were required because the detainment "remained public, routine and temporary in nature, never exceeding the scope of a DUI investigation." The Court further found that the defendant's retrieval of the marijuana and admission that he had smoked it, were entirely voluntary and that "no search was at issue, because [the defendant] personally retrieved the marijuana and pipe after being asked for consent to search." On the fourth issue, the Court restated the rule from *State v. Nobach* that "lay persons are not 'sufficiently knowledgeable about common symptoms of drug consumption, much less the effects of drug consumption on a person's ability to drive a motor vehicle safely, to offer lay opinion testimony on those subjects, based upon personal observations.'" 2002 MT 91, ¶ 13, 309 Mont. 342, 46 P.3d 618. The Court concluded that the officers' opinions that the defendant's driving was impaired due to marijuana consumption were expert opinions that required adequate foundation under the Montana Rules of Evidence 702. Further, the Court concluded that the officers' "training and experience was insufficient to demonstrate the special training or education, and adequate knowledge upon which to base an expert opinion as required by M.R. Evid. 702" and found that "it was error on the part of the District Court to admit the deputies' expert opinions regarding [the defendant's] ability to drive due to marijuana impairment." However, the Court determined that this was a harmless error. Finally, on the fifth issue, the Court concluded that "when viewed as a whole, the instructions fully and fairly instructed the jury regarding the applicable law," that "the District Court did not abuse its discretion by rejecting [the defendant's proposed jury instruction," and that "based upon the evidence before the jury, [the defendant] was not convicted solely on the basis of his refusal to submit to a blood test" as "[s]ufficient corroborating evidence of impairment was presented." Affirmed.

21) *State v. Goodenough*, 2010 MT 247, 358 Mont. 219, 245 P.3d 14

The defendant was convicted by a jury for the offenses of sexual assault (two counts), incest (two counts), and sexual intercourse without consent for the sexual encounters he initiated with his two granddaughters (ten and twelve years old) over the span of three years. He appealed arguing that the District Court erred sentencing him for sexual assault and sexual intercourse without consent as to one of his two victims, violating his protection against double jeopardy provided in Section 46–11–410 of the Montana Code Annotated and that his attorney failed to provide effective assistance of counsel by failing to raise this issue at sentencing. The Montana Supreme Court held that "the charges brought against him and the facts proven at trial support the existence of distinct criminal events," that "[d]escribing a defendant's multiple offenses over a span of years as a continuing course of conduct does not transform those offenses in this case into a single transaction for purposes of § 46–11–410, MCA," and that "his attorney did not provide ineffective assistance by failing to object under that statute." Affirmed.

Justice Leaphart filed a dissenting opinion. He argued that “the pertinent inquiry is not how many events occurred or over what amount of time” but rather “whether the events are so connected as to be considered one transaction for the purpose of prosecution.” He stated that “as a legal matter” if the defendant “did not (as charged) commit the lesser-included offense of sexual assault from 2002 to 2005, he could not logically have committed the greater offense of sexual intercourse without consent during that same time period,” thus, the conviction for sexual assault was in violation of Section 46–11–410(2)(a) of the Montana Code Annotated.

22) *State v. Ferris*, 2010 MT 252, 358 Mont. 244, 244 P.3d 732

The defendant moved to withdraw his guilty plea to felony criminal distribution of dangerous drugs which was entered after warrantless electronic monitoring of a drug transaction. The District Court denied his motion. He appealed arguing that the voluntariness of his plea was undermined by his counsel's failure to inform him at time of plea that an appeal was pending in a case in which the Montana Supreme Court ultimately held that a search warrant was required for electronic monitoring of a defendant's conversations with an informant in the defendant's home. *State v. Goetz*, 2008 MT 296, 345 Mont. 421, 191 P.3d 489. In deciding the defendant's case, the Court stated that *State v. Andrews* controlled stating that “a guilty plea is made on the basis of the law applicable at the time the plea is accepted by the district court, and that the plea may not be withdrawn if a later judicial decision changes the law.” 2010 MT 154, 357 Mont. 52, 236 P.3d 574. The Court stated, “We decline to adopt a standard that requires trial counsel to be aware of the issues in all cases pending on appeal, and to advise clients on how each of those cases might affect his situation.” The Court concluded that the defendant did not “demonstrate prejudice or that there is a reasonable probability that the result would have been different and that he would be allowed to withdraw his plea” had his attorney asserted *Goetz* as a ground for withdrawing the guilty plea at the time of the sentencing. Affirmed.

23) *State v. Norman*, 2010 MT 253, 358 Mont. 252, 244 P.3d 737

The defendant was convicted following a jury trial in District Court of unlawfully possessing game animals. On appeal he argued that the District Court improperly instructed the jury and that his trial attorney rendered ineffective assistance of counsel. The defendant first argued that the District Court erred by failing to instruct the jury that a felony conviction required a finding that the animals had a value exceeding \$1,000. The Montana Supreme Court found that the defendant failed to make a timely objection and that plain error review was improper because the defendant did not firmly convince the Court “that failing to review his challenge to the adequacy [jury instruction] would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process.” The defendant further argued that his trial counsel's failure to object to the proposed instruction evidenced ineffective assistance of counsel. On this matter the Court concluded that the defendant failed to “show prejudice from this omission.” Next the defendant argued that the District Court erred in instructing the jury that “the value of game animals that are unlawfully possessed as part of the same transaction . . . may be aggregated in determining the value.” The Court stated that “the question was not whether the animals had been *taken* as part of the ‘same transaction’ . . . [i]t was whether the animals had been *possessed* as part of the ‘same transaction’ during the specified time period” and concluded that it was “a factual matter for the jury to decide.” The defendant also argued that the District Court erred in giving a special instruction to the jury in response to a question

they posed. However, the Court stated that, although there was some error in the special instruction and the defense counsel should arguably have objected, his “claim fail[ed] because the jury ultimately found him guilty with regard to multiple animals under each count.” The Court further stated that the defendant did not show that his counsel's failure to object to the special instruction prejudiced his defense. Affirmed.

Justice Morris filed a specially concurring opinion. He stated that he was concerned “with the notion that the District Court need not instruct the jury regarding the value of the unlawfully taken game animals as an element of the offense, and that the State need not present evidence of the value of the unlawfully taken game animals in light of the fact that [the Montana Code Annotated] set the values.

24) *State v. Schubert*, 2010 MT 255, 358 Mont. 286, 244 P.3d 748

In this case, around 2:00 am a construction flagger was alerted by another flagger by radio to be aware of a possible drunk driver heading her way in a blue and white Ford pickup. Around ten minutes later, the flagger observed a set of headlights weave repeatedly across both lanes of the road. Upon seeing that the vehicle matched the description given by the other flagger, she had the truck stop and pull over. When talking with the driver, later identified as the defendant, the flagger noticed the smell of alcohol and that his speech was “a little slurred.” The flagger stayed with the defendant until the police arrived. The defendant’s trial was stayed pending his appeal to an order from the District Court denying his motion to suppress evidence and dismiss the charge of misdemeanor driving under the influence (DUI). He argued that the District Court erred in denying his motion to suppress evidence and dismiss on the ground that he was unlawfully arrested by a citizen. More specifically he argued “that the District Court erred as a matter of law by concluding that a citizen making an arrest can rely upon another citizen's report, and by determining that [the other flagger’s radio] report, coupled with [the second flagger’s] observations, constituted probable cause for a citizen's arrest.” The Montana Supreme Court first concluded that, although there were factual questions remaining, an arrest occurred. The Court also concluded that the first flagger’s report could be taken into consideration and based upon this report and the second flagger’s personal observations, probable cause existed for the citizen’s arrest. Affirmed.

25) *State v. Morris*, 2010 MT 259, 358 Mont. 307, 245 P.3d 512

The defendant pleaded no contest in District Court to accountability to prostitution and obstructing a peace officer or other public servant. He appealed arguing that the District Court illegally sentenced him in violation of his constitutional rights and Montana sentencing policy and that District Court abused its discretion by sentencing the defendant to the maximum statutory penalty. More specifically, the defendant argued that his sentences “violate[d] § 46–18–101, MCA, his due process rights, and his Fifth Amendment right against self-incrimination.” The Montana Supreme Court, first concluded that by taking into account the defendant’s prior public service as mayor and county commissioner the court did not violate Section 46-18-101 of the Montana Code Annotated which states, “[s]entencing practices must be neutral with respect to the offender's race, gender, religion, national origin, or social or economic status,” as the defendant did not present any authority that his public service qualifies as “social or economic status.” The Court then concluded that the District Court did not violate the defendant’s due process rights as the defendant “fail[ed] to point to any portion of the sentencing order that reflect[ed] reliance on improper or erroneous information.” On the defendant’s self-

incrimination argument stating that he was punished for a lack of remorse and failure to admit he was wrong, the Court found that his argument failed because “the District Court provided eight valid reasons for the sentences, none of which indicate[d] any reliance on lack of remorse or accountability.” Regarding whether the District Court abused its discretion by sentencing the defendant to the maximum statutory penalty, the Court found that the “sentences were not arbitrary and did not exceed the bounds of reason.” Affirmed.

26) *State v. District Court of the Eighteenth Judicial District of Montana*, 2010 MT 263, 358 Mont. 325, 246 P.3d 415

The State of Montana filed a Writ of Supervisory Control (Petition) in *State v. Anderson*, which was pending in the Eighteenth Judicial District Court. The Petition challenged a pretrial ruling by the District Court which suppressed certain evidence for the State in the deliberate homicide case. The State argued that the District Court’s decision was based on a mistake of law and caused a gross injustice. Considering whether the issues raised by the State’s Petition were appropriate for resolution by the Montana Supreme Court through a writ of supervisory control, the Court concluded, in accordance with the factors from *Lamb v. Fourth Judicial District Court*, that (1) urgency or emergency factors existed making the normal appeal process inadequate, that (2) the case involved a purely legal question regarding that the interpretation and construction of a statute or rule, namely the transaction rule and the rules regarding *Just* Notices (*State v. Just*, 184 Mont. 262, 602 P.2d 957 (1979)) and Modified *Just* Notices (*State v. Matt*, 249 Mont. 136, 814 P.2d 52 (1991)), and that (3)(a) the District Court was proceeding under a mistake of law and was causing a gross injustice by leaving the State with virtually no evidence with which to prosecute a deliberate homicide charge. 2010 MT 141, ¶ 10, 356 Mont. 534, 234 P.3d 893. Considering whether the State’s evidence was correctly deemed inadmissible, the Court concluded that the problem was in the precedent, stating “the rule . . . articulated in *Just* and *Matt* [were] not effectively serving the purposes for which they were adopted . . . [had] given rise to needlessly technical notice requirements, created uncertainty and inconsistency in the analysis of alleged character evidence, and led to the wrongful exclusion of evidence in some cases . . . [and were] not true to the purposes of Rule 404(b), which has never included a notice requirement and does not require satisfaction of all the criteria set out in the Modified *Just* Rule.” The Court reasoned that no practical purpose existed for *Just* Notices in that the defense receives the proper notification of the evidence against him or her through discovery requirements, however, *Just* Notices were problematic by “put[ing] the prosecutor in the position of having to justify the admission of evidence in the absence of any objections by the defendant,” forcing the prosecution to “identify any prosecutorial evidence that the defense might claim is extrinsic,” and “upsets the pretrial process” by creating often long laundry lists of evidence “which benefit no one.” The Court overruled *Just* and *Matt* and set forth the new rule as follows: “As part of its obligations under the discovery statutes, the prosecution must disclose to the defendant, upon request, the witnesses it may call and the evidence it may introduce. We hold that this disclosure requirement is sufficient to ensure that the defendant receives notice of any ‘other crimes, wrongs, or acts’ evidence. For clarification, the requirement is simply to disclose the evidence; the prosecutor is not also required at the outset to explain why the evidence is admissible. Rather, it is up to the defendant to identify any of the State’s evidence that she believes should be excluded as irrelevant (Rule 402), unfairly prejudicial (Rule 403), relevant only for an improper propensity inference (Rule 404), or inadmissible under some other rule, and to explain with argument and authority why the evidence should be excluded. This may be accomplished by

means of a motion in limine. The prosecutor will then be required to respond to the defendant's objections and to demonstrate the evidence's admissibility. The court should conduct a hearing and issue a written decision with appropriate findings of fact and conclusions of law. If the court determines that the evidence is admissible, the defendant may request an instruction under Rule 105. Lastly, if the prosecution fails to disclose any evidence pursuant to these procedures, then the defendant may request sanctions, including exclusion of the evidence, under § 46–15–329, MCA.” The Court granted the Petition for a Writ of Supervisory Control, reversed the Decision and Order Re: defendant’s Motion to Strike Amended Just Notice and Objections to State’s Just Notice, and remanded the case to the District Court.

27) *State v. Dethman*, 2010 MT 268, 358 Mont. 384, 245 P.3d 30

The defendant was convicted in District Court of assault on a peace officer and resisting arrest. He appealed arguing that the District Court abused its discretion when it denied his motion for substitution of counsel and allowed him to proceed pro se, and that the District Court erred by failing to include the full mens rea requirement for the crime of assault on a peace officer in the jury instructions. The defendant argued that the District Court “failed to make even a cursory inquiry into [his] complaints” for new counsel, however, the Montana Supreme Court concluded that the hearing held by the District Courts hearing with the “primary purpose” of conducting an inquiry in the defendant’s request for new counsel was adequate. Considering whether the District Court erred in allowing the defendant to proceed pro se, the Court stated that the defendant had effective counsel, was warned regarding the dangers of proceeding pro se, and had his appointed counsel available at all times during trial as standby counsel. The Court concluded that “[the defendant] [could not] claim his right to counsel was violated because the District Court honored his decision to proceed without the assistance of counsel.” Regarding the defendant’s argument about the jury instruction, the Court concluded that because the defendant did not object at trial and later acquiesced to the instruction, he could not “claim the District Court erred in giving the instruction to which he agreed.” Affirmed.

28) *Wilson v. State*, 2010 MT 278, 358 Mont. 438, 249 P.3d 28

The defendant appealed from an order of the District Court denying and dismissing his petition for postconviction relief. He argued that his medical treatment at Montana State Prison (MSP) constituted cruel and unusual punishment or offended his right to dignity. More specifically, the defendant argued that the Department of Correction’s denial of one of the prescriptions for his mental health disorder constituted cruel and unusual punishment under the United States and Montana Constitutions and violated his right to individual dignity under the Montana Constitution. The Montana Supreme Court stated that the record did not indicate “that the staff at MSP consciously disregarded a serious risk of substantial harm to [the defendant’s] health” nor did it indicate that “the Department’s actions, or inactions, at MSP greatly . . . exacerbated [the defendant’s] mental illness” or “deprived him of his sanity.” The Court held “[t]he record does not reflect that the Department disregarded a substantial risk of harm to [the defendant’s] mental health. The Department's actions did not greatly exacerbate [the defendant’s] mental illness. Substantial evidence in the record support[ed] the District Court's decision to deny [the defendant’s] petition for postconviction relief.” Affirmed.

Justice Nelson filed a dissenting opinion. Justice Nelson argued that the treatment of the defendant “is akin to denying a diabetic his insulin, and then punishing him for going into shock.” He concluded that the defendant’s “right of individual dignity is being degraded, and

that he is suffering cruel and unusual punishment at the hands of the State of Montana prison system.” He argued that the Court “should fashion a remedy” and “remand this case to the District Court with instructions to appoint counsel to investigate the conditions of [the defendant’s] confinement and treatment, and, if warranted, to file a petition for appropriate relief in the District Court.”

29) *State v. Lambert*, 2010 MT 287, 359 Mont. 8, 248 P.3d 295

The defendant was resentenced following an order from the Montana Supreme Court which declared a portion of his prior sentence from the Sentence Review Division (SRD) illegal and remanded for resentencing. The Court granted the defendant’s motion for an out-of-time appeal. On appeal, the defendant argued that the District Court erred by imposing a new sentence upon remand instead of striking the illegal portion of the prior SRD sentence. The Montana Supreme Court stated that “[t]he District Court considered all the probative evidence at sentencing,” “had the authority to enforce a new sentence on [the defendant],” and “subsequently imposed a legal sentence.” Affirmed.

30) *State v. Johnson*, 2010 MT 288, 359 Mont. 15, 245 P.3d 1113

Following a jury trial in the District Court, the defendant was convicted of felony intimidation. The District Court sentenced the defendant to five years with the Department of Corrections (DOC) and to an additional consecutive ten years, all suspended, at the Montana State Prison (MSP) for his status as a persistent felony offender (PFO). The defendant appealed arguing that the District Court improperly instructed the jury on the mental state element of intimidation and imposed an illegal sentence by including an additional sentence for his status as a PFO. On the first issue, the Montana Supreme Court concluded that the defendant’s “failure to object to the jury instructions waived his claim of instructional error on appeal.” On the second issue, the Court concluded that “[b]y imposing two separate sentences, the District Court sentenced [the defendant] in violation of § 46–18–502, MCA. Section 46-18-501 and section 46-18-502 state that “a PFO designation is not itself a separate crime carrying a separate sentence, but is a procedural sentence enhancement required by statute.” The Court stated that “there is not, therefore, a separate sentence for the felony and a separate sentence for the persistent felony offender charge, but only one sentence pursuant to § 46–18–502, MCA.” Finally, the Court concluded “that regardless of whether the two separate sentences fall within the parameters of the PFO statute, two separate sentences are illegal” and the “PFO sentence replaces the underlying felony sentence.” The Court held that the defendant’s sentence was illegal and reversed and remanded to the District Court for resentencing.

## 2011

1) *State v. Gieser*, 2011 MT 2, 359 Mont. 95, 248 P.3d 300

The defendant was pulled over for erratic driving and, after officers were unable to get a result from a certified portable breath test (PBT), gave a breath sample using an uncertified PBT. The result was a blood alcohol concentration of .182. He was arrested and later convicted in District Court of driving under the influence (DUI). The defendant appealed arguing that he received ineffective assistance of counsel. He first argued that he received ineffective assistance of counsel because his attorney failed to object to an officer’s testimony describing the

administration and results of a Horizontal Gaze Nystagmus (HGN) test without a “showing that the test was properly administered by the officer, along with expert testimony demonstrating a scientific basis for the reliability of the test results.” The defendant further argued that he was received ineffective assistance of counsel because his attorney failed to object to the admission of the results of the breath test taken from the officer’s out-of-certification PBT apparatus. The State conceded and the Montana Supreme Court agreed that the defendant’s trial counsel’s performance was deficient. The Court also concluded that “there [was] a reasonable probability that the HGN and breath test evidence contributed to the verdict, and that there was no other evidence indicating intoxication that proved the same thing. The Court held that the admission of the HGN and breath test evidence was not harmless. Reversed and remanded for retrial.

2) *State v. Hovey*, 2011 MT 3, 359 Mont. 100, 248 P.3d 303

The defendant was convicted in District Court of 42 counts of sexual abuse of children. He appealed arguing that the District Court abused its discretion by issuing challenged jury instructions. At trial, the jury was presented with two instructions defining the mental state “knowingly.” The court instructed the jury that “[a] person acts knowingly when the person is aware of his or her conduct,” and “[y]ou are instructed that a person acts knowingly with respect to a specific fact, when he is aware of a high probability of that fact's existence.” The Montana Supreme Court concluded that the “knowingly as to conduct” instruction “correctly addressed the mental state element applicable to the possession of child pornography” and that the “knowingly with respect to a specific fact” instruction allowed the jury to determine that the defendant was “aware of a high probability” that the erotic models photographed in the photos found on his computer were children. Finally, the Court concluded that the language of § 45–2–103(4), Mont. Code Ann. “does not require that the same definition of ‘knowingly’ apply to every element of the offense and that different ‘knowingly’ definitions may be applied to the different elements of an offense.” However, the Court stated “this [was] exactly what the District Court did here, instructing the jury on the definitions pertaining to ‘conduct’ and ‘fact.’” Thus, the defendant’s argument was “not helpful to his appeal.” Affirmed.

3) *State v. Goff*, 2011 MT 6, 359 Mont. 116, 247 P.3d 715

The defendant appealed an order of the District Court revoking his suspended sentence. He argued that the District Court abused its discretion in revoking his suspended sentence and in setting new terms and conditions on his sentence. On the first issue, the defendant argued that the District Court was “powerless to revoke his suspended sentence based on the bail jumping violation because there were no conditions of probation set in his 1987 judgment.” The Montana Supreme Court concluded that, under the law at the time the defendant was convicted, “the District Court was authorized in its discretion to revoke [the defendant’s] suspended sentence even though no conditions of probation or parole were set forth in the original judgment. On the second issue, the defendant argued, “in revoking his suspended sentence on his 1987 conviction for robbery, the District Court had only two options under § 46–18–203, MCA (1985): (1) either revoke the suspended sentence and order the defendant to serve the remainder of his prison term; or (2) continue the suspended sentence under the original terms,” and that “by setting new terms and conditions on his sentence, the District Court extended its statutory authority and violated the law.” On this issue, the Court concluded, “Although it is not clear from the written judgment whether the new terms and conditions appl[ied] to both sentences, the oral pronouncement of sentence clearly indicate[d] that the court intended the new terms and conditions to apply only to

[the defendant's] five-year suspended sentence on the 2008 bail jumping conviction and not to his 1987 conviction for robbery.” However, the Court also concluded that “to prevent confusion and further litigation” the case needed to be remanded to the District Court “with instructions to enter an amended judgment in conformance with its oral pronouncement of sentence.” Affirmed and remanded.

4) *State v. Stiffarm*, 2011 MT 9, 359 Mont. 116, 250 P.3d 300

The defendant appealed the District Court's order revoking his suspended sentence arguing that the District Court exceeded its statutory authority, in violation of § 46–18–203(2), MCA, when it considered, and granted, the State's petition to revoke his suspended sentence that was filed before the period of suspension had begun. Section 46–18–203(2) states that “[t]he petition for a revocation must be filed with the sentencing court during the period of suspension or deferral. Expiration of the period of suspension or deferral after the petition is filed does not deprive the court of its jurisdiction to rule on the petition.” The Montana Supreme Court concluded that it must follow the plain meaning of the statute which clearly stated that the petition must be filed during the period of suspension or deferral and the petition against the defendant was filed four days *before* the period of suspension. Thus, the Court overruled the previous line of cases which incorrectly interpreted the language of the statute: *Christofferson v. State*, 272 Mont. 518, 901 P.2d 588 (1995), *State v. Vallier*, 2000 MT 225, 301 Mont. 228, 8 P.3d 112, *State v. Morrison*, 2008 MT 16, 341 Mont. 147, 176 P.3d 1027, and *State v. LeDeau*, 2009 MT 276, 352 Mont. 140, 215 P.3d 672. The Court also urged the Montana Legislature “to amend and clarify § 46–18–203(2), MCA, should the plain meaning of this statute as it now reads, be inconsistent with its intent.” Reversed and remanded.

Justice Baker filed a dissenting opinion, in which Justice Rice joined. Justice Baker argued that “the Legislature has met seven times since we reaffirmed *Sullivan* in *Christofferson* and has not seen fit to change the statute to prohibit filing the petition before the period of suspension or deferral begins.” Justice Baker stated that “[t]he principle of stare decisis should not be used to perpetuate error” but that “[w]hether this Court's initial construction of the statute was correct or not, it has become the law” and “[i]t is the legislature's prerogative, not the Court's, to change the statute if the Court's longstanding interpretation of its language is not what the legislature intended.”

5) *State v. Murray*, 2011 MT 10, 359 Mont. 123, 247 P.3d 721

The defendant appealed an order of the District Court that denied his motion to suppress. He also appealed his sentence for operating a motor vehicle without liability insurance. Specifically, he argued that the District Court erred in denying his motion to suppress because the officer did not have sufficient particularized suspicion to stop him, the District Court erred when it sentenced him for operating a motor vehicle without liability insurance, and, in the alternative, that the prosecutor erred in recommending a sentence for operating a motor vehicle without liability insurance that was outside the scope of the plea agreement. Considering the first issue, the Montana Supreme Court concluded that the District Court's finding that the rural road on which the defendant was driving was of sufficient width and that the defendant violated § 61–8–321, MCA (“[u]pon all roadways of sufficient width, a vehicle must be operated upon the right half of the roadway....”), was not clearly erroneous. On the second issue, the Court restated that Section 61–6–301(4), MCA, which states that a first conviction of driving without insurance is punishable by “a fine of not less than \$250 or more than \$500 or by imprisonment in

the county jail for not more than 10 days, or both.” The Court stated that the defendant’s sentence of six months with all but two days suspended “clearly exceed[ed] the statutory maximum penalty” and concluded that because the case was being reversed and remanded for resentencing, the Court did not need to address the third issue. Affirmed in part, reversed in part, and remanded for resentencing.

Chief Justice McGrath filed a specially concurring opinion which Justice Nelson joined. The Chief Justice argued that probable cause to arrest was not the dispositive issue in this case; rather the dispositive issue was whether the defendant was seized. The Chief Justice stated, “I would hold that [the defendant] was never subjected to a constitutional seizure and suggest the Court take this opportunity to clarify its seizure jurisprudence.” He argued that the *Mendenhall* “reasonable person” standard for seizures is “confusing” and “unhelpful.” Chief Justice McGrath stated that the *Mendenhall* standard “has a problematic built-in contradiction, inquiring whether a reasonable person would feel free to leave, while inherently recognizing that the reasonable person already feels a level of compulsion to remain.” He stated that Montana would be better served by abandoning the *Mendenhall* standard and that “[a] clearer standard would be one similar to the test recently adopted by the Oregon Supreme Court: Whether an officer’s objective actions restrict, interfere with, or deprive an individual’s liberty or freedom of movement.” As for the case at hand, the Chief Justice stated that he “would hold that no seizure occurred because [the officer’s] actions did not objectively restrict, interfere with, or deprive [the defendant’s] liberty or freedom of movement.”

6) *State v. Pearrow*, 2011 MT 18, 359 Mont. 177, 248 P.3d 799

The defendant was convicted in District Court of failing to register as a sexual offender. He appealed, arguing that the District Court erred in denying his motion to dismiss the Information on the grounds that the statutes requiring sexual offenders to register are unconstitutionally vague as applied to him and that the District Court erred in denying his motion to dismiss the Information on the grounds that the statutes requiring sexual offenders to register violated his substantive due process rights. The Montana Supreme Court concluded that the dispositive issue was whether the defendant filed his change of address in a timely manner. The Court stated that “[b]ecause he failed to take any action toward updating his sexual offender registration until 17 days after departing [his previous] address, he was in violation of § 46–23–507, MCA, for failing to keep his registration current.” Affirmed.

Justice Cotter filed a dissenting opinion which Justice Wheat joined. Justice Cotter first argued that the District Court erred in applying the 2007 law as he signed the Registration Form in 2006. Justice Cotter stated, “Where the State undertakes to direct a person to follow a specific set of legal instructions, it should not be later allowed to prosecute that person for failure to follow a new set of instructions of which he has no notice.” She then argued that the defendant did file a change of address in a timely manner because he wrote a letter to the Belgrade Police Department six days after he signed his new lease in Arizona. Justice Cotter added that the defendant “represented in his letter to the Department that his legal research had led him to the conclusion that the Belgrade address constituted a legal street address. He then concluded his letter to the Department as follows: ‘If there is any information you need, please contact me. I hope this covers all of the bases for my registration, and satisfies all of the laws that I am bound to until this mark is removed from my past.’ A sexual offender who knowingly fails to keep his registration current is subject to a felony conviction. Section 46–23–507, MCA (2005) and (2007). I submit that the undisputed facts here demonstrate that [the defendant] did not

‘knowingly’ fail to keep his registration current; in fact, he complied with the letter of the directions he was given, and on top of that, offered to do anything additional he could do to make sure his registration was lawful.”

7) *State v. Savage*, 2011 MT 23, 359 Mont. 207, 248 P.3d 308

The District Court revoked the defendant’s suspended sentence. The defendant did not appeal the revocation of his suspended sentence, however, he appealed from certain conditions that were previously imposed on his suspended sentence and the procedure utilized in imposing those conditions. On appeal he argued that: 1) the District Court erred by prospectively delegating its sentencing authority to the executive branch of government, 2) the Department of Corrections (DOC) sentencing modification procedure, through its use of a condition modification form, violated his rights to due process and assistance of counsel, 3) the conditions prohibiting contact with vulnerable populations and from accessing human nudity are unconstitutionally vague and overbroad, and 4) he received ineffective assistance of counsel. The Montana Supreme Court declined to review issues one, two, and three, because “no justiciable controversy exist[ed].” Regarding the fourth issue, the defendant argued that his counsel did not effectively represent him when he failed to file a brief objecting to the additional and modified conditions that were imposed on his suspended sentence. On this issue, the Court concluded that because there was no indication in the record as to why the defendant’s counsel did not file a brief, this matter should be addressed in a petition for postconviction relief, rather than on direct appeal. Affirmed.

8) *State v. Schaff*, 2011 MT 19, 359 Mont. 185, 247 P.3d 727

The defendant was convicted after a jury trial in District Court of felony Driving Under the Influence (DUI). The defendant argued that during trial the State repeatedly used her post-Miranda silence to create an inference of guilt in violation of her right to due process. The Montana Supreme Court concluded that “the prosecutor did not comment upon [the defendant’s] post-Miranda silence or seek to take advantage of that silence to create an inference of guilt.” Affirmed.

9) *State v. Peterson*, 2011 MT 22, 359 Mont. 200, 247 P.3d 731

After admitting to a charge of deliberate homicide, the defendant entered into a plea agreement under which he agreed to be sentenced to 100 years at Montana State Prison (MSP), none suspended. The District Court accepted the plea agreement but added 10 years consecutive to the 100–year sentence as a weapon enhancement sentence. The defendant appealed the enhanced sentence. Before appellate briefing began, the defendant moved for, and the Montana Supreme Court granted, a stay and remanded the case to allow him to file a motion to withdraw his plea. On remand, the District Court withdrew the challenged sentence, entered an amended sentence without the 10–year enhancement, and denied the defendant’s motion to withdraw his plea. The defendant appealed the District Court’s denial of his motion to withdraw his plea, and challenged the District Court’s authority to withdraw its original sentence and replace it with an amended sentence. § 46–18–116(3), MCA states that “[t]he [district] court may correct a factually erroneous sentence or judgment at any time. Illegal sentences must be addressed in the manner provided by law for appeal and postconviction relief.” The defendant argued that the sentence was not factually erroneous, while the State argued that the District Court did not intend to not follow the plea agreement and was simply fixing its previous error. The Court concluded

that “the District Court expressly accepted the plea agreement but erroneously appended the 10–year sentence enhancement. This being so, the proper remedy is not to allow [the defendant] to withdraw his guilty plea but rather to review the partially illegal sentence on appeal.” The Court further concluded that the District Court did not have the statutory authority to amend its own “unlawful judgment” and that “the authority to review and correct an illegal aspect of a sentence” rests with the Supreme Court. Thus, the Court vacated the amended judgment entered by the District Court, and remanded with instructions to strike the weapon enhancement sentence from the District Court’s original judgment. Vacated in part, affirmed in part, and remanded.

10) *State v. Norquay*, 2011 MT 34, 359 Mont. 257, 248 P.3d 817

The defendant was convicted after a jury trial in District Court of deliberate homicide and tampering with evidence. The defendant appealed arguing that 1) the District Court's admission of the State's expert DNA witness through a videotaped deposition violated the defendant's right to confront the witness, 2) the District Court's *Allen*-instruction given to a deadlocked jury constituted an improperly coercive instruction, and 3) the prosecutor's comments at trial constituted prosecutorial misconduct. On the first issue, the Montana Supreme Court concluded that the videotaped deposition did not violate the defendant's right to confront the witness because the District Court had properly concluded that the pregnant witness was unable to testify in court due to her physician's insistence that she not travel at that point in her pregnancy and that the defendant had an opportunity to cross-examine the witness at her deposition. The Court further stated that the trial had been postponed twice already and that, with over 50 witnesses, another continuance could severely postpone the trial which was already occurring over two years after the victim's death. On the second issue, the Court stated that “[t]he *Allen*-instruction given at [the defendant's] trial did not contain language that instructed the minority jurors to reconsider their views,” and that [t]he jury had ample time to deliberate and nothing in the facts indicate that patently coercive circumstances existed.” Thus the Court concluded that the instruction “did not put undue pressure on jurors to reach a unanimous verdict,” and that the District Court “properly instructed the jury on the law.” Although the Court determined the issue was not dispositive in this case, it did change the pattern jury instruction used as follows:

The judicial process assigns tasks to the *people involved in the case*. ~~the various units~~. It is the task of the witnesses to testify truthfully to the facts as they recall them. ~~as they recall the facts~~. It is the task of the lawyers to prepare the case for final submission to the trier of the facts, the jury. It is the task of the Judge to preside, to instruct you as to the law, and to rule on ~~the admissibility of the~~ *whether certain evidence will be allowed at trial*. It is the task of the jury to decide the case. ~~The ultimate responsibility of the jury is to render a verdict in this cause~~. You are not ~~partisan nor are you~~ advocates in this matter; you are ~~the neutral~~ judges; ~~you are the~~ judges of the facts. It is you and you alone that can ~~render a verdict in~~ *decide* this case. There is no reason to believe that any other 12 ~~men and women~~ *people* would possess any more ability, intelligence, and courage to do the ~~ultimate~~ task assigned to a jury under the American system of justice.

~~The final test of the quality of your service will be in the verdict which you return to this Court. It is only by rendering a verdict in this cause that you can make a definite contribution to efficient judicial administration as you arrive at a just and possible verdict.~~ *The purpose of this instruction is to encourage you to collaborate with your fellow jurors in order to reach a just and fair verdict in this case. This instruction is not*

*meant to coerce or to force a verdict. You should take as much time as needed in your deliberations.*

~~We have never asked, as a matter of fact we have instructed you, that~~ You should not surrender your honest convictions in this matter for the mere purpose of returning a verdict or solely because of the opinion of other jurors. This does not mean, however, that you should avoid ~~the your task assigned to you~~ of rendering a verdict in this case.

*This instruction is not more important than any other instruction I have previously given you. You should consider this instruction together with, and as part of, all the other instructions. Please return to your jury room and, again, diligently and earnestly resume your deliberations.*

On the third issue, the Court concluded that the defendant presented this issue for the first time on appeal and denied to apply a plain error review. However, the Court concluded that the defendant's counsel did not provide ineffective assistance of counsel when he failed to object to the prosecutor's comments at trial. Affirmed.

11) *State v. Rodriguez*, 2011 MT 36, 359 Mont. 281, 248 P.3d 850

Following the District Court's denial of the defendant's motion to dismiss, the defendant was convicted by a jury of felony Driving Under the Influence (DUI). The defendant appealed arguing that the officer lacked particularized suspicion to conduct an investigatory stop and that the District Court erred in allowing the introduction of Horizontal Gaze Nystagmus (HGN) evidence during trial. On the first issue, the Montana Supreme Court determined that the officer's specific articulable facts and inferences gathered while observing the defendant (seeing a truck rolling slowly through the parking lot of a closed business which contained significant expensive inventory at 11:30pm without headlights on and inferring that the driver was casing the business to commit burglary) support a finding of particularized suspicion to justify an investigative stop. On the second issue, the Court determined that the District Court did not err in finding the responding officer an expert witness qualified to testify about the administration of the HGN test as the officer testified at length about his training in the HGN test, his previous qualification as a DUI expert witness in justice court, and his investigation of roughly two DUIs per week. Affirmed.

12) *State v. Payne*, 2011 MT 35, 359 Mont. 270, 248 P.3d 842

The defendant was convicted by a jury of felony failure to register as a sexual offender. On appeal he argued that 1) the District Court erred in denying his motion to dismiss for insufficient evidence, 2) the District Court abused its discretion when it allowed hearsay evidence over his objection, and 3) the prosecutor invaded the province of the jury by making remarks that constituted comments on the evidence. On the first issue, the defendant argued that the State failed to prove that he acted "knowingly" when he failed to register in Montana. On this issue, the Montana Supreme Court determined that the State did not have to prove that the defendant had been instructed to register. It only needed to prove that he knowingly failed to register. The Court emphasized that the defendant previously knew he had to register in Connecticut, he moved to Montana, and he did not register in Montana. The Court concluded that the "jury had before it sufficient evidence to determine that [the defendant] had 'knowingly' failed to register." On the second issue, the defendant argued that a detective's testimony regarding a phone call she had in which she determined that the defendant had to register in

Connecticut and was not at the time in compliance with his registration requirements in Connecticut was hearsay that violated the confrontation clauses of the United States and Montana Constitutions. On this issue, the Court determined that the statements of the detective at trial were testimonial hearsay and the District Court erred in admitting them at trial. However, the Court concluded, using the *Van Kirk* analysis, that because the detective's testimony "did not go to an element of the charged offense," because "no untainted admissible evidence was presented to show that [the defendant] was not in compliance with Connecticut's registration laws," because the defendant failed to raise a propensity objection at trial, and because "the jury had sufficient admissible evidence before it to support its verdict that [the defendant] 'knowingly' failed to register in Montana", "the District Court's admission of inadmissible hearsay evidence was harmless error." On the final issue, the Court concluded that the defendant failed to object at trial regarding statements made by the prosecutor during closing statements and did not meet the threshold for plain-error review. Therefore, the Court declined to review this issue. Affirmed.

13) *State v. Guill*, 2011 MT 32, 359 Mont 225, 248 P.3d 826

The defendant was convicted by a jury of sexual intercourse without consent, sexual intercourse without consent by accountability, and incest by accountability. She was sentenced to three concurrent terms of 25 years prison with 10 years suspended. The defendant appealed claiming two issues regarding her sentencing: 1) the condition requiring her to continue being responsible for the victim's counseling, treatment, or therapy costs was illegal, and 2) the restriction on contact with her husband was illegal and unreasonable. The facts of the case are best described as bizarre and weighed heavily on the Montana Supreme Court's decision. The defendant and Douglas Guill fell in love while Douglas was still married to Candace Guill and lived with her and their two young children, Sarah and Jacob. Prior to this, Douglas began telling friends and family that he was being directly instructed by God. He claimed that God wanted him to be with the defendant. The defendant moved into the house with Douglas, Candace, and the children. For the first few nights the defendant was in the house, Douglas, Candace, and the defendant slept in the same bed, but following that, Douglas had Candace sleep in a storage building on the property that had a woodstove and electricity but lacked plumbing, requiring Candace to use an out-house. Although eventually being moved into the basement of a house built on the property, Candace's conditions did not much improve over the following fourteen years. She was essentially treated as a slave, doing work around the house, and property, and homeschooling her children. She testified that she was extremely afraid of Douglas and feared what he might do if she refused or left. The children were led to believe that Douglas had the ability to send people to hell and that if they misbehaved he would send them to hell. Meanwhile, the defendant and Douglas spent 24 hours a day, 7 days a week together to the point where the defendant fed Douglas and they went to the bathroom together. Douglas began having sexual intercourse with Sarah when she was six years old. The defendant began participating in the sexual abuse shortly after moving in with Douglas, Candace, and the children. Candace and Jacob were never aware of the sexual abuse as they were isolated in other parts of the house while it occurred. After about ten years, the defendant began having digital penetration with Sarah at Douglas's request. Sarah testified that the sexual abuse lasted from the time she was six until she was twenty-two, at which point she ran away from the house, and that it was never anything she wanted to participate in, but, rather, that it "felt normal," and "it felt like life, that's the way it had to be." Douglas convinced Sarah that if she were ever to tell

anyone about the sexual abuse he would harm himself or harm others and that it would be her fault and she would never be forgiven. Two months after leaving the house, Sarah reported the sexual abuse to the authorities and both Douglas and the defendant were arrested. The defendant requested a joint trial with Douglas despite being advised against it by counsel. The District Court initially agreed to the joint trial, however very shortly in, it determined that the joint trial did not appear to be in the defendant's best interest. The defendant was given two mental health evaluations, one before trial, and one before sentencing. Although the doctor administering the evaluations did not discover any personality traits that would cause the defendant difficulties in maintaining satisfactory day-to-day functioning, any signs of antisocial, narcissistic, or sadistic traits, or deviant sexual interests, no prior history of criminal or sexually deviant acts, and no issues with drug or alcohol abuse, he did find that the defendant "tend[ed] to be driven in her day-to-day behaviors and attitudes by a need for acceptance and gratification from others,' especially those in authority" and "[was] quite vulnerable to external influence and may [have] act[ed] in ways which compromise[d] her own internal values and morals in favor of obtaining validation and acceptance from others." The defendant introduced several pieces of evidence demonstrating her utter devotion to Douglas and attempted to create a defense that she was acting under his control. The Prosecution maintained that even if she were acting to please Douglas, she was capable of refusing to participate in the sexual abuse of Sarah. The jury found the defendant guilty on all charges. The two parts of the defendant's sentence which she contested were the Court's stipulation that she pay the victim's counseling, treatment, or therapy costs and the requirement that she have no contact with Douglas through any means. The only exception to this order expressed by the Court was in the instance that "the defendant's therapist determine[d] that limited contact for therapeutic purposes, under the direct supervision of the therapist, [was] in both community and the defendant's best interest for her treatment and rehabilitation." Regarding the first issue, the defendant contended that the condition requiring her to continue being responsible for the victim's counseling, treatment, or therapy costs was illegal because it did not specify the total amount of restitution she was required to pay. The State conceded that this did not comply with this statutory mandate and was consequently illegal thus the Court remanded the issue back to the District Court to correct the illegal provision. As for the second issue, the defendant contended that the restriction on contact with her husband was illegal and unreasonable. The Court first turned to the statutory authority. The State argued that § 46-18-202(1)(f), MCA, authorized the sentencing judge to any restrictions or conditions that were "reasonably related to the objectives of rehabilitation and the protection of the victim and society." Using the nexus test, the Court concluded that the restriction was "reasonably related to the related to the objectives of rehabilitation and protection of the victim and society, and had a correlation or connection to the underlying offense." The Court stated that "the no-contact restriction [was] not simply a component of [the defendant's] rehabilitation; it [was] a prerequisite for it." The Court then moved on to discuss the constitutionality of the restriction. The Court first concluded that strict scrutiny was proper in reviewing the restriction because "marriage is a fundamental right under Article II, and thus is entitled to the highest level of scrutiny." The Court concluded that the State had to show the restriction furthered "a compelling governmental interest and [was] narrowly tailored to achieve that interest." On the first prong, the defendant conceded and the Court agreed that "rehabilitation and the protection of the victim and society [were] compelling governmental interests." As to the second prong, the Court concluded that the "no-contact restriction [was] not overly broad," as "prohibiting contact with Douglas [was] an essential component of Nicole's rehabilitation." Thus the Court held that the

restriction “passe[d] constitutional muster.” Affirmed in part, reversed in part, and remanded for further proceedings.

14) *State v. Bullplume*, 2011 MT 40, 359 Mont. 289, 251 P.3d 114

The defendant pleaded no contest in District Court to mitigated deliberate homicide. District Court refused to accept plea agreement and offered D opportunity to withdraw plea. D withdrew plea, went to trial, was convicted of Deliberate Homicide, and sentenced to 80 years. On first appeal, Supreme Court found that D had not effectively withdrawn plea and remanded for resentencing on the Mitigated Deliberate Homicide charge. District Court sentenced D to 40 years. On this appeal, the defendant argued that 1) the State breached the pre-sentence agreement, and 2) the District Court's sentence violated his due process rights. Prior to the defendant's sentencing hearing, the defendant, his counsel, and the prosecutor all signed a pre-sentence agreement. The parties both agreed to recommend 40 years at Montana State Prison, with 10 suspended. Under the agreement, both sides were obligated to refrain from arguing for any sentence other than the one jointly recommended, and the State agreed to not call any witnesses at the sentencing hearing. The agreement explicitly noted it was non-binding, and the District Court was free to impose any legal sentence for mitigated deliberate homicide. The District Court exercised this freedom by sentencing the defendant to 40 years with no time suspended as well as adding a 20-year restriction on his parole eligibility. On the first issue, the defendant argued that the State breached the pre-sentence agreement in three ways: 1) by endorsing the District Court's decision to read the trial transcript, 2) by improperly eliciting testimony in support of a different sentence, and 3) by failing to jointly recommend the agreed-to sentence. The Montana Supreme Court found the first assertion moot as the agreement had not yet been made at the point in time in which the State endorsed the District Court's reading of the trial transcript. The Court points out that the second assertion fails because nothing in the agreement precluded the State from cross-examining witness and nothing in the State's questions was “an attempt to undermine, or resulted in the undermining of the pre-sentence agreement.” Finally, as to the third assertion, the Court stated that by willingly entering into the pre-sentence agreement the State informed the District Court of a joint sentence recommendation. On the second issue, the defendant argued that his sentence for mitigated deliberate homicide “was imposed as punishment for the successful appeal of his original deliberate homicide conviction” and that “his re-sentence amount[ed] to equivalent time in prison, for a lesser charge” thus violating his right to due process. The Court stated that the defendant's “re-sentence both shorten[ed] the pre-parole eligibility period and greatly reduce[d] his maximum incarceration term.” The Court concluded that his sentence did not constitute an “increased sentence” and thus the record did “not support [his] allegation of judicial vindictiveness” and “there [was] no merit to his due process argument.” Affirmed.

15) *State v. Holt*, 2011 MT 42, 359 Mont. 308, 249 P.3d 470

The defendant was convicted on his guilty plea of burglary, and, after a bench trial, failing to register as a sex offender. The Court deviated from the plea agreement of the parties by designating the defendant as a Level III sex offender and requiring the defendant to complete Phase I and II of the sex offender treatment before being eligible for parole. The defendant appealed, arguing that it was illegal for the District Court to designate him a Level III sex offender and to condition his parole eligibility for the burglary conviction upon completion of sex offender treatment. On the issue of sex offender treatment, the Montana Supreme Court

determined that it would not address this matter on appeal as the defendant did not object to the stipulation during sentencing. Regarding whether the District Court improperly imposed a condition that the defendant register as a sexual offender as part of the burglary sentence, the Court concluded that the recommendation by the District Court only included a true fact and a statute citation and “the sentence was not invalidated in any way by the reference to the registration requirement.” Regarding whether the District Court improperly designated the defendant as a Level III sex offender, the Court concluded that because burglary is not a sexual offense, “the District Court lacked the power to designate an offender level in connection with that offense.” Affirmed in part, reversed in part, and remanded.

Justice Nelson filed an opinion concurring in part and dissenting in part. He stated that he agreed with the Court’s “conclusion that the District Court’s recommendation to the parole board, that [the defendant] be required to register as a sexual offender if granted parole, [was] legal.” He further agreed with the Court’s conclusion that the Level III sex offender designation in conjunction with the defendant’s burglary sentence was illegal. Justice Nelson differed from the Court, however, by concluding that conditioning the defendant’s parole eligibility for the burglary charge on his completion of sex offender treatment was illegal. He stated based on the record from the defendant’s sentencing hearing, and as a “purely factual matter,” he was unwilling “to leap to the conclusion that [the defendant] ‘acquiesced’ in the imposition of the condition on his burglary sentence.” Furthermore, he stated that as a “legal matter” he “strenuously disagree[s]” with the Court’s “continuing policy of allowing the courts of this state to impose unauthorized sentences if a defendant ‘acquiesces’ in the illegality.” He added that the “whole line of authority . . . is legally untenable, not to mention downright ridiculous.” Justice Nelson went on to state that “neither § 46–18–201(4)(o) nor § 46–18–202(2), MCA, contains a specific grant of authority for judges to impose restrictions or conditions on parole eligibility.” As to § 46–18–202(1)(f), MCA, he argued that prior cases decided by the Court did not interpret the statute to provide courts with a general authority to impose parole conditions. Justice Nelson further argued that “even assuming, for the sake of argument, that § 46–18–202(1)(f), MCA, could be construed broadly to grant sentencing judges authority over parole eligibility, doing so would undermine the Legislature’s delegation of this matter to the parole board.” In arguing the lack of authority the court system has over parole, Justice Nelson stated, “In essence, the Legislature took the pie represented by § 46–18–202(1)(f), MCA, carved out the piece relating to parole, and handed all but a few morsels of it to the parole board.” Finally, Justice Nelson went on to argue that the Level III designation of the defendant was improper. He stated that interpreting § 46–23–509(2) and (3), MCA to allow sentencing judges to “impose tier level designations and sexual offender treatment programs upon convictions for speeding, shoplifting, possession of stolen property, inciting a riot, arson, and the like is, frankly, absurd,” and not in line with legislative intent.

16) *State v. Lindsey*, 2011 MT 46, 359 Mont. 362, 249 P.3d 491

The defendant entered a guilty plea to a charge of sexual assault in accordance with a plea agreement. The defendant then filed a motion to withdraw his guilty plea. The motion was denied by the District Court and the defendant appealed. On appeal, the defendant argued that 1) he is entitled to have the charge against him dismissed because a transfer hearing was not held within the time provided in § 41–5–206(3), MCA, 2) the District Court erred in denying his motion to withdraw his guilty plea, 3) the District Court erred in failing to respond to Lindsey’s

request for new counsel, and 4) he received ineffective assistance of counsel from his first attorney when she failed to move to dismiss the charges against him because a transfer hearing was not held within the time provided in § 41–5–206(3), MCA. On the first issue, the Montana Supreme Court determined that the defendant waived his right to a transfer hearing by both pleading guilty and by expressly waiving his right through his attorney at his change of plea hearing. On the second issue, the Court concluded that the factual findings of the District Court were not clearly erroneous and the conclusions were properly based upon applicable Montana law. On the third issue, the Court stated that, although the defendant had written a letter to the court complaining of the services he was receiving from his public defender, his expressed dissatisfaction occurred early in the case and he had on-going issues, he had plenty of time to raise them. The Court also emphasized the defendant’s representation at the change-of-plea hearing that he was satisfied with the performance of his attorney. The Court concluded that the District Court did not err by failing to respond to the defendant’s request for new counsel. Finally, on the fourth issue, the Court applied the *Strickland* test. The Court stated that he failed to demonstrate that the charges against him would have been dismissed if only his attorney had made a motion to dismiss the charges based on a lack of a timely transfer hearing sometime 30 days after the information was filed. The Court found that the defendant failed the second requirement of the *Strickland* as he was unable to show that he was prejudiced by the conduct of his attorney. Thus, the Court found that the defendant did not receive ineffective assistance of counsel. Affirmed.

17) *State v. Flynn*, 2011 MT 48, 359 Mont. 376, 251 P.3d 143

The defendant pled guilty to driving under the influence of alcohol and/or drugs but reserved his right to appeal. The only issue he raised on appeal was whether the officer had particularized suspicion to stop his vehicle. The officer reportedly saw the defendant’s truck pass over the fog lane three separate times while following behind him on the highway. The Montana Supreme Court first found that *State v. Lafferty* never established a bright line rule that crossing the fog line was not sufficient particularized suspicion for a traffic stop. 1998 MT 247, ¶ 14, 291 Mont. 157, 967 P.2d 363. In response to the defendant’s argument that his driving was not illegal, the Court stated, that they have “repeatedly confirmed that an officer need not witness illegal driving or a violation of the traffic code in order to have a particularized suspicion.” The defendant relied on the Court’s decisions in *Lafferty* and *Morris v. City of Great Falls* that a defendant may subsequently explain his or her behavior in order to invalidate an officer’s determination of particularized suspicion. The Court concluded that “a defendant’s after-the-fact explanation for his or her conduct has no bearing on a court’s determination of whether an officer possessed particularized suspicion to justify a stop,” and “decline[d] to rely on [*Lafferty* and *Morris*] as precedent.” The Court found that the officer had particularized suspicion based on his “observations, in conjunction with rational inferences drawn from the time of night and external conditions.” Affirmed.

18) *State v. Baze*, 2011 MT 52, 359 Mont. 411, 251 P.3d 122

The defendant was convicted in District Court after a jury trial of driving under the influence of alcohol (DUI). He appealed claiming that the District Court erred when it admitted the faxed report containing his blood test results under M.R. Evid. 803(6), the business records hearsay exception. The Montana Supreme Court, citing *Bean v. Montana Bd. of Labor Appeals*, stated that “business records are presumed reliable because: “1) employees *generating* these

records are motivated to accurately prepare these records because *their employer's business depends on the records to conduct its business affairs*; and 2) the routine and habit of *creating* these records also lends reliability.” 1998 MT 222, ¶ 20, 290 Mont. 496, 965 P.2d 256 (emphasis added by the Court). The Court stated that the District Courts reliance on *United States v. Adefehinti*, a D.C. Circuit Court case, to “resolve admissibility in a Montana state court under the Montana Rules of Evidence was erroneous.” Further, the Court stated that “Montana has not adopted [an] expanded view of the business records hearsay exception,” and declined to do so in this case. The Court held that “the State failed to satisfy the foundational elements of M.R. Evid. 803(6), the business records hearsay exception” by failing to provide a witness from “the entity *creating* the business record—not the entity *receiving* it—to establish that the record was prepared in accordance with its regular and trustworthy business practices.” Reversed and remanded for a new trial.

19) *State v. Pearson*, 2011 MT 55, 359 Mont. 427, 251 P.3d 152

The defendant appealed an order of the District Court denying his motion to suppress and dismiss evidence. He argued 1) that the officers' conduct exceeded the scope of his traffic stop, and 2) that the officers would not have inevitably discovered the evidence obtained in the officers' unwarranted second search of his fanny pack. In this case, the defendant was pulled over for a broken headlight. After observing some suspicious behavior of the defendant and discovering the defendant was on probation by running the license plate, an officer had the defendant step out of the car and submitted him to pat down search. The officer also searched his fanny pack for weapons. The officer then saw a can of pepper spray in the defendant's vehicle and, based on the knowledge the probationers are not allowed to have weapons including pepper spray, the officer handcuffed the defendant and placed him the back of the police car. The officer attempted to contact the defendant's probation officer while another officer obtained consent to search the vehicle and conducted another search of the fanny pack. During the second search of the fanny pack, the other officer discovered a bundle of methamphetamine. On the first issue, the Montana Supreme Court concluded that the articulable facts obtained after the initial stop for a broken tail light (the defendant pulled off the road and into a parking spot instead of pulling over on the side of the road, he jerked about nervously in the car and appeared to reach to the passenger seat for what officers feared might have been a weapon, both officers saw him tightly gripping a wad of cash in his hand, an officer saw a “meth watch” sticker in the rear window of the car, and suspected illegal drug use, and a check on his driver license revealed that he was on probation and had a drug history) “supported the officers' suspicion that [the defendant] might have weapons or contraband in his car,” and that “this suspicion properly served to enlarge the scope of his traffic stop and justified the officers' additional questioning.” On the second issue, the defendant contended that he consented only to a search of his car, and, therefore, the second search of his fanny pack constituted an unlawful search. The Court agreed that the second search of the fanny pack was unlawful, however, it stated that the “doctrine of inevitable discovery applied and thereby rendered admissible the evidence.” The Court concluded that the officers' would have inevitably discovered the methamphetamine found in the second search of the defendant's fanny pack during a routine inventory search. In response to the dissent, the Court stated that “the search of [the defendant's] fanny pack [was] not justified by an unlawful ‘after-the-fact’ consent. [His] possession of pepper spray violated the conditions of his probation and subjected him to immediate detention. The officers had substantial evidence to detain [him] before, and independent of, the unlawful search of [his] fanny pack that revealed

the bundle of methamphetamine. The evidence supports our conclusion that [he] would have been subjected, therefore, to a routine inventory search at the detention center. The officers inevitably would have discovered the methamphetamine in [his] fanny pack.” Affirmed.

Justice Nelson filed an opinion concurring in part and dissenting in part. He stated that he agreed with the Court on the first issue, but disagreed on the second issue. He stated that the Court “incorrectly applied the inevitable discovery doctrine to the facts in this case.” Justice Nelson argued that the assumption that the evidence would have inevitably been discovered during an inventory search at the detention facility “presuppose[d] that the officers had decided to arrest [the defendant] and transport him to the detention facility even before they searched the fanny pack for the second time.” He argued that the facts did not support this assumption. Justice Nelson stated that “the evidence seized from [the defendant’s] fanny pack was not the inevitable product of a legal probationary search already in progress. The District Court’s reasoning to the contrary assumes a post-search authorization can cure the illegality of the search, but the inevitable discovery doctrine is not meant to justify law enforcement’s decision to not follow proper procedure.” Regarding the assumed future inventory search at the detention facility, Justice Nelson argued that the Court relied on “the assumption that [the defendant] would have been detained for the pepper spray violation alone. However, [the defendant’s probation officer] did not testify that he would have authorized a *probation hold* absent the drug evidence. Rather, he testified that he would have authorized a *search* of [the defendant’s] vehicle and fanny pack had the officers contacted him after observing the pepper spray.” Justice Nelson argued that the search at the detention facility was not “inevitable” because it was dependent on the officer’s talking with the probation officer and the probation office authorizing the probation hold on just the pepper spray. However, the probation officer testified that he authorized the hold based on *both* the pepper spray and the methamphetamine. The officer did testify that he would have arrested the defendant based on the pepper spray alone, however, Justice Nelson argued that the officers’ actions were inconsistent with that testimony. He questioned, “If the pepper spray alone was enough in the officers’ opinion to justify [the defendant’s] arrest, why bother to enlist additional officers to search [his] vehicle? Why not just arrest [him] for the probation violation and take him to jail? Why bother to solicit [his] consent to search his vehicle unless the officers felt they did not yet have enough evidence to arrest him? And why, if they had already decided to arrest [him] after finding the pepper spray, did they wait so long to read him his Miranda rights? Why, if [the officer] intended to arrest [the defendant] anyway, did he need the permission of [the defendant’s] probation officer to transport [him] to jail? Justice Nelson concluded that the State failed to prove by a preponderance of the evidence that the tainted evidence would inevitably have been discovered through lawful means and that “[i]n fact, the evidence [was] to the contrary.” Justice Nelson concluded that he would have reversed the case based on the second issue.

20) *City of Missoula v. Moore*, 2011 MT 61, 360 Mont. 22, 251 P.3d 679

The defendant pled no contest in Municipal Court to operating a noncommercial vehicle with an alcohol concentration of .08 or more (DUI per se). She reserved her right to appeal the court’s denial of her motion to suppress and dismiss. The District Court denied her appeal. On appeal, the Montana Supreme Court considered two issues: 1) Did the District Court correctly determine that the defendant raised an objection to the 911 transcripts for the first time on appeal? 2) Did substantial evidence support the District Court’s finding that the officer had

particularized suspicion to conduct an investigatory stop of the defendant's vehicle? On the first issue, the Court stated that the defendant "assented to and relied upon the 911 transcripts during the hearing," that "her general, global objection at the beginning of the hearing did not preserve for appeal her current objection to the 911 transcripts," and that "treating [her] global objection as a motion in limine d[id] not change the result." The Court concluded that "[h]er objection was not specific enough to relieve her of her duty to contemporaneously object during the hearing," and "the District Court correctly determined [she] did not preserve her objection for appeal and properly considered the 911 transcripts in analyzing whether particularized suspicion existed." On the second issue, as the officer's particularized suspicion was based upon a citizen informant's report, the Court analyzed the three factor test from *State v. Pratt* to determine the reliability of the informant's report. 286 Mont. 156, 951 P.2d 37 (1997). Under the first *Pratt* factor, the Court concluded that both informants in this case identified themselves to the authorities. As to the second *Pratt* factor, the Court concluded that both informants provided information based on their personal observations. On the third *Pratt* factor, the Court concluded that the officer corroborated both informants' information and reiterated that it was enough that the officer only corroborated innocent behavior, as the other two *Pratt* factors were met. Affirmed.

21) *State v. McDowell*, 360 Mont. 83, 253 P.3d 812

The defendant pled no contest in District Court to assault with a weapon and burglary. He appealed his sentences. On appeal he argued that 1) the prosecutor breached the plea agreement and 2) the District Court erred by not crediting him for time served. On the first issue, the Montana Supreme Court concluded that the prosecutor's conduct at sentencing (calling the victim as a witness, calling the person who prepared the Pre-sentence investigation report (PSI) as a witness, and relying on facts from the PSI) did not undercut the plea agreement. On the second issue, the Court stated, "Each day of incarceration prior to or after a conviction must be credited against a defendant's sentence." The Court concluded that, as the defendant was incarcerated, released, and subsequently re-incarcerated until sentencing, the District Court erred in not giving the defendant any credit for this time served. Remanded to the District Court for a determination of the correct amount of credit to be given for time served.

22) *State v. Wilmer*, 2011 MT 78, 360 Mont. 101, 252 P.3d 178

The defendant was convicted of waste of a game animal and failure to tag the carcass of a game animal. On appeal, he argued 1) that the District Court erred in admitting photographs of the deer carcass several days after it was seized from his property, and 2) the District Court erred in admitting expert testimony regarding the condition of the meat. On the first issue, the defendant argued that the photographs were not probative as they were taken three days after the deer was confiscated and were thus "not instructive as to the condition of the carcass while in [the defendant's] possession." On this issue, the Montana Supreme Court stated, "Any change the carcass may have undergone in the three days between confiscation and disposal affected the weight of the evidence rather than its admissibility," and found that the photographs were properly admitted. On the second issue, the defendant argued that the District Court should have excluded expert testimony "because it was based solely on [the expert's] observation of the photographs admitted at trial and because the jury reasonably could have determined whether the meat was fit for human consumption without expert testimony." The Court first determined that the expert's opinion based solely on the photographs was properly admitted as it was "helpful to the jury in reaching a conclusion on whether the meat had been wasted." Further, the Court

concluded that the determination of the quality of meat was beyond the ordinary understanding of the jury and required expert testimony. Affirmed.

23) *Nava v. State*, 360 Mont. 96, 255 P.3d 53

The defendant was convicted of deliberate homicide and sentenced to life in prison. The defendant appealed the District Court's denial of his petition for Postconviction Relief (PCR). He argued 1) that the District Court erred in ruling that his PCR Petition was untimely, 2) that the interests of justice require this matter be remanded so that he can file an amended PCR Petition, and 3) that the District Court erred by not appointing him counsel before dismissing his PCR Petition. On the first issue, the Montana Supreme Court found that when the defendant delivered his PCR Petition and supporting documents to the Clerk of Court, and the Clerk time stamped them as "filed," the defendant successfully filed his PCR Petition within one year from the date his conviction was final. The Court stated that the District Court's subsequent ruling on a separate motion did not invalidate his timely filing of the Petition. The Court held that the District Court erred in concluding his PCR Petition was untimely. On the second issue, the defendant urged the Court to consider "his pleadings as a whole, and not foreclose his right to pursue postconviction relief simply because he inserted the facts supporting his claims into his simultaneously filed supporting memorandum, rather than directly into the PCR Petition." He requested the Court remand his case to allow him to amend his PCR Petition once, as permitted by § 46-21-105(1)(a), MCA. The Court stated affirming the District Court simply because the defendant attached his recitation of facts to a memorandum rather than the Petition would elevate "form over substance," and allowed the defendant the opportunity to amend his PCR Petition. The Court declined to address the third issue because it was mooted by the fact that he retained counsel. Reversed and remanded with instruction to allow the defendant to file an amended PCR Petition with the assistance of counsel.

24) *State v. Otten*, 360 Mont. 144, 253 P.3d 834

The defendant was convicted of operating a motor vehicle while declared to be a habitual traffic offender. On appeal he argued that 1) the District Court's denial of his motion to dismiss was erroneously premised on an incorrect definition of "motor vehicle," 2) the District Court erred in denying his motion to dismiss on the ground that there was insufficient evidence to support the verdict, and 3) the District Court erroneously instructed the jury on the definition of "motor vehicle." On the first issue, the defendant argued that because subsection (ii) of § 61-1-101(40)(a) defining a "motor vehicle" applied to quadricycles, subsection (i) could not be interpreted to also include quadricycles within its definition. Subsection (i) defined a "motor vehicle" as "a vehicle propelled by its own power and designed or used to transport persons or property upon the highways of the state." He argued that the State must have shown that his quadricycle was "equipped for use on the highways as prescribed in chapter 9" under subsection (ii) and failed to submit sufficient evidence at trial to do so. The Montana Supreme Court concluded that the quadricycle could have been found to be a motor vehicle under either subsection of the statute. On the second issue, the Court concluded that the testimony of an officer and a witness that they had seen the defendant ride his four-wheeler around town on several occasions, along with the defendant's current registration of the four-wheeler as "street legal" provided sufficient evidence to support the jury's verdict. On the third issue, the Court concluded that the District Court correctly determined that the full statutory definition of "motor vehicle" was applicable to the defendant's four-wheeler and "therefore correctly instructed the

jury to apply the definition in § 61–1–101(40), MCA, and did not abuse its discretion in doing so.” Affirmed.

25) *State v. Grant*, 360 Mont. 127, 252 P.3d 193

The defendant was convicted of aggravated assault after a jury trial in District Court. On appeal he argued that the District Court’s action of ceasing his counsel’s juror-by-juror inquiry of their understanding of “protracted” deprived him of the right to an impartial jury. The Montana Supreme Court concluded that it was “within the District Court’s discretion to limit counsel’s insistent focus on one word in the statutory elements of the offense,” as this questioning “struck the District Court as taking on elements of argument that the victim’s injury was not of a protracted nature, rather than inquiry into juror bias.” Affirmed.

26) *State v. Finley*, 360 Mont. 173, 252 P.3d 199

The State of Montana appealed an order of the District Court reversing the defendant’s conviction for partner or family member assault, entered in a Justice Court of record. On appeal, the State argued that the evidence presented to establish reasonable apprehension of bodily injury was sufficient to support the defendant’s conviction. The defendant argued that the State’s appeal was precluded by law. As to the issue raised by the defendant, the Montana Supreme Court found that “the State is not precluded from appellate review when a district court, acting as an intermediate appellate court, sets aside a guilty verdict entered by a justice court of record” as such circumstances do not “subject defendants to impermissible retrial, further prosecution or double punishment for the same offense.” On the issue raised by the State, the Court found that there was sufficient evidence beyond the testimony of the victim recanting the statements she made to officers on the night of the incident for the Justice Court to conclude that “a reasonable person would have realized that bodily injury could result.” The Court held that, based on the record, “the trier of fact could have found the required elements of partner or family member assault beyond a reasonable doubt,” and the District Court erred in reversing the guilty verdict entered by the Justice Court. However, the Court reversed and remanded for the District Court to resolve an issue of prosecutorial misconduct raised by the Defendant but not addressed by the District Court.

27) *State v. Maine*, 360 Mont. 182, 255 P.3d 64

The State of Montana charged the defendant with felony driving under the influence of alcohol (DUI). He filed a motion seeking to invalidate one of the prior convictions and thus reduce the present offense to his third DUI, a misdemeanor. The District Court denied the motion. He then pled guilty pursuant to a plea agreement, reserving his right to appeal the denial of his motion. On appeal, the defendant argued that the District Court erred in denying his motion to reduce the charge to a misdemeanor. With regard to the approach for determining whether a prior conviction may be used to enhance punishment on a current charge, the Montana Supreme Court altered the burden-shifting procedural framework from *State v. Okland*, 283 Mont. 10, 941 P.2d 431 (1997). The Court in *Okland* required that the following procedure be followed to determine if a prior conviction may be used to enhance punishment on a prior charge: “(1) a rebuttable presumption of regularity attaches to the prior conviction, (2) the defendant has the initial burden to produce direct evidence that the prior conviction is invalid, and (3) once the defendant has made this showing, the burden shifts to the State to produce direct evidence and prove by a preponderance of the evidence that the prior conviction was not entered

in violation of the defendant's rights.” Following a detailed description of federal and Montana law, the Court added to the procedure as follows:

(1) a rebuttable presumption of regularity attaches to the prior conviction, and we presume that the convicting court complied with the law in all respects; (2) the defendant has the initial burden to demonstrate that the prior conviction is constitutionally infirm; and (3) once the defendant has done so, the State has the burden to rebut the defendant's evidence. However, as the moving party, the ultimate burden of proof—which includes both the burden of production and the burden of persuasion—shall be on the defendant, who must prove by a preponderance of the evidence that the conviction is invalid. The burden is not on the State to prove by a preponderance of the evidence that the conviction is valid, and this facet of the framework . . . is accordingly modified to this extent. Furthermore, to meet his or her burden of proof, the defendant may not simply point to an ambiguous or silent record, but must come forward with affirmative evidence establishing that the prior conviction was obtained in violation of the Constitution. Self-serving statements by the defendant that his or her conviction is infirm are insufficient to overcome the presumption of regularity and bar the use of the conviction for enhancement.

The Court then found that the defendant did not meet his initial burden to demonstrate that his prior conviction was constitutionally infirm as he failed to show that 1) his counsel's performance fell below an objective standard of reasonableness, and 2) a reasonable probability existed that the result of his trial would have been different but for counsel's errors. Affirmed.

Justice Baker filed a concurring opinion. Justice Baker stated that she agreed that a “strong interest in finality of judgments supports placing a limit on collateral attack of underlying convictions,” however, like the Court, she did not find a textual basis for a rule, similar to the federal rule, “that allows such attack for the violation of one fundamental right but not for the violation of another, equally fundamental right.” She agreed with the Court's decision to “reject that artificial distinction in favor of a rule of convenience.”

Justice Rice filed an opinion concurring in part and dissenting in part. He stated that he concurred with the Court's judgment affirming the District Court, but dissented from the Court's reasoning. He argued that the Court's decision allows for “collateral attacks upon prior convictions on virtually limitless grounds” which substantially expands the Court's jurisprudence that only allowed challenges based on asserted violation of the right to counsel. Justice Rice further argued that the Court's decision was contrary to that of the United States Supreme Court and other states which have addressed the issue. He argued that finality in judgments benefits the judiciary as well as the people and that opening the door too wide for collateral attacks on prior judgments would create administrative difficulties.

28) *State v. Wright*, 360 Mont. 246, 253 P.3d 838

The defendant was convicted of sexual intercourse without consent following a jury trial in District Court. He appealed, arguing 1) that his right to due process was violated by the false and misleading presentation of DNA evidence, and 2) that he received ineffective assistance of counsel. On the first issue, the Montana Supreme Court concluded that “the jurors were not left

with an entirely uncontested interpretation of the DNA evidence,” and thus held that the defendant did not demonstrate that his right to due process was violated. On the second issue, the Court concluded that the record did not reveal why the defendant’s counsel failed to undertake the actions the defendant alleged that she should have taken thus the claim could not be addressed on direct appeal. Affirmed.

29) *State v. Brown*, 360 Mont. 278, 253 P.3d 859

The defendant’s first trial ended in a mistrial. Subsequently the defendant was convicted in Justice Court of driving while the privilege to do so was suspended, failing to carry proof of insurance, and driving under the influence (DUI), all misdemeanor charges. On appeal, she argued that she receive ineffective assistance when her counsel failed to file a motion to dismiss on grounds that she did not receive a speedy trial. The Montana Supreme Court stated that misdemeanor charges must be dismissed under § 46–13–401(2), MCA, if the defendant did not request a postponement and the State did not show good cause for the delay. As the defendant did not move for any postponements after the second trial was scheduled, the State was required to “insist upon a timely trial date or show good cause why the trial could not be held within the required 6 months.” The Court found that the State did neither. The Court concluded that “the failure of [the defendant’s] counsel to move for dismissal after the expiration of [six] months following the mistrial was deficient performance, and does not meet the objective standard of reasonableness,” as there was “no plausible justification’ for counsel’s failure to file the motion.” Further, the Court concluded that, but for counsel’s deficient performance, the result of the proceeding would have been a dismissal of the charges and the defendant suffered extreme prejudice as a consequence of her ineffective assistance of counsel. Remanded with instructions to dismiss Brown’s charges and vacate her conviction.

30) *Rogers v. State*, 360 Mont. 334, 253 P.3d 889

The defendant was convicted on two counts of sexual assault. He filed a petition for post-conviction relief which the District Court denied. The defendant appealed, arguing 1) that he received ineffective assistance of counsel during his trial and on direct appeal and 2) that prosecutorial misconduct violated his due process rights. On the first issue, the defendant identified several alleged deficiencies in his attorney’s “pretrial investigation, use of expert testimony, decisions regarding objections to vouching and prosecutorial misconduct, admissibility of evidence, and other trial irregularities,” as well as two additional claims that “allegedly occurred during [his attorney’s] representation of [him] on direct appeal.” On this issue, the Montana Supreme Court found that none of the attorney’s alleged instances of ineffectiveness during pretrial investigation or during trial fell outside the “broad professional discretion of an attorney’s strategic decisions.” Further, the Court found although the attorney could have appealed the admissibility of a videotape in which the defendant had attempted to remove his handcuffs, the District Court’s incorrect admission of the videotape did not constitute reversible error of his conviction. Thus, the Court concluded that “a reasonable probability d[id] not exist that the outcome of [the defendant’s] direct appeal would have been different had [his attorney] additionally appealed the videotape evidence of the handcuff incident.” On the second issue, the Court found that because the defendant did not raise the issue on direct appeal he could not raise it in post-conviction relief. Affirmed.

31) *State v. Heavygun*, 360 Mont. 413, 253 P.3d 897

The Defendant was convicted in District Court of deliberate homicide, driving under the influence (DUI), violation of an order of protection, criminal endangerment, driving while the privilege to do so is suspended or revoked, and tampering with physical evidence. On appeal, he argued 1) that his right to be present at all critical stages of his criminal proceeding was violated, and 2) that he received ineffective assistance of counsel. On the first issue, the Montana Supreme Court found that the defendant was not prejudiced by his absence from the omnibus hearing, and thus declined to consider whether an omnibus hearing constitutes a “critical stage.” Instead, the Court proceeded by assuming that the omnibus hearing was a critical stage. The Court found that the defendant’s absence from the omnibus hearing was not a structural defect in that it did not render the trial “so fundamentally unfair that reversal [was] required.” On the second issue, the Court concluded that because “the record does not demonstrate the reasoning (the ‘why’) behind any of the alleged errors committed by [the defendant’s] counsel,” his claims were “better addressed in postconviction proceedings.” The Court affirmed the District Court on the first issue, and dismissed the defendant’s ineffective assistance claims without prejudice to raising them in a postconviction proceeding.

32) *State v. Johnson*, 360 Mont. 443

The defendant, a life and disability insurance producer, was convicted on two counts of felony theft pursuant to a plea agreement. He appealed the District Court’s restitution order based on the State’s failure to submit sworn victim affidavits as required by § 46–18–242(1)(b), MCA. Although the defendant did not challenge the measure of restitution, he did claim that “because no victim affidavits were submitted, the sentence was illegal and not supported by competent evidence.” The Court concluded that the defendant failed to preserve his objection to the omission of victim affidavits. Affirmed.

33) *State v. Kopp*, 360 Mont. 501, 255 P.3d 160

The defendant appealed from the District Court’s denial of her motion to dismiss the charge of criminal possession of dangerous drugs, a felony. On appeal she argued that the District Court erred in deny her motion to dismiss pursuant to §§ 46–11–503 and –504, MCA. She had already pled guilty to possession of drug paraphernalia in Justice Court, when the baggies and spoon found in her bag were sent to the State Crime Lab. However, a syringe also found in the bag was mistakenly not sent. When the Crime Lab reported that the baggies and spoon tested positive for methamphetamine, the State charged the defendant with possession of dangerous drugs. Shortly thereafter, the State realized that the syringe had not been tested and sent it to the Crime Lab. The Crime Lab reported back that the substance in the syringe was methadone. The State moved for leave to amend the information from possession of dangerous drugs (methamphetamine) to possession of dangerous drugs (methadone). The District Court granted leave. The defendant argued that her conviction “was based on the same transaction as her prior conviction in justice court.” The Montana Supreme Court had applied a three-part test to determine when a subsequent prosecution is barred under § 46–11–504 which provides greater protection from double jeopardy than the United State Supreme Court’s “elements” test:

“(1) a defendant’s conduct constitutes an offense within the jurisdiction of the court where the first prosecution occurred and within the jurisdiction of the court where the subsequent prosecution is pursued; (2) the first prosecution resulted in an acquittal or a conviction; and (3) the subsequent prosecution is based on an offense arising out of the same transaction [as that term is defined in § 46–1–202(23), MCA].”

The Court concluded that “the ‘spatial proximity’ of these items within the blue bag [was] not sufficient, by itself, to connect these items in a single objective,” and thus, “the charges [did] not fall within the meaning of ‘same transaction’ under § 46–1–202(23)(a), MCA.” Affirmed.

Justice Nelson filed a concurring opinion. He stated that he agreed with the Court’s decision and added only that “the Stipulated Facts [on which the defendant’s motion was based] offer zero insight into what [the defendant’s] criminal objective or objectives were. Hence, her motion was properly denied for failure to provide factual support for her claim.”

34) *State v. Stock*, 361 Mont. 1, 256 P.3d 899

The defendant was convicted by jury in District Court of felony incest and felony tampering with evidence. He appealed, arguing that 1) the District Court erred when it allowed a six-year-old alleged incest victim to testify via two-way electronic audio-video communication rather than in the presence of him and the jury, 2) the District Court abused its discretion when it prohibited him from conducting a forensic interview with, and calling as a trial witness, the four-year-old sibling of the two alleged incest victims, and 3) the District Court erred in allowing the State to present evidence and summary testimony regarding pornographic images obtained from his computer under § 26–1–103, MCA, the transaction rule. On the first issue, the defendant argued that the District Court’s decision to allow the victim to testify via two-way electronic audio-video communication was unconstitutional as it violated his rights under the Confrontation Clause. The Montana Supreme Court concluded that the defendant’s right to confront the witness was not violated as the witness was “under oath, [the defendant] had the opportunity of a full and contemporaneous cross-examination of [the witness], and [the defendant] and the jury had the ability to listen to [the witness] and observe her demeanor, body language, and any hesitancy during testimony in real-time via the two-way audio-video monitor.” The Court added that the defendant “also had the opportunity to confer with his attorney during the testimony.” On the second issue, the Court concluded that “it was entirely reasonable for the [District Court] to conclude that [the youngest child] did not have relevant testimony to offer, was incompetent to testify, and would be psychologically harmed if required to testify.” The Court affirmed the District Court’s order prohibiting the youngest child from being interviewed and from testifying at trial. On the third issue, the Court declined to rule on the merits because the defendant failed to preserve the issue for appeal. Affirmed.

35) *State v. Main*, 360 Mont. 470, 255 P.3d 1240

The defendant was convicted of deliberate homicide, felony murder. He appealed, arguing that 1) the District Court erred by denying his motion to suppress, 2) the District Court erred by denying his motion to dismiss for insufficient evidence at the close of the State’s case-in-chief, and 3) he was denied effective assistance of counsel. On the first issue, the Montana Supreme Court found that the defendant’s request to call his mother so she could call his lawyer prior to his initial questioning was not a clear and unequivocal request for a lawyer. The Court further found that the defendant’s waiver of his *Miranda* rights was “voluntarily, knowingly, and intelligently given.” On the second issue, the Court reviewed the evidence presented by the State and found that “the evidence was sufficient to permit the jury to find the elements of the crime had been committed beyond a reasonable doubt.” On the third issue, the Court concluded that the defendant’s ineffective assistance of counsel claims were more appropriate for

postconviction relief proceedings and that the defendant did not meet the burden for plain error review of these claims. Affirmed.

36) *State v. Garcia*, 360 Mont. 537, 254 P.3d 589

The defendant was convicted of aggravated assault following a jury trial in District Court. He appealed, arguing that his sentence was enhanced because he refused to admit guilt. The Montana Supreme Court stated that the District Court did not sentence the defendant more harshly because he refused to admit guilt, but rather for the gravity of the offense. Affirmed.

37) *State v. Burns*, 361 Mont. 191, 256 P.3d 944

The defendant was convicted pursuant to a guilty plea in the District Court of driving under the influence (DUI) per se and was designated as a persistent felony offender (PFO). He appealed, arguing that 1) the District Court erred in denying his motion to dismiss for lack of a speedy trial, 2) the District Court erred in denying his motion to suppress evidence, 3) the District Court erred in denying his motion to dismiss the felony DUI charge on the grounds that his third prior DUI conviction was invalid, and 4) the District Court erred in sentencing him as a persistent felony offender. On the first issue, the Supreme Court of Montana stated that the District Court “made a scrupulous recitation of the procedural dates and facts and diligently applied the *Ariegwe* analysis to those facts.” The Court found that the defendant failed to meet the burden of proof on appeal because he did not demonstrate how the District Court erred, but rather just argued that it should have come to a different conclusion for each of the four factors. Further, the Court found that “the District Court did not err in balancing and weighing the four factors and, therefore, it did not err in denying [the defendant’s] motion. On the second issue, the defendant argued that the officers did not have particularized suspicion to conduct an investigative stop. However, the Court found that under the community caretaker doctrine, the officers had reason to investigate and open the defendant’s vehicle door as he was slumped over in his seat, with his vehicle running and headlights on, on a cold night. Upon opening the door the officers smelled alcohol, observed a bottle of vodka on the passenger seat that was only one-fourth full, and observed the defendant’s red, glassy eyes, slurred speech, and difficulty locating his driver’s license, difficulty maintaining his balance, and disorientation. The Court concluded that these observations gave the officers particularized suspicion to begin a DUI investigation. On the third issue, the Court concluded that the defendant failed to show that his prior DUI conviction was invalid as his “self-serving affidavit was contradicted by the documents he submitted from the Billings Municipal Court records” from the previous conviction. On the fourth issue, the Court concluded that “the District Court did not err in sentencing [the defendant] as a PFO on the DUI per se charge because [his] sentence was within the parameters provided by statute and is consistent with this Court’s precedent” that “sentences imposed based on an offender’s status as a persistent felony offender replace the sentence for the underlying felony.” Affirmed.

38) *Patrick v. State*, 361 Mont. 204, 257 P.3d 365

The defendant appealed from an interlocutory order of the District Court substituting the second District Court judge after the first recused herself from his postconviction proceedings. He argued 1) that the District Court erred when it denied his motion to invalidate the State’s judicial substitution, and 2) that the District Court erred when it denied his request for additional time to file a motion for judicial substitution. On the first issue, the defendant argued that there

was no right to judicial substitution in postconviction proceedings, that the State never properly served the motion to substitute, and that he was denied due process because the District Court issued its order before he had the opportunity to file a reply brief. The Court concluded “that when a sentencing judge recuses herself from postconviction proceedings, the parties may move for judicial substitution pursuant to § 3–1–804, MCA.” The Montana Supreme Court clarified that normally “§ 46–21–101(1), MCA, takes precedence over § 3–1–804, MCA, because the specific policies that favor having the sentencing judge preside over postconviction proceedings conflict with the general statutory right of judicial substitution.” However, the Court stipulated that “once a petition is properly filed in ‘the court that imposed the sentence’ and the sentencing judge recuses herself, the policies articulated in [favor of maintaining the same court] are absent.” The Court held that “the District Court did not err when it concluded that § 3–1–804(8), MCA, applied, and the ‘right to move for substitution of a district judge [was] reinstated.’” On the defendant’s second argument on the first issue, the Court concluded that because judicial substitution occurs automatically upon the filing of a timely motion, the defendant’s argument that his copy of the motion was sent to the wrong address and thus he was not properly served with the motion would elevate form over function as the defendant did receive notice of the substitution to the correct address which was sent out on the same day. To the defendant’s third argument on the first issue, the Court concluded that the defendant “had the opportunity to present all of his contentions to the District Court, and the District Court considered and rejected them.” On the second issue, the Court stated, “It would be inequitable to fault [the defendant] for failing to request a judicial substitution... when he filed an objection based upon the non-frivolous belief that the substitution was invalid.” Thus, the Court found that the defendant “should have been given the opportunity to file his own motion for judicial substitution.” Affirmed in part, reversed in part, and remanded for further proceedings.

39) *State v. Torgerson*, 361 Mont. 225, 257 P.3d 373

The defendant was convicted of possession of unlawfully killed wildlife and unlawful possession of bird parts. After trial, he filed a motion for the return of property seized during the investigation which the District Court denied. The defendant appealed, arguing that the District Court erred by denying his motion for return of seized property. The Court stated that, although the jury only determined the value of the illegally possessed animals to be \$500 as opposed to the possible \$9,500 for the deer he allegedly took illegally, the jury was not required which animal or animals they believed the defendant took illegally. The Court concluded that the District Court had substantial evidence supporting its finding that “the three deer mounts which the defendant [sought] were illegally taken and that he [was] not entitled to their possession. Affirmed.

40) *State v. Spreadbury*, 361 Mont. 253, 257 P.3d 392

The defendant pled no contest to a charge of felony intimidation. He appealed from the resulting judgment entered against him in the District Court. As to whether the defendant waived the right to raise a probable cause challenge when he entered his no contest plea without reserving the issue for appeal, the Montana Supreme Court held that whether the information included allegations establishing probable cause to support the charge against the defendant is not a jurisdictional issue. The Court concluded that “by entering a no contest plea without reserving for appeal the question whether there was probable cause to support the information

filed against him, [the defendant] waived the right to raise the issue on appeal from the final judgment entered.” Affirmed.

41) *State v. DaSilva*, 361 Mont. 288, 258 P.3d 419

The Defendant was found guilty of failure to provide notice of address change as a sex offender, a felony, and resisting arrest, a misdemeanor, following a jury trial in District Court. He appealed, arguing 1) that the District Court violated his due process right by instructing the jury as a matter of law that his previous Washington conviction was a “sexual offense” and 2) that the District Court erred in granting a continuance of trial that was requested by the State to permit an amendment to the Information. On the first issue, the Montana Supreme Court found that the District Court correctly ruled and instructed the jury because the question of whether the defendant’s prior conviction in Washington was a sexual offense for which he was required to register in Montana was a question of law for the judge to decide and not a question of fact for the jury. The Court held that the District Court “‘fully and fairly’ instructed the jury on the law in this case and did not violate [the defendant’s] due process rights.” On the second issue, the Court found that while the information was amended, it was based on the same set of facts as the original information and the defendant still had three weeks to prepare for trial following the entry of the order granting the continuance. Thus, the Court concluded that the District Court did not err in granting the continuance requested by the State. Affirmed.

42) *State v. Johnston*, 361 Mont. 301, 258 P.3d 417

The defendant was charged with driving under the influence of alcohol (DUI). The District Court granted the defendant’s motion to suppress the results of his breath test and the State appealed. The defendant’s motion to suppress was based on *State v. Gieser*, in which the Montana Supreme Court stated that “breath testing machines be field inspected and calibrated on a ‘weekly basis.’” 2011 MT 2, 359 Mont. 95, 248 P.3d 300. The District Court concluded that, although the current Administrative Rules of Montana required devices to be field inspected on a monthly, not weekly, basis, “district courts are required to follow the decisions of [the Montana Supreme] Court ‘whether or not they agree with them.’” The Montana Supreme Court stated, “Nothing in the *Gieser* opinion changed the administrative rule on field certification of breath analysis instruments, nor was any change intended.” The Court concluded that although *Gieser* included an incorrect recitation of the administrative rules, that statement was dicta that should “not be cited or relied upon as authority as to how often breath analysis instruments must be field certified.” Reversed and remanded.

43) *State v. Hartsoe*, 361 Mont. 305, 258 P.3d 428

The defendant was convicted of aggravated assault, a felony, and violation of an order of protection, a misdemeanor following a jury trial in District Court. He appealed, arguing 1) the District Court abused its discretion and violated his right to due process by permitting him to be shackled in a chair and brought into the courtroom during voir dire, 2) the District Court violated his right to individual dignity by permitting him to be shackled in a chair and brought into the courtroom during voir dire, 3) the District Court erred in granting his request to represent himself, 4) the District Court erred in holding him in contempt and failed to comply with statutory and due process requirements. In deciding the first issue, the Montana Supreme Court used the two-part test set forth in *State v. Herrick*: 1) the court is persuaded by compelling circumstances that some measure is needed to maintain the security of the courtroom, and 2) the

court pursues less restrictive alternatives before imposing physical restraints. 2004 MT 323, ¶ 15, 324 Mont. 76, 101 P.3d 755. As a matter of first impression, the Court determined that “courts must act to guard against defendants who act disruptively in order to prevent or postpone their trials and degrade the judicial system” and found that “maintaining courtroom decorum constitutes a compelling circumstance under the first prong of our *Herrick* test.” In this case, the Court concluded that the first part of the *Herrick* test was met, as the defendant refused to take his seat at counsel table. However, the Court concluded that the second part of the *Herrick* test was not satisfied as there was “no record that the District Court assessed the harms associated with the use of shackles, pursued less restrictive alternatives before physically restraining [the defendant], or made any effort to conceal [his] shackles from the jury in order to limit the prejudice and harm associated with their use.” The Court then took the opportunity to modify the *Herrick* test to allow for harmless error analysis rather than following the prior precedent of automatically reversing a defendant's conviction after concluding the district court violated a *Herrick* prong. The Court concluded that “[o]nce it has been established that either prong of *Herrick* has been violated, the first question is whether the error is structural.” If the error is not structural, “the State must demonstrate that there is no reasonable possibility that the violation prejudiced the defendant.” The Court concluded that the record showed that the error committed was not structural and the “impact of the error upon [the defendant] and his defense was not so pervasive as to render it not susceptible to harmless error analysis.” However, the Court found that the record was not adequately developed to analyze whether the error is harmless. The Court declined to address the second issue because it was remanding the case based on the first issue. On issue three, the Court concluded the record showed that the defendant “voluntarily, knowingly, and intelligently waived his right to counsel.” On the fourth issue, the Court concluded that the issue was not properly before the Court as “contempt of court orders issued by a district court are final and usually unreviewable by this Court except by way of a writ of certiorari or review,” and declined to address the issue on appeal. Affirmed in part and remanded in part.

Justice Nelson filed a concurring opinion which Justice Baker joined. Justice Nelson first stated that, although he did not believe that prior caselaw required that the consideration of less restrictive alternatives before imposing physical restraints on the defendant be documented in the record, he agreed that the approach provided “trial courts and prosecutors with a strong incentive to create a proper record where a defendant has been shackled.” Next, Justice Nelson stated that he agreed with the Court that the error was not structural as the due process violation did not “so contaminate the framework of the trial as to preclude analysis under harmless error standards.” However, he reached this conclusion, not because the defendant was only shackled for a small portion of voir dire and then free from shackles for the remainder of his trial, but rather because the potential jurors were present when the defendant refused to take his seat and were “cognizant of the reason why [the defendant] was returned to the courtroom shackled to the chair.”