I. JURISDICTION

***City of Cut Bank v. Bird*, 2001 MT 296, 307 Mont. 460, 38 P.3d 804 (Glacier). State Appeal; Reversed; Gray, C.J.** City police attempted to pull over DUI suspect within his jurisdiction, but vehicle proceeded onto Blackfoot Reservation. City officer notified county sheriff, and they eventually caught up with the vehicle after it crashed on the reservation. Tribal police officers were notified and took occupants into custody. Bird was eventually charged with reckless driving in city court for eluding a police officer. The district court granted Bird's motion to suppress, ruling that neither the city nor county officer had jurisdiction to effectuate an arrest on the reservation. The Supreme Court disagreed on the basis of U.S. v. Patch, (9th Cir. 1997), 114 F.3d 131, which held that "under the doctrine of hot pursuit, a police officer who observes a traffic violation within his jurisdiction to arrest may pursue the offender into Indian County to make the arrest." Bird also argued that his extradition from the reservation was illegal, which the Supreme Court rejected. Justice Nelson, concurring, pointed out that the majority need not have considered that issue since irregularities in extradition proceedings must be made in the asylum state, i.e., tribal court. Justice Trieweiler, dissenting, concluded that the district court properly suppressed all evidence of conduct which occurred on the reservation because that conduct was irrelevant to the charge of eluding a police officer within city limits.

II. INVESTIGATIVE PROCEDURES/TECHNIQUES

A. Investigative Subpoenas

***State ex rel. McGrath v. District Court*, 2001 MT 305, 307 Mont. 491, 38 P.3d 820 (Ravalli). Order granting State's request for writ of supervisory control; remanded for further proceedings.** Defendant refused a BAC test at hospital following a car accident. Officer obtained an investigative subpoena to access her medical records, which showed a BAC of above the legal limit. District court refused to allow the State to use those results because of the Defendant's refusal, which would permit an "end run" around implied consent statutes. The Supreme Court held that district court was proceeding under a mistake of law and granted the writ. The Court held on the basis of its decision in State v. Newill, 285 Mont. 84, 946 P.2d 134 (1997), that the implied consent law does not apply to diagnostic blood tests taken for medical treatment purposes. The only question for the district court is whether the evidence is competent under Mont. Code Ann. § 61-4-404(3), and the Supreme Court remanded for that inquiry. Trieweiler dissented, concluding that Mont. Code Ann. § 61-8-402 requires the defendant's consent

before medical tests can be obtained for purposes of DUI prosecution. He would overrule Newill.

***State v. Bilant*, 2001 MT 249, 307 Mont. 113, 36 P.3d 883 (Musselshell). Affirmed; Leaphart, J. (en banc)** Bilant was involved in a car accident. There was evidence he had been drinking and he told the officer that he had taken a pain reliever called "propoxy" that afternoon, prescribed by Dr. Teal in Billings. The officer than called Dr. Teal's office and was told that Bilant's only prescription was for propoxyphene napsylate acetamimophen (Darvocet N100).

At the next interview, Bilant denied his earlier statement that he had taken "propoxy" and said he had only taken a Tylenol the morning of the accident. The State then applied for an investigative subpoena from Dr. Teal's office, seeking information about Bilant's prescriptions from 1996 to the present. The office responded to the subpoena by sending the county attorney Bilant's entire medical file dating from 1991.

Bilant moved to suppress the medical information provided by the office over the phone and pursuant to the subpoena. The district court denied the motions.

The Court addressed the following issues:

(1) Did the district court err by denying a motion to suppress medical record information acquired by an investigating officer from a health care provider by telephone inquiry?

The Court held that the information obtained by the officer's telephone inquiry to Dr. Teal's office should have been suppressed on the basis of "informational privacy" provided by Article II, Section 10 of the Montana Constitution. Bilant did not forfeit his constitutional right to claim confidentiality of his medical records by revealing limited information to the officer. She conducted an illegal search when she telephoned the doctor's office without obtaining an investigative subpoena under Mont Code Ann § 46-4-301(3), which requires probable cause.

(2) Did the district court err in finding probable cause for an investigative subpoena seeking medical record information?

The Court held that the investigative subpoena was nevertheless properly issued. Bilant volunteered the information that he took "propoxy" on the afternoon of the accident. That evidence was independent of the information derived from the illegal phone inquiry and could be legally used.

The Court held that it would review de novo the probable cause basis for an investigative subpoena for constitutionally protected material, which was based in part on illegally obtained information, to determine whether probable cause supported its issuance without the illegal evidence. The Court found that after the medical information subject to suppression had been excised, the affidavit

established probable cause and that the State had a compelling interest in obtaining Bilant's medical records in order to confirm his initial admissions to the officer.

(3) Did the district court issue the investigative subpoena for an overly broad time period?

Bilant argued that since the accident occurred in January and the subpoena sought medical records "to present," the subpoena was overly broad. The Court rejected that argument, agreeing with the State that Bilant could have been obtaining refill orders from the office for prior prescriptions.

Finally, Bilant attempts to implicate the State for the medical office's delivery of records dating back to 1991, when the subpoena only sought records dating back to 1996. The Court noted that the laws regarding disclosure of medical information are directed to health care providers, not law enforcement and that the exclusionary rule was thus inapplicable.

B. Miranda/Interrogation

***State v. Spang*, 2002 MT 120, ___ Mont. ___, ___ P.3d ___ (Hill). Affirmed in Part; Reversed in Part; Regnier, J.** After law enforcement officers read Spang his *Miranda* rights at the beginning of Spang's second interview, Spang stated, "shit, man I need a lawyer". An officer asked Spang whether he wished to continue with the interview or talk with an attorney first. Spang agreed to continue. Spang's request for counsel was unequivocal. Thus, he could not be the subject of further questioning by officers, even a non-incriminating, clarifying question, until an attorney was made available to him or he initiated further conversation. The district court erred when it denied Spang's motion to suppress the statements he made during his second custodial interrogation, and the error, although trial error, was not harmless. Even though the inadmissible evidence was cumulative to other admissible evidence, including Spang's first voluntary statement to law enforcement, the State failed to demonstrate that qualitatively, there is no reasonable possibility that Spang's second statement, and the transcripts made therefrom, did not contribute to his conviction.

***State v. Spang*, 2002 MT 120, ___ Mont. ___, ___ P.3d ___ (Hill). Affirmed in Part; Reversed in Part; Regnier, J.** The district court properly denied Spang's motion to suppress Spang's voluntary statements made to law enforcement on September 17, because there is no evidence to suggest that the delay (Friday to Monday) between Spang's arrest and initial appearance influenced the voluntariness of his September 17 statements.

III. SEARCH AND SEIZURE

A. Search Warrants

***State v. Gray*, 2001 MT 250, 307 Mont. 124, 38 P.3d 775 (Silver Bow). Affirmed; Regnier, J.** There was sufficient probable cause to support the issuance of a search warrant where the reliable confidential informant's hearsay information was corroborated by independent police investigation, such as investigation of the exterior of Gray's home, and inspection of utility records for Gray's residence.

***State v. Griggs*, 2001 MT 211, 306 Mont. 366, 34 P.3d 101 (Gallatin). State Appeal; Affirmed; Nelson, J.** An anonymous informant provided police with information about Griggs' illegal mushroom grow operation and other personal information about Griggs, including his residence, vehicle, military background, and use of the mushrooms to trade for marijuana. The police corroborated all of the personal information, including an admission by Griggs that he used marijuana. Affirming the district court's order suppressing evidence seized pursuant to a warrant based on this information, the Supreme Court held that in order for the independent police investigation of an anonymous tip to be sufficient to support a probable cause determination, the police corroboration must reveal indicia of human conduct that becomes suspicious when viewed in conjunction with the informant's incriminating information concerning the suspect's criminal activity.

***State v. Hardaway*, 2001 MT 252, 307 Mont. 139, 36 P.3d 900 (Yellowstone). Reversed; Cotter, J.** Hardaway was found with blood on his hands near the scene of a burglary and was arrested and taken to the jail, where the blood on his hands was swabbed. The Supreme Court held that the officers should have first obtained a search warrant to swab the blood, finding that the swabbing constituted a search, that the search was not incident to the arrest, and that there were no exigent circumstances justifying a warrantless search.

***Trent Hauge v. District Court for the Twenty-second Judicial District of the State of Montana*, 2001 MT 255, 307 Mont. 195, 36 P.3d 947 (Stillwater). Petition for Writ of Supervisory Control Denied.** When a search warrant allowed officers to seize "anything else of value", in violation of the particularity requirement, the appropriate remedy is to severe the overbroad catchall clause and suppress only that evidence seized pursuant to the catchall clause. In this case, no evidence was seized pursuant to "anything else of value" clause.

The search warrant was supported by probable cause because the officer

sufficiently corroborated the CI's information by: verifying the identities of the occupants of the trailers and the ownership of the vehicles; corroborating the CI's report that one of the principals in the drug operation was stopped for driving without taillights; personally observing the mobile homes on three separate occasions and finding the traffic patterns to be just as the CI described; and by contacting a neighbor who had previously complained of suspected drug activity and heavy traffic and confirming that the traffic patterns still continued.

B. Investigative Stops

***Grindeland v. State*, 2001 MT 196, 306 Mont. 262, 32 P.3d 767 (Cascade). State Appeal; Affirmed; Gray, C.J.** Grindeland was stopped for failing to use his turn signal and, based on observations after the stop, was asked to perform a breath test which he refused. His drivers license was suspended as a result. The district court reinstated Grindeland's license because, in its determination, Grindeland was not required to signal since the investigating officer could not specifically identify what vehicles might have been affected by Grindeland's failure to signal. (The relevant statute, Mont Code Ann § 61-8-336, forbids a driver from turning a vehicle "without giving an appropriate signal . . . in the event any other traffic may be affected by such movement.") Without the obligation to signal, the investigating officer lacked particularized suspicion to initiate a stop. The State appealed and the Supreme Court affirmed the lower court's ruling. Justice Leaphart dissented, noting that this places an impossible burden on the State and forces the officer to pay more attention to the surrounding circumstances than the vehicle which he is stopping.

***Bracha v. State*, 2002 MT 43N (unpublished) (Judith Basin). State Appeal; Reversed; Gray, C.J.** Bracha was stopped after she failed to dim her high beams to a highway patrol vehicle traveling in the opposite direction. Based upon the investigating officer's observations after the stop, Bracha was asked to take a breath test. Bracha refused the test, and her driver's license was suspended. Bracha petitioned the district court for reinstatement of her driving privileges. Relying upon Reynolds, Broken Rope and Lafferty, the district court reinstated Bracha's license--concluding that a minor traffic violation does not constitute grounds for an investigatory stop. The State appealed, and the Court reversed, "hold[ing] that Bracha's failure to dim her high beams for oncoming traffic was an adequate basis for an investigatory stop."

***State v. Clayton,* 2002 MT 67, 309 Mont. 215, 45 P.3d 30 (Gallatin). Affirmed;**

Leaphart, J. Bozeman police officers followed Clayton's vehicle after observing it "accelerating hard" as it left a local bar and grill. Within a short period of time, Clayton's vehicle turned on a cross street and came to a stop. As the patrol vehicle pulled in behind Clayton's vehicle, one of the officers shined a police spotlight on the vehicle "to see how many people were in there." As the patrol vehicle was coming to a stop, the driver (Clayton) exited his car, looked at the patrol car, and started running. One of the officers recognized Clayton immediately. Knowing that Clayton's driver's license was revoked, the officer gave chase. Clayton fell several times before he was chased down and handcuffed. Clayton filed a motion to suppress, claiming that he had been subjected to an illegal stop. The district court denied the motion. Clayton then pled guilty to felony DUI, reserving his right to appeal the suppression issue.

On appeal, the State argued that a reasonable person would not feel seized or not free to leave merely because the person's vehicle was illuminated by an officer's spotlight. However, the State contended that a person running like a bat-out-of-hell was neither a reasonable person nor a seized person. The State argued it would be illogical to conclude that a "fleeing person" is "seized," relying upon the United States Supreme Court's opinion in California v. Hodari D., which held that a seizure occurs only when a suspect actually submits to lawful authority. The Court rejected the State's reliance on Hodari D., and refused to "march lock-step." In the Court's view Hodari D. "added a subjective element to the traditionally objective test of whether a seizure has occurred." The Court held that Article II, Section 11 requires a purely objective test, which does not depend upon a defendant's subjective reactions. Nonetheless, distinguishing its prior opinion in Roberts, the Court held that no stop (seizure) occurred prior to the time Clayton took off running: "The police officers slowing down and coming to a stop behind Clayton's vehicle and shining a spotlight into his vehicle do not amount to such a show of authority that a reasonable person would have believed he or she was not free to leave."

***City of Missoula v. Cook*, 2001 MT 237, 307 Mont. 39, 36 P.3d 414 (Missoula). Affirmed; Gray, C. J.** Cook moved to suppress all evidence acquired during an investigative stop, arguing that the stop was not justified by particularized suspicion. In concluding that Officer Guy had particularized suspicion to stop Cook's vehicle and in distinguishing this case from its previous decision in State v. Reynolds, 272 Mont. 46, 899 P.2d 540 (1995) the Supreme Court emphasized the following: (1) Cook waited at a flashing red traffic light for at least 25 seconds despite the fact there was no traffic near the intersection; (2) Cook's delay in responding to Officer Guy's honking of his patrol car horn; (3) Officer Guy's

testimony that, based on his training and experience, the failure to respond to traffic signals can indicate that a driver is impaired; and (4) Officer Guy's testimony that,
based on his training and experience, in the early morning hours of a Sunday he was more likely to encounter an impaired driver.

***State v. Bauer (Laurence)*, 2001 MT 248, 307 Mont. 105, 36 P.3d 892 (Hill). Reversed; Leaphart, J.** Bauer was arrested for being a minor in possession of alcohol and was taken to jail, where he was searched and found to be in possession of dangerous drugs. The Supreme Court held that the arrest was unlawful because there were no circumstances requiring Bauer's immediate arrest and imprisonment was not a potential punishment for second-offense MIP. Therefore, the search at the jail was also unlawful, and the drug evidence should have been suppressed.

***State v. Marvin Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735 (Deer Lodge). Affirmed; Cotter, J.** The arresting officer had particularized suspicion to stop the defendant since the defendant first drew suspicion by pulling into and then immediately pulled back out of a parking lot after spotting the officer's patrol car. While following the truck the officer observed the driver was traveling ten miles per hour in a twenty-five mph zone; the driver was continuously watching the officer in the rearview mirror; and the driver shifted from the edge of the roadway to the mid-point and across it, several times, and on at least one of these occasions the defendant's vehicle would have impeded oncoming traffic.

***State v. Loiselle*, 2001 MT 174, 306 Mont. 166, 30 P.3d 1097 (Missoula). Affirmed; Regnier, J.** A police officer observed Loiselle's vehicle late one night drifting across a right-hand lane and across the white fog line. At the time, Loiselle was driving in the vicinity of some bars. Loiselle then turned into a local car dealership parking lot without signaling. The police officer turned his cruiser around and followed Loiselle. The officer then observed Loiselle's vehicle change lanes without signaling, drift, and cross the fog line. Loiselle was driving with one wheel crossing the fog line and on the shoulder of the road for three seconds. During this time, his car was weaving slightly back and forth. The officer performed an investigative stop. A video camera in his vehicle recorded Loiselle's driving patterns and the subsequent stop. Loiselle pled guilty to a DUI charge and failing to have proof of insurance. He reserved his right to appeal the denial of his motion to suppress evidence. The Supreme Court found that the totality of the circumstances gave the officer the particularized suspicion necessary to make an investigatory stop of Loiselle's vehicle. Loiselle's visible weaving and his crossing

the fog line for three seconds suggested to the investigating officer, a five-year veteran, that Loiselle drove impaired, which with such other factors as the lateness of the evening and the proximity to several nearby bars, established a particularized suspicion to justify the stop.

C. Stop and Frisk

***State v. Krause*, 2002 MT 63, 309 Mont. 174, 44 P.3d 493 (Beaverhead). Affirmed in Part; Reversed and Remanded in Part; Nelson, J.** In this appeal of a license reinstatement denial, the Court agreed with the Defendant that Mont. Code Ann. § 46-5-402(4), Montana's stop and frisk statute, required that the officer, prior to questioning the Defendant, had to inform him that he was a peace officer; that the stop was not an arrest, but rather a temporary detention for an investigation; and that, upon completion of the investigation, he would be released if not arrested. Although the Court noted that the legislature probably did not intend that peace officers give this warning when a person is stopped for a DUI investigation, it held that the district court erred by not suppressing the statements the Defendant made without being given the warning.

D. Field Sobriety Tests

***State v. Marvin Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735 (Deer Lodge). Affirmed; Cotter, J.** The Defendant did not have a right to counsel before submitting to a breath test and field sobriety tests. The officer properly read the Defendant Montana's implied consent advisory form before asking the Defendant to submit to a breath test. A mere request that a suspect perform sobriety tests without interrogation of the suspect does not constitute a custodial interrogation.

E. Private Citizen Arrest

***State v. Kallowat*, 2000 MT 354N (unpublished) (Sanders County). Affirmed; Trieweiler, J. (panel includes Regnier, Nelson, Leaphart, and Gray).** Kallowat appealed from his DUI conviction, arguing that the person who arrested him did not have probable cause to do so. The arresting person was a Hot Springs police officer who had failed to report a prior felony conviction from another State because he assumed the felony had been stricken from his record when he completed the conditions of his deferred sentence. The City of Hot Springs fired the officer and Kallowat moved to dismiss the charges against him, arguing his arrest was illegal. The district court denied the motion on the basis that the person

had probable cause to arrest Kallowat as a private citizen.

The Court held that the person had probable cause to arrest Kallowat based on the following facts: Kallowat's vehicle was parked on a sidewalk; Kallowat and his passenger were passed out in the vehicle and Kallowat could not be immediately revived; a bottle of alcohol was between Kallowat's legs; the keys were in the ignition and the radio was on. The Court further held that these facts demonstrated the need for immediate action pursuant to Mont. Code Ann. § 46-6-502(1) because the person did not know when Kallowat might awaken and attempt to operate the vehicle and because he had a weapon in his possession.

IV. COMMENCEMENT OF PROSECUTION

A. Charging Documents

***State v. Elliott*, 2002 MT 26, 308 Mont. 227, 43 P.3d 279 (Custer). Affirmed; Leaphart, J.** Elliott was charged with deliberate homicide for the death of her newborn infant. The charging affidavit outlined the evidence regarding the age of the newborn, the circumstances of the defendant's medical condition within a week of the delivery (which alerted medical personnel and law enforcement to the situation), the discovery of the baby's body in the defendant's basement, and the skull fractures suffered by the baby. The fact that the affidavit did not state that the baby was born alive did not mean that the affidavit did not state the probability that the crime was committed.

Similarly, the issue of whether the baby was born alive was a factual determination for the jury and the motion to dismiss was properly denied.

***State v. Landis*, 2002 MT 45, 308 Mont. 354, 43 P.3d 298 (Lincoln) Affirmed; Gray, C.J.** Landis was charged with felony theft and deceptive practices when he accepted money from a co-op for services never provided. Months after the omnibus hearing, Landis moved to dismiss the charges for lack of probable cause. The district court denied the motion solely on the basis that the motion was untimely. On appeal, Landis attempted to challenge the ruling on the merits of his motion. The Supreme Court affirmed the district court's ruling that the motion was untimely.

***City of Red Lodge v. Kennedy*, 2002 MT 89, 309 Mont. 330, 46 P.3d 602 (Carbon). Reversed; Leaphart, J.** Conviction for misdemeanor stalking reversed after trial de novo where amended complaint was untimely filed on the day of trial. The amendment was one of substance, not form, because it alleged

several additional episodes of stalking, together with the allegation that all incidents formed a continuous course of conduct. Further, the court may not rely upon ancillary court filings to inform the defendant of the charges against him.

***State v. Hardaway*, 2001 MT 252, 307 Mont. 139, 36 P.3d 900 (Yellowstone). Reversed; Cotter, J.** Hardaway broke into a residence, touched numerous objects, and had pornography and erection lotion in his possession. He was charged with burglary for his unlawful entry with the intent to commit an offense, namely theft or a sexual offense. The Supreme Court held that charging the intended offense in the alternative violated Hardaway's right to notice of the charge and to a unanimous jury verdict.

***State v. Vainio*, 2001 MT 220, 306 Mont. 439, 35 P.3d 948 (Lewis & Clark). Reversed; Nelson, J.** The Supreme Court overturned Vainio's two convictions for Medicaid Fraud and one conviction for Unsworn Falsification to Authorities. Deciding only certain issues in the case, the court ruled that a defendant can not be found guilty of a policy or rule that has not been adopted in compliance with MAPA, even though the Defendant in this case was personally notified that what he was doing was violative of a policy and the Medicaid Fraud statute refers to policies, as well as rules (so much for harmless error). Regarding the second conviction, the court overturned it on the same basis, even though the argument was not presented until appeal. Regarding the last conviction, the Court basically supplanted its review of the testimony for the jury's, finding insufficient evidence.

B. Felony DUI

***State v. Anderson (John Henry)*, 2001 MT 188, 306 Mont. 243, 32 P.3d 750 (Wibaux). Affirmed; Leaphart, J.** At the sentencing hearing for third offense DUI, Anderson challenged the validity of one of his earlier DUI convictions. He claimed there was no evidence in the record that he had waived his right to counsel in the prior case. The claim was rejected by the district court and again on appeal. The Supreme Court held that Anderson failed to meet his burden of proof because the *lack* of evidence of effective waver is not direct evidence of invalidity. "In sum, it is not proof of anything. It is absence of proof."

***Town of Columbus v. Harrington*, 2001 MT 258, 307 Mont. 215, 36 P.3d 937 (Stillwater). Affirmed; Leaphart, J.** DUI defendant argued, among other things, that the trial court erred when it permitted the arresting officer to read statements

from non-admitted documents into evidence and by admitting the results of the preliminary alcohol screening test (PAST). The Supreme Court disagreed. The officer properly used his arrest report to refresh his memory, as the foundation for admission was a matter addressed to the trial court, and it was within the trial court's discretion to permit the witness to refresh his memory. Outside of the presence of the jury, the prosecution recalled the arresting officer to the stand to lay a proper foundation for the admission of the PAST. The officer testified from a training manual to show that the model used for the PAST had been approved. Because Mont. R. Evid. 104(a) authorized the trial court to consider the training manual relied on by the officer, it did not abuse its discretion in admitting the PAST results.

V. GUILTY PLEAS

***Mallak v. State*, 2002 MT 35, 308 Mont. 314, 42 P.3d 794 (Yellowstone); Reversed and Remanded; Cotter, J.** Mallak, who barely spoke English and was mildly mentally retarded, pled guilty in 1989 to several drug-related offenses. He completed his sentence in 1994. In 1999, he applied for U.S. citizenship. The request was denied and INS initiated deportation proceedings. Mallak filed for postconviction relief or, alternatively, to withdraw his guilty plea, claiming that had he known that deportation could be a consequence he would not have pled guilty. The district court summarily denied the request.

On appeal, Mallak requested a remand for an evidentiary hearing, arguing that the statute of limitations for postconviction relief should be tolled during the time Mallak was incarcerated, citing the civil tolling provisions. The State argued that the civil tolling provisions do not apply in postconviction relief, and that actual innocence (which Mallak was not claiming) was the only exception to the time bar. The majority of the Court ignored this argument and construed Mallak’s petition as a motion to withdraw his guilty plea. Without a transcript of the plea colloquy (all records were destroyed), and ignoring Mallak’s request for an evidentiary hearing, the Court ordered that Mallak be allowed to withdraw his plea, finding statutory “good cause” under Mont. Code Ann. § 46-16-105(2), based on Mallak’s allegation that he would not have pled guilty had he known of the consequences (deportation). Chief Justice Gray dissented, pointing out that the majority resolved the case on an issue not briefed by the parties to achieve a “happy ending.” Justice Treiweiler concurred, stating that he would have reversed the district court and arrived at the same result based on the “fundamental miscarriage of justice” exception to the statute of limitations which applies to postconviction matters.

***State v. Afterbuffalo*, 2002 MT 14, 308 Mont. 163, 40 P.3d 375 (Cascade). Reversed and Remanded; Gray, C.J.** Afterbuffalo pled guilty based on a plea agreement that allowed him to withdraw his plea if the court did not accept the parties' recommendation for a suspended sentence with certain probation conditions. The sentencing court followed the recommendation, but added the requirement that defendant be placed in a prerelease facility or on ISP. Defendant moved to withdraw his plea on the ground that this condition was outside the scope of the plea agreement. The district court denied the motion, and the Supreme Court reversed. The Court held that Afterbuffalo bargained for an ordinary suspended sentence with specified conditions--not to participate in a program that materially altered the impact of his suspended sentence. He should have been allowed to withdraw his guilty plea as a result of the court's added condition.

***State v. Schaff*, 2001 MT 130, 305 Mont. 427, 28 P.3d 1073 (Yellowstone). Affirmed in Part, Reversed in Part, and Remanded for Futher Proceedings; Regnier, J.** Non-record based allegations of ineffective assistance of counsel relating to the voluntariness of a guilty plea are properly litigated in postconviction relief even though petitioner challenged the voluntariness of his plea on direct appeal. Remanded for further inquiry into petitioner's allegation that his trial counsel, who was initially retained but was later court-appointed after petitioner ran out of money to pay him, gave him only two hours to decide whether to accept the plea or reject the plea offer.

***State v. Feight*, 2001 MT 205, 306 Mont. 312, 33 P.3d 623 (Jefferson). Affirmed; Nelson, J.** The appellants, father and son, pled guilty in justice court to misdemeanor assault. They subsequently moved to withdraw their guilty pleas, but the justice court denied the motions. Feights then appealed the denial of their motions to the district court. The district court dismissed the appeals as not statutorily authorized. On appeal from the dismissal, the Supreme Court affirmed. The Court ruled there is no statutory right of appeal from a justice court's order denying a motion to withdraw a guilty plea.

***State v. Liefert*, 2002 MT 48, 309 Mont. 19, 43 P.3d 329 (Broadwater) Affirmed; Nelson, J.** In 1999, Liefert pled guilty to partner assault in justice court. He was later charged by the feds with illegal possession of a weapon by a person convicted of misdemeanor domestic abuse. In an attempt to avoid the federal charge, he moved to withdraw his guilty plea in the justice court; he claimed his plea was not knowing and voluntary because he was not advised that

he would lose his gun rights by operation of federal law. The motion was denied, and he appealed to district court, which also denied his motion. He then appealed to the MT Supreme Court. Although there is no statutory right to appeal from a justice court's denial of a motion to withdraw a guilty plea, the Court treated this case as a denial of a motion for postconviction relief.

On the merits, the Court reaffirmed that state courts do not need to advise defendants of the collateral consequences of a conviction. It concluded that the federal gun restriction was a collateral consequence of Liefert's state conviction. The Court rejected Liefert's argument that he was misled by "negative implication" based on the state statutes that permit state courts to restrict gun rights.

***State v. Boucher*, 2002 MT 114, 309 Mont. 514, ___ P.3d ___ (Mineral) Reversed; Rice, J.** Boucher moved the justice court to withdraw his guilty plea to DUI after learning his driving privileges were revoked in another state on account of the conviction. The motion was denied, and he attempted to appeal to district court, now claiming that his plea was not entered knowingly because he had only been advised that he was waiving the right to appeal at the initial appearance, and he shouldn't be expected to remember that advisement five months later. The district court dismissed the appeal because there is no statutory right of appeal following entry of a guilty plea.

The Supreme Court reversed. First, it avoided its own lack of jurisdiction over the case by treating it as an appeal from a district court's denial of postconviction relief. Second, the Court decided Boucher's guilty plea was not entered knowingly. Relying on Mont. Codee Ann. § 46-17-203(2), which requires that a defendant be informed of the waiver of the right to appeal "before the plea is accepted," the Court concluded that this statute "gives the clear impression" that the defendant must be informed about the waiver "at the time a guilty plea is entered," and not earlier or later.

***ATTENTION*:** This case creates a new rule of law. Justice courts must now advise defendants of all rights being waived by entry of a guilty plea "**at the time a guilty plea is entered**," including the right to appeal to district court.

***State v. Kellames*, 2002 MT 41, 308 Mont. 347, 43 P.3d 293 (Yellowstone). Affirmed; Gray, C.J.** The Supreme Court held that the district court did not abuse its discretion by denying Kellames's motion to withdraw his guilty plea. The court's interrogation was adequate, the plea agreement resulted in the dismissal of other charges, and Kellames's allegations of pressure from his mother and his mental illness were insufficient to challenge the voluntariness of his plea.

***State v. Peplow*, 2001 MT 253, 307 Mont. 172, 36 P.3d 922 (Ravalli). Reversed; Cotter, J.** Peplow drove drunk without insurance or a driver's license. Peplow

argued, among other things, that the trial court erred by not accepting his tendered guilty pleas to driving while license was suspended or revoked and operating a motor vehicle without liability insurance. The Supreme Court held that the trial court had erred because before or during trial, the trial court was mandated to accept Peplow's guilty plea, as long as the statutory requirements of voluntariness, intelligence, and a factual basis for the plea were fulfilled.

VI. PRETRIAL

A. Discovery

***State v. Elliott*, 2002 MT 26, 308 Mont. 227, 43 P.3d 279 (Custer). Affirmed; Leaphart, J.** Elliott was charged with deliberate homicide for the death of her newborn infant. She was interviewed by law enforcement officers and the audiotapes of the interviews were played during trial. The Defendant's claim of lack of notice that the tapes would be presented was without merit, given the State's production of the tapes and transcripts during discovery, the State's notice regarding admissions and confessions, and the lack of a suppression motion by the Defendant.

***Patterson v. Dept. Motor Vehicles*, 2002 MT 97, 309 Mont. 381, 46 P.3d 642 (Missoula). State Appeal Affirmed; Regnier, J.** Officer responding to anonymous 911 call found an unconscious male slumped over the wheel of a vehicle with the car still running. The officer woke the man, who was identified as Stephen Patterson, and detected a strong smell of alcohol. Patterson refused a breath test and his license was suspended. In the course of the license reinstatement proceedings, Patterson requested a transcription of the 911 report. The district court warned the State that failure to produce the tape would result in dismissal of the suspension and reinstatement of Patterson's drivers license. The State informed the court that it was unable to obtain the 911 report, and the matter was dismissed. The State appealed, arguing that a license reinstatement proceeding is limited to the three factors in Mont. Code Ann. § 61-8-403, that the requested 911 report contains information beyond those enumerated issues, and that the district court should not have granted Patterson's petition without a showing of relevant information in the report relative to the issues at hand. The Court rejected this proposal, stating that the district court retains discretion to fashion appropriate sanctions for discovery violations. The dissenters (Nelson, Rice and Leaphart), scoffed at this result, concluding that the discovery issue is "nothing but a red herring," since the 911 tape was totally irrelevant under the undisputed facts of the case.

B. Motions

1. Necessity of Hearing on Speedy Trial Claim

***State v. Pounds*, 2001 MT 192N (unpublished) (Yellowstone). Affirmed; Rice,**

J. The defendant argued that the district court erred in denying his motion to dismiss for lack of speedy trial without holding an evidentiary hearing. The Court agreed with the State that this issue should be reviewed for abuse of discretion since the defendant was not challenging the denial of his speedy trial motion on the merits and no statutory mandate for an evidentiary hearing exists. The Court held that there was no reason to hold an evidentiary hearing because, although there was a factual dispute about the allocation of the delay, the district court denied the motion on the assumption that the entirety of the delay was attributable to the State.

2. Motion to Dismiss Felony

***State v. Peterson*, 2002 MT 65, 309 Mont. 199 , 44 P.3d 499 (Fergus). Affirmed as to one conviction; remanded for further findings as to the other conviction; Nelson, J.** Peterson collaterally challenged the felony status of his fourth offense driving under the influence charge, on the ground that as to two of his previous misdemeanor convictions, he was not informed of his right to counsel. The Court remanded for further findings as to one of the prior convictions to determine whether Peterson was represented by counsel, or whether he waived counsel, when the record was unclear if counsel was, in fact, present when he entered his guilty plea. On the other prior conviction, the Court affirmed the district court’s finding that Peterson was properly informed of his right to counsel. Peterson failed to preserve his right to appeal on the issue of judicial notice of a judge’s testimony in another case as to his routine practice regarding informing defendants of their right to counsel, where Peterson failed to object.

3. Motion to Substitute Counsel

***State v. Weaver (William Larry)*, 2001 MT 115, 305 Mont. 315, 28 P.3d 451 (Missoula); Trieweiler, J.** Weaver argued the district court erred when it refused to substitute counsel. Weaver filed numerous complaints about his appointed counsel, stating that she failed to meet with him regularly, failed to file motions on his behalf (he submitted some sixty-four different motions), and failed to adequately discuss trial strategy. Citing State v. Gallagher, 1998 MT 70, & 10, 288 Mont. 180, 955 P.2d 1371, the Court concluded the district court's inquiry about the motions Weaver had requested and counsel's consultation was adequate. It reiterated the requirement that a defendant demonstrate an irreconcilable conflict so great that it results in a total lack of communication.

4. Motion to Suppress Post Arrest Statement

***State v. Nalder*, 2001 MT 270, 307 Mont. 280, 37 P.3d 661 (Hill). Affirmed; Gray, C.J.** Nalder was charged with tampering with physical evidence. Nalder filed a motion to suppress her post-arrest statement and dismiss the charge on the grounds that probable cause did not exist for her warrantless arrest. The district court denied her motion.

The Supreme Court affirmed the district court's decision. The Court rejected Nalder's claim that she was merely present in her friend's apartment when officers executed a search warrant and concluded that the totality of the circumstances in this case, taken in light of the officers' training, was sufficient to establish probable cause to arrest Nalder. The Court specifically noted that the officers who conducted the search were extensively trained and specifically certified to deal with methamphetamine laboratories. The Court also noted that after the officers entered the apartment to execute the search warrant, Agent Wodnik found Nalder in the kitchen standing a few feet away from a Mason jar filled with a white substance, which appeared to Agent Wodnik to be the first stage of the methamphetamine-producing process. In the kitchen the officers also discovered various other items and ingredients used to manufacture methamphetamine. Finally, the Court pointed out that when Agent Wodnik entered the kitchen "he heard the toilet flushing, observed Nalder was the only individual in the vicinity of the bathroom and was concerned, based on his training, that evidence may have been destroyed."

C. Continuance

***State v. Elliott*, 2002 MT 26, 308 Mont. 227, 43 P.3d 279 (Custer). Affirmed; Leaphart, J.** The Defendant was charged in January and trial was set for December. The district court did not abuse its discretion in denying a motion made in November, given the lack of diligence by the Defendant in securing a witness.

***State v. Fields*, 2002 MT 84, 2002, 309 Mont. 300; 46 P.3d 612 (Yellowstone). Reversed and New Trial Ordered on Deliberate Homicide Conviction; Gray, C.J.** Defense counsel wished to present two psychiatrists to testify that Fields was under extreme stress when he shot the victim. The trial court refused to grant a continuance for the defense to present its second expert witness. Fields argued, among other things, that the trial court erred by denying Fields' motion for a continuance to allow the expert witness to testify. The Supreme Court agreed. The charged offense at issue was deliberate homicide. The delay requested was less

than one-half day in a case originally estimated to require a week. The trial court ruled that the testimony was not merely cumulative, and based on that ruling, Fields' counsel told the jury he would present two psychiatric experts, the testimony would have gone directly to the defense of mitigated deliberate homicide. Finally, the State used in its closing argument the facts that Fields presented only one expert. On that record, and considering the interests of justice and Fields' right to a fair trial, the trial court erred by denying the continuance.

D. Mental Competency of Accused

***State v. Lamb*, 2001 MT 241, 307 Mont. 54, 36 P.3d 871 (Yellowstone). Affirmed; Leaphart, J.** On the basis of a mental evaluation, the district court ordered Defendant committed to the DOC with the recommendation that he be placed in Warm Springs. DOC complied, but later moved him to MSP after doctors determined that Lamb was in need of correctional placement. Because the transfer did not comply with Mont. Code Ann. § 46-14-312(3), the Supreme Court in a prior habeas action ordered Lamb's return to the State Hospital under the custody of DPHHS. A year later, DPHHS petitioned for review of sentence and the district court ordered Lamb to be transferred to MSP or DOC for appropriate institutional placement. The Supreme Court affirmed, rejecting Lamb's contention that the State was bound by the plea agreement, which contemplated a commitment to the State Hospital. The Court's determination that Lamb no longer suffers from a mental disease or defect controls.

***State v. Garner*, 2001 MT 222, 306 Mont. 462, 36 P.3d 346 (Cascade). Affirmed; Regnier, J.** Russell Garner and Steven Newhouse were charged with theft of a pickup truck. Garner, who was also charged with forgery, was tried separately. The allegations were that the two had stolen a truck in Missoula and that Garner later presented a stolen check at a check cashing service in Great Falls. Garner was apprehended after fleeing when he realized the employees had called the police.

Garner argued that, before trial commenced, he should have been granted a hearing on his competence to proceed because he was denied his prescribed antidepressants, his behavior at trial showed he was incompetent, and his attorney doubted his competence. The Court summarized federal and Montana tests for competence but concluded that Garner displayed a "fair degree of competency." Although he was "at times animated, if not belligerent, he capably questioned witnesses" and argued cogently. The Court also rejected Garner's argument that additional evidence on an earlier attempted suicide and treatment should have required a retrospective competency hearing. The Court pointed at the length of

time between the past treatment and the trial, coupled with Garner's failure to show how the earlier problems affected his trial competency.

E. Jury Selection

***State v. Bird*, 2002 MT 2, 308 Mont. 75, 43 P.3d 266 (Yellowstone). Reversed; Nelson, J.** Bird's counsel appeared with the prosecutor in chambers to individually voir dire a prospective juror. The prosecutor noted Bird's absence, and defense counsel's response indicated that Bird had been consulted and was agreeable with the situation. On appeal, Bird was represented by different counsel and argued that his right to be present during a critical stage of the proceedings was violated. The Supreme Court agreed, rejecting the State's argument that Bird expressly waived his right to be present. Voir dire is a critical stage of the proceedings, and the Court refused to find a voluntary waiver on the basis of the record. Consequently, the Court held that "in the future, a trial court must explain to the defendant, on the record, the defendant's constitutional right to be present at all critical stages of the trial, including in-chambers individual voir dire, and that if a defendant chooses to waive that right, the court must obtain an on-the-record personal waiver by the defendant acknowledging that the defendant voluntarily, intelligently, and knowingly waives that right."

***State v. Ford,* 2001 MT 230, 306 Mont. 517, 39 P.3d 108 (Cascade). Affirmed; Cotter, J.** Ford was convicted of deliberate homicide after beating his male roommate to death. Ford claimed that the decedent attacked him and that Ford was acting in self-defense. Following voir dire, the prosecution exercised six strikes against panelists who happened to be female. After the sitting jury was sworn and the venire was dismissed, Ford's trial counsel moved for a new jury pool, claiming that the State's exercise of its peremptory strikes violated Ford's right "to a jury of his peers." The prosecution, without any prompting from the district court, offered explanations for his strikes. The district court, without stating its reasons for doing so, overruled the objection. On appeal, "Ford first labeled his dispute over the State's exercise of peremptory challenges a 'Batson' challenge." The Court refused to address the merits of the Batson issue, holding that the issue was waived by trial counsel's failure to assert the objection before the jury was sworn and the venire dismissed. The Court observed that an untimely Batson challenge impairs counsel's ability to defend his or his strikes and deprives the district court of the ability to correct any error in the proceedings in a timely fashion.

The Court took the opportunity to discuss Batson and its progeny, noting that Batson (which involved racial discrimination in the exercise of peremptory

challenges) was extended to include gender discrimination in J.E.B. v. Alabama. The Court also noted that Batson has been extended to prevent discriminatory peremptory strikes by criminal defense counsel. The Batson rule also applies to private litigants in civil cases.

***State v. Good,* 2002 MT 59, 309 Mont. 113, 43 P.3d 948 (Missoula). Reversed; Leaphart, J.** Good was convicted of a sexual abuse charge involving his teenage stepdaughter; the jury hung on two sexual assault counts. He appealed, claiming that he was denied his right to a speedy trial and that the district court abused its discretion when it denied defense challenges for cause during voir dire.

The Court affirmed the district court with respect to the speedy trial claim, but reversed the district court's decision to deny challenges for cause involving two panelists who testified that they would find it hard to believe that a young female victim would fabricate such serious allegations. The district court intervened in the questioning, and gave a short rendition of the State's burden of proof and a juror's duty to sit with skepticism of the State's case. The judge asked one panelist if she "quibbled" with what the judge called his "little civics speech." The panelist stated that she could assume the proper frame of mind if she sat on the jury. The trial judge denied the challenge, as well as another challenge involving a panelist who was questioned by defense counsel regarding the district court's "civics speech." Relying upon its earlier opinion in DeVore, the Court held that the district court abused its discretion because the testimony of both panelists raised serious questions about their ability to serve with impartiality. The Court also emphasized that it has "repeatedly admonished trial judges to refrain from attempting to rehabilitate jurors by putting them in a position where they will not disagree with the court."

Finally, the Court overruled DeVore to the extent it contemplated harmless error analysis when a district court erroneously denies a challenge for cause. Relying upon its recent opinions in LaMere, Van Kirk and Bird, the Court held that when the defense removes the disputed panelists with peremptory challenges and exhausts all of its peremptory challenges, the error is structural and requires automatic reversal. The structural error issue was not briefed because Van Kirk (which requires consideration of structural error even if the issue is not raised) was decided after the briefing in Good was completed.

Justices Trieweiler concurred with the reversal but dissented from the Court's abandonment of the DeVore harmless error test, and he argued that the Court's recent structural/trial error dichotomy was a mistake. Justice Rice dissented, concluding that the district court's opportunity to evaluate the panelists in person was more reliable than the majority's second-guessing of the district court based upon the "cold, dry transcript."

***State v. Freshment,* 2002 MT 61, 309 Mont. 154, 43 P.3d 968 (Yellowstone). Reversed; Nelson, J.** Following Freshment's convictions on two sexual intercourse without consent counts, the Court addressed whether the district court abused its discretion when it denied challenges for cause to two panelists. The district court allowed the State to rehabilitate one of these panelists after she had repeatedly told defense counsel that she could not acquit the defendant because Freshment should know that teenage girls will lie about their age. Another panelist stated that he thought the defendant should be aware that teenagers lie, and that he would be sympathetic to the victim because his daughter works with sexual assault victims. The district court refused to excuse either panelist for cause. The Court found an abuse of discretion with respect to both panelists, concluding that the panelists "stated an actual bias directly related to an issue critical to the outcome of the case, i.e., whether Freshment could have a reasonable belief one of the victims was 16 or older." The Court held, "Coaxed recantations in which jurors state they will merely follow the law, whether prompted by the trial court, the prosecution, or the defense, do not cure or erase a clearly stated bias which demonstrates actual prejudice against the substantial rights of a party." Based upon Van Kirk and Good (decided the same day), the Court held that the error was structural, and therefore required automatic reversal regardless of the quality of the State's evidence. As an aside, the same day Good and Freshment were decided, the Court reversed a jury verdict in a civil case, Reff-Conlin's Inc., after concluding that the trial court erroneously denied a valid challenge for cause.

Justice Rice concurred in the Court's holding only with respect to the panelist who repeatedly expressed bias, concluding that her "answers form[ed] a sufficient basis to overcome the due deference we must give the trial court in ascertaining whether there was an abuse of discretion."

***State v. Deschon*, 2002 MT 16, 308 Mont. 175, 40 P.3d 391 (Lewis and Clark). Affirmed in Part and Remanded for Evidentiary Hearing; Leaphart, J.** Deschon's right to due process was not violated because no transcript of voir dire exists for review on appeal since there is the availability of alternative devices that would fulfill the same functions as a transcript. The Court remanded for an evidentiary hearing in district court, during which witnesses such as the prosecutor, defense attorney, court reporter and clerk of court may testify as to their memory of the voir dire proceeding.

F. Severance

***State v. Freshment,* 2002 MT 61, 309 Mont. 154, 43 P.3d 968 (Yellowstone).**

Reversed; Nelson, J. Following Freshment's convictions on two sexual intercourse without consent counts, the Court addressed two issues on appeal, namely, whether the district court should have severed the two counts and whether the district court abused its discretion when it denied two challenges for cause.

The Court held that the two counts were properly joined because they were sufficiently similar in character. Both counts involved sexual intercourse without consent of inebriated 15-year-olds, both victims were introduced to Freshment through mutual friends, both crimes occurred within two days, both occurred in Billings, and both charges alleged that Freshment knew the ages of the victims. The Court also concluded that Freshment did not suffer unfair prejudice from joinder. However, the Court held that the district court's denial of Freshment's motion to sever the counts was an abuse of discretion: "Because the similarities between the counts are insufficient as evidence of a common scheme or plan and would not be admissible for other purposes, such as proof of motive, opportunity, intent, knowledge, identity, or absence of mistake, the counts here would not be admissible against each other in separate trials under the third factor of the modified Just/Matt rule." Nonetheless the Court refused to reverse the district court because "when the charges are few and the evidence is straightforward, unfair prejudice will not be found because it is unlikely a jury will confuse the evidence and improperly find guilt on one count using evidence from the other." The Court emphasized that the charges involved different victims with little overlapping evidence. However, the Court reversed on the voir dire issue.

VII. TRIAL

A. Evidence

1. Relevance

***State v. Elliott*, 2002 MT 26, 308 Mont. 227, 43 P.3d 279 (Custer). Affirmed; Leaphart, J.** Elliott was charged with deliberate homicide for the death of her newborn infant. The testimony of a forensic anthropologist regarding the cause, timing, and force of the skull fractures suffered by the newborn was relevant and properly allowed.

***State v. Elliott*, 2002 MT 26, 308 Mont. 227, 43 P.3d 279 (Custer). Affirmed; Leaphart, J.** Elliott was charged with deliberate homicide for the death of her newborn infant. The Defendant's bald claim that a pediatrician's testimony was

needlessly cumulative was not supported by reference to authority and did not specify how the district court abused its discretion and therefore was in violation of Mont. R. App. P. 23. The district court was affirmed.

Also, Rule 106, and the completeness doctrine allowed the Defendant to cross examine the officer regarding questions and statements made during an

unrecorded portion of the Defendant's interview. It did not require suppression of the tapes.

***State v. Detonancour*, 2001 MT 213, 306 Mont. 389, 34 P.3d 487 (Madison). Affirmed; Leaphart, J.** The district court erred when it allowed a nurse practitioner to testify in extensive detail about the rape examination process because such testimony was not probative of the ultimate issue of consent, but the error was harmless.

2. Foundation

***State v. Marvin Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735 (Deer Lodge). Affirmed; Cotter, J.** The district court erred by allowing the arresting officer to testify about the Defendant's performance on the HGN test when the testimony did not establish that the officer was specially trained or educated, or that he had adequate knowledge to qualify as an expert able to explain the correlation between alcohol consumption and nystagmus. The court's error was harmless. The first step in the harmless error inquiry is whether the error was structural error or trial error. If the error is structural, it is not amenable to a harmless error analysis. If the error is trial error, the next inquiry is whether there is a reasonable probability that the inadmissible evidence might have contributed to the conviction. The Court abandons the use of the "overwhelming evidence" test and from this point forward will employ the "cumulative evidence" test. Under this test, the State must demonstrate that admissible evidence proved the same facts as the inadmissible evidence and must demonstrate that the quality of the inadmissible evidence was such that there was no reasonable possibility that it might have contributed to the Defendant's conviction. In the instant case, qualitatively, and in comparison to the admissible evidence presented proving the Defendant was under the influence of alcohol, there is no reasonable possibility that the HGN testimony contributed to the Defendant's conviction.

***State v. Ohms,* 2002 MT 80, 309 Mont. 263, 46 P.3d 55 (Ravalli). Reversed; Cotter, J.** Eddie Ohms was charged with felony theft for liberating a masonry

saw. The only issue on appeal was whether there was sufficient evidence of the saw's value to support a conviction for a felony. Under the statute in effect at the time, the State was obligated to prove the saw worth more than $500.

The crux of the testimony was the admission of the State's expert that he based his value estimations on replacement parts, not on used parts. Nor was he specifically asked to provide the current market value. The Court strictly applied the value ruling in State v. Martin, 2001 MT 83, 305 Mont. 123, 23 P.3d 216, interpreting Mont. Code Ann. § 45-2-101(74)(a). The State must first show that market value cannot be ascertained satisfactorily before it may use replacement value.

The Court brushed aside without mention the State's clever argument that it had effectively shown market value could not be established because used saws of equivalent capacity were not reasonably available just after the theft.

***Town of Columbus v. Harrington*, 2001 MT 258, 307 Mont. 215, 36 P.3d 937 (Stillwater). Affirmed; Leaphart, J.** DUI defendant argued, among other things, that the trial court erred when it permitted the arresting officer to read statements from non-admitted documents into evidence and by admitting the results of the preliminary alcohol screening test (PAST). The Supreme Court disagreed. The officer properly used his arrest report to refresh his memory, as the foundation for admission was a matter addressed to the trial court, and it was within the trial court's discretion to permit the witness to refresh his memory. Outside of the presence of the jury, the prosecution recalled the arresting officer to the stand to lay a proper foundation for the admission of the PAST. The officer testified from a training manual to show that the model used for the PAST had been approved. Because Mont. R. Evid. 104(a) authorized the trial court to consider the training manual relied on by the officer, it did not abuse its discretion in admitting the PAST results.

3. Confessions and Admissions

***State v. Elliott*, 2002 MT 26, 308 Mont. 227, 43 P.3d 279 (Custer). Affirmed; Leaphart, J.** Elliott was charged with deliberate homicide for the death of her newborn infant. She was interviewed by law enforcement officers and the audiotapes of the interviews were played during trial. The Defendant claim of lack of notice that the tapes would be presented was without merit, given the State's production of the tapes and transcripts during discovery, the State's notice regarding admissions and confessions, and the lack of a suppression motion by the Defendant.

Also, Mont. R. Evid. 106, and the completeness doctrine allowed the Defendant to cross examine the officer regarding questions and statements made during an unrecorded portion of the Defendant's interview. It did not require suppression of the tapes.

And, the tapes of the interviews of the Defendant were the best evidence of the interviews.

***State v. Steven Francis*, 2001 MT 233, 307 Mont. 12, 36 P.3d 390 (Silver Bow). Reversed; Regnier, J.** The district court erred when it admitted the Defendant's friends' out of court statements to his former girlfriend, made in the Defendant's presence, that he and the Defendant committed the homicide. The friend refused to answer questions at trial on the ground that he might incriminate himself. These statements were not admissible as statements against penal interest nor were they admissible as those of a co-conspirator since a co-conspirator's statements made after attainment of the conspiracy's object are not admissible unless the movant can prove an express agreement existed among co-conspirators to continue to act in concert to cover up the crime after its commission. Since the State did not argue below, that the statements were admissible as an admission of a party-opponent pursuant to Mont. R. Evid. 801 (d)(2)(A), the record was inadequate to determine if the friend's statement would have been admissible under Rule 801(d)(2)(A). The State alternatively argued on appeal that the statements were admissible as testimony concerning out of court statements made by the friend and adopted by the Defendant, pursuant to Rule 801(d)(2)(B). The State failed to present sufficient evidence to show that the Defendant adopted the friend's statements, and the district court never made an express determination that the Defendant adopted the friend's statements.

The friend's videotaped confession was not admissible under Rule 804(b)(3), as statements against his penal interest since the confession consisted mainly of blaming the Defendant. Non-inculpatory statements where the declarant merely blames another person are not necessarily credible or admissible. The admission of the friend's out of court statements did not constitute harmless error. Even though the State presented other cumulative admissible evidence regarding the Defendant's purposeful participation in the homicide, there is a reasonable possibility that the inadmissible evidence contributed to the verdict.

***State v. Spang*, 2002 MT 120, ___ Mont. ___, ___ P.3d ___ (Hill). Affirmed in Part, Reversed in Part; Regnier, J.** After law enforcement officers read Spang his *Miranda* rights at the beginning of Spang's second interview, Spang stated, "shit, man I need a lawyer". An officer asked Spang whether he wished to

continue with the interview or talk with an attorney first. Spang agreed to continue. Spang's request for counsel was unequivocal. Thus, he could not be the subject of further questioning by officers, even a non-incriminating, clarifying question, until an attorney was made available to him or he initiated further conversation. The district court erred when it denied Spang's motion to suppress the statements he made during his second custodial interrogation, and the error, although trial error, was not harmless. Even though the inadmissible evidence was cumulative to other admissible evidence, including Spang's first voluntary statement to law enforcement, the State failed to demonstrate that qualitatively, there is no
reasonable possibility that Spang's second statement, and the transcripts made therefrom, did not contribute to his conviction.

4. Rule 404/Character Evidence

***State v. Dobson,* 2001 MT 167, 306 Mont. 145, 30 P.3d 1077 (Musselshell). Reversed; Gray, C.J.** Dobson, who was represented at trial and sentencing by Matthew Sisler, was convicted of four counts of sexual intercourse without consent of a fifteen-year-old minor and sentenced to a long prison term. On appeal, the Court addressed two issues:

(1) Whether the district court abused its discretion when it allowed Dobson to be cross-examined regarding his offensive behavior during his arrest, while limiting his testimony concerning animosity between Dobson and local law enforcement; and (2) whether the district court violated Mont. R. Evid. 404(b), by instructing the jury that Dobson had been previously charged with sexual intercourse without consent of a fifteen-year-old minor. With respect to the first issue, the Court affirmed, noting that Dobson opened the door to cross-examination by suggesting that he would have cooperated with a search warrant. The State was entitled to rebut "Dobson's implication that he was peaceful and cooperative toward law enforcement with evidence that he was not."

With respect to the 404(b) issue, the district court instructed the jury that Dobson had been previously charged with sexual intercourse without consent of a fifteen-year-old girl, but it admonished the jury, "The evidence presented in this instruction is only to be used for proof of knowledge that is a felony crime for an individual to have sexual intercourse with anyone under the age of 16 years." Relying upon the principle that the State "must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence," the Court reversed and remanded for a new trial. The Court held that Dobson's knowledge of the law was not a fact of consequence to the action because knowledge of the law is not an element of the offense of sexual intercourse

without consent of a minor.

***State v. Bauer (Chester)*, 2002 MT 7, 308 Mont. 99, 39 P.3d 689 (Deer Lodge). Affirmed; Rice, J.** The district court permitted the State to introduce evidence that Bauer had been in prison for many years and was on probation at the time of the offense. The Supreme Court held that the evidence was properly admitted as part of the transaction and was not "other crimes" evidence.

***State v. Aakre*, 2002 MT 101, 309 Mont. 403, 46 P.3d 648 (Cascade). State Appeal; Affirmed; Nelson, J.** Aakre was charged with child sexual assault. At trial the State was permitted to introduce evidence of Aakre's sexual assault of another child 16 years earlier. Aakre moved for a new trial based on State v. Sweeney, and the district court granted the motion. The State appealed. The Supreme Court held that the evidence was not admissible under the "plan" exception to Rule 404(b). The Court concluded that "plan" is synonymous with "common scheme" and requires the prior crime to be distinctively similar and sufficiently near in time.

5. Res Gestae

***State v. Detonancour*, 2001 MT 213, 306 Mont. 389, 34 P.3d 487 (Madison). Affirmed; Leaphart, J.** The victim properly testified that immediately after the assault the Defendant went into her daughter's bedroom and returned to the living room wearing a pair of her daughter's panties. The Defendant's conduct, was relevant as part of the transaction since the actions occurred immediately after the sexual assault and right before the victim called 911.

6. Opinion and Expert Testimony

***State v. Marvin Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735 (Deer Lodge). Affirmed; Cotter, J.** The district court erred by allowing the arresting officer to testify about the Defendant's performance on the HGN test when the testimony did not establish that the officer was specially trained or educated, or that he had adequate knowledge to qualify as an expert able to explain the correlation between alcohol consumption and nystagmus. The court's error was harmless. The first step in the harmless error inquiry is whether the error was structural error or trial error. If the error is structural, it is not amenable to a harmless error analysis. If the error is trial error, the next inquiry is whether there is a reasonable probability that the inadmissible evidence might have contributed to

the conviction. The Court abandons the use of the “overwhelming evidence” test and from this point forward will employ the “cumulative evidence” test. Under this test, the State must demonstrate that admissible evidence proved the same facts as the inadmissible evidence and must demonstrate that the quality of the inadmissible evidence was such that there was no reasonable possibility that it might have contributed to the Defendant’s conviction. In the instant case, qualitatively, and in comparison to the admissible evidence presented proving the Defendant was under the influence of alcohol, there is no reasonable possibility that the HGN testimony contributed to the Defendant’s conviction.

***State v. Detonancour*, 2001 MT 213, 306 Mont. 389, 34 P.3d 487 (Madison). Affirmed; Leaphart, J.** A rape victim’s advocate properly testified as an expert on Rape Trauma Syndrome (RTS). The witness had training and experience in working with rape victims. Her lack of formal education in the field of psychology went to the weight of her testimony rather than its admissibility.

***State v. Nobach*, 2002 MT 91, 309 Mont. 342, 309 P.3d 342 (Flathead). Affirmed; Gray, C.J.** Officer arriving on scene of a single car accident observed defendant’s bizarre behavior, leading him to believe Defendant was under the influence of drugs or alcohol. Alcohol was ruled out, and a blood test later revealed that Defendant had ingested a combination of prescription drugs. At trial, officer testified about Defendant’s behavior, and was asked to give his opinion about whether Defendant’s ability to safely operate a vehicle would be diminished by his consumption of drugs. Supreme Court held that this calls for an expert opinion, which the officer was not qualified to give (his basic training covered illegal substances, not combined effect of prescription drugs). The error in admitting his testimony was harmless, however, since the State’s pharmacological expert offered the same testimony and was clearly qualified to do so.

***State v. Fields*, 2002 MT 84, 2002, 309 Mont. 300, 46 P.3d 612 (Yellowstone). Reversed and New Trial Ordered on Deliberate Homicide Conviction; Gray, C.J.** Defense counsel wished to present two psychiatrists to testify that Fields was under extreme stress when he shot the victim. The trial court refused to grant a continuance for the defense to present its second expert witness. Fields argued, among other things, that the trial court erred by denying Fields’ motion for a continuance to allow the expert witness to testify. The Supreme Court agreed. The charged offense at issue was deliberate homicide. The delay requested was less than one-half day in a case originally estimated to require a week. The trial court

ruled that the testimony was not merely cumulative, and based on that ruling, Fields' counsel told the jury he would present two psychiatric experts, the testimony would have gone directly to the defense of mitigated deliberate homicide. Finally, the State used in its closing argument the facts that Fields presented only one expert. On that record, and considering the interests of justice and Fields' right to a fair trial, the trial court erred by denying the continuance.

7. Hearsay

***State v. Hope*, 2001 MT 207, 306 Mont. 334, 33 P.3d 629 (Yellowstone). Affirmed; Leaphart, J.** Hope assaulted his girlfriend. Just before the assault, his girlfriend wrote herself a note describing Hope's angry mood and her concern for her safety. The note was admitted at trial. The Supreme Court held that the note was a recorded present sense impression within the exception to the hearsay rule.

***State v. Steven Francis*, 2001 MT 233, 307 Mont. 12, 36 P.3d 390 (Silver Bow). Reversed; Regnier, J.** The district court erred when it admitted the Defendant's friends' out of court statements to his former girlfriend, made in the Defendant's presence, that he and the Defendant committed the homicide. The friend refused to answer questions at trial on the ground that he might incriminate himself. These statements were not admissible as statements against penal interest nor were they admissible as those of a co-conspirator since a co-conspirator's statements made after attainment of the conspiracy's object are not admissible unless the movant can prove an express agreement existed among co-conspirators to continue to act in concert to cover up the crime after its commission. Since the State did not argue below, that the statements were admissible as an admission of a party-opponent pursuant to Mont. Admin. R. 801 (d)(2)(A), the record was inadequate to determine if the friend's statement would have been admissible under Rule 801(d)(2)(A). The State alternatively argued on appeal that the statements were admissible as testimony concerning out of court statements made by the friend and adopted by the Defendant, pursuant to Rule 801(d)(2)(B). The State failed to present sufficient evidence to show that the Defendant adopted the friend's statements, and the district court never made an express determination that the Defendant adopted the friend's statements.

The friend's videotaped confession was not admissible under Rule 804(b)(3), as statements against his penal interest since the confession consisted mainly of blaming the Defendant. Non-inculpatory statements where the declarant merely blames another person are not necessarily credible or admissible. The admission of the friend's out of court statements did not constitute harmless error.

Even though the State presented other cumulative admissible evidence regarding the Defendant's purposeful participation in the homicide, there is a reasonable possibility that the inadmissible evidence contributed to the verdict.

8. Documentary Evidence/Exhibits

***State v. Elliott*, 2002 MT 26, 308 Mont. 227, 43 P.3d 279 (Custer). Affirmed; Leaphart, J.** Elliott was charged with deliberate homicide for the death of her newborn infant. She was interviewed by law enforcement officers and the audiotapes of the interviews were played during trial. The Defendant claim of lack of notice that the tapes would be presented was without merit, given the State's production of the tapes and transcripts during discovery, the State's notice regarding admissions and confessions, and the lack of a suppression motion by the Defendant.

Also, Mont. R. Evid. 106 and the completeness doctrine allowed the Defendant to cross examine the officer regarding questions and statements made during an unrecorded portion of the Defendant's interview. It did not require suppression of the tapes. And, the tapes of the interviews of the Defendant were the best evidence of the interviews.

9. Rape Shield

***State v. Bauer (Chester)*, 2002 MT 7, 308 Mont. 99, 39 P.3d 689 (Deer Lodge). Affirmed; Rice, J.** The Supreme Court held that the district court properly excluded, under the rape shield statute, a crime lab DNA report that showed the presence, on the victim's blanket, of semen from someone other than Bauer.

***State v. Detonancour*, 2001 MT 213, 306 Mont. 389, 34 P.3d 487 (Madison). Affirmed; Leaphart, J.** The district court correctly refused to allow the Defendant to present evidence that at a birthday party two days prior to the sexual assault, the victim pulled the defendant onto her lap, because this did not meet the definition of past sexual conduct under Mont Code Ann § 45-5-511.

10. BAC

***State ex rel. McGrath v. District Court*, 2001 MT 305, 307 Mont. 491, 38 P.3d 820 (Ravalli). Order Granting State's Request for Writ of Supervisory Control; Remanded for Further Proceedings.** Defendant refused BAC test at hospital following a car accident. Officer obtained an investigative subpoena to access her medical records, which showed a BAC of above the legal limit. The district court refused to allow the State to use those results because of the Defendant's refusal, which would permit an "end run" around implied consent statutes. The Supreme Court held that district court was proceeding under a mistake of law and granted the writ. The Court held on the basis of its decision in State v. Newill, 285 Mont. 84, 946 P.2d 134 (1997), that the implied consent law does not apply to diagnostic blood tests taken for medical treatment purposes. The only question for the district court is whether the evidence is competent under Mont. Code Ann. § 61-4-404(3), and the Supreme Court remanded for that inquiry. Trieweiler dissented, concluding that Mont. Code Ann. § 61-8-402 requires the defendant's consent before medical tests can be obtained for purposes of DUI prosecution. He would overrule Newill.

***Town of Columbus v. Harrington*, 2001 MT 258, 307 Mont. 215, 36 P.3d 937 (Stillwater). Affirmed; Leaphart, J.** DUI defendant argued, among other things, that the trial court erred when it permitted the arresting officer to read statements from non-admitted documents into evidence and by admitting the results of the preliminary alcohol screening test (PAST). The Supreme Court disagreed. The officer properly used his arrest report to refresh his memory, as the foundation for admission was a matter addressed to the trial court, and it was within the trial court's discretion to permit the witness to refresh his memory. Outside of the presence of the jury, the prosecution recalled the arresting officer to the stand to lay a proper foundation for the admission of the PAST. The officer testified from a training manual to show that the model used for the PAST had been approved. Because Mont. R. Evid. 104(a) authorized the trial court to consider the training manual relied on by the officer, it did not abuse its discretion in admitting the PAST results.

***State v. Peplow*, 2001 MT 253, 307 Mont. 172, 36 P.3d 922 (2001) (Ravalli). Reversed; Cotter, J.** Peplow drove drunk, wrecked his truck on a desolate stretch of road, then walked to a bar and inebriated himself more heavily to thwart the integrity of any sobriety testing. Peplow argued, among other things, that the trial court erred by denying his motion for a directed verdict on the tampering with evidence charge. The Supreme Court held that the trial court had erred because consuming alcohol after a vehicle accident did not constitute tampering with physical evidence; Mont. Code Ann. § 61-8-404 did not contemplate that potentially measurable amounts of alcohol, still within the human body, constituted evidence, and until one's breath or blood had been obtained or collected for analysis, it could not be considered physical evidence, under Mont. Code Ann. § 45-7-207, or a thing presented to the senses, as explained in Mont. Code Ann. § 26-1-101(2).

***State v. Krause*, 2002 MT 63, 309 Mont. 174, 44 P.3d 493 (Beaverhead). Affirmed in part; reversed and remanded in part; Nelson, J.** In this appeal of a license reinstatement denial, the Court agreed with the Defendant that the district court erroneously admitted the results of his independent blood alcohol test. The State argued that the blood test results were introduced to substantiate the officer's observations and opinion with regard to the defendant's intoxication. The Court held that such evidence was barred by Rule 608(a) of the Montana Rules of Evidence because the officer's character for truthfulness had not been attacked.

11. Sufficiency of the Evidence and Credibility

***State v. Elliott*, 2002 MT 26, 308 Mont. 227, 43 P.3d 279 (Custer). Affirmed; Leaphart, J.** Elliott was charged with deliberate homicide for the death of her newborn infant. The evidence included evidence of the age of the newborn, the behavior and statements of the Defendant prior to and after the delivery, the circumstances of the Defendant's medical condition within a week of the delivery (which alerted medical personnel and law enforcement to the situation), the discovery of the baby's body in the Defendant's basement, and the skull fractures suffered by the baby. Viewed in a light most favorable to the prosecution, there is sufficient evidence to support the finding that the Defendant was guilty of deliberate homicide.

***State v. Giant*, 2001 MT 245, 307 Mont. 374, 37 P.3d 49 (Yellowstone). Reversed; Nelson, J.** Giant was charged with assaulting his wife, who made several statements at the time of the assault indicating that Giant was the assailant. Immediately after the assault Giant fled to California. At trial his wife testified that it was their son, rather than Giant, who committed the assault. The wife's prior inconsistent statements were introduced in evidence. The district court denied Giant's motion for a directed verdict. The Supreme Court held that if a prior inconsistent statement is the sole proof of an essential element of the offense (such as identity), it must be corroborated by independent evidence, and evidence of flight is insufficient as a matter of law to corroborate a prior inconsistent statement.

***State v. Landis*, 2002 MT 45, 308 Mont. 354, 43 P.3d 298; (Lincoln) Affirmed; Gray, C.J.** Landis was charged with deceptive practices and felony theft as part of a common scheme when he accepted money from a co-op for services never provided. Landis moved for a directed verdict. He claimed that, if he took any money, it was from a co-op that was neither a legal entity nor a person, as required by statute. With respect to the deceptive practices charge, Landis claimed that his only deception came after he had already received the money. Viewing the evidence in a light most favorable to the State, the Supreme Court affirmed the denial of Landis' motion for a directed verdict. It found sufficient evidence for the jury to conclude that he stole the money from a "person," and it was for the jury to decide which, if any, of his statements were deceptive.

***State v. Kaske (Arthur Paul)*, 2002 MT 106, 309 Mont. 445, ___ P.3d ___**

(Missoula). Affirmed; Regnier, J. Kaske had two trials, both resulting in convictions for possession of dangerous drugs and, on the second trial, for bail jumping, as well. William Boggs represented him on the first trial--after Boggs replaced Dirk Beccarri, from the Missoula County Public Defender's Office. On the second trial, because there was a possibility Boggs might be called as a witness for the bail jumping charge arising from Kaske's failure to appear for sentencing on the first trial, Margaret Borg, the head of the Missoula Public Defenders was appointed to replace Boggs. (Boggs, while Kaske was at large, succeeded in a motion for a new trial.) Kaske requested that she be replaced because she would not communicate with him, would not file various motions and petitions, and would not find the exculpatory evidence he insisted existed.

At issue on appeal were whether the district court should have appointed substitute counsel for Borg and whether the State had sufficient evidence to prove the elements of bail jumping.

***State v. Kaske (Arthur Paul)*, 2002 MT 106, 309 Mont. 445, ___ P.3d ___ (Missoula). Affirmed; Regnier, J.** Kaske argued that the State failed to prove the elements of bail jumping as defined by Mont. Code Ann. § 45-7-308 because the order from the court setting his time for sentencing did not comply with the requirements for a "release order" in Mont. Code Ann. §§ 46-9-110 and -111. The Court, citing State v. Heffner, 1998 MT 181, 290 Mont. 114, 965 P.2d 736, said that the State is only required to prove the statutory elements of an offense, and the bail-jumping statute does not mention a release order. It requires only that a person be "set at liberty by court order." Testimony from the deputy clerk of court that Kaske was present when the district judge set the time and place for sentencing after the first trial and directed Kaske to appear, which he failed to do.

***State v. Thompson*, 2001 MT 119, 305 Mont. 342, 28 P.3d 1068 (Teton). Affirmed; Trieweiler, J.** After viewing the evidence in the light most favorable to the prosecution, any rational trial of fact could have found the essential elements of the crime beyond a reasonable doubt. The victim testified her daddy touched her in the wrong places while she was wearing her pajamas, and she wanted to tell the truth so her daddy could get help. The victim's mother confirmed that the victim stated it was her father who touched her and testified the victim asked her mother to protect her from the Defendant. The Defendant was with the victim at the time it was alleged the sexual assault occurred, and he had the opportunity to commit the sexual assault. The victim's behavior was noticeably different after the sexual assault. Even though there was no physical evidence of sexual abuse a pediatrician testified that physical signs are generally not evident in fondling cases. An expert

testified that she suspected the victim had been sexually abused, and it is common among children who have been sexually abused to make inconsistent statements regarding the identification of the perpetrator.

***State v. Spang*, 2002 MT 120, ___ Mont. ___, ___ P.3d ___ (Hill). Affirmed in Part; Reversed in Part; Regnier, J.** The district court properly denied Spang's motion to suppress Spang's voluntary statements made to law enforcement on September 17, because there is no evidence to suggest that the delay (Friday to Monday) between Spang's arrest and initial appearance influenced the voluntariness of his September 17 statements.

***State v. Nelson (David Wayne)*, 2002 MT 122, ___ Mont. ___, ___ P.3d ___ (Ravalli). Affirmed; Cotter , J.** David Wayne Nelson, accompanied by his nephew Fred, went to a couple's home in Ravalli County. At the close of their visit, Nelson grabbed the lady of the house, Shari, wrapped wire around her wrists, and threw her to the floor. Fred held a gun to the head of her partner, Jim, who was in a wheelchair. Shari was ultimately released, and Nelson took $70 from Jim before leaving. Nelson was convicted of aggravated kidnapping, robbery, and two counts of accountability for felony assault.

B. Principles of Liability

1. Accountability

***State v. Spang*, 2002 MT 120, ___ Mont. ___, ___ P.3d ___ (Hill). Affirmed in Part; Reversed in Part; Regnier, J.** The district court properly denied Spang's motion for directed verdict on the charges of intimidation by accountability. The evidence established that Spang assisted the principal (Danell) prior to and during the commission of intimidating two persons. Spang collected collateral property on Danell's behalf, tore telephone cords out of the walls in one of the victim's homes, and unloaded and reloaded the clip to a nine millimeter rifle later used by Danell to threaten and ultimately murder the victims. Spang was more than merely present at the crime scene and the evidence was sufficient evidence upon which a rational trier of fact could find beyond a reasonable doubt that Spang committed intimidation by accountability.

2. Intoxication

***State v. Peplow*, 2001 MT 253, 307 Mont. 172, 36 P.3d 922 (Ravalli). Reversed; Cotter, J.** Peplow drove drunk, wrecked his truck on a desolate stretch of road, then walked to a bar and inebriated himself more heavily to thwart the integrity of any sobriety testing. Peplow argued, among other things, that the trial court erred by denying his motion for a directed verdict on the tampering with evidence charge. The Supreme Court held that the trial court had erred because consuming alcohol after a vehicle accident did not constitute tampering with physical evidence; Mont. Code Ann. § 61-8-404 did not contemplate that potentially measurable amounts of alcohol, still within the human body, constituted evidence, and until one's breath or blood had been obtained or collected for analysis, it could not be considered physical evidence, under Mont. Code Ann. § 45-7-207, or a thing presented to the senses, as explained in Mont. Code Ann. § 26-1-101(2).

C. Offenses Against the Person

1. Homicide

***State v. Steven Francis*, 2001 MT 233, 307 Mont. 12, 36 P.3d 390 (Silver Bow). Reversed; Regnier, J.** The district court erred when it admitted the Defendant's friends' out of court statements to his former girlfriend, made in the Defendant's presence, that he and the Defendant committed the homicide. The friend refused to answer questions at trial on the ground that he might incriminate himself. These statements were not admissible as statements against penal interest nor were they admissible as those of a co-conspirator since a co-conspirator's statements made after attainment of the conspiracy's object are not admissible unless the movant can prove an express agreement existed among co-conspirators to continue to act in concert to cover up the crime after its commission. Since the State did not argue below, that the statements were admissible as an admission of a party-opponent pursuant to Mont. R. Evid. 801 (d)(2)(A), the record was inadequate to determine if the friend's statement would have been admissible under Rule 801(d)(2)(A). The State alternatively argued on appeal that the statements were admissible as testimony concerning out of court statements made by the friend and adopted by the Defendant, pursuant to Rule 801(d)(2)(B). The State failed to present sufficient evidence to show that the Defendant adopted the friend's statements, and the district court never made an express determination that the Defendant adopted the friend's statements.

The friend's videotaped confession was not admissible under Rule 804(b)(3), as statements against his penal interest since the confession consisted mainly of blaming the Defendant. Non-inculpatory statements where the declarant

merely blames another person are not necessarily credible or admissible. The admission of the friend's out of court statements did not constitute harmless error. Even though the State presented other cumulative admissible evidence regarding the Defendant's purposeful participation in the homicide, there is a reasonable possibility that the inadmissible evidence contributed to the verdict.

***State v. Deschon*, 2002 MT 16, 308 Mont. 175, 40 P.3d 391 (Lewis and Clark). Affirmed in part and Remanded for Evidentiary Hhearing; Leaphart, J.** Deschon was not denied effective representation of counsel because one of his two attorneys had a conflict of interest. During trial, the defense called William Lawrence to testify in support of Deschon's affirmative defense. One of Deschon's attorneys was also representing Lawrence on a pending, and completely unrelated, charge of domestic abuse. Lawrence testified favorably for Deschon. Even assuming arguendo that an actual conflict of interest existed, Deschon could not establish that his counsel's performance was adversely affected by an actual conflict of interest.

Deschon's right to due process was not violated because no transcript of voir dire exists for review on appeal since there is the availability of alternative devices that would fulfill the same functions as a transcript. The Court remanded for an evidentiary hearing in district court, during which witnesses such as the prosecutor, defense attorney, court reporter and clerk of court may testify as to their memory of the voir dire proceeding.

2. Assault/Related Offenses

***City of Kalispell v. Cameron*, 2002 MT 78, 309 Mont. 248, 46 P.3d 46 (Flathead). Reversed; Trieweiler, J.** Court overturned Defendant's conviction for obstructing a police officer based on insufficient evidence. City neglected to file a brief in opposition, and AG's office wasn't served with opening brief, which might have been part of the problem.

3. Sexual Crimes

***State v. Bauer (Chester)*, 2002 MT 7, 308 Mont. 99, 39 P.3d 689 (Deer Lodge). Affirmed; Rice, J.** Bauer was convicted of incest after the district court denied his motion for a direct verdict. The Supreme Court held that the evidence was sufficient to sustain the conviction, rejecting Bauer's claim that the victim's testimony was inherently incredible.

***State v. Detonancour*, 2001 MT 213, 306 Mont. 389, 34 P.3d 487 (Madison). Affirmed; Leaphart, J.** The district court correctly refused to allow the Defendant to present evidence that at a birthday party two days prior to the sexual assault, the victim pulled the Defendant onto her lap, because this did not meet the definition of past sexual conduct under Mont Code Ann § 45-5-511. The victim properly testified that immediately after the assault the Defendant went into her daughter's bedroom and returned to the living room wearing a pair of her daughter's panties. The Defendant's conduct, was relevant as part of the transaction since the actions occurred immediately after the sexual assault and right before the victim called 911. The district court erred when it allowed a nurse practitioner to testify in extensive detail about the rape examination process because such testimony was not probative of the ultimate issue of consent, but the error was harmless. A rape victim's advocate properly testified as an expert on Rape Trauma Syndrome (RTS). The witness had training and experience in working with rape victims. Her lack of formal education in the field of psychology went to the weight of her testimony rather than its admissibility.

D. DUI

***State v. Nelson*, 2001 MT 236, 307 Mont. 34, 36 P.3d 405 (Gallatin). Affirmed; Regnier, J.** After receiving a report that a bartender was concerned for her safety because someone was parked outside the bar at closing time, Belgrade police officers found Nelson (who had been asked to leave the bar shortly before closing) slumped over the steering wheel of his truck. The engine was running and the music was blaring inside the vehicle. Nelson showed all the classic signs of intoxication but he declined to undergo field sobriety testing or a breath test. Nelson claimed that he was merely using his vehicle as shelter from the cold and that he was waiting for his brother to come pick him up. The first trial resulted in a hung jury. In the first trial, Judge Olson instructed the jury that "actual physical control . . . does not include use of a vehicle solely for a place of shelter or habitation." In the second trial, Nelson asserted the defense necessity or choice of evils, and asked Judge Swandal to give common-law instructions regarding these defenses and/or the instruction given by Judge Olson in the first trial. Judge Swandal declined to give any such instruction, believing they were unavailable as a matter of law "especially under the facts here" because "there were certainly other options available to the Defendant in this matter." The Supreme Court affirmed, noting that common law defenses are merged into the statutory defense of compulsion. Nelson relied on only one case involving a non-statutory necessity

defense, but the facts in Nelson's case did not satisfy the elements of the defense. The Court agreed with Judge Swandal that other options were available to Nelson that did not render it necessary for him to assume physical control and operation of the vehicle. Nelson could have sought shelter at a nearby hotel or he could have used a blanket in his truck "instead of turning on his car." In the words of the Court: "Nelson was not physically injured. He drove to the bar by himself, on a cold night, without a jacket, clad only in a sleeveless T-shirt. This was a self-created predicament that had multiple solutions. While the comfort of Nelson's

truck undoubtedly presented a welcome refuge, we see no reason it requires us to adopt the defense of necessity."

***State v. Krause*, 2002 MT 63, 309 Mont. 174, 44 P.3d 493 (Beaverhead). Affirmed in Part; Reversed and Remanded in Part; Nelson, J.** In this appeal of a license reinstatement denial, the Court refused to address the issue whether a driveway is a way of this State open to the public because there was ample evidence in the record to support the district court's conclusion that the Defendant had been driving or was in actual physical control of a vehicle upon a way of this State open to the public.

***State v. Anderson (John Henry)*, 2001 MT 188, 306 Mont. 243, 32 P.3d 750 (Wibaux). Affirmed; Leaphart, J.** During the sentencing hearing for driving after having been declared an habitual traffic offender, the district court heard evidence that Anderson had been recently charged with third offense DUI. Later, in the DUI proceeding, Anderson claimed he had already been sentenced for the DUI, and moved to dismiss on double jeopardy grounds. The charge was dismissed, but the Montana Supreme Court reinstated the charge in State v. Anderson, 1998 MT 258, 291 Mnt. 242, 967 P.2d 413. On remand, Anderson renewed his motion on the basis of the Court's ruling in State v. Guillaume, 1999 MT 29, 293 Mont. 224, 975 P.2d 312 (reasoning therein that the state Constitution provides greater protection against double jeopardy than under US Constitution). The renewed motion was denied. On appeal, the Supreme Court held that Guillaume applied only to legislative enactments that enhance sentences for conduct which is already included as an element of the underlying offense (e.g. felony assault and weapon enhancement).

***State v. Anderson (John Henry)*, 2001 MT 188, 306 Mont. 243, 32 P.3d 750 (Wibaux). Affirmed; Leaphart, J.** At the sentencing hearing for third offense DUI, Anderson challenged the validity of one of his earlier DUI convictions. He

claimed there was no evidence in the record that he had waived his right to counsel in the prior case. The claim was rejected by the district court and again on appeal. The Supreme Court held that Anderson failed to meet his burden of proof because the *lack* of evidence of effective waver is not direct evidence of invalidity. "In sum, it is not proof of anything. It is absence of proof."

***State v. Marvin Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735 (Deer Lodge). Affirmed; Cotter, J.** The arresting officer had particularized suspicion to stop the Defendant since the Defendant first drew suspicion by pulling into and then immediately pulled back out of a parking lot after spotting the officer's patrol car. While following the truck the officer observed the driver was traveling ten miles per hour in a twenty-five mph zone; the driver was continuously watching the officer in the rearview mirror; and the driver shifted from the edge of the roadway to the mid-point and across it, several times, and on at least one of these occasions the Defendant's vehicle would have impeded oncoming traffic.

***State v. Peplow*, 2001 MT 253, 307 Mont. 172, 36 P.3d 922 (Ravalli). Reversed; Cotter, J.** Peplow drove drunk, wrecked his truck on a desolate stretch of road, then walked to a bar and inebriated himself more heavily to thwart the integrity of any sobriety testing. Peplow argued, among other things, that the trial court erred: (1) by denying his motion for a directed verdict on the tampering with evidence charge; and (2) by not accepting his tendered guilty pleas to driving while license was suspended or revoked and operating a motor vehicle without liability insurance. The Supreme Court held that the trial court had erred because: (1) consuming alcohol after a vehicle accident did not constitute tampering with physical evidence; Mont. Code Ann. § 61-8-404 did not contemplate that potentially measurable amounts of alcohol, still within the human body, constituted evidence, and until one's breath or blood had been obtained or collected for analysis, it could not be considered physical evidence, under Mont. Code Ann. § 45-7-207, or a thing presented to the senses, as explained in Mont. Code Ann. § 26-1-101(2); and (2) before or during trial, the trial court was mandated to accept the Peplow's guilty plea, as long as the statutory requirements of voluntariness, intelligence, and a factual basis for the plea were fulfilled.

E. Bail Jumping

***State v. Kaske (Arthur Paul)*, 2002 MT 106, 309 Mont. 445, ___ P.3d ___ (Missoula). Affirmed; Regnier, J.** Kaske had two trials, both resulting in convictions for possession of dangerous drugs and, on the second trial, for bail

jumping, as well. William Boggs represented him on the first trial—after Boggs replaced Dirk Beccarri, from the Missoula County Public Defender's Office. On the second trial, because there was a possibility Boggs might be called as a witness for the bail jumping charge arising from Kaske's failure to appear for sentencing on the first trial, Margaret Borg, the head of the Missoula Public Defenders was appointed to replace Boggs. (Boggs, while Kaske was at large, succeeded in a motion for a new trial.) Kaske requested that she be replaced because she would not communicate with him, would not file various motions and petitions, and would not find the exculpatory evidence he insisted existed.

At issue on appeal were whether the district court should have appointed substitute counsel for Borg and whether the State had sufficient evidence to prove the elements of bail jumping.

***State v. Kaske (Arthur Paul)*, 2002 MT 106, 309 Mont. 445, ___ P.3d ___ (Missoula). Affirmed; Regnier, J.** Kaske argued that the State failed to prove the elements of bail jumping as defined by Mont. Code Ann. § 45-7-308 because the order from the court setting his time for sentencing did not comply with the requirements for a "release order" in Mont. Code Ann. §§ 46-9-110 and -111. The Court, citing State v. Heffner, 1998 MT 181, 290 Mont. 114, 965 P.2d 736, said that the State is only required to prove the statutory elements of an offense, and the bail-jumping statute does not mention a release order. It requires only that a person be "set at liberty by court order." Testimony from the deputy clerk of court that Kaske was present when the district judge set the time and place for sentencing after the first trial and directed Kaske to appear, which he failed to do.

F. Other Offenses

***State v. Peplow*, 2001 MT 253, 307 Mont. 172, 36 P.3d 922 (Ravalli). Reversed; Cotter, J.** Peplow drove drunk, wrecked his truck on a desolate stretch of road, then walked to a bar and inebriated himself more heavily to thwart the integrity of any sobriety testing. Peplow argued, among other things, that the trial court erred by denying his motion for a directed verdict on the tampering with evidence charge. The Supreme Court held that the trial court had erred because consuming alcohol after a vehicle accident did not constitute tampering with physical evidence; Mont. Code Ann. § 61-8-404 did not contemplate that potentially measurable amounts of alcohol, still within the human body, constituted evidence, and until one's breath or blood had been obtained or collected for analysis, it could

not be considered physical evidence, under Mont. Code Ann. § 45-7-207, or a thing presented to the senses, as explained in Mont. Code Ann. § 26-1-101(2).

F. Jury Issues

1. Voir Dire

***State v. Ford,* 2001 MT 230, 306 Mont. 517, 39 P.3d 108 (Cascade). Affirmed; Cotter, J.** Ford was convicted of deliberate homicide after beating his male roommate to death. Ford claimed that the decedent attacked him and that Ford was acting in self-defense. Following voir dire, the prosecution exercised six strikes against panelists who happened to be female. After the sitting jury was sworn and the venire was dismissed, Ford's trial counsel moved for a new jury pool, claiming that the State's exercise of its peremptory strikes violated Ford's right "to a jury of his peers." The prosecution, without any prompting from the district court, offered explanations for his strikes. The district court, without stating its reasons for doing so, overruled the objection. On appeal, "Ford first labeled his dispute over the State's exercise of peremptory challenges a 'Batson' challenge." The Court refused to address the merits of the Batson issue, holding that the issue was waived by trial counsel's failure to assert the objection before the jury was sworn and the venire dismissed. The Court observed that an untimely Batson challenge impairs counsel's ability to defend his or his strikes and deprives the district court of the ability to correct any error in the proceedings in a timely fashion.

The Court took the opportunity to discuss Batson and its progeny, noting that Batson (which involved racial discrimination in the exercise of peremptory challenges) was extended to include gender discrimination in J.E.B. v. Alabama. The Court also noted that Batson has been extended to prevent discriminatory peremptory strikes by criminal defense counsel. The Batson rule also applies to private litigants in civil cases.

***State v. Good,* 2002 MT 59, 309 Mont. 113, 43 P.3d 948 (Missoula). Reversed; Leaphart, J.** Good was convicted of a sexual abuse charge involving his teenage stepdaughter; the jury hung on two sexual assault counts. He appealed, claiming that he was denied his right to a speedy trial and that the district court abused its discretion when it denied defense challenges for cause during voir dire.

The Court affirmed the district court with respect to the speedy trial claim, but reversed the district court's decision to deny challenges for cause involving two panelists who testified that they would find it hard to believe that a young female victim would fabricate such serious allegations. The district court

intervened in the questioning, and gave a short rendition of State's burden of proof and a juror's duty to sit with skepticism of the State's case. The judge asked one panelist if she "quibbled" with what the judge called his "little civics speech." The panelist stated that she could assume the proper frame of mind if she sat on the jury. The trial judge denied the challenge, as well as another challenge involving a panelist who was questioned by defense counsel regarding the district court's "civics speech." Relying upon its earlier opinion in DeVore, the Court held that the district court abused its discretion because the testimony of both panelists raised serious questions about their ability to serve with impartiality. The Court also emphasized that it has "repeatedly admonished trial judges to refrain from attempting to rehabilitate jurors by putting them in a position where they will not disagree with the court."

Finally, the Court overruled DeVore to the extent it contemplated harmless error analysis when a district court erroneously denies a challenge for cause. Relying upon its recent opinions in LaMere, Van Kirk and Bird, the Court held that when the defense removes the disputed panelists with peremptory challenges and exhausts all of its peremptory challenges, the error is structural and requires automatic reversal. The structural error issue was not briefed because Van Kirk (which requires consideration of structural error even if the issue is not raised) was decided after the briefing in Good was completed.

Justices Trieweiler concurred with the reversal but dissented from the Court's abandonment of the DeVore harmless error test, and he argued that the Court's recent structural/trial error dichotomy was a mistake. Justice Rice dissented, concluding that the district court's opportunity to evaluate the panelists in person was more reliable than the majority's second-guessing of the district court based upon the "cold, dry transcript."

State v. Freshment, **2002 MT 61, 309 Mont. 215, 43 P.3d 968 (Yellowstone). Reversed; Nelson, J.** Following Freshment's convictions on two sexual intercourse without consent counts, the Court addressed whether the district court abused its discretion when it denied challenges for cause to two panelists. The district court allowed the State to rehabilitate one of these panelists after she had repeatedly told defense counsel that she could not acquit the Defendant because Freshment should know that teenage girls will lie about their age. Another panelist stated that he thought the Defendant should be aware that teenagers lie, and that he would be sympathetic to the victim because his daughter works with sexual assault victims. The district court refused to excuse either panelist for cause. The Court found an abuse of discretion with respect to both panelists, concluding that the panelists "stated an actual bias directly related to an issue critical to the outcome of

the case, i.e., whether Freshment could have a reasonable belief one of the victims was 16 or older." The Court held, "Coaxed recantations in which jurors state they will merely follow the law, whether prompted by the trial court, the prosecution, or the defense, do not cure or erase a clearly stated bias which demonstrates actual prejudice against the substantial rights of a party." Based upon Van Kirk and Good (decided the same day), the Court held that the error was structural, and therefore required automatic reversal regardless of the quality of the State's evidence. As an aside, the same day Good and Freshment were decided, the Court reversed a jury verdict in a civil case, Reff-Conlin's Inc., after concluding that the trial court erroneously denied a valid challenge for cause.

Justice Rice concurred in the Court's holding only with respect to the panelist who repeatedly expressed bias, concluding that her "answers form[ed] a sufficient
basis to overcome the due deference we must give the trial court in ascertaining whether there was an abuse of discretion."

***State v. Deschon*, 2002 MT 16, 308 Mont. 175, 40 P.3d 391 (Lewis and Clark). Affirmed in Part and Remanded for Evidentiary Hearing; Leaphart, J.** Deschon's right to due process was not violated because no transcript of voir dire exists for review on appeal since there is the availability of alternative devices that would fulfill the same functions as a transcript. The Court remanded for an evidentiary hearing in district court, during which witnesses such as the prosecutor, defense attorney, court reporter and clerk of court may testify as to their memory of the voir dire proceeding.

2. Jury Conduct/Deliberations

***State v. Thompson*, 2001 MT 119, 305 Mont. 342, 28 P.3d 1068 (Teton). Affirmed; Trieweiler, J.** The district court did not abuse its discretion when it had the four-year-old sexual assault victim's testimony read to the jury after the jury had begun deliberations. Pursuant to Mont. Code Ann. § 46-16-503, it is within the sound discretion of the court to determine whether the jury should rehear testimony. Since the jury could not hear the young victim during her trial testimony, the testimony was an essential part of the case, and the testimony included evidence favorable to both parties, the district court properly allowed the jury to hear the victim's testimony during deliberations.

***State v. Tapson*, 2001 MT 292, 307 Mont. 428, 41 P.3d 305 (Yellowstone). Reversed; Nelson, J. (Rice, J., dissenting)** Floyd Tapson was charged with

attempted deliberate homicide, aggravated kidnapping, and sexual intercourse without consent. The State alleged that Tapson, who was an employer in a group home for developmentally disabled juvenile males, took, on a pretext, the developmentally disabled girl friend of one of his charges to his own home, where he tied her to a post in his basement for several hours, had nonconsensual sex with her, and then took her to a deserted area near Billings, where he shot her. She was wounded in the face and arm from two gunshots, but she was able to flee in the darkness.

After deliberating for two days, the jury sent a note to the judge saying it had a verdict on one charge and could not reach a verdict on the other two. The court, after consulting with the prosecution and defense counsel, in the presence of the Defendant, decided, with the express agreement of defense counsel, to take substitute verdict forms into the jury room.

The Court concluded that the judge's entry into the jury room with only the jury present, without a contemporaneous, personal, knowing, voluntary, and on-the-record waiver" of the Defendant's "constitutional rights to a public trial and to be present at all critical stages of the trial" was reversible error. The Court rejected the State's argument that there was not only waiver by counsel in the presence of the Defendant but also through the Defendant's failure to object.

3. Instructions

***State v. Rogers*, 2001 MT 165, 306 Mont. 130, 31 P.3d 724 (Missoula). Reversed; Leaphart, J.** Counsel is ineffective when he neglects to offer a "failure to agree" instruction to accompany a lesser included offense instruction where there is a reasonable probability that the jury might have reached a different verdict but for the error (i.e., where there are sufficient facts to support a conviction for a lesser included offense). This result avoids the danger that jurors, harboring doubts as to a defendant's guilt on the greater offense, will wrongly yield to the majority rather than not convict the defendant of any offense at all. Does this mean that counsel is per se ineffective if he fails to offer a "failure to agree" instruction whenever the court instructs on a lesser included offense (since the LIO requires some factual support in the record)? I don't know . . .

Also, counsel has a constitutional obligation to file a notice of appeal when requested to do so by the defendant, or must file an **Anders** brief.

***State v. Nelson (David Wayne)*, 2002 MT 122, ___ Mont. ___, ___ P.3d ___ (Ravalli). Affirmed; Cotter , J.** Fred was persuaded to testify against his uncle

by a plea agreement, which was admitted into evidence as an exhibit and about Fred was cross-examined. Fred had moved from his home in Dillon to Hamilton a few months before the events in question, and Nelson's counsel questioned him about the circumstances surrounding his leaving Dillon. Nelson's counsel sought to examine Fred about some charges in Dillon, attempting to show that the Beaverhead County prosecutor had dismissed a charge after Fred made a deal there to testify against other codefendants. The object of cross-examining Fred on this topic was to impeach his testimony about why he had left Dillon and also to demonstrate a pattern of testifying against codefendants. On the State's objection, the district court barred cross-examination on this topic under Mont. R. Evid. 403, finding the connection too tenuous and apt to confuse the jury, especially since the defense was unable to show that formal charges had actually been filed in Beaverhead County.

The Court upheld the district court, stating that Rule 611, M.R.Evid., which grants the district court reasonable control over the interrogation of witnesses, supported the court's decision because Nelson had been given an opportunity for effective cross-examination. He had "wide latitude when cross-examining Fred" on the plea agreement with the Ravalli County prosecutor, and counsel examined Fred about inconsistencies in his earlier statements and his lies to the police during the investigation. The Court ruled Nelson was not denied his Confrontation Clause rights and that the district court did not abuse its discretion when it prevented Nelson from examining Fred about alleged but unsubstantiated charges in Beaverhead County.

***State v. Crawford*, 2002 MT 117, ____ Mont. ____, ____ P.3d _____ (Missoula). Reversed; Cotter, P. Regnier, J. dissenting.** Crawford was arrested soon after a controlled drug buy. When he was arrested he possessed $1025.00 cash. The State charged him with Criminal Possession of $1025.00 Cash Subject to Forfeiture. The State presented evidence of the $225.00 controlled buy. Crawford presented a witness who stated that she had paid him money recently to work on her vehicle. The State discredited the witness. During deliberations, the jury questioned whether they had to find that all $1025.00 was proceeds of a drug sale in order to find Crawford guilty of the Forfeiture charge. As possession of any amount of proceeds from a drug sale violates the Forfeiture statute, the judge drafted a special interrogatory which allowed the jury to list the amount of funds they determined were proceeds from drug sales. The jury found that Crawford possessed $225 subject to forfeiture.

The Court reversed the district court decision and citing State v. Cline , 179 Mont. 520, 555 P.2d 724 (1976) found that "when the State fails to properly object to a jury instruction, the instruction, whether it includes an unnecessary

element or not, becomes the law of the case once delivered, and the jury is accordingly bound by it." Thus, the $1025.00 specified amount that was contained in the information and the jury instruction became "the law of the case" or an element which the State was required to prove beyond a reasonable doubt. Justice Regnier dissented.

***State v. German, Bryan Lee*, 2001 MT 156, 306 Mont. 92, 30 P.3d 360 (Custer). Affirmed; Gray, C.J**. Bryan Lee German was convicted of attempted felony assault and deliberate homicide. German had acted as an intermediary for the deceased, Willie Gonzales, by obtaining marijuana for him. The marijuana was actually oregano, which, as any aging former hippy would know, does not produce the same effect on the human mind. Gonzales wanted his money back, since the $200 he gave German was considerably more than he would have paid for even the best grade of oregano. German demurred, saying he was only the intermediary. Gonzales was not persuaded, so he threatened reprisal against German and his family. On the day in question, Gonzales followed German home, and German shot Gonzales twice with a sawed-off shotgun while Gonzales was sitting in his car in front of German's house.

***State v. Harris*, 2001 MT 231, 306 Mont. 525, 36 P.3d 372 (Lincoln). Affirmed in Part; Reversed in Part and Remanded for hearing; Nelson, J.** Harris was convicted of one count of incest. The Supreme Court held that Harris was not entitled to a specific unanimity jury instruction because his incestuous acts were so frequently perpetrated and closely connected as to be properly viewed as a single, continuous offense within the exception to the rule in State v. Weaver.

***State v. Bauer (Chester)*, 2002 MT 7, 308 Mont. 99, 39 P.3d 689 (Deer Lodge). Affirmed; Rice, J.** The Supreme Court held that the district court properly refused Bauer's proposed jury instruction on "weak and less satisfactory" evidence, noting that the instruction amounts to a comment on witness credibility and is better left for closing arguments.

***State v. Detonancour*, 2001 MT 213, 306 Mont. 389, 34 P.3d 487 (Madison). Affirmed; Leaphart, J.** The jury instructions, reviewed as a whole, fully and fairly presented the law to the jury. Although the court improperly instructed the jury on direct and circumstantial evidence, when the instructions are read as a whole, the erroneous instruction did not lesson the State's burden of proof. The jury was specifically instructed it was the State's burden to prove the Defendant's guilt beyond a reasonable doubt, which meant the State had to prove every element

of the offense beyond a reasonable doubt. The district court's failure to limit the instruction of "without consent" to the crime of sexual intercourse without consent did to prejudicially affect the Defendant's substantial rights.

***State v. Nelson (David Wayne)*, 2002 MT 122, ___ Mont. ___, ___ P.3d ___ (Ravalli). Affirmed; Cotter , J.** Fred was persuaded to testify against his uncle by a plea agreement, which was admitted into evidence as an exhibit and about Fred was cross-examined. Fred had moved from his home in Dillon to Hamilton a few months before the events in question, and Nelson's counsel questioned him about the circumstances surrounding his leaving Dillon. Nelson's counsel sought to examine Fred about some charges in Dillon, attempting to show that the Beaverhead County prosecutor had dismissed a charge after Fred made a deal there to testify against other codefendants. The object of cross-examining Fred on this topic was to impeach his testimony about why he had left Dillon and also to demonstrate a pattern of testifying against codefendants. On the State's objection, the district court barred cross-examination on this topic under Mont. R. Evid. 403, finding the connection too tenuous and apt to confuse the jury, especially since the defense was unable to show that formal charges had actually been filed in Beaverhead County.

The Court upheld the district court, stating that Rule 611, M.R.Evid., which grants the district court reasonable control over the interrogation of witnesses, supported the court's decision because Nelson had been given an opportunity for effective cross-examination. He had "wide latitude when cross-examining Fred" on the plea agreement with the Ravalli County prosecutor, and counsel examined Fred about inconsistencies in his earlier statements and his lies to the police during the investigation. The Court ruled Nelson was not denied his Confrontation Clause rights and that the district court did not abuse its discretion when it prevented Nelson from examining Fred about alleged but unsubstantiated charges in Beaverhead County.

***State v. Nelson (David Wayne)*, 2002 MT 122, ___ Mont. ___, ___ P.3d ___ (Ravalli). Affirmed; Cotter , J.** At the State's request, the district court gave the jury a "fabrication instruction," one similar to the flight instruction that State v. Hall, 1999 MT 297, 297 Mont. 111, 991 P.2d 929, held an unnecessary comment on the evidence. The Court found no prejudice to Nelson by the instruction but said "its use in future trials is expressly disapproved."

G. Lesser Included Offenses

***State v. Rogers*, 2001 MT 165, 306 Mont. 130, 31 P.3d 724 (Missoula). Reversed; Leaphart, J.** Counsel is ineffective when he neglects to offer a "failure to agree" instruction to accompany a lesser included offense instruction where there is a reasonable probability that the jury might have reached a different verdict but for the error (i.e., where there are sufficient facts to support a conviction for a lesser included offense). This result avoids the danger that jurors, harboring doubts as to a defendant's guilt on the greater offense, will wrongly yield to the majority rather than not convict the defendant of any offense at all. Does this mean that counsel is per se ineffective if he fails to offer a "failure to agree" instruction whenever the court instructs on a lesser included offense (since the LIO requires some factual support in the record)? I don't know . . .

Also, counsel has a constitutional obligation to file a notice of appeal when requested to do so by the defendant, or must file an **Anders** brief.

***State v. German, Bryan Lee*, 2001 MT 156, 306 Mont. 92, 30 P.3d 360 (Custer). Affirmed; Gray, C.J.** German requested and the district court refused an instruction on the lesser included offense of negligent homicide. The Court, noting that neither party raised the issue of whether negligent homicide was a lesser included offense of deliberate homicide, adhered to earlier cases that said a lesser-included offense instruction is not supported by the evidence when the defendant's evidence or theory, if believed, would require an acquittal.

VIII. SENTENCING

A. Designation

1. Persistent Felony Offender

***State v. Pettijohn*, 2002 MT 75, 309 Mont. 244, 45 P.3d 870 (Missoula). Affirmed; Cotter, J.** The issue was whether a district court has subject matter jurisdiction to impose a persistent felony offender designation upon a defendant being sentenced for felony DUI. The Court declined to address whether Pettijohn's claim was procedurally barred on the basis he waived his right to direct appeal by pleading guilty, holding that the merits were dispositive. Relying on Yorek, the Court held that a district court possesses statutory authority to impose a felony offender sentence on a person convicted of felony DUI.

***State v. Yorek*, 2002 MT 74, 309 Mont. 238, 45 P.3d 872 (Ravalli). Affirmed; Cotter, J.** The Court declined to address the district court's ruling that Yorek's

guilty plea procedurally barred him from bringing his claim that the court lacked jurisdiction to designate him a persistent felony offender upon a felony DUI conviction. The Court held that if the underlying charge meets the definition of a felony, and the State has provided proper notice, a district court has the statutory authority to designate and sentence a defendant as persistent felony offender. The persistent felony offender provision makes no distinction between types of felonies nor does it exclude DUIs.

2. Eligibility for Parole

***State v. Ringewold, David Dean*, 2001 MT 185, 306 Mont. 229, 32 P.3d 729 (Lewis and Clark). Reversed; Trieweiler, J.** Ringewold pled guilty to two charges of felony assault in 1995, and the district court placed him in Warm Springs. The order allowed him to petition for a conditional release, but the order did not contain conditions (such as completion of anger management courses) later included in the district court's sentencing order under Mont Code Ann §

Ringewold's original sentence was for 10 years on each court (concurrent) with an additional two years for the use of a weapon (consecutive), for a net sentence of 14 years. At the hearing on the petition for release, the district court added conditions for release and said that she did not wish to issue a sentence longer than Ringewold's original sentence. The judge did not remember the exact sentence, believing it to be 8 years, and she forgot about the extra 4 years for the use of a weapon. She was unsure how much time Ringewold had served at Warm Springs and wanted counsel to find that out.

The written sentence called for a term of imprisonment of 14 years rather than 8 years. It also added the conditions of release mentioned in the judge's oral pronouncement.

Ringewold argued the district court erred when it added conditions to his original sentence because they illegally lengthened his sentence and that he would now be eligible for parole were it not for the additional conditions. Mont Code Ann § 46-14-312(4) provides that a "sentencing court may make any order not inconsistent with its original sentencing authority, except that the length of confinement or supervision must be equal to that of the original sentence."

The Court concluded that the practical effect of the additional conditions was to lengthen Ringewold's sentence, which it deemed a violation of § 46-14-312(4). It would not hold Ringewold to the "impossible burden of proving that if he was eligible for parole it would have been awarded." The matter was remanded to the district court to find whether Ringewold "is in fact being denied consideration for parole because of his failure to satisfy the additional treatment conditions." If that turns out to be the case, the Court ordered "the conditions be

stricken from the District Court's amended judgment."

Justice Rice, joined by the Chief Justice, dissented on two grounds. The first was that the majority actually reduced Ringewold's original sentence, a violation of the statute. The second was that the district court's oral pronouncement contained a "deliberate ambiguity" the district judge wanted cleared up before issuing a written sentence. Such an ambiguity invoked language in State v. Lane, 1998 MT 76, ¶ 37, 288 Mont. 286, 957 P.2d 9, to the effect that the function of the written judgment is to clarify an ambiguous oral sentence.

B. Plea Agreement

***State v. Afterbuffalo*, 2002 MT 14, 308 Mont. 163, 40 P.3d 375 (Cascade). Reversed and Remanded; Gray, C.J.** Afterbuffalo pled guilty based on a plea agreement that allowed him to withdraw his plea if the court did not accept the parties' recommendation for a suspended sentence with certain probation conditions. The sentencing court followed the recommendation, but added the requirement that Defendant be placed in a prerelease facility or on ISP. Defendant moved to withdraw his plea on the ground that this condition was outside the scope of the plea agreement. The district court denied the motion, and the Supreme Court reversed. The Court held that Afterbuffalo bargained for an ordinary suspended sentence with specified conditions--not to participate in a program that materially altered the impact of his suspended sentence. He should have been allowed to withdraw his guilty plea as a result of the court's added condition.

***State v. Wells*, 2001 MT 112, 305 Mont. 303, 27 P.3d 47 (Hill). Affirmed; Trieweiler, J.** After pleading guilty to negligent vehicular assault, Wells was sentenced to a five-year term in the custody of the Department of Corrections, with no time suspended. The Court rejected Wells' contention that the district court did not adequately explain the reasons for its sentence, noting that the district court found that Wells' long history of alcohol abuse and past alcohol-related offenses demonstrated that he was a danger to the public. The Court also rejected Wells' contention that the district judge was required to follow the prosecutor's sentencing recommendation, which was somewhat more lenient than the probation officer's recommendation. The Court noted that the written plea agreement stated that the probation officer's recommendation could differ from the prosecution's, ¶ 16, it was non-binding, and the sentencing court could impose the maximum sentence allowed. "Sentencing is a matter of discretion with the District Court. The record shows that Wells entered the plea agreement with the knowledge that the District Court could sentence him to the maximum extent."

Note: This case suggests that the foregoing plea provision satisfies concerns raised by Justice Trieweiler and others when the district court rejects the prosecution's plea recommendation in favor of a more strict recommendation from a probation officer. Therefore, we recommend that you include this plea provision as a standard provision in your written plea agreements.

***State v. Knox,* 2001 MT 232, 307 Mont. 1, 36 P.3d 383 (Flathead). Affirmed; Nelson, J.** Knox pled guilty to sexual assault of a minor pursuant to a verbal plea arrangement whereby the prosecution would recommend a thirty-year suspended sentence and would drop another sexual assault count. Knox's counsel also represented to the trial court that the prosecution had "indicated" that the victim's parents would not seek a term of imprisonment at sentencing. The trial court accepted Knox's guilty plea. During the plea colloquy, the trial court informed Knox that neither the court nor the victim's parents were parties to the plea agreement, and that the victim's parents could change their minds. Knox was told that if they did change their minds, he would not be permitted to change withdraw his plea. After receiving a copy of the PSI, which included an unfavorable psychosexual evaluation, Knox moved to withdraw his guilty plea, arguing that the prosecution breached the plea agreement because the victim impact statements in the PSI recommended imprisonment. The district court denied the motion to withdraw, noting that its plea colloquy addressed the very matter that had arisen. The Supreme Court affirmed the district court's denial of Knox's motion because Knox was adequately informed of the consequences of the plea and the State fulfilled all material requirements of the oral plea agreement. "Knox knew going in to his entry of plea that whatever agreement the victim's parents made about not recommending prison was not enforceable. The trial judge made that clear to him." The Court also noted that the district court's sentence was a function of the psychosexual evaluation, not the victims' sentencing recommendation.

C. Multiple Punishments

***State v. Anderson (John Henry)*, 2001 MT 188, 306 Mont. 243, 32 P.3d 750 (Wibaux). Affirmed; Leaphart, J.** At the sentencing hearing for third offense DUI, Anderson challenged the validity of one of his earlier DUI convictions. He claimed there was no evidence in the record that he had waived his right to counsel in the prior case. The claim was rejected by the district court and again on appeal. The Supreme Court held that Anderson failed to meet his burden of proof because the *lack* of evidence of effective waver is not direct evidence of invalidity. "In sum, it is not proof of anything. It is absence of proof."

D. Fines or Costs

***State v. Blackwell*, 2001 MT 198, 306 Mont. 267, 32 P.3d 771 (Cascade). Reversed; Gray, C.J.** The State and the Defendant reached a plea agreement on the trial date. Pursuant to local rule, the district court assessed each of the parties one-half of the cost of the jury, including a clerk's salary for one day. The Defendant challenged the imposition of costs on the basis that costs can only be applied in compliance with the sentencing statutes and that they weren't followed. The State argued that the imposition of costs was not part of the Defendant's sentence and was proper pursuant to the local rule, which the Defendant did not challenge. The Court didn't agree with the State's argument and found instead that "the State necessarily posits that district courts may adopt whatever local rules they may desire which impose penalties on a criminal defendant--without regard to whether they are authorized by, or consistent with, sentencing statutes--and avoid both statutory and jurisprudential constraints on their sentencing authority by merely imposing such penalties via separate order in advance of the judgment and sentence in a case. Not surprisingly, perhaps, the State cites no authority for this novel proposition."

E. Enhancement

***State v. Park*, 2001 MT 157, 306 Mont. 98, 30 P.3d 1062 (Park). Affirmed; Gray, C.J.** Park strangled then shot his girlfriend Sandra J. Keilhauer in the head above her left eye. After Park pled guilty to mitigated deliberate homicide, the district court sentenced him to 40 years in prison with no possibility of parole. On appeal, the issue was whether the district court violated the Montana Constitution's prohibition against double jeopardy when it sentenced Park to an additional 10 years in prison for using a weapon. The Supreme Court rejected Park's argument that the use of a weapon was necessarily an element of the offense of mitigated deliberate homicide. Park's argument, which attempted to show that weapon use inheres in all murders, is immaterial under State v. Guillaume, 1999 MT 29, 293 Mont. 224, 975 P.2d 312. Guillaume proscribes weapons enhancement when the underlying offense, by its own terms, requires proof of weapon use. Park's position contravenes traditional statutory construction rules, disregards instances of murder where death is not by any instrumental means, and urges the Court to ignore its own precedent narrowly construing what is a weapon.

F. Victim Impact

***State v. Henderson*, 2002 MT 44N (unpublished) (Jefferson). Affirmed; Gray, C. J.** The Court affirmed Henderson's conviction of three counts of misdemeanor assault. Henderson argued that she presented evidence at trial creating a reasonable doubt that she committed the assaults. The victim-children had recanted some of their testimonies, but not with regard to the assault charges (but relating to other charges of which Henderson was acquitted). Therefore, the district court's language that "the recanted testimony of the children created more than a reasonable doubt, especially as to the felony" did not apply to the assault charges.

Henderson also alleged that her conviction was based solely on unreliable prior inconsistent statements by the children. Again, the court noted that none of the children's statements with regard to the charges of which Henderson was convicted were inconsistent.

G. Other

***State v. Watson (Phillip Carl)*, 2001 MT 143, 306 Mont. 33, 29 P.3d 1026 (Lincoln). Reversed; Trieweiler, J.** Watson pled guilty to assault on a police officer, a felony, Mont. Code Ann. § 45-5-210. As one of his conditions of probation, Watson was not to socialize with females under the age of 19. He objected to the condition on the ground that it was not rationally related to his conviction. The Court agreed, even though the State produced evidence of Watson volatility and propensity for violence. It cited State v. Ommundson, 1999 MT 16, 293 Mont. 133. 974 P.2d 620.

***State v. Muhammad*, 2002 MT 47, 309 Mont. 1, 43 P.3d 318; (Cascade) Affirmed in Part; Vacated in Part and Remanded; Regnier, J.** Muhammad admitted having non-consensual sexual intercourse with a 14-year-old girl. Despite opposition from the victim and the State, District Court Judge Marge Johnson suspended his sentence on numerous conditions, including that he not reside or work in Cascade County; that he post a sign at every entrance to his residence reading, "Children Under the Age of 18 Are Not Allowed By Court Order;" that he pay $5000 in restitution to the victim; and that his supervision not be transferred under an interstate compact unless pre-approved by the district court.

Muhammad didn't appeal until he was revoked for violating conditions of probation, including that he entered Cascade County without permission from his probation officer. The Supreme Court struck the so-called "banishment" order. Without any evidence on the matter before it, the Court held that banishment is

illegal based upon the Court's view that it is "not reasonably related to the goals of rehabilitation and the protections of the victim and society."

The Supreme Court struck the sign requirement. Again, without any evidence before it, the Court held that the sign requirement was illegal because it "is unduly severe and punitive to the point of being unrelated to rehabilitation," and "tends to over-shadow any possible rehabilitative potential that it may generate." The Court thought it sufficient for the district court to require Muhammad to obtain sexual offender treatment, have no contact with the victim or her family and register as a sexual offender.

The Supreme Court struck the restitution order. The district court failed to follow the statutory requirements for ordering restitution. Failure to follow the sentencing statutes "renders a district court's restitution sentence illegal."

The Supreme Court struck the condition that the district court must approve transfer of supervision under the interstate compact for the supervision of probationer. However, it did remand the matter to allow the district court to require that Muhammad receive the equivalent of a MSOTA sexual offender treatment program if his probation is transferred to another state.

***State v. Liefert*, 2002 MT 47, 309 Mont. 19, 43 P.3d 329; (Broadwater) Affirmed; Nelson, J.** In 1999, Liefert pled guilty to partner assault in justice court. He was later charged by the feds with illegal possession of a weapon by a person convicted of misdemeanor domestic abuse. In an attempt to avoid the federal charge, he moved to withdraw his guilty plea in the justice court; he claimed his plea was not knowing and voluntary because he was not advised that he would lose his gun rights by operation of federal law. The motion was denied, and he appealed to district court, which also denied his motion. He then appealed to the MT Supreme Court. Although there is no statutory right to appeal from a justice court's denial of a motion to withdraw a guilty plea, the Court treated this case as a denial of a motion for postconviction relief.

On the merits, the Court reaffirmed that state courts do not need to advise defendants of the collateral consequences of a conviction. It concluded that the federal gun restriction was a collateral consequence of Liefert's state conviction. The Court rejected Liefert's argument that he was misled by "negative implication" based on the state statutes that permit state courts to restrict gun rights.

H. CREDIT FOR TIME SERVED

***State v. Kime,* 2002 MT 38, 308 Mont. 341, 43 P.3d 290 (Gallatin). Affirmed;**

Gray, C.J. While serving a five-year DOC commitment on supervised release, Kime was arrested and placed in the Gallatin County Detention Center on charges of felony theft, DUI, and driving while suspended. Bail was set at $25,000, and Kime did not post bail. Kime later entered a guilty plea to the Gallatin County charges. At sentencing, Kime requested credit for time served from the date of his arrest through the date of the sentencing hearing. The district court credited the time from Kime's arrest through the day Kime was sent to MSP for violating the conditions of his supervised release, but refused to credit any further time. The Court held that after Kime was sent to MSP to serve out the earlier sentence, and he was not "incarcerated on a bailable offense" within the meaning of Mont Code Ann § 46-18-403(1). Therefore, he was not entitled to credit his prison time against his sentence for the Gallatin County offenses: "We conclude that, pursuant to § 46-18-403(1), MCA, a defendant's sentence may be credited with the time he or she was incarcerated only if that incarceration was directly related to the offense for which the sentence was imposed."

IX. POST TRIAL

A. Appeal to Supreme Court

***State v. Rogers*, 2001 MT 165, 306 Mont. 130, 31 P.3d 724 (Missoula). Reversed; Leaphart, J.** Counsel is ineffective when he neglects to offer a "failure to agree: instruction to accompany a lesser included offense instruction where there is a reasonable probability that the jury might have reached a different verdict but for the error (i.e., where there are sufficient facts to support a conviction for a lesser included offense). This result avoids the danger that jurors, harboring doubts as to a defendant's guilt on the greater offense, will wrongly yield to the majority rather than not convict the defendant of any offense at all. Does this mean that counsel is per se ineffective if he fails to offer a "failure to agree" instruction whenever the court instructs on a lesser included offense (since the LIO requires some factual support in the record)? I don't know . . .

Also, counsel has a constitutional obligation to file a notice of appeal when requested to do so by the defendant, or must file an **Anders** brief.

***State v. Gilder*, 2001 MT 121, 305 Mont. 362, 28 P.3d 488 (Missoula). Reversed; Rice, J.** In an earlier appeal, Gilder's DUI conviction was reversed after the Supreme Court found no particularized suspicion for the stop arising from the facts asserted in the officer's report, which had been used by the parties, in lieu of an evidentiary hearing, to support and oppose Gilder's motion to suppress. On remand, the district court conducted an evidentiary hearing and again denied the

suppression motion. In this appeal the Supreme Court held that its earlier decision was the law of the case and that further consideration of the suppression issue was foreclosed.

***State v. Shockley*, 2001 MT 180, 306 Mont. 196, 31 P.3d 350 (Cascade). Vacated in Part; Regnier, J.** Shockley alleged that, in a 1984 prosecution, which was a completely separate prosecution from the 1987 robbery conviction that was the subject of appeal in the instant case, the district court violated the double jeopardy clause. The Montana Supreme Court held that under Mont. R. App. P. 5(b), which requires an appeal from a criminal case to be taken within 60 days, it was without jurisdiction to address the issue.

***Ide v. State,* 2002 MT 28N (unpublished) (Powell). Affirmed; Gray, C.J.** Ide sought reinstatement of his driving privileges, claiming in district court that the arresting officer lacked particularized suspicion of DUI after stopping Ide's vehicle for a taillight violation. On appeal Ide abandoned his particularized suspicion theory, and argued that the officer lacked probable cause to arrest him. Because Ide neither advanced the probable cause issue in district court, nor argued that the officer lack particularized suspicion on appeal (i.e., the theory he relied upon below), the Court affirmed the district court without addressing the merits. The Court noted that it "has repeatedly held that it will not address either an issue raised for the first time on appeal or a party's change in legal theory on appeal."

1. Waiver/Failure to Preserve

***State v. Thompson*, 2001 MT 119, 305 Mont. 342, 28 P.3d 1068 (Teton). Affirmed; Trieweiler, J.** At trial, one counselor testified that she observed the victim engaged in sexual self-stimulation. A second counselor testified that she observed the victim acting inappropriately and heard inappropriate sexual comments. These observations were made prior to the date of the sexual assault alleged in the information. A third counselor, retained by the Defendant after charges were filed, concluded the victim had been sexually abused. The victim's mother testified she believed the victim had been sexually abused, just by someone other than the Defendant. At trial Defendant objected to the testimony on the grounds of relevance. On appeal, Defendant additionally argued the evidence violated Rule 404(b). Thompson waived his right to make the 404(b) argument since he did not object on this ground during trial. The evidence was irrelevant to

whether the Defendant sexually assaulted the victim, but admitting the evidence did not affect the substantial rights of Thompson. The inadmissible evidence was merely cumulative to evidence that was properly before the jury.

***State v. Spang*, 2002 MT 120, ___ Mont. ___, ___ P.3d ___ (Hill). Affirmed in Part; Reversed in Part; Regnier, J.** Since Spang withdrew his motion to dismiss for lack of a speedy trial after the trial court told him that in order to hear the motion it would have to vacate the trial date, the matter was not properly before the Court on appeal. A district court will not be put in error where it was not accorded an opportunity to correct itself.

B. Appeal to District Court

***State v. Feight*, 2001 MT 205, 306 Mont. 312, 33 P.3d 623 (Jefferson). Affirmed; Nelson, J.** The appellants, father and son, pled guilty in justice court to misdemeanor assault. They subsequently moved to withdraw their guilty pleas, but the justice court denied the motions. Feights then appealed the denial of their motions to the district court. The district court dismissed the appeals as not statutorily authorized. On appeal from the dismissal, the Supreme Court affirmed. The Court ruled there is no statutory right of appeal from a justice court's order denying a motion to withdraw a guilty plea.

***State v. Liefert*, 2002 MT 47, 309 Mont. 19, 43 P.3d 329 (Broadwater) Affirmed; Nelson, J.** In 1999, Liefert pled guilty to partner assault in justice court. He was later charged by the feds with illegal possession of a weapon by a person convicted of misdemeanor domestic abuse. In an attempt to avoid the federal charge, he moved to withdraw his guilty plea in the justice court; he claimed his plea was not knowing and voluntary because he was not advised that he would lose his gun rights by operation of federal law. The motion was denied, and he appealed to district court, which also denied his motion. He then appealed to the MT Supreme Court. Although there is no statutory right to appeal from a justice court's denial of a motion to withdraw a guilty plea, the Court treated this case as a denial of a motion for postconviction relief.

On the merits, the Court reaffirmed that state courts do not need to advise defendants of the collateral consequences of a conviction. It concluded that the federal gun restriction was a collateral consequence of Liefert's state conviction. The Court rejected Liefert's argument that he was misled by "negative implication" based on the state statutes that permit state courts to restrict gun rights.

***State v. Boucher*, 2002 MT 114, 309 Mont. 514, ___ P.3d ___ (Mineral). Reversed; Rice, J.** Boucher moved the justice court to withdraw his guilty plea to DUI after learning his driving privileges were revoked in another state on account of the conviction. The motion was denied, and he attempted to appeal to district court, now claiming that his plea was not entered knowingly because he had only been advised that he was waiving the right to appeal at the initial appearance, and he shouldn't be expected to remember that advisement five months later. The district court dismissed the appeal because there is no statutory right of appeal following entry of a guilty plea.

The Supreme Court reversed. First, it avoided its own lack of jurisdiction over the case by treating it as an appeal from a district court's denial of postconviction relief. Second, the Court decided Boucher's guilty plea was not entered knowingly. Relying on Mont. Code Ann. § 46-17-203(2), which requires that a defendant be informed of the waiver of the right to appeal "before the plea is accepted," the Court concluded that this statute "gives the clear impression" that the defendant must be informed about the wavier "at the time a guilty plea is entered," and not earlier or later.

***ATTENTION*:** This case creates a new rule of law. Justice courts must now advise defendants of all rights being waived by entry of a guilty plea "**at the time a guilty plea is entered**," including the right to appeal to district court.

***State v. Kempin*, 2001 MT 313, 308 Mont 17, 38 P.3d 859 (Powder River). Affirmed; Rice, J.** Kempin was charged by Notices to Appear and Complaints with seven hunting violations. Kempin post bond money and later forfeited the seven bonds. The justice court in turn suspended his hunting, fishing and trapping privileges for ten years. Kempin appealed and the district court dismissed Kempin's appeal of the forfeiture of his bonds by the justice court for lack of jurisdiction.

The Supreme Court affirmed the district court's ruling, holding that Mont Code Ann § 46-17-311(2) requires that a trial be conducted in justice court before a defendant can appeal to the district court. As a result of Kempin's forfeiting his bonds, a justice court trial, a prerequisite for perfecting an appeal from justice court was not present in this case. The Court noted that a defendant can also appeal from justice court to the district court when a defendant pleads guilty but preserves legal issues raised by a pretrial motion (§ 46-17-311(1)) and when a defendant is appealing the revocation of suspended sentence (§ 46-17-311(4)). Neither § 46-17-311(1) or –311(4) applied in this case.

1. Harmless Error

***State v. Marvin Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735 (Deer Lodge). Affirmed; Cotter, J.** The district court erred by allowing the arresting officer to testify about the Defendant's performance on the HGN test when the testimony did not establish that the officer was specially trained or educated, or that he had adequate knowledge to qualify as an expert able to explain the correlation between alcohol consumption and nystagmus. The court's error was harmless. The first step in the harmless error inquiry is whether the error was structural error or trial error. If the error is structural, it is not amenable to a harmless error analysis. If the error is trial error, the next inquiry is whether there is a reasonable probability that the inadmissible evidence might have contributed to the conviction. The Court abandons the use of the "overwhelming evidence" test and from this point forward will employ the "cumulative evidence" test. Under this test, the State must demonstrate that admissible evidence proved the same facts as the inadmissible evidence and must demonstrate that the quality of the inadmissible evidence was such that there was no reasonable possibility that it might have contributed to the Defendant's conviction. In the instant case, qualitatively, and in comparison to the admissible evidence presented proving the Defendant was under the influence of alcohol, there is no reasonable possibility that the HGN testimony contributed to the Defendant's conviction.

***State v. Detonancour*, 2001 MT 213, 306 Mont. 389, 34 P.3d 487 (Madison). Affirmed; Leaphart, J.** The district court erred when it allowed a nurse practitioner to testify in extensive detail about the rape examination process because such testimony was not probative of the ultimate issue of consent, but the error was harmless.

***State v. Spang*, 2002 MT 120, ___ Mont. ___, ___ P.3d ___ (Hill). Affirmed in Part, Reversed in Part; Regnier, J.** After law enforcement officers read Spang his *Miranda* rights at the beginning of Spang's second interview, Spang stated, "shit, man I need a lawyer". An officer asked Spang whether he wished to continue with the interview or talk with an attorney first. Spang agreed to continue. Spang's request for counsel was unequivocal. Thus, he could not be the subject of further questioning by officers, even a non-incriminating, clarifying question, until an attorney was made available to him or he initiated further conversation. The district court erred when it denied Spang's motion to suppress the statements he made during his second custodial interrogation, and the error, although trial error, was not harmless. Even though the inadmissible evidence was cumulative to other admissible evidence, including Spang's first voluntary

statement to law enforcement, the State failed to demonstrate that qualitatively, there is no reasonable possibility that Spang's second statement, and the transcripts made therefrom, did not contribute to his conviction.

2. Structural Error/Automatic Reversal

***State v. Bird*, 2002 MT 2, 308 Mont. 75, 43 P.3d 266 (Yellowstone). Reversed; Nelson, J. ; Rice, J., dissenting.** The district court violated the Defendant's constitutional right to appear in all criminal proceedings because the defendant was not present at the individual in-chambers voir dire sessions. The Court held that in the future, a trial court must explain to the defendant, on the record, the defendant's constitutional right to be present at all critical stages of the trial, including in-chambers voir dire, and that if a defendant chooses to waive that right, the court must obtain an on-the-record personal waiver by the defendant acknowledging that the defendant voluntarily, intelligently and knowingly waives that right. The Court found that exclusion from in-chambers voir dire was structural error.

C. Habeas Corpus and Postconviction Relief

***Mallak v. State*, 2002 MT 35, 308 Mont. 314, 42 P.3d 794 (Yellowstone); Reversed and Remanded; Cotter, J.** Mallak, who barely spoke English and was mildly mentally retarded, pled guilty in 1989 to several drug-related offenses. He completed his sentence in 1994. In 1999, he applied for U.S. citizenship. The request was denied and INS initiated deportation proceedings. Mallak filed for postconviction relief or, alternatively, to withdraw his guilty plea, claiming that had he known that deportation could be a consequence he would not have pled guilty. The district court summarily denied the request. On appeal, Mallak requested a remand for an evidentiary hearing, arguing that the statute of limitations for postconviction relief should be tolled during the time Mallak was incarcerated, citing the civil tolling provisions. The State argued that the civil tolling provisions do not apply apply in postconviction relief, and that actual innocence (which Mallak was not claiming) was the only exception to the time bar. The majority of the Court ignored this argument and construed Mallak's petition as a motion to withdraw his guilty plea. Without a transcript of the plea colloquy (all records were destroyed), and ignoring Mallak's request for an evidentiary hearing, the Court ordered that Mallak be allowed to withdraw his plea, finding statutory "good cause" under Mont. Code Ann. § 46-16-105(2), based on Mallak's allegation that he would not have pled guilty had he known of the consequences

(deportation). Chief Justice Gray dissented, pointing out that the majority resolved the case on an issue not briefed by the parties to achieve a "happy ending." Justice Treiweiler concurred, stating that he would have reversed the district court and arrived at the same result based on the "fundamental miscarriage of justice" exception to the statute of limitations which applies to postconviction matters.

***Schrapps v. Mahoney,* 2001 MT 214, 306 Mont. 402, 36 P.3d 338 (Order and Opinion**). The Supreme Court will no longer treat a petition for a writ of habeas corpus as a postconviction petition and rule on it accordingly. If the habeas petition include claims that are cognizable, or potentially cognizable, in postconviction relief, the Court will direct the Clerk of the Supreme Court to forward the petition to the district court that imposed the sentence for filing as a postconviction petition.

***State v. Placzkiewicz*, 2001 MT 254, 307 Mont. 189, 36 P.3d 934 (Missoula). Affirmed; Nelson, J.** The five-year statute of limitations for filing petitions under the pre-1997 postconviction statutes is not tolled by any of the disabilities described in the civil tolling provisions of Mont. Code Ann. § 27-2-401(1). Even though postconviction relief is a civil proceeding, it has its own statute of limitations, and the only exception is where defendant can show his actual innocence.

***State v. Giddings and Goebel*, 2001 MT 155, 306 Mont. 83, 31 P.3d 340 (Cascade). Petition for Rehearing Denied; Nelson, J.** Supreme Court declined State's suggestion to apply its ruling in Giddings prospectively only. Court held that Giddings applies retroactively to all probation violators arrested on a bench warrant between April 28, 1999 and May 1, 2001 (when the statute requiring a probable cause hearing within 36 hours was in effect). Upshot of decision is that counties will have to "re-do" all probation revocation proceedings for offenders who fall under Giddings. As of August 22, 2001, that number is estimated at around 300 statewide.
***Vance v. Acton*, 2001 MT 243, 307 Mont. 71, 36 P.3d 881 (per curiam order).** The State cannot refile a petition to revoke a suspended sentence under Giddings if the original sentence imposed has expired. Even though all previous revocation proceedings were defective and therefore void *ab initio*, the clock was still "ticking" on the original sentence, and the new petition does not "relate back" to the time of the probation violation as if time stood still.

***Gundrum v. Mahoney*, 2001 MT 246, 307 Mont. 96, 36 P.3d 890 (per curiam**

order). The statute which was at issue in Giddings (Mont. Code Ann. §-46-23-1012) does not apply to parole revocations. Therefore, parolees arrested on a bench warrant between April 24, 1999 and May 1, 2001, are not entitled to the benefit of the Giddings decision.

***State v. Schaff*, 2001 MT 130, 305 Mont. 427, 28 P.3d 1073 (Yellowstone). Affirmed in Part; Reversed in Part and Remanded for Futher Proceedings; Regnier, J.** Non-record based allegations of ineffective assistance of counsel relating to the voluntariness of a guilty plea are properly litigated in postconviction relief even though petitioner challenged the voluntariness of his plea on direct appeal. Remanded for further inquiry into petitioner's allegation that his trial counsel, who was initially retained but was later court-appointed after petitioner ran out of money to pay him, gave him only two hours to decide whether to accept the plea or reject the plea offer.

***State v. Johnson*, 2001 MT 225N (unpublished) (Cascade). Affirmed; Rice, J.** The Court affirmed the district court's denial of Johnson's postconviction petition. Johnson entered Alford pleas to the charges of aggravated kidnapping and sexual intercourse without consent. In sentencing Johnson, the court declared him a dangerous offender. Johnson did not appeal, but filed a petition for postconviction relief alleging that his counsel was ineffective for failing to appeal his dangerous offender designation and that the district court lacked subject matter jurisdiction to accept Johnson's guilty pleas and to impose sentence.

The Court held that counsel was not ineffective because, contrary to Johnson's contention, the plea agreement specifically stated that the judge could designate him a dangerous offender. Further counsel was not ineffective for failing to appeal the designation because it was supported by the record and sufficiently justified in the sentence.

With regard to Johnson's "subject matter jurisdiction" claims, the Court held that Johnson by his own admission failed to challenge the voluntary nature of his guilty plea and did not file a motion to withdraw his guilty plea. By pleading guilty, he thus waived all nonjurisdictional claims. The Court held that jurisdictional claims are limited to "those cases in which the district court could determine that the government lacked the power to bring the indictment at the time of accepting the guilty plea from the face of the indictment or from the record." (Hagan and Cortez)

***State v. Pettijohn*, 2002 MT 75, 309 Mont. 244, 45 P.3d 870 (Missoula). Affirmed; Cotter, J.** The issue was whether a district court has subject matter

jurisdiction to impose a persistent felony offender designation upon a defendant being sentenced for felony DUI. The Court declined to address whether Pettijohn's claim was procedurally barred on the basis he waived his right to direct appeal by pleading guilty, holding that the merits were dispositive. Relying on Yorek, the Court held that a district court possesses statutory authority to impose a felony offender sentence on a person convicted of felony DUI.

***State v. Yorek*, 2002 MT 74, 309 Mont. 238, 45 P.3d 872 (Ravalli). Affirmed; Cotter, J.** The Court declined to address the district court's ruling that Yorek's guilty plea procedurally barred him from bringing his claim that the court lacked jurisdiction to designate him a persistent felony offender upon a felony DUI conviction. The Court held that if the underlying charge meets the definition of a felony, and the State has provided proper notice, a district court has the statutory authority to designate and sentence a defendant as persistent felony offender. The persistent felony offender provision makes no distinction between types of felonies nor does it exclude DUIs.

***Robbins v. State*, 2002 MT 116, ___ Mont. ___, ___ P.3d ___ (Cascade). Reversed; Trieweiler, J.** Conviction for robbery and deliberate homicide reversed on appeal of denial of postconviction review. The Supreme Court applied the decision in State v. LaMere, 2000 MT 45, 2 P.3d 204 retroactively to Robbins, under the second exception to the Teague rule of non-retroactivity of "new rules" on collateral review. Teague v. Lane, 489 U.S. 288 (1989).

***State v. Whitlow*, 2001 MT 208, 306 Mont. 339, 33 P.3d 877 (Ravalli). Reversed; Regnier.** The Montana Supreme Court held that the district court incorrectly found that Whitlow's postconviction petition was procedurally barred by the one-year time bar contained in Mont. Code Ann. § 46-21-102.
A postconviction petitioner has one year from the date his or her conviction becomes final to file a postconviction petition. Whitlow filed a direct appeal, and, as a result, pursuant to Mont. Code Ann. § 46-21-102(1)(b) his conviction became final when the time for petitioning the United States Supreme Court for review expired.
***State v. Whitlow*, 2001 MT 208, 306 Mont. 339, 33 P.3d 877 (Ravalli). Reversed; Regnier.** In a postconviction petition, Whitlow alleged his counsel was ineffective because he failed he failed to questions three jurors about potential bias during voir dire. The district court held that Whitlow's ineffective assistance of counsel (IAC) claim was barred by § 46-21-105 because he could have raised his IAC claim on direct appeal. As in State v. Chastain, 285 Mont. 61, 947 P.2d 57

(1997), the district court noted that Whitlow's IAC claim was based on the trial record.

The Supreme Court disagreed. The Court distinguished Chastain and held that Whitlow's IAC claim was not procedurally barred. The Court explained that in Chastain the jurors clearly expressed a potential for bias and their statements demanded further inquiry from defense counsel. In other words, there would be no reasonable tactical decision for defense counsel's failure to further question the jurors and, thus, the IAC claim could be decided on the direct appeal record.

The Court concluded that in this case there might have been a potential explanation or tactical reason by Whitlow's counsel when he failed to question the three jurors in question and, thus, Whitlow's IAC claim cannot be decided solely on trial court record.

***State v. Whitehorn*, 2002 MT 54, 309 Mont. 63, 43 P.3d 922 (Lewis and Clark). Reversed; Cotter, J.** The Supreme Court reversed the district court's denial of Whitehorn's postconviction petition and granted Whitehorn postconviction relief on a Guillaume double jeopardy claim. In Guillaume, the Supreme Court held that application of the weapons enhancement statute to a felony offense that requires proving the use of a weapon violates Montana's Double Jeopardy provision.

On appeal Whitehorn claimed that Guillaume should apply retroactively to his case based on a retroactivity analysis that was not raised in the district court. The Supreme Court overlooked the fact Whitehorn did not raise his retroactivity argument in the district court by applying the plain error doctrine. The Court applied the plain error doctrine despite the fact that Whitehorn in his brief never requested the Court to apply plain error. More troubling was the fact that the Court applied the plain error doctrine for the first time in a postconviction relief appeal.

Whitehorn never initially raised his double jeopardy claim in a direct appeal because he never filed one. In addressing Whitehorn's double jeopardy postconviction claim, the Court seems to have ignored the procedural bar under Mont. Code Ann. § 46-21-105(2). Mont. Code Ann. § 46-21-105(2) provides that grounds for relief that could reasonably have been raised on direct appeal may not be raised in a postconviction proceeding.

In addressing whether to retroactively apply the Guillaume decision to Whitehorn's case, the Court overruled in part its decision in State v. Nichols, 1999 MT 212, 295 Mont. 489, 986 P.2d 1093. In Nichols, the Supreme Court applied the retroactivity analysis from Teague v. Lane, 489 U.S. 288 (1989) and held that the Guillaume decision would not apply retroactively when a party asserts a Guillaume-type double jeopardy claim in a postconviction petition.

In reversing Nichols, the Supreme Court held that the Teague retroactivity analysis only applies to new procedural rules, not substantive rules. The Court

explained that substantive rules are applied retroactively and since the rule announced in Guillaume is a substantive rule it should have been applied retroactively to Whitehorn's case. The Court then applied Guillaume to Whitehorn's case and found a violation of the Montana Double Jeopardy provision.

***State v. Garner*, 2001 MT 222, 306 Mont. 462, 36 P.3d 346 (Cascade). Affirmed; Regnier, J.** Russell Garner and Steven Newhouse were charged with theft of a pickup truck. Garner, who was also charged with forgery, was tried separately. The allegations were that the two had stolen a truck in Missoula and that Garner later presented a stolen check at a check cashing service in Great Falls. Garner was apprehended after fleeing when he realized the employees had called the police.

At sentencing, the State produced evidence of two earlier felony convictions, and the court declared Garner a persistent felony offender. Some five months later, Garner, through new counsel, moved to correct the sentence because the persistent felony offender notice was untimely. The district court ruled that the question must be raised through the postconviction relief process. Granter filed a motion to correct the sentence and a petition for postconviction relief, which was denied.

Almost eleven months later, Garner filed a pro se notice of appeal on the postconviction order, a motion for the appointment of counsel, and a motion for an out-of-time appeal. The supreme court remanded the matter for an evidentiary hearing on Garner's claim that he was not informed of his right to appeal. He was appointed counsel, and his motion for an out-of-time appeal was denied after the evidentiary hearing.

Shortly before the order denying his appeal motion, Garner moved the district court to set aside his guilty pleas because he was denied medication during trial and was incompetent to enter a guilty plea. That motion was denied, and he appealed.

Given that Garner filed his motion almost four years after entering his pleas and almost three years after his petition for postconviction relief, and given his representation by three attorneys during the course of these proceedings, the Court concluded his pro se motion to change his pleas did not raise the potential for substantial prejudice and did not constitute a critical stage.

***State v. Abe*, 2001 MT 260, 307 Mont. 233, 37 P.3d 77 (Missoula). Affirmed; Leaphart, J.** A jury found Abe guilty for the offense of deliberate homicide by accountability for the death of Nanette Hansen on October 24, 1996. Abe appealed the conviction and this Court affirmed the conviction on August 25, 1998. On

December 7, 1999, Abe filed a petition for postconviction relief, which was 14 days beyond the one-year statutory deadline. The one-year statute of limitations was not raised in district court, however, it is a "jurisdictional limit on litigation" and it can be raised at any time. The Court held that the district court correctly concluded that Abe's "new" evidence did not serve to extend the one-year statutory bar and that Abe failed to demonstrate that the statutory limit was waived by a clear miscarriage of justice.

***State v. Wright (Paul Edward)*, 2001 MT 247, 307 Mont. 100, 38 P.3d 772 (Yellowstone). Affirmed; Rice, J.** Paul Edward Wright, who pled guilty to deliberate homicide in 1996, filed a petition for postconviction relief with the district court more than two years after his conviction became final. His pro se petition raised a number of grounds, but the Court affirmed the district court's denial of the petition without discussing any issue beyond whether the petition was procedurally barred by Mont. Code Ann. § 46-21-102. In affirming the district court, the Court noted the "special relation-back provision" of 1997 Mont. Laws ch. 378, § 9(b), which gave those who, like Wright, were convicted between April 26, 1996, and April 24, 1997, until April 24, 1998, to file petitions. The opinion contains a useful discussion of retroactive laws, defining the difference between ex post facto and retrospective laws.

D. Motion for New Trial

***State v. Landis*, 2002 MT 45, 308 Mont. 354, 43 P.3d 298 (Lincoln). Affirmed; Gray, C.J.** Following the entry of judgment, Defendant moved for a new trial and requested the judge's recusal based on an alleged impropriety created by an undisclosed "professional relationship" between the court and one of the State's witnesses and a victim of the charged offenses. The witness/victim was a licensed professional counselor (James Myers) whom the district court had used occasionally to prepare psychological and mental health evaluations in cases before it. The district court denied the motion and the Supreme Court affirmed. Canon 4 of the Canons of Judicial Ethics prohibits the appearance of impropriety in any proceeding, but that does not establish that there was in such appearance based solely on the type of relationship that existed between the court and the witness

***State v. Weaver (William Larry)*, 2001 MT 115, 305 Mont. 315, 28 P.3d 451 (Missoula); Trieweiler; J.** Weaver filed a pro se motion for new trial, which the district court failed to rule on. The Court cited State v. Harvey, 219 Mont. 402,

713 P.2d 517 (1986), which held that it was not error for a district court to refuse pro se motions from defendants who are represented by counsel.

E. Harmless Error

***State v. Nobach*, 2002 MT 91, 309 Mont. 342, 309 P.3d 342 (Flathead). Affirmed; Gray, C.J.** Officer arriving on the scene of a single car accident observed Defendant's bizarre behavior, leading him to believe Defendant was under the influence of drugs or alcohol. Alcohol was ruled out, and a blood test later revealed that Defendant had ingested a combination of prescription drugs. At trial, officer testified about Defendant's behavior, and was asked to give his opinion about whether Defendant's ability to safely operate a vehicle would be diminished by his consumption of drugs. Supreme Court held that this calls for an expert opinion, which the officer was not qualified to give (his basic training covered illegal substances, not combined effect of prescription drugs). The error in admitting his testimony was harmless, however, since the State's pharmacological expert offered the same testimony and was clearly qualified to do so.

F. Revocation of Sentence

***State v. Averill*, 2001 MT 161, 306 Mont. 106, 30 P.3d 1059 (Cascade). Affirmed; Cotter, J.** The district court is not required to find that the Defendant acted with a particular mental state, otherwise applicable in criminal proceedings, when deciding whether a suspended sentence should be revoked. The applicable standard in revocation proceedings is Mont. Code Ann. § 46-18-203, which authorizes the judge to do certain things if the court finds, based on a preponderance of the evidence, that "the offender has violated the terms and conditions of the suspended or deferred sentence."

***State v. Lee*, 2001 MT 176, 306 Mont. 173, 31 P.3d 998 (Cascade). Reversed; Regnier, J.** In anticipation of Defendant's release from prison, State filed a petition to revoke his suspended sentence on the ground that Defendant had not completed sex offender treatment due to the long waiting period. Supreme Court held that, as a matter of due process, the district court cannot revoke for a non-willful violation without considering whether there are adequate alternatives to incarceration that would further the purpose of the suspended sentence.

***Gonzales v. Mahoney*, 2001 MT 259, 307 Mont. 228, 37 P.3d 653 (Opinion and Order).** Revocation of a suspended sentence does not constitute "double

punishment" for purposes of double jeopardy.

State v. Brister, **2002 MT 13, 308 Mont. 154, 41 P.3d 314 (Cascade). Reversed and Remanded; Cotter, J.** In 1984 Brister was sentenced to twenty years in prison for sexual assault with ten years suspended. During the suspended term, Brister committed a felony theft and was revoked by Judge Johnson, who reimposed a ten-year suspended sentence conditioned upon compliance with twenty-six new conditions, including various costs and surcharges, restrictions on Brister's liberty, and the sexual offender registration requirement. Brister did not object to these conditions when they were orally pronounced. Instead, Brister filed a motion to correct the sentence pursuant to Mont. Code Ann. § 46-18-117 (repealed). When the district court did not rule on the motion within 120 days as provided for in former § 46-18-117, Brister filed a notice of appeal. On appeal Brister argued that the district court did not have authority to impose numerous new conditions and that doing so constituted an ex post facto violation. The Court rejected the State's arguments that Brister waived the issue by failing to contemporaneously object, relying upon State v. Lenihan, which held that the Court will "review any sentence imposed in a criminal case, if it is alleged that such sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing." The Court overruled State v. Smith (2001), State v. St. John (2001) and State v. Taylor (2000) to the extent they require a defendant to contemporaneously object to an illegal sentence at the time of oral pronouncement. Without addressing the ex post facto issue, the Court held that the revocation court's sentencing authority was limited by § 46-18-203 (1983), which left the revocation court with the option of either revoking the offender and sending him to prison, or continuing the suspended sentence with the same conditions. The Court held that the district court's disposition was, in effect, a continuation of the suspended sentence with new conditions, and that the court did not have that authority.

Rather than following its past practice of "simply vacating the offending new conditions," the Court remanded the matter to the district court to decide whether to strike the new conditions and continue the suspended sentence, or to revoke the suspension and commit Brister to the DOC for the remainder of his prison sentence.

State v. Frazier**, 2001 MT 210, 306 Mont. 358, 34 P.3d 96 (Cascade). Reversed and Remanded for Resentencing; Nelson, J.** Frazier was sentenced to several consecutive terms, parts of which were suspended. While on probation, Frazier committed additional crimes and the suspended portions of the sentences were

revoked. The Supreme Court held that, contrary to the district court's expressed reservations about its sentencing authority, the court had statutory authority to change the consecutive sentences to concurrent.

***State v. Shockley*, 2001 MT 180, 306 Mont. 196, 31 P.3d 350 (Cascade). Vacated in Part; Regnier, J.** Shockley pled guilty to the offense of robbery and he was sentenced on November 20, 1987. On February 3, 1995, the State filed a petition for revocation of Shockley's suspended sentence. Shockley was finally arrested on March 27, 2000 and he was returned to Montana where he admitted to the violations of his probation. At a hearing, the district court partially revoked Shockley's suspended sentence and imposed additional conditions, including requiring Shockley to pay $4,590 for the cost of his confinement at the Cascade County Detention Center. The State conceded, and the Montana Supreme Court held, that under the statutes in effect at the time of his sentencing--November, 1987--the district court did not have the authority to impose a new condition. The Court, however, rejected the State's suggestion that the case should be remanded for the purposes of resentencing Shockley without the additional conditions. Rather, the Court held that the proper remedy was to strike that portion of the sentence that was illegal.

G. Retroactivity

***State v. Giddings and Goebel*, 2001 MT 155, 306 Mont. 83, 31 P.3d 340 (Cascade). Petition for rehearing denied; Nelson, J.** Supreme Court declined State's suggestion to apply its ruling in Giddings prospectively only. Court held that Giddings applies retroactively to all probation violators arrested on a bench warrant between April 28, 1999 and May 1, 2001 (when the statute requiring a probable cause hearing within 36 hours was in effect). Upshot of decision is that counties will have to "re-do" all probation revocation proceedings for offenders who fall under Giddings. As of August 22, 2001, that number is estimated at around 300 statewide.

***Vance v. Acton*, 2001 MT 243, 307 Mont. 71, 36 P.3d 881 (per curiam order).** The State cannot refile a petition to revoke a suspended sentence under Giddings if the original sentence imposed has expired. Even though all previous revocation proceedings were defective and therefore void *ab initio*, the clock was still "ticking" on the original sentence, and the new petition does not "relate back" to the time of the probation violation as if time stood still.

***Gundrum v. Mahoney*, 2001 MT 246, 307 Mont. 96, 36 P.3d 890 (per curiam order).** The statute which was at issue in Giddings (Mont. Code Ann. § 46-23-1012) does not apply to parole revocations. Therefore, parolees arrested on a bench warrant between April 24, 1999 and May 1, 2001, are not entitled to the benefit of the Giddings decision.

***Robbins v. State*, 2002 MT 116, ___ Mont. ___, ___ P.3d ___ (Cascade). Reversed; Trieweiler, J.** Conviction for robbery and deliberate homicide reversed on appeal of denial of postconviction review. The Supreme Court applied the decision in State v. LaMere, 2000 MT 45, 2 P.3d 204 retroactively to Robbins, under the second exception to the Teague rule of non-retroactivity of "new rules" on collateral review. Teague v. Lane, 489 U.S. 288 (1989).

H. Appeal to District Court

***City of Missoula v. Campbell*, 2001 MT 271, 307 Mont. 286, 37 P.3d 670 (Missoula). Affirmed; Leaphart, J.** Defendant was convicted in municipal court and appealed to district court. After failing to file his brief within the set time limits, the district court dismissed the appeal. On appeal to the Supreme Court, defendant argued that he was entitled to a trial de novo. The Court rejected this argument stating that on appeal from municipal court, the district court is only obligated to review the record, not conduct a trial de novo.

I. Motion To Withdrawal Guilty Plea

***State v. Knox,* 2001 MT 232, 307 Mont. 1, 36 P.3d 383 (Flathead). Affirmed; Nelson, J.** Knox pled guilty to sexual assault of a minor pursuant to a verbal plea arrangement whereby the prosecution would recommend a thirty-year suspended sentence and would drop another sexual assault count. Knox's counsel also represented to the trial court that the prosecution had "indicated" that the victim's parents would not seek a term of imprisonment at sentencing. The trial court accepted Knox's guilty plea. During the plea colloquy, the trial court informed Knox that neither the court nor the victim's parents were parties to the plea agreement, and that the victim's parents could change their minds. Knox was told that if they did change their minds, he would not be permitted to change withdraw his plea. After receiving a copy of the PSI, which included an unfavorable psychosexual evaluation, Knox moved to withdraw his guilty plea, arguing that the prosecution breached the plea agreement because the victim impact statements in

the PSI recommended imprisonment. The district court denied the motion to withdraw, noting that its plea colloquy addressed the very matter that had arisen. The Supreme Court affirmed the district court's denial of Knox's motion because Knox was adequately informed of the consequences of the plea and the State fulfilled all material requirements of the oral plea agreement. "Knox knew going in to his entry of plea that whatever agreement the victim's parents made about not recommending prison was not enforceable. The trial judge made that clear to him." The Court also noted that the district court's sentence was a function of the psychosexual evaluation, not the victims' sentencing recommendation.

X. MISCELLANEOUS

A. Youth in Need of Care

1. Parental Rights Termination

***Matter of C.P.,* 2001 MT 187, 306 Mont. 238, 32 P.3d 754 (Yellowstone). Affirmed; Leaphart, J.** The district court properly terminated parental rights based on fact that mother's parental rights to another child had been terminated for similar allegations of abuse and neglect.

***Matter of J.B.*, 2001 MT 169N (unpublished) (Yellowstone). Affirmed; Rice, J.** Before parental rights may be terminated on the basis of abandonment, there must be personal service on the parent(s) or an affidavit must be filed stating what efforts were made to locate the parent(s). Failure to follow that procedure in this case, however, was not fatal because the district court based its decision to terminate on an alternative theory (failure to complete the treatment plan).

***In re T.A.G. and K.L.G.,* 2002 MT 4, 308 Mont. 89, 39 P.3d 686 (Silver Bow). Affirmed; Gray, C.J.** Father appealed from an order terminating his parental rights, arguing the court erred in finding that his conduct or condition rendering him unfit to parent was unlikely to change within a reasonable time. While there was evidence that the father had made some positive life changes, the father failed to comply with his treatment plans and continued to drink alcohol and use drugs, refused urinalysis requests, failed to attend AA, made death threats to social workers, and refused to allow social workers into his home. The Court found that these indicia of lack of compliance with his treatment plans were also indicia supporting the district court's finding that the father's conduct or condition was unlikely to change within a reasonable time.

***Matter of B.P. and A.P.*, 2001 MT 219, 306 Mont. 430, 35 P.3d 291 (Gallatin). Affirmed; Gray, C.J.** A prior custody order in a divorce case does not bar reconsideration of custody in an abuse and neglect proceeding.

***Matter of B.P. and A.P.*, 2001 MT 219, 306 Mont. 430, 35 P.3d 291 (Gallatin). Affirmed; Gray, C.J.** The writ of habeas corpus cannot be used to physically produce children to testify as witnesses in an abuse and neglect proceeding.

***Matter of E.K., C.K., and J.E.*, 2001 MT 279, 307 Mont. 328, 37 P.3d 690 (Fallon). Affirmed; Cotter, J.** A.K. (the father of E.K. and C.K.) and P.E. (the father of J.E.) are long-haul truck drivers who spent little time raising their respective daughters while the girls were in the care of their chemically dependent mother. All three girls suffered attachment disorders and other psychological and developmental problems as a result of the grossly neglectful parenting they received during their formative years. A.K., who admitted in district court that he had been an absent parent, claimed that he was unaware of the treatment plan until late in the process and that he satisfactorily complied with treatment in a timely fashion after receiving the plan. However, the Court concluded that even if A.K. did not receive his treatment plan right away, he still did not fully complete his treatment tasks within the six-month window contemplated by the plan. The Court's decision to affirm termination of A.K.'s parental rights hinged upon A.K.'s history of "blowing off" his daughters, which mirrored his perfunctory efforts to maintain contain with the caseworker and the girls as required by the treatment plan. P.E. (J.E.'s father) contended that DPHHS failed to fulfill its statutory duty to partner with him to keep the family together. However, the claim was without merit because "[a]lthough P.E. did eventually complete most of the tasks of his treatment plan, he did not even begin working on his parenting for nearly a year and a half after the children were removed." P.E., like A.K., also failed to maintain contact with the caseworker as required by the plan. Both men failed to demonstrate that they could bond with their children. Given the girls' "special developmental disabilities and needs," their best interests supported termination of parental rights. The girls' mother did not appeal termination of her parental rights.

***In the Matter of C.R.O*, 2002 MT 50, 309 Mont. 48, 43 P.3d 913 (Anaconda-Deer Lodge). Reversed; Rice, J. (Gray, Trieweiler, and Regnier concurring) (Cotter and Nelson dissenting, with Leaphart joining).** The district court

terminated the father’s parental rights without a treatment plan pursuant to Mont Code Ann § 41-3-609(4)(b), which provides that a treatment plan is not required if “two medical doctors or clinical psychologists submit testimony that the parent cannot assume the role of parent.” At issue was the testimony of one of the clinical psychologists who did not specifically testify that the father could not assume the role of parent within a reasonable time. The Court held that the statute requires that both psychologists agree that a parent is unable to assume the role of parent and that both must agree that the condition making the parent unable to assume the role of parent is unlikely to change within a reasonable time. The Court will not read between the lines.

Chief Justice Gray, with Justice Trieweiler joining her, concurred, noting that the “within a reasonable time” standard is too short and invited the legislature to revisit the statute in light of this case.

Justice Cotter dissented that while the psychologist was not asked the question whether the father’s condition was unlikely to change within a reasonable time, that was the clear import of his testimony.

Justice Nelson also dissented, stating that in its rush to exalt form over substance, the Court’s decision trammels the inalienable constitutional rights of C.R.O. to pursue life’s basic necessities, to enjoy a safe, healthy, and happy life and to basic human dignity.

***In the Matter of J.J. & C.J.*, 2001 MT 131, 305 Mont. 431, 28 P.3d 1076 (Cascade). Affirmed; Nelson, J. (Joined by Leaphart, J. and Regnier, J.) Gray, C.J., concurring (joined by Trieweiler, J.)** The Court upheld the district court's termination of the mother's parental rights on the basis that she abandoned the children. A DPHHS social worker had sent the mother "case plan recommendations" (not a treatment plan). Three days later, the deputy county attorney moved to terminate her parental rights on the basis of abandonment, of which there was substantial evidence. The mother argued that her parental rights were improperly terminated because she had begun work on a treatment plan and was not given time to complete it. On appeal, the State argued that the case plan recommendations were not a treatment plan, failure of which to complete would constitute an alternative basis for termination. Further, the Court agreed that the mother's failure to even begin work on any of the recommendations only reinforced the State's abandonment argument.

***In re T.A.G.,* 2002 MT 4, 308 Mont. 89, 39 P.3d 686 (Silver Bow). Affirmed; Gray, C.J.** The Court held that the district court did not err in finding that the father’s conduct or condition was unlikely to change within a reasonable time.

While the father had made some positive life changes, he admittedly continued drinking alcohol and using drugs, notwithstanding his seven treatment plans' prohibition on alcohol and drug use. Further, he refused urinalysis requests, did not attend AA, made death threats to social workers, refused to allow social

workers into his home, did not follow through with the chemical dependency program and did not provide verification of AA attendance or find an AA sponsor.

***In the Matter of D.T.H.*, 2001 MT 138, 305 Mont. 502, 29 P.3d 1003 (Yellowstone). Affirmed; Gray, C.J.** The termination of the mother's parental rights was affirmed because there was sufficient evidence of risk to the child based on the parents' relationship. Although there was no physical abuse of the infant, a licensed clinical social worker testified that the parents' relationship was unhealthy, and neither parent (one a sex offender, the other a sexual abuse victim) could adequately parent the child or protect him from harm. The mother was 15-years-old when impregnated by her 38-year-old step-father. Following the birth of the child, the stepfather divorced his wife, and the same day married the then 16-year-old mother. The mother had been a victim of sexual abuse by her natural father at age six, and had never received any meaningful treatment. The mother refused counseling and placement out of the home.

***Matter of A. F.-C.*, 2001 MT 283, 307 Mont. 358, 37 P.3d 724 (Flathead). Reversed; Rice, J.** H.C., the minor parent of A. F.-C., "was adjudicated a youth in need of care and was simultaneously a minor parent in an abuse and neglect proceeding whose own child was adjudicated a youth in need of care." ¶ 40. She contacted her son's guardian ad litem, an attorney, but she was told that he was not her attorney, and she could not be advised by him. H.C.'s mother requested an attorney, which the district court, relying on In re T.C. & R.C., 240 Mont. 308, 784 P.2d 392 (1989), denied. In re T.C. required the appointment of an attorney for parents only before the permanent custody hearings, not during the initial stages. Although the Court has formulated no guidelines on the appointment of counsel, the circumstances of this case show there was a failure of due process. H.C. was fourteen and pregnant when DPHHS contacted her about reports of her shoplifting, her mother was incarcerated, her father was dead, and her local relatives were of no real assistance. The district court "expressed frustration" with H.C.'s counsel, who raised the appropriateness of the treatment plans at the termination hearing, but the Court noted that H.C. "did not have any representation or other adult assistance to make an appropriate and meaningful objection at a time when such objection would have been timely." ¶48. The Court said that due process required that

counsel be appointed for H.C. during the formulation of the treatment plan, before the district court's approval of the plan.

***Matter of A.F.-C.*, 2001 MT 283, 307 Mont. 358, 37 P.3d 724 (Flathead). Reversed; Rice, J.** The mother appealed from an order terminating her parental interest in A.F.-C. The Court reversed on one issue, the appropriateness of the treatment plan. It did so, however, not on the content of the various plans put into effect but on the absence of counsel or adult assistance. The mother was 14 when she had the child, 15 and 16 when she signed the plans.

The district court relied on In Re T.C. & R.C., 240 Mont. 308, 784 P.2d 392 (1989), which held that counsel were not required for parents during the initial stages of child protective proceedings. Although the Court noted it had recently reaffirmed the case in Matter of M.W. & C.S., 2001 MT 78, ¶ 25, 305 Mont. 80, 23 P.3d 206, it concluded that due process, always to be determined in view of all the circumstances (¶ 44), was denied the mother because she did not have the benefit of representation or adult consultation throughout her proceeding. It agreed with her argument that her relationship with her counselors was ambiguous, because of their dual role as both caretakers and enforcers. The district court had chided her and her counsel for raising the plans' appropriateness at the termination hearing, and the Court apparently thought that a bit rich. "Unfortunately, H.C., an indigent minor parent, did not have any representation or other adult assistance to make an appropriate and meaningful objection at a time when such objection would have been timely." ¶48. The Court concluded the proceedings lacked fundamental fairness.

***Matter of P.M.B.*, 2001 MT 217N (unpublished) (Musselshell). Affirmed; Cotter, J**. The district court found that treatment plans for both parents were appropriate but that, despite some good efforts, they were not completed. Members of the father's family testified about his sexual abuse of them in their childhoods. He denied these allegations, as did the mother, whose treatment plan was centered mostly on her alcoholism. The court found that the father was more likely than not a sexual offender, and it accepted professional testimony that he would not be amenable to treatment within a reasonable period. It also found the mother would be unable to protect the child from the father.

The Court concluded substantial evidence supported the district court's findings. One issue had been whether the district court's findings and conclusions addressed statutory factors as required. It did not list the factors or refer to specific statutes. The Court simply concluded the district court's findings and conclusions properly covered the statutory ground.

***Matter of A.C.*, 2001 MT 126, 305 Mont. 404, 27 P.3d 960 (Yellowstone). Affirmed; Rice, J.** In a parental rights termination proceeding brought as a result of unexplained and serious injuries to a small child, the Supreme Court held the treatment plan task that required the parents to provide a reasonable and consistent explanation for the child's injuries was appropriate, the statutory criteria for termination were met, and the prosecutor did not engage in misconduct or deprive the mother of due process when the mother was taken into custody by INS and deported during the proceedings.

***In re B.H. and D.H., Jr.*, 2001 MT 288, 307 Mont. 412, 37 P.3d 736 (Deer Lodge). Affirmed; Trieweiller, J.** The district court did not err when it terminated B.H.'s and D.H. Jr.'s mother's parental rights. Clear and convincing evidence existed for the court's finding that the mother's treatment plan was unsuccessful and that her conduct or condition rendering her unfit to parent was unlikely to change within a reasonable time period. In particular, the expert testimonies offered by the State supported the mother's termination.

***In re B.H. and D.H., Jr.*, 2001 MT 288, 307 Mont. 412, 37 P.2d 736 (Deer Lodge). Affirmed; Trieweiller, J.** Mont Code Ann § 41-3-604(1) does not eliminate the substantive requirements of Mont Code Ann § 41-3-609 and it does not diminish the clear and convincing burden of proof on the party seeking termination of parental rights. However, in this case, the district court acknowledged the presence of the presumption given the facts of this case and properly considered the criteria required for termination in Mont Code Ann § 41-3-609.

***In the Matter of M.F.B., D.A.B., M.S.B., and S.L.B.*, 2001 MT 136, 305 Mont. 481, 29 P.3d 480 (Sanders). Affirmed; Gray, C.J.** The district court's findings that the mother did not comply with the requirements of her treatment plan and that her condition is unlikely to change within a reasonable time were not clearly erroneous. The existence of conflicting evidence does not preclude a trial court's determination that clear and convincing evidence exists to support a finding of fact. The credibility of witnesses is exclusively within the province of the finder of fact. DPHHS did not have to introduce expert testimony regarding the needs of the children to support its petition to terminate parental rights. Nonetheless, the foster parents did discuss the needs of the children and the progress they had made while in foster care. Further, a counselor testified that the mother suffered from a longstanding dependent personality disorder which rendered her unfit to care for

any child's physical, mental, and emotional needs within a reasonable time.

***In the Matter of T.C. and W.C.*, 2001 MT 264, 307 Mont. 244, 37 P.3d 70 (Silver Bow). Reversed; Regnier, J.** Rather than proceed to an adjudicatory hearing, the mother stipulated to the court granting a petition for temporary legal custody. Neither the stipulation, nor the court's order adopting the stipulation specifically mentioned the adjudication of the children as youths in need of care. Thus, the youths were never probably adjudicated as youths in need of care, and the district court erred by terminating the mother's parental rights. The district court violated the mother's due process rights by allowing DPHHS to amend its petition to include abandonment as grounds for termination. Even though some of the facts in the affidavit may have supported a theory of abandonment, the mother was not required to guess at the theory DPHHS intended to raise at the termination hearing.

The district court erred when it terminated the father's rights under a theory of abandonment despite the father's lack of contact and involvement with the children for a number of years. The father never had physical custody of the children, so the district court improperly concluded that the father willfully surrendered physical custody for a period of six months and did not manifest a firm intention to resume physical custody or make permanent arrangements for the children.

2. Temporary Legal Custody

***In the Matter of D.A.,* No. 02-025 (unpublished).** Appellant filed a notice of appeal following the district court's order granting temporary legal custody to DPHHS. The State moved to dismiss the appeal on the ground that an order granting temporary legal custody is interlocutory, so there is no right of appeal. The State suggested that a writ of supervisory control would be available if the district court was acting without statutory authority, but that discretionary rulings would not be subject to review prior to termination. The Supreme Court rejected this proposal, holding that an order granting TLC is a final judgment because it finally determines the rights of the parties in the context of that action. Noting the temporary nature of the order, however, the Court expedited the briefing schedule and required Appellant to file her opening brief within 14 days and the State to respond within 20 days.

3. Long-term custody

***In the Matter of M.W. and L.W.*, 2002 MT 126, ___ Mont. ___, ___ P.3d ___**

(Gallatin). Affirmed; Trieweiler, J. P.W. is the father of M.W. and L.W. The district court awarded long term custody of M.W. and L.W. to DPHHS. On appeal, P.W. claimed the district court procedures were fundamentally unfair because the district court failed to hold a timely permanency plan hearing and DPHHS failed to submit a pre-hearing report three days prior to the permanency plan hearing. The Supreme Court held that P.W. waived appellate review of these claims by his failing to raise a proper objection in the district court.

The Supreme Court rejected P.W.'s claim that DPHHS failed to develop a plan for M.W. with any elements of permanency. The Court held that P.W.'s claim that that DPPHS improperly terminated his visitation with M.W. after the filing of the long-term custody petition was rendered moot by the district court's later reinstating his visitation. The Court also rejected P.W.'s claim the district court denied him a fundamental fair procedure when the district court granted DPHHS a second hearing to prove its case for long term custody of M.W. The district court granted DPHHS a second hearing after the district court held that the guardian's report and testimony that was used during the first hearing violated P.W.'s right to confrontation. The Court agreed with the district court that a refusal to conduct the second hearing and dismissal of the long-term custody petition would not have been in the best interest of M.W.

4. Indian Child Welfare Act

***Matter of K.M.G. and J.G., Jr.*, 2002 MT 3N (unpublished) (Hill). Affirmed; Gray, C.J.** In this Indian Child Welfare Act (ICWA) case, DPHHS supported its petition to terminate parental rights with testimony from a social worker knowledgeable regarding the culture and childrearing practices within the Gros Ventre Tribe. Mother's counsel objected to the social worker's testimony for lack of foundation. The motion was denied. On appeal, mother abandoned her foundational objection, and instead claimed that the district judge effectively testified within the meaning of Mont. R. Evid. 605, and showed judicial bias when he informed counsel that they might want to question the witness in accordance with 25 U.S.C. § 1912(f), which provides, **"No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including the testimony of [culturally] qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."** Mother claimed that when a judge effectively testifies for a witness, Rule 605 does not require the issue to be raised below. The Court rejected mother's arguments, holding that the judge did not testify. Rather,

the judge's actions fell within his authority to interrogate witnesses under Rule 614(b). Because counsel did not preserve an objection to the district court's handling of the witness, the Court declined to address the issue. Although the Court's opinion does not mention it, the State emphasized that the district court meticulously followed ICWA requirements, including, for example, ordering the Indian children to be placed according to ICWA's placement preferences.

B. License Revocation Proceedings

***Grindeland v. State*, 2001 MT 196, 306 Mont. 262, 32 P.3d 767 (Cascade) Affirmed; State Appeal; Gray, C.J.** Grindeland was stopped for failing to use his turn signal and, based on observations after the stop, was asked to perform a breath test which he refused. His drivers license was suspended as a result. The district court reinstated Grindeland's license because, in its determination, Grindeland was not required to signal since the investigating officer could not specifically identify what vehicles might have been affected by Grindeland's failure to signal. (The relevant statute, Mont Code Ann § 61-8-336, forbids a driver from turning a vehicle "without giving an appropriate signal . . . in the event any other traffic may be affected by such movement.") Without the obligation to signal, the investigating officer lacked particularized suspicion to initiate a stop. The State appealed and the Supreme Court affirmed the lower court's ruling. Justice Leaphart dissented, noting that this places an impossible burden on the State and forces the officer to pay more attention to the surrounding circumstances than the vehicle which he is stopping.

***Patterson v. Dept. Motor Vehicles*, 2002 MT 97, 309 Mont. 381, 46 P.3d 642 (Missoula). State Appeal Affirmed; Regnier, J.** Officer responding to anonymous 911 call found an unconscious male slumped over the wheel of a vehicle with the car still running. The officer woke the man, who was identified as Stephen Patterson, and detected a strong smell of alcohol. Patterson refused a breath test and his license was suspended. In the course of the license reinstatement proceedings, Patterson requested a transcription of the 911 report. The district court warned the State that failure to produce the tape would result in dismissal of the suspension and reinstatement of Patterson's drivers license. The State informed the court that it was unable to obtain the 911 report, and the matter was dismissed. The State appealed, arguing that a license reinstatement proceeding is limited to the three factors in Mont. Code Ann. § 61-8-403, that the requested 911 report contains information beyond those enumerated issues, and that the district court should not have granted Patterson's petition without a showing of relevant information in the report relative to the issues at hand. The Court rejected this proposal, stating that the district court retains discretion to fashion appropriate sanctions for discovery violations. The dissenters (Nelson, Rice and Leaphart), scoffed at this result, concluding that the discovery issue is "nothing but a red herring," since the 911 tape was totally irrelevant under the undisputed facts of the case.

***State v. Krause*, 2002 MT 63, 309 Mont. 174, 44 P.3d 493 (Beaverhead). Affirmed in Part; Reversed and Remanded in Part; Nelson, J.** In this appeal of a license reinstatement denial, the Court decided three issues:

1. The Court refused to address the issue whether a driveway is a way of this State open to the public because there was ample evidence in the record to support the district court's conclusion that the Defendant had been driving or was in actual physical control of a vehicle upon a way of this State open to the public.
2. The Court agreed with the Defendant that Mont. Code Ann. § 46-5-402(4), Montana's stop and frisk statute, required that the officer, prior to questioning the Defendant, had to inform him that he was a peace officer; that the stop was not an arrest, but rather a temporary detention for an investigation; and that, upon completion of the investigation, he would be released if not arrested. Although the Court noted that the legislature probably did not intend that peace officers give this warning when a person is stopped for a DUI investigation, it held that the district court erred by not suppressing the statements the Defendant made without being given the warning.
3. Finally, the Court agreed with the Defendant that the district court erroneously admitted the results of his independent blood alcohol test, which the State obtained through an investigative subpoena. The State had argued that the blood test results were introduced to substantiate the officer's observations and opinion with regard to the Defendant's intoxication. The Court held that such evidence was barred by Rule 608(a) of the Montana Rules of Evidence because the officer's character for truthfulness had not been attacked.

C. Implied Consent

***State ex rel. McGrath v. District Court*, 2001 MT 305, 307 Mont. 491, 38 P.3d 820 (Ravalli). Order Granting State's Request for Writ of Supervisory Control; Remanded for Further Proceedings.** Defendant refused BAC test at hospital following a car accident. Officer obtained an investigative subpoena to access her medical records, which showed a BAC of above the legal limit. District court refused to allow the State to use those results because of the Defendant's refusal, which would permit an "end run" around implied consent statutes. The Supreme Court held that district court was proceeding under a mistake of law and granted the writ. The Court held on the basis of its decision in State v. Newill, 285 Mont. 84, 946 P.2d 134 (1997), that the implied consent law does not apply to diagnostic blood tests taken for medical treatment purposes. The only question for the district court is whether the evidence is competent under Mont. Code Ann. § 61-4-404(3), and the Supreme Court remanded for that inquiry. Trieweiler

dissented, concluding that Mont. Code Ann. § 61-8-402 requires the defendant's consent before medical tests can be obtained for purposes of DUI prosecution. He would overrule Newill.

D. Supervisory Control

Trent Hauge v. District Court for the Twenty-second Judicial District of the State of Montana, 2001 MT 255, 307 Mont. 195, 36 P.3d 947 (Stillwater). Petition for Writ of Supervisory Control Denied; When a search warrant allowed officers to seize "anything else of value", in violation of the particularity requirement, the appropriate remedy is to severe the overbroad catchall clause and suppress only that evidence seized pursuant to the catchall clause. In this case, no evidence was seized pursuant to "anything else of value" clause.

The search warrant was supported by probable cause because the officer sufficiently corroborated the CI's information by: verifying the identities of the occupants of the trailers and the ownership of the vehicles; corroborating the CI's report that one of the principals in the drug operation was stopped for driving without taillights; personally observing the mobile homes on three separate occasions and finding the traffic patterns to be just as the CI described; and by contacting a neighbor who had previously complained of suspected drug activity and heavy traffic and confirming that the traffic patterns still continued.

E. Mental Commitment

***Matter of Mental Health of T.J.D.*, 2002 MT 24, 308 Mont. 222, 41 P.3d 323 (Cascade). Reversed; Leaphart, J.** T.J.D. had a long history of schizophrenia and drug abuse. The State initiated commitment proceedings after her live-in boyfriend reported physical abuse and bizarre, threatening behavior by T.J.D. At the commitment hearing, the State called the examining mental health expert as its only witness. The State relied on the boyfriend's statements documented in the expert's report to establish the statutory requirement that T.J.D. was a threat to herself or others. Because of the hearsay restrictions in Mont. Code Ann. § 53-21-126(3), the Court held that the State should have called the boyfriend to testify. The error was not harmless because, even though the commitment was suspended, T.J.D.'s liberty was restricted by the condition that she participate in inpatient treatment, not to mention the stigma involved in a civil commitment.

***State v. Lamb*, 2001 MT 241, 307 Mont. 54, 36 P.3d 871 (Yellowstone). Affirmed; Leaphart, J.** On the basis of a mental evaluation, the district court

ordered Defendant committed to the DOC with the recommendation that he be placed in Warm Springs. DOC complied, but later moved him to MSP after doctors determined that Lamb was in need of correctional placement. Because the transfer did not comply with Mont. Code Ann. § 46-14-312(3), the Supreme Court in a prior habeas action ordered Lamb's return to the State Hospital under the custody of DPHHS. A year later, DPHHS petitioned for review of sentence and the district court ordered Lamb to be transferred to MSP or DOC for appropriate institutional placement. The Supreme Court affirmed, rejecting Lamb's contention that the State was bound by the plea agreement, which contemplated a commitment to the State Hospital. The Court's determination that Lamb no longer suffers from a mental disease or defect controls.

In the Matter of K.G.F., 2001 MT 140, 306 Mont. 1, 29 P.3d 485 (Lewis and Clark). Reversed; Nelson, J. Due process requires that the person who is the subject of an involuntary commitment proceeding must receive effective representation, which means the following must occur:

1. Counsel must have specialized course training, or have received supervised on-the-job training in the duties, skills, and ethics of representing civil commitment respondents, and the record must reflect that the district court allowed the respondent to express his or her desires with respect to the counsel appointed;
2. Before and after counsel meets with the respondent, counsel must conduct a thorough review of all available records, including respondent's prior medical history and treatment; if and to what extent medication has played a role in the commitment proceeding; the respondent's relationship to family and friends within the community; and the respondent's relationship with relevant medical professionals involved in the commitment proceeding; Counsel should attempt to interview all persons who have knowledge of the circumstances surrounding the petition and be prepared to call those persons as witnesses; Counsel should be prepared to discuss all available options for respondent including the practical and legal consequences of those options;
3. Counsel's initial interview with respondent must be conducted in private and be held sufficiently in advance of any hearing to permit effective preparation and prehearing assistance to the client;
4. Prior to examination by a professional person, respondent, via assistance of counsel, must be allowed to make a voluntary and knowing waiver of his or her right to remain silent, or in the alternative, counsel must be present during the examination;

5. The proper role of the attorney is to represent the perspective of the respondent and to serve as a "vigorous advocate" for the respondent's wishes. "Evidence that counsel independently advocated or otherwise acquiesced to an involuntary commitment B in the absence of any evidence of a voluntary and knowing consent by the patient-respondent B will establish the presumption that counsel was ineffective.

F. Fish & Game

***State v. Walter,* 2001 MT 295N (unpublished). Affirmed; Regnier, J.** Federal law does not preclude the State of Montana from requiring that an applicant for a fishing or hunting license provide his or her social security number. Although federal law prohibits a State from denying an individual a privilege because of the person's refusal to disclose his or her social security number, those provisions do not apply to any disclosure which is required by federal statute, and federal statutes under the Social Security Act specifically require states to implement laws requiring applicants of a recreational license to state his or her social security number for purposes of improving the effectiveness of child support enforcement. The provisions of Mont. Code Ann. § 87-2-106 were designed to meet this requirement, and do not violate federal law.

***State v. Britton,* 2001 MT 141, 306 Mont. 24, 30 P.3d 24 (Jefferson). Affirmed; Gray, C.J.** Britton was convicted of two counts of swearing and affirming to a false statement to obtain a Montana resident hunting license. On appeal, Britton argued the residency requirement for obtaining a resident hunting license set forth in Mont. Code Ann. § 87-2-102 (1995) are facially unconstitutional on vagueness grounds. Citing the general definition of residency (Mont. Code Ann. § 1-1-215) and other various statutory definitions of residency, Britton argued that these definitions of residency might confuse a person of ordinary intelligence regarding whether he or she is a resident for purposes of obtaining a resident hunting license. The Court disagreed, explaining that the statutory residency provisions to which Britton refers clearly provide that they are for specific acts or purposes other than obtaining a hunting license. The Court rejected Britton's argument that the general residency statute controlled, stating that § 1-1-215 does note apply when there is specific statutory exception and that § 87-2-102 (1995) clearly provides a specific statutory exception to the general definition of residency for purposes of obtaining a hunting license. Finally, the Court noted that § 87-2-102 (1995) could not state more clearly that its provisions apply in "determining a resident for the purpose of

issuing resident fishing, hunting, and trapping license."

***State v. Boyer,* 2002 MT 33, 308 Mont. 276, 42 P.3d 771 (Phillips). Affirmed; Regnier, J.** Warden Steve Jones was patrolling the Missouri River when he observed Boyer's boat anchored in the River. Concerned that the boat appeared to be unoccupied, Jones approached the boat to find Boyer lying on the floor. Boyer, who stated that he had been napping, told Jones that he was okay. Upon further questioning Boyer told Jones he had been fishing and produced his license. Boyer also disclosed that he had fish in his live well. Jones asked to see the catch, but Boyer balked – suggesting that Jones could inspect the catch later in the evening at the boat launch. After Jones rejected Boyer's suggestion, Boyer reluctantly removed eight fish from his live well. The combined possession limit for walleye and sauger was ten fish. In order to inspect the fish, Jones tied his boat onto Boyer's and stepped onto the transom or exterior platform attached to Boyer's boat. From the transom platform, Jones could see that the live well contained additional fish in excess of the possession limit. Boyer allowed Jones to remove the illegal fish, and Jones confiscated them. The issue on appeal was whether the district court erred in denying Boyer's motion to suppress, when it determined that no search (privacy violation) had occurred.

The Court addressed four sub-issues, reaching a specific holding with respect to each issue. First, the Court held that the decision to approach Boyer's boat was a lawful welfare check, stating, "We would never seek to discourage wardens or other law enforcement officials from assisting persons in potential distress."

Second, the Court declined to read a particularized suspicion requirement into Mont Code Ann § 87-1-502, which authorizes a warden to inspect a fishermen's license, holding, "[A] game warden may request production of a valid hunting or fishing license when the circumstances reasonably indicate that an individual has been engaged in those activities."

Third, the Court addressed whether a warden's request that a fishermen show his catch, as authorized by Mont Code Ann § 87-1-502(6), constitutes an illegal warrantless search. Relying upon the Article IX, Section 1(1) of the Montana Constitution, and the legislature's decision to appoint game wardens "to enforce the laws of this state and the rules of the [D]epartment for the protection, preservation, and propagation of game and fur-bearing animals, fish, and game birds[,]" the Court held that an inspection request does not violate an expectation of privacy that society is willing to recognize as reasonable. The Court stated, "[0]ur Constitution, laws, and regulations mandate special considerations to assure that our wild places and creatures that inhabit them are preserved for future

generations." Noting that fishing is a privilege, and a highly regulated activity, "no objectively reasonable expectation of privacy exists when a wildlife enforcement officer checks for hunting and fishing licenses in open season near game habitat, inquires about game taken, and requests to inspect game in the field. In this capacity, game wardens are acting not only as law enforcement officers, but as public trustees protecting and conserving Montana's wildlife and habitat for all of its citizens."

Finally, the Court addressed whether Jones' decision to step onto the transom of Boyer's boat was reasonable. Although the act of tying onto Boyer's boat was an investigative stop, because it restrained Boyer's freedom of movement, Jones had particularized suspicion based upon Boyer's reluctance to comply with an expected and routine request that he show his fish. Boyer's reasonable expectation of privacy was not violated by Jones' act of stepping onto the transom, because the intrusion was very minimal, and the expectation of privacy associated with a transom is comparable to one's expectations of privacy with respect to the porch of a house, "although certainly a home is a more private and protected than a fishing boat on a public waterway." The Court emphasized that the live well was open when Jones looked into it, and that what Jones did "was certainly no more invasive than a game warden stepping on a bumper to a pickup to inspect a tagged deer or elk." The Court distinguished its opinion in State v. Elison (which rejected an automobile exception to the warrant requirement), noting that Boyer's fish were in plain view in his opened live well, and fishermen have a constitutional and statutory duty produce fish for inspection.

In a concurring opinion, Justice Leaphart stated "If we in effect legally blindfold wardens so that they cannot look into an open live well or the bed of a pick-up truck at a game check point, we will have created a poacher's haven where Montana's treasured wildlife will eventually go the way of the ill-fated dodo bird." Justice Nelson authored a lengthy dissent. Justice Trieweiler also dissented.

Note: This is a factually narrow fish and game case involving an essentially plain-view inspection of fish in the field. This opinion should not be cited out of context or as general authority for reduced expectations of privacy in other search and seizure contexts, including, in particular, in connection with typical motor vehicle stops.

XI. CONSTITUTIONAL ISSUES

A. Due Process/Equal Protection

***State v. Elliott*, 2002 MT 26, 308 Mont. 227, 43 P.3d 279 (Custer). Affirmed; Leaphart, J.** Elliott was charged with deliberate homicide for the death of her

newborn infant. Claiming that a presumption that the baby was born alive existed and that she had the burden of overcoming that presumption, she argued that there was violation of her due process rights. No such presumption existed, and no burden of proof rested with the Defendant. The State was required to, and did,

prove all elements of the case, including that the baby was born alive and therefore was a human being by statutory definition.

***State v. Lee*, 2001 MT 176, 306 Mont. 173, 31 P.3d 998 (Cascade). Reversed; Regnier, J.** In anticipation of Defendant's release from prison, State filed a petition to revoke his suspended sentence on the ground that Defendant had not completed sex offender treatment due to the long waiting period. Supreme Court held that, as a matter of due process, the district court cannot revoke for a non-willful violation without considering whether there are adequate alternatives to incarceration that would further the purpose of the suspended sentence.

***State v. Ford,* 2001 MT 230, 306 Mont. 517, 39 P.3d 108 (Cascade). Affirmed (argued); Cotter, J.** Ford was convicted of deliberate homicide after beating his male roommate to death. Ford claimed that the decedent attacked him and that Ford was acting in self-defense. Following voir dire, the prosecution exercised six strikes against panelists who happened to be female. After the sitting jury was sworn and the venire was dismissed, Ford's trial counsel moved for a new jury pool, claiming that the State's exercise of its peremptory strikes violated Ford's right "to a jury of his peers." The prosecution, without any prompting from the district court, offered explanations for his strikes. The district court, without stating its reasons for doing so, overruled the objection. On appeal, "Ford first labeled his dispute over the State's exercise of peremptory challenges a 'Batson' challenge." The Court refused to address the merits of the Batson issue, holding that the issue was waived by trial counsel's failure to assert the objection before the jury was sworn and the venire dismissed. The Court observed that an untimely Batson challenge impairs counsel's ability to defend his or his strikes and deprives the district court of the ability to correct any error in the proceedings in a timely fashion.

The Court took the opportunity to discuss Batson and its progeny, noting that Batson (which involved racial discrimination in the exercise of peremptory challenges) was extended to include gender discrimination in J.E.B. v. Alabama. The Court also noted that Batson has been extended to prevent discriminatory peremptory strikes by criminal defense counsel. The Batson rule also applies to private litigants in civil cases.

***State v. Liefert*, 2002 MT 47, 309 Mont. 19, 43 P.3d 329 (Broadwater) Affirmed; Nelson, J.** In 1999, Liefert pled guilty to partner assault in justice court. He was later charged by the feds with illegal possession of a weapon by a person convicted of misdemeanor domestic abuse. In an attempt to avoid the federal charge, he moved to withdraw his guilty plea in the justice court; he claimed his plea was not knowing and voluntary because he was not advised that he would lose his gun rights by operation of federal law. The motion was denied, and he appealed to district court, which also denied his motion. He then appealed to the MT Supreme Court. Although there is no statutory right to appeal from a justice court's denial of a motion to withdraw a guilty plea, the Court treated this case as a denial of a motion for postconviction relief.

On the merits, the Court reaffirmed that state courts do not need to advise defendants of the collateral consequences of a conviction. It concluded that the federal gun restriction was a collateral consequence of Liefert's state conviction. The Court rejected Liefert's argument that he was misled by "negative implication" based on the state statutes that permit state courts to restrict gun rights.

***Robbins v. State*, 2002 MT 116, ___ Mont. ___, ___ P.3d ___ (Cascade). Reversed; Trieweiler, J.** Conviction for robbery and deliberate homicide reversed on appeal of denial of postconviction review. The Supreme Court applied the decision in State v. LaMere, 2000 MT 45, 2 P.3d 204 retroactively to Robbins, under the second exception to the Teague rule of non-retroactivity of "new rules" on collateral review. Teague v. Lane, 489 U.S. 288 (1989).

***State v. Kempin*, 2001 MT 313, 308 Mont 17, 38 P.3d 859 (2001) (Powder River). Affirmed; Rice, J.** Kempin was charged with seven hunting violations in justice court. Kempin post bond money and later forfeited the seven bonds. The justice court in turn suspended his hunting, fishing and trapping privileges for ten years.

Kempin argued that his right to due process was violated because the forfeiture of his bonds and the suspension of his privileges were ordered by the justice court without notice. The Supreme Court disagreed, explaining that the justice court discussed the effect of bond forfeiture with Kempin's counsel. The Court also noted that "Kempin also received notice that he risked loss of hunting, fishing and trapping privileges in Montana by the fact that six of the seven written [Notices to Appear and Complaints] issued to him personally by the game wardens stated his license privileges may be suspended."

The Court also rejected Kempin's claims that the justice court's bond forfeiture denied him his constitutional right to trial by jury and those rights associated with a trial. The Court stated that Kempin waived his constitutional rights by failing to appear.

***State v. Deschon*, 2002 MT 16, 308 Mont. 175, 40 P.3d 391 (Lewis and Clark). Affirmed in Part and Remanded for Evidentiary Hearing; Leaphart, J.** Deschon's right to due process was not violated because no transcript of voir dire exists for review on appeal since there is the availability of alternative devices that would fulfill the same functions as a transcript. The Court remanded for an evidentiary hearing in district court, during which witness such as the prosecutor, defense attorney, court reporter and clerk of court may testify as to their memory of the voir dire proceeding.

***In the Matter of T.C. and W.C.*, 2001 MT 264, ,307 Mont. 244, 37 P.3d 70 (Silver Bow). Reversed; Regnier, J.** The district court violated the mother's due process rights by allowing DPHHS to amend its petition to include abandonment as grounds for termination. Even though some of the facts in the affidavit may have supported a theory of abandonment, the mother was not required to guess at the theory DPHHS intended to raise at the termination hearing.

B. Fifth Amendment/Privilege Against Self-Incrimination

***State v. Marvin Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735 (Deer Lodge). Affirmed; Cotter, J.** The Defendant did not have a right to counsel before submitting to a breath test and field sobriety tests. The officer properly read the Defendant Montana's implied consent advisory form before asking the Defendant to submit to a breath test. A mere request that a suspect perform sobriety tests without interrogation of the suspect does not constitute a custodial interrogation.

***State v. Spang*, 2002 MT 120, ___ Mont. ___, ___ P.3d ___ (Hill). Affirmed in Part; Reversed in Part; Regnier, J.** After law enforcement officers read Spang his *Miranda* rights at the beginning of Spang's second interview, Spang stated, "shit, man I need a lawyer". An officer asked Spang whether he wished to continue with the interview or talk with an attorney first. Spang agreed to continue. Spang's request for counsel was unequivocal. Thus, he could not be the subject of further questioning by officers, even a non-incriminating, clarifying question, until an attorney was made available to him or he initiated further

conversation. The district court erred when it denied Spang's motion to suppress the statements he made during his second custodial interrogation, and the error, although trial error, was not harmless. Even though the inadmissible evidence was cumulative to other admissible evidence, including Spang's first voluntary statement to law enforcement, the State failed to demonstrate that qualitatively, there is no reasonable possibility that Spang's second statement, and the transcripts made therefrom, did not contribute to his conviction.

C. Eighth Amendment

***State v. Anderson* 2002 MT 92, 309 Mont. 352, ___ P.3d ___ (Cascade). Affirmed in Part; Remanded; Gray, C.J.** The district court did not err in finding Anderson had violated the conditions of his suspended sentence since Anderson had a prior history of violating the conditions of his suspended sentence; Anderson had a significant criminal history and had been subsequently convicted of three additional felonies; and the record reflected that Anderson failed to comply with a number of the conditions of his suspended sentence. The district court did not sufficiently state its reasons for the revocation of Anderson's sentence. Therefore the matter was remanded for resentencing and the entry of findings sufficient to support the sentence imposed upon revocation of the suspended sentence.

D. Right to Counsel/Effective Assistance

***State v. Rogers*, 2001 MT 165, 306 Mont. 130, 31 P.3d 724 (Missoula). Reversed; Leaphart, J.** Counsel is ineffective when he neglects to offer a "failure to agree" instruction to accompany a lesser included offense instruction where there is a reasonable probability that the jury might have reached a different verdict but for the error (i.e., where there are sufficient facts to support a conviction for a lesser included offense). This result avoids the danger that jurors, harboring doubts as to a defendant's guilt on the greater offense, will wrongly yield to the majority rather than not convict the defendant of any offense at all. Does this mean that counsel is per se ineffective if he fails to offer a "failure to agree" instruction whenever the court instructs on a lesser included offense (since the LIO requires some factual support in the record)? I don't know . . .

Also, counsel has a constitutional obligation to file a notice of appeal when requested to do so by the defendant, or must file an **Anders** brief.

***State v. Schaff*, 2001 MT 130, 305 Mont. 427, 28 P.3d 1073 (Yellowstone).**

Affirmed in Part, Reversed in Part, and Remanded for Futher Proceedings; Regnier, J. Non-record based allegations of ineffective assistance of counsel relating to the voluntariness of a guilty plea are properly litigated in postconviction relief even though petitioner challenged the voluntariness of his plea on direct appeal. Remanded for further inquiry into petitioner's allegation that his trial counsel, who was initially retained but was later court-appointed after petitioner ran out of money to pay him, gave him only two hours to decide whether to accept the plea or reject the plea offer.

***State v. Anderson (John Henry)*, 2001 MT 188, 306 Mont. 243, 32 P.3d 750 (Wibaux). Affirmed; Leaphart, J.** At the sentencing hearing for third offense DUI, Anderson challenged the validity of one of his earlier DUI convictions. He claimed there was no evidence in the record that he had waived his right to counsel in the prior case. The claim was rejected by the district court and again on appeal. The Supreme Court held that Anderson failed to meet his burden of proof because the *lack* of evidence of effective waver is not direct evidence of invalidity. "In sum, it is not proof of anything. It is absence of proof."

***State v. Whitlow*, 2001 MT 208, 306 Mont. 339, 33 P.3d 877 (Ravalli). Reversed; Regnier.** In a postconviction petition, Whitlow alleged his counsel was ineffective because he failed to question three jurors about potential bias during voir dire. The district court held that Whitlow's ineffective assistance of counsel (IAC) claim was barred by Mont. Code Ann. § 46-21-105 because he could have raised his IAC claim on direct appeal. As in State v. Chastain, 285 Mont. 61, 947 P.2d 57 (1997), the district court noted that Whitlow's IAC claim was based on the trial record.

The Supreme Court disagreed. The Court distinguished Chastain and held that Whitlow's IAC claim was not procedurally barred. The Court explained that in Chastain the jurors clearly expressed a potential for bias and their statements demanded further inquiry from defense counsel. In other words, there would be no reasonable tactical decision for defense counsel's failure to further question the jurors and, thus, the IAC claim could be decided on the direct appeal record. The Court concluded that in this case there might have been a potential explanation or tactical reason by Whitlow's counsel when he failed to question the three jurors in question and, thus, Whitlow's IAC claim cannot be decided solely on trial court record.

***State v. Garner*, 2001 MT 222, 306 Mont. 462, 36 P.3d 346 (Cascade).**

Affirmed; Regnier, J. Russell Garner and Steven Newhouse were charged with theft of a pickup truck. Garner, who was also charged with forgery, was tried separately. The allegations were that the two had stolen a truck in Missoula and that Garner later presented a stolen check at a check cashing service in Great Falls. Garner was apprehended after fleeing when he realized the employees had called the police.

Garner was transferred from MSP, where he was on anti-depressants, to the Cascade County Jail for trial. Larry LaFountain was his appointed attorney. A conflict developed between Garner and LaFountain during the trial, and the district court eventually allowed Garner to represent himself. LaFountain had requested that he be allowed to call Garner to the stand to question him about his medication. The court declined that request, but LaFountain said that Garner's anti-depressants had been discontinued when he left the prison for the trial. Garner told the court he was not depressed but angry, because he thought LaFountain was "an idiot." The court allowed Garner to proceed pro se, and it made the inquiry required by Faretta v. California, 422 U.S. 806 (1975), but only after Garner had examined witnesses. There was also some discussion about Garner's competence.

Garner then pled guilty when the court rejected his jury instructions. His theory was that he could not be convicted for forgery unless he actually received money. When the judge ruled otherwise, he pled guilty to both charges.

Having determined the trial court was not required to hold a competency hearing during the trial, the Court examined the trial court's questioning of Garner in light of Faretta and concluded it was adequate ("with additional questioning provided by the prosecution"). The Court agreed with Garner that the four year's delay in filing a motion to withdraw his guilty pleas was not a per se bar, but it noted that he "had ample opportunity to raise his claim . . . while represented by counsel."

***State v. Kaske (Arthur Paul)*, 2002 MT 106, 309 Mont. 445, ___ P.3d ___ (Missoula). Affirmed; Regnier, J.** A straightforward application of State v. Gallagher (Gallagher I), 1998 MT 70, 288 Mont. 180, 955 P.2d 1371, and State v. Gallagher (Gallagher II), 2001 MT 39, 304 Mont. 215, 19 P.3d 817. Kaske conceded that the district court conducted an adequate initial inquiry, but disagreed with the court's conclusion he had not set forth seemingly substantial complaints on Borg's effectiveness. Noting that Borg and Kaske's relationship was not equable, the Court still held that none of his many complaints showed a complete breakdown in communication, that Borg's decisions about the conduct of the case must be given great deference, and that Kaske did not have the right to a particular attorney or a particular defense.

***State v. Harris*, 2001 MT 231, 306 Mont. 525, 36 P.3d 372 (Lincoln). Affirmed in Part; Reversed in Part and Remanded for Hearing; Nelson, J.** The Supreme Court held that Harris's postconviction claim of ineffective assistance of counsel required an evidentiary hearing because the record of the trial court proceedings did not disclose why defense counsel did not request a ruling on the use of Harris's confession for impeachment purposes.

***State v. Thee*, 2001 MT 294, 307 Mont. 450, 37 P.3d 741 (Cascade). Affirmed; Leaphart, J.** In a postconviction proceeding Thee alleged that he was denied the effective assistance of counsel before and during the entry of his guilty plea. The Supreme Court held that Thee failed to show that his counsel was ineffective. Counsel properly advised Thee about the possible punishment for the offense, investigated alleged violence against Thee in jail, researched a possible suppression motion, investigated Thee's mental condition, and advised Thee about applicable lesser included offenses.

***State v. Kellames*, 2002 MT 41, 308 Mont. 347, 43 P.3d 293 (Yellowstone). Affirmed; Gray, C.J.** The Supreme Court held that the district court properly determined that Kellames' complaints about his counsel were not seemingly substantial and did not merit a further hearing.

***In the Matter of K.G.F.*, 2001 MT 140, 306 Mont. 1, 29 P.3d 485 (Lewis and Clark). Reversed; Nelson, J.** Due process requires that the person who is the subject of an involuntary commitment proceeding must receive effective representation, which means the following must occur:

1. Counsel must have specialized course training, or have received supervised on-the-job training in the duties, skills, and ethics of representing civil commitment respondents, and the record must reflect that the district court allowed the respondent to express his or her desires with respect to the counsel appointed;
2. Before and after counsel meets with the respondent, counsel must conduct a thorough review of all available records, including respondent's prior medical history and treatment; if and to what extent medication has played a role in the commitment proceeding; the respondent's relationship to family and friends within the community; and the respondent's relationship with relevant medical professionals involved in the commitment proceeding; Counsel should attempt to interview all persons who have knowledge of the circumstances surrounding the petition and be prepared to call those persons as

witnesses; Counsel should be prepared to discuss all available options for respondent including the practical and legal consequences of those options;

3. Counsel's initial interview with respondent must be conducted in private and be held sufficiently in advance of any hearing to permit effective preparation and prehearing assistance to the client;
4. Prior to examination by a professional person, respondent, via assistance of counsel, must be allowed to make a voluntary and knowing waiver of his or her right to remain silent, or in the alternative, counsel must be present during the examination;
5. The proper role of the attorney is to represent the perspective of the respondent and to serve as a "vigorous advocate" for the respondent's wishes. Evidence that counsel independently advocated or otherwise acquiesced to an involuntary commitment B in the absence of any evidence of a voluntary and knowing consent by the patient-respondent B will establish the presumption that counsel was ineffective.

***State v. Deschon*, 2002 MT 16, 308 Mont. 175, 40 P.3d 391 (Lewis and Clark). Affirmed in Part and Remanded for Evidentiary Hearing; Leaphart, J.** Deschon was not denied effective representation of counsel because one of his two attorneys had a conflict of interest. During trial, the defense called William Lawrence to testify in support of Deschon's affirmative defense. One of Deschon's attorneys was also representing Lawrence on a pending, and completely unrelated, charge of domestic abuse. Lawrence testified favorably for Deschon. Even assuming arguendo that an actual conflict of interest existed, Deschon could not establish that his counsel's performance was adversely affected by an actual conflict of interest.

Deschon's right to due process was not violated because no transcript of voir dire exists for review on appeal since there is the availability of alternative devices that would fulfill the same functions as a transcript. The Court remanded for an evidentiary hearing in district court, during which witnesses such as the prosecutor, defense attorney, court reporter and clerk of court may testify as to their memory of the voir dire proceeding.

***State v. Spang*, 2002 MT 120, ___ Mont. ___, ___ P.3d ___ (Hill). Affirmed in Part; Reversed in Part; Regnier, J.** After law enforcement officers read Spang his *Miranda* rights at the beginning of Spang's second interview, Spang stated, "shit, man I need a lawyer". An officer asked Spang whether he wished to continue with the interview or talk with an attorney first. Spang agreed to

continue. Spang's request for counsel was unequivocal. Thus, he could not be the subject of further questioning by officers, even a non-incriminating, clarifying question, until an attorney was made available to him or he initiated further conversation. The district court erred when it denied Spang's motion to suppress the statements he made during his second custodial interrogation, and the error, although trial error, was not harmless. Even though the inadmissible evidence was cumulative to other admissible evidence, including Spang's first voluntary statement to law enforcement, the State failed to demonstrate that qualitatively, there is no reasonable possibility that Spang's second statement, and the transcripts made therefrom, did not contribute to his conviction.

***State v. Weaver (William Larry)*, 2001 MT 115, 305 Mont. 315, 28 P.3d 451 (Missoula). Affirmed; Trieweiler, J.** Weaver was convicted of the deliberate homicide of Larry Fremou, whose body was found in the woods near Missoula about a month after he disappeared. Fremou was living with Weaver when he was last seen. The State's theory was that Weaver and Fremou had gone into the woods, where Weaver shot Fremou with a borrowed rifle, stripped off Fremou's clothes to burn on fire near where Fremou was shot, and then dragged Fremou's body to a brushy ravine, where it was later discovered by a hunter. The gun was pawned by its owner, and someone else bought it. The police were unable to find it.

When the police recovered the body, it harbored a clutch of maggots, and an entomologist who examined them issued a report giving his opinion of their age. The date of projected death from the report placed the latest possible date of death before the date the suspect rifle had been pawned. The entomologist later died, and a second entomologist disagreed with the earlier report. The district court refused to allow the second entomologist to testify (his opinion would have been favorable to the State), but it allowed him to serve as a foundation witness for the report. Weaver's counsel took steps to have the second entomologist at trial, but she did not call him and did not attempt to offer the report in evidence.
Weaver argued that her failure to have the report introduced was ineffective. The Court disagreed, noting it would not second-guess tactical decisions. Although the district court would have allowed her to attempt to lay a foundation for the report, there was no basis in the record for determining it would have been accomplished. There was nothing in the record disclosing counsel's reasons for not pursuing the report.

***State v. Fields*, 2002 MT 84, 309 Mont. 300, 46 P.3d 612 (Yellowstone). Reversed and New Trial Ordered on Deliberate Homicide Conviction; Gray,**

C.J. The Supreme Court refused to address Fields' allegation of ineffective assistance of counsel that his counsel failed to challenge or remove an allegedly biased juror. The court concluded that under its White decision the record was silent on "why" counsel acted the way he did, and so the claim was not properly before the Court.

***State v. Wright*, 2001 MT 282, 307 Mont. 349, 42 P.3d 753 (Custer). Affirmed; Rice, J.** Wright argued that the trial court erred in denying his motion for postconviction relief as his counsel was ineffective because counsel withheld exculpatory evidence from him prior to Wright's change of plea. The Supreme Court disagreed. The evidence before the trial court showed that no second statements were given by any of the victims. Wright's attorney stated in his deposition that he was unaware of a second statement from any victim that retracted or contradicted the victim's first statement, and he stated that he did not receive such a statement. Also, the State neither received a second statement, nor was aware that any of the victims had made such a statement. The trial court, in its findings of fact, determined the second statements did not exist. Therefore, Wright's counsel's performance was not deficient and the trial court did not err in denying the motion for postconviction relief.

***State v. Russell*, 2001 MT 278, 307 Mont. 322, 37 P.3d 678 (Ravalli). Affirmed; Gray, C.J.** Russell argued that he was denied his right to effective assistance of counsel, as his attorney failed to challenge for cause a relative of the victim and used two peremptory challenges to strike jurors outside the jury pool. The use of peremptory challenges was inherently a tactical function, and the record was silent regarding why Russell's counsel acted or failed to act in the manner currently challenged. Russell's contention regarding ineffective assistance of counsel would have more appropriately been raised in a petition for postconviction relief.

***State v. Allen*, 2001 MT 266, 307 Mont. 253, 37 P.3d 655 (Lake). Affirmed; Trieweiler, J.** Allen went to the victim's home to demand money allegedly owed. The victim asserted that Allen threatened him with a gun and took his television as payment. A witness testified that he saw Allen leaving the home with a gun and the television. Allen argued he received ineffective assistance of counsel. Allen's claim that defense counsel failed to conduct an adequate investigation was not supported by the record. No evidence had been presented before trial or sentencing that defense counsel failed to investigate.

***State v. White*, 2001 MT 149, 306 Mont. 58, 30 P.3d 340 (Pondera). Affirmed;**

Nelson, J. White was found guilty of three counts of forgery. On appeal, the main issue was whether White was denied the effective assistance of counsel which prejudiced her right to a fair trial. The Supreme Court affirmed the district court judgment and dismissed White's direct appeal without prejudice, concluding that the claimed deficiencies were non-record based and could not be reviewed on direct appeal. The Court brought greater clarity to Hagen v. State, 1999 MT 8, 293 Mont. 60, 973 P.2d 233, by further explaining what they characterized as "the bright line separating record and non-record areas of representation:"

> Though not easily distilled into a formula, the definitive question that distinguishes and decides which actions are record and which are non-record, is ***why***? In other words, if counsel fails to object to the admission of evidence, or fails to offer an opening statement, does the record fully explain ***why*** counsel took the particular course of action? If not, then the matter is best-suited for postconviction proceedings which permit a further inquiry into whether the particular representation was ineffective. Only when the record will fully explain why counsel took, or failed to take, action in providing a defense for the accused may this Court review the matter on direct appeal.

White, ¶ 20 (emphasis in original). Here, the record did not describe why White's counsel chose to reserve his presentation of an opening statement for White's case in chief, and then, when that moment arrived, chose to rest without introducing any evidence or calling even one witness.

E. Double Jeopardy

***State v. Anderson (John Henry)*, 2001 MT 188, 306 Mont. 243, 32 P.3d 750 (Wibaux). Affirmed; Leaphart, J.** During the sentencing hearing for driving after having been declared an habitual traffic offender, the district court heard evidence that Anderson had been recently charged with third offense DUI. Later, in the DUI proceeding, Anderson claimed he had already been sentenced for the DUI, and moved to dismiss on double jeopardy grounds. The charge was dismissed, but the Montana Supreme Court reinstated the charge in State v. Anderson, 1998 MT 258, 291 Mont. 242, 967 P.2d 413. On remand, Anderson renewed his motion on the basis of the Court's ruling in State v. Guillaume, 1999 MT 29, 293 Mont. 224, 975 P.2d 312 (reasoning therein that the state Constitution provides greater protection against double jeopardy than under US Constitution). The renewed motion was denied. On appeal, the Supreme Court held that Guillaume applied only to legislative enactments that enhance sentences

for conduct which is already included as an element of the underlying offense (e.g. felony assault and weapon enhancement).

***State v. Walker*, 2001 MT 170, 306 Mont. 159, 30 P.3d 1099 (Big Horn). Affirmed; Gray, C.J.** Walker was convicted of felony DUI and sentenced to six months in prison, followed by two years probation. After she was released from prison and placed on probation, she violated the terms of probation and was revoked. The district court sentenced her to another term of imprisonment. The Supreme Court held that the second prison sentence did not violate the prohibition against double jeopardy and that Mont. Code Ann. § 61-8-731, the DUI sentencing statute, was constitutional.

F. Speedy Trial

***State v. Boese*, 2001 MT 175, 306 Mont. 169, 30 P.3d 1092 (Cascade). Affirmed; Trieweiler, J.** The State satisfied its burden of proving no prejudice in a bad check case under the Bruce speedy trial analysis. The pretrial incarceration was not oppressive or prejudical where Defendant was incarcerated on other charges. More than likely, any anxiety experienced by defendant stemmed from these other, more serious, charges--not the delay. The likelihood of anxiety is contraindicated by the frequency with which Defendant changed his plea, thus adding to the delay. Impairment to the defense was unlikely where Defendant called no witnesses and did not testify, and the evidence of his guilt was strong and not likely to change with time.

***State v. Good,* 2002 MT 59, 309 Mont. 113, 43 P.3d 948 (Missoula). Reversed; Leaphart, J.** Good was convicted of a sexual abuse charge involving his teenage stepdaughter; the jury hung on two sexual assault counts. He appealed, claiming that he was denied his right to a speedy trial and that the district court abused its discretion when it denied defense challenges for cause during voir dire.

With respect to the speedy trial claim, the district court attributed the delay from the October omnibus hearing through the date of a March status conference (126 days) to the Defendant because Good had given notice that he would be filing a motion to suppress which was never filed. On appeal, the Court held that the delay was institutional delay, and therefore should have been assigned to the State. Because the total delay exceeded 275 days, the State bore the burden of proving that Good was not prejudiced. Although the district court had assigned the burden to the defense, the Court held that the district court properly concluded, based upon the State's cross-examination, that Good's anxiety was caused by the filing of the charges rather than trial delay. The Court emphasized that Good suffered no pretrial incarceration and he conceded that his defense was not impaired by the delay. The Court reversed on the voir dire issue.

***State v. Butler,* 2001 MT 197N (unpublished) (Cascade) Affirmed; Nelson, J.** The Court affirmed the district court's denial of Butler's motion to dismiss for lack of speedy trial. The only Bruce factor at issue was whether Butler met his burden of proving he was prejudiced by the pretrial delay. The Court found he failed to prove prejudice because (1) he only spent a short time incarcerated before he posted bail and didn't show that the incarceration was oppressive or unduly prejudicial; (2) any evidence Butler presented with regard to anxiety and concern could be attributed to being charged with a serious drug offense and did not

indicate
aggravation due to the length of delay awaiting trial; and (3) Butler conceded that he suffered no damage to his case because of the delay.

***State v. Price*, 2001 MT 212, 306 Mont. 381, 34 P.3d 112 (Cascade). Affirmed; Rice, J.** Price was convicted of DUI first in justice court and later in district court. On appeal, the Montana Supreme Court denied Price's speedy trial claim even though there was 628 days of delay. The State was responsible for 404 days of delay and of that amount 302 days of delay were institutional in nature. Regarding the issue of prejudice, Price was not incarcerated prior to trial, so the issue of oppressive pretrial incarceration was not considered by the Court. The Court also concluded that Price did not suffer any anxiety and concern beyond the normal amount suffered from being charged with a crime. The Court noted that the sentence Price received in justice court was stayed pending his de novo appeal to district court and, as a result, his driving privileges and his ability to obtain insurance were not affected during the district court prosecution. The Court also concluded that Price's defense was not prejudiced by the delay. The Court noted that Price's two witnesses displayed no signs of diminished memories and Price's own memory was not diminished by the delay.

***In the Matter of A.G.*, 2002 MT 111, 309 Mont. 491, ___ P.3d ___ (Cascade). Reversed and Remanded; Nelson, J.** The Montana Supreme Court held that the district court erred when it determined that that A.G.'s right to a speedy trial had not been violated. The Supreme Court held that the district court's allocation of the delay was incorrect and, as a result, the district court was incorrect when it found the Defendant had the burden to show prejudice. The Supreme Court explained that district court incorrectly calculated the delay when it concluded that A.G. had the burden pursuant to Mont. Code Ann. § 41-5-1404(3) to move to reset the initial answer hearing after he failed to appear at that hearing. The Court stated that Mont. Code Ann. § 41-5-1404(3) by its terms is inapplicable and "it is up to the State to move the case towards prosecution and a defendant is under no obligation to ensure diligent prosecution of the case against him or to help the State avoid dismissal for failure to timely prosecute." After A.G. missed the initial answer hearing, the prosecutor had no knowledge of A.G.'s whereabouts. A.G.'s probation officer however knew A.G.'s whereabouts but failed to inform the prosecutor. The Court imputed the probation officer's knowledge of A.G.'s whereabouts to the State. The Court remanded the case for a hearing in order to allow the State to show a lack of prejudice.

***State v. Stuart, Larry*, 2001 MT 178, 306 Mont. 189, 31 P.3d 353 (Ravalli). Affirmed; Gray, C.J**. This case is a straightforward application of City of Billings v. Bruce, 1998 MT 186, 290 Mont. 148, 965 P.2d 866, as clarified by State v. Hardaway, 1998 MT 224, ¶¶ 14-23, 290 Mont. 516, 966 P.2d 125. Stuart's principal argument was on Bruce's fourth speedy trial analysis, prejudice to the defense, which the Court agreed was insufficient to show prejudice.

Other than Bruce, the opinion mentioned two other useful cases:

1. State v. Olmsted, 1998 MT 301, ¶ 57, 292 Mont. 66, 968 P.2d 1154, "a certain amount of anxiety and concern is inherent in being accused of a crime."
2. Delaware v. K-Decorators, Inc., 1999 MT 13, ¶ 51, 293 Mont. 97, 973 P.2d 818, "statements of counsel are not evidence."

After the district ruled against his speedy trial motion, Stuart filed a motion to reconsider. The Court agreed with the district court ruling that the affidavits were untimely, noting that "Stuart cites to no authority under which a party may wait until an adverse ruling on his or her motion and then come forward in an effort to make a factual record in support of the motion with evidence under that party's control at all times." ¶ 25. The Court also found that the affidavits, read in their entirety, addressed anxiety but did not "transcend the generic anxiety inherent in being an accused discussed in Olmsted.

G. Privacy

***State v. Bilant*, 2001 MT 249, 307 Mont. 113, 36 P.3d 883 (Musselshell). Affirmed; Leaphart, J. (en banc)** Bilant was involved in a car accident. There was evidence he had been drinking and he told the officer that he had taken a pain reliever called "propoxy" that afternoon, prescribed by Dr. Teal in Billings. The officer than called Dr. Teal's office and was told that Bilant's only prescription was for propoxyphene napsylate acetamimophen (Darvocet N100).

At the next interview, Bilant denied his earlier statement that he had taken "propoxy" and said he had only taken a Tylenol the morning of the accident. The State then applied for an investigative subpoena from Dr. Teal's office, seeking information about Bilant's prescriptions from 1996 to the present. The office responded to the subpoena by sending the county attorney Bilant's entire medical file dating from 1991.

Bilant moved to suppress the medical information provided by the office over the phone and pursuant to the subpoena. The district court denied the motions.

The Court addressed the following issue:

(1) Did the district court err by denying a motion to suppress medical record

information acquired by an investigating officer from a health care provider by telephone inquiry?

The Court held that the information obtained by the officer's telephone inquiry to Dr. Teal's office should have been suppressed on the basis of "informational privacy" provided by Article II, Section 10 of the Montana Constitution. Bilant did not forfeit his constitutional right to claim confidentiality of his medical records by revealing limited information to the officer. She conducted an illegal search when she telephoned the doctor's office without obtaining an investigative subpoena under Mont Code Ann § 46-4-301(3), which requires probable cause.

H. Brady

***State v. Thompson*, 2001 MT 119, 305 Mont. 342, 28 P.3d 1068 (Teton). Affirmed; Trieweiler, J.** The State interviewed the four-year-old victim a few days before trial at which time the victim made several contradictory statements about who sexually abused her, including that the Defendant did not sexually abuse her. The victim's mother was present during this interview, and reported the statements to the Defendant and his attorney. The Defendant argued that even though he knew about the statements, the State had an independent duty to tell him about the victim's statements. Since the Defendant knew about the victim's vacillation prior to trial, and was able to use her statements at trial, there is no reasonable probability that the result would have been different had the State informed the Defendant of the victim's comments a few days prior to trial.

I. Right to Be Present

***State v. Bird*, 2002 MT 2, 308 Mont. 75, 43 P.3d 266 (Yellowstone). Reversed; Nelson, J. ; Rice, J., dissenting.** The district court violated the Defendant's constitutional right to appear in all criminal proceedings because the Defendant was not present at the individual in-chambers voir dire sessions. The Court held that in the future, a trial court must explain to the defendant, on the record, the defendant's constitutional right to be present at all critical stages of the trial, including in-chambers voir dire, and that if a defendant chooses to waive that right, the court must obtain an on-the-record personal waiver by the defendant acknowledging that the defendant voluntarily, intelligently and knowingly waives that right. The Court found that exclusion from in-chambers voir dire was structural error.

J. Other

***State v. Stedman*, 2001 MT 150, 306 Mont. 65, 30 P.3d 353 (Jefferson). Reversed; Regnier, J.** Stedman appealed his justice court conviction of the offense of criminal mischief. Following a bench trial, the district court found Stedman guilty. The Supreme Court reversed and remanded for a new trial, finding that the district court was unduly influenced by the justice court proceedings, as evidenced by the district court's references to the justice court in its findings and conclusions, and that Stedman was consequently denied a trial de novo.

Criminal Appeal Caseload Statistics by County

July 1, 2001 to June 30, 2002

KEY:

- #Appeals: Total number of direct appeals in criminal cases
- Publ: Cases that resulted in published decisions
- Aff: Published decisions that were affirmed
- Rev: Published decisions that were reversed
- A/R: Published decisions that were affirmed in part, reversed in part
- Conceded: Cases where the state conceded error
- %Affd: Percentage of published decisions that were affirmed
- Total Affd: Total number of cases (including non-cite opinions) that were affirmed.

County	#Appeals	Publ.	Aff.	Rev.	A/R	Conceded	%Affd	Total Affd
Beaverhead	3	1	0	1	0	0	0%	66%
Bighorn	1	1	1	0	0	0	100%	100%
Broadwater	1	1	1	0	0	0	100%	100%
Butte	3	2	1	1	0	0	50%	66%
Carbon	1	1	0	1	0	0	0%	0%
Cascade	27	21	8	13	0	3	38%	45%
Custer	3	3	3	0	0	0	100%	100%
Deerlodge	2	2	2	0	0	0	100%	100%
Fergus	1	1	1	0	0	0	100%	100%
Flathead	11	3	2	1	0	3	66%	54%
Gallatin	9	4	4	0	0	0	100%	100%
Hill	5	5	3	2	0	0	60%	60%
Jefferson	4	3	2	1	0	0	66%	75%
Lake	2	1	1	0	0	0	100%	100%
Lewis & Clark	8	6	1	5	0	0	16%	25%
Lincoln	3	3	1	2	0	0	33%	33%
Madison	1	1	1	0	0	0	100%	100%
Mineral	3	2	1	1	0	0	50%	66%
Missoula	16	11	7	4	0	0	63%	68%
Musselshell	2	2	1	1	0	0	50%	50%
Park	1	1	1	0	0	0	100%	100%
Phillips	1	1	1	0	0	0	100%	100%
Pondera	1	1	1	0	0	0	100%	100%
Powder River	1	1	1	0	0	0	100%	100%
Powell	1	0	0	0	0	0	N/A	100%
Ravalli	7	7	3	3	1	0	42%	42%
Sanders	2	1	1	0	0	1	100%	50%
Teton	1	1	1	0	0	0	100%	100%

County	#Appeals	Publ.	Aff.	Rev.	A/R	Conceded	%Affd	Total Affd
Wibaux	1	1	1	0	0	0	100%	100%
Yellowstone	21	14	5	7	2	1	36%	52%
TOTALS	143	102	56	43	3	8	54%	75%

Dependent Neglect Caseload Statistics by County
July 1, 2001 to June 30, 2002

County	#Appeals	Publ.	Aff.	Rev.	A/R	Conceded	%Affd	Total Affd
Butte	2	2	1	1	0	0	50%	50%
Carbon	1	0	0	0	0	0	NA	100%
Cascade	1	1	1	0	0	0	100%	100%
Deerlodge	2	2	1	1	0	0	50%	50%
Fallon	1	1	1	0	0	0	100%	100%
Flathead	1	1	0	1	0	0	0%	0%
Gallatin	1	1	1	0	0	0	100%	100%
Hill	1	0	1	0	0	0	NA	100%
Musselshell	1	0	1	0	0	0	NA	100%
Sanders	1	1	1	0	0	0	100%	100%
Yellowstone	7	6	6	0	0	0	100%	100%

State Appeals
July 1, 2001 to June 30, 2002

Case Name	County	Results
State v. Aakre	Cascade	Affirmed
State v. Bracha	Judith Basin	Reversed (unpublished)
City of Cutbank v. Bird	Glacier	Reversed
State v. Griggs	Gallatin	Affirmed
State v. Grindeland	Cascade	Affirmed
Patterson v. DMV	Missoula	Affirmed
State v. VanderHule	Gallatin	Reversed (unpublished)

Original Writs
July 1, 2001 to June 30, 2002

Case Name	County	Result
Hauge	Stillwater	Supervisory control denied
Llewellyn	Ravalli	State’s request for writ granted; remanded

Analysis of Reversible Errors

Cases Where Basis for Reversal was an Issue Not Raised in Court Below

State v. Bird (Yellowstone)
State v. Tapson (Yellowstone)
State v. Whitehorn (Lewis and Clark)
K.G.F. (Lewis and Clark)
State v. Good (Missoula)

Cases Where Basis for Reversal was not an Issue Raised by the Parties

Mallak v. State (Yellowstone)
State v. Whitehorn (Lewis and Clark)
K.G.F. (Lewis and Clark)

Cases Reversed Due to Law Enforcement Error

State v. Bauer (Hill): unlawful arrest
State v. Hardaway (Yellowstone): improper search
State v. Kleinsasser (Cascade): illegal stop
State v. Krause (Beaverhead): illegal stop
State v. Spang (Hill): failure to cease questioning after defendant requested counsel

Cases Reversed Due to Trial Error

State v. Bird (Yellowstone): defendant's non-presence at in chambers voir dire
State v. Cameron (Flathead): insufficient evidence
State v. Crawford (Missoula): insufficient evidence
State v. Dobson (Musselshell): improper admission of 404(b) evidence
State v. Freshment (Yellowstone): voir dire
State v. Fields (Yellowstone): failure to postpone trial to accommodate defense expert
State v. Giant (Yellowstone): insufficient corroboration of prior inconsistent statements
State v. Good (Missoula): voir dire
State v. Ohms (Ravalli): insufficient evidence
Matter of T.J.D. (Cascade): failure of proof
State v. Vainio (Lewis and Clark): insufficient evidence/failure to comply with MAPA

Cases Reversed Due to Improper Charging

State v. Kennedy (Carbon): improper amendment of information
State v. Peplow (Ravalli): improper charge

Cases Reversed Due to Sentencing Errors

State v. Anderson (Cascade)
State v. Blackwell (Cascade)
State v. Brister (Cascade)
State v. Frazier (Cascade)
State v. Muhammad (Cascade)
State v. Ringewold (Lewis & Clark)
State v. Shockley (Cascade)
State v. Smith (Cascade)
State v. Watson (Lincoln)

Cases Reversed Due to Ineffective Assistance of Counsel

State v. Rogers (Missoula)
K.G.F. (Lewis and Clark)

Other:

Matter of A.G. (Cascade): speedy trial problems
State v. Harris (Lincoln): failure to hold postconviction hearing
State v. Lawrence (Yellowstone): failure to hold postconviction hearing
Mallak v. State (Yellowstone): failure to allow defendant to withdraw guilty plea
Robbins v. State (Cascade): retroactive application of LaMere renders conviction invalid
State v. Schaff (Yellowstone): failure to hold postconviction hearing
State v. Stedman (Jefferson): improper consideration of justice court proceedings
State v. Tapson (Yellowstone): judge's contact with jurors outside defendant's presence
State v. Watson (Ravalli): failure to hold postconviction hearing
State v. Whitehorn: retroactive application of Guillaume invalidates defendant's sentence