

## **2003 SUPREME COURT UPDATE OUTLINE**

### **I. ARREST**

***State v. VanDort, 2003 MT 104, 315 Mont. 303, 68 P.3d 728 (Glacier).***

**Reversed; Leaphart, J. (Rice, dissenting).** Officers lacked probable cause to arrest defendant for drug use after stopping his vehicle to investigate a theft of gasoline from service station. Defendant's later statement to officers, admitting to drug use earlier in the day, which was made at the police station after two hours of questioning, should have been suppressed. Miranda warnings given did not attenuate the corrupt effect of the constitutional violation.

***State v. Saxton, 2003 MT 105, 315 Mont. 315, 68 P.3d 721 (Lincoln).***

**Affirmed; Trieweler, J.** Police never arrested Saxton, nor did they place her in custody. They conducted a brief investigative questioning, during which they communicated to Saxton that she was free to leave by telling her she could have a friend take her to the hospital if she wished. Thus, no Miranda warnings were required.

***State v. Wagner, 2003 MT 120, 315 Mont. 498, 68 P.3d 840 (Lewis and Clark).***

**Affirmed; Regnier, J.** No arrest or "seizure" occurred for purposes of Fourth Amendment analysis where officers approached defendant at a phone booth in a public building to investigate a possible drunk driver (who turned out to be the defendant.) The record showed that defendant was not restrained of his liberty by means of physical force or show of authority, and was free to walk away at any time.

## II. INVESTIGATIVE PROCEDURES

*State v. Bingman*, 2002 MT 350, 313 Mont. 376, 61 P.3d 153 (Gallatin).

**Affirmed; Regnier, J.** Pretrial identification procedure was not so impermissibly suggestive as to preclude an in-court identification of defendant.

## III. SEARCH AND SEIZURE

### A. Search Warrants

*State v. Grams*, 2002 MT 188, 311 Mont. 102, 53 P.3d 897 (Lewis and Clark).

**Affirmed, Regnier, J.** Probable cause to search residence for marijuana and drug paraphernalia was established based on following information in warrant application: Middle school student, who sold marijuana to another student, told officer that she obtained marijuana from R.G., who had obtained the drugs from her father; other students at R.G.'s slumber party saw R.G. remove what appeared to be marijuana from her father's dresser; girls admitted smoking marijuana at the party, and told officer that R.G.'s parents smoked in their presence.

*State v. Marks*, 2002 MT 255, 312 Mont. 169, 59 P.3d 369 (Yellowstone).

**Affirmed; Regnier, J. (Nelson, Trieweler dissenting).** The facts contained in the four corners of the warrant application supported a fair probability of arson. Thus, the reviewing magistrate properly issued a search warrant in this case.

*State v. St. Marks*, 2002 MT 285, 312 Mont. 468, 59 P.3d 1113 (Hill).

**Affirmed; Cotter, J.** The State conceded that some information in the warrant application was stale and should not have been considered, but argued that because it was

not illegally obtained, deference should have been given to the magistrate's determination of probable cause. The Court disagreed, saying the ground for deference disappears where information is excised or redacted after the fact, regardless of why the redaction occurred. Nonetheless, there was sufficient corroboration of other innocuous facts to justify issuance of the warrant.

***State v. Sharon Olson*, 2003 MT 61, 314 Mont. 402, 66 P.3d 297 (Cascade).**

**Affirmed, reversed in part; Trieweiler, J.** Even after excising defendant's incriminating statements, search warrant application was supported by probable cause where information regarding existence of meth lab was based primarily on personal knowledge of informant, who was defendant's husband, and where detectives confirmed suspicious activities consistent with a meth operation.

***State v. Palmer*, 2003 MT 129, 316 Mont. 46, 68 P.3d 809 (Missoula).**

**Reversed; Regnier, J. (state appeal).** When applying for a search warrant, police used name of someone who agreed to be an informant, but welshed on his agreement once he was out of jail. Whether this informant qualified as a citizen or confidential informant didn't matter, since his information was sufficiently corroborated by police video surveillance. The Court rejected the district court's reasoning that the surveillance tapes did not establish probable cause because they revealed no actual criminal activity.

**B. Vehicle Stops**

***State v. Kaufman*, 2002 MT 294, 313 Mont. 1, 59 P.3d 1166 (Missoula).**

**Reversed; Nelson, J. (Rice, dissenting).** Traffic stop that resulted in drug possession charges was improper because officer had no particularized suspicion that defendant had violated the law. The officer saw that defendant's taillights were unequally bright in possible violation of Mont. Code Ann. § 61-9-204(1), but as he neared the car, he observed that they were equally bright, but may not have been in proper working order in violation of another traffic law. The Court held that the officer quelled any suspicion of lighting system malfunction before the stop.

***Moore v. State*, 2002 MT 315, 313 Mont. 126, 61 P.3d 746 (Butte Silver-Bow).**

**Regnier, J.** Officer had particularized suspicion to stop defendant's vehicle after observing the vehicle hit a guardrail and drive off, without stopping at a nearby phone to report accident.

***State v. Lacasella*, 2002 MT 326, 313 Mont. 185, 60 P.3d 975 (Missoula).**

**Reversed; Trieweler, J. (Leaphart, Gray, and Rice dissenting).** An officer has no particularized suspicion to stop a vehicle whose license plate is taped to the lower driver's side corner of the windshield, as opposed to the front or rear of the vehicle. .

***State v. Fisher*, 2002 MT 335, 313 Mont. 274, 60 P.3d 1004 (Yellowstone).**

**Reversed; Trieweler, J.** Officer was not justified in stopping defendant's vehicle based on an anonymous tip that three or four persons were in an alley with a gun, where the tip was not corroborated and none of the persons in defendant's vehicle matched the persons described in the tip. Fact that stop was made in high crime area, or that defendant was

driving in a “suspicious” manner did not give rise to particularized suspicion. Once officer verified that temporary registration sticker was valid, his initial suspicion regarding the sticker did not justify the stop either.

***State v. Olson*, 2003 MT 61, 314 Mont. 402, 66 P.3d 297 (Cascade). Affirmed, reversed in part; Trieweler, J.** Particularized suspicion existed to stop vehicle suspected of transporting a meth lab in the trunk, based on information from defendant’s husband, as well as officers’ observations prior to the stop that items were moved from the garage to the trunk of the car.

***State v. Martinez and Olson*, 2003 MT 65, 314 Mont. 434, 67 P.3d 207 (Yellowstone). Reversed; Nelson, J. (Rice, Cotter dissenting).** Billings police had been gathering information about defendants for weeks, hoping to make a drug bust. Much of the information came from a confidential informant. But when police stopped defendant’s vehicle en route to Bozeman, no traffic offense had been committed. Ostensibly the stop was made to check validity of temporary sticker, but when officers approached and saw that sticker was valid and properly displayed, the reason for the stop ended. No further police intrusion was warranted because the CI’s information was not sufficiently corroborated under Reesman. The Court holds that Reesman – not Pratt – provides proper analysis for drug-related vehicle stops.

### **C. Stop and Frisk**

***State v. Niles*, 2002 MT 282, 312 Mont. 453, 59 P.3d 1129 (Flathead).** **Affirmed; Trieweler, J.** Officer responding to a reported theft was justified in detaining defendant pursuant to the investigative stop statute because, within minutes of

the call, defendant was seen with two other individuals who matched description given by store clerk, and when confronted, defendant ran from the officer.

**D. Field Sobriety Tests**

*State v. Feldebrugge*, 2002 MT 154, 310 Mont. 368, 50 P.3d 1067 (Mineral).

**Affirmed; Leaphart, J.** Due process does not require arresting officer to inform defendant of his right to an independent blood test before the officer requests a preliminary breath test (PBT).

*State v. Beanblossom*, 2002 MT 351, 313 Mont. 394, 61 P.3d 165 (Musselshell).

**Affirmed; Leaphart, J. (Trieweiler dissenting).** Mont. Code Ann. § 61-8-402(2) does not create a mandatory duty upon arresting officers to conduct a breath test pursuant to the implied consent law. A due process violation occurs only when an accused requests, and is then denied, an independent sobriety blood test.

**E. Inventory Searches**

*State v. Hamilton*, 2003 MT 71, 314 Mont. 507, 67 P.3d 871 (Gallatin).

**Reversed; Trieweiler, J.** Police have no right to inventory lost property turned into them, distinguishing State v. Pastos (where the Court held that police have a right to conduct inventory search of personal property in an arrestee's possession), on the grounds that the compelling interest in Pastos (the need to assure that property retained at the police station is not dangerous) does not exist with respect to lost property.

**F. Plain View**

*State v. Kathy Olson*, 2002 MT 211, 311 Mont. 270, 55 P.3d 935 (Yellowstone).

**Reversed; Gray, J.** Officer effectuating a lawful arrest in defendant's kitchen was not

entitled to lean around doorway to observe drug paraphernalia in plain view in the other room. No facts indicated the need for a protective sweep. Defendant's after-the-fact consent did not cure the initial illegality.

**G. Consent to Search**

*State v. Olson*, 2002 MT 211, 311 Mont. 270, 55 P.3d 935 (Yellowstone).

**Reversed; Gray, J.** Officer effectuating a lawful arrest in defendant's kitchen was not entitled to lean around doorway to observe drug paraphernalia in other room. No facts indicated the need for a protective sweep. Defendant's after-the-fact consent did not cure the initial illegality.

**H. Canine Sniffs**

*State v. Tackitt*, 2003 MT 81, 315 Mont. 59, 67 P.3d 295 (Flathead). **Reversed;**

**Nelson, J. (Rice, dissenting).** When a person maintains control of a container in which he has a reasonable expectation of privacy (in this case, the trunk of a car), but where the odors from that container are freely exposed to the public, particularized suspicion is required for the use of a canine to detect those odors.

**I. Exigent Circumstances**

*State v. Logan*, 2002 MT 206, 311 Mont. 239, 53 P.3d 1285 (Yellowstone).

**Reversed; Gray, J.** In light of *State v. Elison*, the district court erred when it determined that officers were justified in conducting a warrantless search of a purse retrieved from inside a stopped vehicle. Because the officer testified at the suppression hearing that there was nothing preventing him from obtaining a warrant, the State failed to meet its

heavy burden of establishing exigent circumstances as an exception to the warrant requirement.

*State v. Saxton*, 2003 MT 105, 315 Mont. 315, 68 P.3d 721 (Lincoln).

**Affirmed; Trieweiler, J.** A valid exigent circumstances warrantless search occurred here, which culminated in the lawful seizure of marijuana plants inside a home. Prompt police entry into defendant's dwelling was necessitated by her own frantic call to 911 to report a domestic assault. Although it first appeared to responding officers that no one was home, officers had a duty to detect and protect any victim inside the home.

**J. Community Caretaker Doctrine**

*State v. Lovegren*, 2002 MT 153, 310 Mont. 358, 51 P.3d 471 (Richland).

**Affirmed; Nelson, J.** Recognizing that not all encounters between police and citizens necessarily involve a "seizure" under the Fourth Amendment, the Court adopts the community caretaker doctrine and outlines the three factors that need to be considered when addressing its application.

**K. Scope of Exclusionary Rule**

*State v. Courville*, 2002 MT 330, 313 Mont. 218, 61 P.3d 749 (Lake).

**Affirmed; Nelson, J.** Defendant assaulted a peace officer following a vehicle stop and moved to suppress evidence of the assault based on his claim that the stop was illegal. The Court held that the exclusionary rule does not apply to evidence of criminal conduct committed in response to a claimed 4<sup>th</sup> Amendment violation. To hold otherwise would encourage violence toward law enforcement and would not serve any good public policy.

#### IV. RIGHT TO COUNSEL

*State v. Jefferson*, 2003 MT 90, 315 Mont. 146, 69 P.3d 641 (Bighorn).

**Reversed and remanded for new trial; Trieweiler, J. (Rice, Gray dissenting).**

Defendant was denied effective assistance of counsel when counsel stated in opening and closing statements that Jefferson, facing attempted deliberate homicide charges, was guilty of felony assault. Since there could be no plausible explanation for counsel's conduct under the circumstances, the issue was properly addressed on appeal as opposed to postconviction review.

*State v. Herrman*, 2003 MT 149, 316 Mont. 198, \_\_\_ P.3d \_\_\_ (Yellowstone).

**Affirmed; Leaphart, J.** On direct appeal, defendant claimed that his counsel was ineffective for failing to exercise challenges for cause against two jurors who expressed bias, citing *State v. Chastain*, 285 Mont. 61, 947 P.2d 57 (1997). At the State's request, the Supreme Court overruled *Chastain*, and held that defendant's allegation of ineffective assistance is not appropriately reviewed on direct appeal. That claim must be presented on postconviction review because it is dependent upon facts outside the record.

*State v. Turnsplenty*, 2003 MT 159, 316 Mont. 275, \_\_\_ P.3d \_\_\_ (Yellowstone).

**Affirmed; Rice, J.** Following its reasoning in *Herrmann*, *supra*, the Court declined to address defendant's ineffective assistance of counsel claim relative to juror disqualification on direct appeal. Where the record establishes that counsel committed the alleged errors, but does not reveal whether counsel's inaction was a reasonable tactical decision or a mistake, the issue is properly reserved for postconviction review.

## V. GUILTY PLEAS

*State v. Tweed*, 2002 MT 286, 312 Mont. 482, 59 P.3d 1105 (Butte Silver-Bow).

**Reversed and remanded; Nelson, J.** Any doubt about the voluntary nature of a guilty plea should be resolved in favor of trial on the merits.

*State v. Rardon*, 2002 MT 345, 313 Mont. 321, 61 P.2d 132 (Flathead).

**Reversed and remanded; Cotter, J. (Rice and Gray, dissenting).** Prosecutor cannot give “lip service” to the plea agreement by recommending the sentence in the PSI, then soliciting inflammatory testimony from the victims about the inadequacy of the recommendation. If the prosecutor’s “fervor” in soliciting and offering evidence would cause the court to question the appropriateness of the recommended sentence, the plea agreement has been effectively undercut and defendant is entitled to withdraw his plea or to be resentenced. The issue may be reviewed on appeal pursuant to the doctrine of plain error even if no objection was made at trial.

*State v. Brown*, 2003 MT 166, \_\_\_ Mont. \_\_\_, \_\_ P.3d \_\_\_ (Deerlodge).

**Affirmed; Leaphart, J.** Where sentencing judge did not participate in plea negotiations, there was no merit to defendant’s claim that he was punished at sentencing for exercising his right to a jury trial.

## VI. SPEEDY TRIAL

*State v. Stiffarm*, 2003 MT 70, 314 Mont. 499, 67 P.3d 249 (Cascade).

**Affirmed; Trieweiler, J.** Court refused to overturn’s defendant’s felony assault conviction on the ground that he was denied his right to speedy trial.

## VII. PRETRIAL

### A. Jurisdiction

*State v. Shook*, 2002 MT 347, 313 Mont. 347, 67 P.3d 863 (Sanders).

**Affirmed; Nelson, J.** Defendant did not retain her right to a trial because she initially pled guilty in justice court and waived a right to trial on the merits in district court. Also, she made no motion to withdraw her guilty plea.

*State v. Shook*, 2002 MT 347, 313 Mont. 347, 67 P.3d 863 (Sanders).

**Affirmed; Nelson, J.** Defendant was legitimately prosecuted in state court for illegally shooting game on the Flathead Reservation in violation of an FWP regulation which prohibits non-tribal members from hunting big game on all Montana Indian reservations.

### B. Information and Other Charging Documents

*State v. Tichenor*, 2002 MT 311, 313 Mont. 95, 60 P.3d 454 (Lewis and Clark).

**Affirmed; Nelson, J.** District court properly denied as premature defendant's pretrial motion to dismiss charges, based on defendant's assertion that he lacked requisite intent to commit the offense. Where State has shown probable cause to bring charges, it has no further burden of proof with regard to those charges until trial.

Prosecutor has discretion to charge two counts of stalking, and to identify Count II as a felony based on the "prior conviction" in Count I.

*State v. Sherer*, 2002 MT 337, 313 Mont. 299, 60 P.3d 1010 (Gallatin).

**Affirmed; Rice, J.** District court properly refused to dismiss aggravated assault charge on grounds that the allegations, if true, did not constitute the offense. Sherer's acts of telephoning victims, representing himself as a doctor, and convincing them to injure

themselves is encompassed by the aggravated assault statute, since the “victim’s obedient act flowed directly from Sherer’s instructions.”

***State v. Kern*, 2003 MT 77, 315 Mont. 22, 67 P.3d 272 (Yellowstone).**

**Affirmed; Cotter, J.** An affidavit to establish probable cause under section 45-5-502 (sexual assault) does not require an allegation that the defendant committed the touching. Nor is there required a specific factual assertion that the defendant engaged in the acts to arouse or gratify the sexual response or desire of either party.

When amending the information, the State failed to adhere to all the procedural requirements of 46-11-205, but the error was not reversible because the amendments were of form rather than substance.

***State v. Daniels*, 2003 MT 30, 314 Mont. 208, 64 P.3d 1045 (Lewis and Clark).**

**Affirmed; Nelson, J.** Defendant was properly charged with theft of public assistance, as opposed to Medicaid fraud. Mont. Code Ann. § 45-6-301(45) defines theft as purposely or knowingly obtaining unauthorized control over “any part of public assistance provided under Title 52 or 53.” Medicaid funds are part of public assistance, so the statutory language is broad enough on its face to encompass obtaining or exerting unauthorized control over those funds.

### **C. Discovery**

***State v. Saxton*, 2003 MT 105, 315 Mont. 315, 68 P.3d 721 (Lincoln).**

**Affirmed; Trieweler, J.** Saxton’s assertions that police failed to gather evidence for her are unavailing since officers had no duty to record 911 calls or on-site investigations, and

because record does not show that failure to gather non-material evidence was done with intent to deliberately suppress valuable evidence.

***State v. Ayers*, 2003 MT 114, 315 Mont. 395, \_\_\_ P.3d \_\_\_ (Park). Affirmed; Cotter, J.** When deciding whether to disclose the identity of a confidential informant, court must balance competing interests involved. The burden is on defendant to show the need for disclosure, and the need must override the State's interest in maintaining confidentiality. Mere speculation is not enough.

**D. Continuance**

***State v. Ayers*, 2003 MT 114, 315 Mont. 395, 68 P.3d 768 (Park). Affirmed; Cotter, J.** Trial court did not abuse its discretion by offering to extend trial date because of recently discovered inculpatory evidence, even though defendant was then forced to choose between his right to a speedy trial and his right to prepare a defense.

***State v. Earl*, 2003 MT 158, 316 Mont. 263, \_\_\_ P.3d \_\_\_ (Stillwater). Affirmed; Regnier, J.** Trial court did not abuse its discretion in denying defendant's morning-of-trial request for a continuance, based on his allegation that he did not receive witness statements or expert reports, where the prosecutor produced a letter showing that the report was sent; that the State maintained an open file policy; and that witness statements were faxed to defense counsel prior to trial.

## VIII. JURY SELECTION AND VENUE

### A. Jury Selection

*State v. Wright (Byron)*, 2002 MT 275, 312 Mont. 352, 59 P.3d 432 (Hill).

**Affirmed; Rice, J.** Prospective juror's revelation that he knew defendant had been earlier charged with a similar crime did not require the entire venire panel be stricken, or a new trial granted. Court limited holding of *State v. McMahon*, 271 Mont. 75, 894 P.2d 313 (1995) to "only the most egregious and prejudicial prospective juror comments, amounting to inadmissible opinions or comments about defendant's character or propensities, which could not be cured by admonishment or instruction from the court."

### B. Venue

*State v. Price (Ryan Scott)*, 2002 MT 229, 311 Mont. 439, 57 P.3d 42

(Missoula). **Affirmed; Cotter, J.** Since custodial interference has two elements: (1) defendant took the child knowing he had no legal right to do so; and (2) defendant deprived the custodian of custody, venue is proper in the county where either of these elements occurred.

## IX. TRIAL

### A. General Issues

*Porter v. State*, 2002 MT 319, 313 Mont. 149, 60 P.3d 951 (Ravalli). **Affirmed;**

**Cotter, J.** Although the jury briefly and inadvertently viewed defendant in handcuffs, a new trial was unwarranted absent a showing of prejudice.

## **B. Admissibility of Evidence**

### **1. Other Crimes/Character Evidence**

*State v. Bingman*, 2002 MT 350, 313 Mont. 376, 61 P.3d 153 (Gallatin).

**Affirmed; Regnier, J.** Evidence of defendant's prior DUI convictions were properly admitted after defendant testified on direct examination that he would never operate a motor vehicle after drinking alcohol.

*State v. Nolan*, 2003 MT 55, 314 Mont. 371, 66 P.3d 269 (Yellowstone).

**Reversed; Rice, J.** Character evidence is properly admitted on cross-examination if defendant opens the door, but the right to cross-examine is not without limitation. Here, prosecutor exceeded proper scope of cross-examination by inquiring into inflammatory details of defendant's personal life.

*State v. Ayers*, 2003 MT 114, 315 Mont. 395, 68 P.3d 768 (Park). **Affirmed;**

**Cotter, J.** Ayers sexually assaulted a frail 56-year-old victim, stabbed her to death, and stole her car. At trial, the court properly admitted evidence that, 10 years earlier, Ayers lured a 79-year-old woman out of her home on false pretenses, raped her while threatening to use a knife, then stole her car.

### **2. Confessions/Admissions**

*State v. Hoffman*, 2003 MT 26, 314 Mont. 155, 64 P.3d 1013 (Gallatin).

**Affirmed; Leaphart, J.** Hoffman's statements to police, following timely Miranda warnings, were properly admitted because record showed that, despite Hoffman's extreme fatigue, he understood what was going on and was responsive.

*State v. Sharon Olson*, 2003 MT 61, 314 Mont. 402, 66 P.3d 297 (Cascade).

**Affirmed, reversed in part; Trieweiler, J.** Statements to police, made while in custody and without Miranda warnings, were inadmissible and should have been suppressed. Officers should have realized that questions about whether Olson had a meth lab in her trunk were reasonably likely to elicit incriminating responses.

*State v. VanDort*, 2003 MT 104, 315 Mont. 303, 68 P.3d 728 (Glacier).

**Reversed; Leaphart, J. (Rice, dissenting).** Officers lacked probable cause to arrest defendant for drug use after stopping his vehicle to investigate a theft of gasoline from service station. Defendant's later statement to officers, admitting to drug use earlier in the day, which was made at the police station after two hours of questioning, should have been suppressed. Miranda warnings given did not attenuate the corrupt effect of the constitutional violation.

### **3. Expert Witnesses**

*State v. Russette*, 2002 MT 200, 311 Mont. 188, 53 P.3d 1206 (Hill). **Affirmed; Cotter, J.** District court properly excluded defense expert's testimony regarding reliability of Intoxilyzer 5000 where defense counsel failed to lay proper foundation, under Mont. R. Evid. 702, establishing that the expert had adequate knowledge upon which to challenge the "fact in issue."

*State v. Hoffman*, 2003 MT 26, 314 Mont. 155, 64 P.3d 1013 (Gallatin).

**Affirmed; Leaphart, J.** Defense expert cannot testify about defendant's mental state at the time of the offense. The prohibition against this testimony in Mont. Code Ann. § 46-14-213(2) trumps the seemingly permissible language of Rules 702 and 704.

*State v. Ayers*, 2003 MT 114, 315 Mont. 395, \_\_\_ P.3d \_\_\_ (Park). **Affirmed;** **Cotter, J.** Statistical probability of a DNA match was properly admitted through the State's expert witness, without a Daubert hearing.

#### **4. BAC Evidence**

*State v. Hamilton*, 2002 MT 263, 312 Mont. 249, 59 P.3d 387 (Treasure). **Affirmed;** **Trieweiler, J.** Court assessing admissibility of BAC evidence under Mont. Code Ann. § 61-8-401(4) must consider the totality of circumstances to determine whether the blood test was taken within a reasonable time of the alleged act. Those circumstances must necessarily include the foundation laid to establish the probative value of the test results and the purpose for which the results are admitted.

*State v. Weldele*, 2003 MT 134, 316 Mont. 103, 68 P.3d 872 (Lewis and Clark). Absent record evidence of scientific reliability, PBT results are limited in their admissibility to probable cause evidence only, as outlined in the Court's decision in State v. Strizich (cite). Admission of the PBT results in this case was harmless, however, because of all the other evidence of intoxication.

*State v. Crawford*, 2003 MT 118, 315 Mont. 480, 68 P.3d 848 (Cascade). **Cotter, J. (Rice, dissenting).** Under Weldele, district court should not have admitted PBT results because they were not shown to scientifically reliable. Unlike Weldele, error was not harmless under facts of this case.

Officer was properly allowed to testify about horizontal gaze nystagmus (HGN). Even though the officer is not a medical doctor, he was qualified by extensive training and education to explain the concept of nystagmus and its correlation with alcohol.

## 5. Sufficiency of the Evidence

***State v. Price (Richard Lee)*, 2002 MT 150, 310 Mont. 320, 50 P.3d 530**

**(Cascade). Affirmed; Trieweiler, J.** Evidence of slurred speech, incoherency, manner of driving, and other behavioral attributes was sufficient to sustain DUI conviction despite lack of specific evidence regarding BAC.

***State v. Stevens*, 2002 MT 181, 311 Mont. 52, 53 P.3d 356 (Missoula). Affirmed in part, reversed and remanded in part; Leaphart, J.** Court affirmed the conviction of massage therapist for sexual intercourse without consent, holding that sleeping victim is “physically helpless” for purposes of 45-2-101 and 45-5-501(b)(ii) (2001). Court reversed convictions of other victims who were not asleep, but claimed that they were too frozen or frightened to resist, reducing them to sexual assault rather than sexual intercourse without consent.

***State v. Sherer*, 2002 MT 337, 313 Mont. 299, 60 P.3d 1010 (Gallatin).**

**Affirmed; Rice, J.** Defendant’s acts of telephoning victims, representing himself as a doctor, and encouraging them to injure themselves was within the purview of the aggravated assault statute, since “the victim’s obedient actions flowed directly from Sherer’s instructions.”

***State v. Debus*, 2002 MT 307, 313 Mont. 57, 59 P.3d 1154 (Gallatin).**

**Reversed; Trieweiler, J.** Court reversed defendant’s convictions for felony theft, common scheme, where there was insufficient evidence that defendant was not authorized to issue personal checks from corporate accounts.

*State v. LaMere*, 2003 MT 49, 314 Mont. 326, 67 P.3d 192 (Cascade).

**Affirmed; District Judge Blair Jones (sitting for Justice Leaphart); Rice, J., joined by Gray, C.J., dissenting.** There was sufficient evidence of mitigation to warrant submission of the case to the jury on the prosecution's charge of mitigated deliberate homicide. One witness testified that LaMere and the victim were "flailing at each other" and another witness testified that LaMere and the victim were circling each other, ready to fight. Also, LaMere told police that the victim pulled a knife and gun on him.

*State v. Nolan*, 2003 MT 55, 314 Mont. 371, 66 P.3d 269 (Yellowstone).

**Reversed; Rice, J.** State failed to prove the "set at liberty by court order" element of bail jumping.

*State v. Highpine*, 2003 MT 88, 315 Mont. 129, 68 P.3d 669 (Cascade).

**Affirmed; Nelson, J.** Even though evidence was conflicting, it was sufficient for the jury to find that defendant entered or remained unlawfully in an apartment, and was thus guilty of aggravated burglary.

*State v. Byers*, 2003 MT 83, 315 Mont. 89, 67 P.3d 880 (Missoula). **Affirmed; Regnier, J.** There was sufficient corroboration of accomplice testimony to justify Byers' convictions for conspiracy to commit criminal production or manufacture of dangerous drugs (methamphetamine).

*State v. Bill Bailey*, 2003 MT 150 (2003) (Cascade). **Affirmed; Rice, J.** The jury convicted Bailey of robbery, but acquitted him of assault based on the same underlying facts. Bailey argued that his conviction should be overturned because the verdicts are inconsistent. The Court disagreed, holding that as long as there is sufficient

evidence to support the jury's finding of guilt, any perceived inconsistency in the verdict is immaterial.

*State v. Earl*, 2003 MT 158, 316 Mont. 263, \_\_\_ P.3d \_\_\_ (Stillwater).

**Affirmed; Regnier, J.** Sufficient evidence existed for defendant's sexual assault conviction, establishing the element of "sexual contact," where victim testified that on several occasions, defendant lay close by her, touched her in her vaginal area, and that the touching made her uncomfortable.

*State v. Brown*, 2003 MT 166, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Deerlodge).

**Affirmed; Leaphart, J.** There was sufficient evidence to justify defendant's conviction for deliberate homicide, as opposed to mitigated deliberate homicide, where witnesses testified that defendant was calm after the murder, and the physical evidence was not consistent with defendant's claim that the victim was threatening him with a knife.

## **6. Prosecutorial Misconduct**

*State v. Rodarte*, 2002 MT 317, 313 Mont. 131, 60 P.3d 983 (Cascade).

**Regnier, J.** Mistrial was not warranted where prosecutor, in closing argument, referenced defendant's failure to put on evidence that contradicted testimony of the State's witnesses – not why the defense failed to put on a particular witness. While it is improper for the prosecution to comment on the failure of a defendant to testify on his own behalf, the prosecution is permitted to point out facts at issue that could have been controverted by persons other than defendant, but were not.

*State v. Nolan*, 2003 MT 55, 314 Mont. 371, 67 P.3d 192 (Yellowstone).

**Reversed; Rice, J.** Prosecutor exceeded proper scope of cross-examination after

defendant opened the door to character evidence, by inquiring into inflammatory details of defendant's life.

## **7. Jury Misconduct**

***State v. Lawlor*, 2002 MT 235, 311 Mont. 493, 56 P.3d 863 (Hill). Affirmed; Leaphart, J.** Juror affidavit cannot be used to impeach verdict unless it is shown that extraneous prejudicial information was improperly brought to jury's attention. When a juror is speaking from her own general knowledge about criminal justice system (i.e., that defendant must have three or more prior DUIs or he wouldn't be in district court), rather than personal knowledge of the defendant's prior criminal record, it is not an "external influence" and will not serve as the basis for a new trial.

## **X. INSTRUCTIONS**

### **A. General Principles**

***State v. Nolan*, 2003 Mont. 13, 314 Mont. 47, 62 P.3d 1118 (Yellowstone).** **Affirmed; Gray, C.J.** Defendant cannot challenge the giving of a flight instruction for the first time on appeal. The Court's decision in State v. Hall (which invalidated use of the flight instruction) is prospective only.

***State v. Stiffarm*, 2003 MT 70, 314 Mont. 499, 67 P.3d 249 (Cascade).** **Affirmed; Trieweiler, J.** The Court will not review the giving of a flight instruction for the first time on appeal.

*State v. Earl*, 2003 MT 158, 316 Mont. 263, \_\_ P.3d \_\_ (Stillwater).

**Affirmed; Regnier, J.** Alleged errors in jury instructions will not be reviewed on appeal absent a proper and timely objection at trial.

**B. Elements**

*State v. Price*, 2002 MT 284, 312 Mont. 458, 59 P.3d 1122 (Cascade).

**Reversed; Trieweler, J.** Jury instruction that was based on a provision in the nonsupport statute impermissibly shifted burden of proof on an element of the offense (ability to pay support), which the State was required to prove.

*State v. Tichenor*, 2002 MT 311, 313 Mont. 95, 60 P.3d 454 (Lewis and Clark).

**Affirmed; Nelson, J.** Language in jury instruction referring to a no-contact order did not shift the State's burden of proving every element of the offense of stalking.

*State v. Earl*, 2003 MT 158, 316 Mont. 263, \_\_ P.3d \_\_ (Stillwater).

**Affirmed; Regnier, J.** Jury was properly instructed on "sexual contact" as that term was defined under 1997 law, and in accordance with the Court's decision in State v. Olson, 286 Mont. 364, 951 P.2d 571 (1997).

**C. Lesser Included Offenses**

*Demontiney v. District Court*, 2002 MT 161, 310 Mont. 406, 51 P.3d 476 (Hill).

**Supervisory control granted.** If the jury is erroneously instructed to consider the charge of mitigated deliberate homicide after it concludes the defendant is not guilty of deliberate homicide (a Scarborough problem), the error cannot be deemed harmless because the verdicts are inherently inconsistent.

**D. Defenses**

*State v. Courville*, 2002 MT 330, 313 Mont. 218, 61 P.3d 749 (Lake).

**Affirmed; Nelson, J.** Defendant was prosecuted for assault on a peace officer, and claimed that he acted in self-defense. Jury was properly instructed on both self-defense, as well as the statutory prohibition against use of force to resist arrest. Instructions were not inconsistent, and jury must decide whether officer used unlawful force in executing an arrest and whether defendant reasonably believed he had to defend himself against the imminent use of unlawful force.

**XI. SENTENCING**

**A. General**

*Gilbert v. State*, 2002 MT 258, 312 Mont. 189, 59 P.3d 24 (Butte-Silver Bow).

**Reversed and remanded; Regnier, J.** Sentencing court cannot reserve the right to later modify a parole restriction, nor can it postpone consideration of restitution obligation.

*State v. Johnson (Ira)*, 2002 MT 251, 312 Mont. 164, 58 P.3d 172 (Fergus).

**Affirmed; Gray, C.J.** Defendant's 20-year sentence for partner/family member assault did not violate Eighth Amendment's prohibition against cruel and unusual punishment.

*State v. Winkle*, 2002 MT 312, 313 Mont. 111, 60 P.3d 465 (Stillwater).

**Affirmed; Gray, C.J.** District court did not err in refusing to grant continuance even though defendant claimed he did not have a reasonable opportunity to rebut information presented at sentencing because he had only received the information shortly before the hearing.

*State v. McLeod*, 2002 MT 348, 313 Mont. 358, 61 P.3d 126 (2002)

(Yellowstone). **Affirmed in part, reversed and remanded for consideration of whether defendant has ability to pay fine imposed; Rice, J.** McLeod was not denied due process because the PSI contained erroneous information about whether this was his fourth or fifth felony drug conviction.

*State v. Winkle*, 2002 MT 312, 313 Mont. 111, 60 P.3d 465 (Stillwater).

**Affirmed; Gray, C.J.** No due process violation occurred at sentencing where defendant was given an opportunity to contest the information in the PSI, and his request for a continuance was untimely.

*State v. Shreves*, 2002 MT 333, 313 Mont. 252, 60 P.3d 991 (Lewis and Clark).

**Reversed and remanded; Nelson, J.** The sentencing court violated Shreves' right against self-incrimination by basing its sentence in part on Shreves' failure to show remorse or accept responsibility for his crime.

*State v. Nolan*, 2003 Mont. 13, 314, 47, 62 P.3d 1118 (Yellowstone). **Affirmed;**

**Gray, C.J.** The Court rejected Nolan's claim that the sentencing judge violated due process and § 46-18-101(3)(c) by relying upon his poverty and social status when imposing sentence.

*State v. Daniels*, 2003 MT 30, 314 Mont. 208, 64 P.3d 1045 (Lewis and Clark).

**Affirmed; Nelson, J.** Defendant was properly sentenced for felony theft even though the statute defining the offense had been amended to increase the threshold amount for a felony, and the jury made no finding that defendant stole in excess of \$1,000. Criminal

defendants are properly charged and sentenced in accordance with the statutes in effect at the time they commit the offense.

*State v. Flanagan*, 2003 MT 123, 316 Mont. 1, 68 P.3d 796 (Musselshell).

**Affirmed in part, reversed in part; Gray, C.J.** A district court may make findings of fact based on a PSI that is not offered or admitted as an exhibit at sentencing. Court properly imposed restrictions on defendant's use of alcohol since there was a connection between his use of alcohol and the offense.

*State v. Brown*, 2003 MT 166, \_\_\_ Mont. \_\_\_, \_\_ P.3d \_\_\_ (Deerlodge).

**Affirmed; Leaphart, J.** Where sentencing judge did not participate in plea negotiations, there was no merit to defendant's claim that he was punished at sentencing for exercising his right to a jury trial. Sentencing judge was careful to set out factors justifying an increased sentence.

**B. Designations (Persistent Felony Offender, Nonviolent, Parole Eligibility)**

*State v. Parker*, 2002 MT 162, 310 Mont. 418, 51 P.3d 484 (Missoula).

**Reversed; Nelson, J.** The district court erroneously imposed a dangerous designation (deleted from the law in 1995) in a 1999 revocation proceeding. The State conceded error, but asked the Supreme Court to effectuate the sentencing judge's intentions by declaring defendant parole ineligible for a term of years. The Supreme Court declined to do so, and struck the dangerous designation outright.

*State v. Kern*, 2003 MT 77, 315 Mont. 22, 67 P.3d 272 (Yellowstone).

**Affirmed; Cotter, J.** District court did not err in finding that Kern is a violent offender

where the record showed that the victim of Kern's sexual assaults kept the assaults a secret for two years because defendant threatened to kill her mother if she told. The Court observed: "It is difficult to imagine that a seven-year-old girl would comply with requests to masturbate an adult male absent some threat or intimidation."

## **C. Enhancement**

### **1. DUI**

***State v. McNally*, 2002 MT 160, 310 Mont. 396, 50 P.3d 1080 (Ravalli).**

**Reversed; Cotter, J.** McNally's Colorado conviction for DWAI (driving while ability impaired) could not be used to enhance his Montana DUI conviction because the statutes defining the offenses are not substantially similar. Colorado's DWAI statute allows a conviction where the person's ability to drive is affected to the "slightest degree," while Montana law does not permit a similar gradation of culpability, overruling Montanye v. State, 262 Mont. 258, 864 P.2d 1234 (1993).

***State v. Jackson*, 2002 MT 212, 311 Mont. 281, 54 P.3d 990 (Butte-Silver Bow).**

**Affirmed; Regnier, J.** Defendant failed to prove irregularity in prior DUI proceeding where he testified on direct that he didn't remember whether justice court advised him of his right to counsel; and on cross-examination, admitted that he did, in fact, recall being advised of that right.

***State v. Howard*, 2002 MT 276, 312 Mont. 359, 59 P.3d 1075 (Missoula).**

**Reversed; Leaphart, J.** A prior DUI conviction is not constitutionally valid for enhancement purposes unless the defendant expressly states before pleading guilty: "I hereby waive my constitutional right to counsel." It is not enough for the JP to advise

defendant that she has the right to counsel, and that she waives that right by pleading guilty.

*State v. Kvislen*, 2003 MT 27, 314 Mont. 176, 64 P.3d 1006 (Yellowstone).

**Reversed; Leaphart, J.** Where defendant presents direct evidence rebutting the presumption of regularity with respect to a prior DUI conviction, the district court should have held a hearing to afford the State the opportunity to prove that the conviction was not obtained in violation of defendant's constitutional rights. Remedy on appeal is remand, not dismissal of felony DUI.

*State v. Weldele*, 2003 MT 117, 315 Mont. 452, 69 P.3d 1162 (Lewis and Clark). **Affirmed; Cotter, J.** Evidence of prior DUI convictions used to enhance punishment does not violate the U.S. Supreme Court's decision in Apprendi v. New Jersey.

*State v. Spotted Eagle*, 2003 MT 172, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Pondera). **Affirmed; Nelson, J.** Valid, un-counseled tribal courts convictions can be used to enhance a DUI in state court to a felony offense.

## 2. Other

*State v. Tichenor*, 2002 MT 311, 313 Mont. 95, 60 P.3d 454 (Lewis and Clark). **Affirmed; Nelson, J.** Following successful prosecution for two stalking charges, Defendant's second stalking conviction was properly used to sentence him under the felony provisions of the stalking statute.

**D. Modification of Sentence**

*State v. Kern*, 2003 MT 77, 315 Mont. 22, 67 P.3d 272 (Yellowstone).

**Affirmed; Cotter, J.** Where sentence imposed (15 year DOC commitment with all but 7 years suspended) was clearly illegal, the district court properly modified the unlawful sentence under 46-18-117 (1999).

**E. Restitution/Fines/Costs**

*State v. Benoit*, 2002 MT 166, 310 Mont. 449, 51 P.3d 495 (2002) (Cascade

**County). Affirmed; Regnier, J.** Approximate calculation of restitution amounts is proper “by use of reasonable methods based on the best evidence available under the circumstances[,]” since Mont. Code Ann. § 46-18-243(1)(a) measures pecuniary loss in restitution by what a victim could recover in a civil action. The Court also approved the district court’s allowance of the out-of-pocket expenses incurred examining records. The Court affirmed the district court’s deferment of sentence for six rather than the State’s requested two years, since Mont. Code Ann. § 46-18-201(2)(a)(ii) permitted six years’ deferment “if a financial obligation is imposed as a condition of sentence[.]”

*State v. Welling*, 2002 MT 308, 313 Mont. 67, 59 P.3d 1146 (Cascade).

**Reversed; Trieweiler, J. (Nelson, dissenting).** District court abused its discretion when it did not excuse probationer’s failure to pay restitution, where evidence showed she paid fairly substantial amounts toward restitution obligation before she was injured.

*State v. George*, 2002 MT 300, 313 Mont. 11, 59 P.3d 1151 (Jefferson).

**Affirmed; Nelson, J.** Fine was imposed as a separate and independent condition of defendant’s sentence—not as a condition of the suspended sentence. Therefore, parole

board's removal of suspended portion of sentence did not negate defendant's obligation to pay fine.

*State v. Micklon*, 2003 MT 45, 314 Mont. 291, 65 P.3d 559 (Lincoln).

**Affirmed; Gray, C.J. (Nelson, Trieweiler dissenting).** Micklon specifically agreed to pay interest on a fine imposed at sentencing, and thus waived the right to challenge its legality on appeal (despite the fact that there is no statutory authority for interest on a fine).

*State v. Flanagan*, 2003 MT 123, 316 Mont. 1, 68 P.3d 796 (Musselshell);

**Affirmed in part, reversed in part; Gray, C.J.** The district court had authority to impose restitution as a condition of a suspended sentence since the offense occurred before the amendment to 46-18-201 became effective (the amendment was the subject of a footnote in State v. Horton which questioned the authority of the sentencing court to impose restitution as a condition of a suspended sentence). Remanded for a determination of Flanagan's ability to pay. Court cautions that sentencing judge and the State should not ignore the Court's holding in State v. Pritchett that a court may not leave the determination of the amount, method and time of payment of restitution to the probation officer.

#### **F. Credit for Time Served**

*State v. Fisher*, 2003 MT 33, 314 Mont. 222, 65 P.3d 223 (Beaverhead).

**Reversed and remanded; Leaphart, J.** When granting credit for incarceration prior to conviction under 46-18-403, the sentencing court must not only give credit against any

jail time imposed, but must also give credit for each day of incarceration against any fine imposed, at a rate set by the county.

***State v. Price (Richard Lee), 2002 MT 150, 310 Mont. 320, 50 P.3d 530***

**(Cascade). Affirmed; Trieweiler, J.** Defendant sentenced to consecutive terms is entitled to credit for time served only once against the aggregate of the terms.

***State v. Williams, 2003 MT 136, 316 Mont. 140, 69 P.3d 222 (Powell).***

**Affirmed in part, remanded for resentencing; Leaphart, J.** Where sentencing court fails to consider whether street time credit should be specifically awarded or denied upon revocation of a suspended sentence, proper remedy is a remand for resentencing.

***State v. Gulbranson, 2003 MT 139, 316 Mont. 163, 69 P.3d 1187 (Flathead).***

**Affirmed; Gray, C.J.** District court was not statutorily required to grant credit for time defendant spent confined to his house, after posting bond, awaiting a revocation proceeding. Defendant was not incarcerated, and was not on “house arrest.” To deny credit based on defendant’s significant criminal history was within the district court’s sound discretion.

### **G. Probation Conditions**

***State v. Aune, 2003 MT 3, 314 Mont. 1, 61 P.3d 785 (Bighorn).*** **Affirmed;**

**Cotter, J.** As a condition of his suspended sentence, Aune was ordered to complete sex offender treatment and to have no contact with minor children. Aune contracted with an out-of-state treatment program, which prohibited him from having contact with minors and required that any domestic associate of his participate in treatment. During treatment, Aune became married and, a month later, was terminated from the program

because of unauthorized contact with minors. When the State petitioned to revoke, Aune resisted by arguing that the court had no authority to require him to separate from his wife, who did not participate in treatment as required by the contract. But Aune was revoked for reasons other than his failure to separate, and the revocation was upheld.

***State v. Senn*, 2003 MT 52, 314 Mont. 348, 66 P.3d 288 (Missoula). Affirmed; Trieweiler, J.** District court did not abuse its discretion in revoking suspended sentence where probationer failed to report to his PO in Washington, even though he went unsupervised in Washington for a time.

***State v. Drube*, 2003 MT 138, 316 Mont. 156, 69 P.3d 1182 (Choteau). Affirmed; Gray, C.J.** Probationer was properly revoked because he did not comply with requirement that he enroll in and successfully complete an aftercare sex offender treatment program following his discharge from prison. Court was not required to give probationer opportunity to enroll in another program, since probationer's conduct was not "what he agreed it would be if he were given liberty." New sentence is not rendered illegal by addition of probation conditions in written judgment, which were not orally pronounced at sentencing.

## **XII. POST-TRIAL**

### **A. Motions**

***State v. Tweed*, 2002 MT 286, 312 Mont. 482, 59 P.3d 1105 (Butte Silver-Bow). Reversed and remanded; Nelson, J.** District court should have granted defendant's

motion to withdraw his guilty plea where record demonstrated that defendant was confused about the legal effect of the pretrial agreement's sentencing recommendations.

**B. Appeals**

***State v. Jones*, 2002 MT 170N (2002) (Missoula) (unpublished). Affirmed; Cotter, J.** Because Jones' appellate brief could neither be comprehended by the Court nor realistically responded to by the State, the Court was required to take the harsh step of dismissing his appeal outright.

***State v. Tweed*, 2002 MT 286, 312 Mont. 482, 59 P.3d 1105 (Butte Silver-Bow). Reversed and remanded; Nelson, J.** Remedy for defense counsel's failure to preserve right of appeal is an out-of-time appeal, to be granted by the Montana Supreme Court.

***State v. Ely*, 2003 MT 140, 316 Mont. 169, 69 P.3d 1189 (Lake). Affirmed; Gray, C.J.** A defendant cannot change his legal theory on appeal. Here, defendant argued in district court that evidence of his refusal to submit to a drug test at the request of his probation officer was inadmissible because its probative value was outweighed by its prejudicial effect. On appeal, defendant tried to expand this argument to include constitutional violations. The Supreme Court refused to address those arguments for the first time on appeal.

***State v. Herrman*, 2003 MT 149, 316 Mont. 198, \_\_\_ P.3d \_\_\_ (Yellowstone). Affirmed; Leaphart, J.** On direct appeal, defendant claimed that his counsel was ineffective for failing to exercise challenges for cause against two jurors who expressed bias, citing *State v. Chastain*, 285 Mont. 61, 947 P.2d 57 (1997). At the State's request,

the Supreme Court overruled Chastain, and held that defendant's allegation of ineffective assistance is not appropriately reviewed on direct appeal. That claim must

### **C. Postconviction Relief**

#### **1. General**

*Gratzer v. State*, 2003 MT 169, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Missoula).

**Affirmed; Leaphart, J.** District court properly denied postconviction relief on the merits of petitioner's claim that he was denied due process when the investigating officer knowingly gave false testimony at his trial. The officer's testimony was not materially false and did not go to an element of the offense.

#### **2. Procedural Bars**

*Soriach v. State*, 2002 MT 187, 311 Mont. 90, 53 P.3d 878 (Yellowstone).

**Reversed; Nelson, J.** District court erred in summarily dismissing postconviction petition pursuant to Mont. Code Ann. § 46-21-105(2), where petitioner's IAC claims could not have been raised on direct appeal because record was devoid of counsel's pre-trial tactical decisions.

*State v. Finley*, 2002 MT 288, 312 Mont. 493, 59 P.3d 1132 (Lake). **Affirmed; Cotter, J.** District court properly dismissed petition for failure to state a claim for relief where petitioner made unsupported allegations, without any factual support, and failed to attach affidavits or other evidence in support of his ineffective assistance of counsel claim.

*State v. Root*, 2003 MT 28, 314 Mont. 186, 64 P.3d 1035 (Missoula). **Affirmed;** Rice, J. The one-year limitations period for filing postconviction petitions necessarily

applies to second or subsequent petitions. Note: The Court did not address whether the same rule would apply to amendments of original petitions (see *Maier, infra*).

***Maier v. State*, 2003 MT 144, 316 Mont. 181, 69 P.3d 1194 (Cascade).**

**Affirmed; Regnier, J.** While the plain language of Mont. Code Ann. § 46-21-105(1)(a) allows a postconviction petition to be amended once, the amendment statute must be read in conjunction with the one-year time bar in Mont. Code Ann. § 46-21-102. The time bar is a jurisdictional limit on litigation and its waiver is only justified by a clear miscarriage of justice, i.e., where petitioner alleges newly discovered evidence that establishes his actual innocence.

### **3. Ineffective Assistance of Counsel**

***State v. Hagen*, 2002 MT 190, 311 Mont. 117, 53 P.3d 885 (Sanders).**

**Affirmed, Treiweiler, J.** It is entirely possible within the Strickland framework to find attorney error and prejudice to the defendant, yet conclude that such error did not rise to a level serious enough to result in a verdict unworthy of confidence. Postconviction court's failure to review entire trial court record does not deprive petitioner of due process where same judge presided at petitioner's trial.

***State v. Adams*, 2002 MT 202, 311 Mont. 202, 54 P.3d 50 (Ravalli) Reversed;**

**Cotter, J.** Defense counsel's failure to effectuate a valid withdrawal from the case following conviction deprived defendant of his right to appeal. Remedy is to allow defendant to file a petition alleging all forfeited direct appeal claims, as well as any postconviction claims.

***Williams v. State*, 2002 MT 189, 311 Mont. 108, 53 P.3d 864 (Fergus).**

**Affirmed, remanded for further findings; Trieweiler, J.** District court properly rejected Williams' ineffective assistance of counsel claims where record showed that trial counsel made reasonable efforts to locate witnesses, and that counsel's personal problems did not interfere with his representation. Remanded for consideration of amended claims that were not addressed.

***State v. Graham*, 2002 MT 237, 311 Mont. 500, 57 P.3d 54 (Gallatin).**

**Affirmed; Leaphart, J.** Petitioner does not escape postconviction time bar by asserting that prosecution would have failed to prove the elements of the offense had the case gone to trial. Ineffective assistance of counsel claims do not constitute newly discovered evidence, because they could have been raised on direct appeal. Petitioner failed to show any good cause why he should be allowed to withdraw his guilty plea.

***Watson v. State*, 2002 MT 329, 313 Mont. 209, 61 P.3d 759 (Yellowstone).**

**Reversed and remanded for evidentiary hearing; Rice, J. (Trieweiler concurring; Cotter and Gray dissenting).** The district court improperly dismissed Watson's IAC claim as procedurally barred because the claim could not have been raised on direct appeal. Where the record is void of any evidence as to why defense counsel did not question Watson's mental condition, the issue is properly presented in postconviction relief.

**D. Habeas Corpus**

*State v. Carson*, 2002 MT 234, 311 Mont. 485, 56 P.3d 844 (Rosebud). **Writ granted; Trieweiler, J.** Board of Pardons does not have authority to arbitrarily deny attorney's request to attend parole board hearing.

**XIII. MISCELLANEOUS**

**A. Child Abuse and Neglect**

**1. Temporary Legal Custody**

*L.M.A.T. and B.L.F.T.*, 2002 MT 163, 310 Mont. 422, 51 P.3d 504 (Lincoln). **Affirmed; Cotter, J.** Failure to personally serve father who was incarcerated out-of-state was not fatal in this case, since father was appointed counsel prior to temporary legal custody hearing and the "meat" of the case took place thereafter. Father's conviction for attempted rape of a 13-year-old constituted "clear and convincing evidence" upon which the district court could find that preservation or reunification services for father were unnecessary.

*F.M. and D.M.*, 2002 MT 180, 311 Mont. 35, 53 P.3d 368 (Ravalli). **Affirmed, Rice, J.** Adjudication of children as youths in need of care must be done based on evidence presented at the temporary legal custody stage – not based on evidence at the final termination hearing.

*Matter of H.E.*, 2002 MT 257, 312 Mont. 182, 59 P.3d 29 (Yellowstone). **Affirmed; Gray, J.** Court was not obligated to extend temporary legal custody so that DPHHS could conduct a home study of incarcerated mother's placement preference.

Mother did not identify that person until after child had been placed in foster care, and that person never contacted DPHHS to indicate her desire to care for child during mother's incarceration.

***Matter of D.A.*, 2003 MT 109, 315 Mont. 340, 68 P.3d 735 (Butte Silver Bow).** **Affirmed; Regnier, J. (Trieweiler dissenting).** Orders granting temporary custody are not "final judgments" subject to direct appeal, but instead are interlocutory orders from which the Court will grant relief in extraordinary circumstances.

## **2. Termination of Parental Rights**

***In the Matter of T.E., M.E., and M.E.*, 2002 MT 195, 311 Mont. 148, 54 P.3d 38 (Cascade).** **Affirmed; Rice, J.** District court properly terminating father's parental rights despite father's allegation that the Department and the court failed to hold timely hearings, provide reasonable services to avoid removal of the children from the home, or place the children in a relative's custody. Supreme Court refused to address for the first time on appeal question of whether admission of "unsubstantiated sexual abuse allegations" deprived him of fundamental fairness.

***In re A.L.R., A.A.R., and T.C.R.*, 2002 MT 183, 311 Mont. 76, 54 P.3d 17 (Lewis and Clark).** **Affirmed; Leaphart, J.** Treatment plan was not suspended just because mother moved to another county. Mother's failure to comply with treatment plan objectives culminated in her convictions for criminal production of dangerous drugs and criminal endangerment. Her parental rights were properly terminated.

*A.L., A.L., C.L.*, 2002 MT 169, 310 Mont. 480, 51 P.3d 1131 (Cascade).

**Affirmed, Leaphart, J.** Drug related problems and parent's incarcerated status warranted termination.

*M.T., D.T., T.T. and B.W.*, 2002 MT 174, 310 Mont. 506, 51 P.3d 1141

**(Ravalli). Affirmed; Cotter, J.** Partial compliance with a treatment plan will not prevent termination of parental rights.

*D.T., T.D., and B.D.*, 2002 MT 232, 311 Mont. 463, 56 P.3d 859 (Lewis and

**Clark). Affirmed; Regnier, J.** Despite partial compliance with treatment plan, mother's alcohol and drug addictions, as well as her mental health issues, remained unaddressed and warranted termination.

*S.S., K.C. and J.C.*, 2002 MT 270, 312 Mont. 343, 59 P.3d 393 (Cascade).

**Reversed; Gray, C.J. (Rice, dissenting).** The Court reversed the order terminating father's parental rights on the basis that he abandoned the child. The Court found that the father repeatedly informed DPHHS of his intent to assume care of the child upon his release from prison, and that he completed several programs while incarcerated which demonstrated that intent.

*Matter of A.S.*, 2002 MT 265, 312 Mont. 277, 59 P.3d 382 (Cascade).

**Affirmed; Trieweler, J.** DPHHS made reasonable efforts to ensure that services necessary to complete the treatment plan were made available to petitioner while he was incarcerated. The reason for lack of substantial compliance was petitioner's failure to take advantage of those services, not the mere fact of his incarceration.

***Matter of N.A.*, 2002 MT 303, 313 Mont. 27, 59 P.3d 1135 (Custer). Affirmed; Rice, J.** By his own admission, father failed to fully complete treatment plan. Conditions rendering him unfit were unlikely to change, so parental rights were properly terminated. District court properly denied visitation after determining that it was not in the children's best interests.

***In the Matter of M.O., M.O., and M.O.*, 2003 MT 4, 314 Mont. 13, 62 P.3d 265 (Lincoln). Reversed; Gray, J.** The district court abused its discretion when it terminated mother's parental rights because it did not conduct an adjudicatory hearing, in accordance with Mont. Code Ann. § 41-3-401(2) and -404.

***M.A.D. and C.D.*, 2003 MT 10, 314 Mont. 38, 62 P.3d 717 (Lewis and Clark). Affirmed; Leaphart, J.** District court properly terminated parental rights upon the testimony of a clinical psychologist, a social worker, and a therapist for one of the two children which showed that mother was of limited intelligence and had no ability to protect her children from her "associates."

***Matter of L.S.*, 2003 MT 12, 314 Mont. 42, 63 P.3d 497 (Cascade). Affirmed; Gray, C.J.** Father's strong desire to parent is not enough, where record shows that he did not complete treatment plan and that conduct rendering him unfit was not likely to change within a reasonable time. Since father did not challenge the majority of court's findings that supported order of termination, court's order will not be disturbed on appeal.

***Matter of K.C.H.*, 2003 MT 125, 316 Mont. 13, 68 P.3d 788 (Yellowstone). Affirmed; Leaphart, J.** Court properly terminated father's parental rights along with

mother's where father indicated that mother would be actual caregiver, and father failed to comply with his own treatment plan.

***Matter of J.V., S.V., T.V. and M.T.*, 2003 MT 68, 314 Mont. 487, 67 P.3d 242 (Custer). Affirmed; Nelson, J.** While mother made significant strides on her second treatment plan, her continuing psychological and financial problems adversely impacted her ability to care for her children and made the demands of parenting insurmountable for her. Father failed to comply with the treatment plan by continuing to drink and failing to obtain chemical dependency counseling. Neither condition was likely to change within a reasonable time.

***Matter of S.C., M.J., C.C. and K.C.*, 2003 MT 93, 315 Mont. 188, \_\_\_ P.3d \_\_\_ (Cascade). Affirmed; Gray, C.J.** The only issue on appeal was whether the finding that the condition rendering mother unfit was unlikely to change within a reasonable time. Although mother completed the treatment plan, she was unable to apply what she learned because of her borderline IQ, personality disorder, and chronic low-grade depression.

***A.T. and J.T.*, 2003 MT 154, 316 Mont. 255, \_\_\_ P.3d \_\_\_ (Yellowstone). Affirmed in part, reversed in part; Regnier, J.** Where incarcerated father complied with five of six treatment plan requirements, district court cannot terminate his rights based on a finding that the plan was unsuccessful because of father's long-term incarceration.

***In the Matter of D.V.* 2003 MT 160, 316 Mont. 282, \_\_\_ P.3d \_\_\_ (Yellowstone). Affirmed; Cotter, J.** Court properly approved treatment plan, despite

the fact of the father's incarceration, where plan accounted for father's incarcerated status, and was appropriately tailored to address father's issues. Treatment plans are designed to address the concerns and needs of the child, not the convenience of the parent. Substantial credible evidence supported the finding that the conduct or condition rendering the father unfit was not likely to change within a reasonable time, when the father had ongoing emotional and mental health problems; a history of violent and angry behavior; untreated chemical and alcohol dependency; and was incarcerated long term. Even though father may have made some effort to complete his treatment plan, complete compliance is required as opposed to partial or even substantial compliance.

### **3. Indian Child Welfare Act (ICWA)**

***Matter of G.S. and S.S., 2002 MT 245, 312 Mont. 108, 59 P.3d 1063 (Park).***

**Affirmed; Cotter, J.** The proper evidentiary standard for determining "active efforts" to prevent breakup of the Indian family is the same standard applied to the underlying ICWA proceeding. Thus, if the proceeding involves foster care placement, the standard is "clear and convincing." If the proceeding involves termination of parental rights, the standard is "proof beyond a reasonable doubt."

***Matter of M.D.M, 2002 MT 305, 313 Mont. 51, 59 P.3d 1142 (Yellowstone).***

**Affirmed; Leaphart, J.** District court properly complied with ICWA when it determined that the State's evidence established beyond a reasonable doubt that M.D.M. would be exposed to serious emotional or physical damage unless father's rights were terminated. Even though there was no specific finding to that effect, it is implicit in the court's statements.

***Matter of M.R.G.*, 2003 MT 60, 314 Mont. 396, 66 P.3d 312 (Cascade).**

**Affirmed; Gray, C.J.** Martina Heavy Runner properly testified as a qualified expert for purposes of the ICWA, in a case involving a child member of the Confederated Tribes of Siletz Indians of Oregon. Even though Heavy Runner has no knowledge or experience with the Siletz Tribe, she has substantial knowledge of Indian culture generally, which satisfies the BIA guidelines regarding qualified ICWA experts.

**B. License Revocation/Implied Consent**

***Neal v. State*, 2003 MT 53, 314 Mont. 357, 66 P.3d 280 (Sanders). Reversed; Rice, J.** A petitioner who successfully challenges a licence suspension or revocation is entitled to costs.

***State v. Beanblossom*, 2002 MT 351, 313 Mont. 394, 61 P.3d 165 (Musselshell). Affirmed; Leaphart, J. (Trieweiler dissenting).** Mont. Code Ann. § 61-8-402(2) does not create a mandatory duty upon arresting officers to conduct a breath test pursuant to the implied consent law. A due process violation occurs only when an accused requests, and is then denied, an independent sobriety blood test.

**C. Mental Health Commitment**

***State v. Meeks*, 2002 MT 246, 312 Mont. 126, 58 P.3d 167 (Missoula). Reversed; Regnier, J.** Prosecution is required to dismiss criminal charges against a defendant who has been declared unfit to proceed pursuant to Mont. Code Ann. § 46-14-221(2), and who is still unfit following 90-day review. Prosecution may then proceed with a civil commitment under Mont. Code Ann. § 53-21-121.

*Matter of D.L.T.*, 2003 MT 46, 314 Mont. 297, 67 P.3d 189 (Cascade).

**Reversed; Gray, C.J.** Whether a person poses an imminent threat of injury to the person or others must be proven by overt acts or omissions, Mont. Code Ann. § 53-21-126(2), and cannot be proven by hearsay contained in the report of the professional expert.

#### **XIV. CONSTITUTIONAL ISSUES**

##### **A. Constitutionality of Statutes**

*State v. Mathis*, 2003 MT 112, 315 Mont. 378, 68 P.3d 756 (Missoula).

**Affirmed; Regnier, J.** Section 61-8-314 (granting authority to set speed limits in construction zone) is a constitutional delegation of legislative authority to an administrative agency or private party.

##### **B. Due Process/Equal Protection**

*State v. Feldebrugge*, 2002 MT 154, 310 Mont. 368, 50 P.3d 1067 (Mineral).

**Affirmed; Leaphart, J.** Due process does not require arresting officer to inform defendant of his right to an independent blood test before the officer requests a preliminary breath test (PBT).

*State v. Price (Ryan Scott)*, 2002 MT 229, 311 Mont. 439, 57 P.3d 42

(Missoula). **Affirmed; Cotter, J.** Statute defining custodial interference, Mont. Code Ann. § 45-5-304, is not void for vagueness nor does it violate equal protection simply because a defendant, who is arrested in the presence of the child, cannot avail himself of the defense provided therein (allowing that a defendant who has not left the state and voluntarily returns the child has not committed the offense).

*State v. Davison*, 2003 MT 64, 314 Mont. 427, 67 P.3d 203 (Cascade).

Affirmed; Leaphart, J. Defendant was not denied equal protection when charged with operating a clandestine lab under 45-9-132, as opposed to criminal manufacture of dangerous drugs under 45-9-110 (which provides for a lesser penalty).

**C. Double Jeopardy**

*Demontiney v. District Court*, 2002 MT 161, 310 Mont. 406, 51 P.3d 476 (Hill).

**Supervisory control granted.** Where jury's verdict is inherently inconsistent (i.e., jury acquits of deliberate homicide but convicts of mitigated deliberate homicide), the State cannot retry defendant on either charge as a matter of double jeopardy. Nor can the State retry the defendant on any other offense arising out of same transaction (i.e. negligent homicide), even though the jury made no finding regarding the defendant's guilt on this lesser included offense. Mont. Code Ann. § 46-11-503(1)(a).

**D. Privacy**

*State v. Hamilton*, 2003 MT 71, 314 Mont. 507, 67 P.3d 871 (Gallatin).

**Reversed; Trieweler, J.** Montana citizens have a subjective expectation of privacy in a lost or abandoned item of personal property. Thus, officers seeking to determine ownership of a lost item of property must confine their "search" to that purpose, and use the least intrusive means necessary to identify the owner and secure the property.

*State v. Tackitt*, 2003 MT 81, 315 Mont. 59, 67 P.3d 295 (Flathead). **Reversed; Nelson, J. (Rice, dissenting).** When a person maintains control of a container in which he has a reasonable expectation of privacy (in this case, the trunk of a car), but where the

odors from that container are freely exposed to the public, particularized suspicion is required for the use of a canine to detect those odors.

*State v. Notti*, 2003 MT 170, \_\_\_ Mont \_\_\_, \_\_\_ P.3d \_\_\_ (Jefferson).

**Affirmed; Regnier, J.** The State does not violate a person's right of privacy when it uses a DNA profile obtained as a result of an unrelated criminal investigation.

**E. Ex Post Facto**

*State v. Price (Michael)*, 2002 MT 284, 312 Mont. 458, 59 P.3d 1122 (Cascade).

**Reversed; Trieweiler, J.** Defendant's right to be free from ex post facto application of new laws was violated when, in prosecution for felony nonsupport, state relied on evidence of nonsupport in years when the offense was only a misdemeanor.

**F. Other**

*State v. Shook*, 2002 MT 347, 313 Mont. 347, 67 P.3d 863 (Sanders).

**Affirmed; Nelson, J.** Regulation prohibiting non-tribal members from hunting big game on Montana Indian reservations is not an unauthorized exercise of the FWP Commission's power because the State's obligation to Indians reflects federal supremacy and because a federal court action recognized that the issue of jurisdiction to regulate hunting was left to agreement between the State and the Tribe.

*Walker v. State*, 2003 MT 134, 316 Mont. 103, 68 P.3d 872 (Cascade).

**Reversed; Nelson, J. (Gray, dissenting).** Postconviction relief granted to inmate who demonstrated that prison's use of BMP (behavior management plans) constituted cruel and unusual punishment.

***Wright v. Mahoney*, 2003 MT 141, 316 Mont. 173, \_\_\_ P.3d \_\_\_ (Yellowstone).**

**Affirmed; Leaphart, J.** Inmates sentenced to Montana State Prison (at a time when that was the only facility for men) do not have a federal or state constitutional liberty interest in being housed exclusively at the state prison in Deer. Lodge. The expanded definition of “Montana State Prison” in Mont. Code Ann. § 53-30-101 does not constitute an ex post facto punishment on inmates, so that the Department of Corrections is free to move inmates to other facilities as needed.

## CASES BY COUNTY

### **ANACONDA-DEERLODGE**

1984 Ford Truck	2003 MT 6N	Affirmed	Gray
State v. Brown	2003 MT 166	Affirmed	Leaphart

### **BEAVERHEAD**

State v. Fisher	2003 MT 33	Reversed	Leaphart
-----------------	------------	----------	----------

### **BIGHORN**

State v. Aune	2003 MT 3	Affirmed	Cotter
State v. Jefferson	2003 MT 90	Reversed	Trieweiler

### **BUTTE-SILVER BOW**

Gray v. County	2003 MT 38N	Affirmed	Gray
State v. Jackson	2002 MT 212	Affirmed	Regnier
Gilbert v. State	2002 MT 258	Reversed	Regnier
State v. Ryan	2002 MT 244N	Affirmed	Gray
State v. Tweed	2002 MT 286	Reversed	Nelson
Moore v. State	2002 MT 315	Affirmed	Regnier
D.A.	2003 MT 109	Affirmed	Regnier

## CASCADE

State v. Price	2002 MT 150	Affirmed	Trieweiler
State v. Benoit	2002 MT 166	Affirmed	Trieweiler
A.L. and C.L.	2002 MT 169	Affirmed	Leaphart
T.E., M.E. and M.E.	2002 MT 195	Affirmed	Leaphart
Boese v. State	2002 MT 250N	Affirmed	Rice
State v. Nonnemacher	2002 MT 238N	Affirmed	Leaphart
State v. Lamb	2002 MT 231N	Affirmed	Nelson
S.S., K.C. and J.C.	2002 MT 270	Reversed	Gray
State v. Rodarte	2002 MT 317	Affirmed	Regnier
State v. Price	2002 MT 284	Reversed	Trieweiler
State v. Welling	2002 MT 308	Reversed	Trieweiler
L.S.	2003 MT 12	Affirmed	Gray
Skelton v. State	2003 MT 18N	Affirmed	Gray
State v. LaMere	2003 MT 49	Affirmed	Jones
State v. Bjarko	2003 MT 37N	Affirmed	Nelson
State v. Olson	2003 MT 81	Affd/Revsd	Trieweiler
K.M., Jr.	2003 MT 57N	Affirmed	Nelson
D.L.T.	2003 MT 46	Reversed	Gray
M.R.G.	2003 MT 60	Affirmed	Gray
State v. Gustafson	2003 MT 59N	Reversed	Nelson
State v. Stiffarm	2003 MT 70	Affirmed	Trieweiler

State v. Crawford	2003 MT 118	Affd/Revsd	Cotter
Walker v. State	2003 MT 134	Reversed	Nelson
State v. Highpine	2003 MT 88	Affirmed	Nelson
State v. Davison	2003 MT 64	Affirmed	Leaphart
S.C.	2003 MT 93	Affirmed	Gray
Maier v. State	2003 MT 144	Affirmed	Regnier
Baker v. State	2003 MT 148N	Affirmed	Gray
State v. Bailey	2003 MT 150	Affirmed	Rice
State v. Hendricks	2003 MT 163	Affirmed	Rice
D.K. and K.K.	2003 MT 164N	Affirmed	Gray

## **CHOTEAU**

Chapman v. State	2002 MT 310N	Affirmed	Trieweiler
------------------	--------------	----------	------------

## **CUSTER**

N.A., B.A. and A.A.	2002 MT 303	Affirmed	Rice
J.V., S.V., T.V., and M.T.	2003 MT 68	Affirmed	Nelson

## **FERGUS**

Williams v. State	2002 MT 189	Affirmed	Trieweiler
State v. Johnson	2002 MT 251	Affirmed	Gray

## **FLATHEAD**

State v. Crawford	2002 MT 157N	Affirmed	Cotter
State v. Rardon	2002 MT 345	Reversed	Cotter
State v. Niles	2002 MT 282	Affirmed	Trieweiler
Workman v. State	2002 MT 283N	Affirmed	Rice
State v. Barker	2003 MT 32N	Affirmed	Rice
State v. Tackitt	2003 MT 81	Reversed	Nelson
State v. Gulbranson	2003 MT 139	Affirmed	Gray
Crain v. State	2003 MT 161N	Affirmed	Gray

## **GALLATIN**

State v. Weikert	2002 MT 193N	Affirmed	Gray
Brown v. State	2002 MT 209N	Affirmed	Regnier
State v. Graham	2002 MT 237	Affirmed	Leaphart
State v. Sherer	2002 MT 337	Affirmed	Rice
State v. Debus	2002 MT 309	Reversed	Trieweiler
State v. Bingman	2002 MT 350	Affirmed	Regnier
State v. McLaughlin	2002 MT 320N	Affirmed	Cotter
State v. Hoffman	2003 MT 26	Affirmed	Leaphart
State v. Hamilton	2003 MT 21	Reversed	Trieweiler

## **GLACIER**

State v. VanDort	2003 MT 104	Reversed	Leaphart
------------------	-------------	----------	----------

## **HILL**

State v. Russette	2002 MT 200	Affirmed	Cotter
State v. Lawlor	2002 MT 235	Affirmed	Leaphart
State v. Wright	2002 MT 275	Affirmed	Rice
State v. Marks	2002 MT 285	Affirmed	Cotter
State v. Montoya	2003 MT 75N	Affirmed	Trieweiler
State v. Drube	2003 MT 138	Affirmed	Gray

## **JEFFERSON**

State v. George	2002 MT 300	Affirmed	Nelson
State v. Notti	2003 MT 165	Affirmed	Regnier

## **JUDITH BASIN**

Blake v. Mahoney	2002 MT 186N	Affirmed	Nelson
------------------	--------------	----------	--------

## **LAKE**

State v. Courville	2002 MT 330	Affirmed	Nelson
State v. Finley	2002 MT 288	Affirmed	Cotter
State v. Crain	2002 MT 296N	Affirmed	Cotter

State v. Shook	2002 MT 347	Affirmed	Nelson
State v. Blackcrow	2003 MT 41N	Affirmed	Leaphart
State v. Ely	2003 MT 140	Affirmed	Gray

## **LEWIS AND CLARK**

M.A.D. and C.D.	2003 MT 10	Affirmed	Leaphart
State v. Grams	2002 MT 188	Affirmed	Regnier
A.L.R., A.A.R., T.C.R.	2002 MT 183	Affirmed	Leaphart
D.T., T.D. and B.D.	2002 MT 232	Affirmed	Regnier
State v. Tichenor	2002 MT 311	Affirmed	Nelson
State v. Shreves	2002 MT 333	Reversed	Nelson
Osterloth v. State	2002 MT 271N	Affirmed	Nelson
Sprinkle v. State	2002 MT 299N	Affirmed	Gray
Phillips v. State	2002 MT 324N	Affirmed	Nelson
State v. Weldele	2003 MT 117	Affirmed	Cotter
State v. Wagner	2003 MT 120	Affirmed	Regnier
State v. Daniels	2003 MT 30	Affirmed	Nelson

## **LINCOLN**

L.M.A.T.	2002 MT 163	Affirmed	Cotter
State v. Hornback	2002 MT 219N	Affirmed	Gray
M.D., M.O. and M.O.	2003 MT 4	Reversed	Gray

State v. Micklon	2003 MT 45	Affirmed	Gray
State v. Saxton	2003 MT 105	Affirmed	Trieweiler

## **MINERAL**

State v. Feldebrugge	2002 MT 154	Affirmed	Leaphart
----------------------	-------------	----------	----------

## **MISSOULA**

State v. Parker	2002 MT 162	Reversed	Nelson
State v. Jones	2002 MT 170N	Affirmed	Cotter
State v. Stevens	2002 MT 181	Reversed	Leaphart
State v. Christianson	2002 MT 194N	Affirmed	Regnier
State v. Price	2002 MT 229	Affirmed	Cotter
State v. Meeks	2002 MT 246	Reversed	Regnier
Johnson v. State	2002 MT 253N	Affirmed	Trieweiler
State v. Kaufman	2002 MT 294	Reversed	Nelson
State v. Howard	2002 MT 276	Reversed	Leaphart
State v. Lacasella	2002 MT 326	Reversed	Trieweiler
Ellenburg v. State	2002 MT 302N	Affirmed	Gray
T.H. and C.D.F.	2002 MT 293N	Reversed (St.App)	Trieweiler
State v. Steffes	2003 MT 2N	Affirmed	Cotter
State v. Root	2003 MT 28	Affirmed	Rice
State v. Mathis	2003 MT 112	Affirmed	Regnier

State v. Palmer	2003 MT 129	Reversed (St.App)	Regnier
State v. Byers	2003 MT 83	Affirmed	Regnier
Gratzer v. State	2003 MT 169	Affirmed	Leaphart

## **MUSSELSHELL**

State v. Beanblossom	2002 MT 351	Affirmed	Leaphart
State v. Flanagan	2003 MT 123	Affd/Revsd	Gray

## **PARK**

State v. Hostetler	2002 MT 220N	Affirmed	Gray
G.S. and S.S.	2002 MT 245	Affirmed	Cotter
State v. Cihura	2002 MT 316N	Affirmed	Regnier
A.R. and I.R.	2002 MT 343N	Affd/Revsd	Leaphart
State v. Ayers	2003 MT 114	Affirmed	Cotter

## **PONDERA**

State v. Spotted Eagle	2003 MT 172	Affirmed	Nelson
------------------------	-------------	----------	--------

## **POWELL**

State v. Williams	2003 MT 136	Affd/Revsd	Leaphart
-------------------	-------------	------------	----------

## **RAVALLI**

State v. McNally	2002 MT 160	Reversed	Cotter
F.M. and D.M.	2002 MT 180	Affirmed	Rice
M.T., T.T. and D.T.	2002 MT 174	Affirmed	Cotter
State v. Adams	2002 MT 208	Reversed	Cotter
Porter v. State	2002 MT 319	Affirmed	Cotter
Smith v. State	2003 MT 5N	Affirmed	Gray
State v. Bezanson	2003 MT 113N	Affirmed	Leaphart
Hoke v. DOJ	2003 MT 155N	Affirmed	Regnier

## **RICHLAND**

State v. Lovegren	2002 MT 153	Affirmed	Nelson
-------------------	-------------	----------	--------

## **ROSEBUD**

State v. Carson	2002 MT 234	Affd/Revsd	Trieweiler
-----------------	-------------	------------	------------

## **SANDERS**

State v. Hagen	2002 MT 190	Affirmed	Trieweiler
State v. Frick	2002 MT 298N	Affirmed	Trieweiler
Neal v. State	2003 MT 53	Reversed	Gray

## **STILLWATER**

State v. Winkle	2002 MT 312	Affirmed	Gray
State v. Earl	2003 MT 158	Affirmed	Regnier

## **TREASURE**

State v. Hamilton	2002 MT 263	Affirmed	Trieweiler
-------------------	-------------	----------	------------

## **YELLOWSTONE**

Hawkins v. Mahoney	2002 MT 156N	Affirmed	Leaphart
Soriach v. State	2002 MT 187	Reversed	Nelson
State v. Logan	2002 MT 206	Reversed	Gray
State v. Olson	2002 MT 211	Reversed	Gray
State v. Marks	2002 MT 255	Affirmed	Regnier
H.E.	2002 MT 257	Affirmed	Gray
City v. Beckman	2002 MT 256N	Affirmed	Nelson
Watson v. State	2002 MT 329	Reversed	Rice
State v. McLeod	2002 MT 348	Affd/Revsd	Rice
State v. Taylor	2002 MT 321N	Affirmed	Rice
State v. Fisher	2002 MT 335	Reversed	Trieweiler
M.D.M.	2002 MT 305	Affirmed	Leaphart
Teesdale v. State	2002 MT 273N	Affirmed	Nelson
State v. Nolan	2003 MT 13	Affirmed	Gray

State v. Kvislen	2003 MT 27	Reversed	Leaphart
State v. Nolan	2003 MT 55	Reversed	Rice
State v. Martinez	2003 MT 65	Reversed	Nelson
State v. Kern	2003 MT 77	Affirmed	Cotter
K.C.H.	2003 MT 125	Affirmed	Leaphart
State v. Hermann	2003 MT 149	Affirmed	Leaphart
A.T. and J.T.	2003 MT 154	Affd/Revsd	Regnier
State v. Turnplenty	2003 MT 159	Affirmed	Rice
D.V.	2003 MT 160	Affirmed	Cotter

**CASELOAD STATISTICS (JULY 1, 2002 TO JUNE 30, 2003)**

<b>Direct Appeals</b>	101
<b>Dependent/Neglect Appeals</b>	25
<b>Postconviction Appeals</b>	31
<b>State Appeals</b>	2
<b>Other</b>	6 (includes license revocation; mental health cases)
<b>State Conceded Error</b>	10
<b>TOTAL</b>	<b>175 (120 published decisions; 45 non-cite opinions; 10 unpublished orders)</b>
<b>Cases Affirmed:</b>	121 (70%)
<b>Cases Reversed:</b>	36 (includes 2 state appeals) 20%
<b>Affd in part/Revsd in part</b>	8 (5%)
<b>Cases Where State Conceded Error</b>	10 (5%)