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I. JURISDICTION

State v. Chesley, 2004 MT 165, ___ Mont. ___, ___ P.3d ___ (Gallatin).

Affirmed; Regnier, J. Chesley was convicted of theft and given a deferred imposition of sentence, which was later revoked and changed to a DOC commitment that was partly suspended. After he discharged his sentence, Chesley petitioned the district court to expunge his record, claiming that the criminal record frustrated his efforts to find a job and pursue a career. The district court denied the request because it found no statutory authority for granting it. The Court agreed, holding that Montana courts do not have inherent power and jurisdiction in equity to expunge criminal records. The Court stated that expunction of criminal records is a matter of legislative prerogative, and judicial authority to expunge may be granted or withdrawn only by the legislature.

II. INVESTIGATIVE PROCEDURES/TECHNIQUES

A. Lineups

State v. Baldwin, 2003 MT 346, 318 Mont. 489, 81 P.3d 488 (Cascade).

Affirmed; Regnier. An eyewitness identification was not impermissibly suggestive even though there were variations in appearance among men shown in six photographs. The Court continued its acceptance of *Neil v. Biggers*, 409 U.S. 188 (1972), and its five-part test for “irreparable misidentification.” A second identification in which the witness saw only Baldwin’s booking photograph was impermissibly suggestive, but it was not error to have denied the motion to suppress the identification because “the identification procedure did not give rise to a substantial likelihood of irreparable misidentification.” *Baldwin*, ¶ 20.

State v. DuBray, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (Cascade).

Affirmed; Regnier, J. The district court did not err when it denied DuBray’s motion to suppress a witness’s identification of DuBray through a photographic lineup since the lineup was not impermissibly suggestive.

B. Interviews/Interrogation by Law Enforcement

Matter of C.L., 2004 MT 71, 320 Mont. 369, 87 P.3d 462 (Cascade). **Affirmed; Gray, C.J.** C.L., a juvenile, was cooking methamphetamine at a friend’s house when, as can be expected if teenagers are left alone, a large portion of the residence burned down. The police, having extracted information from one of his colleagues, showed up at C.L.’s home to ask that he accompany them for questioning. They were obscure about why they wanted to do so, mentioning only the fire, but they recited to both him and his mother the full Miranda warnings, obtaining from her a written waiver of C.L.’s rights. His mother, who declined the police’s offer to take her to the station for the questioning,

saw him off with some bad advice: “Just tell the truth and be honest, and you’ll be okay.” He confessed in a videotaped interview after waiving his Miranda rights himself.

The claim was that the waivers were invalid because his mother was not actually present when he waived his rights and because the police did not state up front what they were going to ask him.

In affirming the district court’s denial of C.L.’s motion to dismiss, the Court distinguished Evans v. Montana 11th Jud. Dist. Ct., 2000 MT 38, 298 Mont 279, 995 P.2d 455, on several points. The Court said that neither Evans nor Mont. Code Ann. § 41-5-331 require warning about specific topics of questioning, just that they agree together to waive the rights. A youth and a parent do not have to agree on the waiver in the same place at the same time. The Court also noted that C.L. should have been aware that any questions about the fire would involve methamphetamine production.

***In the Matter of C.T.P.*, 2004 MT 63, 320 Mont. 279, 87 P.3d 399 (Broadwater). Reversed; Cotter, J. (Warner, Rice and Gray, dissenting).** C.T.P., a youth, was in custody when he was questioned by law enforcement about a burglary and was asked to produce the shoes and clothing he wore the night the burglary occurred. The record was silent regarding whether C.T.P. was read his rights or whether officers complied with Mont. Code Ann. § 41-5-331. Invoking the doctrine of plain error, the Court held that the district court should have suppressed all evidence obtained as a result of this encounter, even though the defense failed to file a timely motion to suppress. Warner dissented, concluding that failure to file a timely motion was fatal, and that admission of the evidence at trial was utterly harmless. Gray and Rice joined the dissent.

***State v. Reavley*, 2003 MT 298, 318 Mont. 150, 79 P.3d 270 (Cascade). State appeal. Reversed and remanded; Leaphart, J.** The defendant’s statements to police during an interview were voluntary and admissible, where the defendant chose the date and time for the interview, he drove himself to the police station, he agreed to answer questions, and officers were not in uniform. Even though Miranda warnings were not given at the inception of the interview, they were given as soon as questioning became more focused.

III. SEARCH AND SEIZURE

A. Search Incident to Arrest

***State v. Galpin*, 2003 MT 324, 318 Mont. 318, 80 P.3d 1207 (Ravalli). Affirmed in part; Rice, J.** The search of the defendant’s coat and duffel bag incident to the execution of an arrest warrant was reasonable for purposes of the Fourth Amendment and Article II, Sections 10 and 11, of the Montana Constitution. First, the coat and duffel bag

where located within four to six feet of the arrestee or within his “grab area.” Despite the fact that the defendant was handcuffed before the items were searched, “[i]n the darkness of the early morning hours . . . it would have been readily possible for Galpin to access a weapon hidden among his possessions or discretely eliminate evidence.” Thus, the search was permissible under Mont. Code Ann. §§ 46-5-102 (1) and (3) both as a means of officer protection and to discover and seize fruits of the crime. Second, the search was proper under Mont. Code Ann. § 46-5-102 (4) due to exigent circumstances at the time of the arrest. The duffel bag search was justified because the arresting officers reasonably suspected that it could contain highly toxic and volatile chemicals. The search of the coat was justified because an individual, who was not arrested, was entitled to remain in the residence after the officers departed, “thereby subjecting the evidence to . . . possible disposition and destruction.”

B. Search Warrants

***State v. Minez*, 2004 MT 115, 321 Mont. 148, 89 P.3d 966 (Lake). Affirmed; Rice, J.** No hearing was required under the standards established in Franks v. Delaware, 438 U.S. 154 (1978), and as modified in State v. Worrall, 1999 MT 55, 293 Mont. 439, 976 P.2d 968, because Minez failed to make a substantial preliminary showing that a false statement was included in the application for the search warrant. The Court clarified that although Worrall eliminated the need to establish the affiant’s intent in making the statements in the search warrant application, it did not obviate the defendant’s duty to provide an offer of proof containing affidavits, sworn testimony, or other reliable witness statements which tend to prove the falsity of the information contained in the warrant application. Only if the defendant makes such a showing is a hearing required.

C. Investigative Stops

***State v. Brander*, 2004 MT 150, ___ Mont. ___, ___ P.3d ___ (Powell). Affirmed; Leaphart, J.** The fact that the anonymous tip did not meet the requirements of Pratt for purposes of establishing its reliability was inconsequential. The officer followed the vehicle for several miles and made independent observations that gave rise to a particularized suspicion the defendant was driving under the influence of alcohol. These facts included excessively slow speed and meandering across the fogline.

***State v. Eixenberger*, 2004 MT 127, 321 Mont. 298, 90 P.3d 453 (Flathead). Affirmed in part, reversed in part and remanded; Rice, J.** Officers had particularized suspicion to stop a vehicle (a red Thunderbird) to investigate a series of burglaries in Kalispell where the vehicle matched the description of a suspect vehicle involved in the burglaries, and the prime suspect in the burglaries had recently been issued traffic tickets while driving a red Thunderbird, even though the vehicle was registered to the defendant. Reversed and remanded for resentencing where the presentence investigation failed to

document the victim's pecuniary loss and the defendant's financial resources or ability to pay.

***State v. Hall*, 2004 MT 106, 321 Mont. 78, 88 P.3d 1273 (Ravalli). Affirmed; Nelson, J.** Stop of the defendant's vehicle was justified based on an anonymous informant's tip even though the officer did not observe any independent evidence of impairment. The caller's information was sufficiently reliable to meet the Pratt test. After reviewing decisions from other jurisdictions, the Court concluded that "Pratt was correct in that an officer in the field must be able to rely on reports and dispatches from other officers without having to conduct a cross-examination as to the basis of the report."

D. Stop and Frisk

***Matter of D.R.B.*, 2004 MT 90, 320 Mont. 516, 88 P.3d 808 (Yellowstone). Affirmed; Nelson, J. (Gray, dissenting in part).** An officer saw D.R.B. late at night near a vehicle parked in front of a residence, and she thought he was stealing a license plate. She stopped and asked him what he was doing, and he said he was putting a plate on the vehicle. She recognized D.R.B. from prior contacts and knew that he didn't live at the residence or own a vehicle. She conducted a pat-down search and found a marijuana pipe. The Court held that the officer had particularized suspicion to conduct an investigative stop, that the officer did not exceed the permissible scope of the investigative stop, and that the officer had reasonable cause to conduct the frisk. Chief Justice Gray, joined by Justices Leaphart and Regnier, dissented as to the reasonableness of the frisk, stating that a police officer does not need to feel threatened when confronting a teenager in baggy clothing late at night and that the frisk should be justified by something more than the officer's standard procedure under such circumstances.

E. Exigent Circumstances

***State v. Lanegan*, 2004 MT 134, 321 Mont. 349, ___ P.3d ___ (Lincoln). (State appeal) Affirmed ("affirmed" means "bad"); Regnier, J. (Rice, dissenting).** In the early morning hours in Libby, an officer noticed someone kicking the tires on a car parked at the Town Pump. He checked the license plate and learned that it belonged to another car, one owned by a gentleman thought to be in the drug trade. The officer pulled into the parking lot to investigate, found two people (neither the owner of the plate) walking towards the car. The female, who was the driver, appeared nervous and had difficulty standing still while the officer spoke with her. A second officer arrived, which was a good thing because the defendant became increasingly obstreperous.

When the first officer questioned the defendant, he observed a bulge in the defendant's right coat pocket. Questioned, the defendant admitted he had a gun, but did not say where. The officer attempted to pat the defendant down for weapons, although he

told him he was not under arrest. The defendant struggled and refused to submit to a search, so he was arrested for obstructing an officer and handcuffed. The officer then removed the item causing the bulge--a binocular-pack--from the coat. Unzipping the pack--which he had not squeezed because it might have contained a needle--he found a hypodermic containing a clear fluid. The officer testified that the pack was small, but could have held several kinds of small pistols.

Concluding there were no exigent circumstances because the defendant was restrained and separated from the pack, the district court suppressed the evidence found there. In affirming, the Court rejected the State's argument that the totality of the circumstances, which included the hour of the night, the officers' isolation, the female's behavior (she had run into the Town Pump to use the telephone), meant that the defendant's restraint did not eliminate a threat to the officers from a weapon that might have been contained in the pack. It reasoned that the defendant could not have seized a weapon from the pack, and that a further search would not have revealed any evidence on obstructing a peace officer, the crime for which the defendant had been arrested.

***State v. Stone*, 2004 MT 151, ___ Mont. ___, ___ P.3d ___ (Jefferson).**
Affirmed in part, reversed in part; Nelson, J. Reaching an issue of first impression in Montana, the Court ruled that the exigent circumstances exception to the warrant requirement applies to situations of imminent threats to the lives and well-being of animals. Police entered Stone's residence after hearing a report of starving dogs, cats, rabbits, and guinea pigs around Stone's yard and house. After knocking on Stone's door and hearing no response, the police determined that it was necessary to enter Stone's home to discover and protect the animals. The district court correctly denied Stone's motion to suppress evidence of his animal cruelty. The police officers here reasonably acted to terminate continuing animal cruelty and prevent more cruelty from occurring, and that exigent circumstances therefore existed which required their immediate entry into Stone's yard and house.

F. Field Sobriety Tests

***State v. Toth*, 2003 MT 208, 317 Mont. 55, 75 P.3d 323 (Madison).** **Affirmed; Regnier, J.** Toth argued that law enforcement officers must establish probable cause prior to requesting a breath sample for a preliminary breath test. The Court disagreed. Citing Mont. Code Ann. § 61-8-409(1) and its prior decisions, the Court stated an officer needs only particularized suspicion to request a breath sample for preliminary breath test analysis.

***State v. Turbiville*, 2003 MT 340, 318 Mont. 451, 81 P.3d 475 (Fallon).**
Affirmed: Rice, J. The district court properly denied a defense motion to suppress results of breath tests in a DUI trial, based on the defendant's claim that he was provided misleading information about the consequences of test refusal. The defendant's right to

due process was not implicated by PBT advisory's failure to notify him of the right to judicial review if the PBT was refused; the PBT advisory did not provide misleading or inaccurate information.

G. Canine Sniffs

***State v. Hart*, 2004 MT 51, 320 Mont. 154, 85 P.3d 1275 (Yellowstone).** **Affirmed; Nelson, J. (Rice, specially concurring).** The Court has affirmed the district court's denial of Robert Hart's motion to suppress the dangerous drugs recovered from his van following a canine sniff. Billings police officers stopped Hart's van in order to serve him with an arrest warrant (for sale of dangerous drugs). As the officers approached the van, Hart made a furtive movement toward the floorboard. After Hart was in custody, the officers walked a drug-detecting dog around the exterior of the van and the dog alerted. The officers then obtained a telephonic search warrant for the van and discovered two pounds of marijuana and a quantity of methamphetamine. Applying its decision in *State v. Tackitt*, 2003 MT 81, 315 Mont. 59, 67 P.3d 295, the Court concluded that the canine sniff of the exterior of the van was a "search" under the Montana Constitution, requiring particularized suspicion. The Court further concluded that the officers in this case had reasonable or particularized suspicion to utilize the canine sniff. The Court found that the search warrant was supported by probable cause arising from the canine alert and the circumstances of the arrest. The Court declined to address Hart's argument, based on the 1978 decision in *State v. Schoendaller*, that the smell of marijuana alone is insufficient to support a finding of probable cause, because the argument was raised for the first time on appeal. Justice Rice concurred on the basis of his concurrence in *Tackitt*, in which he stated his view that there is no reasonable expectation of privacy in contraband odors that are allowed to emanate into public places.

H. Emergency Aid Doctrine

***State v. Nelson*, 2004 MT 13, 319 Mont. 250, 84 P.3d 25 (Golden Valley).** **Affirmed; Warner, J.** Under the community caretaker doctrine, police officers have a duty to investigate uncertain situations in order to ensure the public safety. It does not involve detaining a citizen, therefore, it does not involve a seizure. The facts of this case satisfied Montana's test for applicability of the community caretaker doctrine as set forth in *State v. Lovegren*, 2002 MT 153, ¶ 25, 310 Mont. 358, 51 P.3d 471, and therefore the police officer would have been remiss in her duty had she not stopped to check on Nelson's welfare. The officer's subsequent observation of Nelson's state of intoxication was more than enough justification for her to undertake further investigation.

***State v. Reiner*, 2003 MT 243, 317 Mont. 304, 77 P.3d 210 (Lake).** **Reversed; Cotter, J.** The district court erred when it concluded that the police officer conducted a

lawful community caretaking “welfare check” rather than an unlawful investigative stop. During the early morning the local dispatcher received a report of a possible drunk driver. The reporter gave a vehicle description and a partial license plate description. About a half an hour later, an officer on routine patrol saw a vehicle matching the description given parked on the side of a busy stretch of highway not appropriate for parking. The officer turned on his emergency lights, pulled in behind the vehicle, determined the driver was asleep or unconscious, and began knocking on the window. After a few minutes the driver awoke and rolled down the window. The officer immediately smelled the odor of alcohol, saw that the driver’s eyes were red and glassy, and determined the driver slurred his speech. The Court concluded the officer did in fact conduct an investigative stop but did not have particularized suspicion to do so. The Court further concluded the officer did not conduct a welfare check because he stopped to investigate a possible DUI rather than stopping out of concern that the driver was in peril or in need of assistance. (Note: There was testimony presented at the evidentiary hearing that because of the circumstances, the officer would have stopped and checked on the driver even without the report of a possible DUI.)

I. Arrest

***City of Whitefish v. Large*, 2003 MT 322, 318 Mont. 310, 80 P.3d 427 (Flathead). Affirmed; Leaphart, J.** Responding to an anonymous tip of a possible drunk driver, officers confronted the defendant, who was found asleep in her vehicle parked in the carport next to her condo, and subsequently arrested her for DUI. The defendant argued that all evidence should be suppressed because the arrest occurred in violation of a statute, which forbids nighttime arrests for misdemeanors in the home or the person’s private dwelling place. The Court held that the statutory safeguards pertaining to one’s “home” do not encompass a carport attached to a condominium unit. The Court rejected the defendant’s argument that this area was afforded special protection under Article II, section 10 of the Montana Constitution.

***State v. May*, 2004 MT 45, 320 Mont. 116, 86 P.3d 42 (Cascade). Reversed and remanded; Gray, C.J.** May, detained by military security forces on Malmstrom for DUI and turned over to civilian law enforcement, appealed the district court’s denial of her motion to suppress evidence. The Court analyzed military security forces’ authority to detain civilians under Mont. Code Ann. § 46-6-602 (arrest by private party) and applied the three-part Widenhofer (Mont. 1997) test to determine if May was arrested. The Court concluded that detention by military security forces was an arrest. The Court analyzed arrest by a private party under Williamson (Mont. 1998) to determine if they were “warranted in believing that someone is committing or has committed an offense.” The Court concluded probable cause for arrest was lacking where the sole basis for DUI arrest was smell of alcohol.

IV. COMMENCEMENT OF PROSECUTION

A. Charging Documents

***State v. Robison*, 2003 MT 198, 317 Mont. 19, 75 P.3d 301 (Lake).** (State appeal) **Affirmed; Rice, J.** The district court dismissed the charges against the defendant because there was an eleven-day delay between the defendant's initial appearance and the filing of the Information. The Court determined that any delay over ten days was per se unreasonable, which is consistent with the federal rule, and that the defendant was prejudiced thereby. The State appealed, arguing that there is no "10 day" rule in Montana; that under Mont. Code Ann. § 46-10-105, the preliminary examination must be conducted within a "reasonable time;" and that 11 days was not unreasonable under the circumstances. The Court refused to overturn the district court because, even though the lower court improperly began its analysis by applying a ten-day rule, the appellate court could not conclude that the district judge abused his discretion by determining that the time taken to file the Information was unreasonable for purposes of Mont. Code Ann. § 46-10-105. The State failed to make a factual showing in district court that the delay was not unreasonable in this particular case.

B. Statute of Limitations

***State v. DuBray*, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (Cascade).** **Affirmed; Regnier, J.** DuBray was not deprived of due process as a result of preindictment delay, even though the crime occurred in 1986 and the State charged DuBray in 1998. The State had no viable suspect for a lengthy period of time and no statute of limitations exists for deliberate homicide.

***State v. DuBray*, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (Cascade).** **Affirmed; Regnier, J.** The district court properly concluded that the statute of limitations for robbery and theft were tolled while DuBray was incarcerated out-of-state.

***State v. Egdorf*, 2003 MT 264, 317 Mont. 436, 77 P.3d 517 (Musselshell).** **Affirmed; Rice, J.** The three-year statute of limitations for fish and game violations under Mont. Code Ann. §§ 45-1-205(5) and (6) does not violate equal protection and due process.

C. Venue

***State v. Dahlin*, 2004 MT 19, 319 Mont. 303, 84 P.3d 35 (Golden Valley).** **Affirmed and remanded; Leaphart, J.** Dahlin borrowed someone's pickup truck, but didn't return it as agreed. (The testimony showed it had been abandoned in Billings.) Dahlin appealed the district court's denial of his motion for a directed verdict, contending

there was insufficient evidence to prove that he committed a theft or that venue could be in Golden Valley County. The Court agreed that failure to return property as agreed is theft, and it cited federal cases holding that “where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime.” Dahlin, ¶ 11.

***State v. Galpin*, 2003 MT 324, 318 Mont. 318, 80 P.3d 1207 (Ravalli).**
Affirmed in Part, reversed in Part; Rice, J. A possession of precursors charge involving evidence found in Missoula County was properly venued in Ravalli County because of the venue exception in Mont. Code Ann. § 46-2-112 (1), providing that a charge may be filed in any county where an act requisite to the commission of the offense was committed. Here, although there was no direct testimony that the possession of precursors offense occurred in Ravalli County, the defendant was found in possession of the only keys to separate storage units in Ravalli and Missoula counties (where precursors were found) while moving between those counties. As such, the district court properly denied the defendant’s motion to dismiss the possession of precursors charge involving the Missoula County storage unit.

At the time of his arrest in Sanders County, the defendant was in possession of two baggies of methamphetamine. When he was charged in Ravalli County with possession, the defendant moved to dismiss for improper venue. Because the offense has but one requisite act--possession of the drug itself--the Court reversed the defendant’s conviction, noting, “Although it defies logic that one can be engaged in the production of methamphetamine and not also be in possession, neither the State’s Information nor the testimony presented at hearing established that Galpin actually possessed manufactured methamphetamine anywhere but Sanders County.”

Finally, Ravalli County was a proper venue for charges involving the defendant’s methamphetamine manufacturing operations in Missoula and Ravalli Counties because of two venue exceptions. First, given substantial evidence that the defendant was involved “in an ongoing operation of manufacturing methamphetamine throughout Missoula and Ravalli Counties[,]” a rational trier of fact could have found that at least one of the elements of the offense occurred in Ravalli County, rendering it a proper venue according to the venue exception contained in Mont. Code Ann. § 46-3-112 (1). Second, the record established that the defendant’s activities in Missoula and Ravalli Counties were part of a common scheme resulting in “interrelated and sequential” offenses in multiple counties, whereby the defendant used other people and the property of others to provide him with a place to live, assistance in obtaining precursors, manufacturing locations, and the ability to conceal his whereabouts while conducting his mobile operations.

***State v. Lamb*, 2003 MT 273N (Cascade).** **Affirmed; Leaphart, J.** Venue in Cascade County was sufficiently established by reference to the City of Great Falls.

***State v. Ruiz*, 2004 MT 135, 321 Mont. 357, ___ P.3d ___ (Missoula). Affirmed in part, reversed in part and remanded; Gray, C.J. (Leaphart, dissenting).** Activities occurring in more than one county, including Missoula County, were properly charged in Missoula County.

V. GUILTY PLEAS

***State v. Markuson*, 2003 MT 206, 317 Mont. 43, 75 P.3d 298 (Lake). Affirmed; Gray, C.J.** A defendant does not undermine the presumption of regularity, which attaches to a prior conviction by submitting an affidavit stating he was not advised of the dangers and disadvantages of waiving his right to an attorney prior to entering his guilty plea. A trial court is not required to so advise a defendant, as long as the trial court makes sufficient inquiry to ensure that defendant's waiver of the right to counsel is voluntary, knowing, and intelligent. The Ninth Circuit's decision in U.S. v. Akins, 276 F.3d 1141 (9th Cir. 2001) does not compel a contrary conclusion.

***State v. White*, 2004 MT 103, 321 Mont. 45, ___ P.3d ___ (Park). Affirmed; Rice, J.** White entered the nolo pleas pursuant to a plea agreement in which the State agreed to dismissal of other charges and a lenient sentencing recommendation. He sought to withdraw the pleas shortly before the sentencing hearing because he learned of evidence (a prior inconsistent statement) that could be used to impeach the prosecution's main witness against him. He claimed that if he had known about the evidence prior to the change of plea hearing, he would not have changed his pleas or waived his right to a trial. The Court determined that, although White was prompt in his attempt to withdraw the pleas, the district court's interrogation at the change of plea hearing was adequate and White benefited from the dismissal of other charges pursuant to the plea agreement. The Court stated that a plea is made "knowingly" if the defendant has an understanding of the nature of the charge, the maximum penalty and any mandatory minimum, and the possibility of imposition of restitution. A guilty or nolo plea may be "knowing" even if the defendant does not know all of the evidence that might have been available to be introduced at trial. The Court also noted that White had received a benefit in the form of the State's promise to dismiss the other charges and recommend a lenient sentence, even though the charges had not yet been dismissed and the sentencing hearing had not been held at the time he moved to withdraw his pleas. The State's promise is sufficient consideration to support the plea agreement.

VI. PRETRIAL

A. Discovery

***City of Missoula v. Lesko*, 2003 MT 177, 316 Mont. 401, 73 P.3d 166 (Missoula). Affirmed; Gray, C.J.** The City fulfills its discovery obligations in a criminal case by making all material in its file available to defense counsel. The defendant's failure to request discovery or exercise his right to view and copy the City's case file is not the equivalent of discovery abuse by the City.

***State v. DuBray*, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (Cascade). Affirmed; Regnier, J.** The district court properly denied DuBray's discovery request that the State provide the criminal history records of each of its witnesses when DuBray did not justify his wholesale request for information. The Court also properly refused DuBray's request for disclosure of the confidential informant's identification.

***State v. Strauss*, 2003 MT 195, 317 Mont. 1, 74 P.3d 1052 (Sanders). Affirmed in part, reversed in part; Leaphart, J.** No reversible error occurred when the district court allowed a State's witness to testify about an alleged statement, made by the defendant prior to his death, which was disclosed to prosecution during course of trial. Since the witness was listed by the State, and was available to be interviewed by defense, no discovery violation occurred. The prosecutor is not required to disclose information of which he has no knowledge. Defense counsel declined the court's offer for additional time to prepare. Absent some showing of prejudice, no reversible error has been shown.

B. Substitution of Judge

***State ex rel. Dusek v. Eighth Judicial District Court*, 2003 MT 303, 318 Mont. 166, 79 P.3d 292 (Cascade). Writ of supervisory control granted and remanded (per curiam order).** A party in a criminal case has the right, pursuant to Mont. Code Ann. § 3-1-804(1)(c), to move to substitute the district judge for 10 consecutive days after service of an order to show cause, information, or other initiating document. The time period does not run from the date the defendant receives notice of the assigned judge, which was the standard under the previous version of the statute. The date upon which a charging document is "served" will depend on the facts of the case, and does not necessarily occur at arraignment. Service must be on the defendant (not defense counsel) and must be personal service (the fact that defense counsel receives a copy of the information in discovery doesn't count). Supervisory control granted, and case remanded for a determination of when "service" occurred.

C. Continuance

State v. DeMary, 2003 MT 307, 318 Mont. 200, 79 P.3d 817 (Richland).

Affirmed; Warner, J. The district court did not abuse its discretion when it denied DeMary's motion for a continuance, made three days after the district court denied his motion to endorse Dr. Baxter, and one day before trial, because there was little reason to continue the trial in light of the fact that the district court did not abuse its discretion in precluding Dr. Baxter from testifying, nor was DeMary prejudiced by the exclusion of Dr. Baxter's testimony.

State v. VonBergen, 2003 MT 265, 317 Mont. 445, 77 P.3d 537 (Rosebud).

Affirmed; Rice, J. On felony and misdemeanor charges for drugs, theft, and deer poaching, VonBergen's first counsel filed motions to suppress evidence from the stop and search and from his confession. The district court denied the motions, and, four days before trial, VonBergen retained another attorney. The district court continued the trial but declined to hear another suppression motion because time limits set by the first omnibus order had passed. The Court held the district court did not abuse its discretion. It followed Montana and federal cases concluding that the appearance of new counsel is not necessarily good cause for relief under Mont. Code Ann. § 46-13-101 or the analogous federal rule.

D. Mental Competency of Accused

Herold v. Havre City Court, 77 P.3d 554 (Decision without published opinion).

The Court denied Shawn Herold's application for writ of supervisory control, which asked the Court to direct the Havre City Court to authorize and pay for a psychological evaluation that Herold requested to support Herold's mental state defense to several misdemeanor charges. The Court concluded that a city judge does not have authority to order a mental examination and commit a defendant to the state hospital for that purpose. The statute at issue, Mont. Code Ann. § 46-14-202, specifically refers to the district court as the court with authority to order an examination of a defendant's mental condition. The Court found that a city court defendant's right to a mental exam is protected by his right of appeal to the district court.

State v. Tison, 2003 MT 342, 318 Mont. 465, 81 P.3d 471 (Mineral). **Reversed and remanded; Leaphart, J.** Once the district court found Tison unfit to proceed, the district court was required to review his fitness within ninety days. Upon ninety days, the district court had neither found Tison fit to proceed nor made a finding that it appeared Tison would become fit to proceed within the reasonably foreseeable future. Absent such timely findings, the district court was required to dismiss the criminal charges against Tison. Once the 90-day statutory period set forth in Mont. Code Ann. § 46-14-221 expired, the State lacked the power to proceed further with criminal charges.

VII. TRIAL

A. Evidence

1. Corroboration

***State v. Black*, 2003 MT 376, 319 Mont. 154, 82 P.3d 926 (Yellowstone).** **Affirmed; Gray, C.J.** Accomplice testimony was corroborated by sufficient independent evidence, including evidence that the defendant had over \$300 in cash on him when he was arrested after telling an officer he was broke and never carries much cash, evidence that the defendant lied to investigating officers regarding his activities and whether he knew one of the perpetrators, and evidence that the amount of money recovered from the defendant and his associates approximated what two independent witnesses calculated had been stolen.

2. Rule 404/Character Evidence

***State v. Insua*, 2004 MT 14, 319 Mont. 254, 84 P.3d 11 (Ravalli).** **Affirmed; Rice, J.** Insua was charged with manufacture of dangerous drugs and three counts of sexual intercourse without consent with three different minor females. The district court severed the drug charge over the State's objection. He was convicted of that crime before the trial of the other charges, but the district court permitted the State to offer testimony (from a victim who had been nine years old at the time of the offense) that Insua kept marijuana in his lair.

The Court said the district court abused its discretion when it admitted evidence of marijuana use in the sexual offense trial. The court had earlier severed the charges, and Insua was faced with the same evidence again in the second trial. Applying Van Kirk, the Court concluded the error was harmless. Justice Rice did meticulous spadework into the record to weigh prejudice.

***State v. Teters*, 2004 MT 137, 321 Mont. 379, ___ P.3d ___ (Gallatin).** **Affirmed; Rice, J.** The Court affirmed Teters' conviction of sexual intercourse without consent. The Court did not address Teters' argument that his wife's testimony of Teters' history of verbal and physical abuse was improperly admitted under Mont. R. Evid. 404(b), holding that the alleged error was harmless since he was acquitted of the charge to which the testimony pertained. Further, his wife's testimony did not involve any element of the offense of sexual intercourse without consent.

3. Res Gestae/Transaction Rule

***State v. Brasda*, 2003 MT 374, 319 Mont. 146, 82 P.3d 922 (Cascade).**

Affirmed; Nelson, J. Brasda was fighting with his wife outside a bar, and a bouncer from the bar attempted to break the fight up. Brasda pulled out a pocketknife and threatened the bouncer, stating that he was not afraid of going back to prison. Later he stated to the arresting officer that he had not tried to stab anybody. The district court denied Brasda's motion in limine to exclude the two statements. The Court agreed and held that the statements were relevant and admissible under the transaction rule. The Court also rejected Brasda's claim that the knife should not have been admitted into evidence because the State had tampered with it and made it easier to open. The Court did not find the officer's actions with the knife to be tampering and, in any event, the Court declined to consider the tampering argument because it had not been presented to the district court. Finding no error in the district court's evidentiary rulings, the Court declined to address Brasda's cumulative error argument.

***State v. Flowers*, 2004 MT 37, 320 Mont. 49, 86 P.3d 3 (Lincoln). Affirmed; Regnier, J.** The trial court allowed into evidence additional items taken from the victim's home. These additional items were part of the officer's investigative report; however, Flowers was not charged with the theft of these items. The admissibility of evidence under the transaction rule is predicated on the jury's right to hear what transgressed immediately prior and subsequent to the commission of the offense charged. Therefore, although Flowers was not charged with the theft of the additional items, the theft of the additional items were clearly part of the same transaction as the theft of the purse and necklace.

***State v. Lozon*, 2004 MT 34, 320 MT 26, 85 P.3d 753 (Cascade). Affirmed; Gray, C.J.** Lozon was convicted by a jury for felony criminal possession of dangerous drugs. The issue on appeal was whether the district court abused its discretion in allowing testimony regarding a statement made by Lozon that he had used methamphetamine the night before his arrest.

Lozon argued that the statement constituted evidence of other crimes, was inadmissible under Mont. R. Evid. 404(b), and the State failed to give notice of its intent to use the evidence as required by State v. Just and State v. Matt. The Court ruled that where the evidence is not wholly independent or unrelated to the charged offense, it is not "other crimes" evidence and the prosecution is not required to give notice under Just and Matt. Rather, the evidence is admissible under the "transaction rule." Mont. Code Ann. § 26-1-103. Here, Lozon was charged with criminal possession of dangerous drugs after a vial containing methamphetamine was discovered in his room. His statement to law enforcement officers that he had used methamphetamine in his room the night before the search is closely related to the charged offense of possession of dangerous drugs, and is explanatory of the circumstances surrounding the offense, because it establishes his knowledge and possession of drugs in his room shortly prior to the early morning search.

4. Opinion and Expert Testimony

State v. Bailey, 2004 MT 87, 320 Mont. 501, 84 P.3d 1032 (Pondera).

Affirmed; Gray, C.J. The State's failure to list the victims' examining physicians as witnesses in the sexual assault/incest prosecution was not fatal where the State made the physicians' reports available to the defense as part of discovery, and where the State informed the defendant at the omnibus hearing that it would be calling the victims' counselors and physicians as experts at trial.

State v. Bailey, 2004 MT 87, 320 Mont. 501, 84 P.3d 1032 (Pondera).

Affirmed; Gray, C.J. The district court properly allowed the State's medical expert to offer his opinion about whether the victims had been sexually assaulted, even though the opinion was based in part on the girls' hearsay statements provided during the course of treatment.

State v. Bailey, 2004 MT 87, 320 Mont. 501, 84 P.3d 1032 (Pondera).

Affirmed; Gray, C.J. The district court properly excluded testimony from the defense expert to the effect that the defendant was not the perpetrator. Expert testimony to bolster the credibility of a party and his or her claims is not proper because it invades the province of the jury by "placing a stamp of scientific legitimacy on a victim's allegations, or by dismissing the validity of the allegations."

State v. DuBray, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (Cascade).

Affirmed; Regnier, J. The district court did not abuse its discretion when it refused to allow expert testimony on eyewitness identification. The Court adopts the limited admissibility rule meaning that it shall only be an abuse of discretion for a district court to disallow expert testimony on eyewitness testimony when no substantial corroborating evidence exists.

State v. DuBray, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (Cascade).

Affirmed; Regnier, J. The district court did not abuse its discretion when it allowed testimony of a witness who had previously been hypnotized, at the request of law enforcement, and when it refused to allow expert testimony on the effects of hypnosis on memory. The witness never achieved a hypnotic state and did not recall any new information as a result of hypnosis.

State v. DuBray, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (Cascade).

Affirmed; Regnier, J. The district court properly denied expert testimony on incarcerated informants since the concept of prisoners bartering information in exchange for favorable treatment is one that is generally understood in our society. Further, DuBray had an opportunity to question the witnesses about motivations for giving untruthful testimony.

State v. DeMary, 2003 MT 307, 318 Mont. 200, 79 P.3d 817 (Richland).
Affirmed; Warner, J. On direct appeal of his conviction after a jury trial of sexual intercourse without consent of his eight-year-old stepdaughter, A.S., the Court ruled the district court did not abuse its discretion when it denied DeMary's motion, made five days before his trial, to call Dr. Sarah Baxter as an expert witness, because his motion was not supported by good cause, as required by Mont. Code Ann. § 46-15-323(6).

State v. Olsen, 2004 MT 158, ___ Mont. ___, ___ P.3d ___ (Ravalli).
Affirmed; Gray, C.J. Olsen was charged with setting fire to her own house. During trial, Olsen attempted to present the expert testimony of Richard Schefsky concerning the cause of the fire. Schefsky had examined an electrical junction box found near the point of origin of the fire and had concluded that the fire was caused by an electrical short in the box. However, Schefsky is a chemical engineer rather than an electrical engineer, and the district court concluded that Schefsky was not qualified to testify as an expert on the cause of the fire. As Schefsky was testifying about his education and experience, none of which was related to electrical engineering, the district court interrupted and stated, "This is completely useless information." On appeal, Olsen claimed that the district court abused its discretion by refusing to allow Schefsky's expert testimony and by improperly commenting on the evidence. The Court declined to consider the merits of either claimed error because Olsen failed to object to the district court's refusal to allow Schefsky's testimony and also failed to object to the district court's statement. The Court found that a related claim of ineffective assistance of counsel would be more appropriately raised in a postconviction petition inasmuch as the record was devoid of any evidence showing the reasons for counsel' actions and inactions that were the basis of Olsen' complaints.

5. Witness Competency

State v. Gardner, 2003 MT 338, 318 Mont. 436, 80 P.3d 1262 (Park).
Affirmed; Rice, J. The district court did not err in denying Gardner's motion to suppress the child/victim's testimony as tainted. **(The Court declined to consider the issue of whether taint hearings are necessary in child sexual abuse cases.)**

6. Hearsay

State v. Runs Above, 2003 MT 181, 316 Mont. 421, 73 P.3d 161 (Fergus).
Reversed and remanded; Cotter, J. The district court erred when it admitted hearsay statements from two witnesses, through the arresting officer, which connected the defendant to the crimes of obstructing justice and criminal trespass to vehicles. The admission cannot be considered harmless so a new trial is warranted.

7. Documentary Evidence/Exhibits

***State v. DuBray*, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (Cascade).**

Affirmed; Regnier, J. Since law enforcement is required to photograph and fingerprint any person charged with a felony, and to preserve such prints, the fingerprint cards are a public record or report and are properly authenticated pursuant to Mont. R. Evid. 901(b)(7).

***State v. Strauss*, 2003 MT 195, 317 Mont. 1, 74 P.3d 1052 (Sanders). Affirmed in part, reversed in part; Leaphart, J.** A crime scene videotape made two days after a shooting incident should have been admitted without sound, since the officer's commentary had no probative value with respect to how the shooting occurred. Although commentary might be considered a prior statement of a non-party witness under Mont. R. Evid. 801(d)(1), the second prong of the rule was not satisfied (requiring that the recorded commentary be offered to rebut an allegation of fabrication, improper influence, or motive). Error was deemed harmless. The crime scene videotape made two months after shooting was clearly offered as a re-enactment of the crime (not just a crime scene video as the State suggested), and thus required a proper foundation pursuant to *Peschke v. Carroll College*, 280 Mont. 331, 929 P.2d 874 (1997). Since that foundation was lacking, the video was improperly admitted. Error was deemed harmless.

***State v. Struble*, 2004 MT 107, 321 Mont. 89, ___ P.3d ___ (Powell). Affirmed; Nelson, J.** The district court properly denied Struble's motion in limine regarding the admission of the prison logbooks into evidence. Although hearsay, the logbooks were properly admitted under the business records exception, Mont. R. Evid. 803(6). Activity at MSP consists of operating a prison where inmates serve their respective sentences, and operations incorporate prison safety for employees and inmates. The logbooks are an essential part of these operations and, being kept in the regular course of MSP's business by MSP employees as part of their routine duties, are trustworthy. The district court did not abuse its discretion when it granted the State's motion in limine and did not allow Struble to admit a letter from the local County Attorney indicating there was insufficient evidence to prosecute other prison employees for theft based upon inaccurate time records. The letter did not concern Struble and was irrelevant to his prosecution.

***State v. Vandersloot*, 2003 MT 179, 316 Mont. 405, 73 P.3d 174 (Big Horn). Affirmed; Nelson, J.** Vandersloot argued that the trial court erred by allowing the State to enter the medication sign-out sheet into evidence. Vandersloot, however, failed to object to the admission of this evidence. Vandersloot therefore failed to preserve this issue for appeal. The trial court therefore did not abuse its discretion when it allowed the medication sign-out sheet into evidence in the absence of a timely objection.

8. BAC

City of Helena v. Kortum, 2003 MT 290, 318 Mont. 77, 78 P.3d 882 (Lewis and Clark). **Affirmed; Rice, J.** The defendant’s refusal to provide a breath sample is competent evidence of his intoxication under Mont. Code Ann. §§ 61-8-401(5) and -404(3). Whether the test was administered in accordance with proper police procedure goes to the weight of the evidence, not its admissibility. The district court did not abuse its discretion when it allowed into evidence the DOT pamphlet entitled “BAC and You,” but did not allow defense counsel to use the pamphlet as substantive evidence.

9. Spousal Privilege

State v. Baldwin, 2003 MT 346, 318 Mont. 489, 81 P.3d 488 (Cascade). **Affirmed; Regnier, J, joined by Cotter, J. (Rice, Gray and Leaphart, concurring in result, but dissenting on spousal privilege ruling).** The district court erred in its ruling on spousal privilege (Mont. Code Ann. § 46-16-212) and spousal competency to testify (Mont. Code Ann. § 26-1-802), but it was harmless. Since Baldwin and the witness were married at the time of the trial, the witness’s testimony should have been excluded under the privilege. *Baldwin*, ¶ 26. Under *State v. Van Kirk*, 2001 MT 184, 306 Mont. 215, 32 P.3d 735, evidence from other witnesses was sufficient to have convicted him. Justice Rice, joined by the Chief Justice and Justice Leaphart, had a polite version of what my maternal grandmother would have called a “hissy fit.” Justice Rice wrote, “The spousal privilege does not bar admission of a statement made between two persons who were not married at the time the statement was made.” *Baldwin*, ¶ 33. He believed there was substantial evidence to support the district court’s ruling that no common law marriage existed when the statement was made, and that it was not barred from evidence by the spousal privilege.

10. Prior Statements

State v. Teters, 2004 MT 137, 321 Mont. 379, ___ P.3d ___ (Gallatin). **Affirmed; Rice, J.** The Court held that the victim’s prior consistent statements were properly admitted in rebuttal. The Court rejected Teters’ argument that the statements were not offered in response to a charge of improper motivation or subsequent fabrication. The Court found that defense counsel launched a general attack on the victim’s credibility by insinuating that she possessed a motive to fabricate her testimony and that she had been improperly influenced. Although implied, these charges were sufficient to satisfy Mont. R. Evid. 801(d)(1)(B).

11. Other

***State v. Flowers*, 2004 MT 37, 320 Mont. 49, 86 P.3d 3 (Lincoln). Affirmed; Regnier, J.** The Court reviews a district court's application of Mont. R. Evid. 615, which addresses the exclusion of witnesses, for correctness. Law enforcement officers, who are designated State's representative, may be exempt from Rule 615. However, when a trial court grants a motion to exclude witnesses, an arresting officer, who has been designated a State representative, but who testifies at the trial, must also be excluded from the courtroom. The trial court's error in failing to exclude the officer was trial error, which is not presumptively prejudicial and therefore not automatically reversible. In this case, the trial court's failure to exclude the officer was harmless error.

***State v. Slavin*, 2004 MT 76, 320 Mont. 425, 87 P.3d 495 (Gallatin). Affirmed; Rice, J.** The defense was not prejudiced when the trial judge quashed subpoenas issued to a reporter and an editor who had talked with the victim and written a story about the case. The Court did not reach the issue of whether a defendant's right to due process and confrontation supersedes a reporter's privilege, under the media confidentiality act, to refuse to testify. Instead, the Court determined that any error in excluding the testimony was harmless, since Slavin cross-examined the victim concerning the newspaper story and was able to introduce the same evidence. The Court also held that the trial judge did not abuse his discretion by limiting the testimony of a defense expert witness with respect to the victim's prior conduct.

***State v. Vandersloot*, 2003 MT 179, 316 Mont. 405, 73 P.3d 174 (Big Horn). Affirmed; Nelson, J.** Trent Burke, an inmate trustee at the Big Horn County Jail, observed Vandersloot and others engaged in criminal activity while in jail. Burke testified for the State. Vandersloot contended that Burke concocted the story to get out of jail early. A district court has broad discretion to determine whether evidence is relevant and admissible. The weight of the evidence and credibility of the witnesses are exclusively the province of the trier of fact and, in the event of conflicting evidence, it is within the province of the jury to determine witness credibility and the weight of the evidence. Burke's testimony was properly before the jury.

B. Principles of Liability

***State v. Medicine Top*, 2003 MT 286N (Big Horn). Affirmed; Nelson, J.** Medicine Top argued that her codefendant's plea to a lesser charge barred her conviction of felony accountability. The Court disagreed, noting the plain language of Mont. Code Ann. § 45-2-303, which allows one to be so convicted even though another accountable person "has not been prosecuted or convicted, has been convicted of a different offense, is not amenable to justice, or has been acquitted."

C. Offenses Against the Person

***State v. Bay*, 2003 MT 224, 317 Mont. 181, 75 P.3d 1265 (Custer). Affirmed; Gray, C.J.** Bay was convicted of assault on a peace officer. In this case, assault on a peace officer consists of purposely or knowingly causing bodily injury to a peace officer. Bay argued that there was insufficient evidence to support her conviction. She claimed that she did not intentionally cause the officer bodily injury. The Court disagreed. As Bay was leaving Justice Court, she shoved Officer Kaiser and knocked her backwards. Officer Kaiser testified that that the shove hurt. The Court held that the evidence is sufficient to support a jury finding that Bay caused Officer Kaiser bodily injury by shoving Officer Kaiser hard enough to cause her physical pain. The Court also held that the jury could infer from Bay's actions that she was acting knowingly.

***State v. Gardner*, 2003 MT 338, 318 Mont. 436, 80 P.3d 1262 (Park). Affirmed; Rice, J.** There was sufficient evidence to sustain Gardner's conviction of incest. Gardner was given every opportunity to expose any weaknesses in the interviews and the investigatory process. The jury resolves conflicts in testimony and the Court is unwilling to second-guess the jury on appeal.

***State v. McMahon*, 2003 MT 363, 319 Mont. 77, 81 P.3d 508 (Yellowstone). Affirmed; Nelson, J.** The district court properly denied a defense motion for directed verdict in a felony assault trial where evidence showed that the defendant pulled a gun from her purse after a bar owner asked her to leave, even though the bar owner testified that he was "not really" in fear of his life. The element of fear is not required to prove reasonable apprehension of serious bodily injury. The bar owner's reactions, including wrestling the defendant to the ground and attempting to disarm her, demonstrated reasonable apprehension of serious bodily injury sufficient to warrant jury consideration of the case.

***State v. Medicine Top*, 2003 MT 286N (Big Horn). Affirmed; Nelson, J.** Karri Medicine Top was convicted of accountability for felony assault because another woman was kicked in the head during an altercation with Medicine Top and a third woman. On appeal, Medicine Top argued that the district court should have granted her motion for directed verdict because the State failed to prove the use of a weapon. The Court disagreed, noting that a tennis shoe (which both the assailants were wearing) can be a weapon. *State v. Mummey*, 264 Mont. 272, 871 P.2d 868 (1994). Evidence of the use of the tennis shoe was circumstantial to some extent, but any reasonable juror could have found one of the two assailants kicked the victim in the head.

***State v. Vukasin*, 2003 MT 230, 317 Mont. 204, 75 P.3d 1284 (Cascade). Affirmed; Rice, J.** The district court did not abuse its discretion when it denied the defendant's motion for directed verdict on a charge of partner or family member assault. Evidence that the victim fled from her apartment with her dog, locked herself in her

neighbor's bathroom as the defendant yelled he was going to kill her, observing the knife holes the defendant was making in her apartment door, and ultimately fleeing the building, are facts, when viewed in a light most favorable to the prosecution, from which a jury could find, beyond a reasonable doubt, that the defendant caused the victim reasonable apprehension of bodily injury. The State did not improperly introduce prior bad act evidence, in violation of a very generalized motion in limine, when it asked the victim why she went to her neighbor's house when the defendant arrived at the apartment, or when the State asked the investigating officer when the victim reported to him. The defendant's generalized motion in limine and a lack of objection at trial did not preserve the evidentiary issue complained of on appeal.

***State v. York*, 2003 MT 349, 318 Mont. 511, 81 P.3d 1277 (Teton). Affirmed; Regnier, J.** The Court has affirmed Terry York's convictions of assault with a weapon and criminal endangerment, finding the evidence sufficient to support the convictions. York claimed that the victims' version of the incident was factually impossible and that the district court should have granted his various motions to dismiss. The Court noted that the jury was not required to accept or reject the victims' testimony in its entirety. The jury could have reconciled the testimony with the other evidence, and the Court will defer to the jury's assessment of credibility and resolution of disputed issues of fact.

D. Offenses Against Property

***State v. Black*, 2003 MT 376, 319 Mont. 154, 82 P.3d 926 (Yellowstone). Affirmed; Gray, C.J.** The testimony of two witnesses who calculated that between \$1,270 and \$1,300 was missing from a till, together with evidence that the defendant and his associates were in possession of a similar amount of cash, constituted sufficient evidence that the amount of the theft exceeded \$1,000.

***State v. Dahlin*, 2004 MT 19, 319 Mont. 303, 84 P.3d 35 (Golden Valley). Affirmed and remanded; Leaphart, J.** Dahlin borrowed someone's pickup truck, but didn't return it as agreed. (The testimony showed it had been abandoned in Billings.) Dahlin appealed the district court's denial of his motion for a directed verdict, contending there was insufficient evidence to prove that he committed a theft or that venue could be in Golden Valley County. The Court agreed that failure to return property as agreed is theft, and it cited federal cases holding that "where the crime charged is a failure to do a legally required act, the placed fixed for its performance fixes the situs of the crime." Dahlin, ¶ 11.

***State v. Hall*, 2003 MT 253, 317 Mont. 356, 77 P.3d 239 (Hill). Affirmed and remanded for resentencing; Leaphart, J.** The State presented sufficient evidence upon which the jury could base its guilty verdicts to the theft charges.

1. Hall exercised control over the stolen goods because he had occupied the trailer in the two weeks prior to his arrest, and the stolen goods were discovered in the trailer.

2. The owner testified that the value of the stolen goods was about \$40,000. A rational trier of fact could have determined the value was over \$1,000.

The Court declined to address Hall's other two contentions on this issue because he advanced no authority in their support.

State v. Maloney, 2003 MT 288, 318 Mont. 66, 78 P.3d 1214 (Gallatin).

Affirmed; Cotter, J. Maloney reported to State Farm that her car had been stolen when it in fact had been repossessed. The jury convicted her of attempted felony theft. On appeal, the Court rejected Maloney's argument that the "value" of the property at issue was actual value of the insurance claim, not the amount she requested. Since insurance companies do not generally pay the full amount demanded on an insurance claim, the State here failed in its burden of establishing how much State Farm would have actually paid on her claim in order to prove the felony threshold value. The Court decided that the jury could determine Maloney sought insurance money by deception, inferring from Maloney's own written and unqualified request for \$2,575 that the amount exceeded \$1,000, thus constituting a felony. "The fact that she did not receive the funds in the amount that she requested does not negate the fact she attempted to acquire them."

E. Other Offenses

State v. Chapman, 2004 MT 2N (Chouteau). **Affirmed; Gray, C.J.** Disorderly conduct conviction appealed. Sufficient evidence supported the conviction; Chapman disturbed the status quo of several youths by shouting and purposely chasing them off.

State v. Flowers, 2004 MT 37, 320 Mont. 49, 86 P.3d 3 (Lincoln). **Affirmed; Regnier, J.** Sufficient evidence existed for the jury to find Flowers guilty of the offense of violating privacy in communication, Mont. Code Ann. § 45-8-213(1).

State v. Galpin, 2003 MT 324, 318 Mont. 318, 80 P.3d 1207 (Ravalli).

Affirmed in part; Rice, J. Sufficient evidence was presented at trial upon which the jury could conclude that the offense of manufacture of dangerous drugs was committed in Ravalli County, including testimony from the defendant's girlfriend that he manufactured methamphetamine in both Ravalli and Missoula Counties, and expert testimony that meth was being manufactured in both Ravalli and Missoula counties. The evidence established that the defendant was engaged in a common scheme which resulted in "interrelated and sequential" offenses in multiple counties, whereby the defendant used other people and the property of others to provide him with a place to live, assistance in obtaining precursors, manufacturing locations, and the ability to conceal his whereabouts while conducting his mobile operations. Sufficient evidence also supported the defendant's conviction for criminal endangerment in Ravalli County, specifically including evidence

that two young girls suffered dizziness and headaches because of a “strange turpentine-like odor” in their Stevensville residence.

***State v. Lamb*, 2003 MT 273N (Cascade). Affirmed; Leaphart, J.** The defendant’s testimony that he knew his driver’s license was expired was sufficient to support a conviction for driving with an expired driver’s license.

***State v. Rathbun*, 2003 MT 210, 317 Mont. 66, 75 P.3d 334 (Dawson). Affirmed; Cotter, J.** The Supreme Court also concluded that sufficient evidence supported Rathbun’s conviction of criminal possession of dangerous drugs with the intent to distribute, a violation of Mont. Code Ann. § 45-9-103. The Court found that the meaning of the term “distribute” could be discerned from Mont. Code Ann. § 45-9-101, which defines the offense of criminal distribution of dangerous drugs. That definition includes “giving away” any dangerous drug. Since Rathbun admitted to giving away his marijuana on occasion, the elements of the offense were met and the evidence was sufficient.

***State v. Ruiz*, 2004 MT 135, 321 Mont. 357, ___ P.3d ___ (Missoula). Affirmed in part, reversed in part and remanded; Gray, C.J. (Leaphart, dissenting).** Overturning the conviction for assisting an unqualified applicant (nonresident) in obtaining a resident license, the Court stated that “notwithstanding [the warden’s] undercover persona . . . Ruiz did not assist an unqualified applicant to obtain a resident license because [the warden] actually was a Montana resident.” So, the Court ignored the whole point of an undercover investigation and a wealth of evidence of Ruiz’s illegal activity.

***State v. Struble*, 2004 MT 107, 321 Mont. 89, ___ P.3d ___ (Powell). Affirmed; Nelson, J.** A jury convicted Struble, formerly a Shift Captain at MSP, of theft for claiming hours on his time sheet, and accepting pay for hours he did not work. The district court did abuse its discretion when it denied Struble’s motion for a directed verdict. The jurors had before them considerable circumstantial evidence concerning Struble’s time sheets, MSP’s policies regarding logbook entries recording the comings and goings of persons at the prison, and Struble’s duties as a Shift Captain. The evidence was susceptible to differing interpretations and it was the jury’s call to decide which interpretation would prevail.

***State v. Vandersloot*, 2003 MT 179, 316 Mont. 405, 73 P.3d 174 (Big Horn). Affirmed; Nelson, J.** Sufficient evidence existed for the jury to find that Vandersloot committed the offense of criminal sale of dangerous drugs, a violation of Mont. Code Ann. § 45-9-101(3).

***State v. Wandler*, 2004 MT 78N (Cascade). Affirmed; Gray, C.J.** Wandler appealed his conviction for possession of dangerous drugs. The Court concluded that

possession of Oxycodone and lack of proof of a purported prescription provided sufficient evidence in support of the conviction.

F. Jury Issues

1. Voir Dire

State v. Deschon (II), 2004 MT 32, 320 Mont. 1, 85 P.3d 756 (Lewis and Clark). **Affirmed; Rice, J.** In *State v. Deschon (I)*, 2002 MT 16, 308 Mont. 175, 40 P.3d 391, the Montana Supreme Court remanded the case for an evidentiary hearing for the purpose of reconstructing the unrecorded voir dire portions of Deschon’s trial. The trial court conducted the evidentiary hearing and received testimony from two trial jurors, the four attorneys involved in voir dire, and Deschon. After remand, the Court held that the evidentiary hearing held for the purpose of reconstructing the unrecorded voir dire was sufficient to preserve Deschon’s right to due process. The reconstruction of voir dire was sufficiently complete to allow a determination of whether pretrial publicity had created a bias among jurors. Deschon failed to demonstrate juror bias at the evidentiary hearing. During the second appeal, Deschon raised additional juror bias issues, but Deschon failed to prove these new claims at the evidentiary hearing. Deschon received effective assistance of counsel during voir dire. Deschon’s trial counsel had no grounds to challenge two of the prospective jurors for cause and made a reasonable strategic decision when she exercised peremptory challenges to dismiss these two prospective jurors.

State v. Falls Down, 2003 MT 300, ___ Mont. ___, 79 P.3d 797 (Yellowstone). **Affirmed; Nelson J. (Leaphart, dissenting).** On appeal of his deliberate homicide conviction, Falls Down argued that the district court abused its discretion by failing to grant his motion to strike four venire jurors for cause, thus creating per se reversible error. The prospective jurors candidly expressed troubling uncertainties and reservations about their impartiality. One of them even asserted that she had formed a strong opinion and was “pretty convinced” that Falls Down was guilty based on media reports. The State argued that the jurors’ initial responses proved that they could be fair and impartial; only after artful manipulation of their initial responses by defense counsel did their responses become unclear and seemingly biased. The Court agreed with the State.

Editor’s note: This case might be useful for arguing that while a trial judge’s or prosecutor’s “coaxed recantations” will not be countenanced, neither will a defense counsel’s coaxing a prospective juror to avow the existence of an opinion that was not previously expressed.

State v. Falls Down, 2003 MT 300, ___ Mont. ___, 79 P.3d 797 (Yellowstone). **Affirmed; Nelson, J. (Leaphart, dissenting).** Falls Down faulted the district court for not applying the equal protection test under *Batson v. Kentucky*, 476 U.S. 79 (1986).

The Court rejected the State's argument that defense counsel never properly raised a Batson objection for, regardless of the ineffectual manner of the defense counsel's objection, the prosecutor immediately responded about why he exercised his peremptory challenge. While the district court failed to make findings of fact regarding its reason for denying Falls Down's objection, namely that no prima facie case of purposeful discrimination existed, the record here is sufficient to address the issue raised. The Court accepted the prosecutor's race-neutral explanation.

N.B.: The Court underscored the importance of a trial court applying the three-step Batson analysis announced in State v. Ford, 2001 MT 230, 306 Mont. 517, 39 P.3d 108, specifically in regard to establishing an appeal record. The result in this case may have been dictated by the fact that the Court decided its Ford case over a month after Falls Down's trial ended.

***State v. Heath*, 2004 MT 58, 320 Mont. 211, 89 P. 3d 947 (Cascade). Affirmed in part, reversed in part and remanded; Gray, C.J. (Leaphart and Nelson dissenting).** The district court did not abuse its discretion when it denied Heath's requests to excuse two prospective jurors for cause. Heath challenged the first prospective juror because she had worked as a rape counselor and had been the victim of a stalking incident. She said she could be fair and impartial but acknowledged that defense counsel might not want someone with her experience on the jury. The Court stated that it would review the totality of the prospective juror's responses to determine whether they raised a serious question about her ability to be fair. The Court found that her initial statements did not raise a serious question of bias, and any arguable bias appeared only after defense counsel manipulated her statements. Follow-up questions by the prosecutor and the court did not constitute improper rehabilitation. The second prospective juror was challenged primarily on the basis of her training in psychology and sex offenses. The Court held that her training and experience did not establish a state of mind that would prevent her from acting with impartiality.

***State v. Richeson*, 2004 MT 113, 321 Mont. 126, 89 P.3d 958 (Cascade). Affirmed; Warner, J. (Leaphart, dissenting).** The district court did not abuse its discretion when it denied Richeson's challenge of a juror for cause based solely on the juror's employment as a detention officer. During voir dire the State notified the court that the potential juror was a guard at the detention center and could potentially know Richeson through her employment. Richeson had wide latitude to question the juror during voir dire. There is nothing in the totality of the juror's answers during voir dire demonstrating that she had formed an opinion of guilt or innocence based upon her employment, or that her employment would cause her to harbor actual bias against either Richeson or the State. Although bias may be revealed by circumstantial rather than direct evidence, Richeson's speculation falls short of establishing bias via circumstantial evidence.

Since Richeson and the juror/detention officer did not have a “guardian/ward” relationship as defined in law, Richeson’s trial counsel was not ineffective for failing to challenge the juror for cause pursuant to Mont. Code Ann. § 46-16-115(2)(b).

2. Jury Conduct/Deliberations

***State v. Derrick A. Davis*, 2003 MT 341, 318 Mont. 459, 81 P.3d 484 (Lewis and Clark). Affirmed; Cotter, J.** After opening statements, when the first witness was sworn, an unnamed juror told the judge in open court that the juror knew the witness, but had not recognized his last name. The judge took no action and allowed the witness to testify. Davis contended the district court abused its discretion when it failed to conduct a hearing on possible juror bias. The Court held the objection was waived because the defense did not object at trial to the failure to hold the hearing or object when the witness testified. The Court also declined to address the issue under the plain error doctrine.

***State v. DuBray*, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (Cascade). Affirmed; Regnier, J.** DuBray’s due process rights were not violated because one of the jurors claimed to be psychic. DuBray’s counsel helped formulate a response to a situation that arose with a juror. There is nothing in the record to indicate that the juror claiming to be psychic based opinions about the case on her psychic powers.

***State v. Kennedy (Victor Vann)*, 2004 MT 53, 320 Mont. 161, 85 P.3d 1279 (Yellowstone). Affirmed; Cotter, J.** Kennedy was convicted of sexual intercourse without consent in a companion (with separate trials) case to *State v. Falls Down*, 2003 MT 300, ___ Mont. ___, ___ P.3d ___. The Court agreed with Kennedy that his right to be present at critical stages was violated when the trial court excluded him, defense counsel, and the prosecution from its inquiry in chambers when a juror’s conversations during the trial with a police officer friend who was to testify in the trial came to light. It also agreed that the incident amounted to juror misconduct. It concluded, however, that the error was harmless because Kennedy was not ultimately deprived of a fair and impartial trial.

3. Instructions

***State v. DuBray*, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (Cascade). Affirmed; Regnier, J.** Even though the district court did not instruct the jury, as DuBray requested, on how to view the testimony of informants, the district court did give a cautionary instruction that addressed the credibility of informants and which adequately addressed witness motive, bias, or prejudice.

***State v. Hall*, 2003 MT 253, 317 Mont. 356, 77 P.3d 239 (Hill). Affirmed and remanded for resentencing; Leaphart, J.** The district court did not abuse its discretion

in refusing to give Hall’s proposed “Witness Legally Accountable” instruction because it is not proper to give such an instruction where it is not supported by the evidence and is inconsistent with defendant’s claim of innocence.

***State v. Maloney*, 2003 MT 288, 318 Mont. 66, 78 P.3d 1214 (Gallatin).** **Affirmed; Cotter, J.** Maloney unsuccessfully attempted to introduce to the jury an instruction on “market value” pertinent to her defense concerning her fraudulent request for insurance money. The trial court’s refusal to offer Maloney’s instruction concerning attempted property theft did not prejudicially affect her substantial rights. While an instruction in a criminal case must contain an explanation of the crime, it need not contain the exact statutory language. Furthermore, while a defendant is entitled to have the jury instructed on her theory of the case, she is not entitled to an instruction concerning every nuance of her argument. Here, Maloney’s proposed jury instruction would have been largely redundant to the instruction given and would have added little to the jury’s understanding of the law.

***State v. Rinkenbach*, 2003 MT 348, 318 Mont. 499, 82 P.3d 8 (Flathead).** **Reversed in part and remanded; Gray, C.J. (Nelson, Cotter and Regnier, dissenting).** The Court declined to invoke its discretionary power of plain error review to consider a claim of instructional error. The Court also declined to consider whether trial counsel was ineffective for failing to object to the allegedly erroneous jury instruction, finding that the claim would be more appropriately raised in postconviction proceedings. The Court reversed the district court’s sentencing order (the State conceded the sentencing error) and remanded for an evidentiary hearing on restitution issues that were not adequately addressed in the presentence investigation report. Justice Nelson, joined by Justices Cotter and Regnier, dissented and would have reversed the case for instructional error. Justice Warner filed a concurring opinion in response to the dissents, noting that the instructions, considered as a whole, provided the defendant with a fundamentally fair, if not perfect, trial and that perfection at trial is neither possible nor required.

***State v. Strauss*, 2003 MT 195, 317 Mont. 1, 74 P.3d 1052 (Sanders).** **Affirmed in part, reversed in part; Leaphart, J.** The district court properly instructed the jury about the scope of an intoxicated person’s responsibilities pursuant to Mont. Code Ann. § 45-2-203 and Montana v. Egelhoff, 518 U.S. 37 (1996). The defendant did not argue the constitutionality of Mont. Code Ann. § 45-2-203 on independent state constitutional grounds, so the U.S. Supreme Court’s ruling in Egelhoff is controlling.

G. Mistrial

***State v. DuBray*, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (Cascade).** **Affirmed; Regnier, J.** The district court did not become an adversary to DuBray when it

stopped DuBray’s counsel from inappropriately commenting on the evidence or by making a ruling on the admissibility of disputed evidence.

VIII. SENTENCING

A. Persistent Felony Offender

State v. Minez, 2003 MT 344, 318 Mont. 478, 82 P.3d 1 (Lake). **Affirmed; Gray, C.J. (Cotter, Warner and Leaphart, concurring and dissenting).** Minez had not established that he was illegally sentenced as a persistent felony offender. Contrary to Minez’s representation on appeal that no persistent felony offender notice was filed, the district court file contains such a notice. Further, Minez did not object to the notice in the district court on any basis. Because he did not object, no hearing or findings were required under Mont. Code Ann. § 46-13-108(3).

B. Evidence

State v. J.C., 2004 MT 75, 320 Mont. 411, 87 P.3d 501 (Musselshell). **Affirmed; Leaphart, J.** At the sentencing hearing, the district court, in seeking information to individualize J.C.’s punishment, did not err in allowing a counselor to testify about what J.C. told her about the sentence he received for a previous conviction, which was inconsistent with what he later told another counselor. A statement that is covered by the psychotherapist-patient privilege may be inadmissible at trial but is admissible at a sentencing hearing. The district court did not commit a Shreves error, because it did not sentence J.C. more harshly because he failed to admit he committed the charged offense. The Court distinguished Shreves, and referred to it as a “narrow rule.” Regarding the imposition of costs for reimbursement for court-appointed counsel, it can be inferred from the record that counsel agreed upon the amount. The Court will not put the district court in error for adopting an agreed upon amount.

State v. Legg, 2004 MT 26, 319 Mont. 362, 84 P.3d 648 (Carbon). **Affirmed; Rice, J.** A sentencing court is afforded wide latitude under Mont. Code Ann. § 46-18-115(4)(c) in considering information relevant to treatment of the offender or the risk posed to the community, including statements and letters from persons other than the victim.

State v. Mason, 2003 MT 371, 319 Mont. 117, 82 P.3d 903 (Lake). **Affirmed in part, reversed in part, and remanded; Rice, J. (Leaphart and Cotter, concurring and dissenting).** The sentencing court did not violate Mason’s due process rights by considering allegations of other crimes that were dismissed as part of a plea bargain agreement. If Mason believed the information was inaccurate, it was his obligation to

refute it. The district court's designation of Mason as a violent felony offender was erroneous, however, because there was no evidence that Mason used a weapon capable of causing death (in this case a belt), or that his actions caused the child victim any serious bodily injury.

***Matter of N.V.*, 2004 MT 80, 320 Mont. 442, 87 P.3d 510 (Gallatin).** **Affirmed in part, reversed in part; Rice, J.** Twelve-year-old N.V. was adjudicated a delinquent after committing sexual intercourse without consent. In the course of treatment he took several polygraphs, which showed he had been deceptive in his therapy sessions and had not revealed all his victims and other misdeeds. N.V. admitted to violations when the State moved to revoke his probation. An evaluation by another therapist for dispositional purposes also relied on a polygraph.

At disposition, the district court concluded it could not use the polygraph reports, but they remained in the file and were seen by the placement committee. The State conceded the challenge to the disposition even though the effects of the polygraph were indirect. The Court reversed on the use of the polygraph and the report of the therapist who used a polygraph, noting the "inescapable reality" that the polygraphs affected placement.

C. Credit for Time Served

***State v. Mingus*, 2004 MT 24, 319 Mont. 349, 84 P.3d 658 (Yellowstone).** **Affirmed in part, reversed in part and remanded; Leaphart, J.** The district court did not impose an illegal sentence when it fined Mingus to the mandatory minimum \$1,000 fine. The district court was not in error when it did not specify when Mingus was to pay his fine. Since this fine was not discretionary but mandatory, the district court did not have to consider Mingus's ability to pay. The district court did, however, have to credit Mingus's pretrial incarceration toward the fine. Pursuant to Mont. Code Ann. § 61-8-731(3)(f), the district court ordered that, during his probationary sentence, Mingus remain in an aftercare program. During the oral pronouncement of sentence, the district court ordered Mingus to pay for aftercare without considering his financial ability to do so. In the written sentencing order, the district court ordered Mingus to pay for aftercare if he was financially able. Since the oral pronouncement of the sentence controls, the case is remanded for the district court to make the requisite finding.

***State v. Thomas (James Douglas)*, 2004 MT 42N (Ravalli).** **Affirmed; Nelson, J.** The district court revoked Thomas's suspended sentence, awarding him credit for time served while incarcerated, but declining credit for four years on probation. On appeal, the Court rejected various arguments Thomas made seeking to equate probation with parole. It cited *State v. Frazier*, 2001 MT 210, 306 Mont. 358, 34 P.3d 96, to note that the statutes in effect when Thomas committed the original crime governed sentencing and revocation. Applying Mont. Code Ann. §§ 46-18-203(7) (1995) and 46-18-201(4)

(effective July 1, 1997), the district court was required only to state its reasons for granting or denying credit. It was not required to award credit for time served on probation.

***State v. Wright, 2003 MT 358N (Flathead).* Affirmed in part and reversed in part; Regnier, J. (Rice, dissenting).** The Court, in a noncitable opinion, concluded that the district court erred when it failed to give Wright credit for the time he served in the Cascade County Jail and in the Montana State Prison while awaiting his Flathead County revocation hearing.

D. Mandatory Minimums

***State v. Bailey, 2004 MT 87, 320 Mont. 501, 84 P.3d 1032 (Pondera).* Affirmed; Gray, C.J.** Where a victim is less than 16 and the offender is three or more years older, or if the offender inflicts bodily injury in the course of committing incest, he is subject to a four-year mandatory minimum sentence, which cannot be suspended unless one of the exceptions in Mont. Code Ann. § 46-18-222 applies. If none of the exceptions in Mont. Code Ann. § 46-18-222 apply, then the provisions of Mont. Code Ann. § 46-18-205(1) (providing that the first 30 days any mandatory minimum sentence may not be deferred or suspended) do not come into play.

***State v. Legg, 2004 MT 26, 319 Mont. 362, 84 P.3d 648 (Carbon).* Affirmed; Rice, J.** The sentencing court is not obligated to consider exceptions to the mandatory minimum sentence where defendant agreed to the State's recommendation of thirty years. The fact that the sentencing court imposed a fifty-year sentence does not give rise to a due process claim, in part because the defendant failed to object on that basis but, more importantly, because equitable challenges to the sentence must be presented to the Sentence Review Division.

E. Restitution

***State v. Dahlin, 2004 MT 19, 319 Mont. 303, 84 P.3d 35 (Golden Valley).* Affirmed and remanded; Leaphart, J.** Dahlin appealed the district court's tacking on \$500 restitution for loss of the pickup's use. The State conceded the issue because the owner had not claimed loss of use and there was no evidence supporting the award, despite the obvious propriety and reasonableness of the figure.

***State v. Dunkerson, 2003 MT 234, 317 Mont. 228, 76 P.3d 1085 (Lake).* Affirmed in part, reversed in part and remanded; Nelson, J.** Dunkerson was one of several defendants who stole and destroyed property. The district court assessed about \$24,000 restitution against them jointly. The Court agreed with the State that an evidentiary hearing cured the absence of the victim's pecuniary loss documentation from

the PSI and that the district court was within its discretion when it assessed clean-up and out-of-pocket costs beyond the norm. The State conceded that some of the values the district court found were not market values and that the foundation for replacement value was insufficient, and the Court remanded the case for a showing that replacement values were proper because market values were not readily available or for proper testimony on market value. It also allowed value to be established by hearsay.

State v. Hastie, 2003 MT 335N (Cascade). Affirmed; Leaphart, J. (Gray, dissenting). Hastie pled guilty to burglary and she received a two-year deferred sentence. On appeal Hastie challenged the district court's order requiring her to pay \$108.80 in restitution for the damage she caused to the victim's coffee table. Hastie argued that the PSI and the victim's report of his pecuniary loss that was attached to the PSI were insufficient to establish the amount of damage to the coffee table. The Court disagreed, concluding that the district court did not abuse its discretion in relying on the PSI and the victim's report of loss in determining the proper value of restitution. The Court also noted that the 2003 statutory changes to the restitution statutes apply retroactively to defendants who have unpaid restitution.

State v. Heath, 2004 MT 126, 321 Mont. 280, 90 P.3d 426 (Yellowstone). **Affirmed in part, reversed in part and remanded; Rice, J.** In a unanimous en banc decision, the Court has affirmed, in all but one respect, the restitution order imposed by the district court on Douglas Heath, who pled guilty to stealing a jewelry collection in Billings in June 2000. The main issue was whether the district court had authority to impose restitution in conjunction with a prison sentence. The issue arose from a footnote in an earlier decision, State v. Horton, that pointed out an apparent codification error in the 1999 amendments to Mont. Code Ann. § 46-18-201, the general sentencing statute. The Court indicated in the Horton footnote that restitution could only be imposed if the sentencing court also deferred the imposition of sentence. The Legislature amended the statute in 2003 to expressly provide that restitution must be ordered in all appropriate cases, whether or not all or part of the sentence is suspended or deferred, but the validity of restitution orders for offenses committed between 1999 and 2003 was in question until the Court decided this case. The Court found that the 1999 amendments created an ambiguity, which the Court resolved by looking to the legislative history and other indications of legislative intent. The Court confirmed that sentencing courts remained authorized to impose restitution in all cases during the four-year interval between amendments to the statute. The Court also found that the presentence investigation report contained sufficient information upon which to base the restitution order, and that the amount of restitution was supported by substantial evidence. However, the district court failed to establish the amount, method, and time of the restitution payments, and the Court remanded the case to the district court to amend the judgment by addressing the time and method of Heath's restitution payments.

State v. Mikesell, 2004 MT 146, ___ Mont. ___, ___ P.3d ___ (Rosebud). **Affirmed in part, reversed in part and remanded; Nelson, J.** Mikesell pled guilty to three counts of illegal branding. The district court deferred sentencing for three years and ordered restitution in the amount of \$42,181.81. Mikesell appealed from the restitution award.

1. The district court granted the victim \$30,000 for the loss of fifty-five head of cattle from possible drowning and other unknown causes. The Court reversed, stating that the loss of those cattle was not a pecuniary loss that arose from Mikesell's illegally branding the victim's cattle, for purposes of these criminal proceedings, pursuant to Mont. Code Ann. §§ 46-18-241(1) and -243(1)(a).

2. The district court properly determined that Mikesell was responsible for the feed bill (amounting to \$10,000) for the cattle in dispute. This case spanned several years and the cattle were kept at the Livestock Commission for a good portion of that time. The Court stated that Mikesell could have avoided paying a feed bill if he had consented to the cattle's release to their rightful owners. Instead, the cattle remained at the Miles City Livestock Commission because Mikesell insisted that cattle that did not belong to him should be released to him.

3. Due to the lack of clarity in the record regarding Mikesell's ability to pay restitution, i.e., his assets and debts, the Court remanded for further proceedings to determine Mikesell's ability to pay and to set restitution payments accordingly.

State v. Thompson, 2004 MT 131, 321 Mont. 332, ___ P.3d ___ (Cascade). **Affirmed; Regnier, J. (Leaphart, dissenting).** The district court did not abuse its discretion in ordering Thompson to pay restitution in the form of rekeying the commercial building from which he committed theft. Rekeying the building was a direct result of Thompson's criminal activity. Such expense is not a general damage, but a special damage as contemplated by Mont. Code Ann. § 46-18-243. Justice Leaphart dissented, noting that the sole basis for imposing the cost of rekeying was the tenants' alleged feeling of insecurity. "If allaying subjective feelings of insecurity suffices as a basis for restitution, no doubt the next theft victim will request a salary for a full-time security guard or a state-of-the-art alarm system."

F. Fines or Costs

State v. Mingus, 2004 MT 24, 319 Mont. 349, 84 P.3d 658 (Yellowstone). **Affirmed in part, reversed in part and remanded; Leaphart, J.** The district court did not impose an illegal sentence when it fined Mingus to the mandatory minimum \$1,000 fine. The district court was not in error when it did not specify when Mingus was to pay his fine. Since this fine was not discretionary but mandatory, the district court did not have to consider Mingus's ability to pay. The district court did, however, have to credit Mingus's pretrial incarceration toward the fine. Pursuant to Mont. Code Ann. § 61-8-731(3)(f), the district court ordered that, during his probationary sentence, Mingus remain in an aftercare program. During the oral pronouncement of sentence, the court

ordered Mingus to pay for aftercare without considering his financial ability to do so. In the written sentencing order, the district court ordered Mingus to pay for aftercare if he was financially able. Since the oral pronouncement of the sentence controls, the case is remanded for the district court to make the requisite finding.

G. Enhancement

State v. Hall, 2004 MT 106, 321 Mont. 78, 88 P.3d 1273 (Ravalli). **Affirmed; Nelson, J.** Relying upon McNally, Hall challenged his felony DUI conviction, contending that his prior DUI convictions in Washington were not similar to Montana DUI convictions because Washington employs a lesser degree of culpability. A unanimous five-judge panel of the Court rejected Hall's argument. Citing Washington case law, Hall contended that "any appreciable degree" of impairment under Washington law was synonymous with Colorado's "slightest degree" of culpability--a standard the Court in McNally concluded was inconsistent with Montana's impairment standard. Because Washington does not prohibit drinking and driving, which Colorado's DWAI statute effectively proscribed, the Court concluded that "although Washington's DUI statute has a per se subsection, it is more similar to Montana's per se statute than it is to Colorado's DWAI statute." Relying upon the fact that Washington combines driving under the influence and the per se category into a single statutory offense, whereas Montana treats them as separate offenses, Hall also argued that Washington law does not allow a DUI defendant to prove that he was not impaired. However, the Court noted that Montana's per se offense itself permits a conviction regardless of level of impairment. Thus, a person convicted of violating the per se subsection of Washington's statute "commit[s] an offense for which each sub-section has an analogous statute in Montana."

State v. Keenan, 2003 MT 190, 316 Mont. 493, 74 P.3d 1037 (Missoula). **Affirmed; Rice, J.** After he was charged with felony (fourth) DUI, Keenan filed a motion to dismiss, contending that one of his three prior DUIs was constitutionally infirm. Keenan submitted an affidavit in which he averred that he did not recall being advised of his constitutional rights, that he did not recall waiving his right to counsel, and that he was financially unable to retain counsel with respect to the prior conviction. Because the audiotape of the arraignment had been lost, Keenan argued that his affidavit constituted direct evidence of irregularity, citing the principle that waiver cannot be presumed from a silent record. The Court held: (1) Keenan's inability to recall whether he waived his right to counsel was not direct evidence of irregularity; and (2) because the inability to locate the audiotape was not due to governmental misconduct, the presumption of regularity was unaffected by the absence of a transcript or record.

State v. Markuson, 2003 MT 206, 317 Mont. 43, 75 P.3d 298 (Lake). **Affirmed; Gray, C.J.** A defendant does not undermine the presumption of regularity, which attaches to a prior conviction by submitting an affidavit stating he was not advised of the dangers and disadvantages of waiving his right to an attorney prior to entering his

guilty plea. A trial court is not required to so advise a defendant, as long as the trial court makes sufficient inquiry to ensure that defendant's waiver of the right to counsel is voluntary, knowing, and intelligent. The Ninth Circuit's decision in U.S. v. Akins, 276 F.3d 1141 (9th Cir. 2001) does not compel a contrary conclusion.

***State v. Strauss*, 2003 MT 195, 317 Mont. 1, 74 P.3d 1052 (Sanders). Affirmed in part, reversed in part; Leaphart, J.** Because Mont. Code Ann. § 46-1-401(1) was in effect at the time of Strauss's offense, the district court was required to comply with the statute before enhancing Strauss's sentence under the weapon enhancement statute. The statute requires notification of the enhancement, and a separate finding by the jury. Since that was not done, the additional sentence must be stricken.

H. Correction of Sentence

***State v. Frazier*, 2003 MT 353N, (Cascade). Affirmed; Cotter, J.** In a noncitable opinion, the Montana Supreme Court upheld the authority of the district court to correct Craig William Frazier's sentence based upon a factual error at the time the sentence was imposed. The district court had been under the mistaken impression that Frazier was on probation for the suspended portion of his sentence, when in fact he was on parole. The district court was permitted to change the sentence imposed upon revocation so that it commenced after Frazier had completed his term on parole.

***State v. Stone*, 2004 MT 151, ___ Mont. ___, ___ P.3d ___ (Jefferson). (State concession). Affirmed in part, reversed in part; Nelson, J.** Since the statutory maximum term of incarceration for animal cruelty is two years on each count, Stone's sentence of five years on each count to run concurrently is illegal.

I. Other

***Dexter v. Shields*, 2004 MT 159, ___ Mont. ___, ___ P.3d ___ (Fergus). Reversed; Cotter, J.** Dexter was sentenced in justice court on April 9, 1998, for third offense DUI, upon a guilty plea. The Court majority (Cotter, Nelson, Leaphart and Regnier) states that his one-year jail sentence was suspended upon the condition that he serve 90 days and pay a \$770 fine (the dissenters disagree that this was the sentence imposed--see below). As a favor to Dexter, the justice court allowed Dexter to serve his 90 days over time, on week-ends and when he was not working, provided he initially served ten consecutive days and subsequently served at least ten days per month. Dexter served the initial 10 days, but never reported to serve any of the remaining 80 days. Dexter paid none of the \$770 fine. Dexter's suspended sentence expired on April 9, 1999. The district court issued bench warrants and notices to Dexter regarding his failure to comply with the sentence, to no avail. No revocation petition was ever filed. On January 23, 2002, Dexter was finally arrested on one of the bench warrants and

incarcerated. He filed an application for writ of habeas corpus in the district court. The district court concluded that Justice of the Peace Shields was “within his judicial authority to enforce compliance of his lawful sentencing Order.” Dexter appealed the Order of the district court.

The Court agreed with Shields that the denial of a petition for writ of habeas corpus is not appealable but, in the interest of judicial economy, treated the writ denied by the district court as an original writ of habeas corpus before the Court.

The district court found that contempt proceedings under Mont. Code Ann. § 3-10-401(2001) (unlike Mont. Code Ann. § 46-18-203, which contains a requirement that a revocation petition be filed within a specific period of time) have no statutory time limit. The Court concluded that because Dexter’s contempt could have occurred only during the term of his sentence--between April 9, 1998, and April 9, 1999--the contempt statutes in effect at that time are applicable. Under the penalties in Mont. Code Ann. § 3-1-519, which was in effect in 1998 and 1999 (it was repealed in 2001), contempt of court constituted a misdemeanor, which must be commenced within one year after it was committed. Thus, in Dexter’s case, the last date on which he could have committed contempt was the date his sentence expired, April 9, 1999.

The Court stated that although “we do not condone this practice,” it was not deciding whether the justice court could compel compliance under the current contempt statutes. In this case, the action, even if appropriate, was time-barred.

Justice Rice, joined by Chief Justice Gray, dissented. The dissenters disagreed that Dexter’s one-year jail sentence was suspended upon the condition that he serve 90 days and pay a fine. Justice Rice stated the sentencing order clearly stated that only nine months of Dexter’s one-year sentence was suspended. The 90-day jail sentence and the fine were mandatory. Justice Rice stated that those provisions did not expire at the end of Dexter’s period of suspension, because they were not fulfilled. A principle that under guards our statutes is that a sentence of imprisonment needs nothing more in order to be executed. Justice Rice stated it was not necessary for the justice court to invoke its contempt powers to enforce the judgment, which remained in effect and unexecuted. The district court reached the correct conclusion, but for the wrong reasons.

***State v. Hall*, 2003 MT 253, 317 Mont. 356, 77 P.3d 239 (Hill). Affirmed and remanded for resentencing; Leaphart, J.** The district court imposed a higher sentence than the one that was offered during plea bargaining. The State had agreed that pursuant to Baldwin, when the district court becomes involved in plea negotiations and an offer is made, any difference in the sentencing after trial must point out the factors which justify the increased sentence. The Court remanded for resentencing.

***State v. Heath*, 2004 MT 58, 320 Mont. 211, 89 P. 3d 947 (Cascade). Affirmed in part, reversed in part and remanded; Gray, C.J. (Leaphart and Nelson dissenting).** The case was remanded for resentencing because the district court sentenced Heath to a DOC commitment of 25 years, with 5 years suspended, when the law permitted no more than 5 unsuspended years to DOC. The Court rejected Heath’s

argument that the appropriate remedy was to modify his sentence to 25 years DOC, with all but 5 years suspended. The Court concluded that the illegal unsuspended portion of Heath's sentence affected the entire sentence, and it could not discern what the district court would have done if it properly applied the law.

***State v. Herd*, 2004 MT 85, 320 Mont. 490, 87 P.3d 1017 (Missoula). Reversed and remanded for resentencing; Cotter, J. (Gray and Warner, dissenting).** Herd pled guilty to four counts of negligent homicide after driving head-on into an oncoming vehicle while en route from Seattle to Great Falls to see her dying mother. The district court imposed a 40-year sentence, suspended on the condition that Herd lose her driving privileges during that time. The Court reversed, holding that the district court's findings concerning the tragic circumstances of this accident, Herd's good prospects for rehabilitation, and her law-abiding life could not be reconciled with the driving restriction, which "drastically inhibits Herd's ability to make a living, serve the needs of her family, and pay court-ordered restitution." Note that because Herd received no prison time, she was not eligible for sentence review under Mont. Code Ann. § 46-18-901. The Court clarified that, where a defendant is ineligible for sentence review, the Court will review the sentence for both legality and for equity.

***State v. Legg*, 2004 MT 26, 319 Mont. 362, 84 P.3d 648 (Carbon). Affirmed; Rice, J.** Defendant's failure to timely object to technical defects in the sentence (i.e., the adequacy of the reasons for the sentence as contained in the written judgment) constitutes a waiver pursuant to Mont. Code Ann. § 46-18-116.

***State v. Megard*, 2004 MT 67, 320 Mont. 323, 87 P.3d 448 (Lincoln). Affirmed; Gray, C.J.** The district court did not violate Megard's due process rights at a hearing on a petition to revoke Megard's suspended sentence by admitting telephonic testimony of two officers who were attending the Montana Law Enforcement Academy and could not personally attend the hearing. The district court was familiar with both officers and admission of the telephonic testimony did not impede the district court's ability to judge their credibility. Further, Mont. R. Evid. 611(e) was inapplicable to Megard's revocation hearing. Megard's statutory right, pursuant to Mont. Code Ann. § 46-18-203(4), for the opportunity to question adverse witnesses was not violated. Megard's minimum due process rights were met. Finally, even assuming error occurred, Megard could not establish prejudice when Megard admitted three violations and did not challenge the evidence of the fourth violation.

***State v. Pedersen*, 2003 MT 315, 318 Mont. 262, 80 P.3d 79 (Cascade). Affirmed; Cotter, J.** The Court rejected Pedersen's argument that he was entitled to a bifurcated revocation of a suspended sentence hearing, with the evidentiary and dispositional phases separated into two distinct proceedings. No Montana statutory or common law authority supports Pedersen's contention. District courts have wide latitude in controlling courtroom procedure.

***State v. Rathbun*, 2003 MT 210, 317 Mont. 66, 75 P.3d 334 (Dawson).**
Affirmed; Cotter, J. Rathbun claimed that he should have been sentenced to the Montana Department of Public Health and Human Services, instead of being committed to DOC, because his multiple sclerosis had affected his mental functioning, but the Court found that the district court had considered all of the evidence of Rathbun’s mental condition and did not abuse its discretion in finding that Rathbun did not meet his burden to establish the requisite mental condition for a commitment to DPHHS.

IX. POST TRIAL

A. Appeal to Supreme Court

***City of Kalispell v. Iams*, No. 03-072 (February 10, 2004). Dismissed; Gray, C.J.** On appeal from the district court, the appellant provided audio recordings of municipal court proceedings, but refused to provide a transcript, absent Court order.

1. “Rule 9, M.R.App.P., is clear that a written record of the proceedings in the municipal and district courts must be provided on appeal.”

2. *Missoula v. Robertson*, No. 98-029, which the appellant had received, previously clarified “that a stenographic record of proceedings in a municipal court must be filed on appeal to this court.”

***State v. Adgerson*, 2003 MT 284, 318 Mont. 22, 78 P.3d 850 (Lewis and Clark).**
Affirmed; Regnier, J. Reginald Adgerson was convicted of felony stalking under Mont. Code Ann. §§ 45-5-220(1)(b) and (3). The Court declined to review two of the issues because they were not raised below: (1) whether the district judge erred by not recusing herself because his wife was a probation officer who regularly appeared in district court; and (2) whether the prosecutor committed misconduct by not withdrawing because of impartiality (the county attorney regularly works with probation officers, and a deputy county attorney had filed the victim’s initial divorce petition (the victim was married to Adgerson). The Court declined to review under plain error. Similarly, it did not consider Adgerson’s ineffectiveness claim based on trial counsel’s not moving to disqualify all the judges in the district and to remove the prosecutor.

***State v. Daniels*, 2003 MT 247, 317 Mont. 331, 77 P.3d 224 (Cascade).**
Affirmed; Warner, J. The Court refused to invoke its inherent authority under the plain error doctrine to review issues, raised for the first time on appeal, relative to the prosecutor’s comments in closing argument, propriety of the codefendant’s testimony, and legality of jury instruction on legal accountability. The Court did address the defendant’s record-based ineffective assistance of counsel claims and found that: (1) where the record was silent as to why counsel did not call certain witnesses, no ineffective assistance of counsel claim would lie; (2) defense counsel’s cross-examination of the victim was within the accepted practices of trial attorneys; and (3) counsel was not

ineffective for failing to object to evidence, otherwise admissible, that portrayed his client as a gang member or drug dealer.

***State v. Derrick A. Davis*, 2003 MT 341, 318 Mont. 459, 81 P.3d 484 (Lewis and Clark). Affirmed; Cotter, J.** Davis contended that he received ineffective assistance of counsel when defense counsel failed to object to the potentially biased juror. The Court declined to address the issue because the record is silent as to the basis for defense counsel's decision not to object. Finally, Davis maintained he received ineffective assistance of counsel when defense counsel requested a continuance of the trial date, claiming the continuance gave the State the opportunity to file an amended information containing additional charges. The Court declined to address this issue because "the issue was submitted without adequate support," noting that less than one page of Davis's opening brief was devoted to this issue.

***State v. Finley*, 2003 MT 239, 317 Mont. 268, 77 P.3d 193 (Lake). Affirmed in part, reversed in part and remanded; Nelson, J.** Whether the court complies with the requirements of Mont. Code Ann. § 46-23-1012 during a probation revocation proceeding is a question of subject matter jurisdiction, which can be raised anytime. Thus, even though the defendant raised no objection to the procedure employed during the re-revocation of Finley's probation (pursuant to State v. Giddings), any error in that procedure can be reviewed for the first time on appeal.

***State v. Flowers*, 2004 MT 37, 320 Mont. 49, 86 P.3d 3 (Lincoln). Affirmed; Regnier, J.** Mere allegations of error, without proof of prejudice, are inadequate to satisfy the doctrine of cumulative error.

***State v. Henderson*, 2003 MT 285, 318 Mont. 31, 78 P.3d 848 (Flathead). Appeal dismissed; Nelson, J.** Henderson was convicted of attempted deliberate homicide after shooting his brother at close range. Henderson's defense was that the brother was the aggressor. In opening statement, defense counsel implied that jurors would "hear from Ron" about what happened. Ultimately, Ron did not testify. On appeal, appellate counsel alleged that counsel was ineffective for failing to deliver what he promised. The Court declined to review this issue because the record does not fully disclose why counsel took a particular action. The issue is better left for postconviction review.

***State v. Wood*, 2003 MT 204N (Ravalli). Affirmed; Regnier, J.** In an unpublished opinion, the Court affirmed Wood's convictions for conspiracy, attempted criminal possession with intent to distribute dangerous drugs (methamphetamine), and operation of an illegal clandestine laboratory. On appeal, Wood challenged the district court's denial of his suppression motion and his motions for directed verdicts. However, the Court refused to address the merits, noting, "Wood's brief contains conclusory allegations of reversible error with no citations to the record in support of his position."

Because the district court's decision is "presumed correct" and Wood failed to satisfy his burden of showing lower court error, the Court dismissed the appeal.

B. Postconviction Relief

***State v. Cobell*, 2004 MT 46, 320 Mont. 122, 86 P.3d 20 (Cascade).** **Affirmed; Rice, J.** The district court summarily dismissed the petition for postconviction relief in a one-line order, with no explanation of the grounds upon which relief was denied. While district courts are statutorily authorized to summarily dismiss a postconviction petition, Mont. Code Ann. § 46-21-201(1)(a), district courts are urged to set forth the reason for dismissal in order to facilitate review of the decision on appeal. Here, the petition failed to establish sufficient facts to make out a claim of ineffective assistance of counsel, and was properly dismissed.

***Davis v. State*, 2004 MT 112, 321 Mont. 118, 88 P.3d 1285 (Missoula).** **Affirmed; Rice, J.** The Court affirmed the district court's denial of Davis's first postconviction relief petition. Davis had pled guilty to aggravated kidnapping, and was given a deferred sentence. Davis was one month shy of his eighteenth birthday when he committed the crime. The Court also affirmed the denial of Davis's second postconviction relief petition, which was filed after Davis's deferred imposition of sentence was revoked. Davis admitted the allegations in the petition to revoke the deferred sentence.

1. The district court properly denied Davis's first petition because it was time-barred. The Court rejected Davis's contention that his deferred sentence did not constitute a conviction. A deferred imposition of sentence is final for purposes of appeal and postconviction relief. The Court also rejected Davis's assertion that the district court lacked subject matter jurisdiction because the case was not properly transferred from youth court to district court. A review of the record reveals that the filing of the Information in the district court was proper.

2. The district court properly denied Davis's second petition on the grounds of ineffective assistance of counsel. Davis requested a boot camp placement after his deferred sentence was revoked. Davis alleged that his counsel told him to withhold from the district court a back condition that would disqualify him from boot camp. Davis's counsel filed an affidavit denying that he gave that advice. Prior to sentencing, Davis himself told the probation and parole officer that he had suffered a crushed vertebrae and was always in pain, but that the condition would not limit his ability to participate fully in boot camp. This information was reflected in the PSI, and the district court was aware of the back problem when it pronounced sentence. The Court thus concluded that Davis could not show that the alleged deficient performance of his counsel prejudiced him. Further, Davis failed to establish that he would not have pled guilty to the violation of his deferred sentence, and would have insisted on going to trial, but for his counsel's alleged advice not to disclose his back injury.

***Ellenburg v. Chase*, 2004 MT 66, 320 Mont. 315, 87 P.3d 473 (Missoula).**
Affirmed; Nelson J. The Court affirmed the district court’s denial of postconviction relief. The Court held that because Mont. R. Civ. P. 12(b)(6) is inconsistent with the specific pleading and proof provisions of the postconviction petition statutes, “the traditional civil law standards for testing the sufficiency of claims is unavailable to postconviction petitioners.” The Court then procedurally barred the issues raised by Ellenburg because they either were or could have been raised on direct appeal; they were not preserved for appeal under Mont. Code Ann. § 46-12-204(3); or they were not raised in the district court in postconviction proceedings. The Court stated that Ellenburg’s ineffective assistance of counsel claims are “record based” and, therefore, he was required to raise them on direct appeal. Finally, Ellenburg waived his challenge to the sentence he received, including restitution, because he received exactly the same sentence he bargained for.

***Griffin v. State*, 2003 MT 267, 317 Mont. 457, 77 P.3d 545 (Missoula).**
Affirmed; Cotter, J. The district court properly dismissed postconviction petition without a hearing where the petitioner failed to allege facts in support of his claims. Claims that are raised for the first time on appeal will not be addressed. The petitioner’s convictions for sexual assault of children, based on his possession of child pornography, does not violate *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), because Montana law requires that actual children be depicted in the pornography.

***Harris v. State*, 2003 MT 258, 317 Mont. 406, 77 P.3d 272 (Lincoln).**
Affirmed; Gray, C.J. The Montana Supreme Court has affirmed the district court’s denial of Wayland Paul Harris's petition for postconviction relief. The Court held: (1) Harris did not have a right of substitution of the district judge. The specific provisions of Mont. Code Ann. § 46-21-101 require a postconviction relief petition to be filed in the court that imposed the sentence, and the general provisions of Mont. Code Ann. § 3-1-804 concerning substitution are not available in postconviction proceedings; (2) Harris failed to show that his court-appointed attorney had an actual conflict of interest, and the district court did not abuse its discretion in denying Harris's motion for appointment of another attorney; and (3) Harris did not establish that his trial attorney (Ed Sheehy) was ineffective when counsel questioned Harris during direct examination about a confession.

***State v. Hendricks*, 2003 MT 223, 317 Mont. 177, 75 P.3d 1268 (Lincoln).**
Affirmed; Gray, C.J. Hendricks stabbed the victim with a kitchen knife. On direct appeal, Hendricks contended that his counsel was ineffective for failing to raise the affirmative defense of justifiable use of force (even though Hendricks admitted the victim was unarmed). The district court affirmed the conviction but dismissed the IAC claim without prejudice. The district court resolved “conflicting lines of authority” governing instances where the direct appeal record is insufficient to determine an ineffective assistance claim. “[W]e will dismiss the direct appeal and require the defendant to raise

the ineffective assistance claim via a postconviction relief proceeding, if at all.”
Hendricks, ¶¶ 11-12.

***Henson v. State*, 2003 MT 362N (Yellowstone). Affirmed; Leaphart, J.** Henson was convicted of aggravated assault by accountability. He was sixteen years old. Henson later filed a postconviction petition. The district court denied Henson postconviction relief and the Court affirmed the district court’s decision. The Court concluded that the petition was time barred and rejected Henson’s subject matter jurisdiction argument. However, in rejecting that argument, the Court did not follow the reasoning set forth in its recent order in Thompson v. District Court, No. 03-525. The Court stated:

We recognize that Henson argues that the procedural time bar does not apply because jurisdiction cannot be waived and may therefore be argued at any time. Henson claims the District Court did not have jurisdiction over the charge, nor did it have authority to impose his sentence. However, § 41-5-206(1)(b)(iii), MCA (1997), clearly provides that a juvenile sixteen years of age or older may be tried as an adult for aggravated assault. Furthermore, each of the crimes listed in § 41-5-206(1)(b), MCA, may be charged by accountability, including aggravated assault. Section 41-5-206(1)(b)(x), MCA (1997). Therefore, the District Court did have subject matter jurisdiction and the one-year time bar of § 46-21-102(1), MCA, applies.

***Kellames v. State*, 2003 MT 312N (Yellowstone). Affirmed; Cotter, J.** The Court refused to address Kellames’ claim that his confession was coerced, his due process claim regarding his motion for appointment of new counsel, and a number of his ineffective assistance of counsel (IAC) claims because the Court had already addressed those claims in Kellames’ direct appeal. The Court rejected Kellames’ three additional IAC claims, concluding that they should have been brought on direct appeal, were unsupported by the evidence, or would not pass the Strickland test.

***McDonald v. State*, 2004 MT 79N (Granite). Affirmed; Leaphart, J.** In an unpublished opinion written by Justice Leaphart, the Montana Supreme Court has affirmed Judge Mizner’s denial of Darell McDonald’s petition for postconviction relief. McDonald was convicted of various misdemeanor hunting offenses, and he claimed that he was denied the effective assistance of counsel at trial and on appeal. The Court reviewed each claim and determined that counsel’s performance had not been deficient and that McDonald’s complaints concerned, for the most part, strategic decisions that counsel made during the trial and appeal, in many instances after consulting with McDonald. The Court confirmed that such strategic decisions are to be given high deference and would not be second-guessed on appeal.

***State v. Morgan*, 2003 MT 193, 316 Mont. 509, 74 P.3d 1047 (Ravalli).**
Affirmed; Leaphart, J. Following a high-speed chase involving Ravalli County law enforcement officers, Morgan fired a high-powered rifle at three officers, hitting one officer in the elbow. Morgan entered into an open plea agreement whereby he agreed to enter no contest pleas to three counts of attempted deliberate homicide and one count of assault with a weapon in exchange for the prosecution dropping other charges. After receiving life sentences for the attempted deliberate homicide convictions, Morgan filed a petition for postconviction relief asserting three claims of ineffective assistance of counsel: (1) counsel incorrectly advised him the prosecution did not have to prove an essential element of the homicide charge; (2) counsel incorrectly informed him that the judge was inclined to give him a light sentence; and (3) counsel inadequately represented him at the sentence review hearing. The Court rejected each claim, emphasizing that given the language of the pretrial agreement and the strength of the evidence against him, Morgan failed to establish the second (prejudice) prong of the Strickland test. The Court also rejected Morgan's claim that the district court should have allowed him to withdraw his guilty plea, concluding that Morgan satisfied none of the three factors the Court considers when reviewing such matters. Notably, the Court concluded that Morgan's motion, which was filed thirteen months after he entered his pleas, was not timely.

***State v. Pope*, 2003 MT 330, 318 Mont. 383, 80 P.3d 1232 (Missoula).**
Reversed and remanded for a new trial; Warner, J. (Gray and Rice, dissenting). Pope was convicted of sexual intercourse without consent and kidnapping in 1994. More than five years later, he sought to petition for postconviction relief, claiming that newly discovered evidence in the form of DNA evidence justified the Court's review of instructional error. The State countered that Pope's petition was time barred, and that the DNA evidence did not prove his actual innocence. The Court disagreed, noting that there are two different forms of "actual innocence." One is a stand-alone claim, in which case a petitioner must prove he did not commit the crime for which he was convicted. The remedy is that the petitioner goes free. The other is a "gateway" claim, in which case a petitioner must demonstrate that a constitutional violation (in this case, erroneous jury instructions) has probably resulted in the conviction of an individual whom no reasonable juror would have found guilty beyond a reasonable doubt. In the "gateway" situation, a petitioner gets a new trial as a form of relief. Since the jury instructions were faulty, the jury's verdict is suspect, and the petitioner is entitled to a new trial.

***Raugust v. State*, 2003 MT 367, 319 Mont. 97, 82 P.3d 890 (Sanders);**
Affirmed; Rice, J. The Court rejected Raugust's contention that the one-year period for filing a postconviction relief petition should commence on the date the Court issues its remittitur, plus one day under Mont. R. Civ. P. 6(a), plus 90 days under U.S. Supreme Court Rule 13, because the 90-day period for petitioning the U.S. Supreme Court under Rule 13 does not commence at the issuance of remittitur from this Court, but rather, on the date the decision is rendered. The Court rejected Raugust's contention that his claim of newly discovered evidence extended the one-year limitation period under Mont. Code

Ann. § 46-21-102(2). Raugust claimed that he had newly discovered evidence that a key eyewitness to the offense, Rory Ross, confessed to the offense to another witness, Randy Fisher, while waiting in the County Attorney's Office to testify in Raugust's trial. The Court stated that Raugust failed to state when he first became aware of Fisher's recollection of the alleged Ross confession, and Raugust did not demonstrate that this evidence could not have been discovered earlier through diligence, thereby failing to establish the State v. Greeno factors regarding timeliness. Further, the Court said, Ross's alleged confession is directly inconsistent with the totality of evidence presented at trial. Therefore, the Court concluded that the alleged newly discovered evidence is not so material that it would probably produce a different result upon another trial, under Greeno. As such, the one-year time limitation was not waived, and it was not extended under the newly discovered evidence exception.

***Sanchez v. State*, 2004 MT 9, 319 Mont. 226, 86 P.3d 1 (Yellowstone).**

Affirmed; Leaphart, J. The Court held that Sanchez's original postconviction petition and amended postconviction petition were time barred by Mont. Code Ann. § 46-21-101(1). The Court explained that time limitation under Mont. Code Ann. § 46-21-101 is a jurisdictional limit on litigation, but there are exceptions to the time bar. The Court, however, concluded that the statutory exception in Mont. Code Ann. § 46-21-101(2) and the miscarriage of justice exception were inapplicable.

***Schaff v. State*, 2003 MT 187, 316 Mont. 453, 73 P.3d 806 (Yellowstone).**

Affirmed; Regnier, J. The district court properly denied Schaff's postconviction claim that attorney Vern Woodward provided ineffective assistance of counsel when negotiating a plea agreement with the State. The record, from both the lower court proceedings and the postconviction evidentiary hearing, demonstrates that Woodward provided exemplary representation, and was careful to allow Schaff the decision of whether or not to accept the plea agreement, and whether to have another attorney appointed on Schaff's motion to withdraw his guilty plea.

***Thurston v. State*, 2004 MT 142, ___ Mont. ___, ___ P.3d ___ (Cascade).**

Affirmed in part, reversed in part; Regnier, J. The sentencing court's failure to consider the statutory nonviolent offender criteria is not a question of subject matter jurisdiction, so that the district court properly dismissed the claim as procedurally barred from postconviction review. Reversed and remanded for further consideration of the petitioner's non-record based ineffective assistance of counsel claims.

C. Habeas Corpus

***Nelson v. Mahoney*, S. Ct. Order 03-845.** Nelson was convicted of felony DUI and ordered to serve 13 months DOC, followed by 4 years probation. After his appeal was resolved, Nelson presented himself to authorities to begin serving his sentence, to no avail. Nelson remained in the community, enrolling himself in the ACT program, and

otherwise complying with the terms of his sentence. In 2003, he was apprehended on a bench warrant and sent to prison. The Court ordered that Nelson be released from custody because his prison sentence commenced to run back in 2001, when he presented himself to authorities. Habeas relief granted.

Polaski v. State, 03-365 (Missoula); Unpublished order. Following his conviction for fifth offense DUI, Polaski was sentenced to 13 months at MSP, followed by a 5-year commitment to the Department of Corrections. The 5-year commitment was suspended on conditions, including the condition that Polaski complete the WATCH program. Polaski was given credit for 395 days time served, which meant that he discharged his prison sentence the same day it was imposed. Polaski then transferred directly to the WATCH program. Thereafter, he filed a petition for a writ of habeas corpus claiming that he has been in custody for 564 days, that he has more than served his time, and that he should be released immediately. The Court agreed on the basis of Mont. Code Ann. § 61-8-731(1)(a), which contemplates that a DUI defendant will complete a residential alcohol treatment program such as WATCH **during** his 13-month sentence, and that the remaining 5-year sentence will be suspended in its entirety. The Court reasoned that because the district court ordered completion of the WATCH program **in addition to** the 13-month sentence, Polaski's 5-year sentence has not been suspended in its entirety, and his incarceration is illegal.

D. Revocation of Sentence

State v. Finley, 2003 MT 239, 317 Mont. 268, 77 P.3d 193 (Lake). Affirmed in part, reversed in part and remanded; Nelson, J. As a matter of due process, a court must obtain record admissions from the defendant regarding the allegations in the revocation petition. Here, defendant's counsel indicated that the defendant wished to withdraw his previous denials and admit to the allegations set forth in the probation violation report. The Court held that defense counsel cannot waive a defendant's fundamental rights as a matter of convenience, citing Tapson and Bird, so that the order of revocation must be overturned. In a special concurring opinion, authoring Justice Nelson suggested that district courts admonish the defendant regarding the consequences of his admissions, utilizing the following factors from the Illinois case of People v. Hall, 760 N.E.2d 971 (Ill. 2001):

- (1) the probationer understands the specific allegations in the State's petition to revoke probation;
- (2) the probationer understands that he has the right to a hearing with defense counsel present at which the State must prove the alleged violation, and that he has the rights of confrontation and cross-examination at such a hearing;
- (3) the probationer's admission is voluntarily made and not made on the basis of any coercion or promises, other than any agreement as to the disposition of his case;

- (4) the probationer understands the consequences of his admission or the sentencing range for the underlying offense; and
- (5) a factual basis exists for the admission.

E. Sentence Review

***State v. Herd*, 2004 MT 85, 320 Mont. 490, 87 P.3d 1017 (Missoula). Reversed and remanded for resentencing; Cotter, J. (Gray and Warner, dissenting).** Herd pled guilty to four counts of negligent homicide after driving head-on into an oncoming vehicle while en route from Seattle to Great Falls to see her dying mother. The district court imposed a 40-year sentence, suspended on the condition that Herd lose her driving privileges during that time. The Court reversed, holding that the district court’s findings concerning the tragic circumstances of this accident, Herd’s good prospects for rehabilitation, and her law-abiding life could not be reconciled with the driving restriction, which “drastically inhibits Herd’s ability to make a living, serve the needs of her family, and pay court-ordered restitution.” Note that because Herd received no prison time, she was not eligible for sentence review under Mont. Code Ann. § 46-18-901. The Court clarified that, where a defendant is ineligible for sentence review, the Court will review the sentence for both legality and for equity.

X. YOUTHS IN NEED OF CARE

A. Termination of Parental Rights

***In the Matter of A.F. and A.C.*, 2003 MT 254, 317 Mont. 367, 77 P.3d 266 (Yellowstone). Affirmed; Cotter, J.** The statutory criteria for termination was met where the mother suffered from a number of mental conditions, and the counselors and psychologists testified that the orders were difficult to treat, and that the mother had not successfully complied with her treatment plans.

***Matter of A.R. & M.R.*, 2003 MT 280N (Gallatin). Affirmed; Nelson, J.** Failure or refusal to supply urine samples for drug testing (part of the treatment plan), irregular or interrupted compliance with other parts of the treatment plan, including meeting with therapists, case workers, supplying a constant address, continued residence with drug-using partner, all supplied clear and convincing evidence supporting termination. The mother contended that she had changed and deserved another chance, and she also disputed social worker's testimony on warnings of non-compliance.

***In the Matter of A.R. and S.A.R.*, 2004 MT 22, 319 Mont. 340, 83 P.3d 1287 (Yellowstone). Affirmed; Cotter, J.** The mother’s due process rights were not violated when the State did not conduct a permanency plan hearing within the time provided for in Mont. Code Ann. § 41-3-445(1)(a)(i)(B). The proceeding was not fundamentally unfair

because DPHHS worked diligently on reuniting the children with their natural father or their natural mother. Ultimately, DPHHS placed the children with their father who successfully completed his treatment plan. (Note: the Court cautioned that DPHHS should petition for the permanency plan hearings within the statutorily-required time period.) Similarly the length of the proceeding did not prejudice the mother. The district court did not deny the mother due process when it: refused to order DPHHS to pay for a second psychological evaluation of the mother when it had paid for the first evaluation the results of which were uncontested; denied the mother's request for additional state-paid drug analysis when the mother never challenged the results of the drug analysis in the first instance and the State presented convincing evidence of the reliability of the results; and ruled that if the mother's visits with her children were reinstated she could have her counselor present to observe her interaction with her children.

D.T. and K.J.D.M., 2004 MT 52N (Yellowstone). **Affirmed; Cotter, J.** The Court will not review the mother's claim that service by publication was defective where the mother's counsel appeared at the final termination hearing and did not bring the alleged defects to the court's attention.

In Re the Matter of B.B.W., 2003 MT 377N (Park). **Affirmed; Warner, J.** Termination of parental rights appealed.

1. Although the timing and circumstances of the parents' interviews (post-birth, at hospital) were not ideal, they were justified under the circumstances (previous termination of parental rights, inquiry about "in-home" C-section, threat to blow up courthouse, etc.); statutory requirement of parental interviews satisfied.

2. Parents' procedural rights protected where on two occasions prior to termination they could and did present evidence to the court.

In re C.H., S.H., and D.H., 2003 MT 308, 318 Mont. 208, 79 P.3d 822 (Yellowstone). **Affirmed; Leaphart, J.** While the mother attempted to comply with her treatment plan, she failed to comply with all of its terms and was ultimately unsuccessful. The mother denied the Department access to her mental health care providers, she missed meetings, she was likely to return to the lifestyle which gave rise to the proceedings, and she did not demonstrate sufficient mental stability to be able to parent her high needs children.

Matter of J.G., C.G., & M. G.-E., 2004 MT 104, 321 Mont. 54, 89 P.3d 11 (Lincoln). **Affirmed; Warner, J.** The Court's resolution is summarized below for each issue.

1. Did the District Court err in considering issues beyond physical neglect when it concluded R.G. failed to comply with the treatment plan?

The Appellant objected to the district court's considering any problem other than physical abuse, which was the only basis for termination mentioned in the petition. The Court rejected this argument, noting that the order adjudicating the children as youths in

need of care recited “chronic, physical neglect as a result of unsafe and unhealthy living conditions in the family home and parenting deficits exhibited by [R.G.] that caused psychological abuse of the children.” The Appellant was thus on notice of other issues.

Further, Mont. Code Ann. § 41-3-443 says that treatment plans must identify “the problems or conditions that resulted in the abuse or neglect of a child.” The Department may address problems other than the one for which a child is initially removed because the purpose of the proceedings is to protect the child.

2. Did the District Court err in concluding R.G.’s condition was not likely to change in a reasonable time?

The district court could consider whether the Appellant’s emotional problems that led to psychological abuse to the children were unlikely to change in a reasonable amount of time. The district court’s finding was not clearly erroneous because there was evidence the Appellant’s condition would not change within a reasonable time when the children’s welfare was taken into account. The Appellant’s objection that the Department should have called her own psychologist was not preserved for appeal.

3. Did the District Court err in concluding termination of R.G.’s parental rights was in the best interests of the children?

Evidence conflicted, but the district court was not clearly erroneous in accepting a psychologist’s testimony that the children needed a permanent resolution given the long history of the case and that “the situation was confusing to the children and that the children never knew how to behave because they wanted to help their mother but could not handle her parenting deficits.”

***Matter of B.N.Y.*, 2003 MT 241, 317 Mont. 291, 77 P.3d 189 (Silver Bow). Reversed; Rice, J.** In a Silver Bow County case, the Court has reversed the district court’s order terminating the natural mother’s parental rights to B.N.Y., a 12-year-old girl with extreme emotional and behavioral disorders. In an earlier guardianship proceeding in Beaverhead County, another district judge had found B.N.Y. to be a youth in need of care, so the Department of Public Health and Human Services did not request any further adjudication of B.N.Y.’s status until after the district court granted the Department temporary legal custody and approved a treatment plan for the mother. The Court held that the district court failed to comply with the statutory requirement that the adjudication of the child as a youth in need of care must be made before the approval of a treatment plan. The Court stated that the adjudication of the child’s status could not be established by evidence received in a collateral matter. The district court’s failure to adjudicate B.N.Y.’s status as a youth in need of care before proceeding with the treatment plan violated the mother’s right to due process and fundamentally fair procedures at each stage of the termination proceedings.

***In the Matter of J.C., Jr. and R.B.*, 2003 MT 369, 319 Mont. 112, 82 P.3d 900 (Custer). Affirmed; Warner, J.** The district court did not abuse its discretion when it terminated the mother’s parental rights. The record does not demonstrate that the district

court erred in finding that the conduct or condition rendering the mother unfit was unlikely to change within a reasonable time.

Matter of J.C.B. and L.E.C., 2004 MT 111, 321 Mont. 110, 88 P.3d 1280 (Yellowstone). **Affirmed; Rice, J.** Even though the district court's order did not specifically address the fundamental rights of parents, the district court properly applied the statutory criteria for termination, so that no abuse of discretion has been shown. credibility determinations are within the district court's discretion, so where the father's testimony conflicted with the son's testimony regarding extent of abuse, district court was justified in believing the son's version of events and basing its order of termination thereon.

Matter of M.J.R., Youth in Need of Care, 2004 MT 12N (Yellowstone). **Affirmed; Leaphart, J.** This is useful as a straightforward summary of a district court's application of the statutory tests required to terminate parental rights.

Matter of R.F. & H.F., 2004 MT 102N (Cascade). **Affirmed; Regnier, J.** Summary affirmance on a challenge to order terminating parental rights. The Appellant argued her treatment plan was inappropriate, but had stipulated to it, failed to object before the district court, and offered no evidence that she was in compliance with the plan. She did not counter DPHHS's evidence that her condition would not change within a reasonable time.

In re T.J.H., J.H., J.L., and A.L., 2003 MT 352, 318 Mont. 528, 81 P.3d 504 (Yellowstone). **Affirmed; Leaphart, J.** Sufficient evidence supported termination of parental rights for lack of treatment compliance and success based upon the testimony of three social workers that the mother did not follow through, had positive UAs for marijuana, was belligerent, failed to attend AA or one-on-one counseling, missed medical appointments when the children were returned to her care, and failed to terminate a physically abusive relationship.

B. ICWA

In re C.H., S.H., and D.H., 2003 MT 308, 318 Mont. 208, 79 P.3d 822 (Yellowstone). **Affirmed; Leaphart, J.** At issue was the Native American heritage of two of the children. The Court held that C.H. was not an Indian child under the ICWA because of her insufficient blood quantum and because the Little Shell Band is not a federally recognized tribe.

Following the termination hearing, the mother raised D.H.'s possible Indian heritage for the first time in a footnote in her proposed findings of fact, which stated, "[mother] has not alleged that she is a member of an Indian Tribe, however, the undersigned counsel has been verbally advised that [R.H.], [D.H.'s] father is an enrolled member of the Northern Cheyenne Tribe." The Court held that it would not overturn a

child termination proceeding for failure to comply with the ICWA when neither the Department nor the district court had any notice of child's Indian heritage.

The Court noted that if D.H.'s Indian heritage qualifies under the ICWA, the tribe may participate in future proceedings concerning D.H.'s placement. The Court noted that the district court and the Department are on notice of D.H.'s possible Indian heritage for any future proceedings regarding D.H.

***In re K.S., D.S., and C.S.*, 2003 MT 212, 317 Mont. 88, 75 P.3d 325 (Cascade). Affirmed; Regnier, J.** Following termination of her parental rights, the mother appealed, contending that the district court erred when it permitted the Department's expert (Martina Heavy Runner) to testify as an expert for purposes of the Indian Child Welfare Act (ICWA), and that the district court's termination of parental rights was an abuse of discretion. Without addressing the Department's contention that ICWA does not apply because the Little Shell Tribe is not a federally-recognized tribe for purposes of ICWA, the Court concluded that Heavy Runner was qualified as an ICWA expert, noting that she is a Blackfeet tribal member who is also familiar with the customs of the Little Shell Tribe. Deferring to the district court, the Court also concluded that the district court's findings were not clearly erroneous and, because the children have been in foster care since October 1999, Montana law presumes that termination of parental rights is in the best interests of the children.

***In re T.J.H., J.H., J.L., and A.L.*, 2003 MT 352, 318 Mont. 528, 81 P.3d 504 (Yellowstone). Affirmed; Leaphart, J.** Declining to address whether the district court should have treated a letter from the Tribe's ICWA coordinator as hearsay, the Court held that other evidence established that the Indian father's own testimony and the testimony of a social worker that the Department, after engaging in active efforts to ascertain the children's ancestry, had determined that they did not have a sufficient blood quotient to be considered eligible for tribal membership.

***In the Matter of T.W.*, 2003 MT 197N (Cascade). Affirmed; Gray, C.J. (Nelson, J., specially concurring).** The Court declined to address the mother's argument that the district court improperly terminated her parental rights when the father was given extra time to complete his treatment plan because she cited no statutory or case law in support of her argument.

The Court found that the ICWA expert was properly qualified under two of three sets of characteristics that satisfy the expert witness requirement. The mother's argument that the expert wasn't qualified related to the third set of characteristics and while the district court did not specify under which set of characteristics the expert was qualified, the record showed that she was qualified under both the first and second sets of characteristics.

Justice Nelson specially concurred, noting that DPHHS and the district court proceeded as if the ICWA applied without ever definitely determining whether the child was, in fact, an "Indian child." The State had urged the Court to direct trial courts in the

future to definitively determine a child's Indian status before proceeding under the ICWA. Justice Nelson agreed that making that determination initially will conserve DPHHS' and the district court's resources and may eliminate grounds for appeal.

XI. MISCELLANEOUS PROCEEDINGS

A. License Revocation Proceedings

***State v. Alexander*, 2004 MT 92 (Gallatin).** **Affirmed; Nelson, J.** Alexander appealed the denial of his petition to reinstate driving privileges following his refusal to submit to PBT testing. The Court concluded that the facts of the record demonstrate "the exact circumstances under which the State may properly suspend a driver's license" and that Alexander's initial receipt of the wrong notice form (i.e. commercial vehicle form instead of the proper non-commercial form) was irrelevant to whether suspension of his license was proper.

***Parpart v. State*, 2004 MT 4, 319 Mont. 182, 84 P.3d 1 (Lewis and Clark).** **Affirmed in part, reversed in part; Leaphart, J. (Gray and Nelson, dissenting).** A district court has no statutory authority to order suspension of a driver's license beyond the expiration of a defendant's sentence. The dissenters would not have reached this issue because it was not properly before the Court. The issue raised in district court was of a constitutional nature, whereas the Court's resolution of the issue was on statutory grounds.

***Widdicombe v. State*, 2004 MT 49, 320 Mont. 133, 85 P.3d 1271 (Sweet Grass).** **Affirmed; Leaphart, J.** Appeal of denial of a petition for reinstatement of a driver's license. The officer had particularized suspicion because Widdicombe crossed the yellow line three times before he stopped. The Court distinguished *State v. Lafferty*, 1998 MT 247, 291 Mont. 157, 967 P.2d 363, in which it determined that driving close to and crossing the fog line did not give rise to a particularized suspicion. Staying to the right of the yellow line is, however, mandatory. Additionally, *Lafferty* involved a criminal charge of DUI, but this is a civil action in which the petitioner had the burden of proof. The arrest was proper. When he spoke with Widdicombe after the stop, the officer noticed the odor of alcohol and Widdicombe's "slow and deliberate" walk to the patrol car. Widdicombe flunked the HGN and other sobriety tests.

B. Juveniles

***Matter of N.V.*, 2004 MT 80, 320 Mont. 442, 87 P.3d 510 (Gallatin).** **Affirmed in part, reversed in part; Rice, J.** The State conceded error in the court's extending jurisdiction over N.V. until his twenty-fifth birthday because the Extended Jurisdiction Prosecution Act, Mont. Code Ann. § 41-5-1602 (2001), does not apply to offenses that,

were they committed by an adult, bear maximum punishments of life imprisonment, death, or incarceration for one hundred years. Mont. Code Ann. § 41-5-1602(1).

N.V.'s counsel also appealed on the youth court's denial of his request for funds for family counseling and travel expenses for N.V.'s family and of his request for counsel's travel expenses to Pine Hills. The Court agreed that Mont. Code Ann. § 41-5-101(1) says that one of the purposes of the Youth Court Act is to preserve family unity, but agreed with the State that N.V. cited no provision authorizing travel costs. As to counsel's travel, the Court said the youth court did not abuse its discretion when it denied the request because there was no evidence face-to-face consultations were required.

C. Contempt

***Drew v. District Court*, 2004 MT 154, ___ Mont. ___, ___ P.3d ___ (Judith Basin). Writ of supervisory control denied. (Leaphart, dissenting).** Attorney Roberta Drew was held in contempt for failing to comply with a district court order. She filed an original proceeding in the Montana Supreme Court arguing that her due process rights were violated because she was not afforded a neutral judge. The Court noted that when the contempt is indirect, as here, due process requires certain safeguards, but the statute specifically recognizes the authority of the district court to punish where the contempt arises from the violation of a court order (unless it is shown that the judge would not be impartial). Mont. Code Ann. § 3-1-518 (2001). No showing was made here. The Court rejected Drew's argument that the statute was unconstitutional. Leaphart dissented, noting that Judge Tucker had previously found Ms. Drew not to be credible, and could thus not be impartial as the statute requires.

XII. INEFFECTIVE ASSISTANCE OF COUNSEL

***State v. Daniels*, 2003 MT 247, 317 Mont. 331, 77 P.3d 224 (Cascade).** **Affirmed; Warner, J.** The Court refused to invoke its inherent authority under the plain error doctrine to review issues, raised for the first time on appeal, relative to prosecutor's comments in closing argument, propriety of codefendant's testimony, and legality of jury instruction on legal accountability. The Court did address the defendant's record-based ineffective assistance of counsel claims and found that: (1) where the record was silent as to why counsel did not call certain witnesses, no ineffective assistance of counsel claim would lie; (2) defense counsel's cross-examination of the victim was within the accepted practices of trial attorneys; and (3) counsel was not ineffective for failing to object to evidence, otherwise admissible, that portrayed his client as a gang member or drug dealer.

***State v. DeMary*, 2003 MT 307, 318 Mont. 200, 79 P.3d 817 (Richland).** **Affirmed; Warner, J.** DeMary was not denied his right to effective assistance of counsel by defense counsel's failure to timely give notice of his intent to call expert witness Dr. Sarah Baxter because of lack of sufficient prejudice, under Strickland.

DeMary suffered little or no prejudice as a result of the district court's decision to preclude Dr. Baxter from testifying.

***Hope v. State*, 2003 MT 191, 316 Mont. 497, 74 P.3d 1039 (Yellowstone).** **Reversed and remanded; Leaphart, J.** Hope assaulted his girlfriend and was arrested and jailed on Saturday, Sept. 18. He was given an initial appearance in justice court on Thursday, Sept. 23. While in jail, and sometime before his initial appearance, he wrote four letters to the victim, expressing his love and remorse. The letters were admitted at the trial without objection. In his postconviction petition Hope claimed that the delay in his initial appearance violated state law, that the letters were obtained as a result of the delay, and that his counsel was ineffective for failing to object to the admission of the letters. The district court agreed that the delay was unreasonable but found that two of the letters were written within 48 hours after Hope's arrest, before the delay became excessive, and that they would have been admitted even if Hope's attorney had objected. However, the trial court's order mistakenly referred to "Monday, September 21" when Monday was actually September 20. The Court concluded that there was nothing in the record to show that the letters were written before Tuesday, September 21, three days after the arrest, and the Court found that the two letters should also have been suppressed. The Court determined that the failure of Hope's attorney to move for suppression of the letters amounted to ineffective assistance of counsel and remanded the case for a new trial.

***State v. J.C.*, 2004 MT 75, 320 Mont. 411, 87 P.3d 501 (Musselshell).** **Affirmed; Leaphart, J.** J.C., an adult male, was convicted of incest of his male biological son (the Court apparently used the defendant's initials in the opinion to protect the privacy of the victim), based on allegations that he had sexual contact with the victim from May 1999 through May 2001. J.C. was sentenced to 50 years at MSP, with all but 20 years suspended.

J.C.'s counsel was not ineffective for questioning the victim on cross-examination about whether he had been improperly influenced or coached to change his testimony during the break, which allowed the State to present rebuttal testimony of the victim's prior inconsistent statements. The Court stated that this was proper trial strategy, and counsel would have been remiss in his duty if he ignored the complete change in the victim's testimony.

***State v. Notti*, 2003 MT 296, 318 Mont. 146, 79 P.3d 289 (Missoula).** **Affirmed; Cotter, J.** Notti was convicted by a jury of sexual intercourse without consent. On direct appeal, he alleged ineffective assistance of his trial counsel for failing to file pre-trial motions to preclude numerous trial witnesses from repeating the prior inconsistent statements of the complaining witness, and for failing to object at trial when the State repeatedly presented purportedly inadmissible hearsay evidence (Mont. R. Evid. 801(d)(1)(B)) through these witnesses. The Court reiterated that there is a strong presumption of competence of counsel that cannot be rebutted on a silent record.

Because the record was silent in this case as to why counsel failed to file pre-trial motions and failed to object to the admission of the challenged evidence at trial, the claimed deficiencies cannot be reviewed on direct appeal. The judgment of the district court was affirmed, and the ineffective assistance of counsel claim was dismissed without prejudice to its being raised in a postconviction proceeding.

***Schaff v. State*, 2003 MT 187, 316 Mont. 453, 73 P.3d 806 (Yellowstone).** **Affirmed; Regnier, J.** The district court properly denied Schaff's postconviction claim that attorney Vern Woodward provided ineffective assistance of counsel when negotiating a plea agreement with the State. The record, from both the lower court proceedings and the postconviction evidentiary hearing, demonstrates that Woodward provided exemplary representation, and was careful to allow Schaff the decision of whether or not to accept the plea agreement, and whether to have another attorney appointed on Schaff's motion to withdraw his guilty plea.

***Thurston v. State*, 2004 MT 142, ___ Mont. ___, ___ P.3d ___ (Cascade).** **Affirmed in part, reversed in part; Regnier, J.** The postconviction petitioner failed to state a claim that his defense attorney had a conflict of interest, and was thus ineffective, because of his former employment as a deputy county attorney. Even though the ABA Standards on Criminal Justice suggest that the defense attorney should not have represented petitioner in criminal proceedings after supposedly gaining knowledge of the case through his employment, it is not a basis for reversal unless an "actual conflict" is shown.

XIII. CONSTITUTIONAL ISSUES

A. Due Process/Equal Protection

***State v. Egdorf*, 2003 MT 264, 317 Mont. 436, 77 P.3d 517 (Musselshell).** **Affirmed; Rice, J.** The three-year statute of limitations for fish and game violations under Mont. Code Ann. §§ 45-1-205(5) and (6) does not violate equal protection and due process.

***In re A.S.*, 2004 MT 62, 320 Mont. 268, 87 P.3d 408 (Cascade).** **Affirmed; Regnier, J.** In a termination proceeding, parents have a due process right to effective assistance of counsel. The effectiveness of counsel in these situations should be evaluated by the following non-exclusive factors: (1) training and experience; and (2) advocacy. If under these factors, a parent has been denied effective assistance of counsel, then the Court will determine whether a parent suffered prejudice as a result of counsel's ineffectiveness.

***State v. Megard*, 2004 MT 67, 320 Mont. 323, 87 P.3d 448 (Lincoln).** **Affirmed; Gray, C.J.** The district court did not violate Megard's due process rights at a hearing on a

petition to revoke Megard's suspended sentence by admitting telephonic testimony of two officers who were attending the Montana Law Enforcement Academy and could not personally attend the hearing. The district court was familiar with both officers and admission of the telephonic testimony did not impede the court's ability to judge their credibility. Further, Mont. R. Evid. 611(e) was inapplicable to Megard's revocation hearing. Megard's statutory right, pursuant to Mont. Code Ann. § 46-18-203(4), for the opportunity to question adverse witnesses, was not violated. Megard's minimum due process rights were met. Finally, even assuming error occurred, Megard could not establish prejudice when Megard admitted three violations and did not challenge the evidence of the fourth violation.

State v. Pedersen, 2003 MT 315, 318 Mont. 262, 80 P.3d 79 (Cascade).

Affirmed; Cotter, J. Pedersen's due process rights were not violated at the hearing on the revocation of his suspended sentence when the district court denied his request for a continuance and allowed the State to introduce drug test results, even though the State failed to allege and notify Pedersen that his drug use would be used against him. Pedersen was due less process than in a criminal trial, and in any event the district court's error in admitting the drug test results was harmless. The court's findings do not reference the drug test results, nor did the court rely upon them in revoking Pedersen's suspended sentence. The record discloses more than enough evidence to revoke the suspended sentence, Pedersen having openly admitted to violating two probationary conditions.

B. First Amendment/Right to Free Speech

State v. Robinson, 2003 MT 364, 319 Mont. 82, 82 P.3d 27 (Missoula).

Affirmed; Leaphart, J. (Cotter and Gray, dissenting). Was Robinson's speech in unprovokedly yelling "F***** pig," and "F*** you, ***hole" to a police officer on a crowded street protected under the First Amendment or rather was his speech "fighting words" subjecting him to a disturbing the peace charge? Robinson argued, relying on Ninth Circuit Court authority, that a police officer or other public official responsible for maintaining peace and order should have to ignore vulgarities directed at them of the type which would create a breach of the peace if directed at a layperson. The State argued that adopting Robinson's argument would carve an exception out of the constitutionally narrowed limits of proscribable insults directed at society at large and would encourage the notion that officers should have to endure more abuse than other members of society. Agreeing with the State and expressly refusing to "lock-step" with the Ninth Circuit, the Court declared, "Were we to adopt this 'who is likely to respond belligerently' rationale, any troglodyte could wander the streets calling children and old men 'f***** pigs' because, due to their age or infirmity, they, like the well-trained policeman, will not be able to respond in a violent fashion." Robinson, ¶ 21.

Editor's note: Justice Cotter, joined by Chief Justice Gray, dissented and argued children and old men are neither trained nor obligated to keep the peace. The police officer here should have just ignored Robinson's vulgar remarks.

C. Right to Counsel

***State v. Garcia*, 2003 MT 211, 317 Mont. 73, 75 P.3d 313 (Cascade). Reversed and remanded; Regnier, J.** A few weeks prior to trial, Garcia, who was represented by the public defender's office, contacted a private attorney who agreed to represent him for \$3,000 on two conditions: (1) Garcia had to obtain a continuance; and (2) counsel would not handle any appeals. Approximately ten days before trial, Garcia informed the district court that he desired to hire private counsel, that counsel could not be ready for trial, and that he therefore needed a continuance. The district court denied the motion, noting that the public defender was competent and would be ready for trial, the case had been pending since 1997 and Garcia had a right to speedy trial, and that the district court's crowded docket could not accommodate a continuance. The Court concluded that the district court's consideration of the competence of the public defender was irrelevant because Garcia's motion implicated his fundamental right to retain counsel of his choice, Garcia waived his right to speedy trial, and "close questions" regarding motions to continue "should be resolved in favor of the defendant to ensure a fair trial." Because denial of the right to private representation is prejudicial per se, and therefore "structural," the Court reversed and remanded for a new trial.

***State v. Gazda*, 2003 MT 350, 318 Mont. 516, 82 P.3d 20 (Lewis and Clark). Affirmed; Regnier, J.** When a defendant asks for substitution of counsel, the district court is not obligated to appoint new counsel in order to conduct the initial inquiry regarding whether defendant's complaint against his/her attorney is substantial. Chief Justice Gray cautions defense attorneys not to read this opinion as a license to testify against their clients at the initial inquiry.

***State v. Insua*, 2004 MT 14, 319 Mont. 254, 84 P.3d 11 (Ravalli). Affirmed; Rice, J.** On the adequacy of the district court's questioning him before permitting him to represent himself, Insua argued the district court failed to advise him about the specific dangers and disadvantages of representing himself. He maintained that because the Montana Constitution's protection of the right to representation is broader than the federal right, a generalized inquiry is no longer acceptable. He urged adoption of a Ninth Circuit test. The Court agreed our protection is broader, but declined to adopt a specific "litany." A district court must "receive sufficient evidence to support a finding that a defendant's decision to waive the right to counsel and exercise his right to represent himself is made voluntarily, knowingly and intelligently. The test focuses, not on what a defendant was told, but on a determination that a defendant understands his decision and is proceeding voluntarily." So there.

***State v. Minez*, 2003 MT 344, 318 Mont. 478, 82 P.3d 1 (Lake). Affirmed; Gray, C.J. (Cotter, Warner and Leaphart, concurring and dissenting).** Minez was charged and convicted by a jury of Count I, criminal production of dangerous drugs (methamphetamine) and Count II, use or possession of property (glassware and chemicals used to make methamphetamine) subject to criminal forfeiture.

The district court did not abuse its discretion when it denied Minez's motion for substitution of counsel. Minez's assertion on appeal that his trial counsel, Ben Anciaux, had a conflict of interest in representing him was not raised in the district court so the Court refused to consider it. The Court held that the trial court held an adequate initial inquiry into Minez's complaints about Anciaux, and properly exercised its discretion in determining that Minez failed to present seemingly substantial complaints and in declining to hold an additional hearing.

D. Double Jeopardy

***State v. Gazda*, 2003 MT 350, 318 Mont. 516, 82 P.3d 20 (Lewis and Clark). Affirmed; Regnier, J.** Gazda, a convicted felon, shot and killed Bronson Smith with a gun he used to shoot cats. He was prosecuted in federal court as a felon in possession of a firearm, and was prosecuted in state court for the homicide. He argued that the federal prosecution precluded his prosecution in state court under Montana's double jeopardy statute, Mont. Code Ann. § 46-11-504. The Court disagreed, noting that there was no concurrent jurisdiction, nor was the act of shooting Bronson part of the "same transaction" in possessing the gun.

***State v. Minez*, 2003 MT 344, 318 Mont. 478, 82 P.3d 1 (Lake). Affirmed; Gray, C.J. (Cotter, Warner and Leaphart, concurring and dissenting).** Minez's convictions of producing methamphetamine, and possession of glassware and chemicals used to produce methamphetamine, do not violate his rights against double jeopardy. Minez asserted that since Count II was only a form of preparation to committing Count I, his conviction of both counts violates his rights under Mont. Code Ann. § 46-11-410(2)(b). He also asserted that convictions of both counts violates the Double Jeopardy Clause of the U.S. and Montana Constitutions. Regarding Mont. Code Ann. § 46-11-410(2)(b), there was no violation since neither Counts I or II is a statutorily enumerated inchoate offense. *State v. Wolfe*, 250 Mont. 400, 821 P.2d 339 (1991). Regarding Double Jeopardy, the Court stated that the Blockburger test is still appropriate as the standard for determining whether double jeopardy precludes charging two crimes where neither is a lesser-included offense of the other. Finding that the offenses in Mont. Code Ann. § 45-9-110(1) and -206(1) each require proof of an additional fact not required by the other, the Court held that Minez had not established a constitutional double jeopardy violation. (Justices Cotter, Leaphart and Warner dissented on this issue. Finding that Minez had established both a statutory and constitutional double jeopardy violation, they would reverse his conviction of Count II and direct the district court to vacate his sentence on that charge.)

E. Ex Post Facto

***State v. Mount*, 2003 MT 275, 317 Mont. 481, 78 P.3d 829 (Missoula).** **State appeal; reversed and remanded with instructions to reinstate charges; Nelson, J.** Mount was charged in 2000 with failing to register as a sex offender, pursuant to the retroactive registration requirements enacted by the Legislature in 1997. The district court granted Mount's motion to dismiss the charges, on the ground that the Sex Offender Registration Act, as applied to Mount, was ex post facto, because it subjected him to enhanced punishment based on his prior conviction. The Court reversed the district court's ruling, holding that the Act is regulatory and nonpunitive in nature, following the U.S. Supreme Court's analysis in Smith v. Doe, 123 S. Ct. 1140 and Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

F. Speedy Trial

***State v. Bertolino*, 2003 MT 266, 317 Mont. 453, 77 P.3d 543 (Beaverhead).** **Reversed; Rice, J.** Good cause for failing to prosecute a misdemeanor defendant within six months is not established by showing that the defendant failed to comply with court-ordered deadlines. The State should have timely prosecuted the case and asked for sanctions, rather than allowing the six-month deadline to pass.

***State v. Topp*, 2003 MT 209, 317 Mont. 59, 75 P.3d 330 (Ravalli).** **Affirmed; Gray, C.J.** On February 5, 2001, Topp pled guilty to the misdemeanor offenses of DUI (second offense) and failure to provide proof of liability insurance (fourth offense), in Ravalli County Justice Court. On March 14, 2001, the justice court granted the State's motion to dismiss the citations because it intended to file charges in the district court. On March 21, 2001, the State filed an Information in the district court charging Topp with felony criminal endangerment and the two misdemeanor offenses previously dismissed by the justice court. Topp did not dispute the propriety of joinder of the offenses under Mont. Code Ann. § 46-11-404(1). On August 13, 2001, Topp moved to dismiss the two misdemeanor charges for lack of speedy trial, arguing that Mont. Code Ann. § 46-13-401(2) required the misdemeanor charges to be tried within six months of February 5, 2001, the date he pled not guilty in the justice court. The district court denied the motion, and Topp pled guilty, reserving his right to appeal the denial of the motion to dismiss. The Court affirmed, stating that Mont. Code Ann. § 46-13-401(2) is not applicable to the district court in this case because the justice court dismissed the charges significantly less than six months after Topp entered his not guilty plea, thereby exhausting its jurisdiction. At that point, no charges were pending against Topp. When the State joined the misdemeanor charges with the felony charges in district court, the charges, and the case were an entirely new matter, in essence a case de novo in the district court.

G. Privacy

***City of Whitefish v. Large*, 2003 MT 322, 318 Mont. 310, 80 P.3d 427 (Flathead). Affirmed; Leaphart, J.** Responding to an anonymous tip of a possible drunk driver, officers confronted the defendant, who was found asleep in her vehicle parked in the carport next to her condo, and subsequently arrested her for DUI. The defendant argued that all evidence should be suppressed because the arrest occurred in violation of a statute, which forbids nighttime arrests for misdemeanors in the home or the person's private dwelling place. The Court held that the statutory safeguards pertaining to one's "home" do not encompass a carport attached to a condominium unit. The Court rejected the defendant's argument that this area was afforded special protection under Article II, section 10 of the Montana Constitution.

H. Vagueness/Overbreadth

***State v. Adgerson*, 2003 MT 284, 318 Mont. 22, 78 P.3d 850 (Lewis and Clark). Affirmed; Regnier, J.** The Court rejected the defendant's argument that the stalking statute is vague and overbroad because it proscribed protected speech by interfering with his right to parent his children, to family privacy, and to happiness and individual dignity. The Court followed its earlier ruling in *State v. Martel*, 273 Mont. 143, 902 P.2d 14 (1995), which determined that the words of the statute were commonly understood. Although it agreed that some of Adgerson's conduct was protected, it also agreed with the district court that the conduct for which he had been prosecuted--harassment of the victim--was not protected.

***State v. Leeson*, 2003 MT 354, 319 Mont. 1, 82 P.3d 16 (Cascade). Affirmed; Regnier, J.** Leeson was charged with operation of an unlawful clandestine laboratory, in violation of Mont. Code Ann. § 45-9-132 (2001). He moved to dismiss the charge on the ground that 45-9-132 was unconstitutionally vague and overbroad. The district court denied the motion, and Leeson pled guilty, reserving his right to appeal the above issues.

1. Alleged unconstitutional facial vagueness. The Court stated it would not address the State's assertion that Leeson lacked standing (which the State argued was dispositive). Rather, the Court determined that Leeson's assertion failed on its merits. The Court rejected Leeson's contention that a person of ordinary intelligence may be in possession of supplies, equipment, and materials commonly used for other purposes, that COULD be used to manufacture methamphetamine, subjecting that person to arrest for operating an unlawful clandestine laboratory under Mont. Code Ann. § 45-9-132. The Court stated that given the specificity of the relevant statutes, it is difficult to imagine how a person of ordinary intelligence could fail to understand what conduct Mont. Code Ann. § 45-9-132 forbids. Further, Mont. Code Ann. § 45-9-132 incorporates a mens rea requirement, therefore making it virtually impossible for a person to inadvertently violate

the statute. The Court also disagreed with Leeson that the subjective nature of the enforcement of Mont. Code Ann. § 45-9-132, rendered it unconstitutionally vague.

2. Alleged unconstitutional overbreadth. The Court stated it would not address the State's argument that Leeson waived the overbreadth argument for failure to properly raise it before the district court. Rather, the Court determined that Leeson's assertion failed on the merits. The Court rejected Leeson's assertion that Mont. Code Ann. § 45-9-132 was unconstitutionally overbroad because it subjects innocent people to being arrested for possessing certain items, which are otherwise legal to possess, if such items could be used to manufacture methamphetamine. The Court stated that Leeson had not demonstrated how Mont. Code Ann. § 45-9-132 might infringe on constitutionally protected rights in a real or substantial way, and Leeson did not argue that the statute is unconstitutional as applied.

State v. Turbiville, 2003 MT 340, 318 Mont. 451, 81 P.3d 475 (Fallon).

Affirmed; Rice, J. Montana's implied consent statute--specifically, Mont. Code Ann. §§ 61-8-402(4) and (7), and the statutory definition of "driver's license"--Mont. Code Ann. § 61-1-136(3)--are not constitutionally vague as pertains to a nonresident licensee as the definition of driver's license includes any nonresident driving privilege and advisory was technically correct in informing the defendant of the potential serious consequences of losing his Montana driving privileges should he refuse to take a breath test.

I. Brady

State v. DuBray, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (Cascade).

Affirmed; Regnier, J. The State did not fail to disclose exculpatory evidence thereby warranting a mistrial. Any "benefit" that a witness received was incidental to his testimony and not in exchange for the information/testimony.

J. Restoration of Rights

State v. Wagner, 2004 MT 31, 319 Mont. 413, 85 P.3d 750 (Lewis and Clark).

Affirmed; Gray, C.J. Wagner was a convicted sexual and violent offender who discharged his sentence and was released from MSP. Rather than register under the SVORA, he filed a civil action in state district court alleging that the SVORA violated his rights under several provisions of the Montana Constitution, including his rights to be restored to full civil rights upon release from supervision. Mont. Const. Art. II, § 28, and his right to "exist free from state supervision" under Art. II, § 3. The district court entered summary judgment against him on all claims, and he appealed to the Montana Supreme Court. The Court stayed the appeal pending release of State v. Mount, 2003 MT 275, 317 Mont. 481, 78 P.3d 829, in which the Court rejected numerous challenges to the SVORA. On appeal, the Court reaffirmed the holding in Mount that the

rights restored under Mont. Const. Art. II, § 28 are only civil and political rights, such as the right to vote, and do not include the right to be treated as though the prior conviction never happened. The Court specifically held that the rights restored “do not include or equate to individual rights enumerated under either the Montana or United States Constitution,” and that the SVORA does not infringe “any rights” restored under Mont. Const. Art. II, § 28. Wagner, ¶ 16.