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I. INVESTIGATIVE PROCEDURES/TECHNIQUES

A. Miranda/Interrogation

Morrissey v. District Court, No. 04-661 (original writ). The Defendant, charged with homicide and kidnapping, filed an original writ to challenge the district court's ruling regarding the admissibility of his statements made to police. The Court refused to consider the voluntary nature of the defendant's admissions, made after Miranda warnings were given, because voluntariness is "largely a question of fact" and the defendant failed to provide a record of the suppression hearing or a transcript of the interview by police. Supervisory control denied.

State v. McCollom, 2005 MT 61, ___ Mont. ___, 109 P.3d 215 (Powell). **Affirmed; Warner, J.** Michael Gene McCollom was charged with taking unseemly liberties with the daughter of J.S., McCollom's female associate, and one of the daughter's friends. Both girls were about nine years old. J.S. told McCollom that a warrant had been issued for his arrest for sexual assault. McCollom received this news while living in Arizona, having had the generous loan of J.S.'s pickup to travel there. He decided to return to Montana to consult an attorney in Missoula. J.S. arranged to meet him in Rocker to accompany him to the attorney's office. She passed on this information to the police, however, who took the opportunity to arrest McCollom as he and J.S. drove through Powell County.

After his arrest, an officer told McCollom what the police knew, played a portion of the taped interview of one of the girls, and advised McCollom of his Miranda rights. McCollom signed a waiver and allowed the officer to conduct a taped interview. After retaining counsel, he moved to suppress the interview, but then pled guilty, reserving the right to appeal.

His first point was that the Powell County officers obstructed his federal and Montana right to counsel by arresting him knowing he was on his way to consult with an attorney. The Court rejected this argument, which it termed "novel," noting that McCollom had failed to request an attorney either before or during the interview. There was no evidence the police had arrested him to prevent his consulting counsel.

McCollom's second argument was that he was woozy from not having slept for 30 hours and was told what the police suspected before receiving his Miranda warning. The Court applied its usual standard of review to the district court's findings, which did not find McCollom's complaints persuasive.

McCollom also complained that he had confessed because the officer promised leniency and treatment. The district court had noted that the officer's remarks in this

regard occurred after McCollom confessed, not before, and thus discounted the effect of the officer's statement on the voluntariness of the confession. The Court agreed.

***State v. Nelson*, 2004 MT 310, 323 Mont. 510, 101 P.3d 261 (Hill). Affirmed; Rice, J.** An officer's failure to give Miranda warnings or the advisory required (before repeal) by Mont. Code Ann. § 46-5-401 (2001), discussed in State v. Krause, 2002 MT 63, ¶ 38, 309 Mont. 174, 44 P.3d 493, applies to the suppression of statements, not "an officer's observations of a suspect's nonverbal conduct."

II. SEARCH AND SEIZURE

A. Search Warrants

***State v. Anyan, Cleveland, and Klein*, 2004 MT 395, 325 Mont. 245, 104 P.3d 511 (Sanders). Reversed; Nelson, J. (Gray, Warner and Rice, dissenting).** In a 4-3 decision, the Montana Supreme Court has reversed the Sanders County convictions of Tanya Anyan, Jay Cleveland, and Troy Klein for various drug offenses, concluding that Judge McNeil should have granted the defendants' motions to suppress evidence of the meth lab found in their house in Thompson Falls because the officers did not knock and announce their presence before entering the house to serve a search warrant. Addressing an issue of first impression, the Court determined that the officers did not establish sufficient "exigent circumstances" to justify a no-knock entry into the house.

The Court adopted the Fourth Amendment analysis of the United States Supreme Court in Richards v. Wisconsin, which held that to justify a no-knock entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit effective investigation of the crime by (for example) allowing the destruction of evidence. The majority reviewed the following factors and found them to be inadequate to support the district judge's finding of reasonable suspicion: (1) one of the defendants, who was wanted on an outstanding warrant from the State of Washington, had recently purchased ammunition in Thompson Falls; (2) the defendants set up their meth lab in a large, three-story house at which as many as fifteen individuals were present at various times; (3) the defendants had surveillance cameras apparently monitoring the approach to the house; (4) just before the search was to be executed, one of the defendants drove up to the house and warned the others to get inside the house and turn off the lights; and (5) meth labs are inherently dangerous, and the labs may explode or cause a fire if they are too quickly disassembled. The majority established a new rule requiring the magistrate issuing the search warrant to expressly approve or disapprove a no-knock entry where the circumstances justifying the no-knock entry are foreseen, and the investigating officer must set out the foreseen circumstances in the search warrant application if the officer contemplates a no-knock entry.

Justice Rice, joined by Chief Justice Gray and Justice Warner, dissented, finding that the circumstances known to the officers established a reasonable suspicion of danger, futility, or possible destruction of evidence, and were sufficient to justify the no-knock execution of the search warrant.

***State v. Bar-Jonah*, 2004 MT 344, 324 Mont. 278, 102 P.3d 1229 (Cascade).**
Affirmed; Warner, J. Bar-Jonah argued that the police went beyond the scope of the warrant and also seized cameras, photo albums containing hundreds of photos of children, film negatives, and various other items that were not related to the offenses named in the search warrants, i.e., carrying a concealed weapon, a stun gun, and impersonating a police officer. The Court ruled that the district court correctly ruled that items not described in a warrant may be seized so long as a “reasonable relationship” exists between the items seized and the search authorized. The district court correctly found that a reasonable relationship existed between the items seized and Bar-Jonah’s motive for impersonating a police officer and carrying a concealed stun gun, i.e., an effort to kidnap and either molest or murder a child. With respect to the items not entered into evidence at trial, the issue of whether their seizure was proper is moot and any error was harmless because Bar-Jonah’s substantial rights were not affected. Mont. Code Ann. § 46-5-103(1)(c). Further, the fact that some of the items in question may have later been used by police as an evidentiary basis in filing charges against Bar-Jonah in the Zachary Ramsay case does not require suppression of such evidence with respect to this case. The Court also held that the searches were not pretextual, and the information supporting probable cause was not stale because the facts demonstrate a “pattern of continuous conduct.”

***State v. Beaupre*, 2004 MT 300, 323 Mont. 413, 102 P.3d 504 (Jefferson).**
Affirmed; Rice, J. (Gray and Nelson, dissenting). A substitute justice of the peace signed a search warrant. A Jefferson County deputy applied for the warrant, although he did not know the informant, who supplied pictures and other information to a Broadwater County deputy, who did know him.

The search conducted under the warrant produced drug paraphernalia, but not the items in the photographs, which were connected to methamphetamine production. The Jefferson County deputy contacted the Broadwater County deputy, who in turn spoke with the informant, who suggested they might be in Beaupre’s rented residence. Officers then obtained a signed consent form for the further search, which resulted in methamphetamine evidence. At the hearing on the motion to suppress, the officers’ testimony and the Beaupre’s version of events differed considerably. The district court believed the officers.

The issue on which the Court divided was whether the substitute justice had authority to issue the search warrant. Beaupre argued that there was no attempt to call in another sitting justice of the peace or city judge. The Court concluded the local justice of

the peace did determine what other justices were available and did not simply present officers with a “menu” of substitutes, but called in one specific person.

A second problem arose because the sitting justice of the peace’s designation of the substitute justice was completed on the last day of the sitting justice’s term, not actually during his second term, for which the designation was intended. The majority concluded that the phrase “within 30 days of taking office” meant before 30 days had expired, not during a particular period commencing on or after the beginning of the second term. The Court dealt similarly with a waiver of training form for the substitute justice filed three weeks before the sitting justice’s second term began, although it was evidently intended to cover the new term.

The Court concluded the warrant was supported by probable cause, having first analyzed the application under *State v. St. Marks*, 2002 MT 285, ¶ 12, 312 Mont. 468, 59 P.3d 1113, and *State v. Reesman*, 2000 MT 243, ¶¶ 28-35, 301 Mont. 408, 10 P.3d 83. It also noted that hearsay, and, more specifically, observation of fellow officers, could be considered to establish probable cause. Similarly, it concluded the district court properly considered the totality of the circumstances when it ruled the consent for the further search was voluntary.

The dissent divided over the meaning of “within 30 days.” Chief Justice Gray roundly disagreed with the majority, declaring the search was void *ab initio*. Justice Nelson concurred with her dissent, observing that, at least in part, “what the law requires does not make sense.” *Beaupre*, ¶ 77.

Gratified as we are with the majority’s decision, Justice Nelson’s take on the statute for substitute justices of the peace should not be ignored. This case will not end the problem, and it would be advisable for county attorneys to take a close look at the practices of their justices of the peace on this score.

***State v. Frasure*, 2004 MT 242, 323 Mont. 1, 97 P.3d 1101 (Cascade).**
Affirmed; Nelson, J. There was sufficient evidence to support the search warrant obtained for Frasure’s vehicle when: (1) officers determined Frasure, who was sitting in his vehicle outside a restaurant, had an outstanding warrant; and (2) upon approaching Frasure, both officers noticed Frasure appeared jittery and nervous, his speech was accelerated and choppy, and he was sweating. Based upon the officers’ experience and training, they knew their observations were consistent with a person under the influence of methamphetamine, and they had personal knowledge that Frasure was addicted to methamphetamine and had been arrested for methamphetamine offenses in the past. Also, during a pat-down search incident to arrest, one officer found a ceramic pipe, commonly used to ingest marijuana, on Frasure’s person.

***State v. Graham*, 2004 MT 385, 325 Mont. 110, 103 P.3d 1073 (Lincoln).**
Reversed; Cotter, J. (Warner and Rice, dissenting). Evidence seized in Graham’s

home should have been suppressed because the requisite probable cause in the search warrant never existed to establish illegal items would be found in any place other than Graham's unattached garage. The warrant affidavit here indicated that methamphetamine manufacture was taking place in the garage located next to the house. The affidavit included the police officer's recitation of his training, experience, and participation in the investigation of the manufacture of controlled substances, showing that many of the common household items listed in the application are involved in the manufacture of controlled substances. In this 5-2 decision, the Court ruled that, "[c]ommon sense, practical considerations and probabilities" are not enough. Graham, ¶ 26. "[M]ere portability of items commonly used in a methamphetamine laboratory does not justify the search of otherwise unimplicated structures." Graham, ¶ 24.

***State v. Griffin*, 2004 MT 331, 324 Mont. 143, 102 P.3d 1206 (Silver Bow).**

Affirmed; Warner, J. An officer recognized Griffin driving and, knowing he did not have a valid license, stopped him as he exited his vehicle pursuant to a city court policy. During a protective search while Griffin was handcuffed, the officer retrieved a pipe with white residue from Griffin's pocket. Based on the pipe, the officer obtained a search warrant for evidence of drug possession in Griffin's truck. As the officer approached the truck to search it, she noticed semi-transparent garbage bags in the truck bed containing boxes of matches and pseudo ephedrine. Pursuant to another warrant based on the garbage bags, the Southwest Montana Drug Task Force searched Griffin's residence and found booby-trapped explosives protecting a meth lab. The district court denied Griffin's motion to suppress the searches of his person, his truck, and his home. On appeal, the Court declined to address the search of Griffin's person because Griffin was not charged with possession of drug paraphernalia. The Court held that the warrant to search Griffin's truck was not supported by probable cause, because Griffin's possession of a pipe with white residue does not suggest the presence of drug evidence in his truck. However, the officer was lawfully present beside the truck when she saw the garbage bags in the truck bed, and their incriminating nature was immediately present, so the seizure of the bags did not violate Griffin's rights. Therefore, the Court upheld the seizure of the garbage bags and the resulting search of Griffin's house.

***State v. Meyer*, 2004 MT 272, 323 Mont. 173, 99 P.3d 185 (Flathead).**

Affirmed; Regnier, J. Pursuant to a search warrant for Meyer's residence concerning unlawful possession of C4 explosive, officers found the explosive as well as (after Meyer consented to a further search) a boxed methamphetamine lab. In his prosecution for Unlawful Operation of a Clandestine Laboratory, Meyer moved to suppress the evidence on the grounds that the search warrant contained false and stale information, the information provided by an informant was not corroborated, and the contraband seized exceeded the scope of the warrant. The Court held: (1) The warrant was valid because (a) it did not need to allege the unlawful purpose element of the explosives possession offense, but only a fair probability that contraband connected with the offense would be found, and (b) its reference to an offense that commenced with a delivery of explosives sometime during a three-week period, at least 40 days prior to the warrant's issuance, was

not stale because the time frame was sufficiently specific for a continuing offense of possession; (2) the informant was sufficiently reliable without corroboration because (a) the detective knew her identity, (b) she witnessed the offense firsthand, and (c) her admission that she helped transport explosives was made with the reasonable belief that it would subject her to criminal liability. Because the warrant was valid, the consent search leading to the boxed methamphetamine lab was proper, and the district court correctly denied Meyer's suppression motion.

***State v. Ochadleus*, 2005 MT 88, ___ Mont. ___, 110 P.3d 448 (Yellowstone).**
Affirmed; Nelson, J. The district court properly denied the defendant's motion to suppress evidence seized pursuant to a search warrant based upon his claim that the Postal Inspector did not have reasonable grounds to subject a suspicious package placed in the United States Mail to a canine sniff. Using the drug package profile developed by the Postal Inspection Service, the Postal Inspector detained the package because: (1) it was an Express Mail package and drug dealers often use Express Mail service; (2) the label was handwritten rather than a typed business label; (3) all of the seams of the package were taped; (4) the zip code on the label did not match the zip code of where the package originated; (5) the package originated in Tucson, Arizona, a known drug distribution area; and (6) three other Express Mail packages had been delivered to the same address within the past six weeks. The district court also denied the defendant's motion to suppress based on his claim that officers executing a search warrant failed to follow the "knock and announce" rule. As in other federal cases, in the instant case, officers executing the search warrant were seen by one of the occupants of the house before the officers had a chance to knock and announce, thus, the futility exception to the knock and announce rule applies since one cannot announce a presence that is already known. **THE COURT CAUTIONS: DO NOT READ TOO MUCH INTO THE OPINION!**

B. Investigative Stops

***City of Missoula v. O'Neil*, 2004 MT 328, 324 Mont. 124, 102 P.3d 21 (Missoula).** **Affirmed; Gray, C.J.** A campus police officer was technically outside his jurisdiction when he stopped defendant's vehicle for suspected DUI. However, per a 1993 agreement between the City of Missoula and the University of Montana, entered pursuant to Mont. Code Ann. § 20-25-322, the officer had authority to make the stop because it occurred on a street contiguous to the campus.

***State v. Bar-Jonah*, 2004 MT 344, 324 Mont. 278, 102 P.3d 1229 (Cascade).**
Affirmed; Warner, J. The district court properly denied Bar-Jonah's motion to suppress. Bar-Jonah argued that the police lacked particularized suspicion to conduct an investigative stop, and because the information gained in that stop was used to support the probable cause necessary to issue the subsequent search warrants, any evidence gained as a result of the execution of the warrants must be suppressed. He also asserted

that the two searches exceeded the scope of the search warrants, the information supporting probable cause was “stale,” and the searches were “pretextual” in that the police wanted to gain access to Bar-Jonah’s residence to search for evidence of more serious crimes. The Court disagreed with the district court that the initial stop was a mere police-citizen encounter, not implicating the Fourth Amendment. See U.S. v. Mendenhall, 446 U.S. 544 (1980). Under the circumstances, the initial contact with Bar-Jonah was an investigative stop, and not a voluntary encounter from which Bar-Jonah was free to leave. However, the district court was correct that there were sufficient facts to support a particularized suspicion that Bar-Jonah had or was about to commit the offense of impersonating a police officer. Once Bar-Jonah was lawfully detained, given Bar-Jonah’s known criminal history and his statement that he was concealing a stun gun, the officers had sufficient reasonable cause to conduct the ensuing pat down search. The information gained from the investigative stop of Bar-Jonah was properly used to establish probable cause necessary to issue the subsequent search warrants.

***State v. Britt*, 2005 MT 101, ___ Mont. ___, 111 P.3d 217 (Hill). Affirmed; Morris, J.** A rancher near Havre reported that a car had been parked on a gravel road for most of the day. He had stopped to ask whether the occupants needed help, but they were not in distress. The car had moved when a deputy checked, but he saw it parked nearby on the same road. When he approached it, it drove onto the road, and he lost sight of it briefly as he turned around. A few moments later, when he saw it again, the woman who had been the passenger was now the driver, having traded places with the male driver. She was driving near the center of the gravel road. The officer stopped the car. In his search of the car, he found illegal drugs and drug paraphernalia.

The issue on appeal was whether the officer had particularized suspicion to stop the car. In the totality of the circumstances, the Court agreed with the district court, which had concluded that the short time in which the car was out of sight still allowed the officer to infer that the drivers had switched while the car was still moving, and the car was driving unsafely, i.e., swerving in the center of the gravel road.

***State v. Fellers*, 2004 MT 321, 325 Mont. 62, 101 P.3d 764 (Cascade). Affirmed; Nelson, J.** In light of the totality of the circumstances, the investigating officer had particularized suspicion to conduct the investigatory stop. Specifically, the investigating officer had objective data--the information provided by three people who observed the suspicious behavior--and the officer’s own observation of the suspicious behavior. An officer does not need to observe personally illegal activity in order to have particularized suspicion to justify an investigatory stop.

***State v. Gouras*, 2004 MT 329, 324 Mont. 130, 102 P.3d 27 (Glacier). Affirmed; Rice, J.** Gouras and two companions stayed at a motel in Browning and left some marijuana remnants and paraphernalia behind in the room when they checked out. Housekeeping staff found it and reported to the owner, who called the sheriff and said that the three men had just left the motel in a car with expired plates from the state of

Washington. Officers located the car, stopped it, and checked out the license plates while other officers went to the motel to confirm the report about the drugs. The Court found that the officers had particularized suspicion to initiate the investigative stop, utilizing the test in State v. Pratt. The Court confirmed that the officer making the stop does not have to witness any criminal activity or have any incriminating information as long as he acts in reliance upon the directive of an officer who has particularized suspicion. The Court refused to consider Gouras's argument that the stop exceeded its scope and purpose, finding that the argument was not raised in the suppression motion and appeared only as an alternative argument in the reply brief, and the district court had not addressed the issue in its order. Thus, the argument was not preserved for appeal.

***State v. Labuda*, 2004 MT 210N (Hill). Affirmed; Nelson, J.** An officer had particularized suspicion to stop a minivan after receiving a call from a citizen informant who followed the car for several miles on the highway and suspected that the driver was drunk. After the driver of the van pulled into a driveway, the informant stopped and waited for officers to arrive. The informant watched the driver get out of the van, and verified that the person who re-entered the van just prior to the stop was the same driver as earlier.

***State v. Loney*, 2004 MT 204, 322 Mont. 305, 95 P.3d 691 (Cascade). Reversed and remanded; Gray, C. J.** The Court reversed the district court's order granting Loney's motion to dismiss charges of failing to drive on the right side of the roadway and DUI based on its determination that the officer lacked particularized suspicion to justify an investigative stop. In granting the motion to dismiss, the district court relied on Morris v. State, where the Court held that drifting across lanes on a multi-lane city street and then drifting and touching the fogline once or twice did not give rise to particularized suspicion. The Court held that Morris was inapplicable, because here Loney crossed the centerline on more than one occasion and pursuant to Widdicombe, driving across the yellow centerline, absent one of the statutory exceptions constitutes a traffic violation. Observation of a traffic offense is sufficient to establish particularized suspicion.

***State v. Merrill*, 2004 MT 169, 322 Mont. 47, 93 P.3d 1227 (Lincoln). Affirmed; Rice, J.** Officers stopped Merrill because she failed to signal when she changed lanes on Highway 2 in downtown Libby. While a second officer was at the rear of the car, the first officer gave her a warning ticket, then stepped away from the car. He then asked whether he could search her car and her person, and she consented. He found evidence of methamphetamine. The Court said that the stop for the improper lane change infraction was completed when the officer asked for permission to search. The facts did not present objective grounds to suspect Merrill was intimidated or not otherwise free to leave.

***State v. Nelson*, 2004 MT 310, 323 Mont. 510, 101 P.3d 261 (Hill). Affirmed; Rice, J.** The Court rejected Nelson's argument that the traffic stop took too much time and went beyond the conduct that initiated the stop, for which Nelson conceded there was

particularized suspicion. The Court said that the officer's observations of Nelson's behavior accumulated and "took on the quality of an escalating situation in which the additional information gave rise to further suspicions and enlarged the scope of the investigation to that of a possible DUI." Nelson, ¶ 21, citing State v. Henderson, 1998 MT 233, ¶ 22, 291 Mont. 77, 966 P.2d 137. It also noted it had not established specific time parameters for an investigative stop, and that in any event it could not say that the 24-minute stop here was excessive.

***State v. Otto*, 2004 MT 338, 324 Mont. 217, 102 P.3d 522 (Fergus). Affirmed; Cotter, J.** The officer had particularized suspicion to justify an investigative stop because Otto crossed the yellow line of a center turn lane once before he stopped. "Otto would have us distinguish crossing the centerline of a highway from crossing the line which separates the driving lane from a center turn lane . . . [However,] crossing carelessly into a center turn lane where there is the possibility of meeting on-coming traffic likewise places drivers in the position of potentially facing a head-on collision." Otto, ¶ 18.

***State v. Peoples*, 2005 MT 3N (Flathead). Affirmed; Warner, J.** Peoples was convicted of operating an illegal clandestine laboratory based upon a meth lab observed in plain view in his car in the course of an investigative stop. In an unpublished opinion, a five-judge panel unanimously affirmed People's conviction, declining to address the appellate defender's argument, relying upon Pratt, that the officer who initiated the stop was not "directed" to make the stop by an officer having particularized suspicion that Peoples was driving suspended. Because Peoples relied upon a different theory below (pretext), the district court "correctly interpreted the legal issues before it at the time of Peoples' suppression hearing in accordance with settled Montana law." The Court, therefore, did not address the State's alternative argument that the collective knowledge of officers acting as a team should be imputed to the officer making a stop even in the absence of an explicit police directive.

***State v. Schulke*, 2005 MT 77, ___ Mont. ___, 109 P.3d 744 (Missoula). Affirmed; Warner, J.** In appeal of a DUI conviction, the justice court did not err in denying defendant's motion to suppress because the officer had sufficient facts to form particularized suspicion to stop the defendant. Also, by entering a conditional plea, defendant brought himself within exception for the trial de novo requirement, pursuant to Mont. Code Ann. § 46-17-203(2) (1999).

***State v. Steen*, 2004 MT 343, 324 Mont. 272, 102 P.3d 1251 (Gallatin). Affirmed; Regnier, J.** After making what the arresting officer thought was a wide turn in violation of Mont. Code Ann. § 61-8-333(1)(b), Steen was ultimately arrested for DUI. He appealed both municipal and district court judgments, maintaining the officer did not have particularized suspicion to stop him for a violation of Mont. Code Ann. § 61-8-333(1)(b) (2001). Applying the following standard, the Court agreed with the State's interpretation of the cited traffic statute and concluded the officer did have particularized suspicion to stop Steen.

Standard of review: (1) objective data from which an experienced officer could make certain inferences, and (2) a resulting suspicion that the occupant of the vehicle in question is or has been engaged in some wrongdoing. “Whether a particularized suspicion exists is a question of fact dependent on the totality of the circumstances surrounding the investigative stop.”

***State v. Todd*, 2005 MT 108, ___ Mont. ___, 111 P.3d 677 (Gallatin).**

Affirmed; Gray, C.J. Based upon an officer’s observing Todd drive into a city park after closing hours with an open can of beer in his hand, the officer had particularized suspicion that Todd was violating the City of Bozeman’s open container ordinance. Although the officer did not observe erratic driving, particularized suspicion of DUI arose based upon Todd’s glassy eyes, the odor of alcohol on his breath, Todd’s admission that he had been drinking, the fact that the incident occurred at 2 a.m., and undisputed evidence that Todd was driving the car. Noting that Todd did not seek plain error review, the Court declined to address Todd’s argument that the officer’s field sobriety tests did not comply with the National Highway Traffic Safety Administration (NHTSA) handbook because the argument was not raised in district court.

C. Arrest

***State v. Bateman*, 2004 MT 281, 323 Mont. 280, 99 P.3d 656 (Yellowstone).**

Affirmed; Leaphart, J. Bateman’s arrest was based upon a reasonable mistake when law enforcement officers arrested him at his home based upon an arrest warrant issued for Thomas Bateman--but it was a different Thomas Bateman. Nonetheless, the age and physical characteristics of the two Thomas Batemans were similar, and it was not unreasonable for the officers to assume they were serving the warrant on the correct Thomas Bateman. Because the arrest was reasonable, the subsequent discovery of incriminating evidence was legal and therefore admissible. The Court declined to consider Bateman’s claim that the search of his residence violated his right to privacy because he failed to raise that claim in district court, and plain error review was not appropriate. The Court dismissed Bateman’s ineffective assistance of counsel claim because it was not record based.

***State v. Hill*, 2004 MT 184, 322 Mont. 165, 94 P.3d 752 (Missoula). Affirmed; Rice, J.** Hill was not unlawfully seized when, after an officer issued a speeding citation and returned Hill’s driver’s license, the officer made small talk that eventually revealed that Hill was not an authorized driver of the rental vehicle he was driving; a reasonable person would have believed he was free to leave after receiving the citation and driver’s license and, therefore, the subsequent conversation that developed between the officer and Hill was a voluntary exchange.

D. Plain View

State v. DeWitt, 2004 MT 317, 324 Mont. 39, 101 P.3d 277 (Silver Bow).

Affirmed in part, reversed in part; Cotter, J. In the early morning hours of July 28, 2001, DeWitt, under the influence of alcohol and very bad judgment, and nursing a grievance against his former girlfriend, broke into what he thought was her new home. It was, instead, the house next door, occupied by a couple in their 70s. The wife, essentially blind, awoke to find a man beating her husband, who had been asleep beside her. In the ensuing struggle, the man fractured her cheek and broke her husband's nose.

Very soon after the couple called the police, the former girlfriend told the officers that she had received a call from DeWitt shortly before the incident. She was frightened because he could be violent. She had moved since breaking up with him, but he had tried to follow her home, so she believed he knew at least generally where she lived. DeWitt was not unknown to the officers, who went to his last address, where they found his truck, the engine still warm. An officer knocked on the garage door, which, as it was unlatched and not fully closed, swung open. The officers smelled the exhaust of a recently started two-cycle engine, but the garage was empty. They went immediately to the home of another of DeWitt's friends, where they found a motorcycle parked in front, also with the engine still warm. The friend let them in, identified the motorcycle as one belonging to the person who owned the garage, and confirmed that DeWitt was staying with him, although he did not know whether DeWitt was there. Having received permission to search the home, the officers found DeWitt sitting in a dimly lit basement room, drinking a beer. His clothes appeared to be bloodstained, and there were dark stains that looked like blood around his fingernails. A knuckle on his right hand was swollen, red, and bloody. The blood on DeWitt's jeans and shirt matched the DNA profile of the elderly man. DeWitt told the police he had entered the former girlfriend's home to check her caller ID to identify her new boyfriend, but a man had yelled at him and attacked him with a stick. DeWitt said he "elbowed" the people in the bedroom while escaping. The police did not find a stick or club there. DeWitt was convicted of two counts of aggravated burglary.

DeWitt moved to suppress the evidence the police gained from the searches of the garage and the residence where he was staying. The Court said that the record supported the district court's finding that the door to the garage opened at the officers' knock and that the officers immediately identified the exhaust smell of the motorcycle, evidence that fell squarely within the plain view exception. The record also supported the district court's conclusion that the officers' entry into the residence where DeWitt was staying was consensual.

E. Consent to Search

***State v. Gilmore*, 2004 MT 363, 324 Mont. 488, 104 P.3d 1051 (Fergus).**

Affirmed; Nelson, J. (Leaphart, dissenting). Based on a C.I. tip, officers arrived at Gilmore's mother's house and told the mother that someone had seen a marijuana plant growing in her house. The mother consented to a search. In the basement, the officers discovered a locked bedroom door. The mother said she did not have a key to the bedroom because her boyfriend stored his belongings there; she was afraid of her son; she did not want her son in her house; and, she told the officers to kick down the door. The officers did so, found Gilmore asleep on a couch, and seized marijuana and other drug paraphernalia from the bedroom. Later, the mother recanted her story. Gilmore contended that the warrantless search of the locked bedroom where he was residing was unconstitutional. In a 6-1 ruling, the Court stated that the focus is on what the mother told the officers at the time of their entry into the bedroom--i.e., what facts they were operating under then. Consequently, the Court agreed with the State that the mother had actual authority to consent to the search of the locked room and that Gilmore, as a trespasser, had no privacy expectation.

Dissent. The facts that the bedroom had a separate entrance, that Gilmore had a key and his mother did not, and that the officers had to kick down the door, clearly indicate that the mother did not have actual authority to consent. The majority ruling is in opposition to *State v. McLees*, 2000 MT 6, 298 Mont. 15, 994 P.2d 683 (rejecting the doctrine of apparent authority whereby law enforcement officers would be allowed to rely on third parties who appear to have authority to consent to a search).

***State v. Shaw*, 2005 MT 141, ___ Mont. ___, ___ P.3d ___ (Cascade).**

Affirmed, Morris, J. Shaw was stopped for speeding, and the officer discovered that her license had been suspended and that she had no proof of insurance. He detected the odor of alcohol. He asked her consent to search the car, which she gave, and he discovered an open container of an alcoholic beverage, a marijuana pipe, and a set of scales.

Shaw contended that her consent to search was coerced by the officer's threat to have the car (her mother's) impounded while he sought a search warrant. Applying the totality of the circumstances test, the Court determined that Shaw consented to the search voluntarily and did not revoke it. Even if her allegations of the officer's threats had been true, the search would not have been coerced because the officer did not obtain it by promising she would avoid incarceration or make any threats.

***State v. Snell*, 2004 MT 269, 323 Mont. 157, 99 P.3d 191 (Fergus). Affirmed; Gray, C.J.** A highway patrol officer stopped Snell for speeding, brought Snell to his patrol car and cited him, returned Snell's papers, and asked to search his vehicle. Snell consented and the officer found marijuana and drug paraphernalia. Snell appealed the district court's denial of his suppression motion. The Court rejected Snell's contention

that the search required probable cause under *State v. Elison*, because Snell had consented to the search. The Court also held that Snell was not illegally detained following his speeding citation even though he was sitting in the patrol car, because a reasonable person would have felt free to leave the patrol car upon completion of the traffic stop. Because Snell consented to the search during a voluntary encounter the district court did not err in denying Snell's suppression motion.

***State v. Wetzel*, 2005 MT 154, ___ Mont. ___, ___ P.3d ___ (Jefferson).**
Affirmed; Cotter, J. (Leaphart, dissenting). Wetzel's wife Maria was arrested and placed in the back seat of a police vehicle. Wetzel, who was not under arrest, wanted to enter the back seat to talk with Maria. The officers told Wetzel he would have to be searched for contraband before he would be allowed to get into the police vehicle. Wetzel consented to the search, and the officers recovered a pill bottle containing some pills. Wetzel said that the pills were Benadryl, but the officers knew that they were not. The officers retained the pills and later determined that they were dextroamphetamine, a highly controlled drug. The Court held that the district court's findings concerning the voluntariness and scope of Wetzel's consent to the search were not clearly erroneous. The fact that Wetzel was not told he could refuse to give his consent is only one of the factors to be considered in assessing voluntariness and is not determinative of the issue. The Court confirmed that it is not necessary for police to request additional or more explicit permission to search the contents of a closed container discovered in the course of a search to which the defendant consented. Justice Leaphart dissented, stating that since the pills were not obvious contraband, the police should have merely retained them while Wetzel talked with Maria in the police car and then returned the pills to Wetzel when he was finished.

III. COMMENCEMENT OF PROSECUTION

A. Charging Documents/Decisions

***State v. Allum*, 2005 MT 150, ___ Mont. ___, ___ P.3d ___ (Gallatin).**
Affirmed; Leaphart, J. (Nelson, dissenting). Montana Code Annotated § 46-11-110-- providing that "[w]hen a complaint is presented to a court charging a person with the commission of an offense, the court shall examine the sworn complaint or any affidavits, if filed, to determine whether probable cause exists to allow the filing of a charge[,]"-- requires the court to examine a sworn complaint; it does not require one to be filed. Montana Code Annotated § 46-11-102 also states that the prosecution of offenses not charged in district court "must be by complaint." A "sworn" complaint is not mentioned. Thus, the charge was properly commenced by a complaint which was signed, but not sworn, by the officer.

Justice Nelson dissented, arguing that the statutes require a sworn complaint under oath.

***State v. DeWitt*, 2004 MT 317, 324 Mont. 39, 101 P.3d 277 (Silver Bow).** **Affirmed in part, reversed in part; Cotter, J.** DeWitt moved to dismiss the Information because it did not identify the predicate crime for aggravated burglary, because the evidence at trial was insufficient to support the convictions, and because the Information charged two counts of aggravated burglary, while he had effected only one entry. The Court ruled that the Information identified assault as the predicate felony (the “offense therein”) with sufficient clarity and that the State adduced sufficient evidence to overcome a motion for a directed verdict. It agreed with DeWitt that only one charge of aggravated burglary should have been brought, since it is the “unlawful entry with the intent to commit an offense” that defines the crime. The facts would have supported one charge of aggravated burglary and two charges of assault.

The Court rejected DeWitt’s claim of ineffective assistance of counsel, but remanded the case for the dismissal of one count of aggravated burglary and for resentencing.

***State v. Dunfee*, 2005 MT 147, ___ Mont. ___, ___ P.3d ___ (Silver Bow).** **Affirmed; Warner, J.** Dunfee was convicted of aggravated assault and committed to the DOC. He raised four issues on appeal. Dunfee argued the district court erred by denying his motion to dismiss on probable cause. Dunfee had contended that the officers knew facts not in the affidavit that showed he had only defended himself. The Court agreed with the State that these related to the defense of justifiable use of force. Noting that the test was one of discretion, it said that the district court need only examine the affidavit filed to support the Information.

***State v. Gardipee*, 2004 MT 250, 323 Mont. 59, 98 P.3d 305 (Cascade).** **Affirmed; Regnier, J.** The district court did not abuse its discretion or prejudice the defendant’s substantial rights when it allowed the State to file an Amended Information reflecting the defendant’s earlier family or partner assault convictions “to reflect the statutorily-mandated sentencing range for a repeat offender.”

***State v. Hickok*, 2004 MT 174N (Gallatin).** **Affirmed; Gray, C.J. (Rice, concurring).** Hickok appealed her assault on a minor (Mont. Code Ann. § 45-5-212) conviction for bruising/pain inflicted on her 11-year-old son when she struck him on the back during an argument.

1. The Court concluded that prosecutorial discretion permitted charging with either assault on a minor (a felony) or family member assault (a misdemeanor).

***State v. Matt*, 2005 MT 9, ___ Mont. ___, 106 P.3d 530 (Lake).** **Affirmed; Rice, J.** The State charged Matt with assault on a peace officer and assault with a weapon after Matt confronted an officer with a knife, then threw a chair at the officer causing him physical injury. Matt argued that because the acts giving rise to the offenses

arose out of the same incident, and were included offenses, they could not be charged as separate offenses. The Court disagreed, noting that assault on a peace officer required different proof than assault with a weapon. The Court found nothing offensive in the fact that the State can effectively avoid a double jeopardy problem by charging a defendant under one subsection of a statute [Mont. Code Ann. § 45-5-210(1)(c)] rather than another equally plausible subsection [Mont. Code Ann. § 45-5-210(1)(a)].

***State v. Smith*, 2004 MT 191, 322 Mont. 206, 95 P.3d 137 (Yellowstone).**

Affirmed in part, reversed in part; Rice, J. During a telephone conversation, Smith told his estranged wife that he was going to kill her boyfriend with a gun. Shortly thereafter, Smith twice called the boyfriend and Smith stated he was on his way to kill him. Smith’s argument that the prosecutor was obligated to charge him with a violation of privacy in communications as a “specific” offense rather than a violation of assault with a weapon as the “general” offense is without merit. Further, the prosecutor acted within his broad, discretionary powers in charging Smith with assault with a weapon.

***State v. White Bear*, 2005 MT 7, ___ Mont. ___, 106 P.3d 516 (Yellowstone).**

Affirmed; Gray, C.J. White Bear was charged with failing to maintain his violent offender registration, in violation of Mont. Code Ann. §§ 46-23-504 through -507 (SVORA). He moved to dismiss the Information, and the district court denied the motion. White Bear pled guilty, reserving the right to appeal the denial of his motion to dismiss.

On appeal, the Court ruled that the district court properly denied his motion to dismiss the Information. The Court rejected White Bear’s claim that the due process clause prevented him from being charged with failure to register because the district court, at the time he was originally sentenced for felony partner or family member assault (PFMA), did not give him notice of the duty to register. The Court ruled that violation of the SVOA registration requirements is a separate offense, and it is not a part of the criminal sentencing on the original sexual or violent offense.

***State v. Yecovenko*, 2004 MT 196, 322 Mont. 247, 95 P.3d 145 (Valley).**

Affirmed; Rice, J. The district court did not abuse its discretion by permitting the State to amend the Information eleven months after the district court granted leave to file the Information. The amendment was not of substance because it merely changed the date range of three of the four counts. The defendant was not prejudiced by the amendment.

B. Publicity

***State v. Pittman*, 2005 MT 70, ___ Mont. ___, ___ P.3d ___ (Custer).**

Affirmed; Gray, C. J. Pittman moved for a change of venue due to the alleged adverse pretrial publicity from a Miles City Star newspaper article. Pittman argued that the

inclusion of her criminal record in the newspaper article, combined with the report of her allegations of a sexual relationship between herself and a detention officer, were of such inflammatory nature that she could not receive a fair trial in Miles City or Custer County. A defendant seeking a change of venue because of prejudicial publicity must establish that the news reports were inflammatory and that they actually inflamed the prejudice of the community to an extent that a reasonable possibility exists that the defendant may not receive a fair trial. The Court held that the district court did not abuse its discretion in denying Pittman's motion for a change of venue, explaining that the article was not inflammatory.

IV. GUILTY PLEAS

***Lout v. State*, 2005 MT 93, ___ Mont. ___, 111 P.3d 199 (Ravalli). Affirmed; Leaphart, J.** In accepting the plea agreement, defendant validly waived any right he had to appeal or challenge his conviction and lawfully imposed sentence. Defendant told the district court that he was satisfied with his counsel's performance and understood the potential sentences, therefore, he did not show that he was prejudiced by his counsel's actions.

***State v. Lone Elk*, 2005 MT 56, ___ Mont. ___, 108 P.3d 500 (Yellowstone). Affirmed; Leaphart, J.** The Court affirmed the district court's denial of Lone Elk's motion to withdraw his guilty plea. In its Opinion, the Court adopted a new test of voluntariness and a new standard of review. The Court now reviews whether the facts meet the standard for voluntary pleas as a mixed question of law and fact, which it reviews de novo. The Court overruled the line of cases using the abuse of discretion standard.

***State v. Martin*, 2004 MT 288, 323 Mont. 320, 100 P.3d 146 (Yellowstone). Affirmed; Regnier, J.** The Court affirmed the district court's denial of Martin's motion to withdraw his guilty plea.

Martin was charged with assault with a weapon, a felony, in violation of Mont.Code Ann. § 45-5-213(1)(a), and criminal possession of dangerous drugs, a misdemeanor, in violation of Mont. Code Ann. § 45-9-102(2). The State also filed a notice of intent to have Martin designated a persistent felony offender, based on a 1996 conviction of partner family member assault. It was alleged that Martin stabbed his girlfriend, Carolyn Smith. A neighbor informed 911 that Martin told him he had stabbed Smith, and that Martin would not let her out of the apartment to seek medical attention. Police arrived at Martin's apartment and saw that Smith had been stabbed. Police found Martin in the hallway of the apartment building with a black folding knife, and pants and slippers, which appeared to have blood on them.

The district court granted Martin's motion to withdraw his not guilty plea. He accepted a plea agreement in which he would be sentenced to five years to the Department of Corrections, with two years suspended, and the State would dismiss the misdemeanor charge and the persistent felony offender designation. Two days before his sentencing date, a woman claiming to be Smith went to the Public Defender's Office and gave a statement that Martin was not the person who stabbed her.

Martin moved to withdraw his guilty plea, arguing that the fundamental purpose in allowing a withdrawal of a plea is to prevent the possibility of convicting an innocent person. The Court held that the district court did not abuse its discretion in denying the motion considering Smith did not testify at the hearing, the identity of the woman claiming to be Smith was not confirmed as Smith, the birth date she provided was not correct, and the neighbor's statement to police incriminating Martin.

Martin also alleged that he received ineffective assistance of counsel when his trial counsel conceded in the district court that his plea agreement benefited him (the third factor to be considered in determining "good cause" to withdraw the guilty plea under Mont. Code Ann. § 46-16-105). Martin argued that since he had not yet been sentenced, he had not yet received the benefit of the misdemeanor charge being dropped, the persistent felony offender notice having been withdrawn, and the sentence. The Court rejected that assertion, stating that plea agreements are enforceable from the moment they are entered into, and that Martin received the benefit of the bargain at that time. The Court rejected the ineffective assistance of counsel claim, stating that a counsel's performance cannot be deficient when the issue counsel failed to raise lacks merit.

***State v. Rave*, 2005 MT 78, ___ Mont. ___, 109 P.3d 753 (Lake). Reversed; Warner, J.** Chad Alan Rave pled guilty to felony sexual assault, but moved before sentencing to withdraw the plea. The district court denied the motion and sentenced him to 30 years at the Montana State Prison with 20 years suspended.

The Court decided the plea was invalid because Rave was not informed that sexual assault, a misdemeanor, was a lesser-included offense of felony sexual assault. The plea agreement mistakenly advised him that sexual assault, a felony, was a lesser-included offense of the charge he pled to; sexual assault (with bodily injury), a felony. The district court's colloquy at the entry of plea noted that a jury could consider lesser-included offenses, but it did not specify misdemeanor sexual assault (or any other crime). The Court followed *State v. Sanders*, 1999 MT 136, 294 Mont. 539, 982 P.2d 1015, which requires a specific delineation of included offenses.

***State v. Warclub*, 2005 MT 149, ___ Mont. ___, ___ P.3d ___ (Yellowstone). Affirmed; Leaphart, J.** The Court clarified its holding in *State v. Lone Elk*, 2005 MT 56, ¶ 19, 326 Mont. 214, 108 P.3d 500, which applies to cases where a defendant seeks to set aside a guilty plea.

1. In Lone Elk, the Court adopted a new test based largely on Brady v. United States, 397 U.S. 742 (1970). In Lone Elk, the district court erred when it characterized a portion of the holding in Brady dealing with the requirement that a free and voluntary confession “must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.” Brady, 397 U.S. at 754. “It was the ‘however slight’ language, which Brady distinguished as applying only to *unrepresented* defendants during custodial interrogations, that we mis-attributed <sic> as part of the Brady standard.” Warclub, ¶ 18, n.1 (emphasis in original).

2. Justice Leaphart clarified Lone Elk’s holding regarding the standard of review of denials of motions to withdraw guilty pleas. “Henceforth . . . we will review the findings of fact of the trial court to determine if they are clearly erroneous, and conclusions of law to determine if they are correct. When the voluntariness of the plea is at issue, we will review that ultimate mixed question of law and fact de novo, to determine if the trial court was correct in holding that the plea was voluntary.” Warclub, ¶ 24.

***State v. Yarnall*, 2004 MT 333, 324 Mont. 164, 102 P.3d 34 (Gallatin). Affirmed; Cotter, J.** The district court complied with Mont. Code Ann. § 46-14-221(2)(c) and properly denied Yarnall’s motion to withdraw his guilty plea to deliberate homicide. Yarnall’s case is factually distinguishable from State v. Meeks, 2002 MT 246, 312 Mont. 126, 58 P.3d 167 because after the district court initially concluded that Yarnall was unfit to proceed, it committed him to the Montana State Hospital and then reviewed his fitness to proceed at a hearing within 90 days of the commitment, and found Yarnall still unfit to proceed. Even though at the review hearing the mental health expert acknowledged some uncertainty regarding Yarnall’s prognosis, she also opined that her proposed treatment plan offered the possibility that Yarnall could become fit to proceed within the reasonably foreseeable future. The district court properly weighed the evidence before it and concluded that it could order an additional commitment because it was not, based upon the evidence presented, prepared to find that it did not appear Yarnall would regain fitness pursuant to Mont. Code Ann. § 46-14-221(2)(c).

V. PRETRIAL

A. Discovery

***City of Billings v. Peterson*, 2004 MT 232, 322 Mont. 444, 97 P.3d 532 (Yellowstone). Affirmed; Gray, C.J.** Peterson was on trial for DUI and moved for discovery of personnel files of officers involved with the case. Relying on State v. Romero, 279 Mont. 58, 926 P.2d 717 (1996), and Mont. Code Ann. § 46-15-322(5), the Court concluded that Peterson failed to make a showing of “substantial need” for those files. The Court gave only passing consideration to Peterson’s constitutional argument

on this point because the arguments were not adequately developed: “It is not this Court’s obligation to develop parties’ arguments for them.”

***State v. Allum*, 2005 MT 150, ___ Mont. ___, ___ P.3d ___ (Gallatin).**
Affirmed; Leaphart, J. (Nelson, dissenting). The prosecutor’s inability to produce a surveillance video--because the data was routinely destroyed by the bank within two weeks after it was recorded--was not a Brady violation.

***State v. Boettiger*, 2004 MT 313, 324 Mont. 20, 101 P.3d 285 (Cascade).**
Affirmed; Nelson, J. The Court does not condone the State’s failure to provide Boettiger with the name of the arresting officer as a potential witness; however, Boettiger does not demonstrate that he was prejudiced as a result of the arresting officer’s testimony. Boettiger knew the contents of the arresting officer’s testimony, since he had testified at Boettiger’s bench trial in justice court. The Court disregards any error, defect, irregularity or variance that does not affect the accused’s substantive rights.

B. Motions

***State v. Bar-Jonah*, 2004 MT 344, 324 Mont. 278, 102 P.3d 1229 (Cascade).**
Affirmed; Warner, J. The district court properly exercised its discretion in denying Bar-Jonah’s motion to change the order of the trials (to hold the Zachary Ramsey trial before this trial), his second motion for change of venue, for additional peremptory challenges, and to strike the entire jury panel for cause for exposure to pretrial publicity. Bar-Jonah has failed to demonstrate that he was prejudiced by the decision to hold the trial in Butte. Bar-Jonah conceded that during voir dire, each juror assured that they would act with impartiality. The jury’s impartiality was evidenced by the fact that the jury deadlocked on one count of sexual assault and acquitted Bar-Jonah of one count of sexual assault.

C. Mental Competency of Accused

***State v. McCarthy*, 2004 MT 312, 324 Mont. 1, 101 P.3d 288 (Gallatin).**
Affirmed; Regnier, J. McCarthy argued he was incompetent to stand trial and, therefore, the district court should have *sue sponte* ordered an evaluation of him before proceeding to or continuing the trial. The Court rejected McCarthy’s argument, noting that the district court was not presented with substantial evidence of McCarthy’s incompetence to stand trial. The Court explained that throughout the proceedings, McCarthy’s demeanor was odd and destructive, but his statements to the district court demonstrate he understood what was occurring with his case.

McCarthy suggests that his letters and documents that he filed with the district court should have caused the district court to question his competency. McCarthy attached to his Appellant’s Brief a number of incoherent and confusing letters that he had

sent to the district court. A number of these letters were ex parte and returned unread to McCarthy's counsel because the district court was precluded from reading them for judicial ethical reasons. McCarthy also filed a number of documents and letters with the district court after the jury found McCarthy guilty, and in some cases after his sentencing. The Court held: "These letters and documents are not relevant when determining whether the district court should have doubted McCarthy's competency because they would not have caused it to have a good faith doubt about McCarthy's competency when they were never before the court."

The Court also emphasized that defense counsel did not present any medical opinions on McCarthy's competency, request a competency hearing, question his ability to understand the proceedings, answer the allegations against him, or assist in his defense.

D. Jury Selection

State v. Allum, 2005 MT 150, ___ Mont. ___, ___ P.3d ___ (Gallatin). **Affirmed; Leaphart, J. (Nelson, dissenting).** The Court declined to address the legality of the municipal court's method of selecting jurors because Allum's objection, which was raised after the impaneling of the jury, would deprive the municipal court of the ability to correct perceived errors in a timely fashion.

State v. Burkhardt, 2004 MT 372, 325 Mont. 27, 103 P.3d 1037 (Cascade). **Affirmed; Regnier, J. (Cotter and Nelson, concurring; Leaphart, dissenting).** The district court dismissed a panel member for cause on the State's motion. The prospective juror had said he disagreed with and would not follow certain laws having to do with seat belts, guns, and forfeiture. Citing *State v. Freshment*, 2002 MT 61, 309 Mont. 154, 43 P.3d 968, the Court said the panel member "stated a bias related to an issue critical to the outcome of the case: whether he could follow the law as given in light of the evidence" and that "dismissal for cause is favored when a serious question arises about the juror's ability to be impartial."

E. Severance

State v. Riggs, 2005 MT 124, ___ Mont. ___, ___ P.3d ___ (Gallatin). **Affirmed; Nelson, J.** The district court did not abuse its discretion by denying Riggs' motion to sever the charges. Riggs did not establish sufficient prejudice to require severance of the charges.

VI. TRIAL

A. Evidence

***State v. Grindheim*, 2004 MT 311, 323 Mont. 519, 101 P.3d 267 (Fergus).** **Affirmed; Rice, J.** Grindheim asserted that the district court improperly required him to choose between a continuance to prepare for a State witness or losing the opportunity for his expert to testify due to a conflict in his expert's schedule. The Court ruled the district court did not abuse its discretion when it allowed the State to add a witness five days before trial, nor by denying Grindheim's request to call his expert, Dr. Ofshe, out of order. Grindheim had actual prior notice of the witness, the witness's testimony was cumulative, and Grindheim had five days after formal notice to prepare for cross-examination. The district court's finding that allowing Dr. Ofshe to testify out of order would cause jury confusion was not contested by Grindheim on appeal, and therefore, the district court properly denied that request. In any case, any alleged error was harmless, because the witness's testimony was cumulative and had the effect of corroborating another witness.

1. Rule 404/Character Evidence

***State v. Long*, 2005 MT 130, ___ Mont. ___, ___ P.3d ___ (Fergus).** **Affirmed; Warner, J.** Long objected to the district court's allowing all three bindles admitted in evidence to go to the jury room during deliberation. Only one bindle's contents had been tested, and that test had been positive for methamphetamine. The Court said that the district court was presented with no authority and that the presence of the untested bindles had no effect on Long's right to a fair trial.

***State v. Montgomery*, 2005 MT 120, ___ Mont. ___, ___ P.3d ___ (Flathead).** **Affirmed; Cotter, J.** Montgomery was charged with negligent homicide for shooting one of his guests after a ping-pong party in his garage went sour. The victim, whose reputation for belligerence was well-deserved, had gotten into a fight with Montgomery during the party, which then broke up. A short time later, Montgomery heard an intruder enter his home and shot him. Until the trial, he had maintained that he did not know the identity of the intruder, but during trial, he said that he did know who it was an instant before the shooting.

The issue on appeal was the district court's granting of the State's motion in limine, which prevented Montgomery from introducing the victim's earlier violent acts and criminal conduct. The Court said that under either Mont. R. Evid. 404 or 405, the use of the victim's prior bad acts required that Montgomery first establish that he knew whom he was shooting, that he knew of the past violent conduct, and that this knowledge led him to use this level of force.

***State v. Smith*, 2005 MT 18, ___ Mont. ___, 106 P.3d 553 (Missoula).**

Affirmed; Gray, C.J. Smith stole his mother's ATM card and then went on a drinking spree. At his theft trial, and during the cross-examination of his mother, defense counsel elicited the following matter:

Defense Counsel: What efforts, if any, did you take to locate him [Mr. Smith] at that point?

MRS. SMITH: Well, one of the things was is that I went to his parole officer, my husband and I went to his parole officer, to see if he knew where he was at.

Following this question and answer, defense counsel moved for mistrial on the grounds that the previously granted motion in limine was violated by the mother's reference to Smith's parole officer, information that defense counsel argued indicated prior bad acts by Smith. The Court declined to address the merits of Smith's claim. Through his counsel's open-ended cross-examination questioning of an adverse witness, Smith invited the error about which he complains. Compounding Smith's "invited error" waiver was that defense counsel neither requested nor objected to the trial judge's failure to give a curative instruction. Thus, defense counsel actively participated in the alleged error and thus waived his right to complain on appeal that the trial court gave no curative instruction.

2. Res Gestae

***State v. Baker*, 2004 MT 393, 325 Mont. 229, 104 P.3d 491 (Cascade).**

Affirmed; Cotter, J. Baker was convicted of attempted obstruction of peace officers based upon her telephoning her neighbor and leaving a message on his answering machine warning him that a High Risk Unit (HRU) of the Great Falls Police Department ("SWAT" team) was approaching his house. A five-justice panel of the Court affirmed Baker's conviction, addressing three issues. First, because the officers were heavily armed and because Baker admitted that she thought her neighbor was a drug dealer, rational jurors could conclude that Baker intended to hinder the officers' performance of their duties. Second, the Court rejected Baker's contention that the trial court should not have allowed evidence concerning the HRU and the suspect's dangerousness, concluding that the high-risk nature of this particular law enforcement action was transactional evidence. Finally, the Court rejected Baker's claim of instructional error, concluding that the jury was properly instructed regarding both the knowingly standard (applicable to the obstruction statute) and the purposely standard (applicable to the attempt statute).

3. Opinion and Expert Testimony

State v. Frasure, 2004 MT 305, 323 Mont. 479, 100 P.3d 1013 (Cascade).

Affirmed; Leaphart, J. Timi Frasure (Timi) appealed from her conviction for possession of dangerous drugs with the intent to sell.

Timi claimed that the trial court abused its discretion when it allowed the officers to give expert testimony about Timi's intent to sell illicit drugs without the State first laying a foundation establishing their qualifications as experts, as required by Mont. R. Evid. 702. The Court found that the officers' testimony was admissible as lay opinion testimony under Mont. R. Evid 701. Under Rule 701, police officers may testify to matters as to which they have extensive experience and are properly qualified through training and experience. In this case, the State provided sufficient foundation that the officers had extensive training and experience in the methods used in the illicit drug trade and the prices that illicit drugs, such as methamphetamine, generally garner.

State v. Riggs, 2005 MT 124, ___ Mont. ___, ___ P.3d ___ (Gallatin).

Affirmed; Nelson, J. The Court has affirmed the child sex abuse convictions of Robert Riggs, who molested his step-daughter and three of her friends over an 18-month period at his home in Bozeman. The Court concluded: (1) the district court did not abuse its discretion when it limited the testimony of a defense expert witness and excluded the expert from the courtroom during the testimony of the victims. Riggs sought to present expert testimony on the credibility of the victims, even though the State had not presented any expert testimony in its case in chief. Riggs also sought to have his expert present in the courtroom to observe the victims' testimony. The Court affirmed the district court's prohibition of any expert testimony on credibility and the exclusion of the expert from the courtroom; and (2) the district court did not abuse its discretion by allowing the State's expert to testify in rebuttal to the defense expert and by limiting the cross-examination of the State's expert. The State presented expert testimony to rebut the defense expert's criticism of the interview techniques used with the child victims. The State's expert had previously provided therapy for one of the victims. The Court confirmed that a prior therapeutic relationship does not disqualify a psychologist from testifying in a child sex abuse case, and that the defense may be limited from cross-examining the psychologist about the substance of the treatment of the victim.

State v. Sandrock, 2004 MT 195, 322 Mont. 231, 95 P.3d 153 (Cascade).

Affirmed; Nelson, J. The district court did not abuse its discretion when it denied the defendant's motion for a mistrial based upon his claim that the State's mental health expert offered an opinion of the defendant's mental state at the time he committed sexual offenses against his stepdaughter and niece. The expert's testimony that the defendant knew right from wrong was referring to letters that the defendant wrote, which were admitted into evidence. The letters provided the expert with examples of the defendant's

ability to know right from wrong, at least when he wrote the letters. The testimony did not target the ultimate issue of whether the defendant possessed the requisite mental state at the time of the charged offenses. The district court did not abuse its discretion when it allowed a social worker to testify about matters concerning sexual abuse and religious manipulation and control. The testimony was relevant to provide the jury a context for them to understand the intricacies of “religious groups” in general. Further, the testimony was not unfairly prejudicial since the defendant admitted to controlling his victims, and the witness did not testify specifically about the defendant.

***State v. Snell*, 2004 MT 334, 323 Mont. 84, 103 P.3d 503 (Missoula).**

Affirmed; Regnier, J. (Warner, dissenting). The district court properly allowed the arresting officer to testify regarding his observations of intoxication pursuant to Mont. R. Evid. 701, even though the officer was not listed as an expert witness.

***State v. Van Haele*, 2005 MT 153, ___ Mont. ___, ___ P.3d ___ (Treasure).**

Affirmed; Nelson, J. During his revocation proceeding, Van Haele objected to the admission of the results from his sex offender risk assessment on the grounds that the State failed to set forth the foundation required by Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579 (1993). The Court stated that Daubert applies to the admissibility of novel scientific evidence under Mont. R. Evid. 702, but the Rules of Evidence do not apply to revocation proceedings.

4. Documentary Evidence/Exhibits

***State v. Bar-Jonah*, 2004 MT 344, 324 Mont. 278, 102 P.3d 1229 (Cascade).**

Affirmed; Warner, J. The district court did not abuse its discretion when it admitted into evidence two photo albums containing hundreds, possibly thousands, of pictures of young children, only a few of which were of the alleged victims in this case. The photo albums were relevant and probative on the issues of Bar-Jonah’s motive for befriending the victims, the victims’ credibility, and to rebut Bar-Jonah’s defense. The photo albums were not unfairly prejudicial, and Mont. R. Evid. 404(b) is not applicable simply because the evidence implies the defendant is of bad character.

***State v. Bar-Jonah*, 2004 MT 344, 324 Mont. 278, 102 P.3d 1229 (Cascade).**

Affirmed; Warner, J. The district court properly exercised its discretion when it admitted into evidence an article on how to tie ropes and knots, a pamphlet entitled “Autoerotic Asphyxia,” and an envelope addressed to Bar-Jonah from the same organization that produced the pamphlet, all of which were found in Bar-Jonah’s apartment during the searches. The above exhibits were relevant and admissible to corroborate S.J.’s testimony that Bar-Jonah placed a rope around his neck and hung him from the ceiling. Since Bar-Jonah was not prejudiced by the alleged errors, the Court will not apply the doctrine of cumulative error.

State v. Dunfee, 2005 MT 147, ___ Mont. ___, ___ P.3d ___ (Silver Bow). **Affirmed; Warner, J.** Dunfee was convicted of aggravated assault and committed to the DOC. He raised four issues on appeal. Dunfee objected to four color photographs showing the victim's injuries. The trial court has discretion to weigh the probity and prejudice of evidence. The photographs here showed the extent of the injuries and, while unpleasant, were not so inflammatory that the trial court abused its discretion in admitting them.

State v. Pittman, 2005 MT 70, ___ Mont. ___, ___ P.3d ___ (Custer). **Affirmed; Gray, C. J.** A jury found Pittman guilty of Assault on a Peace Officer, Attempted Assault on a Peace Officer, Assault with Bodily Fluid, and Obstructing a Peace Officer. Pittman argued that the district court abused its discretion in allowing the admission of a videotape of her at the detention center. She contended that the videotape was cumulative evidence because the officers in the videotape testified at trial. She also contended the video was inflammatory and prejudicial. The Court disagreed, explaining that the videotape clearly was instructive and corroborative. The Court stated that the videotape presented the jury with the best evidence whether Pittman committed three of the charged offenses.

5. BAC/Intoxication

City of Missoula v. Lyons, 2004 MT 255, 323 Mont. 67, 97 P.3d 1120 (Missoula). **Affirmed; Leaphart, J.** The district court properly upheld the municipal court's finding that the Intoxilyzer 5000 was correctly administered. The current version of the "operational checklist" and Mont. Admin. R. 23.4.212(7), does not require that the subject be "observed" (i.e., in the officer's line of sight) for a minimum of 15 minutes. The record supports the municipal court's finding that there was no oral ingestion of any material and that the officer adhered to the operational checklist.

State v. Flaherty, 2005 MT 122, ___ Mont. ___, ___ P.3d ___ (Lewis and Clark). **Affirmed; Cotter, J.** The Court affirmed the district court's denial of the defendant's motion to suppress the result of his Intoxilyzer 5000 test based upon alleged deficiencies in the 15-minute observation period. According to *State v. Lyons*, the current operational checklist does not require the administrator of the test to keep his eyes on the subject at all times, only that he observe the actual testing, which occurred here. Although the Court did not reach the issue, it credited the State's argument that an unbending requirement that an officer continuously observe the defendant for 15 minutes would ignore the practical realities of law enforcement and "that one of the functions of video equipment is to allow an officer to perform such tasks as pat-downs and booking without jeopardizing the officer's efforts to obtain a timely breath test result."

***State v. Kintli*, 2004 MT 373, 325 Mont. 53, 103 P.3d 1056 (Lewis and Clark).** **Affirmed; Warner, J.** Following arrest for DUI, defendant agreed to provide a breath sample, which registered .262 BAC. Realizing that he failed to read the implied consent advisory prior to requesting the sample, the officer read the advisory and offered to void the prior test and retake it. Defendant opted to stay with the first result. On appeal, and under the facts of this case, the Court rejected defendant's claim that her due process rights were violated by this procedure or that her consent was somehow invalidated.

***State v. Larson*, 2004 MT 345, 324 Mont. 310, 103 P.3d 524 (Pondera).** **Affirmed; Regnier, J.** The Court has affirmed the Pondera County negligent homicide conviction of Mark Larson, who was driving a pickup drunk at a high speed when it went off the road and rolled twice, killing one of the passengers. The Court upheld several challenged evidentiary rulings by Judge Buyske, including the admission of expert testimony from Lynn Kurtz of the State Crime Lab concerning the fact that Larson was in the "elimination phase" at the time his blood was drawn for a BAC test at the hospital two hours after the accident. The expert testimony did not amount to "retrograde extrapolation" of Larson's BAC at the time of the accident. The Court also concluded that the district judge did not abuse his discretion by precluding the admission of the victim's BAC or by excluding evidence of the post-accident erection of new highway signs at the scene of the accident. The Court held that the jury was properly instructed on the definition of criminal negligence, noting that the given instruction followed the statutory definition. The Court rejected Larson's claims that the evidence of impairment and speeding was insufficient to support the convictions of negligent homicide, DUI, and exceeding the speed limit, and the Court found the doctrine of cumulative error to be inapplicable.

***State v. McCaslin*, 2004 MT 212, 322 Mont. 350, 96 P.3d 722 (Gallatin).** **Affirmed; Regnier, J.** The district court did not err in admitting evidence of McCaslin's state of intoxication after his arrest, because it was relevant as part of the transaction, pursuant to Mont. Code Ann. § 26-1-103.

***State v. Otto*, 2004 MT 338, 324 Mont. 217, 102 P.3d 522 (Fergus).** **Affirmed; Cotter, J.** The breathalyzer machine malfunctioned by failing to print Otto's test results. The administering officer testified he witnessed a test result of .159 on the breathalyzer's LED read-out. Otto argued that the district court should have suppressed the test result because the instrument did not give a true "test" as required by administrative rule. According to Otto, because Mont. Admin. R. 23.4.201(31) requires a printed result, and because a printed result was not available in this case, evidence of the result observed by the officer must be suppressed. The Court declined to reach the merits of Otto's argument since he never alleged, much less proved, that the admission of the breath test results prejudiced him in any way. Also, the State adduced ample other evidence of his intoxication.

***State v. Snell*, 2004 MT 334, 323 Mont. 84, 103 P.3d 503 (Missoula).**
Affirmed; Regnier, J. (Warner, dissenting). The State did not present sufficient evidence of reliability regarding the PAST (preliminary alcohol screening test) to warrant admission of the test results as evidence of criminal culpability. The evidence was substantially similar to the evidence in Weldele, which the Court previously held was insufficient for that purpose (even though it may establish probable cause). Note that the evidentiary hearing in this case predated the Court's ruling in Weldele. Another case is currently pending (State v. Crawford) which will hopefully provide the answer to these questions. Justice Warner dissented on this point, disputing the propriety of the Court's decision in Weldele (based on State v. Strizich) and suggesting that "we must give the PAST a fresh look." Justice Warner would have found sufficient foundation to warrant admission of the PAST results.

***State v. Zakovi*, 2005 MT 91, ___ Mont. ___, 110 P.3d 469 (Jefferson).**
Affirmed; Rice, J. Zakovi was injured when he crashed his motorcycle on McClellan Creek Road. When the highway patrol officer arrived at the scene, Zakovi was being loaded into an ambulance. The officer spoke briefly with Zakovi and noted that his breath smelled of alcohol. Zakovi was taken to the hospital in Helena and treated for his injuries. After finishing his investigation at the scene, the officer went to the hospital, spoke with Zakovi again, and administered an HGN test. Zakovi failed the HGN test and was arrested for DUI. When the officer requested a blood sample for BAC analysis, Zakovi admitted he was drunk and told the officer that he didn't need a blood sample. Zakovi eventually consented to the sample, and it was drawn by a hospital lab technician. The Court held that: (1) the officer was not required to give the investigative stop advisory (required by former Mont. Code Ann. § 45-5-402 and State v. Krause) because the officer's questioning and administration of the HGN test at the accident scene and the hospital did not constitute an investigative stop; (2) the district court did not abuse its discretion when it denied Zakovi's motion to exclude the HGN test because of the officer's alleged failure to properly administer the test; (3) the district court properly denied Zakovi's motion to suppress the BAC test results based on alleged lack of consent; and (4) the district court properly denied Zakovi's motion to suppress the BAC results based on his claim that the blood sample was not collected by a qualified person acting under the supervision of a physician or registered nurse.

6. Corroboration

***State v. Burkhart*, 2004 MT 372, 325 Mont. 27, 103 P.3d 1037 (Cascade).**
Affirmed; Regnier, J. (Cotter and Nelson, concurring; Leaphart, dissenting). Burkhart was initially charged with accountability for deliberate homicide, but his codefendant testified against him, and the State amended the Information just before trial. Burkhart argued that the evidence showing him to have been the assailant came entirely from his codefendant's testimony. The Court found corroboration in the physical

evidence (a pathologist confirmed that the holes in the victim's skull matched the round end of a ball peen hammer the police found near the scene--although it did not carry Burkhart's fingerprints) and in Burkhart's angry statements before the assault.

7. Sufficiency of the Evidence and Credibility

State v. Baker, 2004 MT 393, 325 Mont. 229, 104 P.3d 491 (Cascade).

Affirmed; Cotter, J. Baker was convicted of attempted obstruction of peace officers based upon her telephoning her neighbor and leaving a message on his answering machine warning him that a High Risk Unit (HRU) of the Great Falls Police Department ("SWAT" team) was approaching his house. Rejecting Baker's sufficiency of the evidence claim, the Court concluded that because the officers were heavily armed and Baker admitted that she thought her neighbor was a drug dealer, rational jurors could conclude that Baker intended to hinder the officers' performance of their duties.

State v. Dunfee, 2005 MT 147, ___ Mont. ___, ___ P.3d ___ (Silver Bow).

Affirmed; Warner, J. Dunfee was convicted of aggravated assault and committed to the DOC. He raised four issues on appeal. Dunfee claimed there was insufficient evidence to support a conviction of aggravated assault. The Court said the argument failed because, among other things, Dunfee admitted on the stand that he was a professional boxer and that he hit the victim in the face four times.

State v. Kuipers, 2005 MT 156, ___ Mont. ___, ___ P.3d ___ (Gallatin).

Affirmed; Gray, C.J. The Court affirmed the district court's conclusion that sufficient evidence supported Kuipers' convictions of theft and violating an order or protection. This case is so fact-specific, it would not be useful to discuss the details. The Court repeatedly emphasized that the question was not whether the evidence could support a different verdict, but whether sufficient evidence supported the verdict, and that credibility determinations are within the province of the trier of fact.

State v. Pittman, 2005 MT 70, ___ Mont. ___, ___ P.3d ___ (Custer).

Affirmed; Gray, C. J. Pittman claimed that the State's evidence was insufficient to sustain her convictions for Assault on a Peace Officer and Attempted Assault on a Peace Officer. Viewing the evidence in a light most favorable to the prosecution, the Court concluded that there was sufficient evidence to support Pittman's convictions.

B. Principles of Liability

1. Entrapment

State v. Reynolds, 2004 MT 364, 324 Mont. 495, 104 P.3d 1056 (Choteau). **Affirmed; Cotter, J.** The Court affirmed the district court's denial of Reynolds' motion to dismiss on the basis of entrapment. Reynolds argued that officers entrapped him into driving intoxicated and without a valid driver's license and insurance when they instructed the bartender to return his keys after Reynolds was demanding his keys from the bartender in a threatening manner. Reynolds had previously handed the keys to the bartender and been instructed by the officers not to drive. The Court held that it was Reynolds' idea to subsequently demand the return of the keys and to drive away.

C. Justifiable Use of Force

State v. McCaslin, 2004 MT 212, 322 Mont. 350, 96 P.3d 722 (Gallatin). **Affirmed; Regnier, J.** The district court did not err in refusing to instruct the jury regarding injury to a third party bystander while acting in self-defense because the evidence did not support the proposed instructions.

D. Inchoate Offenders

1. Attempt

State v. Baker, 2004 MT 393, 325 Mont. 229, 104 P.3d 491 (Cascade). **Affirmed; Cotter, J.** The Court affirmed Baker's conviction for attempted obstruction of peace officers based upon evidence that she telephoned her neighbor and left a message on his answering machine warning him that a High Risk Unit (HRU) of the Great Falls Police Department ("SWAT" team) was approaching his house.

E. Offenses Against the Person

1. Homicide

State v. Burkhart, 2004 MT 372, 325 Mont. 27, 103 P.3d 1037 (Cascade). **Affirmed; Regnier, J. (Cotter and Nelson, concurring; Leaphart, dissenting).** Richard Earl Burkhart was charged and convicted of deliberate homicide under the felony-murder rule. The predicate felony was assault with a weapon; a ball peen hammer.

The principal issue was whether it was proper to charge Burkhart under the rule when the predicate crime itself caused the death, maintaining that the charges should be “merged.” State courts are divided on merger, and in this instance, the Court declined to adopt the rule in California v. Ireland, 450 P.2d 580 (1969), which required the underlying or predicate felony be independent of the homicide. Applying an earlier case to the felony-murder statute, the Court said the rule required that “the death actually occurred during the underlying felony or the flight thereafter;” the case in this instance.

2. Assault/Related Offenses

***State v. McCaslin*, 2004 MT 212, 322 Mont. 350, 96 P.3d 722 (Gallatin).**
Affirmed; Regnier, J. Sufficient evidence supported McCaslin’s convictions of aggravated assault and assault with a weapon.

***State v. R.B. “J” C.*, 2004 MT 254, 323 Mont. 62, 97 P.3d 1116 (Ravalli).**
Affirmed; Cotter, J. The Defendant (“J”) was charged with two counts of felony assault for burning his half-sister with a heated but unlit cigarette lighter and threatening to burn his brother with the lighter. “J” moved to dismiss the assault charges, arguing that the unlit lighter did not meet the statutory definition of a weapon under Mont. Code Ann. § 45-2-101(78). The district court denied the motion. The Court affirmed the district court’s ruling, concluding that the lighter was a weapon under Mont. Code Ann. § 45-2-101(78). The Court held: “[A]n operable cigarette lighter containing fuel and being used as a device to inflict pain or injury on ‘M,’ and threatened to be used by ‘J’ on his little brother, does satisfy this definition.”

***State v. Smith*, 2004 MT 191, 322 Mont. 206, 95 P.3d 137 (Yellowstone).**
Affirmed in part, reversed in part; Rice, J. During a telephone conversation, Smith told his estranged wife that he was going to kill her boyfriend with a gun. Shortly thereafter, Smith twice called the boyfriend and Smith stated he was on his way to kill him. A victim does not need to “see” a weapon before the element of assault with a weapon is met. The crime of assault with a weapon may be established if: (1) a person uses a weapon, or what reasonably appears to be a weapon, to cause reasonable apprehension of serious bodily injury in the victim; or (2) a person causes reasonable apprehension that the victim will sustain serious bodily injury from a weapon, if it reasonably appears to the victim that a weapon is involved, whether actually seen or not. The phrase “in another” in subpart (1)(b) means the intended victim, not a third party victim who only suffers apprehension of the harm to the intended victim of the serious bodily injury. Thus, the “reasonable apprehension” in subpart (1)(b) references the apprehension which is experienced by the intended victim of the serious bodily injury.

3. Sexual Crimes

***State v. Grindheim*, 2004 MT 311, 323 Mont. 519, 101 P.3d 267 (Fergus).**

Affirmed; Rice, J. The district court did not abuse its discretion when it denied Grindheim's motion for directed verdict on the issue of penetration. (See Mont. Code Ann. § 45-2-101(67)(a), "sexual intercourse means penetration of the . . . mouth of one person by the penis of another person . . .") Grindheim argued that E.S.'s testimony regarding this element was ambiguous. The Court concurred with the district court's finding that E.S.'s testimony was sufficient to sustain a finding of penetration.

4. Other

***State v. McCarthy*, 2004 MT 312, 324 Mont. 1, 101 P.3d 288 (Gallatin).**

Affirmed; Regnier, J. The Court concluded there was sufficient evidence to support McCarthy's conviction for Intimidation.

***State v. McCarthy*, 2004 MT 312, 324 Mont. 1, 101 P.3d 288 (Gallatin).**

Affirmed; Regnier, J. McCarthy filed a motion in limine, requesting that the district court prohibit two probation officers from testifying regarding whether they feared or believed he would carry out his threat to harm a prosecutor. The district court denied his motion. McCarthy claimed the Intimidation statute calls for an objective standard as to whether a reasonable person would believe that the threat would be carried out. He argued that by allowing the probation officers to testify about the effects the threats had on them, the district court converted the test from an objective to a subjective standard. The Court rejected McCarthy's argument, explaining that a victim must testify, subjectively, whether or not they experienced fear, and the jury can determine whether the circumstances justified that fear and whether that fear is reasonable.

***State v. Motarie*, 2004 MT 285, 323 Mont. 304, 100 P.3d 135 (Glacier).**

Affirmed; Leaphart, J. An informant reported Motarie to the Department of Fish, Wildlife and Parks for illegally poaching an elk on the Sun River Game Range. Motarie learned the identity of the informant through the Cut Bank grapevine. Within one month after reporting Motarie to the officials, the informant received a threatening phone call. When viewing the evidence in the light most favorable to the prosecution, a rational trier of facts could have found the essential elements of the two crimes charged beyond a reasonable doubt. In particular, a jury could have determined that Motarie intended to stop the informant from continuing his cooperation with the law enforcement. Thus, Motarie had the requisite purpose for both the intimidation offense and the tampering with witnesses and informants offense.

F. Offenses Against Property

1. Criminal Trespass/Burglary

State v. Allum, 2005 MT 150, ___ Mont. ___, ___ P.3d ___ (Gallatin).
Affirmed; Leaphart, J. (Nelson, dissenting). The Court approved the municipal court's instructing the jury that the State had to prove the following elements to convict Allum of criminal trespass: (1) that the defendant entered or remained unlawfully in an occupied structure; or (2) that the defendant entered or remained unlawfully in or upon the premises of another; and (3) that the defendant acted knowingly. The Court also held that a store manager does not need explicit written authority from the owner of the property to exclude persons from the property in order to be considered an "authorized person" within the meaning of Mont. Code Ann. § 54-6-201 (1) (the criminal trespass statute).

G. Dangerous Drugs

State v. Chase, 2004 MT 375, 325 Mont. 64, 103 P.3d 1060 (Deer Lodge).
Affirmed; Cotter, J. Defendant's drug-related felony conviction was supported by sufficient evidence because she was in possession of the ingredients and supplies for "cooking" methamphetamine in her apartment and was engaged in transporting it at the time of her arrest.

H. DUI

State v. Hayes, 2005 MT 148, ___ Mont. ___, ___ P.3d ___ (Lincoln).
Affirmed; Rice, J. The Court affirmed the district court's conclusion that the Caboose parking lot was a "way of this state open to the public." Hayes challenged the suspension of his driver's license on the basis that his vehicle was not located on a "way of this state open to the public" when he was arrested. Specifically, he argued, that the Caboose parking lot was not "adapted and fitted for public travel." The Court rejected his argument and agreed with the State's position that, even though the parking lot was in bad shape, it was in common use by members of the public patronizing the Caboose and was also used by flower and Christmas tree vendors.

State v. Hudson, 2005 MT 142, ___ Mont. ___, ___ P.3d ___ (Yellowstone).
Affirmed; Morris, J. Hudson was convicted by a jury of one count of DUI, a felony. On appeal, Hudson raised two issues: (1) Whether the district court's instruction to the jury regarding Hudson's actual physical control of the vehicle violated his due process rights; and (2) Whether the district court's instruction to the jury regarding the admissibility of Hudson's refusal to submit to field sobriety tests constitutes an improper comment on the evidence.

1. Hudson objected to the jury instruction that defined “actual physical control” pursuant to Mont. Code Ann. § 61-8-401, as “[a] person is in actual physical control of a motor vehicle if the person is not a passenger, and is in a position to, and had the ability to, operate the vehicle in question,” on the ground that it misstated the law in Montana. The district court refused his proposed instruction that permitted the jury to find whether the defendant drove to where the authorities found the vehicle, and whether the defendant intended to drive. The Court ruled that the jury was correctly instructed regarding “actual physical control” of the vehicle. The district court’s instruction was identical to the Model Criminal Jury Instruction and accurately reflects the law as developed by judicial interpretation. Further, the offense of driving while under the influence remains a strict liability offense that does not require an intent element.

***State v. Maki*, 2004 MT 226, 322 Mont. 420, 97 P.3d 556 (Cascade). Affirmed; Rice, J.** Maki was parked off Highway 87 near a missile access site. When a highway patrolman conducted a welfare check, he discovered that Maki was drunk and arrested him for DUI. In justice court, Maki moved to dismiss the DUI charge, arguing that his arrest took place on Malstrom Air Force Base property and, therefore, he was not on a way of this state open to the public as defined by Mont. Code Ann. § 61-8-101(1). The justice court denied the motion and Maki was convicted of DUI.

Maki appealed his conviction to the district court and was convicted again. Maki claimed that his trial counsel provided ineffective assistance in district court because counsel failed to file a motion to dismiss the DUI charge on the grounds that the missile access site where he had been parked was not on a way of this state open to the public. The Court rejected Maki’s IAC claim, stating:

[B]ecause “ways of this state open to the public” is an element of the offense defined by § 61-8-401, MCA, the issue was before the jury, and Maki had the opportunity to contest the point. He did not need to offer a motion to dismiss to raise this issue. Moreover, the jury necessarily decided as a matter of fact that Maki was on a “way[] of this state open to the public” in order to convict him of the offense charged, though Maki does not challenge this aspect of the jury’s conclusion.

***State v. Snell*, 2004 MT 334, 323 Mont. 84, 103 P.3d 503 (Missoula). Affirmed; Regnier, J. (Warner, dissenting).** Defendant’s inability to recall exactly what occurred in justice court does not constitute “direct evidence” sufficient to overcome the presumption of regularity that attaches to a prior DUI conviction. Without any direct evidence, defendant’s attempt to invalidate the prior convictions with circumstantial evidence (i.e., an attorney-witness’s testimony regarding the justice court’s common practice) should not have even been considered.

I. Other Offenses

State v. Motarie, 2004 MT 285, 323 Mont. 304, 100 P.3d 135 (Glacier).

Affirmed; Leaphart, J. An informant reported Motarie to the Department of Fish, Wildlife and Parks for illegally poaching an elk on the Sun River Game Range. Motarie learned the identity of the informant through the Cut Bank grapevine. Within one month after reporting Motarie to the officials, the informant received a threatening phone call. When viewing the evidence in the light most favorable to the prosecution, a rational trier of facts could have found the essential elements of the two crimes charged beyond a reasonable doubt. In particular, a jury could have determined that Motarie intended to stop the informant from continuing his cooperation with the law enforcement. Thus, Motarie had the requisite purpose for both the intimidation offense and the tampering with witnesses and informants offense.

J. Jury Issues

1. Voir Dire

Ford v. State, 2005 MT 151, ___ Mont. ___, ___ P.3d ___ (Cascade).

Affirmed; Nelson, J. (Cotter, concurring). In State v. Ford the Court declined to address the merits of Ford's Batson claim (alleging gender discrimination in jury selection) because the objection, asserted after the jury was empanelled and sworn and the venire was dismissed, was untimely. Ford then filed a postconviction petition, alleging that his trial counsel was ineffective for failing to lodge a timely Batson objection. The district court concluded that the claim was procedurally barred under Mont. Code Ann. § 46-21-105(2). The Court affirmed, holding that because there is no conceivable trial strategy justifying an untimely Batson objection, the claim was record-based and, therefore, barred.

Although Justice Cotter would not have procedurally barred the claim, she concurred in the Court's judgment, concluding that because trial counsel had no statutory or case law guidance regarding the timing of a Batson objection at the time State v. Ford was decided, counsel's failure to timely object could not have been ineffective.

State v. Bearchild, 2004 MT 355, 324 Mont. 435, 103 P.3d 1006 (Cascade).

Affirmed; Regnier, J. (Gray, Leaphart and Nelson, dissenting). Prior to the commencement of voir dire in this incest prosecution, the prosecutor challenged panelist No. 43 because she had worked in the County Attorney's Office, had access to information regarding criminal and child abuse cases, and was recently fired by the prosecutor. Defense counsel resisted the challenge, contending that he had the right to question the panelist. The district court granted the challenge because No. 43 could be partial, she might poison the venire, and she was unlikely to serve on the petit jury in any

event. On appeal, relying upon LaMere, the appellate defender contended that the granting of the challenge was structural error. By a 4 to 3 vote the Court disagreed. Although the district court's granting of the challenge prior to voir dire was erroneous, it was not a "material failure to substantially comply with Montana's statutes governing the procurement of a trial jury." Unlike LaMere, the impact of the isolated ruling could be ascertained without speculation; because the last panelist questioned during voir dire was No. 36, panelist No. 43 would never have served on the jury. Accordingly, the pre-voir dire excusal of No. 43 was harmless.

The dissenters would have automatically reversed the conviction, reasoning that the excusal materially impacted "the objectivity of determining juror disqualification."

State v. Dunfee, 2005 MT 147, ___ Mont. ___, ___ P.3d ___ (Silver Bow).
Affirmed; Warner, J. Dunfee was convicted of aggravated assault and committed to the DOC. He raised four issues on appeal. Dunfee argued the district court erred by denying his motion for a new trial because a juror had failed to mention on voir dire that he had been assaulted by Dunfee's brother. "[W]here juror non-disclosure does not amount to intentional concealment and no further evidence of bias is proven, there are no grounds for reversal." Dunfee, ¶ 16. No one asked the juror this question.

State v. Lamere, 2005 MT 118, ___ Mont. ___, ___ P.3d ___ (Cascade).
Reversed; Nelson J. The State charged Lamere with aggravated assault and assault with a weapon. One of the jurors that served on Lamere's jury panel is the mother of a paralegal employed by the Cascade County Attorney's Office. The paralegal sat at counsel table during voir dire and assisted the prosecutor. The prospective juror had disclosed this relationship in her juror questionnaire. Neither defense counsel nor the prosecutor questioned the prospective juror about her relationship to the State's paralegal. The juror gave answers favorable to Lamere regarding the concept of presumption of innocence. After the State began presenting its case, defense counsel discovered the relationship between the juror and the State's paralegal and moved the district court to replace the juror with the alternate. Defense counsel acknowledged his failure to take notice of the information disclosed in the juror's questionnaire. The State opposed the motion arguing that the juror had clearly articulated her ability to be fair to both sides. The district court refused to replace the juror with the alternate.

On appeal, Lamere argued trial counsel provided ineffective assistance of counsel during voir dire. The Court held that when defense counsel failed to take note of relevant information in the juror questionnaire, he failed to fulfill his duty to ensure the jury was impartial. Thus, his performance was deficient. The Court goes on to state that defense counsel's deficient performance constituted **structural error** because it occurred in the jury selection process. Further, since the error was structural, "*prejudice is adequately established because a structural error existed, and such errors are presumptively prejudicial.*"

Prosecutors beware: any error in voir dire is potentially structural error. If defense counsel has failed to question prospective jurors about potential bias based upon a relationship disclosed in the juror questionnaire, the prosecutor better do it or risk reversal of a conviction.

***State v. Parrish*, 2005 MT 112, ___ Mont. ___, 111 P.3d 671 (Flathead).** **Affirmed in relevant part, reversed in part; Morris, J.** Applying the rule that the Court will affirm the district court if it reaches the right result for the wrong reason, the Court held that defense counsel’s Batson objection to the prosecution’s exercising all of its peremptory strikes against males (in a sexual assault/sexual intercourse without consent prosecution) was untimely pursuant to the Court’s decision in Ford because the objection was not formally presented until a motion for a new trial was filed. This is the third time the Court has declined to address a Batson claim because the objection was not timely asserted.

2. Instructions

***State v. Allum*, 2005 MT 150, ___ Mont. ___, ___ P.3d ___ (Gallatin).** **Affirmed; Leaphart, J. (Nelson, dissenting).** The Court approved the municipal court’s instructing the jury that the State had to prove the following elements to convict Allum of criminal trespass: (1) that the defendant entered or remained unlawfully in an occupied structure; or (2) that the defendant entered or remained unlawfully in or upon the premises of another; and (3) that the defendant acted knowingly. The Court rejected Allum’s argument that the instruction permitted the jury to pick and choose which elements the State had to prove, holding that the State’s obligation to prove “every element” does not mean ‘all elements’ that are included in a statute when the statute gives alternate elements that may constitute the underlying offense.” Responding to the dissent, the Court declined to address the absence of a specific unanimity instruction because Allum neither raised the issue at trial nor on appeal.

Justice Nelson dissented, contending that the Court should reverse the trial court *sua sponte* based upon the absence of a unanimity instruction. He criticized the Court for “ignoring the Constitution and genuflecting at the altar of a mere rule of procedure.” He added, “In spite of this Opinion, I sincerely hope that practitioners do not start using this instruction. It misstates the law. It is, no doubt, confusing to the jury. And, I believe, giving this instruction will eventually require reversal of a conviction.”

***State v. Baker*, 2004 MT 393, 325 Mont. 229, 104 P.3d 491 (Cascade).** **Affirmed; Cotter, J.** The jury was properly instructed regarding both the knowingly standard (applicable to the obstruction statute) and the purposely standard (applicable to the attempt statute) in a case involving attempted obstruction of peace officers.

State v. Dunfee, 2005 MT 147, ___ Mont. ___, ___ P.3d ___ (Silver Bow).
Affirmed; Warner, J. Dunfee was convicted of aggravated assault and committed to the DOC. He raised four issues on appeal. The jury asked a question, which the court answered by saying the answer was in certain existing instructions. If the existing instructions correctly state the law, which was the case here, then that response to a question is not error.

State v. Gray, 2004 MT 347, 324 Mont. 334, 102 P.3d 1255 (Silver Bow).
Affirmed; Rice, J. Gray was convicted of criminal mischief, assault on a peace officer, and resisting arrest when he smashed his truck into several patrol cars. Gray was upset that his former residence in Butte was being demolished.

Gray argued the instruction on assault on a police officer was erroneous because it did not specifically instruct the jury that it must agree which of several officers experienced reasonable apprehension or fear. His counsel failed to object to the instruction, and Gray also maintained it should be reviewed under the plain error doctrine and that his counsel was ineffective. His counsel did accomplish the following addition to the instruction: “Specifically, Officer Katie Graham, Officer Russ Robertson, or Officer John Bleile.”

Considering the record and his counsel’s participation in drafting the instruction, the Court declined to apply plain error and declined to review whether the instruction was erroneous.

Gray was convicted of a single count of assaulting a police officer, but all the officers testified they were frightened and they all drew a weapon when he attacked them. The record showed “overwhelming evidence of guilt,” and the Court did not believe Gray was prejudiced because there was no specific unanimity instruction. His counsel, therefore, was not ineffective.

State v. Grindheim, 2004 MT 311, 323 Mont. 519, 101 P.3d 267 (Fergus).
Affirmed; Rice, J. The district court did not abuse its discretion by denying Grindheim’s request to instruct the jury on an alleged lesser-included offense of endangering the welfare of children. Endangering the welfare of children cannot be a lesser-included offense of sexual intercourse without consent because the former offense requires proof of additional elements, including that the defendant be at least eighteen years of age, and assisting or encouraging a child under the age of sixteen to engage in sexual conduct. Further, even if the Court were to accept Grindheim’s assertion that the offense of endangerment of children was a lesser-included offense, the evidence in this trial would not have supported his conviction of that offense, but rather, would have supported Grindheim’s acquittal.

State v. Hudson, 2005 MT 142, ___ Mont. ___, ___ P.3d ___ (Yellowstone).
Affirmed; Morris, J. The Court ruled that the district court correctly instructed the jury

regarding the admissibility of Hudson's refusal to submit to field sobriety tests. Evidence of a refusal to submit to field sobriety tests, including the breathalyzer, remains admissible in any criminal action or proceeding. Hudson argued that evidence of his refusal tends to be only marginally probative as to the ultimate issue of guilt, similar to the flight instruction that the Court suggested should be left for argument, rather than for the district court to instruct the jury, in State v. Hall, 1999 MT 297, ¶ 46, 297 Mont. 111, 991 P.2d 929. The Court rejected that argument, stating that Hall was inapposite because a statute specifically provides that evidence of refusal remains admissible. Mont. Code Ann. § 61-8-404(2). Moreover, the district court instructed the jury that evidence of refusal simply constitutes another factor to be considered along with all other relevant, competent evidence in determining whether a person is guilty. The jury instruction mirrored the language of the statute and thus correctly set forth the law applicable to the case.

***State v. Long*, 2005 MT 130, ___ Mont. ___, ___ P.3d ___ (Fergus). Affirmed; Warner, J.** The district court allowed the State to re-open direct examination of its informant witness over Long's objection. During the questioning, the witness recounted Long's unnoticed prior bad acts. The district court gave a cautionary instruction, but denied Long's motion for a mistrial. The Court ruled that the cautionary instruction was sufficient to protect Long. It recognized that the State had not intended to inject the prior bad acts into the trial.

***State v. McCaslin*, 2004 MT 212, 322 Mont. 350, 96 P.3d 722 (Gallatin). Affirmed; Regnier, J. (Nelson and Cotter, dissenting).** The district court properly instructed the jury pursuant to Mont. Code Ann. § 45-2-203 (i.e., voluntary intoxication is not a defense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense). Montana v. Egelhoff, 518 U.S. 37 (1996), reversed the Montana Supreme Court's unanimous decision in State v. Egelhoff, 272 Mont. 114, 900 P.2d 260 (1995), and held that the statute did not violate the Due Process Clause of the U.S. Constitution. McCaslin argued that the statute and jury instruction violated the Due Process Clause of the Montana Constitution and that it shifted the burden of proof in violation of Sandstrom v. Montana, 442 U.S. 510 (1979). The Court majority in this case ruled that Mont. Code Ann. § 45-2-203 did not violate the Montana Due Process Clause, nor did it improperly shift the burden of proof. Justices Nelson and Cotter dissented on this issue, based on Justice Nelson's special concurrence in State v. Egelhoff.

K. Lesser-Included Offenses

***State v. Becker*, 2005 MT 75, ___ Mont. ___, 110 P.3d 1 (Cascade). Affirmed in part, reversed in part and remanded; Nelson, J. (Gray and Rice, dissenting).** In a

4-2 decision, the Court has affirmed in part, and reversed in part, Justin Becker's convictions of drug-related offenses in Cascade County. Becker helped a friend cook some meth and was arrested after the police found meth precursors, along with a quantity of meth, in a suitcase he loaded into the trunk of a car. He was charged with, and later convicted of, criminal production or manufacture of dangerous drugs by accountability, criminal possession of dangerous drugs, and criminal possession of precursors to dangerous drugs. The defense attorney moved to dismiss the precursor charge on grounds that prosecuting Becker for both possessing precursors and manufacturing meth would violate his double jeopardy rights. However, the defense attorney did not include the meth possession charge in his motion, and he argued the motion solely on federal constitutional grounds, under the Blockburger test, and did not assert Montana's statutory double jeopardy protections as grounds for dismissal. The majority found that the defense attorney was ineffective for failing to present to the district court what the majority determined was a meritorious argument in favor of dismissal of the meth possession charge. The majority held that possession of dangerous drugs was an included offense of the production of dangerous drugs charge, and that Becker could not be convicted of both charges. The majority concluded that the precursor charge was not included within the production charge, and that Becker was properly convicted of those two charges. The majority also concluded that Becker was properly sentenced for the production charge, under a somewhat ambiguous statute. The case was remanded for resentencing on the two convictions remaining after dismissal of the possession of dangerous drugs conviction.

Justice Rice and Chief Justice Gray filed separate dissents, disagreeing with the majority's decision to reach the double jeopardy issue via an ineffective assistance claim on direct appeal instead of through postconviction proceedings. Gray's dissent discusses what she calls the miasma/minfield created by the Court's jurisprudence on IAC claims, particularly with respect to whether or not they can be raised on direct appeal.

State v. Cameron, 2005 MT 32, ___ Mont. ___, 106 P.3d 1189 (Cascade).
Affirmed; Rice, J. William W. Cameron, Sr., attacked his granddaughter's 14-year-old friend, who had come to trust him (she called him "grandpa") and spent a great deal of time in his home. Having absorbed an unwise quantity of vodka, Cameron grabbed the girl, ripped her shirt, fondled her, and attempted other acts the child found offensive and which she successfully resisted. She escaped and made her way home, walking and running the eight miles back, crying the entire way. When she arrived, she clung to her sister and said, "Grandpa tried raping me."

The State charged Cameron with one count of felony sexual assault, two counts of misdemeanor assault, and one count of unlawful restraint. Before trial, the State moved to dismiss all but the felony count, of which Cameron was then convicted. During trial, he submitted proposed instructions on misdemeanor assault as a lesser-included offense of sexual assault, which the district court declined to give. The Court affirmed, concluding that, as charged, misdemeanor assault was not an included offense of sexual

assault because the definition of “sexual contact” under Mont. Code Ann. § 45-2-101(66)(b), which the State applied and which the allegations under the sexual assault count tracked, did not include the elements in Mont Code Ann § 45-2-101(66)(a), which referred to contact that causes bodily injury or humiliated, harassed, or degraded another. As charged and as alleged, felony sexual assault in this case did not include misdemeanor assault because it did not contain elements akin to those under Mont. Code Ann. § 45-5-201(1)(c). Consequently, it was not an included offense because it did not differ from sexual assault only in the respect that it was a less serious crime as required by Mont. Code Ann. § 46-1-202(9), which defines included offenses.

The Court also said that the election to hone in on felony sexual assault, to the exclusion of any included offenses, was an acceptable strategy that did not improperly cut off Cameron’s right to present included offenses because, as presented, there was no lesser offense actually included within felony sexual assault.

Cameron also challenged the district court’s admission of the child’s hearsay statement. Under the circumstances, the Court said it was an excited utterance because she “made a statement relating to a startling event while she was under the stress caused by the event.” Cameron, ¶ 35; Mont. R. Evid. 803(2).

***State v. Pittman*, 2005 MT 70, ___ Mont. ___, ___ P.3d ___ (Custer).**
Affirmed; Gray, C. J. A jury found Pittman guilty of Assault on a Peace Officer, Attempted Assault on a Peace Officer, Assault with Bodily Fluid, and Obstructing a Peace Officer. The Court held that the district court did not abuse its discretion in denying Pittman’s request for a lesser-included offense instruction on resisting arrest. A defendant is entitled to a lesser-included offense instruction when any evidence in the record would permit the jury to find the defendant guilty of the lesser and acquit her of the greater offense. Resisting arrest occurs when one prevents or attempts to prevent an officer from effecting an arrest. Pittman already was under arrest when she engaged in the conduct at the detention center, which formed the bases of the charges of Assault on an Officer and Attempted Assault on an Officer. Accordingly, no evidence in the record would have allowed the jury to find Pittman guilty of the lesser-included offense of resisting arrest and acquit her of either or both of the two felony offenses.

L. Conduct of Prosecutor

***Clausell v. State*, 2005 MT 33, ___ Mont. ___, 106 P.3d 1175 (Yellowstone).**
Affirmed; Morris, J. (Nelson, dissenting). The Court rejected Clausell’s claim that the prosecutor made various impermissible comments during the trial, which were: (1) that during the State’s rebuttal argument, the prosecutor assailed Clausell’s attorney for “hiding the ball;” (2) injected his personal, non-record experiences into his closing argument to call Clausell a liar; (3) argued facts not in evidence by asserting that Clausell

muffled the gunshot noise; and (4) improperly asked the jury to put itself in the place of the victim at trial. The Court held that Clausell failed to establish prosecutorial misconduct. In some instances, Clausell took isolated statements out of the overall context of the State's rebuttal argument. Many of the objectionable comments can be fairly seen as an effort to emphasize the inconsistencies in Clausell's defense theories.

Dissent; Nelson, J. “[W]e have thrown holy water on the prosecutor’s misconduct . . . In failing to apply the proper precedent to the prosecutor’s misconduct in this case . . . our Opinion will simply encourage more of the same improper conduct. I would reverse and remand this case for a new trial.” Clausell, ¶¶ 43-45.

State v. Dunfee, 2005 MT 147, ___ Mont. ___, ___ P.3d ___ (Silver Bow).
Affirmed; Warner, J. Dunfee was convicted of aggravated assault and committed to the DOC. He raised four issues on appeal. The district court denied Dunfee’s motion for a new trial based on the prosecutor’s remarks on rebuttal argument. The Court declined to review the issue under the plain error doctrine. Dunfee failed to object during the argument.

State v. Godfrey, 2004 MT 197, 322 Mont. 254, 95 P.3d 166 (Ravalli).
Affirmed; Cotter, J. The defendant was convicted of sexual assault. No law enforcement officer ever interviewed the defendant and thus never gave the defendant a Miranda warning. At the defendant’s initial appearance, his counsel filed an Acknowledgment of Rights form the defendant had signed. The form advised the defendant that during the criminal proceedings he had the right to remain silent. The defendant testified at trial and for the first time offered his version of events. The prosecutor questioned him about his testimony being the first time he offered his explanation of events. Defense counsel did not object. The prosecutor also referred to the defendant’s explanation and the time he had to think about it in closing. Although the Court rejected the State’s argument that the State did not induce Godfrey to remain silent since it never subjected him to an interrogation, the Court declined to invoke the plain error doctrine to conclude that the prosecutor violated the defendant’s constitutional right to due process by commenting during trial on his pre-trial silence. The Court deemed the prosecutor’s question and comment to be “inadvisable” but viewed them as a comment on the defendant’s story rather than on his silence.

M. Mistrial

State v. Mallak, 2005 MT 49, ___ Mont. ___, 109 P.3d 209 (Yellowstone).
Affirmed; Rice, J. Prior to defendant’s trial for partner family member assault, the district court granted the defense motion in limine to exclude prior acts of violence between the defendant and his girlfriend (the victim). At trial, the prosecutor attempted to rehabilitate the witness in response to questioning from the defense attorney, which prompted the judge to remind the parties about the motion in limine. The prosecutor’s questions, although not

a direct violation of the motion in limine, caused the victim to suggest in her response that there had been past incidents of abuse. The district court declared a mistrial and ordered a new trial. Mallak argued that the new trial was barred by double jeopardy under Oregon v. Kennedy, 456 U.S. 667 (1982) and State v. Laster, 223 Mont. 152, 724 P.2d 721 (1986) because the prosecutor's conduct was intended to cause a mistrial in order to get a "second bite at the apple." (This is a narrow exception to the general rule that declaration of a mistrial does not bar a second trial). The Court disagreed in light of the particular facts of the case, and the fact that the prosecutor's conduct was "the product of [his] inadvertence, not intention."

N. Defendant's Presence

***State v. Aceto*, 2004 MT 247, 323 Mont. 24, 100 P.3d 629 (Flathead).**

Reversed; Cotter, J. The district court violated Aceto's fundamental constitutional right to be present and appear in person in all criminal proceedings when it removed him from the courtroom without first giving him a warning and when it later failed to provide him with an opportunity to return to the courtroom.

***State v. McCarthy*, 2004 MT 312, 324 Mont. 1, 1 P.3d 288 (Gallatin).**

Affirmed; Regnier, J. After the first day of trial, McCarthy got into a fight with the jail staff and, as a result, he chose not to appear for the second day of his trial. McCarthy's counsel filed a written waiver of McCarthy's right to be present at trial and the trial continued without him.

Relying on Tapson and Bird, McCarthy argued that the district court erred when it accepted his written waiver of appearance at trial because the district court never made a determination of whether his waiver was voluntary and whether he fully understood the implications of his waiver. The Court rejected McCarthy's argument, stating: "Unlike the defendants in Tapson and Bird, McCarthy was apprised of his rights through his counsel, he was afforded an opportunity to waive his right, he made a knowing, intelligent and voluntary written waiver of his right to be present, witnessed by his counsel, which was presented to and accepted by the court and is part of the district court record. In that waiver, McCarthy states "he knowingly, voluntarily and intelligently waives his right to appear."

McCarthy also claimed that he should have personally given the waiver in the district court and on the record. The Court rejected this claim, holding that McCarthy chose not to appear in district court and his voluntary absence precluded the district court from obtaining an on-the-record personal waiver.

***State v. Riggs*, 2005 MT 124, ___ Mont. ___, ___ P.3d ___ (Gallatin).**

Affirmed; Nelson, J. Riggs' right to be present at all critical stages of the trial was not

violated when the district court spoke with two jurors outside Riggs' presence. The Court distinguished State v. Bird and State v. Tapson, finding the case to be more similar to United States v. Gagnon, in which the interactions between judge and juror were minor occurrences that did not prejudice the defendant's opportunity to defend against the charges.

VII. SENTENCING

A. Designation

1. Eligibility for Parole

State v. Rardon, 2005 MT 129, ___ Mont. ___, ___ P.3d ___ (Flathead). **Affirmed; Nelson, J.** Defendant's due process rights were not violated on resentencing where the judge imposed a shorter term sentence, but imposed a parole eligibility restriction which would require the defendant to serve a minimum of 37 years.

B. Conditions

State v. Dobson, 2005 MT 43N (Musselshell). **Affirmed; Warner, J.** Brian Dobson's original conviction of four counts of felony sexual intercourse without consent (underage female) and three counts of sale of dangerous drugs was reversed. On remand for a new trial, the State amended the Information to charge felony intimidation (of an underage female for the purpose of having sex), to which Dobson pled under an agreement.

After he discharged his prison time, Dobson's suspended sentence was revoked because he didn't comply with the program and because he was living with a woman with a minor daughter away from his designated residence.

The more important issue the Court resolved (albeit in non-citable form) is that requiring sexual offender treatment has a sufficient nexus to intimidation because the purpose of the intimidation was to coerce the minor female to have sex with him.

Dobson also claimed he was terminated from the program only because he failed to pay, and he denied that he was living with the girlfriend. The district court didn't believe him, and the Court said there was sufficient evidence to sustain its factual findings.

State v. Grindheim, 2004 MT 311, 323 Mont. 519, 101 P.3d 267 (Fergus). **Affirmed; Rice, J.** Grindheim argued that requiring him to perform 2,000 hours of community service after serving his six-month jail term was per se unreasonable because

the alleged crime occurred against a single victim and not against the community itself. The district court found that the crime had resulted in a “tear in this rural area’s social fabric from [Grindheim’s] misjudgment . . . [i]n short, society has suffered harm as well.” The district court also found that Grindheim needed to demonstrate goodwill to the members of the community who had supported him by writing favorable letters to the district court. The Court concluded that the district court did not err in imposing the sentence because the imposition of the conditions and community service are within the parameters of the sentencing statute and are reasonably related to the circumstances of the offense.

State v. Kroll, 2004 MT 203, 322 Mont. 294, 95 P.3d 717 (Yellowstone).

Affirmed in part, reversed in part; Rice, J. Kroll was sentenced for the felony offense of issuing bad checks as part of a common scheme. Using the fraudulent checks, Kroll had purchased hundreds of mail-order items from national merchants, including appliances, computers, collectibles, various coin collections, bronzes, figurines, and apparently, to some degree, pornography. The Court ruled that the district court did not err in requiring Kroll to undergo a sexual risk assessment as a condition of sentence. The record shows that Kroll purchased a significant amount of pornographic materials using bad checks. Thus, the nature of the materials purchased with the illegal funds established a sufficient connection between the crime and the condition requiring Kroll to undergo a sexual risk assessment. Also, the sentencing conditions restricting Kroll’s right to gamble bear a sufficient connection to the underlying offense and are reasonably related to his rehabilitation, as well as to the protection of society, given Kroll’s demonstrated willingness to enter into easy money-making schemes.

State v. Lucero, 2004 MT 248, 323 Mont. 42, 97 P.3d 1106 (Yellowstone).

Affirmed in part, reversed in part and remanded; Rice, J. Sentencing limitations or conditions must have some correlation to the underlying offense for which a defendant is being sentenced. “Here, there is no evidence that Lucero’s assault upon an officer was influenced by a chemical dependency or intoxicating substance. Nor is there any connection between a condition prohibiting Lucero from entering into games of chance and the underlying offense.” Lucero, ¶ 30. The Court ordered those conditions to be stricken from the written judgment on remand.

State v. Malloy, 2004 MT 377, 325 Mont. 86, 103 P.3d 1064 (Yellowstone).

Affirmed in part, reversed in part; Warner, J. Malloy was sentenced for Failure to Register as a Sexual Offender. In its oral pronouncement of judgment, the district court did not impose two conditions requiring Malloy to maintain full-time employment, because Malloy is on full Social Security Disability. Likewise, the district court did not impose a condition requiring Malloy not to have contact with the victims of his current offense, because failure to register is a “victimless” crime. The Court vacated the foregoing conditions. The State conceded that the district court lacked authority to impose the conditions prohibiting Malloy from using alcohol and from entering gambling

establishments as those conditions were not related to the offense for which Malloy was convicted. The Court, however, affirmed other conditions, such as conditions applicable to sexual offenders, since Malloy violated a sexual offender law designed to protect society from recidivist sexual offenders. The conditions reasonably relate to the objectives of protecting society as required by statute. Malloy waives his complaints against other conditions because he makes a new complaint regarding those conditions and because he made the district court believe he acquiesced to the thrust of those conditions.

***State v. Ruiz*, 2005 MT 117, ___ Mont. ___, ___ P.3d ___ (Ravalli). Affirmed; Cotter, J.** A district court's authority to impose a sentence is defined and constrained by statute. So, the sentences for fish and game violations that provided for loss of hunting, fishing, and trapping privileges were legal because the applicable penalty statutes authorized them. The condition of the sentence that prohibited Ruiz from accompanying other hunters, trappers, or anglers, and from engaging in nongame hunting during the period of his sentence, was a proper and reasonable condition pursuant to Mont. Code Ann. § 46-18-202. Finally, the district court did not abuse its discretion in sentencing Ruiz (the penalties were not too harsh).

***State v. Tracy*, 2005 MT 128, ___ Mont. ___, ___ P.3d ___ (Cascade). Reversed and remanded; Warner, J.** Tracy appealed from an order sentencing him to Montana State Prison (MSP) for ten years, with five years suspended. He raised the following issues on appeal:

1. Did the district court err when it revoked Tracy's ten-year suspended commitment to the Department of Corrections, and reimposed a sentence of ten years at MSP, with five years suspended?

The Court ruled that a sentence to MSP is not the same sentence, or a lesser sentence, than a commitment to DOC for placement in an appropriate facility or program. Even though the term of years is the same (ten years), an MSP sentence imposes an additional, more burdensome, condition requiring Tracy to go to prison, which is precluded by Mont. Code Ann. § 46-18-203(7)(c)(1995). The 2003 amendments to Mont. Code Ann. § 46-18-203 (which were intended by the Legislature to be applied retroactively) authorized the district court's December 16, 2003 sentence. However, the application of the 2003 version of Mont. Code Ann. § 46-18-203 to Tracy, who committed his crimes in December 1996, is an ex post facto application of the law, which cannot stand constitutional muster. The Court vacated the sentence, and remanded to the district court to enter a judgment imposing the same or a lesser sentence as his original commitment to DOC.

2. Did the district court err in failing to give Tracy credit on the sentence in this case for time served in detention on other, concurrent, sentences?

The Court concluded that Mont. Code Ann. § 46-18-203(7)(b), in conjunction with Mont. Code Ann. § 46-18-401(1)(a), require that credit be given for time spent in a detention center or on home arrest on all sentences that are being served concurrently. By definition, concurrent sentences are to be served simultaneously. The Court remanded to the district court to calculate and grant such time.

C. Plea Agreement

State v. Rardon, 2005 MT 129, ___ Mont. ___, ___ P.3d ___ (Flathead). **Affirmed; Nelson, J.** Prosecutor did not breach the plea agreement, which recommended a specific sentence, by allowing the victims to testify at sentencing that defendant should, in essence, spend the rest of his life in prison. The testimony was not used to undermine the State's sentencing recommendation, even though the State had to subpoena the victim to testify.

D. Multiple Punishments

State v. Anthony, 2004 MT 379N (Flathead). **Affirmed; Warner, J.** In an unpublished opinion, relying upon Micklton, the Court concluded that Anthony waived his double jeopardy claim by affirmatively agreeing to the \$9,000 forfeiture condition the district court imposed. The Court likewise rejected Anthony's claim that his trial counsel was ineffective for failing to raise the claim on appeal. Because the claim was without merit, neither Strickland prong was satisfied. Justices Nelson and Leaphart specially concurred, reiterating their disagreement with the idea "that a defendant can waive an illegal sentence."

E. Mandatory Minimums

State v. Webb, 2005 MT 5, ___ Mont. ___, 106 P.3d 521 (Cascade). **Affirmed; Cotter, J.** Defendant was convicted of sexual intercourse without consent and was sentenced to life without parole pursuant to Mont. Code Ann. § 46-18-219. In response to Webb's appeal issues challenging the validity of the mandatory minimum sentence, the Court held: (1) it will not second-guess the sentencing court's determination that no exceptions to the mandatory minimum sentence applied; (2) Mont. Code Ann. § 46-18-219 does not violate substantive or procedural due process; (3) the Montana legislature had legitimate reasons for creating a mandatory minimum sentence for repeat sex offenders; and (4) passage of the law does not violate separation of powers.

F. Restitution

State v. Denham, 2005 MT 26, ___ Mont. ___, 107 P.3d 1263 (Yellowstone).

Affirmed; Morris, J. Denham conceded the district court properly imposed restitution in the amount of \$60,099, but claims the district court erroneously delegated responsibility for setting Denham's restitution schedule to the probation officer pursuant to Mont. Code Ann. § 46-18-244(6), because this statute was not in effect at the time he committed his offenses. A modification in procedure to carry out a duty does not constitute retroactive legislation. The statutory amendment allowing the district court to order the probation officer to set a restitution payment schedule did not impair any of Denham's rights or impose additional duties upon Denham. The district court also properly imposed the statutorily mandated fees and surcharge.

State v. Eaton, 2004 MT 283, 323 Mont. 287, 99 P.3d 661 (Gallatin). **Affirmed in part, reversed in part; Rice, J.** Eaton stole money from a cemetery association for which he had been appointed receiver, and he also stole money from the Beth Shalom Temple for which he was treasurer. The thefts amounted to more than \$114,000. The judge sentenced Eaton to 20 years in prison, 15 suspended, and ordered him to pay 20 percent of his net income, including social security benefits, toward restitution after he is released from prison. The Court concluded that the judge had authority to impose a restitution order in addition to imposing a prison sentence (under *State v. Heath*), but the Court also concluded that the reference to social security benefits in the definition of Eaton's net income violated 42 U.S.C. 407(a), which provides that no social security benefits shall be subject to execution, levy, attachment, garnishment, or other legal process. The Court found that the restitution order was an improper attempt to subject Eaton's social security benefits to "other legal process."

The Court confirmed its view, set out in *State v. Lenihan*, that a defendant is not required to object to a condition imposed during sentencing, even if the defendant believes the condition is illegal, because of the risk that the judge could forgo a more lenient sentence and impose a harsher sentence if the invalid condition were brought to the court's attention. Instead, the defendant can ask the Court to review the sentence's legality, and the defendant will not be deemed to have waived the issue because of failure to make a contemporaneous objection.

State v. Eaton, 2004 MT 381, 325 Mont. 92, 103 P.3d 1068 (Gallatin).

Affirmed; Warner, J. Eaton was committed to DOC for ten years, with eight years suspended, and ordered to pay restitution as a condition of the suspended sentence. She challenged the district court's statutory authority to order restitution as a condition of a suspended sentence, relying on a footnote in *State v. Horton*. Since the Court rejected the same challenge in two recent decisions (*State v. Heath* and *State v. Myles Eaton*), the Court affirmed the judgment of the district court.

***State v. Gilbert*, 2004 MT 368, 324 Mont. 530, 106 P.3d 127 (Silver Bow).** **Affirmed; Gray C.J.** Gilbert committed the offenses of negligent arson and burglary. The fire Gilbert set destroyed a building. The PSI estimated the replacement cost of the building at \$5,375,000 and the total losses caused by Gilbert's fire at \$5,721,684.57. The district court ordered Gilbert to pay only \$24,000 in restitution. Gilbert argued that the district court improperly used the replacement cost of the building when determining his restitution obligation, and claimed that the district court should have used the actual value of the building. The Court agreed with Gilbert, but concluded that Gilbert was not prejudiced by the district court's error because the district court had not required him to pay full restitution. The Court stated that Gilbert's \$24,000 restitution obligation was a miniscule fraction of the replacement cost of the building.

In addition, the Court rejected Gilbert's argument that the PSI had not documented Gilbert's financial resources and future ability to pay restitution.

***State v. Good*, 2004 MT 296, 323 Mont. 378, 100 P.3d 644 (Ravalli).** **Affirmed; Leaphart, J.** Good was Huseby's neighbor, and "harassment" is too light a word for his conduct towards Huseby and Huseby's family. Good eventually plead nolo contendere to charges of misdemeanor assault, disorderly conduct, and tampering with public records or information (he falsified aspects of his military records). On appeal, Good challenged the restitution the district court ordered.

First, he argued that the expenses for which he was required to reimburse Huseby were not "pecuniary losses" under Mont. Code Ann. § 46-18-243(1). These expenses included mortgage payments Huseby made on his first home, from which he moved to avoid Good's abuse. The Court concluded that the mortgage costs could have been recovered in a civil action, thus satisfying Mont. Code Ann. § 46-18-243(1)(a). They were not so "attenuated from his assault" that they did not qualify as damages that arose from his criminal acts. At the insistence of law enforcement, Huseby had also purchased video surveillance equipment. The Court agreed that these expenses were properly assessed because Huseby was "cooperating in the investigation and prosecution of the offense." Mont. Code Ann. § 46-18-243(1)(d).

Second, the restitution was not an "excessive fine" in violation of the Eighth Amendment. Noting that the United States Supreme Court has not yet applied the Excessive Fines Clause of the Eighth Amendment to the states, the Court nevertheless interpreted Montana's analogue to it and concluded that the restitution here did not violate this provision because it was not "grossly disproportional to the gravity of a defendant's offense."

Third, the restitution was not cruel and unusual punishment under the constitutions of Montana and the United States. As the Court put it: "The claim has no merit."

***State v. Grindheim*, 2004 MT 311, 323 Mont. 519, 101 P.3d 267 (Fergus).** **Affirmed; Rice, J.** The district court imposed a restitution obligation of \$6,496.60. Grindheim argued that he was improperly required to pay for “undefined amounts” of E.S.’s future counseling costs for the six-year period of Grindheim’s deferred sentence. The Court noted that it held in Benoit that losses may be recoverable even if uncertain if they are calculated by use of reasonable methods based on the best evidence available under the circumstances. The Court concluded that the restitution calculations were reasonable and the district court did not err in imposing restitution for E.S.’s future counseling needs. The district court heard extensive testimony regarding E.S.’s long-term counseling needs, and Grindheim did not offer evidence that contradicted the testimony.

***State v. Honey*, 2005 MT 107, ___ Mont. ___, ___ P.3d ___ (Ravalli).** **Affirmed in part, reversed and remanded in part; Cotter, J. (Leaphart, concurring in part and dissenting in part).** Samuel Honey was charged with two counts of burglary (felonies), two counts of theft (felonies), and one count of theft (misdemeanor). Pretrial, Honey moved to suppress statements he provided to Detective Burlingham of the Ravalli County Sheriff’s Department. After an evidentiary hearing, the district court denied the motion. A jury found Honey guilty as charged. Honey was sentenced to the Department of Corrections for five years on each felony count, all sentences to run concurrently, with no time suspended. He was ordered to pay restitution, jointly and severally with two others, in the amount of \$14,686, and the cash bond previously posted was ordered to be applied towards Honey’s restitution obligation.

The Court panel (Justices Cotter, Gray, Nelson, Warner, and Leaphart) affirmed the denial of the suppression motion, finding that the district court’s conclusions that Honey was not subject to custodial interrogation, that his confession was voluntary, and that he was not unlawfully denied counsel, were not clearly erroneous, and that the district court correctly interpreted and applied that law.

All of the above, except Justice Leaphart, however, reversed the sentence and remanded for resentencing, concluding that the district court’s imposition of restitution under Mont. Code Ann. § 46-18-201 (2001), in the absence of a deferral or suspension of all or part of Honey’s sentence, was illegal since it was outside the statutory parameters. The panel majority stated that, contrary to the State’s argument, it did not conclude in State v. Heath, 2004 MT 126, 321 Mont. 280, 90 P.3d 426, that restitution could be imposed in all cases, including those in which the defendant was sentenced to an unsuspended term of imprisonment. Justice Leaphart dissented, and would affirm the imposition of restitution, stating that Mont. Code Ann. § 46-18-202(1)(f) allows the sentencing court discretion to impose restitution when it would advance the objectives of rehabilitation and protection of the victim.

***State v. McDanold*, 2004 MT 167, 322 Mont. 31, 97 P.3d 1076 (Dawson).**
Affirmed in part, and vacated in part; Gray, C.J. McDanold participated in an earlier abduction and assault of Berry, but did not participate in the abduction one month later that ended with Berry's homicide. The district court sentenced McDanold to prison and ordered him to pay restitution, jointly with several codefendants, for funeral and other expenses incurred by Berry's parents. The county attorney later stipulated with defense counsel to reduce McDanold's restitution obligation by removing the funeral expenses, but the district court refused to amend the judgment. On appeal the Court confirmed the district court's authority to order restitution along with a term of imprisonment (see State v. Heath, 2004 MT 126, 321 Mont. 280, 90 P.3d 426), but vacated the restitution order and remanded the case for the district court to consider whether the expenses of Berry's parents were sufficiently connected to McDanold's crimes and whether some of the parents' claims had been paid by the crime victims compensation program. The Court also directed the district court to reconsider amending the judgment to reflect the fact that one of the charges to which McDanold pled guilty (assault with a weapon) was based on a theory of accountability. McDanold claimed that he was subject to more restrictions in prison because the accountability basis for the charge was not reflected in the judgment.

***State v. McIntire*, 2004 MT 238, 322 Mont. 496, 97 P.3d 576 (Cascade).**
Affirmed; Nelson, J. In a Cascade County appeal, the Court has affirmed the district court's sentencing order requiring Michael McIntire to pay restitution. McIntire was charged with burglary, theft, and forgery after he entered the apartment of a neighbor who had recently died and stole a computer and two checks. He made the checks out to himself and cashed them. He entered into a plea agreement with the county attorney and pled guilty to the burglary charge. The theft and forgery charges were dismissed pursuant to the plea agreement. At sentencing, and later on appeal, he argued that he should not be required to pay restitution for the forged checks because the forgery charges had been dismissed. The Court agreed with the district court that the burglary and forgery charges were sufficiently connected to permit a restitution order requiring McIntire to reimburse the estate of the deceased neighbor for the two checks. The Court distinguished two earlier cases, State v. Horton and State v. Setters, which held that a sentencing court lacked authority to order restitution in connection with an unrelated and dismissed charge. The Court also held that the district court had authority, under the 1999 version (since amended) of Mont. Code Ann. § 46-18-201, to order restitution as a condition of a suspended sentence, relying on its decision in State v. Heath, which rejected the argument (based on a footnote in State v. Horton) that an apparent codification error arising from the 1999 amendments to the statute limited restitution orders to those cases in which the imposition of sentence is deferred.

***State v. Thaut*, 2004 MT 359, 324 Mont. 460, 103 P.3d 1012 (Flathead).**
Affirmed; Warner, J. (Nelson and Leaphart, dissenting). In a 5-2 decision in this Flathead County case, the Court has affirmed Judge Katherine Curtis's sentencing order requiring Thaut to pay restitution to the victim he injured when he fired a shotgun

through the window of the victim's car, striking the victim in the face. Thaut pled guilty and was sentenced to a term of imprisonment and ordered to pay nearly \$70,000 in restitution. Thaut challenged the constitutionality of the restitution statutes, as amended by the 2003 Legislature in HB 220. The Court held that Thaut lacked standing to raise the constitutional challenge to the statutes, since Thaut's restitution was determined under the previous version of the statutes, and he was unable to show a direct, personal injury, or threat thereof, resulting from application of the amended statutes, to him. The Court also held that the district judge did not err in determining that Thaut had the ability to pay restitution, finding sufficient evidence in the record (particularly Thaut's testimony at the sentencing hearing, where he was attempting to persuade the district court not to incarcerate him) to support the restitution order.

State v. Workman, 2005 MT 22, ___ Mont. ___, 107 P.3d 462 (Yellowstone). **Affirmed; Rice, J.** Jack Leroy Workman and some friends burglarized three homes during March 2002 to the tune of some \$36,000 altogether. The friends received misdemeanors, one of them paying restitution of \$200. Workman pled guilty to all the burglaries and received a total of six years commitment to the DOC, plus restitution totaling some \$27,000. At sentencing, Workman argued he should not have to bear joint and several liability for restitution, just his proportionate share.

On appeal, Workman attacked the restitution documentation, calculation, and order, all of which would have been concededly inadequate under the earlier version of Mont. Code Ann. §§ 46-18-242 and -244, but not under the 2003 amendments, which, as the Court graciously put it, "the State correctly notes" were retroactive for restitution obligations unpaid as of October 1, 2003, the amendments' effective date. The restitution calculations and order passed muster under the amended statutes.

Similarly, the district court did not err by making Workman jointly and severally liable. The Court affirmed on this issue, noting that the district court was obligated under Mont. Code Ann. § 46-18-242(1) (2003) to require an offender to make full restitution. Also, Mont. Code Ann. § 46-18-244(2) (2001) and (2003) provided that restitution should follow the contours of the civil law. Under that test and on this record, the district court's order was acceptable.

Workman also argued that his friends got off easily, so his burden was unjust. The Court said, "Nonetheless, the fate of Workman's accomplices is immaterial to the court's authority to impose full restitution." Workman, ¶ 19.

G. Fines or Costs

State v. Parrish, 2005 MT 112, ___ Mont. ___, 111 P.3d 671 (Flathead). **Affirmed in relevant part, reversed in part; Morris, J.** The State conceded that the expert witness fees and expenses assessed by the district court exceeded the \$10 per diem

provided for by statute. Therefore, the Court remanded for the limited purpose of reassessing costs.

***State v. Wiedrich*, 2005 MT 127, ___ Mont. ___, ___ P.3d ___ (Yellowstone).**
Affirmed in part, vacated in part; Cotter, J. The district court failed to give Wiedrich credit against his \$1,000 fine as is required under Mont. Code Ann. § 46-18-403(2) for the period of time he was incarcerated prior to his conviction. In light of the amount of time Wiedrich was incarcerated and the daily rate of credit for incarceration in Yellowstone County, the Court vacated Wiedrich's \$1,000 fine.

H. Enhancement

***State v. Polaski*, 2005 MT 13, ___ Mont. ___, 106 P.3d 538 (Missoula).**
Affirmed; Cotter, J. Defendant was charged with fifth offense DUI on the basis of four prior DUI convictions from California in 1988, 1996, 1997, and 2001. He argued that the first three convictions had been expunged in California, so that the 2001 conviction became his "first" conviction for purposes of determining whether he could be prosecuted for felony DUI in Montana. The Court held that expungement is irrelevant--the only question is enhancement, and since California's DUI law is similar to Montana's, a prior California conviction can be counted for enhancement purposes. The Court refused to address Polaski's other issues that were not adequately briefed or were moot under the circumstances of the case.

I. Oral v. Written

***State v. Kroll*, 2004 MT 203, 322 Mont. 294, 95 P.3d 717 (Yellowstone).**
Affirmed in part, reversed in part; Rice, J. Kroll complained that the trial court's written imposition of six suspended sentence conditions were not contained in the district court's oral pronouncement of his sentence in violation of State v. Lane, 1998 MT 76, 288 Mont. 286, 957 P.2d 9. The State argued that Lane no longer works to illegalize a sentence containing a non-conforming written judgment since the Legislature passed a curative procedure, set forth in Mont. Code Ann. § 46-18-116(2) (effective March 20, 2001), directing how non-conforming judgments must be handled. The statute mandatorily requires the defendant's presence at a hearing (when the procedure is invoked), thus exonerating a non-conforming written judgment of its unconstitutional defect identified in Lane: that a defendant cannot be sentenced *in absentia* in effect where the defendant had no notice and hearing. However, a defendant must act timely for Mont. Code Ann. § 46-18-116(2) provides that a "defendant . . . waive[s] the right to request modification of the written judgment if a request for modification of the written judgment is not filed within 120 days after the filing of the written judgment in the sentencing court." The State argued that this waiver provision means defendants like Kroll cannot bypass the curative remedy at their choosing in favor of having the Court review their sentences in the first instance. This would essentially defeat the purpose of

Mont. Code Ann. § 46-18-116, which is to have the district courts remedy their own sentencing errors. Also, if defendants are allowed to maintain that the orally pronounced judgment remains controlling even after ignoring express statutory procedures for curing the non-conforming written judgment, then, as a result, the curative remedy under Mont. Code Ann. § 46-18-116 is a nullity.

The Court disagreed but neglected to discuss the State's nullity argument. The statute in no way supercedes or modifies the Lane decision. The oral pronouncement of sentence continues to control in situations in which a conflict exists between the oral and written judgments. "Section 46-18-116 simply provides the parties an avenue for conforming the written judgment to the oral pronouncement of sentence."

***State v. Van Haele*, 2005 MT 153, ___ Mont. ___, ___ P.3d ___ (Treasure). Affirmed; Nelson, J.** Van Haele's written sentence did not deviate from the oral pronouncement.

***State v. Wiedrich*, 2005 MT 127, ___ Mont. ___, ___ P.3d ___ (Yellowstone). Affirmed in part, vacated in part; Cotter, J.** The transcripts demonstrate that the sentencing court clearly adopted the sentence recommended in the PSI. Wiedrich and his attorney were fully aware of the few variations from the PSI that the district court made in the sentence. The Court therefore declined to remand for resentencing. However, the Court "nonetheless caution[ed] judges once again to carefully articulate, at pronouncement of sentence, each 'aspect, term, requirement and conclusion' of an imposed sentence."

J. Other

***State v. Bar-Jonah*, 2004 MT 344, 324 Mont. 278, 102 P.3d 1229 (Cascade). Affirmed; Warner, J.** The district court properly declined to strike the presentence investigation report. Bar-Jonah has not proven that the preparer was biased in her preparations of the PSI or that the sentencing court abused its discretion in sentencing Bar-Jonah.

***State v. Bar-Jonah*, 2004 MT 344, 324 Mont. 278, 102 P.3d 1229 (Cascade). Affirmed; Warner, J.** The district court did not err in admitting interviews and testimony at the sentencing hearing from victims in the criminal cases in which Bar-Jonah had been convicted many years prior and from alleged victims of long past incidents never reported to the police. The Court rejected Bar-Jonah's argument that his constitutional right to confront and cross-examine witnesses was violated at the sentencing hearing. Bar-Jonah failed to object on this ground below and has thus waived it on appeal. The Court declined to address the issue as plain error, because its refusal would not result in a manifest miscarriage of justice.

***State v. Burkhart*, 2004 MT 372, 325 Mont. 27, 103 P.3d 1037 (Cascade).**
Affirmed; Regnier, J. (Cotter and Nelson, concurring; Leaphart, dissenting).
Burkhart maintained his innocence throughout the proceedings, including sentencing. The district court chastised him for his lack of remorse, which Burkhart argued showed the district court punished him for refusing to admit his guilt or show remorse for killing the victim. The Court agreed with the State's position that the grounds for the sentence followed the recommendations of the prosecution and Burkhart's probation officer and reflected Burkhart's criminal history and the brutality of the offense as well as the lack of remorse. The record did not suggest the district court would have given a different sentence had Burkhart shown remorse.

***State v. Dunfee*, 2005 MT 147, ___ Mont. ___, ___ P.3d ___ (Silver Bow).**
Affirmed; Warner, J. Dunfee was convicted of aggravated assault and committed to the DOC. He raised four issues on appeal. The district court properly considered, for sentencing purposes, the pre-sentence report that contained records of Dunfee's numerous prior police contacts, some of which did not result in arrest or conviction. A trial court may consider the broad spectrum of incidents making up the background of an offender in determining the proper sentence.

The district court's order requiring any correctional placement of Dunfee be made outside of Butte-Silver Bow County was a proper limitation reasonably related to the objectives of rehabilitation and the protection of the victim and society.

***State v. Evert*, 2004 MT 178, 322 Mont. 105, 93 P.3d 1254 (Flathead).**
Reversed; Leaphart, J. In September 1997, Raymond Evert was sentenced to 65 years at MSP with 15 suspended for felony sexual assault. Parole eligibility required completion of all phases of the sex offender treatment program. In June 1998, he filed a pro se petition for postconviction relief. After numerous filings and delays, Evert, who by then had appointed counsel, reached an agreement with the State for resentencing, which was accomplished on November 15, 2002. The agreement called for the dismissal of his postconviction relief petition in exchange for another shot at sentencing.

On resentencing, the district court amended his sentence to 65 years at MSP with 20 suspended. His parole eligibility was slightly modified. On appeal, he argued that he should receive good time on parole eligibility because the district court was initially confused about statutory changes on how good time was to be applied.

Evert's objective on appeal was to receive good time against parole eligibility, which would have deducted about two years from his prison time. The State's objective was to frustrate that enterprise. The Court resolved the matter on an issue neither party raised or briefed and that both wanted to avoid: subject matter jurisdiction. It noted that jurisdiction cannot be conferred by consent. It voided the amended sentence, reinstated

the original sentence, and remanded for consideration of his original petition for postconviction relief.

State v. Fode, 2005 MT 83N (Ravalli). Affirmed; Morris, J. Fode was serving the probationary portion of his felony DUI sentence when he was convicted of another crime in another county and sentenced to MSP. Fode’s probation was revoked, and the trial court ordered that the remainder of his sentence be served at MSP, consecutive to the sentence from the other county. Fode argued that the trial court exceeded its authority because his sentence effectively extended his stay at MSP beyond the date that his probationary period would have ended. The Court held that the trial court acted within its authority by sentencing Fode to serve the remaining term in prison and that it did not matter that the remaining term was to be served after Fode served the prison sentence from the other county.

State v. Pittman, 2005 MT 70, ___ Mont. ___, ___ P.3d ___ (Custer). Affirmed; Gray, C.J. The Court concluded that the district court did not abuse its discretion in sentencing Pittman to prison instead of to the custody of DPHHS. Pittman’s expert, clinical psychologist, Dr. Tom Peterson, testified that Pittman was mentally ill, and, at the time she committed the offenses, she was not able to conform her behavior to the requirements of the law. The State’s expert, psychiatrist, Dr. William Stratford, testified that, in his opinion, Pittman’s ability to conform her conduct to the requirements of the law was minimized due to voluntary ingestion of drugs and alcohol, in combination with a florid personality disorder, rather than because of psychosis or mental illness. Stratford recommended that the district court sentence Pittman to prison.

On appeal, Pittman argued that the district court should have accepted Peterson’s opinion instead of Stratford’s. The Court rejected Pittman’s argument, stating that the district court determines the weight and credibility of evidence, and its determination will not be disturbed on appeal. The Court concluded: “Because the [district] court’s resolution of the conflict between the two opinions is supported by the record, we will not disturb it.”

VIII. POST TRIAL

A. Appeal

City of Billings v. Peterson, 2004 MT 232, 322 Mont. 444, 97 P.3d 532 (Yellowstone). Affirmed; Gray, C.J. Peterson was convicted of DUI in municipal court. He appealed to district court on several issues, one of which was the legality of the stop. The municipal court transmitted the record, but did not include a tape of the pre-trial hearing. Nor was the tape transcribed. The district court affirmed the municipal court on the basis of the record before it. On appeal, Peterson claimed that the district

court's order must be reversed because no recording was available for its review. The Court affirmed, stating: "Nothing in the statutes precludes a district court from affirming on an incomplete record, provided the record is sufficient for review." The Court gave the following warning: "[This] Court is increasingly alarmed about the number of cases currently on appeal to this Court which involve incomplete, unavailable, and disorderly municipal court records."

***City of Missoula v. Lyons*, 2004 MT 255, 323 Mont. 67, 97 P.3d 1120 (Missoula). Affirmed; Leaphart, J.** An electronic recording of a courtroom hearing is properly a part of the record available for appellate review.

***Noel v. State*, 2004 MT 261N (Lincoln). Affirmed; Regnier, J.** Noel plead guilty to felony sexual assault, then absconded before sentencing. He was arrested in Spokane a year-and-a-half later, extradited, and charged with bail jumping. After pleading guilty to bail jumping, he was sentenced to ten years at MSP with two years suspended for sexual assault, five years suspended consecutive for bail jumping. The original sexual assault plea agreement called for ten years suspended contingent on acceptance into a treatment program.

Noel did not file an appeal, but brought the postconviction relief action ten months after sentencing. He complained that he was incompetent to plead guilty because he had been awarded disability under the Social Security Act based on mental limitations, the sexual offender evaluation failed to take his disability into account, the State maliciously refiled bail jumping after dismissing it, the State violated the plea agreement, and the district court failed to follow statutory requirements for sentencing.

The Court agreed all these issues could have been raised on appeal. The opinion's concluding paragraph commences with the most beautiful sentence in the English language--for state appellate attorney, anyway: "We agree with the State."

***State v. Allum*, 2005 MT 150, ___ Mont. ___, ___ P.3d ___ (Gallatin). Affirmed; Leaphart, J. (Nelson, dissenting).** Rejecting Allum's claim that the appellate district court should have summarily ruled in his favor because the State missed the deadline for seeking additional time to file a brief, the Court held that Rule 14(c) of the Montana Uniform Municipal Court Rules of Appeal subjects the appeal to possible summary dismissal but it does not mandate dismissal. "Summary dismissal is up to the discretion of the district court[.]"

***State v. Dill*, 2005 MT 134, ___ Mont. ___, ___ P.3d ___ (Yellowstone). Affirmed; Rice, J.** This is the kind of case that makes you wonder why anyone wants to be a cop. Dill was visiting his mother and her companion at the Billings Sheraton. Dill and the companion had words, a security guard was called, and Dill punched him in the nose. Other guards came and "escorted" Dill from the room. He managed to discharge

one of the guard's pepper spray cans. When the officer took him into custody, Dill spit in his face.

Dill appealed his conviction in municipal court, but too late--63 days after the conviction. The Court said the 3-day grace period under Mont. R. App. P. 21(e) does not apply when a rule requires a filing within a fixed time, as in Mont. R. App. P. (b), which sets the time limits for filing a notice of appeal.

State v. Frazier, 2005 MT 99, ___ Mont. ___, ___ P.3d ___ (Cascade).

Affirmed; Cotter, J. The Court has affirmed Judge Macek's order dismissing Craig Frazier's appeal from his speeding conviction following a jury trial in justice court. The Cascade County Justice Court has been established as a court of record, and Frazier's appeal was, therefore, limited to questions of law and subject to the Uniform Municipal Court Rules of Appeal to District Court. The rules require the appellant to file a brief within 15 days after the electronic record from the justice court is filed with the district court. When Frazier did not file a timely brief, the prosecutor moved to dismiss the appeal, and Judge Macek granted the motion. The Court affirmed, finding that the district court has discretion to dismiss an appeal for failure to file a timely brief.

State v. Johnson, 2005 MT 48, ___ Mont. ___, 108 P.3d 485 (Hill). **Affirmed; Cotter, J.** Johnson claimed that collecting his DNA pursuant to the probation term in his sentence violated his right under the search and seizures clause of the Montana Constitution. The Court declared that Johnson's argument was not properly before it. Johnson did not object on the search and seizure grounds in the sentencing court. He has otherwise failed to raise a proper constitutional argument challenging the DNA testing term in his sentence. Because his sentence remains within lawful parameters, it therefore must be affirmed.

State v. Pittman, 2005 MT 70, ___ Mont. ___, ___ P.3d ___ (Custer).

Affirmed; Gray, C.J. A jury found Pittman guilty of Assault on a Peace Officer, Attempted Assault on a Peace Officer, Assault with Bodily Fluid, and Obstructing a Peace Officer. For the first time on appeal, Pittman argued that her constitutional rights to confrontation and due process were violated because the victims of her assault and attempted assault were law enforcement officers. Pittman contended that if her victims were not officers she could have been found guilty of misdemeanor assaults. The Court held that Pittman waived appellate review of her argument because she failed to first raise it in the district court.

Pittman also claimed that the conduct of law enforcement prior to trial violated her rights to due process and a fair trial. The Court declined to address Pittman's claim because she failed to cite any authority to support it.

***State v. Price*, 2005 MT 79N (Missoula). Affirmed; Warner, J.** Ryan Scott James Price plead guilty to custodial interference, reserving the right to appeal pretrial motions. The Court upheld the conviction in *State v. Price*, 2002 MT 229, 311 Mont. 439, 57 P.3d 42. While the appeal was pending, Price violated probation, and his deferred sentence was revoked. He moved to withdraw his guilty plea, which the district court denied, and the appeal in this case followed.

Ultimately determining that Price's counsel was not ineffective and that his plea was voluntary, the Court said that several of the errors raised in this appeal were disposed of in its initial opinion and declined to discuss them. It observed that one of his arguments, that his plea was not voluntary because the district court did not advise him of the statutory defense of voluntary return of the child, was "puzzling" because his attorney had moved to dismiss on that basis, and Price was present when the motion was heard. Price did not complain of ineffective assistance until he violated probation.

***State v. Reeder*, 2004 MT 244, 323 Mont. 15, 97 P.3d 1104 (Gallatin). Appeal dismissed; Gray, C.J.** The Court dismissed for lack of jurisdiction. The district court had reversed the Defendant's municipal court conviction for DUI. Among the 22 issues raised on appeal to the district court, it reversed and remanded for a new trial when it determined the lower court "erroneously admitted the results of an Intoxilyzer breath test without proper foundation and the error was not harmless."

The district court had affirmed the denial of "Reeder's motion to suppress his preliminary breath test result, concluding Reeder's due process rights were not violated when an officer administered the test after reading the Preliminary Alcohol Screening Test Advisory Card (PAST)." The Court declined to address this issue.

***State v. Van Haele*, 2005 MT 153, ___ Mont. ___, ___ P.3d ___ (Treasure). Affirmed; Nelson, J.** The Court refused to address Van Haele's ex post facto argument because his argument was "both unsupported by citation and irrelevant to the disposition."

The Court also held that the district court did not err in denying Van Haele's "Speedy Hearing" claim. It concluded that Van Haele failed to cite legal authority and portions of the record that would support his claim.

The Court concluded that the district court did not err in denying Van Haele's motion to withdraw his guilty pleas.

***State v. Webster*, 2005 MT 38, ___ Mont. ___, 107 P.3d 500 (Cascade). Affirmed; Gray, C.J.** Because non-record-based ineffective assistance of counsel (IAC) claims cannot be raised on direct appeal, the Court decided that Webster's IAC

allegations were not properly before it and that Webster should pursue postconviction relief.

In *dicta*, however, the Court hinted that one of Webster's IAC claims was meritless. Webster claimed his counsel erred by failing to object when the prosecutor asked him, on cross-examination, if the police officers were lying. Webster cited *State v. Hart*, 2000 MT 332, 303 Mont. 71, 15 P.3d 917, and contended these questions were improper because "they were irrelevant and were asked only to make him look bad." *Webster*, ¶ 14. The Court suggested Webster cannot establish his IAC claim since no Montana authority clearly establishes whether questioning a defendant about the truthfulness of other witnesses is proper. "[I]ndeed, we have declined to establish a bright-line rule on the propriety of such questions." *Webster*, ¶ 15 (citing *Hart*, ¶ 43).

B. Habeas Corpus and Postconviction Relief

***Basto v. State*, 2004 MT 257, 323 Mont. 80, 97 P.3d 1113 (Cascade). Affirmed; Rice, J.** Even if Basto had a viable Eighth Amendment claim, it was procedurally barred under Mont. Code Ann. § 46-21-105(2), because Basto failed to raise it on direct appeal.

***Camarillo v. State*, 2005 MT 29, ___ Mont. ___, 107 P.3d 1265 (Yellowstone). Affirmed; Cotter, J.** Petitioner's claim that his juvenile sentence exceeded statutory limits could not be considered since the postconviction petition was not timely filed, and the issues could have been raised on direct appeal. Petitioner cannot excuse this delay by arguing that the sentencing court's authority involves a question of subject matter jurisdiction. While the district court denied petitioner's claim on its merits, the Court will affirm a district court's ruling if the district court reaches the right result, even for the wrong reason.

***Elliott v. State*, 2005 MT 10, ___ Mont. ___, 106 P.3d 517 (Custer). Affirmed; Morris, J.** Petitioner convicted of murdering her baby at birth failed to sustain her burden of proving that trial counsel was ineffective for not securing an expert witness to testify in support of her defense theory that the child was stillborn, where the record showed that counsel made efforts prior to trial but the intended witness backed out because of his unwillingness to testify to that effect. Petitioner failed to show that such an expert could be found, or that expert testimony in that regard would have overcome the State's evidence that the child was born alive. Nor was counsel ineffective for failing to seek a continuance, or in questioning the State's expert when petitioner's proposed questioning was only with the benefit of hindsight.

***Ford v. State*, 2005 MT 151, ___ Mont. ___, ___ P.3d ___ (Cascade). Affirmed; Nelson, J. (Cotter, concurring).** The Court affirmed the denial of postconviction relief with respect to several claims of ineffective assistance of counsel, holding that some claims were based upon allegations rather than facts in the record as

required by Mont. Code Ann. § 46-21-104 (1)(c), others were not supported by legal authority as required by Mont. Code Ann. § 46-21-104 (2), and some claims were raised for the first time on appeal.

***Pena v. State*, 2004 MT 293, 323 Mont. 347, 100 P.3d 154 (Yellowstone).** **Affirmed; Rice, J.** In a murder and burglary case, denial of defendant’s motion for postconviction relief on grounds that it was time-barred was proper as he did not assert that newly-discovered evidence proved that he was innocent or that he actually was innocent. The postconviction time bar is jurisdictional, and failure to comply with its requirements means that the district court lacks jurisdiction to entertain the petition. The only exception is where petitioner makes a showing of actual innocence.

***Sanders v. State*, 2004 MT 374, 325 Mont. 59, 103 P.3d 1053 (Yellowstone).** **Affirmed; Warner, J.** Petitioner claimed that the district court lacked authority to revoke his probationary term because the district court failed to follow the statutory procedure for holding a probable cause hearing within 72 hours of arrest on the probation violation (Giddings issue). The Court concluded that this claim was not subject to review in a postconviction petition because it could have been raised on direct appeal. The Court rejected petitioner’s claim that failure to hold a probable cause hearing within 72 hours divests the court of jurisdiction, stating: “Whether a district court commits a statutory error must not be confused with the question of whether the court had the power or capacity to proceed in the first instance.”

***Sellner v. State*, 2004 MT 205, 322 Mont. 310, 95 P.3d 708 (Lake).** **Affirmed; Rice, J.** The Court rejected the State’s argument that Sellner’s amended petition was barred by the one-year time bar. The State invited the Court to read Mont. Code Ann. §§ 46-21-102(1) and -105(1)(a) in conjunction, and require all original petitions and amendments to be filed within one year of the conviction becoming final. The Court declined the invitation, stating that to do so would obviate the third sentence of Mont. Code Ann. § 46-21-105(1)(a), which permits the court discretion in setting a deadline for filing an amended petition. [Legislation may wish to be considered.]

***State v. Daniels*, 2005 MT 110, ___ Mont. ___, 111 P.3d 675 (Lake).** **Affirmed; Gray, C.J.** Daniels, a minor, argued in a postconviction petition that the district court lacked jurisdiction to proceed over his case because he never expressly waived his right to a hearing under Mont. Code Ann. § 41-5-206(3). The district court addressed the merits of Daniels’s claim and denied him postconviction relief.

On appeal, the Court concluded that Daniels’s claim was time-barred by Mont. Code Ann. § 46-21-102. The Court rejected Daniels’s argument that the time bar does not apply when a petitioner raises a jurisdictional claim. The Court stated:

Daniels mistakenly contends the absence of jurisdiction he claims in this case transcends the statutory one-year time limit for petitions for postconviction relief. Both jurisdictional and nonjurisdictional claims are subject to the time limitation in § 46-21-102, MCA.” *Peña*, ¶ 38. The time bar applies to all claims except claims alleging the existence of newly-discovered evidence which, if proved and viewed in light of the evidence as a whole, would establish that the petitioner is actually or legally innocent. *Peña*, ¶ 27. Daniels has made no such claim. “We conclude Daniels’ claim that the District Court lacked jurisdiction is time-barred under § 46-21-102, MCA.

Daniels, ¶ 12.

***State v. Fyant*, 2004 MT 298, 323 Mont. 408, 104 P.3d 434 (Missoula).**
Affirmed; Nelson, J. Fyant plead guilty in justice court to failing to provide proof of insurance, with the fines suspended upon a finding by the justice court of Fyant’s inability to pay. After hearing evidence of Fyant’s ability to pay, the justice court refused to suspend the fines. Fyant claimed the refusal was an illegal sentence and appealed to the district court, which dismissed her appeal for lack of jurisdiction to hear an appeal from a guilty plea in justice court. Fyant appealed to the Court, arguing that she was entitled to the same appeal rights as the State, including the right to appeal an illegal sentence in justice court. The Court held that Mont. Code Ann. § 46-17-203(2)(a) clearly bars an appeal from a plea of guilty in justice court, and that Fyant’s sole remedy is postconviction relief.

***State v. Oatman*, 2004 MT 360, 324 Mont. 472, 104 P.3d 1048 (Missoula).**
Affirmed; Regnier, J. The district court properly dismissed Oatman’s postconviction petition on the basis of the statute of limitations. Oatman had not come forth with any newly-discovered evidence of his actual innocence. For his sole evidentiary claim, Oatman cited trial testimony purporting to show that one of his robbery victims contradicted the allegation that Oatman robbed her. Because Oatman’s jury had heard this evidence, Oatman’s “evidence” does not satisfy the “actual innocence” gateway permitting the review of his otherwise-barred postconviction petition.

C. Revocation of Sentence

***State ex rel. Best v. Slaughter*, No. 04-497 (per curiam order).** Best was convicted of DUI under the 1997 statutes. He was sentenced in 1998 to 13 months, followed by 4 years probation. Best discharged to probation in 1999 and, had he abided by his probation conditions, would have discharged the sentence in September 2003. However, Best violated the probation conditions, first in April 2001 and again in October 2003. In this habeas action, Best argued that the district court was without

authority to continue his state supervision beyond September 2003 (when his original four-year probationary term would have expired) because Mont. Code Ann. § 61-8-731(5) (1997) only allows the court to impose the “remainder of” the sentence upon revocation. The Court disagreed, holding that the provisions of Mont. Code Ann. § 46-23-1013(2) (allowing the court to require defendant to serve the sentence imposed or any lesser sentence) apply, so that a DUI defendant may, in effect, do “life on the installment plan” just like any other criminal defendant.

***State v. Rudolph*, 2005 MT 41, ___ Mont. ___, 107 P.3d 496 (Richland).** **Affirmed in part, reversed in part, and remanded for resentencing; Gray, C.J.** The district court did not abuse its discretion in revoking Rudolph’s suspended sentence since a court may revoke a suspended sentence even if the defendant has committed a single violation. Rudolph concedes that he was convicted of endangering the welfare of children less than one month prior to the State filing a revocation petition, and this conviction violated his conditions of probation. Thus, his claim that the State relied upon other state violations is irrelevant. The district court exceeded its statutory authority, pursuant to Mont. Code Ann. § 46-18-203(7)(c) (1997), to impose new conditions after revoking Rudolph’s suspended sentence. The district court failed to consider Rudolph’s ability to pay the costs of his court-appointed counsel prior to imposing these costs. The Court remanded for resentencing.

***State v. Van Haele*, 2005 MT 153, ___ Mont. ___, ___ P.3d ___ (Treasure).** **Affirmed; Nelson, J.** The State’s initial revocation proceeding against Van Haele violated the statutory provisions set forth in Mont. Code Ann. § 46-23-1012(4) (1999) because Van Haele was not afforded a probable cause hearing within 36 hours of his arrest. After the Court issued its opinions in Goebel and Giddings, the State filed an amended revocation petition pursuant to Mont. Code Ann. § 46-23-1012(1) (2001) and the district court again revoked Van Haele’s suspended sentence. The Court disagreed with Van Haele’s argument that the State’s initial failure to comply with the 1999 statute deprived the district court of jurisdiction and that the State’s amended revocation proceeding under Mont. Code Ann. § 46-23-1012(1) (2001) was proper.

The district court revoked Van Haele’s suspended sentence because Van Haele failed to qualify for admission into a certified outpatient sexual offender treatment program. The Court approved revocation on this basis because the condition was in the district court’s original sentence. The Court also said Van Haele’s privilege against self-incrimination was not violated because he refused to admit the two offenses because he pled guilty, waiving his Fifth Amendment right.

IX. MISCELLANEOUS

A. Youth in Need of Care

***In re A.A.*, 2005 MT 119, ___ Mont. ___, ___ P.3d ___ (Silver Bow).**

Affirmed; Nelson, J. The district court properly terminated a mother’s parental rights, Mont. Code Ann. § 41-3-609, where she did not comply with her treatment plans, she had a history of involving herself with unstable, abusive relationships, and she was still associating with individuals who could put her and her children at risk.

***In re A.C.*, 2004 MT 320, 324 Mont. 58, 101 P.3d 761 (Cascade). Affirmed;**

Nelson, J. The Department properly placed the children with their noncustodial parent pursuant to Mont. Code Ann. § 41-3-438(3)(b) after determining it was in the children’s best interest. The Department took the necessary steps to ensure the placement was safe as required by the Interstate Placement of Children compact. The Court did not address the constitutionality of this statutory provision, which allows the judge, following the dispositional hearing, to “order the placement of the child with the noncustodial parent, superseding any existing custodial order, and dismiss the proceeding with no further obligation on the part of the department to provide services to the parent with whom the child is placed or to work toward reunification of the child with the parent or guardian from whom the child was removed in the initial proceeding.”

***In re A.R.*, 2005 MT 23, ___ Mont. ___, 107 P.3d 457 (Park). Affirmed; Warner, J.**

The mother appealed an order granting DPHHS long-term custody, bringing two grounds for reversal. The first attacked the adequacy of the findings and conclusions. The Court affirmed, making some useful observations. Under Mont. Code Ann. § 41-3-102(7)(a), which defines “child abuse or neglect,” the mother’s hitting the children, calling them “assholes and idiots,” and having the two boys sleep in the same bed with her qualified, among other things, as sufficient credible evidence to support the abused and neglected findings. The Court distinguished the hearsay relied upon in this case by the testifying psychologist from that in Matter of B.S., 252 Mont. 435, 436, 829 P.2d 939, 940 (1992), placing the hearsay here within Mont. R. Evid. 703, and the testimony in Matter of K.C.H., 2003 MT 125, ¶ 21, 316 Mont. 13, 68 P.3d 788.

***In re C.J.K.*, 2005 MT 67, ___ Mont. ___, 109 P.3d 232 (Lewis and Clark).**

Affirmed; Cotter, J. Citing evidence that the mother failed to protect the child from physical and psychological abuse by the mother’s boyfriend, as well as evidence that on one occasion she failed to feed the child until 4:30 p.m., the trial court’s finding that C.J.K. was an abused and neglected youth was not clearly erroneous. The mother failed to complete parenting classes, and the trial court’s finding that the mother was unlikely to address her chemical dependency problem within a reasonable time was not clearly

erroneous. The Court rejected the mother's claim that she needed more time to address her serious methamphetamine addiction.

***In re C.R.C.*, 2004 MT 389, 325 Mont. 133, 104 P.3d 1065 (Lincoln). Reversed; Gray, C.J. (Nelson, specially concurring; Warner, dissenting).** Because C.R.C. had not raised the issue, the Court noted as a warning to district courts that the finding on whether C.R.C. required commitment was not the "detailed statement of the facts" required by Mont. Code Ann. § 53-21-127(8)(a). It reversed because the evidence relied on by the district court was insufficient to show an imminent threat of injury to C.R.C. or others. Moreover, the professional person who testified was not the same person appointed under Mont. Code Ann. §§ 53-21-122(2) and -123(1).

***In the Matter of C.S.*, 2004 MT 252N (Lewis and Clark). Affirmed; Leaphart, J.** The statutory requirements for termination of parental rights are satisfied. The parties stipulated that C.S. was a youth in need of care. Clear and convincing evidence supports the district court's decision that the mother did not successfully complete the treatment plan, and the conduct or condition that rendered the mother unfit was unlikely to change within a reasonable time.

***In re D.B.*, 2004 MT 371, 325 Mont. 13, 103 P.3d 1026 (Custer). Affirmed; Leaphart, J.** The district court did not err when it denied mother's and father's motion to dismiss the petition to terminate parental rights based on newly-discovered evidence that one of the children suffered from a skin disease--the symptoms of which could be confused with sexual abuse. Further, the sexual abuse allegations attributable to a mis-diagnosis did not taint the proceeding to such a degree that the mother was denied due process. The district court had adequate grounds independent of the mis-diagnosis for adjudicating the children as youths in need of care. Any taint attributable to the mis-diagnosis did not pervade the case to violate fundamental fairness.

The district court ordered the psychologist who evaluated the mother and father to take into account alleged child abuse that took place in California between 1990 and 1997. The mother claims this violated Mont. Code Ann. §§ 41-3-202(5)(c)(i)(A) to (B) (2003) which requires DPHHS in Montana to destroy unsubstantiated records after three years. This statute was enacted in 2003, after the commencement of this youth in need of care action and after the district court's order in question. The statute was not legislatively declared to apply retroactively, thus there was no statutory violation.

The district court's finding that the mother failed to complete her treatment plan is correct. Partial compliance is not enough, nor is going through the motions without implementing new skills learned. Further, the mother's treatment plan was appropriate, even assuming it contained some inappropriate tasks. If a treatment plan contains both appropriate and inappropriate tasks, the parent need not complete the inappropriate tasks, and the district court cannot consider that failure in its determination whether to terminate

parental rights. The district court still had substantial credible evidence supporting its finding by clear and convincing evidence that the mother did not complete her treatment plan.

The district court correctly determined that the conduct or condition rendering the mother unfit to parent was unlikely to change within a reasonable time. Any gains the mother made during the periods she participated in the treatment objectives were insufficient to enable her to adequately parent her children. Her mental illnesses are “sufficient in number, degree of severity, and effect” to support the district court’s conclusion.

The father’s treatment plans were appropriate even though he was incarcerated for a period of the youth in need of care action. He had time before and after his incarceration to complete at least portions of his treatment plan but failed to do so. Further, the father could have obtained some of his evaluations while incarcerated.

The district court correctly found that the father failed to complete his treatment plan even assuming the district court should not have required him to undergo a psycho-sexual evaluation, because the father failed to complete two necessary and integral treatment plan tasks. The district court also correctly determined that the conduct or condition rendering the father unfit to adequately parent his children was unlikely to change within a reasonable time. The father suffered from Paranoid Personality Disorder with elements of narcissism and antisocial orientation. He refused further evaluation and treatment and the evidence demonstrated he was too narcissistic to acknowledge and correct his own children’s developmental deficiencies.

***Matter of D.G. & R.G.*, 2005 MT 139, ___ Mont. ___, ___ P.3d ___ (Custer).** **Affirmed, Gray, C.J.** D.W., the children’s mother, attacked the district court’s termination order on two points. She argued that the treatment plan was inappropriate because it required her to seek treatment for a bipolar disorder without evidence that she suffered from that disorder. In upholding the plan, the Court listed evidence from the record supporting that diagnosis, including D.W.’s own statements to mental health workers that she had the disorder. D.W. also challenged the plan’s failure to mention post-traumatic stress disorder and recommend treatment for it, even though she had been diagnosed with that condition. The Court said that the treatment plan’s language that essentially included any other mental health issues was sufficient.

***In re J.B.K.*, 2004 MT 202, 322 Mont. 286, 95 P.3d 699 (Yellowstone).** **Affirmed; Gray, C.J.** On appeal, the mother argued that her treatment plan conflicted with the Americans with Disabilities Act. She was indisputably mentally disabled and argued that the ADA required that the Department give her more time to complete the plan. Without ruling explicitly whether the ADA applies to youth-in-need-of-care matters (see ¶ 25), the Court affirmed the termination, noting the evidence of the

mother's low functioning and the likelihood it would remain unchanged, as well as the Department's having offered her every available service.

***In re M.B.*, 2004 MT 304, 323 Mont. 468, 100 P.3d 1006 (Ravalli). Affirmed; Rice, J.** The district court did not abuse its discretion when it terminated the mother's parental rights to all of the children, rejecting the mother's claims that the YINC adjudication was improper, that she had successfully completed her treatment plan, and that her unfitness would change within a reasonable time. The Court found no abuse of discretion in the district court's decision to terminate both parents' rights to W.B., who was not a victim of the father's sexual abuse but had been a secondary victim and had suffered emotional trauma. The Court rejected the mother's contention that the district court should have extended the deadlines for the original treatment plan after it extended the Department's temporary legal custody. The Court also agreed with the district court that the Department's social worker did not have a legally significant conflict of interest with the mother arising from a disturbance that the mother created at the Department's office and the resulting criminal charges against the mother.

***In re M.W.*, 2004 MT 301, 323 Mont. 433, 102 P.3d 6 (Yellowstone). Affirmed; Cotter, J.** It was not reversible error for the district court to allow the social worker to adopt as his testimony the affidavit filed in support of the petition to terminate. Even though the affidavit allegedly contained hearsay-within-hearsay, mother's counsel was given the opportunity to challenge any hearsay statements therein and failed to do so.

***In re P.D.L.*, 2004 MT 346, 324 Mont. 327, 102 P.3d 1225 (Missoula). Affirmed; Regnier, J.** Two years after his parental rights were terminated, P.D.L.'s father moved for relief against the judgment, maintaining he had not been given notice of the proceedings or informed that he had a right to an attorney. The Court affirmed on a ground the district court did not consider, that waiting two years before pursuing a remedy under Mont. R. Civ. P. 60(b) was unreasonable. The Court agreed with the district court that a fair reading of the record showed the Appellant was aware proceedings had been started and that a final hearing was imminent. In addition to the delay, the Court noted that the Appellant was serving a term in the prison of another state for abusing P.D.L.'s older sister and that he would not be released until P.D.L. attained majority, a condition that would have terminated his parental rights under Mont. Code Ann. §§ 42-2-608 and 41-3-609(2)(d).

***In re S.T.*, 2004 MT 266N (Cascade). Affirmed; Warner, J.** Amid multiple obstacles to parenting S.T., B.T., S.T.'s father, told the social worker he was leaving Montana, was on drugs, and was too unstable to parent the child. Four months later, DPHHS successfully petitioned to terminate B.T.'s parental rights for abandonment and failure to complete the treatment plan.

B.T., who was incarcerated, appeared at the termination hearing and asserted he did not abandon S.T. because he left the child with a social agency and that the Department undermined his ability to complete the treatment plan because the social worker had been in contact with his mother.

The core of B.T.'s argument on abandonment was that Mont. Code Ann. § 41-3-102(1)(a), which defines the term, must be read conjunctively so that all four subsections must be satisfied before a parent may be deemed to have abandoned a child. Noting the use of "or" at the close of the penultimate subsection, the Court disagreed. Only one of the separately stated factors must exist when a statute contains a disjunctive. S.T., ¶ 15.

On his second issue, the Court said that even though Mont. Code Ann. § 41-3-205 obligates the Department to maintain confidentiality, Mont. Code Ann. § 41-3-101(3) requires it to place children with their extended family if in their best interests. B.T.'s conflict with his mother was not the only consideration for the Department, especially in view of S.T.'s best interests being predominate. S.T., ¶ 23.

***In re T.R. and S.R.*, 2004 MT 388, 325 Mont. 125, 104 P.3d 439 (Yellowstone). Affirmed; Cotter, J.** A father's parental rights to three children were terminated because he failed to comply with the provisions of three treatment plans; the evidence showed that the father completed none of the conditions while out of jail.

B. License Revocation Proceedings

***Brewer v. State*, 2004 MT 193, 322 Mont. 225, 95 P.3d 163 (Custer). Affirmed; Gray, C.J.** The district court properly denied Brewer's motion to reinstate his driver's license, which was revoked based upon his failure to submit to a breath test after his arrest for DUI. The arresting officer had reasonable cause to believe Brewer was driving under the influence of alcohol prior to requesting that Brewer perform field sobriety tests when the officer: (1) detected an odor of alcoholic beverage on Brewer's breath; (2) Brewer admitted he had been drinking; (3) Brewer could not produce the proper vehicle documentation; and (4) Brewer's attitude during the traffic stop was argumentative and uncooperative.

***Clark v. State ex rel. Driver Improvement Bureau*, 2005 MT 65, ___ Mont. ___, 109 P.3d 244 (Yellowstone). Affirmed; Cotter, J.** The Court affirmed the district court's denial of petitioner's motion to reinstate his driver's license based on his claim that the officer lacked particularized suspicion for the stop. The officer's testimony, combined with the on-board video, indicated that the petitioner's vehicle hit the curb and bounced back into the lane of traffic, then swerved several times into the other westbound lane of traffic. The question is not whether any one of petitioner's driving aberrations

was itself illegal, but whether the officer can point to specific and articulable facts which, taken together, reasonably warrant the intrusion.

***Eustance v. State*, 2005 MT 34, ___ Mont. ___, 107 P.3d 478 (Cascade).**

Affirmed (State appeal); Gray, C.J. Eustance was arrested for DUI, but refused to submit to a breath test, and his license was seized and suspended. He petitioned for its reinstatement. At the hearing on the petition, Eustance was the only witness. Reinstating the license, the district court found that “there is no evidence to support that the initial stop of Eustance’s vehicle was justified by particular suspicion, and no probable cause existed for Eustance’s arrest.” Cascade County appealed, arguing that Hunter v. State, 264 Mont. 84, 869 P.2d 787 (1994), requires that a petitioner in a proceeding under Mont. Code Ann. § 61-8-403, cannot meet the necessary burden of proof with only the petitioner’s unsupported testimony, but must present the testimony of the arresting officer. The Court rejected this application of Hunter, stating: “[W]e observed that Hunter’s testimony was contradicted by the videotape and, in light of the conflicting evidence, the district court did not err in concluding she had not met her burden of proof. Hunter, 264 Mont. at 87-88, 869 P.2d at 789-90. In the present case, there was no conflicting evidence.”

***Muri v. State*, 2004 MT 192, 322 Mont. 219, 95 P.3d 149 (Custer). Affirmed;**

Gray, C.J. The district court properly denied Muri’s motion to reinstate her driver’s license, which was revoked based upon her failure to submit to a breath test after her arrest for DUI. The arresting officer had reasonable cause to believe Muri was driving under the influence of alcohol prior to requesting that she perform field sobriety tests when the officer: (1) observed Muri swerve in her driving lane at least once; (2) smelled a strong odor of an alcoholic beverage when he spoke with Muri; (3) Muri could not produce her driver’s license upon request; (4) Muri could not initially recite her social security number but eventually did so with slurred speech; and (5) Muri admitted she had consumed alcohol.

C. Indian Child Welfare Act

***In re A.N. & M.N.*, 2005 MT 19, ___ Mont. ___, 106 P.3d 556 (Yellowstone).**

Affirmed; Leaphart, J. The Court rejected the father’s claim that the Department failed to prove beyond a reasonable doubt that it had engaged in active remedial efforts to keep the Indian family together as required by the Indian Child Welfare Act (ICWA) and In re G.S. The Department held two family-group decision meetings, paid for father’s sex-offender evaluation, and arranged a good-bye visit when the children were moved to North Dakota. However, the father’s own apathy and indifference prevented the Department’s making more active efforts at providing intensive services. The Court also rejected father’s argument that the Department’s cultural ICWA expert needed to have more experience with the case than simply reading the Department’s file. ICWA requires testimony from a qualified witness; it “does not require a specific form of that testimonial

evidence.” Finally, the Court held that the district court’s refusal to extend temporary legal custody was not an abuse of discretion.

***In re M.R.G.*, 2004 MT 172, 322 Mont. 60, 97 P.3d 1085 (Cascade). Affirmed; Nelson, J.** Affirming termination of an Indian mother’s parental rights, the Court addressed two issues. First, the district court applied the applicable ICWA standard of proof beyond a reasonable doubt despite the absence of a specific finding that the standard was met. Second, the district court’s termination order was supported by evidence beyond a reasonable doubt, including testimony from ICWA and other experts that removing the child from his Native American foster family would subject him to serious harm, as well evidence of the mother’s treatment failures and history of relapsing into severe alcoholism.

***In re S.R.*, 2004 MT 227, 322 Mont. 424, 97 P.3d 559 (Yellowstone). Affirmed; Leaphart, J.** The decision to terminate parental rights was supported by substantial credible evidence upon which the district court could conclude that the Department had presented evidence beyond a reasonable doubt, including the testimony of a qualified cultural expert, that continued parental custody would result in serious emotional or physical damage to the children, and that the Department had engaged in active rehabilitative efforts to prevent the breakup of the Indian family, as required by the Indian Child Welfare Act (ICWA).

D. Juveniles

Matter of N.V., a Youth in Need of Care, Sup. Ct. No. 04-347, Dismissed; Morris, J. (Warner, dissenting). The initial appeal in this matter was reported at *Matter of N.V.*, 2004 MT 80, 320 Mont. 442, 87 P.3d 510. While it was pending, N.V. requested a transfer from Pine Hills to a different facility on the grounds he was not receiving appropriate sexual offender treatment. There was considerable talk about whether the district court had continuing authority over changes in placement after an initial commitment to Pine Hills, and whether the Department of Corrections had to pay for everything. Finally, the district court ordered a second placement and the DOC agreed to pay.

N.V. appealed anyway, contending that the issue was not moot because he remained in an inappropriate placement (not a conceded issue) for a year and a half and because the issue on appeal was important and would arise again. It was unclear, besides a pronouncement that the DOC was wrong to oppose the transfer, what remedy N.V. sought other than chastisement. The majority determined there was no longer a justifiable controversy and that the Court was “reluctant to address issues of this degree in the absence of an actual controversy.”

The dissent cited the Department's "monumental efforts to protect its budget" and believed "the Department may again undertake herculean efforts to avoid a ruling."

***State v. Whiteman*, 2005 MT 15, ___ Mont. ___, 106 P.3d 543 (Big Horn).** **Affirmed; Morris, J.** The State initially filed a petition for delinquency in youth court against 13-year-old Whiteman, alleging acts that if committed by an adult constituted the offenses of deliberate homicide and aggravated assault. The State then gave notice of its intent to file an Information against Whiteman in district court and requested the court conduct a transfer hearing. Pursuant to Mont. Code Ann. § 41-5-206(3), the court conducted a hearing to determine whether Whiteman's case should be handled in youth court or district court. The district court's findings of fact were not clearly erroneous. There is substantial credible evidence to support the court's findings that: probable cause existed for the charge of deliberation homicide; a youth court proceeding would not have served the interests of community protection; and a youth court proceeding would not promote Whiteman's rehabilitation. It was up to the district court to resolve any conflicts in the testimony presented, and it did not err by finding the testimony of the State's witnesses to be more persuasive. Even though the court relied heavily upon the State's proposed findings of fact and conclusions of law, the district court's findings of fact were "comprehensive findings of fact that intimately detailed the testimony offered at trial."

***State ex rel. D.M.B. v. Mont. Thirteenth Judicial Dist.*, 2004 MT 335, 324 Mont. 190, 103 P.3d 514 (Yellowstone).** **Writ of supervisory control granted; Rice, J.** The youth court adjudicated D.M.B. to be a juvenile delinquent. Prior to the final dispositional hearing, the State requested that D.M.B. undergo a psychosexual evaluation. D.M.B. objected to the evaluation. Citing *State v. Ommundson*, 1999 MT 16, 293 Mont. 133, 974 P.2d 620, D.M.B. argued that the youth court should not allow the evaluation because no nexus existed between the underlying charges and the evaluation. The district court granted the State's request and D.M.B. sought a writ of supervisory control with the Court.

The Court granted the writ, holding that the youth court erred in ordering a predispositional psychosexual evaluation over D.M.B.'s objection. The Court explained that Mont. Code Ann. § 41-5-1503(1) allows the youth court to order predisposition evaluations only when the youth has waived his or her constitutional rights. Because D.M.B. objected to the evaluation and refused to waive his constitutional rights, the Court concluded that the district court erred in ordering the evaluation.

While Mont. Code Ann. § 41-5-1503(1) prohibited the youth court from ordering a **predispositional** evaluation over D.M.B.'s objection, the Court stated that the youth court could order the evaluation as part of its final dispositional order pursuant to Mont. Code Ann. §§ 41-5-1512(1)(g) and (i).

Finally, the Court concluded that its decision in Ommundson does not bar the youth court from ordering D.M.B. to undergo a psychosexual evaluation as part of D.M.B.'s disposition because its criminal holding in Ommundson was not controlling in a case brought under the Youth Court Act.

E. Destruction/Release of Evidence

Kelly Ann Thomas v. McKenzie, No. 04-428 (original writ). In order to meet the qualifications for placement in a youth correctional facility pursuant to Mont. Code Ann. § 41-5-1513(1)(b)(i), there must be record evidence of four or more prior misdemeanor convictions. To qualify as a “conviction,” the record must show that the youth admitted to the conduct that formed the basis of the charge, or that a judge or jury made a determination regarding guilt. It is not enough that the youth accepted probation after being accused of the conduct constituting the misdemeanor offense.

F. Supervisory Control and Other Original Proceedings

Pinocci v. District Court, No. 05-068 (supervisory control denied). The State (on behalf of Cascade County) petitioned the Court for supervisory control after the district court granted a municipal court appellant an extension of time to file his opening brief, arguing that the district court had no authority under Uniform Municipal Court Rule 14 to grant an extension after the time for filing the brief had passed. The Court refused to grant extraordinary relief, noting that the State took a contrary position in a Gallatin County case (State v. Robert Allum) where the State missed the filing deadline by one day and sought an out-of-time extension. The Court admonished: “The State cannot have it both ways.”

Schaefer v. Egeland, 2004 MT 199, 322 Mont. 274, 95P.3d 724 (Park).
Affirmed; Leaphart, J. After the justice court held him in contempt for failing to fully complete the court-ordered ACT program, Schaefer petitioned the district court for a writ of review, contending that because he received a certificate of completion from the ACT program, the justice court’s contempt ruling exceeded the court’s jurisdiction. The district court dismissed the writ, concluding that Schaefer should have brought a petition for postconviction relief. The Court held that although the district court dismissed the writ for the wrong reason (because the only avenue of review from a civil contempt is a writ of review), dismissal was the right result. Because Schaefer failed to prove that he fully satisfied all of his continuing treatment obligations, the justice court, which was in the best position to weigh the evidence and credibility of the witnesses, had jurisdiction to hold Schaefer in contempt.

State ex rel. D.M.B. v. Mont. Thirteenth Judicial Dist., 2004 MT 335, 324 Mont. 190, 103 P.3d 514 (Yellowstone). Writ of supervisory control granted; Rice, J. The

youth court adjudicated D.M.B. to be a juvenile delinquent. Prior to the final dispositional hearing, the State requested that D.M.B. undergo a psychosexual evaluation. D.M.B. objected to the evaluation. Citing State v. Ommundson, 1999 MT 16, 293 Mont. 133, 974 P.2d 620, D.M.B. argued that the youth court should not allow the evaluation because no nexus existed between the underlying charges and the evaluation. The district court granted the State's request and D.M.B. sought a writ of supervisory control with the Court.

The Court granted the writ, holding that the youth court erred in ordering a predispositional psychosexual evaluation over D.M.B.'s objection. The Court explained that Mont. Code Ann. § 41-5-1503(1) allows the youth court to order predisposition evaluations only when the youth has waived his or her constitutional rights. Because D.M.B. objected to the evaluation and refused to waive his constitutional rights, the Court concluded that the district court erred in ordering the evaluation.

While Mont. Code Ann. § 41-5-1503(1) prohibited the youth court from ordering a **predispositional** evaluation over D.M.B.'s objection, the Court stated that the youth court could order the evaluation as part of its final dispositional order pursuant to Mont. Code Ann. §§ 41-5-1512(1)(g) and (i).

Finally, the Court concluded that its decision in Ommundson does not bar the youth court from ordering D.M.B. to undergo a psychosexual evaluation as part of D.M.B.'s disposition because its criminal holding in Ommundson was not controlling in a case brought under the Youth Court Act.

G. Mental Commitment

In re Mental Health of D.S., 2005 MT 152, ___ Mont. ___, ___ P.3d ___ (Gallatin). **Affirmed; Morris, J. (Gray, Nelson, and Cotter, dissenting).** D.S., on the Sheriff's service of a restraining order obtained by his estranged girlfriend, told the Sheriff he was going to kill himself. The Sheriff placed D.S. in custody, and the State filed a petition for involuntary commitment on the basis of a mental health worker's report. The district court appointed a second mental health worker to examine D.S. and make recommendations. The mental health worker recommended commitment to Warm Springs, although she was unable to specify a particular mental disorder from DSM-IV, but he remained suicidal. The Court concluded the record showed clear and convincing evidence beyond a reasonable medical certainty that he had a mental disorder and that his several statements about suicide were overt acts showing an imminent threat of danger to himself.

The district court's remark at hearing that it "had no other option" but to send D.S. to Warm Springs was not the detailed statement of facts required by Mont. Code Ann.

§§ 53-21-127(5) and (8). The Court remanded the matter for a determination of the least restrictive environment, accompanied by the required findings.

Justice Cotter, joined by the Chief Justice and Justice Nelson, vigorously dissented, arguing that the record did not contain evidence rising to proof that D.S. had both a mental disorder and was under imminent threat of self-inflicted injury as demonstrated by overt acts.

***In re Mental Health of T.M.*, 2004 MT 221, 322 Mont. 394, 96 P.3d 1147 (Cascade). Affirmed; Warner, J.** The district court's order of commitment was affirmed.

1. The district court did not err in denying any alleged request for a continuance to obtain an expert witness on homelessness because the court was not presented with anything to deny. The Court does not address issues raised for the first time on appeal because it is unfair to fault the trial court on an issue it was never given an opportunity to consider.

2. T.M.'s counsel did not ineffectively represent T.M. by failing to procure an expert on the general ability of mentally ill homeless persons to subsist while untreated because Mont. Code Ann. § 53-21-126(1) specifically limits the presentation of evidence to that which is relevant to a particular respondent's condition. Further, any testimony given by an expert witness on the general tendencies of the mentally ill homeless would not have rebutted the testimony offered by the State that T.M. himself was not capable of surviving on his own.

3. The district court did not abuse its discretion in allowing T.M. to remain in the courtroom during the jury trial. T.M. made three relatively innocuous statements during voir dire. He then settled down and was calm for the remainder of the trial. This record does not justify a conclusion that T.M.'s behavior was so prejudicial that the jury would not have been able to take an objective look at the evidence presented.

4. The district court did not abuse its discretion in denying T.M.'s request on the date set for jury trial for a continuance to obtain private counsel. The appropriate standard to apply to last minute requests to dismiss court-appointed counsel is that there be good cause and a compelling reason shown. "The mere fact that T.M. repeatedly changed his mind about who he would accept as an independent evaluator is not a sufficiently exceptional circumstance to justify prolonging a trial in order for T.M. to 'make some calls' when, considering T.M.'s indigent status, it is highly unlikely that he would have found an attorney to take his case."

X. CONSTITUTIONAL ISSUES

A. Due Process/Equal Protection

***Ford v. State*, 2005 MT 151, ___ Mont. ___, ___ P.3d ___ (Cascade).**

Affirmed; Nelson, J. In State v. Ford the Court declined to address the merits of Ford's Batson claim (alleging gender discrimination in jury selection) because the objection, asserted after the jury was empanelled and sworn and the venire was dismissed, was untimely. Ford then filed a postconviction petition, alleging that his trial counsel was ineffective for failing to lodge a timely Batson objection. The district court concluded that the claim was procedurally barred under Mont. Code Ann. § 46-21-105 (2). The Court affirmed, holding that because there is no conceivable trial strategy justifying an untimely Batson objection, the claim was record-based and therefore barred.

***State v. Herrick*, 2004 MT 323, 324 Mont. 76, 101 P.3d 755 (Cascade).**

Affirmed; Gray, C.J. Herrick attempted to shoot a Great Falls police officer at close range, but the gun misfired. While in custody awaiting trial, Herrick was charged twice with possession of a deadly weapon by a prisoner, and he sent threatening letters to the prosecutor and others. The State requested special security precautions at the trial. Judge Neill rejected several of the State's requests but permitted Herrick to be restrained with leg irons, but not handcuffs, during the trial. The judge was careful to assure that the jury did not observe Herrick in restraints. The Court adopted the federal due process analysis of the Ninth Circuit in Morgan v. Bunnell, which requires a showing of compelling circumstances and consideration of less restrictive alternatives to shackling. The Court confirmed that the trial judge has broad discretion in assessing the need to maintain security in the courtroom. On this issue, the Court found no difference between the state and federal constitutional due process requirements. The Court found no abuse of discretion or fair trial/due process violation in the decision to restrain Herrick with leg irons during the trial. The Court also rejected Herrick's claim that shackling at trial violated his state constitutional right to individual dignity.

***State v. McCaslin*, 2004 MT 212, 322 Mont. 350, 96 P.3d 722 (Gallatin).**

Affirmed; Regnier, J. (Nelson and Cotter, dissenting). The district court properly instructed the jury pursuant to Mont. Code Ann. § 45-2-203 (i.e., voluntary intoxication is not a defense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense). Montana v. Egelhoff, 518 U.S. 37 (1996), reversed the Montana Supreme Court's unanimous decision in State v. Egelhoff, 272 Mont. 114, 900 P.2d 260 (1995), and held that the statute did not violate the Due Process Clause of the U.S. Constitution. McCaslin argued that the statute and jury instruction violated the Due Process Clause of the Montana Constitution and that it shifted the burden of proof in violation of Sandstrom v. Montana, 442 U.S. 510 (1979). The Court majority in this case ruled that Mont. Code Ann. § 45-2-203 did not violate the

Montana Due Process Clause, nor did it improperly shift the burden of proof. Justices Nelson and Cotter dissented on this issue, based on Justice Nelson's special concurrence in Egelhoff.

***State v. Parrish*, 2005 MT 112, ___ Mont. ___, 111 P.3d 671 (Flathead).** **Affirmed in relevant part, reversed in part; Morris, J.** Applying the rule that the Court will affirm the district court if it reaches the right result for the wrong reason, the Court held that defense counsel's Batson objection to the prosecution's exercising all of its peremptory strikes against males (in a sexual assault/sexual intercourse without consent prosecution) was untimely pursuant to the Court's decision in Ford because the objection was not formally presented until a motion for a new trial was filed.

***State v. Redfern*, 2004 MT 277, 323 Mont. 225, 99 P.3d 223 (Flathead).** **Affirmed; Gray, C.J.** After vacating a concurrent sentence, which contained a parole eligibility date restriction, at resentencing the district court imposed a consecutive sentence in order to achieve the same objective it sought to obtain initially--allowing Redfern enough time to complete chemical dependency treatment before his release into the community. Although Redfern received a greater period of potential imprisonment and supervision than the court originally imposed, the court's resentencing decision satisfied the due process requirements established in North Carolina v. Pearce.

B. First Amendment/Right to Free Speech

***Sellner v. State*, 2004 MT 205, 322 Mont. 310, 95 P.3d 708 (Lake).** **Affirmed; Rice, J.** Sellner's counsel was not ineffective with respect to the investigation of Parcell's personnel files, etc., to possibly portray him as the aggressor and the use of the justifiable use of force defense. Sellner's counsel did not abandon the attempted mitigated deliberate homicide defense. Accordingly, counsel's performance was not deficient. There was no deficiency in counsel's performance with respect to the defense based upon the civil suit filed by Parcell against Sellner for negligence, and no error by the district court in permitting defense counsel to pursue that strategy. Sellner's trial counsel's failure to offer a "failure to agree" instruction did not constitute deficient performance because Sellner bore the burden to overcome the presumption that his counsel acted in a reasonable, professional manner, and Sellner failed to present any evidence on the matter at the evidentiary hearing.

C. Eighth Amendment

***Basto v. State*, 2004 MT 257, 323 Mont. 80, 97 P.3d 1113 (Cascade).** **Affirmed; Rice, J.** Basto alleged that his sentence violated the Eighth Amendment because his sentence was disproportionately severe when compared to his two codefendants.

In rejecting his claim, the Court stated that Basto's sentence did not violate cruel and unusual punishment protections because Basto received the sentence he bargained for in his plea bargain, the voluntariness of his guilty pleas were not at issue in the district court, and his sentence falls within the maximum guidelines.

D. Right of Confrontation

State v. Carter, 2005 MT 87, ___ Mont. ___, ___ P.3d ___ (Cascade) Affirmed; Nelson, J. (Leaphart, concurring; Gray and Rice, dissenting). At trial, Carter objected, on hearsay grounds, to the admission of field certification forms and the state crime lab's annual certification form offered to show that the Intoxilyzer 5000 was working properly when it was used to test Carter. Judge Macek overruled the hearsay objection and admitted the forms. On appeal, Carter abandoned the hearsay argument and argued instead that the admission of the forms violated his right of confrontation under Crawford v. Washington. The Court decided to consider the new argument or theory for the first time on appeal, citing several civil cases, including Cottrill v. Cottrill Sodding, to create a new exception (the Cottrill exception) to the contemporaneous objection rule. The exception apparently complements the Court's authority, under its plain error decisions, to review any issue it deems worthy of appellate review, despite the lack of a contemporaneous objection in the trial proceedings and the statutory prohibition to appellate review of issues unpreserved for appeal. Under Cottrill, the Court has reserved to itself the power to examine constitutional issues that involve broad public concerns to avoid future litigation on a point of law, and the Court will not regard itself as bound by, or limited to, the arguments and reasoning of either trial or appellate counsel, which would "lead us far from what we understand to be the true object of the court."

Turning to the Crawford issue, the Court found that admission of the certification forms did not violate Carter's right of confrontation since the forms were not "testimonial." The forms were not substantive evidence of the offense, but rather were foundational evidence necessary for the admission of substantive evidence. The Court affirmed its prior decision in State v. Delaney, which permitted the certification forms to be considered for foundational purposes without testimony from the persons who completed the forms.

Justice Leaphart filed a special concurrence, noting his belief that a hearsay objection may double as a Confrontation Clause objection under certain circumstances. Chief Justice Gray, joined by Justice Rice, dissented from the Court's decision to reach the merits of the Crawford issue and would have affirmed for the reason that the appeal was not properly before the Court. The dissent objected to the Court's far-reaching statement of its Cottrill exception, suggesting that the Court has indicated its clear intent to recognize no bounds in reaching an issue it wants to reach at any time and in any case

and predicting that the statement will be quoted in future cases “when the Court does not wish to conduct itself within any applicable parameters.”

E. Right to Counsel/Effective Assistance

***Gonzales v. State*, 2004 MT 223N (Flathead). Affirmed; Nelson, J.** Gonzales claimed that his trial counsel’s performance was deficient because counsel had told him that if he pled guilty he would receive a sentence of no more than 20 years, and that the prosecutor had agreed to that sentence. After reviewing the plea agreement and change of plea hearing, the Court found no merit to Gonzales’s claim.

***Soraich v. State*, 2004 MT 215, 322 Mont. 375, 97 P.3d 529 (Yellowstone). Affirmed; Warner, J.** Soraich had argued that his trial counsel botched the defense by promising jurors in his opening statement that he would produce evidence from a defense investigator pointing out that the actual murderer was the only witness to the shooting. During trial, defense counsel decided against calling the investigator as a witness, an act which Soraich argued allowed the prosecution to claim in closing argument that the defense never proved the murderer might be someone else. Because Soraich could not satisfy the second (prejudice) prong of the Strickland analysis, the Court decided it need not determine whether he had proven his counsel committed any constitutionally-recognizable error. The Court said the State offered ample evidence proving Soraich was the killer and that defense counsel relied on other witnesses to establish his point. “We hold that this single factor in a complex trial that lasted five days does not demonstrate a reasonable probability that the outcome of the trial would have been different absent the alleged error by counsel.”

***State v. Audet*, 2004 MT 224, 322 Mont. 415, 96 P.3d 1144 (Cascade). Dismissed; Cotter, J.** Audet pleaded not guilty to assaulting a peace officer, a felony, and (after his counsel convinced him to do so) pleaded not guilty to resisting arrest, a misdemeanor. At trial, his counsel conceded in opening arguments that Audet was guilty of resisting arrest, but not of assaulting a peace officer. The State’s attorney argued in closing that in conceding the resisting arrest charge, Audet “essentially” conceded the mental state necessary for assaulting a peace officer. The jury convicted Audet of both counts, and on direct appeal, Audet claimed ineffective assistance of counsel. The Court, citing State v. Hendricks, 2003 MT 223, 317 Mont. 177, 75 P.3d 1268, dismissed the appeal because, absent evidence in the record demonstrating the reasons underlying Audet’s counsel’s opening argument concession, it was unable to determine whether the decision constituted an unreasonable defense strategy that would overcome the presumption that counsel’s actions fall within the range of reasonable professional conduct. The Court went on to observe that Audet had raised a “colorable claim” of ineffective assistance of counsel, the merits of which require an exploration of the reasons his attorney took the actions at issue.

***State v. Henderson*, 2004 MT 173, 322 Mont. 69, 93 P.3d 1231 (Missoula). Reversed; Leaphart, J. (Warner, dissenting).** Ineffectiveness claim. Minimalist approach by defense counsel didn't cut it. "The sum total of counsel's legal work on Henderson's behalf is that he asked the county attorney to propose a plea bargain and then signed the prosecution's first offer on June 8." *Henderson*, ¶ 6. His counsel had not interviewed any witnesses and did not investigate a motion to suppress. What seemed to tip the balance, though, was the prosecution and district court's bullying when Henderson balked at pleading.

Good summary of ineffectiveness standards. Justice Warner vigorously dissented, noting absence of prejudice.

***State v. Kougl*, 2004 MT 243, 323 Mont. 6, 97 P.3d 1095 (Cascade). Reversed; Leaphart, J.** Kougl was convicted of Operation of an Unlawful Clandestine Laboratory in large part on the testimony of his accomplices. The Court concluded that Kougl's counsel was ineffective for failing to request a jury instruction that accomplice testimony should be viewed with distrust and a jury instruction that accomplice testimony should be corroborated by other evidence. The record was silent on "why" counsel did not request the instructions. However, the Court concluded that it was unnecessary to determine "why" counsel failed to do so in a postconviction proceeding because counsel could not have had a plausible justification for not requesting the instructions. The Court added that since counsel could not have had a plausible explanation, counsel's performance was deficient under the first prong of the Strickland test.

***State v. Lucero*, 2004 MT 248, 323 Mont. 42, 97 P.3d 1106 (Yellowstone). Affirmed in part, reversed in part; Rice, J.** Lucero's claim of ineffective assistance of counsel is meritless. Lucero attempted to put the substance of his attorney's plea advice and Lucero's understanding in issue. The testimony of defense counsel, however, demonstrated that he fully communicated the plea offer to Lucero and that Lucero insisted on going to trial. Accordingly, counsel's assistance was not deficient.

***State v. Weaver*, 2005 MT 158, ___ Mont. ___, ___ P.3d ___ (Missoula). Affirmed; Morris, J. (Warner, Rice, and Gray, concurring; Cotter, Leaphart, and Nelson, dissenting).** On November 7, 1993, a hunter found James Fremou's partially decomposed body in the brush near Missoula. Fremou died from a gunshot wound. There were many suspects, but no evidence sufficient to file charges until 1996, when Weaver confessed to the murder to his talkative cellmate in a Georgia prison. Weaver had escaped from a Georgia institution several years before, and when Fremou was found, Weaver was living in Missoula using the name and Social Security Number of someone deceased. His identity was discovered when his fingerprints were taken during an unconnected investigation, although Weaver was among those interviewed on Fremou's death. *State v. Weaver*, 2001 MT 115, 305 Mont. 315, 28 P.3d 451.

This opinion dealt with his petition for postconviction relief, which claimed his trial counsel was ineffective because she did not interview or call a number of witnesses whose police interviews revealed testimony about other suspects. The majority concluded that counsel's decision was not ineffective because she had read the reports, knew the proposed witnesses, and thought they would be unreliable and possibly damaging. She elected to draw exculpatory evidence about other suspects from the State's chief investigator, which she accomplished at trial. Those concurring in the majority opinion thought counsel was ineffective in this regard, but agreed that Weaver had not shown a reasonable probability that the result would have been different.

The second issue concerned an entomologist's report opining that the maggots found on Fremou's body could not have been introduced before a certain date--which contradicted the State's proposed date of death and conflicted with other evidence, such as the date of a pawn ticket for the suspected murder weapon (which had departed Missoula and was not available for testing). The State and counsel learned a few days before trial that the entomologist had died. The State obtained another entomologist, who, however, disagreed with the report. Weaver's counsel was given the choice of having the report admitted with foundation from the new entomologist, but then risking rebuttal by the second expert, whom counsel thought was qualified and persuasive. She elected to forgo the report and, with Weaver's concurrence, resisted a continuance. The majority agreed she made a tactical decision worthy of deference.

F. Speedy Trial

State v. Blair, 2004 MT 356, 324 Mont. 444, 103 P.3d 538 (Yellowstone). **Affirmed; Regnier, J.** Applying the four tests from *City of Billings v. Bruce*, 1998 MT 186, 290 Mont. 148, 965 P.2d 866, the Court attributed 273 days delay to the State, but concluded Blair did not show prejudice under *Bruce*, including a showing that he suffered anxiety and concern or that his defense was impaired as a result of the delay.

G. Privacy

State v. Hill, 2004 MT 184, 322 Mont. 165, 94 P.3d 752 (Missoula). **Affirmed; Rice, J.** Hill was not unlawfully searched when with the consent of the rental car company officers searched a rental car that Hill was not authorized to drive, after Hill twice voluntarily disclaimed any knowledge or ownership of two duffel bags found in the rental car's trunk; Hill did not have an objectively reasonable expectation of privacy in a rental car he illegally possessed, or in its contents that he disclaimed.

***State v. Redlich*, 2004 MT 235, 322 Mont. 476, 97 P.3d 1090 (Beaverhead).**

Affirmed; Regnier, J. Rebekah Michelle Smith and Bryan James Redlich were guests at a party in Roslyn Tash's Dillon apartment. The Dillon City Police came to the apartment in the early morning hours on a complaint of loud noise and the smell of marijuana. They knocked on the apartment door, and an adult guest allowed them to enter. They saw Tash and recognized her as the tenant, but did not ask her permission to enter, and she did not object to their presence.

When the officers arrived, Smith was in the bathroom, throwing up. An officer entered the bathroom, whereupon Smith's age and the alcoholic source of her vomiting became apparent. An officer found Redlich in a bedroom. Smith was convicted of possessing an intoxicating substance while under 21. Redlich was charged with unlawful transactions with children and underage possession of alcohol.

Neither Smith nor Redlich had an expectation of privacy in the common areas of the apartment since neither had a possessory interest and hence no standing to object to the search. Smith, however, did have a privacy expectation while in the bathroom, and the community caretaker exception did not apply because there were no objective, specific, and articulable facts requiring officer assistance when there were alternate means to determine Smith's well-being. Redlich, however, had no privacy expectation in the apartment's bedroom. The Court suppressed Smith's search, but upheld Redlich's.

H. Vagueness/Overbreadth

***State v. Allum*, 2005 MT 150, ___ Mont. ___, ___ P.3d ___ (Gallatin).**

Affirmed; Leaphart, J. (Nelson, dissenting). Rejecting Allum's argument that the criminal trespass statute would be rendered vague or overbroad if the phrase "authorized person" were not limited to persons have written authority from the property owner, the Court concluded that Allum's overbreadth challenge was speculative and his vagueness challenge failed because "[a] person of ordinary intelligence who reads the statute will have fair notice that he will have committed trespass if he refuses to leave a store when the manager of the store asks him to leave."

I. Brady

***State v. Allum*, 2005 MT 150, ___ Mont. ___, ___ P.3d ___ (Gallatin).**

Affirmed; Leaphart, J. (Nelson, dissenting). The prosecutor's inability to produce a surveillance video--because the data was routinely destroyed by the bank within two weeks after it was recorded--was not a Brady violation.