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## I. JURISDICTION

### A. Youth Court Lacks Authority to Increase Restitution

***In re K.D.K.*, 2006 MT 187, 333 Mont. 100, 141 P.3d 1212 (Ravalli). Reversed; Gray, C. J.** K.D.K. was ordered to pay restitution as part of his disposition as a delinquent youth. The dispositional order placed K.D.K. on probation to age 18, and granted the Youth Court jurisdiction to age 21 for purposes of the restitution obligation. Shortly after K.D.K.'s 18th birthday, the Youth Court amended the order at the State's request to include additional restitution obligations. The Court reversed, holding that the court had no authority to do so since it retained jurisdiction only for purposes of ensuring payment of restitution originally imposed--not to increase the restitution amount. The Court opined that a court may retain jurisdiction to modify restitution pursuant to Mont. Code Ann. §§ 41-5-205(1) and -1422(1). However, the language of the dispositional order at issue here clearly limited retention of jurisdiction beyond K.D.K.'s 18th birthday to enforcement of the financial obligations in the original order, and not to impose additional restitution.

### B. Civil Commitments

***In re G.M.*, 2007 MT 100, 337 Mont. 116, 157 P.3d 687 (Yellowstone). Reversed; Morris, J.** The district court had subject matter jurisdiction to consider the State's June 2, 2006 petition for civil commitment of G.M. even though it was filed under the same cause number as G.M.'s May 5, 2006 commitment order, and even though G.M. had appealed the May 5, 2006 commitment order. The State filed the second petition under the first cause number based upon the Montana Uniform Caseload Filing Standards, which are intended solely for record-keeping within the office of the Clerk of Court. Further an appeal to the Court divests the district court of jurisdiction over the order or judgment from which the appeal is taken. Thus, the district court was divested of jurisdiction only of the May 5, 2006 commitment order.

### C. Finality of Judgment

***City of Billings v. Costa*, 2006 MT 181, 333 Mont. 84, 140 P.3d 1070 (Yellowstone). Affirmed; Gray, C.J.** A district court's order affirming a denial of a motion to suppress was a "final judgment" despite the district court's "remand" to the municipal court for sentencing. The municipal court had already imposed a sentence, then stayed it pending appeal, so the "remand" was "a nullity." An appellate court (including the Montana Supreme Court) need not formally "remand" cases involving affirmed criminal judgments or direct that stays pending appeal be lifted.

***State v. Bonamarte*, 2006 MT 291, 334 Mont. 376, 147 P.3d 220 (Gallatin). Dismissed without prejudice; Per curiam.** Because Bonamarte appealed his conviction before the issue of restitution had been resolved, there was no "final judgment" and no appellate

jurisdiction. The municipal court had sentenced Bonamarte, and ordered restitution conditional on a State request within 60 days and a court hearing. But Bonamarte appealed before the 60 days was up, and the district court improperly considered the appeal. Bonamarte's appeal should be considered as effectively filed on the day of and after the municipal court enters its final judgment.

**D. District Court Authority to Dismiss Appeals from Justice Court**

***State v. Clark*, 2006 MT 313, 335 Mont. 39, 149 P.3d 551 (Gallatin). Reversed and remanded; Leaphart, J.** Clark was convicted in justice court and appealed for a trial de novo to district court. Clark failed to appear personally, although his attorney was present and ready to proceed. At the State's request, the district court dismissed the appeal under the authority of Mont. Code Ann. § 46-17-311(5), concluding that the defendant must personally appear or the appeal is subject to dismissal. The Court disagreed, concluding that counsel was authorized to act on Defendant's behalf under Mont. Code Ann. § 46-16-122. The district court thus lacked authority to dismiss the appeal.

**II. INVESTIGATIVE PROCEDURES**

**A. Interviews/Interrogations of Adults**

***State v. Jones*, 2006 MT 209, 333 Mont. 294, 142 P.3d 851 (Fergus). Affirmed; Morris, J.** Considering the totality of the circumstances, including his experience with the criminal justice system and prior interrogations, the Defendant's Mirandized statements were voluntary. His statement that he was "through talking" was not an unequivocal invocation of the right to remain silent because he remained talkative. Absent evidence that the police interviewers lied to or misled the suspect, the use of guilt assumption techniques was permissible.

***State v. Stombaugh*, 2007 MT 105, 337 Mont. 147, 157 P.3d 1137 (Jefferson). Affirmed; Rice, J.** The district court assessed the credibility of the witnesses and found that the investigating officer gave Stombaugh Miranda warnings. The trier of fact makes credibility determinations and those decisions will not be disturbed on appeal. By implication, the district court also found that Stombaugh did not make a request for counsel.

**NOTE: The Court cautioned lower courts to always make written findings of fact and conclusions of law because rendering findings and conclusions from the bench can result in the court overlooking an issue or giving an inadequate rationale that is insufficient for appellate review. This can result in a remand.**

## **B. Interviews/Interrogations of Minors**

***In re Z.M.*, 2007 MT 122, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Sanders). Affirmed in part, reversed in part; Leaphart, J.** Fourteen-year-old Z.M. was charged with a number of felony and misdemeanor counts, including felony burglary and theft. He filed a motion to suppress evidence and statements. The district court denied his motion and Z.M. subsequently plead guilty to one felony count of burglary.

The Court dismissed the State’s argument that Z.M. had failed to reserve the right to appeal in light of his “guilty plea” and addressed the merits of Z.M.’s appeal.

The Court reversed the denial of fourteen-year-old Z.M.’s motion to suppress his statements confessing to burglarizing a bowling alley. His first statement was made prior to being given Miranda warnings and before his parents arrived. Although his parents had arrived before Z.M. made his second statement, the officer failed to preserve a tangible record that he was given Miranda warnings and that his parents consented to the interview. Z.M.’s interview was tape-recorded, but the State was unable to produce the tape at the suppression hearing. Z.M. did not sign a waiver form and, in light of his and his mother’s testimony that he was not given Miranda warnings, the Court concluded that the youth court erred in finding that he was given Miranda warnings and that his parents consented to the interview. The Court remanded the case to the youth court, with instructions that Z.M. must be allowed to withdraw his guilty plea.

## **III. SEARCH AND SEIZURE**

### **A. Searches**

#### **1. Warrants**

##### **a. District court authority to issue**

***State v. Dasen*, 2007 MT 87, 337 Mont. 74, 155 P.3d 1282 (Flathead). Affirmed; Leaphart, J.** Although she did not issue the first (defective) warrant, Judge Curtis had jurisdiction to issue a second warrant after she had been substituted pursuant to Mont. Code Ann. § 3-1-804.

##### **b. Probable cause**

***State v. Barnaby*, 2006 MT 203, 333 Mont. 220, 142 P.3d 809 (Lake). Affirmed in part, reversed in part and remanded for resentencing; Morris, J.** Under the totality of circumstances test, there was sufficient reliable evidence to support issuance of a

warrant to search the Defendant's residence. Police had information that the Defendant's residence was frequented by June Sheridan, a known drug dealer, and numerous other people at all hours of the day and night; two citizens reported that Sheridan was possibly cooking meth in the Defendant's home, and Sheridan was observed buying ingredients commonly used to make meth.

Justices Cotter and Nelson dissented. Nelson's 65 page dissent is particularly enlightening with respect to his views on privacy and search warrants.

***State v. Stombaugh*, 2007 MT 105, 337 Mont. 147, 157 P.3d 1137 (Jefferson).**

**Affirmed; Rice, J.** There was probable cause to support the search warrant application and, since Stombaugh was properly Mirandized, there was no reason to excise her admissions from the application.

***State v. Zito*, 2006 MT 211, 333 Mont. 312, 143 P.3d 108 (Ravalli). Affirmed;**

**Warner, J.** Considering the totality of the circumstances, the justice of the peace had probable cause to issue a warrant of Zito's residence based upon information from a non-anonymous informant who smelled the odor of marijuana at Zito's property 18 days prior, the informant's observation of over 30 marijuana plants the same day the affidavit was presented, and a flyover of the property which corroborated the informant's description of suspected areas. Although the informant's tip (that he had seen marijuana on the property) occurred after the flyover, that does not negate the corroborative value of the information obtained via the flyover. Probable cause was also supported by a detective's averment that junk vehicles and a tarp on the premises suggested an attempt to create a secluded area for illegal activity, a criminal background check documenting that Zito had a prior drug-related conviction, and a report from a concerned citizen that Zito was growing marijuana (although it was not based on personal observation).

Justice Nelson, joined in part by Chief Justice Gray, specially concurred, arguing that language in the Court's opinion suggesting that the Court should pay "great deference" to the reviewing magistrate's determination is "not boundless," and that the Court's probable cause analysis should not have relied upon Zito's five-year-old conviction for possession of drug paraphernalia.

### **c. Staleness**

***State v. Dutton*, 2007 MT 56, 336 Mont. 192, 153 P.3d 642 (Lincoln). Affirmed;**

**Gray, C. J.** Dutton pled guilty to criminal production of dangerous drugs, reserving the right to appeal the district court's denial of his motion to suppress. The Court affirmed the district court's decision, concluding that the information in the search warrant application was not stale. The Court also rejected Dutton's claim that his purchases of methamphetamine precursors (matches, HEET, red devil lye, and pseudoephedrine tablets) were for normal household purposes.

## 2. **Exceptions to the Warrant Requirement/Exclusionary Rule**

### a. **Plain View**

*State v. Delao*, 2006 MT 179, 333 Mont. 68, 140 P.3d 1065 (Yellowstone). **Affirmed; Nelson, J.** Under the “plain view” doctrine, an officer properly seized a bottle of vodka partially covered under the center armrest of Delao’s vehicle, where the officer had arrested Delao and then returned to Delao’s vehicle to look for the keys in order to roll up the power windows and secure the vehicle by the side of the road. The officer had an obligation to secure the vehicle, and was therefore lawfully present inside it; the bottle was in plain view, and its incriminating nature was immediately apparent.

### b. **Consent**

*State v. Copelton*, 2006 MT 182, 333 Mont. 91, 140 P.3d 1074 (Gallatin). **Affirmed; Gray, C. J.** The Court affirmed Judge Salvagni’s denial of Copelton’s motion to suppress the methamphetamine evidence found during the search of a car in which Copelton was a passenger. The person responsible for the car, Ruben Garcia, consented to the search. Copelton sought to suppress the evidence on the grounds that the officers did not have probable cause to search the car and that the consent was involuntary. The Court reaffirmed its holding in *State v. Snell* that voluntary consent is sufficient to justify the warrantless search of a vehicle and that a showing of probable cause is not required for a consensual search. The Court overruled a portion of its decision in *State v. Shaw* that suggested otherwise. Reviewing the totality of the circumstances of Garcia’s consent, the Court rejected Copelton’s arguments that Garcia’s limited education in Mexico and his limited understanding of the English language rendered his consent involuntary. The Court confirmed that the officers’ failure to inform Garcia of his right to refuse consent is not determinative of the voluntariness issue and does not, by itself, render the consent unknowing or involuntary. The Court, citing *State v. Dawson*, also confirmed that nonverbal consent, such as a shrug of the shoulders, can be effective where the conduct indicates unequivocal consent to the search.

### c. **Probation searches/home visits**

*State v. Fritz*, 2006 MT 202, 333 Mont. 215, 142 P.3d 806 (Missoula). **Affirmed; Leaphart, J.** The Court affirmed the district court’s determination that reasonable cause existed to conduct a probationary search of the truck Fritz was driving because another violating probationer stated that there was a methamphetamine lab in the vehicle, the officers knew that Fritz had failed to report to his probation officer and that he was associating with another violating probationer at a residence where drugs were found, and officers had observed Fritz driving the truck. Although the officers knew that the truck

was not registered to Fritz, citing State v. Galpin, the Court noted that methamphetamine cooks frequently conceal their portable laboratories by using vehicles registered in someone else's name. As the Court has previously held, Fritz's assigned probation officer did not need to be consulted prior to the search. Finally, the Court rejected Fritz's argument that the search was unreasonable because the police purportedly used Fritz's probation officers as a subterfuge for a criminal investigation.

***State v. Greeson*, 2007 MT 23, 336 Mont. 1, 152 P.3d 695 (Yellowstone). Affirmed in part, reversed in part; Gray, C.J.** Based on its holding in State v. Moody, 2006 MT 305, 334 Mont. 517, 148 P.3d 662, the Court rejected Greeson's challenge to the condition that she must make her home open and available for the probation officer to visit, noting that a home visit is not a search and that a probationer has no reasonable expectation of privacy that would preclude home visits.

***State v. Moody*, 2006 MT 305, 334 Mont. 517, 148 P.3d 662 (Yellowstone). Affirmed; Leaphart, J.** As conditions of Moody's deferred sentence, the sentencing court imposed the conditions that Moody make her "home open and available for visits as required per [Department of Corrections] policy" and that Moody not leave her assigned district without first obtaining written permission of her probation officer. Moody objected to the home visitation condition, contending that probationary home visits, absent reasonable cause, violated her rights of privacy and protection from unreasonable searches and seizures. Moody also objected to the travel restriction. The district court overruled Moody's objections, and the Court initially reversed, holding that, absent prior reasonable cause, probationary home visits are unconstitutional.

Relying upon the DOC's written policies permitting home visits (absent reasonable cause) while requiring reasonable cause for actual searches, as well as recent federal decisions, particularly Samson v. California, 126 S. Ct. 2193 (2006) (upholding a suspicionless search of a parolee), the State petitioned for rehearing. The State argued that if there is no "reasonable cause" requirement for a search of a parolee, there should be no such requirement for less intrusive home visits, which are not searches for constitutional purposes. The Court agreed. The Court, which withdrew its initial opinion, held that "a convicted felon who is granted probation on a clearly expressed condition, of which she is 'unambiguously' aware, that she make her home open and available for the probation officer to visit pursuant to state policy does not have an actual expectation of privacy that would preclude such visits . . . [and] [s]ince there is no actual expectation of privacy, there is no search." Even if an actual expectation of privacy existed, society would not be prepared to recognize that expectation as objectively reasonable because the recidivism rate of probationers is significantly higher than the general crime rate. Although a home visit is not a search, a home visit can evolve into a search of enclosed areas (e.g., cabinets, drawers, or closets) which would require reasonable cause. However, at its inception, a home visit is not a search. The Court also upheld the travel restriction as reasonable and appropriate.

Justice Nelson dissented from the Court's determination that a home visit is not a search, emphasizing the sanctity of the home and Montana's more protective privacy right and arguing that home visits, which involve visual inspections of a probationer's home for evidence of violations, are searches which cannot be conducted on a purely suspicionless basis.

**d. Canine sniffs**

***State v. Stombaugh*, 2007 MT 105, 337 Mont. 147, 157 P.3d 1137 (Jefferson).** **Affirmed; Rice, J.** Particularized suspicion existed to support a canine sniff of Stombaugh's vehicle based upon the totality of the following circumstances: the family report of Stombaugh's drug use and notification of her location in their home; Stombaugh's admission of pending drug charges in Washington; police confirmation of the pending felony drug charges; Stombaugh's urgency in seeking removal of her vehicle out of the county and her unusual desire to pay more than the car was worth to do so; and the discovery in plain sight of an unidentifiable white pill on the dash of Stombaugh's vehicle and Stombaugh's evasiveness about the pill.

**e. Exigent circumstances**

***State v. Gomez*, 2007 MT 111, 337 Mont. 219, 158 P.3d 442 (Flathead).** **Affirmed; Rice, J.** The district court properly denied Gomez's motion to suppress evidence gained when the police conducted a warrantless search of Gomez's padlocked duffle bag because the search was supported by exigent circumstances. The officers were engaged in detoxifying a meth lab inside a motor home where Gomez had been staying but had seemingly abandoned. The motor home owners gave officers permission to enter the motor home. When the first officer entered the motor home, he immediately identified what appeared to be a meth lab and backed out. Other officers, with experience dismantling meth labs, came to detoxify the motor home. When the officers moved a duffle bag from what they were sure was contaminated bedding, they heard sounds of liquid sloshing and metal or glass clanging within the bag. The officers immediately become concerned about a possible chemical reaction, and decided to carefully open the duffle bag. The search was warranted because an urgency had arisen during the process of dismantling the meth lab, which posed a potential threat to the safety of the officers, as well as the properties and persons in the immediate area.

***State v. Madplume*, 2007 MT 11, 335 Mont. 290, 150 P.3d 956 (Lake).** **(State Appeal.) Reversed and remanded; Cotter, J. (Rice and Warner, concurring.)** In an appeal brought by the State, the Court reversed Judge McNeil's order that suppressed evidence of the victim's DNA recovered from the warrantless swabbing of Preston Madplume's fingers. Madplume was arrested on misdemeanor charges and taken to the tribal jail. A 15-year-old girl then told authorities that before the arrest Madplume had touched her and digitally penetrated her. Without first obtaining a search warrant,

officers swabbed Madplume's hands and fingers in an effort to recover DNA evidence. Lab tests showed that the victim's DNA was on one of Madplume's fingers. Relying on State v. Hardaway, 2001 MT 252, 307 Mont. 139, 36 P.3d 900, the district court granted Madplume's motion to suppress the DNA evidence. The Court reversed, distinguishing Hardaway on the basis that the swabbing in that case was for Hardaway's own blood rather than for a foreign substance on his hands. The Court found that, unlike the situation in Hardaway, the DNA evidence here could have been easily destroyed or compromised, even while Madplume was under police supervision, and that exigent circumstances existed to justify the warrantless swabbing. Justice Cotter's opinion was joined by Chief Justice Gray and Justice Leaphart. Justices Rice and Warner filed separate concurring opinions, indicating that they would have found a similar exigency in Hardaway that justified the warrantless search in that case.

**f. Independent source**

***State v. Dasen*, 2007 MT 87, 337 Mont. 74, 155 P.3d 1282 (Flathead). Affirmed; Leaphart, J.** Affirming Dasen's felony convictions for promotion of prostitution, sexual abuse of children, and prostitution, the Court applied the independent source exception to the fruit of the poisonous tree doctrine. Although the first search warrant was invalid because it failed to particularly describe the items to be seized as required by Groh v. Ramirez, the second search warrant (which complied with Groh) was valid because it was based on information obtained by the State prior to the first search warrant, as well as information obtained from additional sources not connected to or derived from the first search.

**g. Search incident to arrest**

***In re Z.M.*, 2007 MT 122, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Sanders). Affirmed in part, reversed in part; Leaphart, J.** Because the officer smelled alcohol on Z.M., Z.M. had been missing from home overnight, was truant from school, and his mother and the school's resource officer had requested that he be picked up, the officer had probable cause to arrest Z.M. for the offense of consuming or possessing alcohol and take him into custody and, incident to arrest, the officer was entitled to search Z.M. and the area within his reach. Thus, the alcohol and money found on Z.M. was lawfully seized.

***State v. Cooney*, 2006 MT 318, 335 Mont. 55, 149 P.3d 554 (Missoula). Affirmed; Morris, J.** Officers performed a search of Cooney incident to a lawful arrest at a residence which was being searched pursuant to a search warrant. Before placing Cooney in the patrol vehicle, another officer, who had been told that a more thorough search was required for officer safety, conducted another pat down to make certain that Cooney had no weapons. That latter search resulted in the discovery of a pipe used to ingest methamphetamine. The Court held that the search was lawful, reasoning: "We do not read § 46-5-102(1), MCA, to require a police officer to trust his personal safety to a

perfunctory search performed by other officers when those same officers have advised him that their initial search was insufficient to ensure the safe transport of the prisoner.”

## **B. Seizures**

### **1. Arrest**

***In re Z.M.*, 2007 MT 122, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Sanders). Affirmed in part, reversed in part; Leaphart, J.** Because the officer smelled alcohol on 14-year-old Z.M., Z.M. had been missing from home overnight, was truant from school, and his mother and the school’s resource officer had requested that he be picked up, the officer had probable cause to arrest Z.M. for the offense of consuming or possessing alcohol and take him into custody.

***State v. Ellington*, 2006 MT 219, 333 Mont. 411, 143 P.3d 119 (Gallatin). Reversed; Morris, J.** The Court reversed Judge Brown’s order denying Ellington’s motion to suppress illegal drugs seized during an investigative detention. While executing a search warrant for somebody else’s car, which was in a casino parking lot, officers saw Ellington standing by the car, leaning in the window, and talking with the occupants. When Ellington saw the police, he stepped back from the car and began walking toward the casino. The police stopped him, informed him he was being detained pending a drug investigation of Wizenburg’s car, frisked him for weapons, handcuffed him, and placed him in the back seat of a patrol car. Ellington was informed that he was not under arrest but that he would be transported to the Law and Justice Center for questioning. There an officer started to remove Ellington’s handcuffs and found that Ellington was holding something in his fist. When Ellington refused to unclench his fist, the officer physically opened the fist and found a baggie of meth. Ellington was then arrested and taken to the detention facility. The Court found that the “arrest” actually occurred when Ellington was placed in handcuffs in the parking lot, even though the officer told Ellington that he was not under arrest. The Court gave a broad definition to the term “arrest” under which an arrest has occurred if a reasonable person, innocent of any crime, would not have felt free to walk away under the circumstances. The Court made no distinction between “arrest” and “temporary detention” and did not address the use of handcuffs to transport persons in police vehicles to another location for questioning. The Court found that the “arrest” was not based on probable cause, since the officers did not yet know if there were drugs in Wizenburg’s car and the officers had not seen Ellington and the car’s occupants exchange any items consistent with a drug sale. The Court also found that Mont. Code Ann. § 46-5-228 did not justify the officers’ actions. That statute permits a temporary detention and search of any person on the premises being searched at the time of the search, but the statute does not authorize the officers to escalate the detention into an arrest without probable cause. The Court noted that the weapons frisk had revealed no contraband and that the temporary detention outside the casino should have ended at that point.

## 2. Investigative Stops

***City of Billings v. Costa*, 2006 MT 181, 333 Mont. 84, 140 P.3d 1070 (Yellowstone).** **Affirmed; Gray, C.J.** An officer had particularized suspicion to stop a vehicle where he knew there was an arrest warrant for the registered owner of the vehicle and the driver was the same gender as the registered owner (female). The officer did not need to obtain a physical description of the registered owner and compare it with the driver's appearance before initiating the stop. The fact that vehicle owners sometimes lend their vehicles to others did not make the officer's inference that the vehicle was being driven by the registered owner unreasonable.

***State v. Benders*, 2006 MT 275, 334 Mont. 231, 146 P.3d 751 (Yellowstone).** **Affirmed; Leaphart, J.** Because the driver was operating his vehicle 30 to 45 miles-per-hour under the speed limit, causing traffic to pile up behind him, the officer had particularized suspicion to stop the vehicle for violation of Mont. Code Ann. § 61-8-311(1).

***State v. Ellington*, 2006 MT 219, 333 Mont. 411, 143 P.3d 119 (Gallatin).** **Reversed; Morris, J.** The Court found that an "investigative detention" during which the Defendant was handcuffed and transported to a police station for questioning was actually an "arrest" without probable cause. See III, B. I. Arrest.

***State v. Lockett*, 2007 MT 47, 336 Mont. 140, 152 P.3d 1279 (Yellowstone).** **Affirmed; Leaphart, J.** The Court affirmed the denial of Lockett's motion to suppress, concluding that the officer had objective indicia of wrongdoing given the totality of the circumstances: the officer observed Lockett and the passenger drinking beer in a parking lot; the vehicle was traveling at slow rate of speed (50 mph) on Interstate 90; and the officer observed the vehicle weaving and crossing the fog line on two separate occasions. The Court distinguished Lafferty, which involved only crossing the fog line.

***State v. Meza*, 2006 MT 210, 333 Mont. 305, 143 P.3d 422 (Yellowstone).** **Affirmed; Morris, J.** Because Meza parked in the middle of the street, impeding traffic, the officer had particularized suspicion to stop Meza's vehicle. Based upon Meza's narcotics history, his parole status, his nervousness after being stopped, and the officer's observing his illegally parked car outside a drug house, the officer had particularized suspicion of narcotics activity to justify a canine sniff of the exterior of Meza's vehicle. Finally, the Court concluded that Meza had failed to demonstrate ineffectiveness regarding his trial counsel's decision not to challenge a subsequent parole search of the vehicle, given the strong precedent supporting the validity of such a search.

***State v. Thompson*, 2006 MT 274, 334 Mont. 226, 146 P.3d 756 (Lewis and Clark).** **Affirmed; Gray, C.J.** The officer had particularized suspicion to stop a vehicle he

observed make a wide right-hand turn and cross into the oncoming lane of traffic, which is a violation of Mont. Code Ann. § 61-8-333(1). All subsequent observations of intoxication were admissible despite Thompson's claim that the stop was illegal because he was not cited for a traffic violation. In view of the officer's personal observation of illegal activity and the officer's testimony at the suppression hearing, which the district court in its discretion found to be credible, this case is factually analogous to State v. Steen, 2004 MT 343, and distinct from State v. Lafferty, 291 Mont. 157, 967 P.2d 363 (1998) and Morris v. State, 2001 MT 13, 304 Mont. 114, 18 P.3d 1003.

***State v. Vincent*, 2007 MT 94, 337 Mont. 87, 155 P.3d 1292 (Lewis and Clark).**

**Affirmed; Warner, J.** The issue of particularized suspicion can be decided without trial and is required to be raised at or before the omnibus hearing. The Defendant on trial for DUI waived his claim that the arresting officer lacked particularized suspicion to stop him because the Defendant waited until the end of the State's case to raise this ground. It was too late to raise the matter in a motion for a judgment of acquittal.

***State v. Waite*, 2006 MT 216, 333 Mont. 365, 143 P.3d 116 (Missoula). Reversed and remanded; Rice, J. (State Appeal).** The Court reversed the district court's order holding there was not particularized suspicion for the investigative stop of Waite's vehicle. The officer's failure to cite Waite for following too closely did not prohibit consideration thereof to determine whether particularized suspicion existed. Similarly, consideration of Waite's following too closely was not prohibited because the officer failed to note it in his report. The officer testified about his observation and it was captured on videotape, which the district court viewed. Under the totality of the circumstances, continuously swerving within the lane, crossing over the center line twice, crossing over the fog line numerous times, and following too close, late at night, was sufficient to establish a particularized suspicion.

***State v. Wrzesinski*, 2006 MT 263, 334 Mont. 157, 145 P.3d 985 (Lewis and Clark).**

**Affirmed; Rice, J.** The district court properly denied the Defendant's motion to suppress statements he made to the arresting officer during an investigative stop. Since the Defendant was the subject of a traffic stop that was public and temporary in nature, his statements were made in a non-custodial setting even though he was not free to leave.

## IV. RIGHT TO COUNSEL

### A. Determining Indigent Status

**Rios v. Justice Court, 2006 MT 256, 334 Mont. 111, 148 P.3d 602 (Cascade.) Order; Per Curiam.** This was an original action filed in the Court by the Appellate Defender, arguing that the justice court had no authority to second-guess its determination of indigency pursuant to Mont. Code Ann. § 47-1-111. The Office of State Public Defender (OSPD) initially determined that Rios was eligible for a public defender. Justice of the Peace Harris initiated an inquiry sua sponte under Mont. Code Ann. § 47-1-111(d), to determine whether Rios was, in fact, indigent based on his knowledge of Rios's finances. The Court held that judicial review of the OSPD's determination of indigency is appropriate only if one of the parties initiates that review. Justice Rice dissented, stating: "It makes no sense that a court, empowered to review and approve, is nonetheless rendered powerless to inquire."

### B. Defense Counsel's Failure to File or Pursue Appeal

**Woepfel v. City of Billings, 2006 MT 283, 334 Mont. 306, 146 P.3d 789 (Yellowstone). Reversed and remanded; Leaphart, J.** Woepfel was convicted of PFMA in municipal court. He appealed to justice court but his attorney did not file a brief and the appeal was dismissed. Woepfel petitioned for postconviction relief claiming that his attorney was per se ineffective and that he was entitled to pursue any foregone appeal issues (namely, a confrontation claim). The State acknowledged counsel's error, but argued that Woepfel was not prejudiced thereby because his underlying confrontation issue lacked merit. The Court refused to address the merits of the underlying issue, noting that a demonstration of non-frivolous issues is one way to show prejudice, but also, the prejudice prong is satisfied if the defendant objectively indicated his intent to appeal. Objective intention was shown in this case by the filing of the notice of appeal. The matter was remanded to the district court for appellate review of any claims Woepfel could have made on appeal from municipal court

### C. Criteria for Appointment of Counsel

**Dillard v. State, 2006 MT 328, 335 Mont. 87, 153 P.3d 575 (Rosebud). Order; Per Curiam.** Dillard requested appointment of counsel, relying upon various statutory provisions addressing the right to counsel and to appointment of counsel, specifically including Mont. Code Ann. § 46-8-104, which provides: "Any court of record may order the office of state public defender . . . to assign counsel, . . . to defend any defendant, petitioner, or appellant in any postconviction criminal action or proceeding if the defendant, petitioner, or appellant desires counsel and is unable to employ counsel." Concluding that the appointment statutes were poorly drafted and overbroad (particularly

with respect to appointment in postconviction proceedings), and “to deal with increasing numbers of requests for appointed counsel on a case-by-case basis under a flawed statute,” the Court adopted the following criteria for the appointment of counsel under Mont. Code Ann. § 46-18-104:

We will appoint counsel where the defendant’s, petitioner’s or appellant’s motion or petition demonstrates--by reference to specific facts and documents in the record (preferably attached as exhibits to the motion or petition), and by citation to specific jurisprudential, statutory or constitutional authority--that (a) statute specifically mandates the appointment of counsel; (b) the defendant, petitioner or appellant is clearly entitled to counsel either under the United States Constitution or under Montana’s Constitution; or (c) extraordinary circumstances exist that require the appointment of counsel to prevent a miscarriage of justice.

The Court placed pro se litigants on notice that “conclusory allegations and demands that typically characterize these motions and petitions will not suffice.”

## V. RIGHT TO SELF-REPRESENTATION

***State v. Browning*, 2006 MT 190, 333 Mont. 132, 142 P.3d 757 (Lake). Reversed; Leaphart, J.** Browning pled guilty to sixth offense DUI after dismissing three court-appointed attorneys. Browning later moved to withdraw his plea, claiming it was entered without the advice of counsel. The district court denied the motion, noting that Browning was clearly instructed prior to the plea that his third attorney would be his last court-appointed counsel, the court gave Browning the option of retaining counsel but his daughter apparently absconded with the retainer fee, and that Browning was advised of the dangers and disadvantages of self-representation. The Court reversed, holding that Browning made no unequivocal request to proceed pro se. The Court held that in the absence of an unequivocal request, the district court should have instructed attorney #3 to remain on as standby counsel even though Browning insisted that the attorney be discharged. Justice Rice concurred, but noted that the Court has created “an unnecessary and costly rule that accommodates defendants engaged in shenanigans with the judicial system.”

***State v. Mann*, 2006 MT 160, 332 Mont. 476, 139 P.3d 159 (Cascade). Reversed; Cotter, J.** The district court violated Mann’s right to appear at all critical stages of the proceedings against him, in violation of the Sixth Amendment and Mont. Const. art. II, § 24, when it excluded Mann from a discussion of whether he should be allowed to represent himself, during which his own counsel portrayed Mann “in a negative light.” Defense counsel accused Mann of threatening his first attorney, called Mann a liar, and speculated that Mann would disrupt the proceedings. The error was prejudicial because it

rendered Mann's decision, after the discussion, to proceed with counsel "both unintelligent and uninformed."

## VI. GUILTY PLEAS

***State v. Browning*, 2006 MT 190, 333 Mont. 132, 142 P.3d 757 (Lake). Reversed; Leaphart, J.** Browning pled guilty to sixth offense DUI after dismissing three court-appointed attorneys. Browning later moved to withdraw his plea, claiming it was entered without the advice of counsel after the district court declined to appoint a fourth attorney. The Court held that in the absence of an unequivocal request to represent himself, the district court should have instructed attorney #3 to remain on as standby counsel even though Browning insisted that the attorney be discharged. See V. Right to Self-Representation.

***State v. Frazier*, 2007 MT 40, 336 Mont. 81, 153 P.3d 18 (Yellowstone). Reversed; Leaphart, J.** Emphasizing that any doubts regarding voluntariness should be resolved in favor of allowing withdrawal of a guilty plea, the Court reversed the district court's denial of Frazier's motion. Although the justice court advised Frazier that by pleading guilty he would be admitting the allegations in the notice to appear and complaint, Mont. Code Ann. § 46-12-212 requires the court to solicit admissions from a defendant regarding what acts the defendant committed that constitute the offense charged. Justice Warner dissented, arguing that the Court should not have reached the merits because Frazier did not specifically raise any claim in justice court regarding the adequacy of the court's plea colloquy.

***State v. Holt*, 2006 MT 151, 332 Mont. 426, 139 P.3d 819 (Yellowstone). Affirmed in part and reversed in part; Warner, J. (Gray and Nelson, concurring.)** The Court affirmed the conviction of Holt but reversed one of the conditions of his suspended sentence. Holt, a Billings attorney, was charged with felony theft based upon his misappropriation of client funds. Holt asked the Court to exercise plain error jurisdiction and allow him to withdraw his nolo contendere plea, based upon his claim that his plea agreement, if restructured, could have allowed him to serve his term of imprisonment under the former good time statute, thereby discharging his sentence sooner. He argued that he did not know about the possibility of good time credit and that his plea, therefore, was not made knowingly. The Court found that plain error review was not appropriate under the circumstances.

***State v. Iaforaro*, 2007 MT 77, 336 Mont. 489, 155 P.3d 1238 (Gallatin). Affirmed; Morris, J.** The district court correctly denied Iaforaro's motion to withdraw his plea of nolo contendere to the felony attempted kidnapping charge. Iaforaro's plea agreement stipulated that if the court did not accept his plea of nolo contendere to the kidnapping charge, the State would proceed to trial on the felony attempted sexual assault charge.

The district court was not obligated to inform Iaforaro of the lesser-included offense of kidnapping because no possibility existed that Iaforaro could have been convicted of the lesser included offense of unlawful restraint. If the plea agreement was not accepted, Iaforaro would have proceeded to trial on the felony attempted sexual assault charge. Iaforaro does not allege the court failed to inform him of the lesser-included offenses applicable to felony attempted sexual assault.

***State v. Phillips*, 2007 MT 117, 337 Mont. 248, \_\_\_ P.3d \_\_\_ (Beaverhead).**

**Affirmed; Rice, J.** The district court properly denied the Defendant's motion to withdraw his guilty plea because he knew the prosecution's recommendation was nonbinding and he also knew that the sentencing court's recommendation of placement in ISP was not binding on the DOC.

## VII. RIGHT TO SPEEDY TRIAL

***State v. Diaz*, 2006 MT 303, 334 Mont. 479, 148 P.3d 628 (Cascade). Affirmed;**

**Leaphart, J.** The district court did not err when it denied Diaz's motion to dismiss for an alleged speedy trial violation. Diaz was responsible for the delay caused by the State's inability to locate a material witness after Diaz contacted the witness and instructed her not to testify. Diaz did not meet his burden to show prejudice.

***State v. Doyle*, 2007 MT 125, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Silver Bow). Affirmed;**

**Morris, J.** Doyle was not denied his right to a speedy trial based on the 598 days that elapsed between his arrest and the beginning of the trial. The Court criticized the district court's "skeletal order" for failing to apportion the delay between the State and the defendant, reminding judges that they "must allocate correctly the specific number of days of delay . . . to avoid this type of confusion concerning the burden of proof." However, because the State demonstrated that the Defendant was not prejudiced, the burden of proving prejudice shifted to the Defendant regardless of which party was responsible for the majority of the delay. And the Defendant failed to establish that his pretrial incarceration was "oppressive;" he presented no evidence that the delay enhanced his level of anxiety and concern; he failed to establish prejudice based on medical care he received in jail; the rift in the Defendant's relationship with his girlfriend and daughter predated his arrest; and, of most importance, he failed to prove that the delay prejudiced his defense.

***State v. Harlson*, 2006 MT 312, 335 Mont. 25, 150 P.3d 349 (Yellowstone). Affirmed;**

**Leaphart, J.** Harlson failed to carry his burden of proving undue prejudice from speedy trial delay.

***State v. LaGree*, 2007 MT 65, 336 Mont. 375, 154 P.3d 615 (Valley). Affirmed;**

**Rice, J.** LaGree experienced a 426-day delay between the initial charge and the

scheduled trial. The Court first determined the 88-day delay caused by defense counsel's request for a mental evaluation of LaGree was appropriately charged to LaGree and therefore only 338-days were charged to the State. Nonetheless, the State was charged with over 275 days of delay and therefore the burden fell on the State to demonstrate lack of prejudice to LaGree. When addressing this most important factor under Barker v. Wingo--whether the defendant was prejudiced as a result of the delay--the State successfully rebutted the presumption of prejudice against LaGree and therefore he was not denied his constitutional right to a speedy trial.

***State v. Lewis*, 2007 MT 16, 335 Mont. 331, 151 P.3d 883 (Lewis and Clark). Affirmed; Morris, J. (Gray, Leaphart, Warner, and Rice, concurring; Nelson and Cotter, dissenting.)** The court ruled that it will not review an appellant's speedy trial issue raised for the first time on direct appeal because the issue requires evidentiary development. The record did not show the cause of delay; it is devoid of any argument from the parties on this issue; and no decision from the district court exists that the Court can review for correctness. The inadequate record also prevents the Court from reviewing Lewis's conviction under the plain error review doctrine and prevents review of the claim of ineffective assistance of counsel for failing to preserve the speedy trial issue below. The record remains silent on whether Lewis's counsel even discussed the speedy trial issue with Lewis or whether Lewis directed her counsel not to raise it.

Justice Nelson, joined by Justice Cotter, dissented. The dissenters would remand the case to the trial court for a hearing putting the State to its burden to prove the 404-day delay did not prejudice Lewis. Further, despite the majority's position that defense counsel's failure to raise the speedy trial issue may have been tactical, no plausible justification exists for counsel's failure "to file a 'nothing-to-lose-and-everything-to-gain' motion to dismiss for lack of speedy trial." "We need not, and ought not, condemn Lewis to postconviction proceedings in which she likely will not be represented by counsel and in which, experience teaches, she will have virtually no chance of prevailing--assuming she even gets a hearing on the merits." Lewis, ¶ 38.

***State v. Spang*, 2007 MT 54, 336 Mont. 184, 153 P.3d 646 (Yellowstone). Affirmed; Gray, C.J.** The Court affirmed Judge Baugh's denial of Spang's motion to dismiss for lack of a speedy trial. Spang's felony DUI trial had been continued four times, twice at his request and twice because of conflicts in the court's calendar. Because the delay attributed to the State was 275 days, the State had the burden of disproving prejudice from the delay. The Court concluded that the State satisfied its burden. Spang spent seven months in jail, but was out of jail for eight months before the trial. The pretrial incarceration did not keep him from being employed as a truck driver, since his driver's license had been revoked at the time of his arrest. There was no evidence that the delay had exacerbated Spang's anxiety and concern. Although Spang belatedly claimed that the delay prevented him from locating a defense witness and testing his car for mechanical

problems, the Court agreed with the district court that Spang's defense was not impaired as a result of trial delay.

## VIII. PRETRIAL

### A. Commencement of the Prosecution

#### 1. Probable Cause Affidavit

*State v. Harlson*, 2006 MT 312, 335 Mont. 25, 150 P.3d 349 (Yellowstone). **Affirmed; Leaphart, J.** Affirming Harlson's convictions for theft and criminal endangerment, the Court concluded that the district court properly allowed the State to amend the Information to add a DUI charge (made more than five days prior to trial) and it properly determined that the charging documents established a probability that Harlson committed the charged offenses.

*State v. Holt*, 2006 MT 151, 332 Mont. 426, 139 P.3d 819 (Yellowstone). **Affirmed in part and reversed in part; Warner, J. (Gray and Nelson, concurring.)** Holt, a Billings attorney, was charged with five counts of felony theft based upon his misappropriation of client funds. Holt filed a pretrial motion to dismiss two of the theft charges because the affidavit in support of the Information did not allege independent admissible evidence that Holt exercised unauthorized control over the clients' money. The Court held that the Information contained sufficient factual allegations to establish probable cause and that Holt's motion to dismiss for insufficiency of the evidence was premature. Holt entered into a plea agreement that waived his right to have the charges proved beyond a reasonable doubt, and he is precluded from arguing that, if put to the test at trial, the State would have failed in its burden of proof. Justice Nelson, joined by Chief Justice Gray, filed a concurring opinion, writing separately to address the question of the appropriate standard of review for district court rulings on the sufficiency of the affidavit of probable cause supporting the Information.

#### 2. Sufficiency of the Complaint

*State v. Ditton*, 2006 MT 235, 333 Mont. 483, 144 P.3d 783 (Gallatin). **Affirmed; Warner, J. (Gray, Nelson and Cotter, dissenting.)** Although the record does not contain a written order stating that the Municipal Court found probable cause to file the complaint, the appellate district court found that the Municipal Court did make a prior finding of probable cause as required by Mont. Code Ann. § 46-11-110. Because Ditton failed to transmit the transcript of the hearing, at which the municipal court judge testified, Ditton failed to establish that the district court's finding was clearly erroneous.

And, although the legislature should consider amending Mont. Code Ann. § 46-11-110, the statute does not require the finding of probable cause to be in writing.

The dissent, authored by Justice Nelson, argued that the Court had mischaracterized the record, which established that the probable cause determination was not made until six months after the charge was filed. The dissenters would have reversed on the basis of structural error, arguing: “The assessment and determination of probable cause is a vital judicial function because of the enormous power wielded by the prosecutorial arm of government--a power which places a great burden on citizens (some of whom are ultimately acquitted) and can put them at risk of deprivation of ‘life, liberty, or property,’ Mont. Const. art. II, § 17.”

### **3. Multiple Charges**

#### **a. Predicate misdemeanors**

***State v. Dasen*, 2007 MT 87, 337 Mont. 74, 155 P.3d 1282 (Flathead). Affirmed; Leaphart, J.** Affirming Dasen’s felony convictions for promotion of prostitution, sexual abuse of children, and prostitution, the Court held that the prosecution’s decision to charge 10 counts of prostitution (each involving different victims), with 1 count charged as a misdemeanor and the remaining counts charged as felonies, was proper according to *State v. Tichenor*. The Court declined to address Dasen’s reliance upon Ninth Circuit authority requiring a prior conviction element to be charged explicitly because the argument was not raised in district court.

#### **b. Joinder/Severance**

***State v. Harlson*, 2006 MT 312, 335 Mont. 25, 150 P.3d 349 (Yellowstone). Affirmed; Leaphart, J.** Affirming Harlson’s convictions for theft and criminal endangerment, the Court concluded that the district court properly allowed the State to amend the Information to add a DUI charge (made more than five days prior to trial) and Harlson failed to carry his burden of proving unfair prejudice from joinder of the charges.

***State v. Holt*, 2006 MT 151, 332 Mont. 426, 139 P.3d 819 (Yellowstone). Affirmed in part and reversed in part; Warner, J. (Gray and Nelson, concurring.)** The Court affirmed the conviction of Holt but reversed one of the conditions of his suspended sentence. Holt, a Billings attorney, was charged with five counts of felony theft based upon his misappropriation of client funds. Holt filed a motion to sever the charges, arguing that the large amount of money he stole as alleged in the first count would turn the jury against him regarding the other counts. The Court found no abuse of discretion in the district judge’s decision to deny the motion, noting that Holt’s claims of prejudice were speculative and unsupported.

## **B. Bail and Bond**

***Miller v. Eleventh Judicial Dist. Court*, 2007 MT 58, 336 Mont. 207, 154 P.3d 1186 (Flathead). Petition for Writ of Habeas Corpus Denied, Per Curiam.** The Court denied, without prejudice, Terry Miller's habeas petition requesting that the district court be ordered to release him on his own recognizance pending trial. Miller was charged with negligent homicide in August 2006. His bail was originally set at \$30,000 and was then reduced to \$10,000. Miller asserted that he is indigent and not a flight risk and should therefore be released on his own recognizance. The Court determined that the record was insufficient to determine whether Miller lacked the ability to post any amount of bail and also whether the district court could have released him on conditions that could have ensured the protection of the community.

Although the Court denied Miller habeas relief "at this time" and without prejudice, the Court indicated a willingness to review bail issues prior to trial in a habeas corpus proceeding. Further, the Court overruled the Ingraham abuse of discretion standard for review of bail issues pending trial and appeal and stated "all future petitions for writ of habeas corpus praying for release on bail, filed directly in this Court, shall be considered independent of the legal proceeding under which the detention is sought to be justified."

## **C. Substitution of Judge**

***State v. Dasen*, 2007 MT 87, 337 Mont. 74, 155 P.3d 1282 (Flathead). Affirmed; Leaphart, J.** Although she did not issue the first (defective) warrant, Judge Curtis had jurisdiction to issue a second warrant after she had been substituted pursuant to Mont. Code Ann. § 3-1-804.

## **D. Discovery**

***State v. Ditton*, 2006 MT 235, 333 Mont. 483, 144 P.3d 783 (Gallatin). Affirmed; Warner J.** Because Ditton failed to show that evidence the State allegedly failed to provide him would have been exculpatory, the Municipal Court's decision denying exclusion of evidence allegedly obtained during pretrial incarceration was affirmed.

## **E. Complaints against Counsel/Continuance**

***State v. Hendershot*, 2007 MT 49, 336 Mont. 164, 153 P.3d 619 (Ravalli). Reversed and remanded; Cotter, J.** The district court's denial of Hendershot's request for substitution of counsel was an abuse of discretion because Hendershot's counsel sent an associate to attend a revocation hearing and a hearing on the adequacy of primary counsel's representation, counsel apparently scheduled a change of plea hearing without talking to the client, the request for substitution occurred well in advance of trial, and the associate

represented to the court that communication between the firm and Hendershot had irreparably broken down. Justice Warner, joined by Justice Rice and Judge Harkin (sitting for Morris) dissented, arguing that the record suggested that Hendershot was playing games to obtain a dismissal on speedy trial grounds.

***State v. Molder*, 2007 MT 41, 336 Mont. 91, 152 P.3d 722 (Cascade). Affirmed; Warner, J.** The district court’s denial of Molder’s request for a continuance of the trial was proper because Molder’s counsel, who was appointed five months prior to trial, represented that he was ready for trial and that he chose not to interview some of the victims for strategic reasons. Significantly, the Court observed that “a continuance granted on the morning of trial would have forced the young victims to undergo the emotional trauma of waiting and then preparing for trial again.” The district court was also not required to hold a separate hearing regarding Molder’s complaints about his counsel because communication between Molder and his counsel was not totally broken down and Molder did not request different counsel.

***State v. Worthan*, 2006 MT 147, 332 Mont. 401, 138 P.3d 805 (Ravalli). Affirmed; Rice, J.** Worthan was convicted of two counts of sexual intercourse without consent, two counts of incest, and one count of tampering with a witness or informant. The Court ruled that the district court did not abuse its discretion by denying his attorney’s motions to withdraw and to appoint new counsel. Regarding the first such motion, the Court stated that despite Worthan’s personal statement to the district court that he had difficulty communicating with his attorney, Worthan failed to demonstrate that there was a “total lack of communication.” The district court specifically noted that the attorney was performing her job adequately and that her motions have been well-briefed. The Court stated that the district court’s interpretation of Worthan’s complaints as “part of the constant stresses and strains of a busy lawyer running a busy law office” appeared to be correct. The second motion to withdraw focused on the possible conflict between Worthan and his attorney that could have occurred had the attorney been called to testify (which she was not). The Court stated that the attorney had been unable to substantiate that she was likely to be a necessary witness at trial, and she was unable to demonstrate that her disqualification shortly before the scheduled start of trial would not work a hardship on Worthan. Further, the district court offered to appoint co-counsel, but the attorney never requested that, and there was no prejudice because she did not testify at trial.

## **F. Jury Selection**

***State v. Barnaby*, 2006 MT 203, 333 Mont. 220, 142 P.3d 809 (Lake). Affirmed in part, reversed in part and remanded for resentencing; Morris, J.** Defense counsel claimed that the State used its peremptory challenges in a discriminatory manner to exclude Native Americans from the venire (a Batson challenge). The district court overruled the objection, noting that the State removed two Native American jurors, but not a third. The Court noted that a court may not deny relief simply because the State did

not strike all members of a particular race from the jury under Batson. However, the record did not support Defendant's allegation that the challenges were racially motivated. The Court admonished district courts to provide "detailed reasoning for the basis of denying a Batson challenge."

***State v. Harville*, 2006 MT 292, 334 Mont. 380, 147 P.3d 222 (Gallatin). Affirmed; Gray, J.** Harville was accused of assaulting an elderly woman at a laundry after a dispute over a washing machine. A jury convicted Harville in municipal court. The district court correctly determined that the municipal court did not abuse its discretion when it denied Harville's challenges for cause against two prospective jurors. The prospective jurors' (both males) belief that generally, men should not hit women, did not demonstrate prejudice with respect to Harville's asserted defense of justifiable use of force. The district court concluded that the prospective jurors' beliefs were consistent with those held by society in general, not isolated areas of bias. Harville did not cite any authority under which a commonly held belief may be the basis for a successful challenge for cause. The district court's decision is presumed correct, and Harville did not meet his burden of establishing error.

NOTE: Justice Cotter issued a dissent in which she writes: "The point is not whether one believes such crimes to be wrong, the point is whether one's adamancy in this regard will color his judgment to the point that such person cannot with impartiality weigh the evidence against the accused."

***State v. Hausauer*, 2006 MT 336, 335 Mont. 137, 149 P.3d 895 (Missoula). Affirmed in part and reversed in part; Cotter, J.** The district court abused its discretion by denying Hausauer's motion to excuse a juror for cause, where the juror indicated during voir dire that she firmly believed there must be a good reason Hausauer was on trial. The mere fact Hausauer was charged with a crime, combined with the juror's confidence in law enforcement, carried weight in the juror's mind, and raised a serious question as to her ability to afford Hausauer the presumption of innocence.

Justice Warner concurred only because neither the State, nor the court, determined whether the juror could and would follow the law, once she was advised that the law unequivocally states that the charge against Hausauer is no evidence whatsoever of his guilt. The juror's comments did nothing more than express what is naturally in every prospective juror's mind at the beginning of a case--there must be some evidence of guilt, or why would we all be here?

***State v. Rennaker*, 2007 MT 10, 335 Mont. 274, 150 P.3d 960 (Missoula). Affirmed in part, reversed in part, and remanded for resentencing; Leaphart, J.** Rennaker, who was convicted of incest, argued that during voir dire two jurors had intentionally concealed information regarding their past experiences with sexual abuse. The Court rejected Rennaker's argument, holding that there was nothing in the record indicating that

the jurors intentionally concealed information and there was no other evidence that the jurors were biased.

## **G. Recidivist Offenses (Prior Convictions)**

### **1. Tribal Court Convictions**

*State v. Walker*, 2007 MT 34, 336 Mont. 56, 153 P.3d 614 (Hill). **Affirmed; Morris, J.** Relying upon State v. Spotted Eagle (holding that a prior conviction which is valid under tribal law can be used for recidivist purposes under Montana law), the Court held that Walker had failed to prove that his prior DUI conviction in tribal court was irregular or that the Fort Belknap Tribal Code guaranteed indigent defendants the right to legal counsel in 1992. As a matter of comity, an uncounseled tribal court conviction is considered constitutionally valid if tribal law does not grant a right to counsel because the Indian Civil Rights Act does not afford Native Americans the right to counsel in tribal court.

### **2. Deferred Sentences**

*State v. Tomaskie*, 2007 MT 103, 337 Mont. 130, 157 P.3d 61 (Toole). **Reversed; Leaphart, J.** Tomaskie was charged with felony possession of dangerous drugs (marijuana) because he had a prior misdemeanor conviction which had resulted in a deferred sentence. After pleading guilty to the felony charge and prior to sentencing, Tomaskie had the prior misdemeanor charge dismissed because he had fulfilled the conditions of the deferral. Tomaskie then moved to dismiss the felony charge, which the district court denied. By a vote of 5 to 2, the Court reversed and remanded to the district court for resentencing, reasoning that Tomaskie was not convicted when he entered his guilty plea to the felony because a conviction does not occur until sentence is imposed; and, at the time of felony sentencing, the prior deferred misdemeanor had been dismissed. Justice Warner, joined by Justice Rice, dissented, arguing that prior precedent required the Court to treat Tomaskie's claim as non-jurisdictional and waived when he pled guilty.

### **3. Multiple Changes**

*State v. Dasen*, 2007 MT 87, 337 Mont. 74, 155 P.3d 1282 (Flathead). **Affirmed; Leaphart, J.** The Court declined to address Dasen's reliance on Ninth Circuit authority requiring a prior conviction element to be charged explicitly because the argument was not raised in district courts. See VIII. A. 3. (a) Predicate Misdemeanors.

## X. TRIAL

### A. State's Right to Trial by Jury

*State ex rel. Long v. Justice Court*, 2007 MT 3, 335 Mont. 219, 156 P.3d 5 (Lake). **Order; Per curiam.** Writ of Supervisory Control was granted and was relief granted to the State in a case involving the issue of whether only a defendant can request a jury trial. Relying on the language of Mont. Const. art. II, § 26 and (to a lesser degree) Mont. Code Ann. § 46-17-201 (2005), the Court held that both parties have the right to trial by jury. The Constitution establishes the right and the manner of expression of a party's waiver of the right was properly addressed by the Montana Legislature in the statute. The holding in *State ex rel. Nelson v. District Court*, 262 Mont. 70, 863 P.2d 1027 (1993), that the State does not have a right to request a jury trial, was overruled. The case was remanded.

### B. Evidence

#### 1. Judicial Notice

*State v. Ditton*, 2006 MT 235, 333 Mont. 483, 144 P.3d 783 (Gallatin). **Affirmed; Warner, J.** The municipal court properly refused to take judicial notice of the ADA and of the symptoms of insulin-dependent diabetes because Ditton failed to establish the relevance of the ADA to the DUI charge and the accuracy of Ditton's proffered "facts" could be reasonably questioned within the meaning of Mont. R. Evid. 201(d).

#### 2. Foundation

*State v. Matz*, 2006 MT 348, 335 Mont. 201, 150 P.3d 367 (Yellowstone). **Affirmed; Rice, J.** Affirming Matz's aggravated assault conviction, the Court held that because Matz failed to lay a foundation showing that the victim was under the influence, the trial court's exclusion of evidence that the victim was in possession of marijuana and paraphernalia was a proper exercise of discretion.

#### 3. Other Crimes/Character Evidence

*State v. Doyle*, 2007 MT 125, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Silver Bow). **Affirmed; Morris, J.** Montana Rule of Evidence 609 prohibits the admissibility of a witness's prior conviction for impeachment purposes; and an accomplice's testimony that he had never witnessed a person being killed did not open the door to impeachment of the accomplice with convictions for theft, burglary and other misdemeanor offenses. The evidence also would have been inadmissible as cumulative. The district court also properly limited cross examination regarding the accomplice's character because the Defendant did not offer the evidence under one of the recognized exceptions. Lastly, the court properly

limited cross examination regarding whether the State was the sole determiner of the accomplice's testimony with respect to the plea agreement because the accomplice was cross examined extensively about the benefits of his plea agreement. Thus, the district court's limitation of cross examination did not deny the Defendant his right to confrontation.

#### **4. Confessions/Admissions**

***State v. Wrzesinski*, 2006 MT 263, 334 Mont. 157, 145 P.3d 985 (Lewis and Clark). Affirmed; Rice, J.** The district court properly denied the defendant's motion to suppress statements the defendant made to the arresting officer during an investigative stop. Since the defendant was the subject of a traffic stop that was public and temporary in nature, his statements were made in a non-custodial setting even though he was not free to leave.

***State v. Zito*, 2006 MT 211, 333 Mont. 312, 143 P.3d 108 (Ravalli). Affirmed; Warner, J.** Although Zito was in custody when he stated that he had a "medical grow," Zito was not questioned by any law enforcement officer or otherwise coerced or induced to make the statement in question. Because there was no interrogation, the statement was admissible.

#### **5. Exhibits/Photographs**

***State v. English*, 2006 MT 177, 333 Mont. 23, 140 P.3d 454 (Yellowstone). Affirmed; Rice, J.** In a negligent homicide prosecution, photographs of the victim taken in the emergency room were properly admitted because, considering the "bizarre circumstances of the case" and English's "odd behavior" after running over the victim, depiction of types of injuries suffered by the victim could have helped the jury determine whether English was criminally negligent.

#### **6. Expert Witnesses**

***State v. Ditton*, 2006 MT 235, 333 Mont. 483, 144 P.3d 783 (Gallatin). Affirmed; Warner, J.** When a proper foundation is laid, law enforcement officers may testify as experts regarding the cause of an accident and whether the driver was under the influence of alcohol. Whether officers are qualified to distinguish between the symptoms of diabetes and alcohol impairment is a matter for cross-examination. Thus, the jury was properly instructed regarding opinion testimony.

***State v. St. Germain*, 2007 MT 28, 336 Mont. 17, 153 P.3d 591 (Ravalli). Affirmed; Rice, J.** A jury convicted St. Germain of four counts of incest and four counts of sexual intercourse without consent. The victim was his stepdaughter. The sexual abuse occurred when she was between the ages of 11 and 19. St. Germain argued that the trial

court should have applied this Court's holding in State v. Geyman to allow his witness to testify and attack the victim's credibility. Since, however, the victim in this case was 19 years old when she initially reported the abuse and 20 years old at the time of trial, and there was no evidence of any physical or mental disability, the jury was capable of assessing her credibility without the assistance of expert testimony.

## 7. Hearsay

***State v. Diaz*, 2006 MT 303, 334 Mont. 479, 148 P.3d 628 (Cascade). Affirmed; Leaphart, J.** A jury convicted Diaz of attempted deliberate homicide, robbery, and solicitation to commit witness tampering. The district court did not abuse its discretion when it refused to allow Diaz to present hearsay statements from one witness that another witness confessed the crimes to him. Diaz did not demonstrate the hearsay declarant was "unavailable" within the meaning of Mont. R.Evid. 804(a)(5). Diaz's counsel failed to use reasonable means to locate the declarant. Diaz's ineffective assistance of counsel claim against his attorney for failing to use reasonable means to find the unavailable declarant fails because Diaz failed to prove prejudice. Defense counsel presented evidence of the unavailable declarant's alleged confession through the testimony of the State's lead investigator and used the alleged confession in closing argument. Diaz actually benefited by not having the alleged declarant testify because the declarant could not deny making the statements.

***State v. English*, 2006 MT 177, 333 Mont. 23, 140 P.3d 454 (Yellowstone). Affirmed; Rice, J.** English failed to prove that the district court abused its discretion by admitting statements of the victim because English only addressed admission of the statements under Mont. R. Evid. 803(2) (excited utterance) and 803(4) (medical diagnosis) when the statements were admitted under other hearsay exceptions. The Court held: "Failure to challenge each of the alternative bases for a district court's ruling results in affirmance."

## 8. BAC Evidence

***State v. English*, 2006 MT 177, 333 Mont. 23, 140 P.3d 454 (Yellowstone). Affirmed; Rice, J.** Distinguishing Havens v. State, the Court held that the admission of English's .06 BAC, obtained six hours after the accident, was proper in a negligent homicide prosecution. Here, unlike Havens, there was evidence of negligence, including expert testimony that English may have seen the victim before he ran over her, as well as evidence that English may have been impaired by the consumption of alcohol.

***State v. McGowan*, 2006 MT 163, 332 Mont. 490, 139 P.3d 841 (Lewis and Clark). Affirmed; Morris, J.** Breath tests taken 50 minutes after McGowan was initially pulled over, showing a breath alcohol concentration of .092, were sufficient to support the jury's conviction of McGowan for "DUI Per Se." Breath tests need only be "taken within a

reasonable time after the alleged act,” as the DUI statute requires. The State did not need to present retrograde extrapolation evidence to relate the BAC results back to the time of driving.

Justice Nelson, joined by Justice Cotter, dissented, saying that it is “this kind of activism that gives traction to those who criticize courts as acting as super-legislatures,” and argues that the Court has inserted into the “DUI Per Se” statute language from the DUI statute that had been omitted. Under the “DUI Per Se” statute, he would require retrograde extrapolation evidence to show alcohol concentration while driving.

***State v. Weitzel*, 2006 MT 167, 332 Mont. 523, 140 P.3d 1062 (Lewis and Clark). Affirmed; Warner, J.** Weitzel alleged that the city failed to prove that his BAC was .10 or greater while he was driving because the test administered via the Intoxilyzer 5000 was taken 51 minutes after the stop and the city made no attempt to extrapolate the results with his BAC at the time he was driving. The Court, relying on its recent decision in *State v. McGowan*, held again that it agreed with the courts of those States which have determined that it was not necessary to prove through retrograde extrapolation evidence what a person’s BAC was at the time he was driving. The Court also noted that Weitzel had the opportunity and did introduce evidence that went to the weight of the BAC test evidence (not the admissibility of the test) and was thus able to argue there was a reasonable doubt as to his guilt. However, the city presented circumstantial evidence that verified the BAC test results, including the officer’s observations of Weitzel when he was stopped. The Court, therefore, held that “considering the results of the Intoxilyzer breath test, along with the other evidence, we conclude that the city presented sufficient evidence to convict Weitzel of DUI Per Se.”

### **C. Sufficiency of the Evidence**

#### **1. Appellate Standard of Review**

***State v. Swan*, 2007 MT 126, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Yellowstone). Affirmed; Leaphart, J.** The Court held, *sua sponte*, that the appropriate standard for reviewing a district court’s denial of a motion for directed verdict is de novo rather than abuse of discretion and it overruled prior cases to the extent that they stand for a different standard of review.

#### **2. Criminal Negligence**

***State v. English*, 2006 MT 177, 333 Mont. 23, 140 P.3d 454 (Yellowstone). Affirmed; Rice, J.** Both the testimony of the State’s accident reconstruction expert and the fact that the decedent’s death was caused by being run over, permitted a rational jury to infer that

English was criminally negligent. Therefore, the district court's denial of English's directed verdict motion was a proper exercise of discretion.

### **3. Credibility/Evidence Weighing**

***State v. Rennaker*, 2007 MT 10, 335 Mont. 274, 50 P.3d 960 (Missoula). Affirmed in part, reversed in part, and remanded for resentencing; Leaphart, J.** The Court concluded that viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence for the jury to find Rennaker guilty of two counts of Incest. The first count alleged that Rennaker had sexual contact and/or intercourse with his 17-year-old stepdaughter in 1998. The second count alleged Rennaker has sexual intercourse with his stepdaughter without her consent when she was 18 through 22. On appeal, Rennaker claimed there was insufficient evidence to support his convictions. The Court stated that the jury weighed the testimony and the credibility of the witnesses, and the jury determined that the stepdaughter was 17 years old in 1998 and she had not consented to sexual intercourse with Rennaker after she turned 18 years old.

### **4. Circumstantial Evidence**

***State v. Hausauer*, 2006 MT 336, 335 Mont. 137, 149 P.3d 895 (Missoula). Affirmed in part and reversed in part; Cotter, J.** The district court did not abuse its discretion in denying Hausauer's motion for a directed verdict of acquittal of operating an unlawful clandestine laboratory. There was sufficient circumstantial evidence to allow the jury to infer Hausauer's mental state, despite the lack of specific evidence of anything Hausauer did or failed to do. Hausauer was burned in the fire of a camping trailer he was occupying. The camper's charred remains contained many items commonly used to produce methamphetamine, as well as a bottle with traces of meth in it. The camper lacked power, running water, or sewage facilities, indicating it was not used for living quarters.

### **5. Reasonable Apprehension**

***State v. Swan*, 2007 MT 126, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Yellowstone). Affirmed; Leaphart, J.** Reviewing the record de novo, there was sufficient evidence that the Defendant's threat with a weapon, although communicated over the telephone, caused reasonable apprehension of bodily injury to the Defendant's wife and a man with whom the Defendant thought she was having an affair. Relying upon State v. Smith, the Court reiterated that it was not necessary for either victim to directly perceive the gun with their senses, emphasizing that the Defendant put a gun to his wife's heads two days before and threatened to shoot her, and the wife immediately relayed the telephone threat to the other victim, who was in the room and who had been told that the Defendant had previously threatened the wife with a gun.

## 6. Corroboration of Accomplice Testimony

*State v. Doyle*, 2007 MT 125, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Silver Bow). **Affirmed; Morris, J.** Viewing the evidence in the light most favorable to the prosecution, independent of accomplice testimony, the jury was permitted to conclude that the Defendant had the purpose to promote or facilitate a deliberate homicide and aided or abetted others in the planning or commission of deliberate homicide. Such corroborating evidence included photographs, the testimony of the State’s Medical Examiner, witness testimony that the Defendant admitted suffocating the decedent, and, although inconclusive standing alone, evidence of the Defendant’s flight. The Court also rejected the Defendant’s claim that Mont. Code Ann. § 45-2-303 lessens the State’s burden of proof. Although the other accomplices pled guilty to deliberate homicide by accountability without admitting that they delivered a fatal blow, the State proved that the offense was “committed” and that is all that Mont. Code Ann. § 45-2-303 requires.

### D. Alleged Prosecutorial Misconduct

*State v. Upshaw*, 2006 MT 341, 335 Mont. 162, 153 P.3d 579 (Missoula). **Affirmed; Rice, J. (Leaphart and Nelson, dissenting.)** The Court affirmed Upshaw’s convictions for assault with a weapon, aggravated burglary, and possession of dangerous drugs, holding that it would not exercise plain error review of Upshaw’s claim that the prosecution elicited testimony regarding post-Miranda silence because there was no clear comment on or infringement of Upshaw’s right to remain silent. Justices Leaphart and Nelson, dissenting, would have exercised plain error review and reversed Upshaw’s convictions based upon Doyle error.

### E. Jury Conduct/Deliberations

*State v. Doyle*, 2007 MT 125, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Silver Bow). **Affirmed; Morris, J.** The district court properly instructed the jurors that they should not surrender their honest opinions to the will of the majority, and the court never forced deliberations when the jury informed the court that it was at “an impasse” after the second day of deliberations. Thus, the court’s denial of the Defendant’s motion for a mistrial was not an abuse of discretion.

*State v. Parker*, 2006 MT 258, 334 Mont. 129, 144 P.3d 831 (Lake). **Reversed; Cotter, J.** In a unanimous en banc decision, the Court reversed the Lake County conviction of Glen Parker and remanded the case for a new trial. The Court held that Parker’s right of confrontation was violated when the jury had access to the statement of a witness who did not testify and was not subject to cross-examination. Parker was charged with assault with a weapon after he struck his wife with a broken table leg and stabbed her with a knife. After arresting Parker, the police took statements from Parker’s

four children, recording the statements on an audiotape. At the conclusion of the last interview with the children, the police took a statement from a houseguest, Eve Kratz, who witnessed part of the assault. The statement was recorded on the same audiotape. At trial the children stated they could not remember the incident or related a different version of the incident, so the audiotape was introduced to present the prior inconsistent statements. The judge allowed the tape to go to the jury room during deliberations. Kratz did not testify, and her recorded statement was not played for the jury, but the tape included her statement. The Court rejected the State's arguments that Parker did not preserve the issue by objecting to the delivery of the tape to the jury room, that Parker did not establish that the jurors actually heard Kratz's statement, and that the delivery of the tape with Kratz's statement was harmless error.

## **F. Instructions**

### **1. Opinion Testimony**

***State v. Ditton*, 2006 MT 235, 333 Mont. 483, 144 P.3d 783 (Gallatin). Affirmed; Warner, J.** When proper foundation is laid, law enforcement officers may testify as experts regarding the cause of an accident and whether the driver was under the influence of alcohol. Whether officers are qualified to distinguish between the symptoms of diabetes and alcohol impairment is a matter for cross-examination. Thus, the jury was properly instructed regarding opinion testimony. In addition, as the Court has previously held, the jury need not be instructed that a driver must be impaired more than to the "slightest degree."

### **2. Justifiable Use of Force**

***State v. Archambault*, 2007 MT 26, 336 Mont. 6, 152 P.3d 698 (Yellowstone). Affirmed; Cotter J.** The district court's instruction regarding the affirmative defense of justifiable use of force was proper because the instruction, taken nearly verbatim from Mont. Code Ann. § 45-3-102, provided adequate guidance to the jury regarding the elements of the defense. Although the Defendant's proposed instruction--a nearly verbatim recitation of MCJI No. 3-110--was also a fair statement of the law, the instruction given by the trial court was a proper exercise of its broad discretion, and the Court's function on appellate review is not "to determine whether the court formulated the instructions in the best possible way."

***State v. Matz*, 2006 MT 348, 335 Mont. 201, 150 P.3d 367 (Yellowstone). Affirmed; Rice, J.** Affirming Matz's aggravated assault conviction, the Court held that the trial court properly refused to give a defense instruction which would have placed the burden of proving justifiable use of force on the State, and the jury was not required to reach

specific unanimity regarding the alternate types of serious bodily injury caused by Matz's conduct.

### 3. Intoxication/Negligent Homicide

***State v. English*, 2006 MT 177, 333 Mont. 23, 140 P.3d 454 (Yellowstone).** **Affirmed; Rice, J.** By a vote of 5 to 2, the Court affirmed English's negligent homicide conviction and sentence, holding that the following intoxication instruction, read together with the court's other instructions, was a fair statement of the law: "Intoxication is not an essential element of negligent homicide. Intoxication is merely one of the factors to be considered in determining whether the death of Wilma Nielsen was caused by the negligent actions of James English."

Justice Nelson and Chief Justice Gray dissented and would have reversed and remanded for a new trial. Justice Nelson concluded that the Court's negligence instructions were "hopelessly confusing and internally inconsistent." The Chief Justice concluded that the phrase "the negligent actions of James English," while not expressly directing the jury to assume that English was negligent, likely caused jury confusion.

### 4. Specific Unanimity

***State v. Auld*, 2006 MT 189, 333 Mont. 125, 142 P.3d 753 (Missoula).** **Affirmed; Rice, J.** The Court declined to exercise plain error review to examine whether the State violated Auld's right to a unanimous jury verdict by improperly combining two instances of witness tampering into one charge. Auld never objected below to the Information or the jury instructions. Justice Nelson dissented and would have reached the specific unanimity instruction issue via plain error review.

***State v. Dasen*, 2007 MT 87, 337 Mont. 74, 155 P.3d 1282 (Flathead).** **Affirmed; Leaphart, J.** Affirming Dasen's felony convictions for promotion of prostitution, sexual abuse of children, and prostitution, the Court declined to exercise plain error review of Dasen's claim that the trial court should have given a specific unanimity instruction regarding the sexual abuse of children count because the charge, involving a single criminal episode, a given location, and two discrete victims, was specific enough that there was no chance of jury confusion.

***State v. Hausauer*, 2006 MT 336, 335 Mont. 137, 149 P.3d 895 (Missoula).** **Affirmed in part and reversed in part; Cotter, J.** Although the Court reversed on other grounds, the Court said that on remand the unanimity instructions should take into account that "unanimity means more than an agreement that the defendant has violated the statute in question; it requires substantial agreement as to the principal factual elements underlying a specific offense."

## 5. Definition of Assault With a Weapon

*State v. Swan*, 2007 MT 126, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Yellowstone). **Affirmed; Leaphart, J.** The district court did not broaden the definition of assault with a weapon by instructing the jury that an assault can occur “whether [the weapon is] actually seen or not” because the language is pulled directly from the Court’s opinion in State v. Smith and omitting the phrase would have caused jury confusion.

## 6. Purposely or Knowingly

*State v. Doyle*, 2007 MT 125, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Silver Bow). **Affirmed; Morris, J.** The following instruction nearly replicates Mont. Code Ann. § 45-2-201(2)(b), and is not an impermissible Rothacher instruction: “If purposely or knowingly causing the death of Richard Solwick was not within the contemplation or purpose of the Defendant, either element can nevertheless be established if the result involves the same kind of harm or injury as contemplated but the precise harm or injury was different or occurred in a different way, unless the actual result is too remote or accidental to have a bearing on the Defendant’s liability or on the gravity of the offense.” The instruction fully and fairly instructed the jury because a reasonable juror could interpret it to direct the jury to consider whether the Defendant’s contemplated “result” included some act designed to promote or facilitate causing the death of another human being in the context of deliberate homicide by accountability.

## 7. Lesser-Included Offenses

*State v. Doyle*, 2007 MT 125, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Silver Bow). **Affirmed; Morris, J.** Criminal endangerment is not a lesser included offense of deliberate homicide by accountability, and there was no evidence to suggest that the victim’s brutal death was the result of a negligent act. Therefore, the court’s refusal to give lesser-included instructions on criminal endangerment and negligent homicide was not an abuse of discretion.

## 8. Jury Deliberations

*State v. Doyle*, 2007 MT 125, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Silver Bow). **Affirmed; Morris, J.** The district court properly instructed the jurors that they should not surrender their honest opinions to the will of the majority and the court never forced deliberations when the jury informed the court that it was at “an impasse” after the second day of deliberations. Thus, the court’s denial of the Defendant’s motion for a mistrial was not an abuse of discretion.

## **G. Defenses**

### **1. Outrageous Governmental Misconduct**

***State v. Ditton*, 2006 MT 235, 333 Mont. 483, 144 P.3d 783 (Gallatin). Affirmed; Warner, J.** The Court rejected Ditton’s claim of outrageous governmental misconduct because that “most narrow” defense only applies when the government essentially manufactures a crime for the sake of pressing charges.

### **2. Mistake of Age**

***State v. Dasen*, 2007 MT 87, 337 Mont. 74, 155 P.3d 1282 (Flathead). Affirmed; Leaphart, J.** Affirming Dasen’s felony convictions for promotion of prostitution, sexual abuse of children, and prostitution, the Court held Dasen was not prevented from defending against the sexual abuse of children charge on the basis that he was mistaken regarding the girls’ ages because a “child” for purposes of Mont. Code Ann. § 45-5-625 (2003) is a person less than 18 years of age (rather than a person less than 16 years of age), and Dasen presented evidence and argument at trial that the girls were 18 years or older.

### **3. Permission by Non-cohabiting Spouse to Take Property**

***State v. Ramsey*, 2007 MT 31, 336 Mont. 44, 152 P.3d 710 (Missoula). Affirmed; Leaphart, J.** The Court held that the fact that a non-cohabiting spouse gives permission to a third party to enter the other spouse’s residence and take marital property provides no defense to burglary and theft. The wife and husband had separated and ceased living together. The Defendant was the wife’s boyfriend who claimed the wife gave him consent to enter her husband’s trailer and retrieve her belongings. The record refutes the wife gave actual consent. In any event, by statute “[i]t is no defense that theft was from the offender’s spouse.” Thus, the wife’s purported consent could not serve as a defense to theft. Further, while the Defendant might have thought he had lawful permission to enter the trailer, the law nonetheless recognizes theft by a spouse, and the Court has “long held that ignorance of the law is no excuse.”

### **4. Disability**

***State v. Ditton*, 2006 MT 235, 333 Mont. 483, 144 P.3d 783 (Gallatin). Affirmed; Warner, J.** The municipal court properly refused to take judicial notice of the ADA and of the symptoms of insulin-dependent diabetes because Ditton failed to establish the relevance of the ADA to the DUI charge and the accuracy of Ditton’s proffered “facts” could be reasonably questioned within the meaning of Mont. R. Evid. 201(d). The

municipal court properly denied Ditton's motion to dismiss based upon evidence that Ditton was impaired. And it is not the State's burden to prove, as Ditton contended, that impairment is not caused by diabetes.

## **5. Res Judicata/Collateral Estoppel**

***State v. Ditton*, 2006 MT 235, 333 Mont. 483, 144 P.3d 783 (Gallatin). Affirmed; Warner J.** Since the DUI charge was not at issue in Ditton's petition for reinstatement of his driver's license, the doctrines of collateral estoppel and res judicata did not apply.

### **H. Defendant's Right to Be Present at Critical Stages**

***State v. Mann*, 2006 MT 160, 332 Mont. 476, 139 P.3d 159 (Cascade). Reversed; Cotter, J.** The district court violated Mann's right to appear at all critical stages of the proceedings against him, in violation of the Sixth Amendment and Mont. Const. art. II, § 24, when it excluded Mann from a discussion of whether he should be allowed to represent himself, during which his own counsel portrayed Mann "in a negative light." Defense counsel accused Mann of threatening his first attorney, called Mann a liar, and speculated that Mann would disrupt the proceedings. The error was prejudicial because it rendered Mann's decision, to proceed with counsel "both unintelligent and uninformed."

Justice Rice dissented: "There is no question that Mann was uncooperative and potentially dangerous to persons in the courtroom." He was properly excluded because the discussion was primarily about the security issues he presented. The comments made about Mann by his counsel in his absence were "of little moment when compared to the substantial discussion about the security risks" and any prejudice to Mann was "*de minimus*."

***State v. St. Germain*, 2007 MT 28, 336 Mont. 17, 153 P.3d 591 (Ravalli). Affirmed; Rice, J.** St. Germain's right to be present at all critical stages of the trial was not violated because he was present at all critical stages of the trial. He cannot claim his constitutional right to be present at all critical stages of the trial was infringed at a stage that never occurred despite his theory that a stage of trial should have occurred but did not. St. Germain claimed on appeal that the court should have questioned a juror concerning an alleged hallway conversation between the juror and the victim's father.

## XI. SENTENCING

### A. Evidence

#### 1. Accurate Information

*State v. Harper*, 2006 MT 259, 334 Mont. 138, 144 P.3d 826 (Ravalli). **Affirmed; Warner, J.** The district court did not violate Harper’s due process right to be sentenced based on correct information. The information available to the district court was sufficient to reach the conclusion that Harper was “the hub of this methamphetamine distribution operation.” Harper’s sentence was not in violation of Apprendi, because the sentence he received was less than the statutory maximum.

#### 2. Polygraph Evidence

*State v. Evert*, 2007 MT 30, 336 Mont. 36, 152 P.3d 713 (Flathead). **Affirmed; Leaphart, J.** Because one of Evert’s procedurally-barred claims involved the use of polygraph evidence at sentencing, the Court admonished that polygraph results cannot be introduced or used at sentencing, including in connection with a sex offender evaluation.

#### 3. Negative Inferences from Silence/Lack of Remorse

*State v. Rennaker*, 2007 MT 10, 335 Mont. 274, 150 P.3d 960 (Missoula). **Affirmed in part, reversed in part, and remanded for resentencing; Leaphart, J.** Rennaker was convicted of two counts of Incest. The first count alleged that Rennaker had sexual contact and/or intercourse with his 17-year-old stepdaughter in 1998. The second count alleged Rennaker has sexual intercourse with his stepdaughter without her consent when she was 18 through 22. Although the Court affirmed Rennaker’s convictions, it reversed Rennaker’s sentence, holding that the district court “violated Rennaker’s right against self-incrimination when, based on Rennaker’s silence, it drew a negative inference of lack of remorse.” The Court explained:

If a court chooses to sentence a defendant based upon lack of remorse, it cannot infer lack of remorse from a defendant’s silence. Rather, it must point to affirmative evidence in the record demonstrating lack of remorse. For example, the court can consider evidence as to the manner of the commission of the offense or admissible statements made by a defendant pre-trial, at trial, or post-trial.

## **B. Designations**

### **1. PFO**

***State v. Mainwaring*, 2007 MT 14, 335 Mont. 322, 151 P.3d 53 (Yellowstone).** **Affirmed; Cotter, J.** In 1999, Mainwaring was convicted under Mont. Code Ann. § 41-5-206 (the transfer provisions of the Youth Court Act). In accordance with Mont. Code Ann. § 41-5-2510, the district court later reviewed the sentence and suspended the remainder upon a finding that he had been substantially rehabilitated. Just after turning 21, Mainwaring committed a new felony. The State sought a persistent felony offender designation based on the 1999 conviction. Mainwaring objected, claiming that the district court lacked statutory authority to sentence him as a PFO. The Court disagreed, noting that Mainwaring clearly qualified as a PFO, and that nothing in the Youth Court Act or the Criminally Convicted Youth Act prevented that result.

### **2. Crimes of Violence/Violent Offenders**

***State v. English*, 2006 MT 177, 333 Mont. 23, 140 P.3d 454 (Yellowstone).** **Affirmed; Rice, J.** Because negligent homicide involves the death of a person, it is a crime of violence for sentencing purposes, within the meaning of Mont. Code Ann. § 46-18-104(2)(a)(ii).

***State v. Upshaw*, 2006 MT 341, 335 Mont. 162, 153 P.3d 579 (Missoula).** **Affirmed; Rice, J.** The Court affirmed Upshaw's convictions for assault with a weapon, aggravated burglary, and possession of dangerous drugs, holding that the sentencing court properly declined to apply the presumption favoring a deferred sentence for Upshaw's first drug possession conviction because all of the evidence relevant to sentencing established that Upshaw was a violent offender.

### **3. Parole Restrictions**

***State v. Garrymore*, 2006 MT 245, 334 Mont. 1, 145 P.3d 946 (Missoula).** **Affirmed; Rice, J. (Gray and Nelson, concurring.)** After he was sentenced to life without parole for the deliberate homicide of his toddler stepdaughter, Garrymore challenged the sentencing court's authority to restrict parole under Mont. Code Ann. § 46-18-202(2), contending that the parole restriction authority violates Apprendi and Blakely. The Court rejected the argument, holding that the statute is constitutional because it gives broad, indeterminate discretion to the sentencing court and because there is no presumption of parole eligibility in Montana. And the statutory requirement that the sentencing court provide written reasons for the restriction is constitutional because the statute does not require the judge to make any particular findings of fact not found by the jury. Finally, although the court also based its restriction on Garrymore's lack of remorse and recidivist

history, prior convictions are an exception to Apprendi, and lack of remorse, which is important to the exercise of indeterminate sentencing discretion, does not pertain to whether the Defendant has a legal right to a lesser sentence within the meaning of Blakely.

As discussed in Justice Nelson’s special concurring opinion, because the sentencing court did not find that the restriction was “necessary for the protection of society,” the Court’s opinion does not address the constitutionality of the language in the third sentence of Mont. Code Ann. § 46-18-202(2), providing that the court “shall” impose the restriction if it makes that finding.

## C. Enhancements

### 1. **Prior Deferred Sentence**

***State v. Tomaskie*, 2007 MT 103, 337 Mont. 130, 157 P.3d 691 (Toole). Reversed and Remanded; Leaphart, J.** Tomaskie was charged with felony possession of dangerous drugs (marijuana) because he had a prior misdemeanor conviction which had resulted in a deferred sentence. After pleading guilty to the felony charge and prior to sentencing, Tomaskie had the prior misdemeanor charge dismissed because he had fulfilled the conditions of the deferral. Tomaskie then moved to dismiss the felony charge, which the district court denied. By a vote of 5 to 2, the Court reversed and remanded to the district court for resentencing, reasoning that Tomaskie was not convicted when he entered his guilty plea to the felony because a conviction does not occur until sentence is imposed; and, at the time of felony sentencing, the prior deferred misdemeanor had been dismissed. Justice Warner, joined by Justice Rice, dissented, arguing that prior precedent required the Court to treat Tomaskie’s claim as non-jurisdictional and waived when he pled guilty.

### 2. **Weapon**

***Adams v. State*, 2007 MT 35, 336 Mont. 631, 153 P.3d 601 (Ravalli). Affirmed; Leaphart, J.** The Court rejected Adams’ claim that his 10-year weapon enhancement was illegal. Although Apprendi does not apply retroactively to cases on collateral review, it does apply retroactively to Adams’ conviction, which was pending on direct review and not yet final when Apprendi was decided. However, failure to submit a sentencing factor to the jury is trial error rather than structural error; and the appropriate harmless error test (for purposes of both the Sixth Amendment and Mont. Const. art. II, § 26) is whether the Court can determine beyond a reasonable doubt that the result would have been the same absent the error. Here, the Apprendi error was harmless beyond a reasonable doubt because it was uncontroverted that Adams used a gun in the commission of the offense.

### 3. Prior State/Tribal Court Convictions

*State v. Walker*, 2007 MT 34, 336 Mont. 56, 153 P.3d 614 (Hill). **Affirmed; Morris, J.** Relying upon *State v. Spotted Eagle* (holding that a prior conviction which is valid under tribal law can be used for recidivist purposes under Montana law), the Court held that Walker had failed to prove that his prior DUI conviction in tribal court was irregular or that the Fort Belknap Tribal Code guaranteed indigent defendants the right to legal counsel in 1992. As a matter of comity, an uncounseled tribal court conviction is considered constitutionally valid if tribal law does not grant a right to counsel because the Indian Civil Rights Act does not afford Native Americans the right to counsel in tribal court.

#### D. Modification of Sentence

*State v. Seals*, 2007 MT 71, 336 Mont. 416, 156 P.3d 15 (Missoula). **Reversed; Cotter, J.** Seals pled guilty to 3 counts of criminal possession of dangerous drugs. The maximum term of imprisonment was 5 years, but he was sentenced to a 5-year DOC commitment on count 1 and to 10-year suspended DOC commitments on counts 2 and 3, to run concurrently, but consecutively to count 1. Seals served his sentence on count 1. The district court later revoked his suspended sentences for probation violations and, recognizing the 10-year sentences were illegal, sentenced him to 5 years on each count, to run consecutively to each other. The district court stated that its goal had always been to have Seals under supervision for a total of 15 years.

The Court held that because his originally-imposed sentences were illegal, the district court could only impose a “lesser sentence” pursuant to Mont. Code Ann. § 46-18-203(7)(c). Running the two 5-year sentences consecutively did not constitute a “lesser” sentence because Seals was still facing 10 years supervision. The Court acknowledged that the district court could have originally sentenced Seals to three 5-year sentences, to run consecutively. However, having imposed illegal sentences, the court no longer had the discretion to impose consecutive sentences upon revocation. The Court ordered the district court to run Seals’ sentences on counts 2 and 3 concurrently.

#### E. Restitution/Fines

##### 1. Failure to Object Regarding Ability to Pay

*State v. Holt*, 2006 MT 151, 332 Mont. 426, 139 P.3d 819 (Yellowstone). **Affirmed in part and reversed in part; Warner, J. (Gray and Nelson, concurring.)** The Court has affirmed the conviction of Holt but reversed one of the conditions of his suspended sentence. Holt, a Billings attorney, was charged with five counts of felony theft based upon his misappropriation of client funds. Holt claimed that the district judge did not

make an informative inquiry into his ability to pay restitution. Holt did not object to the judge's inquiry at the sentencing hearing, and the Court concluded that Holt's challenge to the restitution order does not fall within the Lenihan exception for allegedly illegal sentences and that the Court should not address the issue in the absence of a contemporaneous objection.

***State v. Kotwicki*, 2007 MT 17, 335 Mont. 344, 151 P.3d 892 (Cascade). Affirmed; Morris, J. (Nelson, dissenting.)** At sentencing, when the court fined Kotwicki \$25,000, his counsel objected that the fine would unfairly minimize the time spent in pretrial incarceration. However, on appeal, invoking the Lenihan exception to the contemporaneous objection rule, Kotwicki contended that the fine was illegal because the court failed to inquire and make specific findings regarding ability to pay. The Court, relying upon its decisions in Nelson (1995) and Swoboda (1996), held that the sentence was an "objectionable" sentence, not an illegal sentence for purposes of Lenihan. Because the sentencing court had statutory authority to impose a \$50,000 fine, the court's \$25,000 fine was within statutory parameters. The purpose of the Lenihan rule is not to create an institutional incentive for defendants to remain silent at sentencing. Thus, Kotwicki's failure to object to the court's sentence on the grounds that the court failed to consider Kotwicki's ability to pay, constituted a waiver precluding the Court from reviewing the issue on appeal. Justice Nelson dissented and would have reversed and remanded for resentencing.

## 2. Youth Court

### a. Modification of restitution

***In re K.D.K.*, 2006 MT 187, 333 Mont. 100, 141 P.3d 1212 (Ravalli). Reversed; Gray, C.J.** K.D.K. was ordered to pay restitution as part of his disposition as a delinquent youth. The dispositional order placed K.D.K. on probation to age 18, and granted the Youth Court jurisdiction to age 21 for purposes of the restitution obligation. Shortly after K.D.K.'s 18th birthday, the Youth Court amended the order at the State's request to include additional restitution obligations. The Court reversed, holding that the court had no authority to do so since it retained jurisdiction only for purposes of ensuring payment of restitution originally imposed--not to increase the restitution amount. The Court opined that a court may retain jurisdiction to modify restitution pursuant to Mont. Code Ann. §§ 41-5-205(1) and -1422(1). However, the language of the dispositional order at issue here clearly limited retention of jurisdiction beyond K.D.K.'s 18th birthday to enforcement of the financial obligations in the original order, and not to impose additional restitution.

### **b. Market value**

***In re T.M.R.*, 2006 MT 246, 334 Mont. 64, 144 P.3d 809 (Yellowstone). Reversed; Leaphart, J.** T.M.R. was charged with burglary and his case was transferred to youth court. As part of the disposition of his case, the youth court ordered T.M.R. to pay restitution for the vehicle he damaged. The youth court based restitution on the replacement cost of the vehicle rather than the market value of the vehicle. T.M.R. appealed the district court's use of replacement cost. The Court noted that the youth court statutes regarding restitution, unlike the adult restitution statutes, do not provide guidance on how to determine the amount of restitution. The Court further noted that prior to the 2003 statutory amendment to the adult sentencing statutes, restitution for adult offenders was based on market value if it could be ascertained. The Court further stated: "Unlike the adult sentencing statutes, the Youth Court Act was not amended in 2003 to include replacement cost as a way to determine restitution." Therefore, the Court concluded the more equitable and consistent approach to determining restitution under the Youth Court Act is to measure damages based on market value. The Court also concluded that the youth court erred when it failed to subtract the salvage value the victim received for the vehicle from the total amount of restitution.

### **3. Victims Include Insurance Companies**

***State v. Sharp*, 2006 MT 301, 334 Mont. 470, 148 P.3d 625 (Lewis and Clark). Affirmed; Leaphart, J.** Absent evidence in the record that the victim of a crime was not fully compensated for her loss, an insurance company with a right of subrogation is a victim entitled to be awarded restitution by the sentencing court pursuant to Mont. Code Ann. § 46-18-243(2)(a)(iv).

### **F. Alternatives to Imprisonment**

***State v. Barnaby*, 2006 MT 203, 333 Mont. 220, 142 P.3d 809 (Lake). Affirmed in part, reversed in part and remanded for resentencing; Morris, J.** The Court affirmed the conviction but reversed and remanded for resentencing because the district court did not adequately consider alternatives to imprisonment for a first-time nonviolent felony offender.

***State v. Upshaw*, 2006 MT 341, 335 Mont. 162, 153 P.3d 579 (Missoula). Affirmed; Rice, J.** The Court affirmed Upshaw's convictions for assault with a weapon, aggravated burglary, and possession of dangerous drugs, holding that the sentencing court properly declined to apply the presumption favoring a deferred sentence for Upshaw's first drug possession conviction because all of the evidence relevant to sentencing established that Upshaw was a violent offender.

## **G. Credit for Time Served**

***State v. DeWitt*, 2006 MT 302, 334 Mont. 474, 149 P.3d 549 (Silver Bow). Affirmed; Leaphart, J.** Following revocation of DeWitt’s 20-year suspended sentence, the court imposed a term of 10 years, with 5 years suspended, giving credit for 160 days served for time awaiting revocation but not mentioning 1,275 days served and for which DeWitt had previously been given credit prior to revocation. The Court held that DeWitt was not subject to double jeopardy because, prior to revocation, he was released on probation with 16.5 years remaining on his suspended sentence. Because DeWitt was credited with 160 days served while he was awaiting the revocation hearing, the revocation court had about 16 years to work with when DeWitt violated; and the court’s 10-year sentence with 5 years suspended was well within that limit. The revocation court could have sentenced DeWitt to 16.5 years, less the 160 days served, with no time suspended at all. Thus, the court’s 10-year term, with 5 years suspended, was well within statutory parameters and did not violate double jeopardy.

***State v. Miller*, 2006 MT 159, 332 Mont. 472, 139 P.3d 839 (Lewis and Clark). Affirmed; Warner, J.** When imposing a prison term following revocation of a suspended sentence, the district court was not statutorily obligated to award the Defendant credit for time served in an Indiana prison on an unrelated offense. Even though the sentences were discharging simultaneously, they did not merge. Thus, the district court had discretion to allow credit for time served under Mont. Code Ann. § 46-18-201(4), but was not *required* to do so under Mont. Code Ann. § 46-18-401(1)(b).

## **H. Probation Conditions**

### **1. Home Visits**

***State v. Greeson*, 2007 MT 23, 336 Mont. 1, 152 P.3d 695 (Yellowstone). Affirmed in part, reversed in part; Gray, C.J.** Based on its holding in *State v. Moody*, 2006 MT 305, 334 Mont. 517, 148 P.3d 662, the Court rejected Greeson’s challenge to the condition that she must make her home open and available for the probation officer to visit, noting that a home visit is not a search and that a probationer has no reasonable expectation of privacy that would preclude home visits.

***State v. Moody*, 2006 MT 305, 334 Mont. 517, 148 P.3d 662 (Yellowstone). Affirmed; Leaphart, J.** After pleading guilty to felony assault on a peace officer and DUI pursuant to a plea agreement, as conditions of Moody’s deferred sentence, the sentencing court imposed the conditions that Moody make her “home open and available for visits as required per [Department of Corrections] policy” and that Moody not leave her assigned district without first obtaining written permission of her probation officer. Moody objected to the home visitation condition, contending that probationary home visits,

absent reasonable cause, violated her rights of privacy and protection from unreasonable searches and seizures. Moody also objected to the travel restriction. The district court overruled Moody's objections, and the Court initially reversed, holding that, absent prior reasonable cause, probationary home visits are unconstitutional.

Relying upon the DOC's written policies permitting home visits (absent reasonable cause) while requiring reasonable cause for actual searches, as well as recent federal decisions, particularly Samson v. California, 126 S. Ct. 2193 (2006) (upholding a suspicionless search of a parolee), the State petitioned for rehearing. The State argued that if there is no "reasonable cause" requirement for a search of a parolee, there should be no such requirement for less intrusive home visits, which are not searches for constitutional purposes. The Court agreed. The Court, which withdrew its initial opinion, held that "a convicted felon who is granted probation on a clearly expressed condition, of which she is 'unambiguously' aware, that she make her home open and available for the probation officer to visit pursuant to state policy does not have an actual expectation of privacy that would preclude such visits . . . [and] [s]ince there is no actual expectation of privacy, there is no search." Even if an actual expectation of privacy existed, society would not be prepared to recognize that expectation as objectively reasonable because the recidivism rate of probationers is significantly higher than the general crime rate. Although a home visit is not a search, a home visit can evolve into a search of enclosed areas (e.g., cabinets, drawer, or closets) which would require reasonable cause. However, at its inception, a home visit is not a search. The Court also upheld the travel restriction as reasonable and appropriate.

Justice Nelson dissented from the Court's determination that a home visit is not a search, emphasizing the sanctity of the home and Montana's more protective privacy right and arguing that home visits, which involve visual inspections of a probationer's home for evidence of violations, are searches which cannot be conducted on a purely suspicionless basis.

## 2. No Alcohol

***State v. Armstrong*, 2006 MT 334, 335 Mont. 131, 151 P.3d 46 (Missoula). Reversed; Gray, C.J.** Armstrong agreed to plead guilty to aggravated assault with a weapon and misdemeanor criminal mischief in exchange for deferred and suspended sentences. Although the prosecution agreed not to recommend that the court condition Armstrong's sentence upon abstaining from alcohol and staying out of bars and casinos, the PSI recommended the conditions because Armstrong had an anger control problem, which is exacerbated by alcohol consumption. The district court imposed the conditions, subject to Armstrong's objection. Relying upon State v. Ommundson, 1999 MT 16, 293 Mont. 133, 974 P.2d 620 (holding that the condition must have a nexus to the offense for which the convict is being sentenced), and State v. Holt, 2006 MT 151, 332 Mont. 426, 139 P.3d 819, the Court held that the conditions were illegal and struck them. The Court

reasoned that there was no evidence that Armstrong had been drinking at the time of his offenses or that he had chemical dependency problems at that time, concluding: “The objectives of § 46-18-202(1)(f), MCA, are to rehabilitate the offender by imposing restitution or requiring treatment so that he or she does not repeat the **same criminal conduct** and to protect society from further **similar conduct**.” (emphasis added).

***State v. Greeson*, 2007 MT 23, 336 Mont. 1, 152 P.3d 695 (Yellowstone).** **Affirmed in part, reversed in part; Gray, C.J.** The Court reversed the district court’s imposition of the condition that Greeson shall not possess or consume intoxicants/alcohol and shall not enter any place where intoxicants are the chief item of sale. The Court concluded that there was no nexus or connection between the alcohol restriction and the offense of which Greeson was convicted. The Court did not address the State’s argument that the alcohol restriction, like other restrictions on gambling, association, employment, etc., was intended to promote Greeson’s rehabilitation and that a nexus to the crime was not required. The Court found that the prosecutor’s “unsupported commentary” about the general connection between alcohol consumption and criminal activity was inadequate to establish a nexus between Greeson and her crime (identity theft). The Court relied upon a series of “nexus” decisions, beginning with *State v. Ommundson*, 1999 MT 16, 293 Mont. 133, 974 P.2d 620, and pointed out its recent decision in *State v. Holt*, 2006 MT 151, 332 Mont. 426, 139 P.3d 819, which was decided after the briefing in Greeson’s appeal.

***State v. Holt*, 2006 MT 151, 332 Mont. 426, 139 P.3d 819 (Yellowstone).** **Affirmed in part and reversed in part; Warner, J. (Gray and Nelson, concurring.)** Holt challenged two conditions that the district judge imposed on the suspended portion of his sentence. One prohibited Holt’s possession and consumption of alcohol, and the other prohibited him from establishing a checking or credit card account. Since the record did not establish that alcohol contributed to the offenses, the Court found that there was no correlation between alcohol and the theft charges and struck the condition from Holt’s sentence. The Court affirmed the second condition as having a correlation with the crimes, noting that Holt could raise his argument before the Sentence Review Division.

### 3. No Contact

***State v. Letasky*, 2007 MT 51, 336 Mont. 178, 152 P.3d 1288 (Yellowstone).** **Reversed; Morris, J.** A convict who violates a “no contact” condition of his suspended sentence can be revoked, but he cannot be separately prosecuted for criminal contempt for the same conduct because compliance with a condition of a suspended sentence is not an independent “mandate of the court” for purposes of Mont. Code Ann. § 45-7-309(1)(c). In addition, criminal contempt is not among the enumerated consequences that a revocation court may impose upon an offender who violates a condition of his suspended sentence. Justice Rice specially concurred, arguing that if “no contact” was

imposed as a sentencing “restriction” rather than a “condition,” violation of such a stand-alone restriction would, in his view, support an independent charge for contempt.

## **I. Lenihan Exception**

***State v. Garrymore*, 2006 MT 245, 334 Mont. 1, 145 P.3d 946 (Missoula). Affirmed; Rice, J. (Gray and Nelson, concurring).** The Court reaffirmed the broad scope of the Lenihan exception to the contemporaneous objection rule, holding that despite Garrymore’s failure to raise the Apprendi/Blakely issue in district court, the Lenihan rule permits the Court to review “certain allegedly illegal sentences” which would otherwise be procedurally barred due to the lack of an objection in sentencing court.

The Chief Justice specially concurred, arguing that appellants “must present more in the way of discussion and analysis regarding entitlement to the [Lenihan] exception.”

Justice Nelson authored a 64-page special concurring opinion, arguing, in part, that the Court should have taken the opportunity to define the scope of the Lenihan exception to the contemporaneous objection rule, citing numerous briefs in which the State has asked the Court to do so, by holding that “the Lenihan exception to the timely objection rule is properly invoked by a defendant who alleges a colorable claim that the sentencing court lacked statutory authority to impose the challenged sentence.” Justice Cotter also specially concurred, for the most part joining in Justice Nelson’s conclusions regarding Lenihan.

***State v. Holt*, 2006 MT 151, 332 Mont. 426, 139 P.3d 819 (Yellowstone). Affirmed in part and reversed in part; Warner, J. (Gray and Nelson, concurring.)** Holt claimed that the district judge did not make an informative inquiry into his ability to pay restitution. Holt did not object to the judge’s inquiry at the sentencing hearing, and the Court concluded that Holt’s challenge to the restitution order does not fall within the Lenihan exception for allegedly illegal sentences and that the Court should not address the issue in the absence of a contemporaneous objection.

***State v. Kotwicki*, 2007 MT 17, 335 Mont. 344, 151 P.3d 892 (Cascade). Affirmed; Morris, J. (Nelson, dissenting.)** At sentencing, when the court fined Kotwicki \$25,000, his counsel objected that the fine would unfairly minimize the time spent in pretrial incarceration. However, on appeal, invoking the Lenihan exception to the contemporaneous objection rule, Kotwicki contended that the fine was illegal because the court failed to inquire and make specific findings regarding ability to pay. The Court, relying upon its decisions in Nelson (1995) and Swoboda (1996) held that the sentence was an “objectionable” sentence, not an illegal sentence for purposes of Lenihan. Because the sentencing court had statutory authority to impose a \$50,000 fine, the court’s \$25,000 fine was within statutory parameters. The purpose of the Lenihan rule is not to create an institutional incentive for defendants to remain silent at sentencing. Thus,

Kotwicki's failure to object to the court's sentence on the grounds that the court failed to consider Kotwicki's ability to pay, constituted a waiver precluding the Court from reviewing the issue on appeal. Justice Nelson dissented, and would have reversed and remanded for resentencing.

## **J. Alleged Judicial Vindictiveness**

***State v. English*, 2006 MT 177, 333 Mont. 23, 140 P.3d 454 (Yellowstone). Affirmed; Rice, J.** The district court, which imposed a 20-year (10 suspended) sentence for negligent homicide, did not punish English for going to trial. The sentencing court's discussion of a distinction between sentences imposed for those who plead guilty or *nolo contendere* and persons convicted by a jury was appropriate because the distinction was accepted by the Court in *State v. Baldwin*. And, unlike *Baldwin*, there was no disparity between the sentence offered during pretrial negotiations and the ultimate sentence, nor was the court involved in the plea bargaining process.

## **K. Consecutive Versus Concurrent Sentences**

### **1. Out-of-State Sentences**

***State v. Auld*, 2006 MT 189, 333 Mont. 125, 142 P.3d 753 (Missoula). Affirmed; Rice, J.** The district court did not err by ordering that Auld's sentence for witness tampering would run consecutively to Auld's previous criminal sentence from Hawaii. Auld was on parole from the Hawaii sentence at the time of this crime. The Court rejected Auld's argument that the sentencing court could only impose a consecutive sentence in relation to sentences imposed by Montana courts. The statutes clearly indicate "that the public policy of Montana is to have sentences, wherever imposed, run consecutively unless otherwise ordered by a court." Justice Nelson dissented: "If the Legislature had envisioned that out-of-state offenses would be included in the requirements of the statute [relating to consecutive sentences], it would have said so."

### **2. Increased Term of Sentence Following Revocation**

***State v. Seals*, 2007 MT 71, 336 Mont. 416, 156 P.3d 15 (Missoula). Reversed; Cotter, J.** Seals plead guilty to 3 counts of criminal possession of dangerous drugs. The maximum term of imprisonment was 5 years, but he was sentenced to a 5-year DOC commitment of count 1 and to 10-year suspended DOC commitments on counts 2 and 3, to run concurrently, but consecutively to count 1. Seals served his sentence on count 1. The district court later revoked his suspended sentences for probation violations and, recognizing the 10-year sentences were illegal, sentenced him to 5 years on each count, to run consecutively to each other. The district court stated that its goal had always been to have Seals under supervision for a total of 15 years.

The Court held that because his originally-imposed sentences were illegal, the district court could only impose a “lesser sentence” pursuant to Mont. Code Ann. § 46-18-203(7)(c). Running the two 5-year sentences consecutively did not constitute a “lesser” sentence because Seals was still facing 10 years supervision. The Court acknowledged that the district court could have originally sentenced Seals to three 5-year sentences, to run consecutively. However, having imposed illegal sentences, the court no longer had the discretion to impose consecutive sentences upon revocation. The Court ordered the district court to run Seals’ sentences on counts 2 and 3 concurrently.

## **L. Compliance with Plea Agreements**

### **1. Youth Court**

***In re H.C.R.*, 2007 MT 64, 336 Mont. 369, 155 P.3d 1221 (Hill). Reversed; Rice, J.** The Youth Court abused its discretion when it imposed a DOC commitment following a probation violation because the parties had previously stipulated that if the youth violated, they would file a joint petition to transfer the case to district court and to transfer supervision to adult probation services. Treating the stipulation in Youth Court as a plea agreement and emphasizing that the State is held to strict and meticulous standards of performance, the Court determined that the State’s decision to seek a custodial sentence with the DOC rather than an adult probationary sentence breached the parties’ agreement.

### **2. PSI Author**

***State v. Bartosh*, 2007 MT 59, 336 Mont. 212, 154 P.3d 58 (Flathead). Affirmed; Warner, J.** The PSI author’s decision to attach transcripts of telephone conversations (between Bartosh and his fiancé) to the PSI was not a breach of the prosecution’s plea agreement because there was no evidence that the State called the transcripts to the attention of the probation officer in an effort to undermine the plea agreement. The prosecution’s decision to place a social worker on the stand to testify regarding Bartosh’s compliance with a treatment plan was also permissible because “[i]f a defendant chooses to present information in support of a sentence he argues for, the State may counter with testimony to the effect that such information is misleading or untrue, without breaching a plea agreement.”

## XII. POST TRIAL

### A. Postconviction Relief

#### 1. Gillham Orders

*Marble v. State*, 2007 MT 98, 337 Mont. 99, \_\_\_ P.3d \_\_\_. **Opinion and Order.** In Petition of Gillham, 704 P.2d 1019 (1985), the Court ordered that when petitions for postconviction relief are filed alleging ineffective assistance of counsel, the Attorney General must first apply to the Court for an order preserving the responding attorney from charges of discipline or malpractice for revealing necessary confidential information. In response to our request for clarification of the Gillham procedure, the Court ruled that Gillman motions may be filed in the district court where the postconviction proceeding is pending and “[a]n attorney ordered to respond pursuant to a *Gillham* order issued by a district court shall not be subject to disciplinary proceeding before the Commission on Practice nor be subject to charges of malpractice. This immunity extends to all information, testimony or documents necessarily provided in response to allegations of ineffective assistance of counsel.”

#### 2. **Preference for Postconviction Resolution of IAC Claims**

*State v. Upshaw*, 2006 MT 341, 335 Mont. 162, 153 P.3d 579 (Missoula). **Affirmed; Rice, J. (Leaphart and Nelson, dissenting.)** The Court affirmed Upshaw’s convictions for assault with a weapon, aggravated burglary, and possession of dangerous drugs, holding that Upshaw’s ineffective assistance of counsel claims were not properly before the Court on direct appeal because there were plausible justifications for counsel’s failure to object to other acts evidence.

*State v. Worthan*, 2006 MT 147, 332 Mont. 401, 138 P.3d 805 (Ravalli). **Affirmed; Rice, J.** Worthan was convicted of two counts of sexual intercourse without consent, two counts of incest, and one count of tampering with a witness or informant. Worthan alleged ineffective assistance against defense counsel, Kelli Sather, on several grounds: her failure to call to the stand Dr. Whitley, who physically examined the two minor victims; her failure to discover the deficiencies in the qualifications of her expert, “Dr.” Stuber; her elicitation of social worker Verwolf’s testimony regarding another report of sexual abuse against Worthan; and her failure to investigate a list of potential witnesses that Worthan had provided her. The Court stated that all of the above claims were more appropriate for consideration in a petition for postconviction relief, except for the claim regarding Verwolf’s testimony about another report of sexual abuse.

### 3. Time Bar

#### a. New claims at hearing

***State v. Stevens*, 2007 MT 137, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Missoula). Affirmed; Gray, C.J.** Stevens raised two claims of ineffective assistance of counsel at his postconviction hearing which were not raised in his petition for postconviction relief. Because the petition was filed on the last day of the one-year period for filing such petitions, the claims raised at the later hearing were time-barred.

#### b. Newly-discovered evidence

***Crosby v. State*, 2006 MT 155, 332 Mont. 460, 139 P.3d 832 (Missoula). Reversed; Cotter, J. (Warner, dissenting.)** Crosby petitioned for postconviction relief claiming that his rape victim, Crosby’s daughter, recanted her 1996 trial testimony. The State argued the recantation did not qualify under the exception to the postconviction statute of limitations regarding newly-discovered evidence that, if proved and viewed in light of the evidence as a whole, would establish that the petitioner did not engage in the criminal conduct for which he was convicted. The postconviction judge heard the daughter’s recantation first hand and found it unbelievable.

After the principal appellate briefing was submitted, the Court decided *State v. Clark*, 2005 MT 330, 330 Mont. 8, 125 P.3d 1099. In *Clark*, the Court decided that in instances where a defendant moves for a new trial based on newly-discovered evidence in the form of witness recantation, *State v. Perry*, 232 Mont. 455, 758 P.2d 268 (1988) is overruled to the extent it stands for the proposition that a “trial judge is required to grant a new trial only when he is satisfied the recantation of the witness is true.” *Clark*, ¶ 32. To the extent that *Perry* stands for the proposition “[w]hen a new trial is sought on the basis of recanting testimony of a prosecution witness, the weight to be given such testimony is for the trial judge passing on the motion for a new trial to determine,” it is “retained as authoritative precedent.” *Clark*, ¶ 33. Since in the instant case the postconviction court passed on the ultimate truthfulness of the recanting testimony, a reversal is required in light of *Clark*.

Justice Warner dissented: *Clark* expressly allows a judge to consider the “weight and credibility” of the recantation. *Clark*, ¶ 38. This basically means, in other words, truthfulness. Thus, *Clark* did not bar the district court from considering the truth (or “credibility”) of the recantation. Rather, *Clark* expanded the overall analysis and required examination of several other essential factors but directed a court not to base its decision--whether to grant relief--solely on its finding as to the ultimate truthfulness of the recantation. Here, the trial judge did in fact weigh other factors and so complied with *Clark*.

#### 4. Procedural Bar

***Hardin v. State*, 2006 MT 272, 334 Mont. 204, 146 P.3d 746 (Missoula). Affirmed; Leaphart, J.** In a unanimous en banc decision, the Court affirmed Judge Harkin’s denial of Hardin’s petition for postconviction relief. Hardin pled nolo contendere to a charge of sexual intercourse without consent and was sentenced pursuant to a plea agreement. He did not appeal, but a year later he petitioned for postconviction relief, claiming that the district court did not have jurisdiction to accept a nolo plea to a sex offense and that he was denied the effective assistance of counsel. The Court concluded that the statutory restriction on nolo pleas in sex cases (Mont. Code Ann. § 46-12-204) is not jurisdictional and that Hardin’s claim was, instead, a challenge to the legality of his sentence and was procedurally barred because Hardin did not raise it on appeal. The Court also rejected Hardin’s ineffective assistance claim, finding that Hardin was not prejudiced by his attorney’s allowing him to plead nolo contendere to a sex offense, contrary to law, since the nolo plea inured to his benefit. The Court found that Hardin’s nolo plea, together with the plea agreement and waiver of rights form that he signed, amounted to a waiver of his right to complain about his attorney’s alleged failure to investigate his case.

***State v. Evert*, 2007 MT 30, 336 Mont. 36, 152 P.3d 713 (Flathead). Affirmed; Leaphart, J.** Because Evert’s postconviction claims could have been raised on direct appeal, they were procedurally barred. The Court emphasized that the procedural bar applies to claims which are not properly raised or preserved for appeal in district court.

#### 5. Ineffective Assistance

##### a. Tactical/strategic decisions

***State v. Auld*, 2006 MT 189, 333 Mont. 125, 142 P.3d 753 (Missoula). Affirmed; Rice, J.** Auld’s counsel did not render ineffective assistance of counsel by stipulating, for strategic reasons, to the element of the witness tampering charge that “an official proceeding” was pending. The stipulation was entered into so the jury would not hear that Auld was on parole at the time of the offense.

***State v. Hartinger*, 2007 MT 141, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Ravalli). Affirmed; Rice, J.** Counsel’s decision to not to file a motion to suppress Hartinger’s incriminating statements was an informed, strategic choice based upon his belief that the statements were not the product of custodial interrogation and his plan to use the officers’ failure to Mirandize Hartinger to prove his theory that police officers make mistakes. Counsel’s decision not to seek suppression of a 911 audiotape was likewise an informed, tactical one, based upon counsel’s determination that the evidence was favorable to the defense. Finally, counsel’s decision to identify himself with the views of pro-law enforcement panelists was also strategic, as was his decision not to challenge such panelists for cause.

***State v. Stevens*, 2007 MT 137, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Missoula). Affirmed; Gray, C.J.** The district court’s findings rejecting Stevens’ claims of ineffective counsel were supported by substantial evidence that counsel’s advice that Stevens not testify at trial and his decision not to call character and other witnesses was part of a reasonable strategy to keep the focus on the quality of the State’s evidence rather than upon Stevens himself.

***State v. Worthan*, 2006 MT 147, 332 Mont. 401, 138 P.3d 805 (Ravalli). Affirmed; Rice, J.** Worthan was convicted of two counts of sexual intercourse without consent, two counts of incest, and one count of tampering with a witness or informant. Worthan alleged ineffective assistance against defense counsel, including counsel’s elicitation of a social worker’s testimony regarding another report of sexual abuse against Worthan. The Court denied the claim on direct appeal, concluding that it was clear from the record that the testimony that defense counsel eluded from the social worker was the result of a considered tactical decision, upon which a claim of ineffective assistance of counsel cannot be sustained.

**b. Waiver of IAC claims**

***Hardin v. State*, 2006 MT 272, 334 Mont. 204, 146 P.3d 746 (Missoula). Affirmed; Leaphart, J.** In a unanimous en banc decision, the Court rejected Hardin’s ineffective assistance claim, finding that Hardin was not prejudiced by his attorney’s allowing him to plead nolo contendere to a sex offense, contrary to law, since the nolo plea inured to his benefit. The Court found that Hardin’s nolo plea, together with the plea agreement and waiver of rights form that he signed, amounted to a waiver of his right to complain about his attorney’s alleged failure to investigate his case.

**c. Alleged failure to object to instructions**

***Adams v. State*, 2007 MT 35, 336 Mont. 63, 153 P.3d 601 (Ravalli). Affirmed; Leaphart, J.** The district court properly dismissed the postconviction claim that counsel was ineffective for failing to object to a lesser-included instruction on aggravated assault because the record contained evidence of serious bodily injury (a scar, a concussion, and occasional pain in the victim’s ribs).

**d. Alleged failure to move for directed verdict**

***Adams v. State*, 2007 MT 35, 336 Mont. 63, 153 P.3d 601 (Ravalli). Affirmed; Leaphart, J.** Counsel’s failure to move for a directed verdict was not ineffective because such a motion is properly granted “only when there is a complete absence of any evidence which would justify submitting an issue to a jury.”

e. **Adequacy of counsel’s investigation/trial presentation**

*State v. Stevens*, 2007 MT 137, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Missoula). **Affirmed; Gray, C.J.** The district court’s findings rejecting Stevens’ claims that his counsel failed to conduct an adequate pretrial investigation and to present testimony from defense witnesses are supported by substantial evidence and “[t]hat another lawyer might have handled the case differently does not render counsel ineffective.”

f. **Voir dire**

*Hartinger v. State*, 2007 MT 141, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Ravalli). **Affirmed; Rice, J.** As the Court held in *State v. Herrman*, it is not per se ineffective for defense counsel to exercise a peremptory strike against a prospective juror who could be challenged for cause. Here, counsel made a strategic decision to rehabilitate pro-law enforcement panelists rather than challenging them for cause and to associate himself with the conservative views of the venire while making the point that officers make mistakes. The Court observed that law enforcement officers and panelists connected to law enforcement are not, without more, automatically excluded from jury service.

g. **Failure to file or pursue appeal**

*Hartinger v. State*, 2007 MT 141, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Ravalli). **Affirmed; Rice, J.** Hartinger was advised by postconviction counsel of his right to file an out-of-time appeal and instead chose to file a petition for postconviction relief. As a result of Hartinger’s waiver of his right to file an out-of-time appeal, he can claim no prejudice stemming from his trial counsel’s failure to file a timely notice of appeal.

*Woepfel v. City of Billings*, 2006 MT 283, 334 Mont. 306, 146 P.3d 789 (Yellowstone). **Reversed and remanded; Leaphart, J.** Woepfel was convicted of PFMA in municipal court. He appealed to justice court but his attorney did not file a brief and the appeal was dismissed. Woepfel petitioned for postconviction relief claiming that his attorney was per se ineffective and that he was entitled to pursue any foregone appeal issues (namely, a confrontation claim). The State acknowledged counsel’s error, but argued that Woepfel was not prejudiced thereby because his underlying confrontation issue lacked merit. The Court refused to address the merits of the underlying issue, noting that a demonstration of non-frivolous issues is one way to show prejudice, but also, the prejudice prong is satisfied if the defendant objectively indicated his intent to appeal. Objective intention was shown in this case by the filing of the notice of appeal. The matter was remanded to the district court for appellate review of any claims Woepfel could have made on appeal from municipal court.

## 6. Prejudice Prong

***Adams v. State*, 2007 MT 35, 336 Mont. 63, 153 P.3d 601 (Ravalli). Affirmed; Leaphart, J.** The district court properly dismissed a postconviction claim alleging that defense counsel was ineffective for failing to file a motion to dismiss on speedy trial grounds because the principal delay was due to first counsel's motion to withdraw and Adams failed to carry his burden of proving prejudice.

***Hartinger v. State*, 2007 MT 141, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Ravalli). Affirmed; Rice, J.** Even if counsel should have moved to suppress Hartinger's incriminating statements, there was no reasonable probability of a different outcome because there was ample independent evidence to support Hartinger's criminal endangerment conviction.

***State v. Diaz*, 2006 MT 303, 334 Mont. 479, 148 P.3d 628 (Cascade). Affirmed; Leaphart, J.** Diaz's ineffective assistance of counsel claim against his attorney for failing to use reasonable means to find the unavailable declarant fails because Diaz failed to prove prejudice. Defense counsel presented evidence of the unavailable declarant's alleged confession through the testimony of the State's lead investigator and used the alleged confession in closing argument. Diaz actually benefited by not having the alleged declarant testify because the declarant could not deny making the statements.

### B. Habeas

#### 1. Facially Invalid Sentences

***Engebretson v. McGrath*, No. OP 06-0444. Habeas relief granted and remanded.** Engebretson was sentenced as a persistent felony offender in 1993, and the court suspended the entire sentence without finding that any of the mandatory minimum exceptions were applicable. Engebretson petitioned for habeas corpus relief 13 years later, claiming that his sentence was illegal and he should be released. The State claimed that the issue could have been raised on direct appeal or postconviction review, and was therefore inappropriate for habeas corpus review. The Court disagreed, finding that the sentence was facially invalid under Lott, and was thus amenable to habeas relief. The Court noted that Mont. Code Ann. § 46-18-502(3) (1993) imposes restrictions on the suspension or deferral of a sentence for a PFO during the first five years of the sentence, so that the court had no authority to suspend Engebretson's entire sentence as a PFO. Upon resentencing, the court presumably may reimpose a sentence under the PFO statute, but cannot suspend more than five years unless the court finds an exception to the mandatory minimum. The Court did not address the fact that the court's fully-suspended sentence benefited Engebretson.

***Lott v. State*, 2006 MT 279, 334 Mont. 270, 150 P.3d 337 (Gallatin). Habeas relief granted and remanded; Leaphart, J.** In 1992, following entry of guilty pleas, Lott was sentenced for aggravated kidnapping, sexual intercourse without consent, aggravated burglary, and felony assault. He received 10-year, consecutive weapon enhancements for each offense. In Guillaume, decided in 1999, the Court held that application of the weapon enhancement to a felony offense that itself requires proof of use of a weapon violates Montana's more protective double jeopardy right. In Whitehorn, decided in 2002, the Court held that Guillaume applies retroactively and clarified that felony assault with a weapon and aggravated assault are the only offenses that may not be enhanced.

In October 2005, Lott filed a petition for a writ of habeas corpus with the Court, alleging that the weapon enhancements subjected him to double jeopardy in light of Guillaume. The State responded that Lott's petition was time-barred, procedurally-barred, and without merit. However, on October 27, 2006, the Court issued a final Opinion and Order granting Lott habeas relief regarding his sentences for felony assault and aggravated assault, and remanded to the district court for resentencing on those counts.

The Court held: "In light of the writ's history and purpose, as well as Montana's constitutional guarantee in Article II, Section 19, that the writ of habeas corpus *shall never be suspended*, we conclude that, as applied to a facially invalid sentence--a sentence which, as a matter of law, the court had no authority to impose--the procedural bar created by § 46-22-101(2), MCA, unconstitutionally suspends the writ." Because a facially invalid sentence is a "grievous wrong" and a "miscarriage of justice," the Montana delegates "intended, at a minimum, that an individual incarcerated pursuant to a facially invalid sentence--for example, a sentence which either exceeds the statutory maximum for the crime charged or which violates the constitutional right to be free from double jeopardy--have the ability to challenge its legality." The Court reasoned: "In Montana . . . there are inherent limits on the Legislature's ability to define or restrict the scope of the writ because the fundamental principle of the writ [the right to challenge the cause of imprisonment] cannot be 'suspended' under Article II, Section 19 of the Montana Constitution."

Note: Although Lott has been cited in habeas petitions filed in district court and in the Court, its holding is narrow, applying only to facially invalid sentences which the district courts have no statutory or constitutional authority to impose. The procedural and time bars are still valid and the Court has applied them post-Lott when the sentence is facially valid or within statutory parameters.

## **2. Parole Restriction Authority**

***Gratzer v. Mahoney*, 2006 MT 282, 334 Mont. 297, 150 P.3d 343 (Silver Bow). Habeas relief denied; Leaphart, J.** Gratzer was given a life without parole sentence following his conviction for deliberate homicide in 1992. In 2005, Gratzer filed a habeas

petition in the Court, alleging that the sentencing court did not have statutory authority to impose a parole restriction for a life sentence because a life sentence is not a term sentence for purposes of Mont. Code Ann. § 46-18-202(2) (1981); he was illegally designated a dangerous offender; and his 10-year weapon enhancement was illegal in light of Apprendi and its progeny.

Citing Lott, the Court determined that the procedural bar contained in Mont. Code Ann. § 46-22-101(2) was inapplicable because Gratzner's challenges called into question the facial validity of his sentence. Accordingly, the Court addressed the merits of Gratzner's claims. First, the Court concluded that the language and structure of the parole restriction and parole eligibility statutes revealed that a life sentence is a term sentence and, obviously, a term exceeding one year. Second, the Court rejected Gratzner's objection to his dangerous offender designation because it had no effect on the length of time he must serve before becoming parole eligible. Finally, addressing Gratzner's Apprendi claim, the Court "confirm[ed] that Apprendi and its progeny do not apply retroactively to cases on collateral review."

### **3. Revocation Proceedings**

***Chandler v. Missoula County, OP 07-0041 (Order). Habeas relief denied.*** Double jeopardy does not preclude the state from filing a petition to revoke the suspended portion of the sentence due to conduct committed while the Defendant was on parole. In this case, Chandler was a parolee in Washington when he committed several parole violations. Washington imposed sanctions, including jail time. Montana then issued a warrant for Chandler's arrest, along with a petition to revoke in anticipation of his discharge to probation within the month. Chandler argued that the imposition of sanctions (jail time) in Washington foreclosed Montana from imposing similar sanctions (revocation) for the same conduct. The Court rejected this argument, noting that Chandler was sanctioned in Washington for parole violations, while the sanctions to be imposed by Montana were for probation violations, and that there is no double punishment as they are separate portions of the sentence. Habeas relief was denied.

#### **C. Probation Revocation**

##### **1. Sufficiency of Evidence**

***State v. Baird, 2006 MT 266, 334 Mont. 185, 145 P.3d 995 (Sanders). Affirmed; Warner, J.*** Baird violated an order of protection that prohibited him from having contact with Tamara Walker, the mother of his child. He pled guilty to felony stalking and received a deferred sentence. The district court subsequently revoked Baird's deferred sentence. The Court rejected Baird's claim that there was insufficient information to revoke his deferred sentence. The Court noted that Baird's admitted use of marijuana

was a violation of the law and thus a violation of Baird's deferred sentence. The Court also concluded that Baird violated his deferred sentence by having contact with Walker other than what was necessary to exchange their child. The Court rejected Baird's claim that the district court improperly relied on hearsay testimony, noting that the rules of evidence do not apply at a probation revocation hearing.

## 2. District Court's Reasons

***State v. Baird*, 2006 MT 266, 334 Mont. 185, 145 P.3d 995 (Sanders). Affirmed; Warner, J.** Baird argued that he was denied due process because the district court failed to set forth the evidence it relied upon and the underlying reasons for the revocation of his sentence. The Court disagreed, concluding the oral and written records from the district court provided an adequate basis for the Court's review.

## 3. Inapplicability of Criminal Contempt Proceedings

***State v. Letasky*, 2007 MT 51, 336 Mont. 178, 152 P.3d 1288 (Yellowstone). Reversed; Morris, J.** A convict who violates a "no contact" condition of his suspended sentence can be revoked, but he cannot be separately prosecuted for criminal contempt for the same conduct because compliance with a condition of a suspended sentence is not an independent "mandate of the court" for purposes of Mont. Code Ann. § 45-7-309(1)(c). In addition, criminal contempt is not among the enumerated consequences that a revocation court may impose upon an offender who violates a condition of his suspended sentence.

## 4. Credit for Time Served on Unrelated Offense

***State v. Miller*, 2006 MT 159, 332 Mont. 472, 139 P.3d 839 (Lewis and Clark). Affirmed; Warner, J.** When imposing a prison term following revocation of a suspended sentence, the district court was not statutorily obligated to award defendant credit for time served in an Indiana prison on an unrelated offense. Even though the sentences were discharging simultaneously, they did not merge. Thus, the district court had discretion to allow credit for time served under Mont. Code Ann. § 46-18-201(4), but was not ***required*** to do so under Mont. Code Ann. § 46-18-401(1)(b).

## 5. Mental Disease or Defect

***State v. Boulton*, 2006 MT 170, 332 Mont. 538, 140 P.3d 482 (Cascade). Affirmed; Rice, J.** Defendant argued in response to the State's petition to revoke that the court was required to continue her probationary sentence pursuant to Mont. Code Ann. §§ 46-14-311 and -312, because her mental disease or defect rendered her unable to comply with the requirements of the law. The Court held that the provisions of Mont. Code Ann.

§§ 46-14-311 and –312 are not applicable in probation revocation proceedings. Even though evidence relating to mental disease or defect is relevant and a district court may consider that evidence when deciding whether to continue or revoke a probationary sentence, the court is not *required* to continue probation as a matter of law.

#### **D. Bail Pending Appeal**

*State v. Duncan, No. OP 07-0199. Habeas denied.* The Court denied a state habeas petition by Duncan, a level 1 sex offender, who challenged the district court’s order denying him bail pending appeal. The Court cited Phillips v. State, 2006 Mont. Lexis 171 (concluding there is a presumption that the court shall order detention pending appeal).

The result in Duncan is predictable, but the decision is significant in two respects. First, the Court contrasted the presumption of detention pending appeal with its approach to pretrial release in its recent order in Miller v. Eleventh Judicial District, 2007 MT 58, stating: “In contrast, *prior to conviction, a defendant ‘has a presumptive right to be released on a reasonable bail*, or on his own recognizance upon conditions that will protect the community.”

Second, the Court reiterated its earlier ruling in Miller that it will no longer review bail issues to determine whether the district court abused its discretion. Rather, when addressing habeas petitions raising bail issues, the Court will review the request in the same manner as other original proceedings commenced pursuant to Rule 17 of the Montana Rules of Civil Procedure. The Court’s approach appears to be due to its belief that pretrial bail processes discriminate against indigent defendants.

When handling bail issues, be advised that the Court presumes a right to bail prior to conviction and that, when habeas claims are filed in the Court, it reviews bail issues de novo. The Court’s recent approach highlights the importance of a good record.

### **XIII. MISCELLANEOUS**

#### **A. Termination of Parental Rights**

##### **1. No Right to Trial by Jury**

*In re M.H.*, 2006 MT 208, 333 Mont. 286, 143 P.3d 103 (Cascade). **Affirmed; Gray, C.J.** Absent a timely objection, the Court will not review on appeal the district court’s failure to hold a timely show cause hearing. The Court affirmed its earlier

holding in Matter of C.L.A., 211 Mont. 393, 685 P.2d 931 (1984), that there is no right to a jury trial in dependent neglect proceedings.

## 2. ADA

***In re M.H.*, 2006 MT 208, 333 Mont. 286, 143 P.3d 103 (Cascade). Affirmed; Gray, C.J.** The Court rejected the father’s claim that the Department failed to accommodate his mental disability in violation of the Americans with Disabilities Act (ADA), since the evidence showed that the father would require assistance 24/7 in order to be a “minimally adequate parent.”

## 3. Adjudication Stage

***In re A.S.*, 2006 MT 281, 334 Mont. 280, 146 P.3d 778 (Gallatin). Affirmed; Nelson, J. (Gray, dissenting.)** The district court’s Order following the adjudicatory hearing stated that the mother stipulated that A.S. met the definition of a youth in need of care and that the court questioned the mother about her understanding of the stipulation and ramifications of that decision. A review of the transcript, however, indicates that this is inaccurate. Nevertheless, in this case, it was appropriate for the court to find A.S. a youth in need of care based upon the mother’s own admissions, which she made in the presence of her counsel. The mother admitted she was addicted to meth, that she needed treatment, and that her addiction impacted A.S. unfairly. It was also undisputed that the mother was incarcerated on a felony drug charge and awaiting disposition. A.S.’s father was also in prison for a drug conviction. Further, neither the mother nor her counsel objected to statements by counsel for DPHHS that the parties had reached an agreement regarding adjudication. It would not be in A.S.’s best interest to reverse the termination order and remand for further proceedings when much of the delay previously in the proceeding was caused by the mother’s drug relapses and her failure to put her child’s needs above her need to indulge her own addiction. Chief Justice Gray dissented on this issue and would have reversed the termination order.

Even though the district court erroneously attributed some pieces of information to the wrong witness, there is substantial evidence from credible witnesses to affirm the lower court’s finding that dismissing the termination petition would create a substantial risk of harm to A.S. or would be detrimental to A.S.’s physical or psychological well-being.

The district court correctly concluded that the conduct or condition rendering the mother unfit to parent A.S. was unlikely to change within a reasonable time. The mother had been given every opportunity to maintain sobriety but, despite all of the resources available to her, she failed to do so.

#### 4. Aggravated Circumstances

***In re M.A.L.*, 2006 MT 299, 334 Mont. 436, 148 P.3d 606 (Cascade). Affirmed; Rice, J.** The mother had physical custody of the children in Montana after fleeing from Texas to get away from the father. Ultimately, DPHHS terminated the mother’s parental rights. While investigating the father, DPHHS learned that he had a prior conviction in Texas for a sexual offense involving a minor. DPHHS petitioned to terminate the father’s parental rights and requested the court to conclude, based upon the existence of an aggravated circumstance, pursuant to Mont. Code Ann. § 41-3-423, it was not necessary for DPHHS to provide rehabilitative services to the father. The father moved to dismiss the termination petition arguing that finding an aggravated circumstance based upon a sexual offense conviction that predates the passage of Mont. Code Ann. § 41-3-423 would constitute an unlawful retroactive application of the statute. The district court denied the father’s motion to dismiss and concluded that the State correctly relied upon the father’s 1985 sexual offense conviction to establish an aggravated circumstance.

At the termination hearing, the court allowed the State to introduce certified copies of a “Deferred Adjudication Order,” a “Judgment Adjudicating Guilt,” and an “Indictment of [the father] for the Offense of Aggravated Sexual Assault on a Child.” The father objected to admission of the documents arguing that the documents were hearsay and did not establish that he was guilty of the offense of indecency with a child. The father further argued that even assuming he had been convicted of the offense of indecency with a child, that Texas offense would not meet the definition of an “aggravated circumstance” pursuant to Mont. Code Ann. § 41-3-423(2)(a). On appeal, the Court held, in part:

1. Montana Code Annotated §§ 41-3-423(2)(a) and -609(1)(d) went into effect in 1999. DPHHS initiated termination proceedings against the father in September 2003. Thus, the father was on notice that his prior Texas sexual offense conviction could be used as an aggravated circumstance to justify termination of his parental rights if he allowed his children to be abused/neglected. Applying the statutes to the conviction, which occurred prior to the date they became effective, does not constitute an unlawful retroactive application of the statutes.

2. The certified copy of the judgment adjudicating the father’s guilt in Texas was properly admitted under Mont. R. Evid. 803(22), and the district court did not abuse its discretion when it admitted the judgment adjudicating guilt as proof of an aggravated circumstance pursuant to Mont. Code Ann. § 41-3-423(2)(a).

3. The district court correctly concluded that the father’s prior Texas conviction for indecency with a child constituted an “aggravated circumstance” under Mont. Code Ann. § 41-3-423(2)(a).

## 5. Complete Treatment Compliance Required

***In re L.H.*, 2007 MT 70, 336 Mont. 405, 154 P.2d 622 (Lincoln). Affirmed; Rice, J.** The district court did not abuse its discretion in terminating the father, M.H.’s parental rights to L.H. Complete compliance with a treatment plan is required as opposed to partial compliance or even substantial compliance. M.H. had a history of criminal conduct and failed to complete previous treatment plans and failed to comply with conditions of probation. DPHHS developed a new treatment plan for M.H., which contemplated his incarceration. M.H. was unable to comply with conditions such as providing written documentation of his AA/NA attendance, corresponding with L.H. weekly, and keeping in contact with the social worker. The Court stated: “While some of M.H.’s infractions may seem insignificant individually, in light of his prior failures with treatment plans, his current plan, and his circumstances, they were not inconsequential.” In determining whether the conduct or condition rendering M.H. unfit to parent was unlikely to change within a reasonable time, the district court properly considered M.H.’s long-term drug and alcohol problem and how that impacted his parenting of another child, K.H. M.H. voluntarily relinquished his rights to K.H. The Court stated: “A parent’s track record in the raising of children is a critical consideration in determining the parent’s likelihood of future success.” Further while M.H. may have been sober for most of the instant youth in need of care proceeding, he was also incarcerated for most of that period.

### B. DUI/License Revocation

#### 1. Collateral Estoppel/Res Judicata

***State v. Ditton*, 2006 MT 235, 333 Mont. 483, 144 P.3d 783 (Gallatin). Affirmed; Warner, J.** Since the DUI charge was not at issue in Ditton’s petition for reinstatement of his driver’s license, the doctrines of collateral estoppel and res judicata did not apply.

#### 2. ADA

***State v. Ditton*, 2006 MT 235, 333 Mont. 483, 144 P.3d 783 (Gallatin). Affirmed; Warner, J.** The municipal court properly refused to take judicial notice of the ADA and of the symptoms of insulin-dependent diabetes because Ditton failed to establish the relevance of the ADA to the DUI charge and the accuracy of Ditton’s proffered “facts” could be reasonably questioned within the meaning of Mont. R. Evid. 201(d). The municipal court properly denied Ditton’s motion to dismiss based upon evidence that Ditton was impaired. It was not the State’s burden to prove, as Ditton contended, that impairment is not caused by diabetes.

### 3. Right to Independent Blood Test

*State v. Wrzesinski*, 2006 MT 263, 334 Mont. 157, 145 P.3d 985 (Lewis and Clark). **Affirmed; Rice, J.** The Court concluded that the Defendant, who was convicted of DUI, did not request an independent blood test, and assuming that he had done so, the arresting officer did not unreasonably impede him from obtaining an independent blood test. As the arresting officer read the Defendant the implied consent advisory form, he read the parenthetical of the advisory: “Later I may ask you to take a blood test.” After doing so, he paused and said he would not be asking for a blood test because he did not believe the Defendant was under the influence of drugs. The Defendant queried why the officer would not request a blood test, and the officer responded: “Because we take a breath test is what we do.” The Defendant then stated: “I want a blood test though.” The officer told the Defendant to hold on, and he would explain that to him. The officer read the entire advisory form including the portion instructing the Defendant he could get an independent blood test at his own expense. After the officer finished reading the advisory, the Defendant did not request an independent test or otherwise raise the topic of alternatives to the breath test. Justice Nelson dissented.

### 4. Suspension for Nonpayment of Fines

*State v. Pyette*, 2007 MT 119, 337 Mont. 265, \_\_\_ P.3d \_\_\_ (Missoula). **Reversed; Warner, J. (State Appeal).** The Court reversed the district court’s determination that Mont. Code Ann. § 61-5-214 violated due process because it purportedly provided insufficient notice and opportunity to be heard prior to suspension of a driver’s license for nonpayment of fines. Applying the three-factor test from *Matthews v. Eldridge*, 424 U.S. 319 (1976), the Court concluded that Pyette received adequate notice that her license would be suspended for nonpayment of fines if she did not appear in court within ten days, emphasizing that a person threatened with deprivation of a protected property interest does not need to be told “how to complain,” such notices have to be generic to cover all possible situations, and the State has an important interest in the cost-effective administration of its driver’s license system, including ensuring that offending drivers appear in court, comply with court orders, and pay properly imposed fines.

## C. Youth Court Act

### 1. Restitution

*In re K.D.K.*, 2006 MT 187, 333 Mont. 100, 141 P.3d 1212 (Ravalli). **Reversed; Gray, C.J.** K.D.K. was ordered to pay restitution as part of his disposition as a delinquent youth. The dispositional order placed K.D.K. on probation to age 18, and granted the Youth Court jurisdiction to age 21 for purposes of the restitution obligation. Shortly after K.D.K.’s 18th birthday, the Youth Court amended the order at the State’s

request to include additional restitution obligations. The Court reversed, holding that the court had no authority to do so since it retained jurisdiction only for purposes of ensuring payment of restitution originally imposed--not to increase the restitution amount. The Court opined that a court may retain jurisdiction to modify restitution pursuant to Mont. Code Ann. §§ 41-5-205(1) and -1422(1). However, the language of the dispositional order at issue here clearly limited retention of jurisdiction beyond K.D.K.'s 18th birthday to enforcement of the financial obligations in the original order, and not to impose additional restitution.

***In re T.M.R.*, 2006 MT 246, 334 Mont. 64, 144 P.3d 809 (Yellowstone). Reversed; Leaphart, J.** T.M.R. was charged with burglary and his case was transferred to youth court. As part of the disposition of his case, the youth court ordered T.M.R. to pay restitution for the vehicle he damaged. The youth court based restitution on the replacement cost of the vehicle rather than the market value of the vehicle. T.M.R. appealed the district court's use of replacement cost. The Court noted that the youth court statutes regarding restitution, unlike the adult restitution statutes, do not provide guidance on how to determine the amount of restitution. The Court further noted that prior to the 2003 statutory amendment to the adult sentencing statutes, restitution for adult offenders was based on market value if it could be ascertained. The Court further stated: "Unlike the adult sentencing statutes, the Youth Court Act was not amended in 2003 to include replacement cost as a way to determine restitution. **Therefore, we conclude the more equitable and consistent approach to determining restitution under the Youth Court Act is to measure damages based on market value.**" The Court also concluded that the youth court erred when it failed to subtract the salvage value the victim received for the vehicle from the total amount of restitution.

## 2. PFO

***State v. Mainwaring*, 2007 MT 14, 335 Mont. 322, 151 P.3d 53 (Yellowstone). Affirmed; Cotter, J.** In 1999, Mainwaring was convicted under Mont. Code Ann. § 41-5-206 (the transfer provisions of the Youth Court Act). In accordance with Mont. Code Ann. § 41-5-2510, the district court later reviewed the sentence and suspended the remainder upon a finding that he had been substantially rehabilitated. Just after turning 21, Mainwaring committed a new felony. The State sought a persistent felony offender designation based on the 1999 conviction. Mainwaring objected, claiming that the district court lacked statutory authority to sentence him as a PFO. The Court disagreed, noting that Mainwaring clearly qualified as a PFO, and that nothing in the Youth Court Act or the Criminally Convicted Youth Act prevented that result.

## 3. Increased Sentences Following Transfer

***In re H.C.R.*, 2007 MT 64, 336 Mont. 369, 155 P.3d 1221 (Hill). Reversed; Rice, J.** The Youth Court abused its discretion when it imposed a DOC commitment following a

probation violation because the parties had previously stipulated that if the youth violated, they would file a joint petition to transfer the case to district court and to transfer supervision to adult probation services. Treating the stipulation in Youth Court as a plea agreement and emphasizing that the State is held to strict and meticulous standards of performance, the Court determined that the State's decision to seek a custodial sentence with the DOC rather than an adult probationary sentence breached the parties' agreement.

#### **4. Interrogations/Interviews**

***In re Z.M.*, 2007 MT 122, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Sanders). Affirmed in part, reversed in part; Leaphart, J.** Fourteen-year-old Z.M. was charged with a number of felony and misdemeanor counts, including felony burglary and theft. He filed a motion to suppress evidence and statements. The district court denied his motion and Z.M. subsequently plead guilty to one felony count of burglary.

The Court dismissed the State's argument that Z.M. had failed to reserve the right to appeal in light of his "guilty plea" and addressed the merits of Z.M.'s appeal.

The Court reversed the denial of 14-year-old Z.M.'s motion to suppress his statements confessing to burglarizing a bowling alley. His first statement was made prior to being given Miranda warnings and before his parents arrived. Although his parents had arrived before Z.M. made his second statement, the officer failed to preserve a tangible record that he was given Miranda warnings and that his parents consented to the interview. Z.M.'s interview was tape-recorded, but the State was unable to produce the tape at the suppression hearing. Z.M. did not sign a waiver form and, in light of his and his mother's testimony that he was not given Miranda warnings, the Court concluded that the youth court erred in finding that he was given Miranda warnings and that his parents consented to the interview. The Court remanded the case to the youth court, with instructions that Z.M. must be allowed to withdraw his guilty plea.

#### **D. Mental Health Commitments**

##### **1. Sufficiency of the Evidence**

***In re A.K.*, 2006 MT 166, 332 Mont. 511, 139 P.3d 849 (Powell). Reversed; Gray, C.J.** The Court held that the district court erred in finding that A.K.'s mental disorder (bipolar disorder) rendered her a danger to herself and others. Prior to the initiation of involuntary commitment proceedings, A.K. had been diagnosed with bipolar disorder, developmental disorder and polysubstance dependence. A.K. had stopped taking her medication, had been drinking alcohol and left Helena without telling her mother/guardian, in the company of a friend whom she could not identify. The "friend"

left A.K. stranded in Deer Lodge, where A.K. proceeded to the local tavern and drank from noon on Wed. until 2 a.m. on Thursday. A.K. flopped with strangers and began drinking again the next day until she came to the attention of local authorities. The mental health professional concluded that A.K.'s reported symptoms and his observations were consistent with the prior diagnosis of bipolar disorder with recent manic episode. He also diagnosed A.K. as mildly retarded with a suggestion of borderline personality disorder. The mental health professional concluded that A.K.'s judgment and impulse control were profoundly impaired; her cognitive delay put her at significant risk; and A.B.'s ability to defend or protect herself was more at a "childlike level."

The term mental disorder does not include mental retardation and/or addiction to drugs or alcohol, and the district court's inclusion of mental retardation and polysubstance abuse does not relate to the issue of whether a mental disorder exists. The mental health expert did not specifically testify how A.K.'s cognitive delays, poor judgment and poor impulse control, resulted from the mental disorder rather than her mental retardation. Consequently, A.K.'s cognitive delays may not be used for purposes of determining that, because of her mental disorder, she presents an imminent threat requiring commitment. (Ditto for A.K.'s polysubstance abuse.) The district court's findings were not supported by sufficient evidence.

NOTE: Justice Rice wrote an excellent dissent detailing the evidence that supported the district court's findings.

## **2. Detailed Statement of Facts**

***In re A.K.*, 2006 MT 166, 332 Mont. 511, 139 P.3d 849 (Powell). Reversed; Gray, C.J.** The district court's findings of fact did not satisfy the requirement of Mont. Code Ann. § 53-21-127(8) of a "detailed statement of the fact" relied upon by the court to show that respondent suffers from a mental disorder requiring commitment. See also XIII, D, 1 (Sufficiency of the Evidence).

***In re G.M.*, 2007 MT 100, 337 Mont. 116, 157 P.3d 687 (Yellowstone). Reversed; Morris, J.** The district court failed to provide a detailed statement of facts supporting both of its commitment orders. The court's findings failed to detail the factual basis of its determination that G.M. suffered from a mental disorder and required commitment as mandated by Mont. Code Ann. § 53-21-127(8)(a). As a result of this deficiency, the court's findings are clearly erroneous.

## **3. Recommitment During Pending Appeal**

***In re G.M.*, 2007 MT 100, 337 Mont. 116, 157 P.3d 687 (Yellowstone). Reversed; Morris, J.** The district court had subject matter jurisdiction to consider the State's June 2, 2006 petition for civil commitment of G.M., even though it was filed under the same

cause number as G.M.'s May 5, 2006 commitment order and even though G.M. had appealed the May 5, 2006 commitment order. The State filed the second petition under the first cause number based upon the Montana Uniform Caseload Filing Standards, which are intended solely for record-keeping within the office of the Clerk of Court. Further, an appeal to the Court divests the district court of jurisdiction over the order or judgment from which the appeal is taken. Thus, the district court was divested of jurisdiction only of the May 5, 2006 commitment order.

### **E. Forfeiture**

***State v. Branam*, 2006 MT 300, 334 Mont. 457, 148 P.3d 635 (Missoula). Reversed; Warner, J. (State Appeal.)** The Defendant's Cadillac Escalade was stopped by law enforcement as a result of a reported assault committed by occupants of the vehicle. The occupants fled the stop, leaving the vehicle on the street unattended. Consequently, the vehicle was towed to a storage yard, where an employee of the towing service discovered \$32,000 in cash and a semi-automatic rifle in the Escalade. When the petition for forfeiture was filed, the State alleged that following the search multiple confidential informants reported that Branam used the Escalade to conduct a large-scale marijuana distribution business. Branam moved to dismiss the petition or, in the alternative, for summary judgment, contending that at the time the vehicle was seized (towed) the State lacked probable cause to seize under Mont. Code Ann. § 44-12-103. The district court dismissed the petition and the State appealed.

Reversing the district court, the Court held that the forfeiture statutes contemplate that when the State lawfully seizes property for reasons other than forfeiture, while the property is lawfully in the State's possession, a forfeiture petition may be filed based upon the subsequent development of probable cause to believe the property is subject to forfeiture.

## **XIV. CONSTITUTIONAL ISSUES**

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

#### **1. Parole Restriction Authority**

***State v. Garrymore*, 2006 MT 245, 334 Mont. 1, 145 P.3d 946 (Missoula). Affirmed; Rice, J. (Gray and Nelson, concurring.)** After he was sentenced to life without parole for the deliberate homicide of his toddler stepdaughter, Garrymore challenged the sentencing court's authority to restrict parole under Mont. Code Ann. § 46-18-202(2), contending that the parole restriction authority violates Apprendi and Blakely. The Court rejected the argument, holding that the statute is constitutional because it gives broad,

indeterminate discretion to the sentencing court and because there is no presumption of parole eligibility in Montana. And the statutory requirement that the sentencing court provide written reasons for the restriction is constitutional because the statute does not require the judge to make any particular findings of fact not found by the jury. Finally, although the court also based its restriction on Garrymore's lack of remorse and recidivist history, prior convictions are an exception to Apprendi and lack of remorse, which is important to the exercise of indeterminate sentencing discretion, does not pertain to whether the defendant has a legal right to a lesser sentence within the meaning of Blakely.

As discussed in Justice Nelson's special concurring opinion, because the sentencing court did not find that the restriction was "necessary for the protection of society," the Court's opinion does not address the constitutionality of the language in the third sentence of Mont. Code Ann. § 46-18-202(2), providing that the court "shall" impose the restriction if it makes that finding.

## **2. Driver's License Suspension for Failure to Pay Fines**

***State v. Pyette*, 2007 MT 119, 337 Mont. 265, \_\_\_ P.3d \_\_\_ (Missoula). Reversed; Warner, J. (State Appeal).** In this State appeal, the Court reversed the district court's determination that Mont. Code Ann. § 61-5-214 violated due process because it purportedly provided insufficient notice and opportunity to be heard prior to suspension of a driver's license for nonpayment of fines. Applying the three-factor test from Matthews v. Eldridge, 424 U.S. 319 (1976), the Court concluded that Pyette received adequate notice that her license would be suspended for nonpayment of fines if she did not appear in court within ten days, emphasizing that a person threatened with deprivation of a protected property interest does not need to be told "how to complain;" such notices have to be generic to cover all possible situations, and the State has an important interest in the cost-effective administration of its driver's license system, including ensuring that offending drivers appear in court, comply with court orders, and pay properly imposed fines.

### **B. Confrontation**

#### **1. Jury's Consideration of Extra-Record Evidence**

***State v. Parker*, 2006 MT 258, 334 Mont. 129, 144 P.3d 831 (Lake). Reversed; Cotter, J.** In a unanimous en banc decision, the Court reversed the Lake County conviction of Glen Parker and remanded the case for a new trial. The Court held that Parker's right of confrontation was violated when the jury had access to the statement of a witness who did not testify and was not subject to cross-examination. Parker was charged with assault with a weapon after he struck his wife with a broken table leg and stabbed her with a knife. After arresting Parker, the police took statements from Parker's

four children, recording the statements on an audiotape. At the conclusion of the last interview with the children, the police took a statement from a houseguest, Eve Kratz, who witnessed part of the assault. The statement was recorded on the same audiotape. At trial, the children stated they could not remember the incident or related a different version of the incident, so the audiotape was introduced to present the prior inconsistent statements. The judge allowed the tape to go to the jury room during deliberations. Kratz did not testify, and her recorded statement was not played for the jury, but the tape included her statement. The Court rejected the State's arguments that Parker did not preserve the issue by objecting to the delivery of the tape to the jury room, that Parker did not establish that the jurors actually heard Kratz's statement, and that the delivery of the tape with Kratz's statement was harmless error.

## 2. Scope of Cross Examination

*State v. Doyle*, 2007 MT 125, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_ (Silver Bow). **Affirmed; Morris, J.** The district court's limitation of cross examination of an accomplice did not deny the Defendant his right to confrontation. Montana Rule of Evidence 609 prohibits the admissibility of a witness's prior conviction for impeachment purposes; and an accomplice's testimony that he had never witnessed a person being killed did not open the door to impeachment of the accomplice with convictions for theft, burglary and other misdemeanor offenses. The evidence also would have been inadmissible as cumulative. The district court also properly limited cross examination regarding the accomplice's character because the Defendant did not offer the evidence under one of the recognized exceptions. Lastly, the court properly limited cross examination regarding whether the State was the sole determiner of the accomplice's testimony with respect to the plea agreement because the accomplice was cross examined extensively about the benefits of his plea agreement.

### C. Due Process

#### 1. Multiple Charges

*State v. Dasen*, 2007 MT 87, 337 Mont. 74, 155 P.3d 1282 (Flathead). **Affirmed; Leaphart, J.** Affirming Dasen's felony convictions for promotion of prostitution, sexual abuse of children, and prostitution, the Court held that the prosecution's decision to charge 10 counts of prostitution (each involving different victims), with one count charged as a misdemeanor and the remaining counts charged as felonies, was proper according to *State v. Tichenor*. The Court declined to address Dasen's reliance upon Ninth Circuit authority requiring a prior conviction element to be charged explicitly because the argument was not raised in district court.

## 2. Defendant's Right to Present a Defense

*State v. Dasen*, 2007 MT 87, 337 Mont. 74, 155 P.3d 1282 (Flathead). **Affirmed; Leaphart, J.** Dasen was not prevented from defending against the sexual abuse of children charge on the basis that he was mistaken regarding the girls' ages because a "child" for purposes of Mont. Code Ann. § 45-5-625 (2003) is a person less than 18 years of age (rather than a person less than 16 years of age), and Dasen presented evidence and argument at trial that the girls were 18 years or older.

### D. Double Jeopardy

#### 1. DUI/Driver's License Revocation Proceedings

*State v. Ditton*, 2006 MT 235, 333 Mont. 483, 144 P.3d 783 (Gallatin). **Affirmed; Warner, J.** Since the DUI charge was not at issue in Ditton's petition for reinstatement of his driver's license, the doctrines of collateral estoppel and res judicata did not apply.

#### 2. Revocation Proceedings

*Chandler v. Missoula County*, OP 07-0041 (Order). **Habeas relief denied.** Double jeopardy does not preclude the state from filing a petition to revoke the suspended portion of the sentence due to conduct committed while the Defendant was on parole. In this case, Chandler was a parolee in Washington when he committed several parole violations. Washington imposed sanctions, including jail time. Montana then issued a warrant for Chandler's arrest, along with a petition to revoke in anticipation of his discharge to probation within the month. Chandler argued that the imposition of sanctions (jail time) in Washington foreclosed Montana from imposing similar sanctions (revocation) for the same conduct. The Court rejected this argument, noting that Chandler was sanctioned in Washington for parole violations, while the sanctions to be imposed by Montana were for probation violations, and that there is no double punishment as they are separate portions of the sentence. Habeas relief denied.

*State v. DeWitt*, 2006 MT 302, 334 Mont. 474, 149 P.3d 549 (Silver Bow). **Affirmed; Leaphart, J.** Following revocation of DeWitt's 20-year suspended sentence, the court imposed a term of 10 years, with 5 years suspended, giving credit for 160 days served for time awaiting revocation but not mentioning 1,275 days served and for which DeWitt had previously been given credit prior to revocation. The Court held that DeWitt was not subject to double jeopardy because, prior to revocation, he was released on probation with 16.5 years remaining on his suspended sentence. Because DeWitt was credited with 160 days served while he was awaiting the revocation hearing, the revocation court had about 16 years to work with when DeWitt violated; and the court's 10-year sentence with 5 years suspended was well within that limit. The revocation court could have sentenced

DeWitt to 16.5 years, less the 160 days served, with no time suspended at all. Thus, the court's 10-year term, with 5 years suspended, was well within statutory parameters and did not violate double jeopardy.

### **3. Weapon Enhancements**

***State v. Matz*, 2006 MT 348, 335 Mont. 201, 150 P.3d 367 (Yellowstone). Affirmed; Rice, J.** Affirming Matz's aggravated assault conviction, the Court held that an enhancement based upon the jury's separate finding that Matz used a weapon did not violate double jeopardy because use of a weapon was not an element of the offense.

#### **E. Privacy**

***State v. Ditton*, 2006 MT 235, 333 Mont. 483, 144 P.3d 783 (Gallatin). Affirmed; Warner, J. (Gray, Nelson and Cotter, dissenting.)** The Court affirmed the municipal court's denial of Ditton's motion to suppress various items of evidence, including the videotape of Ditton's arrest, observing that the Court has never extended Montana's greater privacy protections "to a person's actions on a public street[.]"

#### **F. Self-Incrimination/Miranda**

##### **1. Voluntary Statements**

***State v. English*, 2006 MT 177, 333 Mont. 23, 140 P.3d 454 (Yellowstone). Affirmed; Rice, J.** The Court declined to review for plain error alleged violations of English's right to remain silent stemming from the testimony of several officers and a paramedic, concluding that English's defense counsel may have declined to move for a mistrial for strategic reasons: "English's raw assertion on appeal that the offensive testimony 'pervaded the entire trial' is left ultimately undeveloped, leaving us to wonder why, if the assertion is true, his trial counsel did not move for a mistrial or otherwise object to the testimony[.]" If error occurred, "it was certainly not plain."

***State v. Zito*, 2006 MT 211, 333 Mont. 312, 143 P.3d 108 (Ravalli). Affirmed; Warner, J.** Although Zito was in custody when he stated that he had a "medical grow," Zito was not questioned by any law enforcement officer or otherwise coerced or induced to make the statement in question. Because there was no interrogation, the statement was admissible.

##### **2. Mirandized Statements**

***State v. Jones*, 2006 MT 209, 333 Mont. 294, 142 P.3d 851 (Fergus). Affirmed; Morris, J.** Considering the totality of the circumstances, including his experience with

the criminal justice system and prior interrogations, the Defendant's Mirandized statements were voluntary. His statement that he was "through talking" was not an unequivocal invocation of the right to remain silent because he remained talkative. Absent evidence that the police interviewers lied to or misled the suspect, the use of guilt assumption techniques was permissible.

**G. Effective Assistance of Counsel**

(See Section XII, A. 5. above)