

# 2011-12 Criminal Case Summary

(October 6, 2011, to September 27, 2012)

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*This document is an editorialized summary of the Montana Supreme Court criminal and DN decisions and the U.S. Supreme Court constitutional criminal law decisions that I found of interest. It is not a comprehensive account of all opinions from the period and specifically does not cover federal statutory decisions.*

## Topics:

1. [Pleas and Plea Agreements](#)
2. [Sentencing](#)
3. [Revocations](#)
4. [Double Jeopardy](#)
5. [IAC and Right to Counsel](#)
6. [Trial Rights and Procedures](#)
7. [Writs and Collateral Review Mechanisms](#)
8. [Miranda](#)
9. [Search and Seizure](#)
10. [Evidentiary Issues](#)
11. [Substantive Elements and Defenses](#)
12. [DNs and DIs](#)

## 1. Pleas and Plea Agreements

### **Parole restriction permissible at sentencing when plea agreement was silent on topic**

*State v. Lewis*, 2012 MT 157: The parties entered into an appropriate disposition agreement that was silent as to parole eligibility. The district court followed the plea agreement's term of imprisonment recommendation but ordered that the MSP term be served without parole. Noting that the agreement was silent as to parole eligibility, the district court rejected Lewis's objection that the parole restriction exceeded the plea agreement. At sentencing, the State had said it was not actively seeking a parole restriction but stated it was within the district court's discretion to do so. On appeal, Lewis argued this in-court statement either clarified or amended the plea agreement. The Court disagreed and held that the State's

comments did not modify the plea agreement, leaving district court free under the terms of the agreement to impose a parole restriction. The Court also held that the State did not breach by arguing that the district court's parole restriction was permissible under the agreement.

#### **46-12-210 has the full rights advisement for a valid plea**

*State v. Otto*, 2012 MT 199: In a 4<sup>th</sup> DUI case, Otto challenged his prior DUI convictions on the basis that he had not been advised of his rights to appeal, to a speedy trial, and to object to illegally obtained evidence. These rights are not within the advisement of rights required by 46-12-210. The Court rejected Otto's claim, distinguished a prior pronouncement in *State v. Knox*, 2001 MT 232, as dicta, and held that the only mandated rights advisement is of the rights listed in 46-12-210.

#### **Un-objected to fine did not render plea involuntary**

*State v. Burns*, 2012 MT 97: Defendant pled pursuant to an agreement that recommended a set prison term but was silent as to any fine. The district court imposed a \$5,000 fine. Defendant did not object to the fine or challenge it during his direct appeal. Subsequently he tried to withdraw his plea, arguing that the fine exceeded the plea agreement. The Court held that Defendant's failure to object to the fine at sentencing and long delay in moving to withdraw indicated that his plea was voluntary.

## **2. Sentencing**

### **A. Limitations on sentence**

#### **Mandatory life without parole for juveniles violates 8<sup>th</sup> Amendment**

*Miller v. Alabama*, 132 S. Ct. 2455: Because "children are constitutionally different than adults for purposes of sentencing," the Court held that statutorily mandatory life-without-parole sentences for juveniles convicted of homicide violate the Eighth Amendment's prohibition of cruel and unusual punishment. Sentencing judges can still choose to impose life without parole but must "take into account how children are different [than adults], and how those differences counsel against irrevocably sentencing them to a lifetime in prison."

#### **Consecutive federal sentence—try to go to federal prison first**

*Setser v. United States*, 132 S. Ct. 1463: A federal district court can order a federal sentence to run consecutive to an anticipated but not yet imposed state sentence.

Tactically, this means if the federal court has set a federal sentence consecutive to your state case but you get the state judge to order the state sentence concurrent to the federal sentence, it appears that whether the sentences actually end up being consecutive or concurrent will depend on which prison system the guy ends up in first. To give effect to the state court's concurrent sentence you will need to ensure (perhaps through a MT parole to federal custody) that your guy goes to the federal BoP first. MT DoC will then count the federal time towards the concurrent state sentence. If he goes to MT DoC first, then federal BoP will not count the state time towards the consecutive federal sentence.

### ***Apprendi* applies to fines**

*Southern Union Co. v. United States*, 132 S. Ct. 2344: Defendant was convicted by a jury of storing chemicals without a permit. The statutory punishment was a per-day fine; however, the jury was not asked to find the duration the violation. Rather the district court found that the violation lasted 762 days and imposed a fine based on that calculation. Defendant appealed and argued that *Apprendi* required a jury finding on the duration of violation used to increase the maximum fine. The Court agreed and held that the *Apprendi* rule does not distinguish between different kinds of punishment. So long as the offense is a non-petty offense for which there is a Sixth Amendment jury right, *Apprendi* applies in full and requires the jury to find any fact that increases the maximum penalty.

### **Prior convictions used for sentencing enhancement purposes not required to be found by a jury.**

*State v. Covington*, 2012 MT 31: The sentencing judge imposed life without parole for Covington's robbery conviction because the judge found under 46-18-219 that Covington had previously been convicted of two other robbery offenses. On appeal Covington argued that this judicial determination of his sentencing enhancement factors violated his right to a jury trial. The Court disagreed. Of note to Montana constitutional analysis generally, in rejecting Covington's argument that the Montana Constitution affords a greater jury trial right here than that previously recognized under the U.S. Constitution, the Court held that to show an enhanced right under the Montana Constitution a defendant must point to either (1) language in the Montana Constitution's provision that differs from the U.S. Constitution's, (2) comments from our Constitutional Convention showing an intent for a greater right, or (3) other uniquely Montanan

rights which read in conjunction with the provision in question illustrate a broader protection.

### **DoC sentence is a departure from PFO minimum**

*State v. Thompson*, 2012 MT 208: On appeal, Thompson argued that his 5 year DoC sentence was unlawful because the district court failed to apply the exception to PFO sentencing at 46-18-222(5) for assaults where no serious bodily injury was inflicted. The Court addressed this claim by determining that the district court had exercised its discretion to depart under 46-18-222(5) by imposing a DoC sentence rather than the five years “in the state prison” generally required by 46-18-502 for a PFO.

## **B. Costs and restitution**

### **Imposition of jury costs requires ability-to-pay analysis that does not chill right to jury**

*State v. Moore*, 2012 MT 95: A jury found Moore guilty. Over Moore’s indigency objection, the district court imposed public defender, jury, and prosecution costs totaling \$2,887 without analyzing whether Moore could afford them. The PSI had some information about his assets, debts, and past employment but did not analyze his ability to pay costs. The Court reversed because the district court failed to independently ascertain Moore’s ability to pay the costs and, thereby, encroach upon Moore’s right to a jury trial. When analyzing imposition of jury costs, the sentencing court “must take into account the potential chilling effect of these jury costs on the rights of an indigent defendant to a jury trial in a criminal case . . . [and] analyze the factors contained in 46-18-232(2), MCA, with an eye to preserving an indigent defendant’s ‘inviolable’ right to a jury trial in a criminal case.”

Although focused on the jury costs and the right to a jury trial, the Court also remanded for determination of Moore’s ability to pay public defender costs and the opinion could support an argument regarding chilling the right to counsel.

### **Comparative negligence in restitution**

*City of Whitefish v. Jentile*, 2012 MT 185: Jentile pled guilty to Eluding a Peace Officer after leading several Whitefish patrol cars on a short chase to his driveway. When Jentile pulled into his driveway and parked, the first patrol car following him was able to safely stop, but the second patrol car then rear-ended the first, causing seven grand in damages. As Jentile pointed out at the restitution hearing, a subsequent MHP investigation concluded that the second officer caused

the accident by following the first patrol car too closely. The city court nonetheless imposed restitution for the full damages.

The Court reversed, holding that Jentile had sufficiently raised a comparative negligence claim and that the city court, thus, erred in failing to consider and compare the degree to which the second officer's negligence caused the collision. The Court observed that while police in a chase can ignore some traffic rules, they still have a duty to drive safely under the circumstances of a pursuit. The Court remanded for the city court to conduct a proper comparative negligence analysis. Justice Rice dissented and concluded that the city court had conducted a comparative negligence analysis and found Jentile 100% liable.

### **Judge can find causation for restitution where causation is not an element of the offense found by jury**

*City of Billings v. Edward*, 2012 MT 186: A jury found Edward guilty failure to remain at an accident and failure to report. The evidence at trial was that in pulling out of a parking lot, Edward struck a bicyclist on the sidewalk, knocking the bicyclist into the road causing two cars to collide. Edward then drove off. The muni court imposed four grand in mostly lost wages restitution. Edward appealed the restitution order to district court, which affirmed. She then appealed to the Court, which also affirmed.

As to the imposition of restitution, Edward argued that the city had not proven that she actually caused the bicyclist's injuries. While causing the accident was not an element of the offenses found by the jury, the Court held that there was sufficient evidence for the muni court itself to find causation. The Court also held that a jury determination was not necessary. The Court declined to consider Edward's comparative negligence argument (bicyclists illegally riding on sidewalk) as she had not raised it below.

As to the amount of restitution, Edward argued that city failed to present sufficient evidence of the bicyclist's hours and salary and unemployment. The Court held that the bicyclist's sworn testimony as to the loss was sufficient and not speculative.

### **Restitution law in effect at time of offense controls, but need to object**

*State v. Johnson*, 2011 MT 286: A decade-old stepdaughter sexual assault was pled out as intimidation. Johnson appealed the imposition of restitution for the victim's past counseling. Because the offense occurred in 1999, the Court noted that the 1999 restitution statute (requiring future ability to pay information to be in the PSI) would control. However, because there was no objection to the absence of ability to pay info at sentencing, the Court refused to reach the issue. On a State

concession, the Court did reverse the award of to-be-determined future counseling cost and remanded for determination of a specific dollar amount.

Johnson also appealed a broad condition requiring PO permission before going to parks, malls, family functions, etc. Again, there was no objection at sentencing so the Court refused to consider the issue. However, the Court did note (presumably referring to 46-23-1011(4)) that “if these [restrictions] prove to be unduly burdensome in practice, Johnson and/or his probation officer may seek relief from the District Court.”

### **Minimum-wage summer job non-speculative for purpose of lost-wages restitution**

*State v. Dodson*, 2011 MT 302: Dodson pled to criminal endangerment for an alcohol-related wreck that injured the other driver, a 17 year-old. The district court imposed lost-wages restitution for the victim not being able to find and work a summer job. The restitution award was based on the victim’s father’s calculation of 10 fulltime weeks at minimum wage. The Court held this evidence was sufficient to make the award non-speculative where the Dodson failed to present any evidence at sentencing that the victim would not have been able to find a minimum-wage summer job if uninjured.

### **Court can order public sale of seized guns used as trial exhibits**

*State v. Fadness*, 2012 MT 12: After a trial, non-contraband exhibits belonging to the defendant (unlike the State property in *Torgerson*) must presumptively be returned to the defendant. However, if the items in question are firearms that the federal law prohibits the defendant from possessing, then the district court can allow the State to sell the property and give the proceeds to the defendant. The Court held that, as a convicted felon, the defendant had no affirmative Montana right to possess firearms. Without explicitly deciding that the defendant’s request to have the guns released to his father for his father to sell on his behalf would constitute constructive possession by the defendant (as the State argued), the Court held that the district court did not abuse its broad discretion in deciding to have the State sell them instead.

The Court distinguished situations in which a defendant had sought to completely give-away his guns to a third-party. I would suggest that going forward a defendant would have better luck asking to fully gift his guns to friends or family rather than seeking to have the friends/family hold or dispose of them on his behalf.

### **C. Probation conditions**

***Ashby* nexus requirement is still alive post-*Hernandez* (if somewhat more flexible)**

*State v. Green*, 2012 MT 87: There is no indication that Green has an alcohol problem or that alcohol was involved in his assault offense; however, the district court imposed a no-alcohol condition. Three members of the Court affirmed on the basis that the alcohol ban has an *Ashby* nexus to Green as an offender in that alcohol would be detrimental to Green's Major Depressive Disorder and long history of violence. The fourth vote for affirming came from a special concurrence that would apparently due away with the Court's *Ashby* nexus review and have conditions reviewed only through the Sentence Review Division.

One dissenter concluded that the *Ashby* nexus requirement was not satisfied here but then would have applied *Hernandez* to affirm because no-alcohol is a standard condition in DoC's regs. Two other dissenters would have found that the *Ashby* nexus requirement was not met here and would have reversed the condition. Adding the votes up that seems to make five Justice who still believe some *Ashby* nexus requirement applies to no-alcohol conditions even though DoC's standard conditions prohibit alcohol.

**Condition prohibiting Δ from taking his children to parks, etc w/o chaperone upheld in registration case**

*State v. Melton*, 2012 MT 84: Melton was convicted for failing to register as a sexual offender. His registration requirement arises out of a 1999, consensual encounter with a 15-year-old in Washington when he was 20. He has since married a different woman and is raising a family but has failed to comply with his Washington probation. Scollati evaluated him as a Level 1 but recommended no unsupervised contact with children other than his own. Melton did not object to conditions prohibiting him from having such unsupervised contact with children other than his own and from going to the usual list of parks, pools, and holiday festivities without an approved chaperone. His narrow claim was that there must be an exception to the chaperone requirement for when he attends parks, etc. with his own kids. The Court was not persuaded.

The Court declined to adopt a bright line rule whether or not the *Ashby* "offense nexus" requirement in a registration conviction can be based upon the original sexual offense. Here, the Court held the 1999 statutory rape conviction to be relevant to his "offense nexus" because Melton had absconded from its probation and not completed the ordered treatment. In any case, the Court also found an "offender nexus" existed for limitations on his contact with children due to Scollati's eval and Melton's having not completed treatment. Finally, the Court concluded that the absence of an exception allowing Melton take his kids to parks, etc. without a chaperone was not unreasonable, unduly punitive, or overbroad.

### **1,500 exclusion condition upheld**

*State v. Cook*, 2012 MT 34: The Court held that the condition prohibiting Cook from coming within 1,500 feet of kid-places did not effect an unlawful banishment. The Court thought it had a reasonable nexus to Cook and his substantial history as a sexual offender. The Court did strike a GPS monitoring condition as impossible because no such service is presently available in Montana.

### **Registration requirement cannot be modified like a general suspended sentence condition.**

*In re M.W.*, 2012 MT 44: Through a series of youth court revocations and eventual transfer to district court, M.W. received a sexual assault sentence that order him to register as a Level 1 sexual offender. After a period of doing well on probation, the district court relieved M.W. from supervision but denied his petition to be relieved from registration. The district court ruled that it lacked authority to do so at that point. M.W. appealed, and the Court affirmed. The Court explained that registration is an independent statutory requirement, not a general sentencing condition that goes away when the suspended sentence is discharged. M.W. can only be relieved of registering through the provisions of § 46-23-506(3)(b) (i.e., 10 years for a Level 1 plus law-abiding and best interests of society).

### **Sex-related conditions—except SO-level designation—upheld in burglary**

*State v. Leyva*, 2012 MT 124: Leyva was originally charged with SIWC but settled the case with a plea to burglary for remaining unlawfully with the purpose to commit a sexual assault. He had two prior sexual offense convictions. As requested by the State and the PSI, the district court imposed the full panoply of sexual offender probation conditions (MSOTA treatment, SO level designation, no parks or unsupervised contact with minors, no internet, etc.). On appeal, the Court struck the SO-level designation because the statutes make clear that such level-designation as a part of registration is allowed for a non-sexual offense if and only if it is in the plea agreement. However, the Court affirmed all of the other sex-related conditions. It rejected Leyva's argument that such conditions can only be imposed upon conviction of a sexual offense and found an offender-nexus to Leyva because although he has no history of harming children or abusing the internet, the SO eval suggested the restrictions and categorized Leyva as "morally indiscriminate, situational offender" who "looks for opportunity and vulnerability."

Justice Nelson, concurring, described the Court's review of sentencing conditions as "an exercise in futility" and called the nexus requirement a "pointless charade." He criticized DoC and district courts for using a laundry list of stock

conditions that ignore the Court's previous admonitions that "sentencing must be individualized."

#### **D. Parole restrictions**

##### **No parole restrictions on DoC sentences**

*State v. Winter*, DA 11-0429: In an Order, the Court accepted the State's concession that a district court lacks authority to imposed parole eligibility restrictions on a DoC sentence.

##### **Retribution-based parole restriction allowed; 110 years w/o parole not cruel and unusual for homicide**

*State v. Paulsrud*, 2012 MT 180: Paulsrud was convicted of deliberate homicide for shooting his girlfriend (and then unsuccessfully trying to kill himself). The district court sentenced him to 110 years without parole due the court's assessment of the horrendous nature of his offense and its effects. On appeal, Paulsrud argued (1) that the parole restriction was unlawful because the district court had not found that a parole restriction was necessary for the protection of society and (2) that the sentence was cruel and unusual. As to (1), the Court interpreted 46-12-202(2) as authorizing parole restrictions for reasons other than the protection of society and affirmed the district court's imposition of a parole restriction based upon the nature and effect of the offense. As to (2), the Court found no 8<sup>th</sup> Amendment violation because Paulsrud had not carried his burden to prove that his 110 years without parole "shocks the conscience."

##### **Failure to give parole restriction reasons not reviewable for first time on appeal**

*State v. Lewis*, 2012 MT 157: The Court refused to consider a claim that the district court failed to give adequate reasons for its parole restriction because the issue was not objected to below. The *Lenihan*-exception did not apply since the parole restriction fell within the sentences authorized by statute and, thus, was not "illegal" for *Lenihan* purposes.

#### **E. Sentencing rationales and methodology**

##### **Discussing changing sentence if defendant owns up, not punishment for maintaining innocence**

*State v. Wilson*, 2011 MT 277: "Though the District Court did discuss the possibility of changes to Wilson's sentence if he owned up to his actions, the record does not suggest the District Court punished Wilson for refusing to confess

to his crimes.” The Court based this holding upon the district court not having listed ‘refuses to confess crime’ among its formal reasons for the sentence.

### **Sentencing court must explicitly tie its lack of remorse finding to Δ’s affirmative conduct/statements**

*State v. Briscoe*, 2012 MT 152: In its sentencing reasons, the district court said Briscoe “does not appear to have any remorse for this particular offense.” On appeal, the Court noted that the district court had not linked this lack of remorse conclusion to any evidence in the record. Even though there were ugly statements in evidence from Briscoe evidencing a lack of remorse, the Court reversed and remanded for resentencing because the district court “must tie its finding of lack of remorse to actions or statements made by [the defendant] *in its pronouncement of the sentence.*”

### **Δ’s denials allowed to be used at sentencing through “treatment potential”**

*State v. Howard*, 2011 MT 246: The Court rejected a claim in a sex case that Howard’s sentence was based upon his refusal to admit the crime. The district court appropriately consider treatment potential and everyone involved made explicit statements that the defendant had a right to deny the offense and go to trial. It seems likely that the State/district court will generally be able to backdoor the use of defendants’ denials at sentencing through the SO evals and “treatment potential.” To me it is a practice worth fighting, but it may be a largely losing battle.

### **Victims properly allowed to testify to Defendant’s failure to apologize**

*State v. Dodson*, 2011 MT 302: Dodson challenged the length of sentence, arguing that the district court improperly considered testimony from the victim’s family that Dodson had failed to apologize. The Court noted that the district court itself did not mention this lack of apology in its sentencing reasons and held that the district court did not abuse its discretion in allowing the victim’s family to testify regarding the failure to apologize.

### **Discretionary sentencing decision affirmed on direct appeal**

*State v. Habets*, 2011 MT 275: Defendant had mental health problems and while drinking randomly attacked a stranger, causing significant injuries. Following some evaluations, he entered an open plea to agg assault in exchange for the State not going PFO. The district court imposed a 1-year DoC commit followed by 19 years MSP with a Nexus recommendation. DoC sent Habets to Shelby. Habets appealed on the basis that the district court failed to account for his mental illness and his attempts to obtain treatment prior to the

assault and generally did not follow Montana's statutory sentencing policies/principles. Court seemed sympathetic to "the tragic facts surrounding this case" but held that the district court did consider the sentencing principles identified by 46-18-101 and that the sentence was lawful as it was within statutory limits. (The oddity of putting a DoC commit plus MSP within a single sentence was not discussed.)

### **Sentence affirmed despite unfulfilled promise not to consider certain evidence**

*State v. Simmons*, 2011 MT 264: Simmons argued that the district court violated due process at sentencing by assuring her during the evidentiary phase of the hearing that "I'm not going to grade her based on her deportment in the jail" and then later basing its sentencing decision in part on "the Defendant's personality disorder [that] has manifested itself through negative behavior in the detention center." The Court rejected the claim, holding that because of the numerous other sentencing factors explicitly considered by the district court, Simmons failed to meet her burden on appeal of showing that the district court relied on materially false allegations in forming its sentence. The issue might be viable in a case where the topic of the unfulfilled promise not to consider formed a greater percentage of the district court's list of sentencing factors.

### **Prosecutor's arguments were inappropriate, but judge's sentence affirmed.**

*State v. Kingman*, 2011 MT 269: The Court denounced the prosecutor's statements at sentencing that the defendant did "not need to be treated with any sort of respect" and is an "animal" needing to be "caged." However, the district court here did not adopt the prosecutor's sentiments and instead articulated a number of valid reasons for imposing the maximum sentence. Improper sentencing argument does not entitle a defendant to resentencing unless it is shown to have influenced the judge.

## **3. Revocations**

### ***Stiffarm* prospective only: revocation petition could be filed before suspended sentences except between 1/26/2011 to 4/20/2011.**

*State v. Cook*, 2012 MT 34: Prior to Cook leaving MSP to start probation, the State filed a PtR alleging noncompliance with residence and SO treatment conditions. On appeal, Cook argued that under *Stiffarm*, 2011 MT 9, and the then-existing version of § 46-18-203(2), the State lacked authority to file a PtR prior to the start of probation. Holding that *Stiffarm* announced a new procedural rule (but not a "watershed" one), the Court decided that *Stiffarm* did not apply

retroactively. The Court has, thus, seemingly limited *Stiffarm* to revocations that occurred between January 26, 2011, and April 20, 2011. Nelson dissented, pointing out that this case didn't involve retroactivity at all since the statute had said the same thing recognized in *Stiffarm* since 1983.

### **Probation violations don't have to be willful**

*State v. Cook*, 2012 MT 34: The Court rejected Cook's argument that the district court erred in revoking Cook's sentence for housing violations that were not willful. The Court distinguished cases involving the failure to pay fines/restitution when unable and held that failures to make rehabilitation conditions happen can support revocation and re-incarceration regardless of involuntariness.

### **Need proof $\Delta$ held on PV to challenge PO's failure to file RoV w/i 10-days**

*State v. Evans*, 2012 MT 115: The Court acknowledged that failure to meet the requirement at 46-23-1012(4) that the PO file a report of violation within 10 days of a PO's warrantless arrest is a "jurisdictional error" that voids the proceedings. However, Court will bend over backwards to find that the defendant was not probation "arrested." Here, the district court where Evans was initially arrested set bond on the PV at \$20,000 concurrent to a \$15,000 bond on Evans's new felony assault. The Court held that this record was insufficient to show that Evans was being held on the PV because he was also being held on the new assault charge and never posted bail on that. (Ironically, the State conceded and the Court awarded time-served credit towards the PV sentence for this same period.) Counsel also failed to make a record of when the PO actually placed a PV hold on Evans with the jail. The Court also appears to hold that by later filing a PtR and then obtaining a judicial arrest warrant, the State effectively reinitiated the proceedings and cured any jurisdictional problems from the initial warrantless PO arrest process.

### **State's third-hand revocation evidence sufficient; consider confrontation objection**

*State v. Evans*, 2012 MT 115: The State's sole evidence at the revocation hearing was the PO's testimony as to what he had read in a police incident report as to what the alleged assault victim had initially told the police. (The resulting assault charges were later completely dropped when the victim recanted.) The Court held that this evidence, although it "may have been sloppy practice" by the State, was sufficient to prove a violation by a preponderance because Evans "did not object, did not testify, and did not put on any evidence of his own" (such as

testimony from the OPD investigator who had obtained the recantation) and, thus, the PO's allegation "stands uncontradicted."

The Court declined to review Evans's plain error claim that this unjustified use of third-hand testimony violated his limited confrontation right under the Due Process Clause. Consider raising such a due process objection where the State is trying to use the PO to testify to things of which the PO has no personal knowledge. The existence of such a limited confrontation right in revocations is established in *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

### **Dispositional order can maintain jurisdiction to transfer youth to adult probation after 18<sup>th</sup> birthday.**

*In re T.M.L.*, 2012 MT 9: The Youth had a dispositional order that said juvenile probation until 18 and upon turning 18, the Youth must appear for a transfer hearing to set-up adult probation. The State didn't seek a transfer to adult probation until six months after the Youth turned 18. The Youth moved to dismiss arguing the court had lost jurisdiction when the State didn't file its transfer petition before he turned 18. The Court rejected this claim because the dispositional order's "appear for a hearing" language purposefully retained jurisdiction after 18 and the Act allows for such retention until 21.

## **4. Double Jeopardy**

### **Foreperson's mid-deliberation announcement of jury's opposition to greater charges is not a "final verdict" barring retrial**

*Blueford v. Arkansas*, 132 S. Ct. 2044: Blueford was charged with capital murder and three, nested LIOs: first-degree murder, manslaughter, and negligent homicide. Arkansas is an "acquittal-first" jurisdiction, meaning that the jury is instructed that it can only consider a LIO if it has acquitted on the greater offense. The jury form told the jurors to convict of one charge or acquit on all. Blueford's jury foreperson orally announced the jury was "unanimous against" capital murder and first-degree but deadlocked on manslaughter. The jury was told to resume deliberations. Meanwhile Blueford requested and was refused a new verdict form where the jury could report acquittals on the first two counts. The jury then reported another deadlock, and the trial court declared a mistrial.

When the State sought to retry Blueford on all counts, he moved to dismiss the first two on double jeopardy grounds. However, the Court held that there was no double jeopardy bar because the foreperson's oral announcement was not a "final verdict" of acquittal on the first two charges. It was not a "final verdict"

because the jurors could have reconsidered their positions on the first two charges during the resumed deliberations.

Although Montana is not an acquittal-first state, Blueford's experience still suggests that whenever possible we want verdict forms that ask jurors to specifically find the defendant not guilty of each greater charge even if deadlocked on the LIOs. If the verdict form has "not guilty" written next to a charge that should be a "final verdict" of acquittal that bars retrial on that charge.

### **District court's own mid-trial dismissal for insufficient evidence during de novo retrial cannot be appealed.**

*City of Cut Bank v. Hall*, 2012 MT 16: Unlike in *Finley*, the district court here was conducting a de novo retrial, not appellate review of a lower court of record. At the close of the City's evidence, the district court granted a motion to dismiss for insufficient evidence and dismissed the case. The City appealed from this dismissal arguing that it had presented sufficient evidence. The Court dismissed the City's appeal with prejudice because the prosecution cannot appeal from a trial court's mid-trial finding of insufficient evidence. Such a trial dismissal is an acquittal for double jeopardy purposes (unlike the intermediate appellate court ruling in *Finley*).

### **Statutory double jeopardy requires same victim**

*State v. Fox*, 2012 MT 172: Fox was convicted in federal court of sexual exploitation of sister A and charged in state court with one count of felony sexual assault against sister A and one count of felony sexual assault against sister B. The state district court dismissed the sexual assault involving sister A pursuant to a MT double jeopardy statute (46-11-504) and *Neufeld*, 2009 MT 235, but refused to dismiss the second count. The Court affirmed, holding that even though the conduct against the two sisters was similar, there was no statutory double jeopardy bar to charging the conduct with sister B in state court because the federal conviction dealt with sister A and only sister A.

## **5. IAC and Right to Counsel**

### **IAC applies to plea negotiations**

*Missouri v. Frye*, 132 S. Ct. 1399: The prosecutor sent defense counsel an offer to plead to a misdemeanor. Defense counsel failed to convey the offer to the defendant and it expired. The case then went to trial, where the defendant was found guilty and sentence to three years in prison. On appeal, the Court held that *Strickland* two-prong IAC test applies and that it is deficient performance not to

convey a formal, favorable plea offer. To show prejudice, the defendant must demonstrate a reasonable probability that he would have accepted the offer and also that plea deal would have been accepted by the trial court.

*Lafler v. Cooper*, 132 S. Ct. 1376: Defendant was charged with an attempted homicide for shooting at a fleeing victim. The prosecutor offered a favorable plea, but defense counsel convinced the defendant to reject the offer because the prosecution would be unable to prove intent at trial due to the defendant having shot the victim below the waist. The Defendant was convicted at trial and sentenced to approximately four times more prison than called for in the rejected offer. The parties agreed that counsel's below-the-waist advice was deficient performance.

As to prejudice, the Court held the defendant must show a reasonable probability that but for the deficient advice he would have taken the offer and that the trial court would have accepted it. (The Court rejected the prosecution's argument that the subsequent trial cured any prejudice.) As to the remedy, because sentencing courts don't have to follow plea agreements, once IAC is established, the trial court then has discretion to leave the prior sentence/convictions in place or impose some lesser sentence such as that envisioned by the plea agreement.

### **No right to postconviction counsel but procedural default may be excused**

*Martinez v. Ryan*, 132 S. Ct. 1309: Federal habeas petitioner argued he had a constitutional right to effective postconviction counsel because postconviction was the first time he could raise his trial attorney's IAC. On appeal, the Court avoided this constitutional question by deciding that federal habeas courts have equitable authority to excuse the procedural default of a trial IAC claim caused by the lack of or ineffective assistance of postconviction counsel.

### **No IAC for failing to file cert petition**

*Sanchez v. State*, 2012 MT 191: Sanchez shot his girlfriend after learning of an affair. The trial was basically on mitigation. The State introduced a note from the decedent written 11 days before the shooting stating that if she turned up dead, it would be because Sanchez killed her. On direct appeal, the Court rejected Sanchez's Confrontation Clause challenge to this note, holding that the forfeiture by wrongdoing exception applied because the note's declarant was unavailable to testify due to Sanchez killing her. The Office of the Appellate Defender undertook to file a petition for cert to the U.S. Supreme Court, but then inadvertently didn't. The U.S. Supreme Court subsequently reversed a California case relied upon by the Court in rejecting Sanchez's direct appeal claim and held that the forfeiture by wrongdoing exception allows such statements only where the defendant killed the declarant *for the purpose* of preventing her from testifying.

Sanchez filed a PPCR alleging that appellate counsel was ineffective in failing to file the promised cert petition. The district court denied the petition and the Court affirmed. The Court observed that there is no federal constitutional right to appointed counsel or effective counsel regarding a cert petition and declined to say whether such a right exists under the Montana Constitution. Instead the Court held that even if there is a Montana IAC right with respect to cert petitions, Sanchez cannot prevail because he has not proven by a preponderance of the evidence that there is a reasonable probability that the U.S. Supreme Court would have granted cert. As an alternate prejudice analysis, the Court also concluded that admission of the note (even if erroneous) did not impact the trial's outcome.

Justices Cotter and Nelson, dissenting, would have held that because Sanchez had counsel, he had a right to that counsel not being ineffective. As to prejudice, the dissent believed U.S. Supreme Court would have granted cert and summarily reversed and that the thereby excluded note had a reasonable probability of impacting the jury's rejections of Sanchez's heat-of-passion mitigation argument.

### **Counsel's blunt assessment of trial risks not IAC or grounds for plea withdrawal**

*Burns v. State*, 2012 MT 100: Burns appealed from the district court's denial of his motion to withdraw his guilty plea to Sexual Abuse of Children. The motion to withdraw was based on IAC allegations that counsel had moved to change venue without Burns' approval and had coerced him to plead out by advising him that prior sexual assault allegations might come in at trial. The Court concluded that counsel had discussed the change of venue with Burns and that Burns had not shown counsel's other advice to be anything more than a blunt assessment of Burns's legal circumstances.

### **Various objection, investigation, and issue selection choices not deficient**

*Rosling v. State*, 2012 MT 179: Rosling, convicted of deliberate homicide, filed a PPCR claiming IAC by trial and appellate counsel. The district court denied the petition after an evidentiary hearing, and the Court affirmed.

Trial counsel was not deficient for not obtaining testing of a palm print found at the scene because the testing might have linked Rosling to the scene despite the client's assurances to counsel that it was not his print. Counsel's failure to object during closing to several arguably improper statements by the prosecutor was not deficient because it was a reasonable tactical decision in light of the trial court's reaction to earlier objections.

Appellate counsel was not deficient for not appealing the trial court's denial of a mistrial after the State briefly showed the jury photos of the defendant with

Nazi tattoos that had been prohibited pretrial. Appellate counsel's choice was reasonable because no copy of the photos appeared in the appellate record and because counsel raised other potentially meritorious issues instead. Appellate counsel was also not deficient for failing to make a personal presence claim regarding an in-chambers trial discussion because the record did not conclusively establish whether the defendant was present or not.

Justice Nelson wrote separately to remind postconviction petitioners that under *Whitlow*, 2008 MT 140, they need to present *evidence* as to the "prevailing professional norms" to succeed on an IAC claim, normally from an expert witness.

### **No IAC for not requesting mistrial in light of overwhelming evidence of guilt**

*State v. Miner*, 2012 MT 20: Miner was convicted of assault on an officer for punching an officer during a traffic stop. Early in the trial, the State had agreed to redact from the officer's patrol video any mention of charging Miner with DUI because that charge was never brought by the State. During the State's direct of the officers involved, however, two consecutive officers mentioned that they had been investigating Miner for DUI. Defense counsel objected and the district court and prosecutor asked the jury to disregard mention of DUI. On appeal Miner argued that defense counsel's failure to move for a mistrial as a result of these statements was IAC. The Court rejected the IAC claim, holding that Miner had not shown prejudice. Given the weight of the evidence against her (video of assault) and the cautionary instructions, Miner did not demonstrate a reasonable probability that the district court would have granted a mistrial if counsel had asked.

### **Series of IAC claims rejected**

*St. Germain v. State*, 2012 MT 86: The Court affirmed the district court's denial of a PPCR raising five IAC claims regarding trial and direct appeal counsel. The proceedings arose out of St. Germain's SIWC and incest convictions for sexually abusing his stepdaughter between the ages of 11 and 19.

Claim 1: no prejudice from trial counsel having turned over investigator's notes to the prosecution as the witnesses interviewed were on balance favorable to the defense.

Claim 2: Failure to consult with or call a medical expert regarding the stepdaughter's sexual abuse exam was not deficient because counsel used cross to establish that the physical evidence was consistent with either sexual abuse or consensual intercourse.

Claim 3: No deficiency as to other acts evidence because counsel had objected to much of it and because counsel's inadvertent introduction of negative testimony regarding St. Germain's conduct was caused by St. Germain's own failure to alert counsel that such conduct existed.

Claim 4: No deficiency in not seeking introduction of stepdaughter's prior statement that her biological father "*might* have molested her in her sleep" because the speculative statement was insufficient under the rape shield statute to establish that she'd made a prior false accusation.

Claim 5: There was no prejudice from not appealing the denial of a for-cause challenge of a juror who had strong feelings about sex offenders and who could only commit to "try" to be fair because the claim would not have succeeded on appeal due to the juror understanding the State's burden and having no bias against St. Germain in particular.

### **IAC-based PPCR denied**

*Miller v. Montana*, 2012 MT 131: In a PPCR a defendant can raise a claim that appellate counsel was IAC for not raising an IAC as to trial counsel. However, here, trial counsel was not ineffective (and, therefore, neither was appellate counsel in not briefing IAC). Specifically, the Court held: (1) prosecutor's closing argument that Miller lied was proper because it was based on inferences from the trial evidence, not personal opinion; (2) no prejudice shown from failure object to State's use of PowerPoint slides; (3) no prejudice from not specifically impeaching witness with statements of having drunk various numbers of beers because counsel did present the witness's significant intoxication; (4) contrary to Miller's claims, counsel had impeached the witnesses regarding locations, being asleep, where the car keys were, and Miller misdirecting a search for the body; and (5) no prejudice shown regarding the prosecutor's argument during consideration of a motion to dismiss for insufficient evidence.

### **IAC omission claim denied on direct appeal for lack of prejudice**

*State v. Briscoe*, 2012 MT 152: In a direct appeal, Briscoe claimed trial counsel was ineffective for did not seeking suppression of several in-custody statements. The Court assumed that counsel was deficient but then held there was no IAC because, in light of the other strong evidence of guilt in the case, Briscoe failed to establish a reasonable probability that suppression of the in-custody statements would have produced a different trial result. Interestingly, after saying that such omission IAC claims "are often ill-suited for direct appeal" review, the Court then conducted such a direct appeal review (rather than kicking the IAC claim along to PCR as usual) without any explicit explanation as to why it was deciding the claim's merits on direct appeal.

### **Imperfect does not equal deficient**

*Bomar v. State*, 2012 MT 163: In a kid sex case, Bomar's PPCR argued that trial counsel were ineffective for not presenting the district court with timely expert

testimony that would have negated the admissibility foundation for the State's abused-kid credibility expert. Trial counsel's failure to present this testimony to the district court prior to the district court admitting the State's expert's testimony resulted in the issue being waived for direct appeal. However, the Court rejected this PCR IAC claim, holding that trial counsel had tried very hard to have the State's expert's testimony excluded and their performance, if perhaps imperfect, was not deficient.

Bomar also argued trial counsel were ineffective for promising medical evidence of no penetration during opening statement and then not presenting any medical evidence during trial. The Court held there was no prejudice because the State did not present medical evidence of penetration.

### **PCR IAC claims denied on prejudice prong**

*Ariegwe v. State*, 2012 MT 166: Trial counsel in this SIWC/attempted-SIWC case was not ineffective for not objecting to expert testimony that the alleged victim's psychological condition was consistent with the alleged rape. The Court held that given the other evidence against him, Ariegwe failed establish a reasonable probability that the trial's outcome would have been different without the expert testimony.

The Court also rejected an IAC claim regarding trial counsel's failure to play a recording of the alleged victim enthusiastically recounting the alleged sexual encounter to a friend. Counsel had promised during opening statement to play the tape and later testified that he simply forgot to do so. Given the quality of the recording and its potentially inculpatory aspects, Ariegwe had not demonstrated a reasonable probability of a different trial outcome if the tape had been played.

### **No inquiry required into IAC complaints where defendant did not ask for new counsel; waiver of counsel upheld.**

*State v. Clary*, 2012 MT 26: The morning of trial Clary asked to represent himself. He gave as reasons counsel's lack of communication and preparation. The district court warned him of the dangers of representing himself. Clary said he understood and still wanted to represent himself. The district court found that he was knowingly and voluntarily waiving his right to counsel and allowed him to proceed pro se. On appeal, Clary argued that the district court erred in allowing him to go pro se without making an initial inquiry into whether his complaints about counsel were seemingly substantial. The Court held: (1) the requirement to make an adequate initial inquiry into complaints about counsel only applies if the defendant is requesting new counsel and (2) Clary's statement that he was requesting to represent himself because of his attorney's inaction does not necessarily negate an otherwise apparently valid waiver of

counsel. The Court held the district court did not abuse its discretion in allowing Clary to proceed pro se.

### **Waiver of counsel upheld**

*State v. Wilson*, 2011 MT 277: The Court upheld the voluntariness of Wilson's decision to represent himself. Despite his "at times somewhat bizarre" demeanor, the district court had before it mental health eval that he was fit to represent himself. Wilson was consistent from the beginning in wanting to represent himself and the district court repeatedly tried to convince him to accept the assistance of counsel. Whether he managed to present a competent defense at trial is irrelevant to the waiver decision.

## **6. Trial Rights and Procedures**

### **A. Confrontation**

#### **Confrontation Clause and expert testimony as to secondhand data relied upon by the expert**

*Williams v. Illinois*, 132 S. Ct. 2221: In a rape trial the crime lab witness testified that the state lab sent evidence to an accredited private lab that sent them back a DNA profile that the witness then matched to the defendant's DNA. The defendant objected on confrontation grounds as he was not able to cross anyone from the outside tech that actually analyzed the sample. The Supreme Court affirmed admission of the outside DNA profile relied upon by the State expert in a 4-1-4 decision. The plurality said the data was not offered for its truth and/or was not testimonial because it was not directed at any particular defendant. But in counting votes for different aspects of this fractured decision I came up with the following:

(1) all agree that there is no confrontation problem with an expert testifying to an explicitly hypothetical statement that "if A is true, then in my opinion B is true";

(2) five votes say that the facts relied upon by an expert for his opinion are subject to the Confrontation Clause *if* the expert obtained those facts through someone else's "testimonial" statement;

(3) *Williams* provides no majority definition of the outer limits of testimonial statements;

(4) five votes say that lab reports are not inherently non-testimonial statements;

(5) five votes say that a statement that has the primary purpose of establishing past events for a future prosecution AND that has the “formality and solemnity” of a “certified” report or formal police interview is somewhere within the definition of testimonial statement. (The defendant lost here because one vote said under this last bit that the outside lab’s DNA result was too informal to be a testimonial statement.)

If I had a trial where a State expert was relying upon a lab report as part of the basis for his opinion (say an autopsy opinion that relied in part on a tox screen from the crime lab), I would (a) get the report, letter, or statement used by the expert into the record for appeal purposes, (b) argue that the report, letter, or whatever was a formal, certified report affirmatively vouching for the given result, and (c) argue that even if the report, letter, or whatever was informal, it met the recounting-past-events-for-trial definition of testimonial from pre-*Williams* cases (and argue that because there was no majority opinion in *Williams*, the decision did not actually alter the Confrontation Clause landscape).

## **B. Court and charge setup**

**Trial in front of substitute JP voided: particular substitute did not meet statutory requirements; question of when a substitute may be used left open**

*Blodgett v. Missoula Justice Court*, 2012 MT 134: Defendant filed a petition for supervisory control challenging the justice of the peace’s practice of calling in a substitute judge to preside over the second trial when she has two jury trials set for the same day. Blodgett was found guilty at a trial presided over by retired district court judge Harkin purporting to act as a substituted JP.

The Court noted that the argument about when a substitution JP can be called in comes down to whether the JP being “absent” under 3-10-231(3) means the broader unable to act because in another trial or the narrower physically outside of the courthouse. The Court seemed to hint that it favored the latter, narrower interpretation, but did not decide the issue as to *when* a substituted can be used.

Instead the Court focused on *who* can be a substituted and held that Judge Harkin had not met the requirements to be a substitute JP under 3-10-231(2). Court held that the JP had not established that Judge Harkin was named on the statutorily required list of substitutes nor that the JP had obtained the statutorily required training waiver for Judge Harkin from the Commission on Court of Limited Jurisdiction (which amusingly Judge Harkin was a member of prior to his retirement) nor that Judge Harkin had signed the required written oath after receiving the training waiver nor that proof of these three things had been filed with the county clerk as required. The Court also faults the JP for not trying to call

in a city judge before moving to the general substitute list. The Court voided Blodgett's trial.

### **Joinder grant and severance denial affirmed.**

*State v. Kirk*, 2011 MT 314: The Court held that three burglary charges (one at Hooters, one at a tanning salon, and one at a home) and a drug charge (pills stolen from Hooters) were all properly joined. The Court accepted that the string of burglaries were part of a common scheme and would require duplicative appearance by several witnesses. The Court also held that the district court did not abuse its discretion in determining that it was not necessary to sever the counts in order to prevent unfair prejudice. Observing that a defendant's burden to win severance is "substantial," the Court held that "while Kirk may have faced some prejudice as a result of the joint trial, he did not prove that the prejudice was so great that it prevented a fair trial." As a small sunny-side to Montana's bleak severance law, the Court did say that if a defendant wishes to testify as to one count and not the others, the State's cross must be limited to the count addressed in his direct testimony.

### **Clarified test for a presumed prejudice change of venue motion**

*State v. Kingman*, 2011 MT 269: A change of venue motion can be based either upon a presumed or an actual prejudice theory. Actual prejudice requires showing "through voir dire or other means that the jury pool harbors actual partiality or hostility against the defendant that cannot be laid aside."

Presumed prejudice requires showing that "an irrepressibly hostile attitude pervades the jury pool or that the complained-of publicity has effectively displaced the judicial process." Presumed prejudice overrides jurors' voir dire claims of impartiality. Factors for determining presumed prejudice include the size of the community, community sentiment, the inflammatory nature of the publicity, the amount of time between the offense and the trial, and of "prime significance" whether jurors ended up acquitting the defendant of some charges. Presumed prejudice applies only in "extreme circumstances" ("a circus atmosphere or lynch mob mentality"). The Court found that the defendant's presumed prejudice claim here "does not even come close to meeting the high standard necessary to establish such prejudice."

Two side notes: (1) change of venue motions must be renewed as new events generate new impartiality concerns—events after your motion will not be considered on appeal; and (2) if you are doing a jury pool survey, ask not just whether an opinion has been formed but also what that opinion is and whether it could be set aside.

### **C. Discovery and *Brady***

#### **Failure to disclose eyewitness's contradictory statements was a *Brady* violation.**

*Smith v. Cain*, 132 S. Ct. 627: The Court found a *Brady* violation in a murder case where prosecutors had not disclosed evidence that their sole eyewitness could not initially identify the defendant and had otherwise contradicted his later trial testimony. Although impeachment evidence does not always create the requisite “reasonable probability” of a different outcome for a *Brady* violation, here where the eye witness was the only evidence connecting the defendant to the crime, the undisclosed statements contradicting the witness’s trial testimony were plainly material.

#### ***Brady* claim can be raised for the first time during appeal to district court**

*State v. Ellison*, 2012 MT 50: Ellison tried to raise a *Brady* claim for the first time on appeal to district court from justice court. The district court ruled that it lacked jurisdiction to consider the claim because the alleged *Brady* material was not in the justice court record. On appeal to the Supreme Court, the Court held that the district court’s ruling was error because the district court should have either considered the claim under 46-20-701(2)(b) (the statutory plain error provision for when the State suppresses evidence) or sent the case back down for the justice court to hold a hearing regarding the alleged *Brady* violation.

However, the Court then addressed the merits of the *Brady* claim and found no violation both because the information was known to the defendant prior to trial (in part because it was produced to the other defense counsel in a different case) and because the evidence would not have produced a different trial outcome in light of other similar evidence at trial and the “ample evidence” of guilt.

#### **Discovery attempt to get Intoxilyzer “source code”**

*State v. Peters*, 2011 MT 274: DUI defendant sought production from the State of the “source code” used by the Intoxilyzer 8000. The State responded that they don’t have it—only the private Intoxilyzer company does. The MT judge issued a “Certificate of Judge Requesting Out-of-State Witness” commanding the Kentucky company’s president to appear and produce the source code. A judge in Kentucky found the MT Certificate defective and ruled the source code is a trade secret. The company, however, offered to produce the source code at its Kentucky office subject to a pretty serious confidentiality protective order/agreement (for example, an expert who loads the source code onto her computer at the office must destroy her computer’s hard drive before leaving).

The MT district court found the requirement to sign the agreement reasonable and gave full faith and credit to the Kentucky court's determination that the source code was protecting information. On appeal, the Court affirmed both giving full faith and credit to the Kentucky decision and the district court's ruling that requiring the defendant to sign the confidentiality agreement was not an "undue hardship" under our discovery statute. The Court declined to consider due process and confrontation claims since it held that the company was making the source code reasonably available.

### **Crime lab subpoena quashed as "unreasonably voluminous"**

*State v. Peters*, 2011 MT 274: The district court quashed much of a defense subpoena to the MT crime lab seeking Intoxilyzer 8000 information. The district court did require the crime lab to produce operating/training manuals, the particular machine's procurement contract, and inspection and training certifications. The Court affirmed the district court's determination that the rest of the subpoena was "unreasonably voluminous." (The Court noted, but did not rule upon, the district court's alternate rationale that only the court, not defense counsel, can issue subpoenas duces tecum in criminal cases.)

## **D. Prosecutorial misconduct**

### **Prosecutor's jury arguments not reversible error.**

*City of Billings v. Staebler*, 2011 MT 254: The Court affirmed the district court's denial of an appeal from a muni court DUI trial. The appeal to district court raised plain error and IAC claims regarding the prosecutor's comments. During voir dire, the prosecutor responded to a juror's reference to "levels of intoxication" by mentioning news articles about DUIs in which somebody gets killed but then did comment on "the other extreme" of the spectrum as well. During closing argument, the prosecutor referred to the impaired defendant not being able to be aware of a child crossing the street. The defendant's particular offense did not involve a child or a wreck.

The district court held the comments were unfairly prejudicial (triggering plain error review) and that trial counsel was deficient for not objecting but then affirmed the conviction because of a lack of IAC-prejudice due to the overwhelming evidence of guilt. The district court appears to have conflated its IAC and plain error analyses.

Without addressing the district court's analysis, the Court affirmed the district court as right for the wrong reasons because neither comment was reversible error. The voir dire statement was merely a discussion of the different levels of intoxication. The might-hit-a-kid closing was seemingly within the

latitude afforded during closing argument and did not mislead jurors into believing that this case involved a child. Additionally, the Court noted there was overwhelming evidence of guilty.

### **Prosecutor's arguments based on interpretations of evidence not improper**

*State v. Branham*, 2012 MT 1: The Court rejected a claim that in closing argument the prosecutor misstated the evidence regarding the knife used in the homicide. The Court noted that “a prosecutor is ‘entitled to some latitude in his argument’ about credibility and about the evidence” and held that the prosecutor’s arguments were based upon a reasonable interpretation of the trial evidence. The Court also rejected an improper personal opinion claim arising out of the prosecutor’s statement that the defendant was telling the jury things that aren’t true. The Court held this was a proper argument based on evidence admitted at trial.

### **Prosecutor's ‘by God, he’s guilty’ comments troubling**

*State v. Lacey*, 2012 MT 52: The Court was not pleased with the prosecutor’s un-objected-to closing argument that the jury should “go back there and find [Lacey] guilty because, by God, he is.” The Court was troubled by the implication that either the prosecutor had access to info the jury did not or that the jury should accept her assertion based on her swearing to a divine authority. However, the comments did not stray so far from permissible as to warrant plain error review.

### **Prosecutor's argument did not require reversal because jury presumed to follow judge's instructions**

*State v. Labbe*, 2012 MT 76: The district court gave the normal “would rely upon it in ones most important affairs” definition of beyond a reasonable doubt. During closing argument, the prosecutor gave caring for one’s children as an example of one’s most important affairs and then told jurors that another way to look at beyond reasonable doubt in the case was whether jurors would hire the defendant to babysit their kids. Without exactly saying whether this was improper, the Court affirmed the conviction because the defendant had not rebutted the presumption that jurors follow instructions and take the law from the court only.

## **E. Substitution of district court judges**

**Deadline for requesting substitution of judge in youth court case runs from when youth appears in court to answer charging petition**

*D.H., J.H., and Bledsoe v. Fourth Jud. Dist. Ct.*, 2012 MT 106: Judge Larson in Missoula had ruled that the ten days in which to file a motion to substitute him pursuant to 3-1-804 ran from the youths' detention hearings even though no petition charging the youths to be delinquent had yet been filed. The Court reversed and held that the ten-days runs not from the detention/probable cause hearing but rather from when the youth appears in court to answer the allegations in a charging petition pursuant to 41-5-1403.

### **Substitution deadline in DNs runs from show cause hearing**

*A.C. v. Tenth Jud. Dist. Ct.*, 2012 MT 110: Analogizing to its youth court decision in *D.H.*, the Court held in this companion writ that for DNs the "initial appearance" that starts the 10-day substitution clock is the show cause hearing under 41-3-432(4) at which the parent first appears in court to answer the DN petition's allegations. The Court reversed the district court's ruling that counsel's notice of appearance started the clock.

### **But defendants appealing from a lower court to district court are not entitled to substitution except in a de novo retrial appeal.**

*D.H., J.H., and Bledsoe v. Fourth Jud. Dist. Ct.*, 2012 MT 106: The defendant lost a pre-trial suppression issue in a non-record justice court, entered a conditional plea preserving that issue, and then filed a notice in justice court appealing the preserved issue to district court. In district court Judge Larson ruled that the 10 days in which to substitute him ran from the date that the clerk of justice court delivered the appeal file to the clerk of district court even though the defendant had not yet appeared in district court.

The Court affirmed on the alternate basis that the appealing defendant had no right of substitution at all. Because 3-1-804 speaks of trial-type things such as "summons" and an "initial appearance," the Court interpreted 3-1-804 as having no application to appeals from lower courts where the district court is sitting as an appellate court (i.e. preserved issue appeals from non-record lower courts and all appeals from lower courts of record). Interestingly, the Court expressly invited future litigants to raise and brief the issue of "whether to broaden the statute to include a right of substitution of a district judge on an appeal from a justice court of record."

### **Later recusal mooted defendant's petition regarding judge's denial of substitution**

*Franks v. 11<sup>th</sup> Judicial District Court*, OP 12-0517: The State charged Franks in district court. A district court judge was immediately assigned, but then Franks was brought before a Justice of the Peace for his initial appearance. He did

not appear before the district court judge until a couple of weeks later at arraignment. Franks moved to substitute the district court judge on the day of his arraignment, but the district court ruled that the substitution clock began running when Franks made his initial appearance before the JP and denied the motion as untimely. A year passed and then Franks filed a motion for reconsideration citing two new decisions (2012 MT 106 & 110). The district court denied that. With 13 days before trial, Franks petitioned the Court for supervisory control, asking that the district court judge be substituted and that all actions by that judge be set aside going back to arraignment.

The Court ordered an expedited response or stay of the trial. The district court judge responded by recusing himself and inviting in a new judge, and the State then asked the Court to dismiss the petition as moot. The State argued that it was unnecessary to wind the case back to day one because everything the now-substituted judge had done in the preceding year was merely procedural (there were no suppression motions, etc.) and he retained jurisdiction under the substitution rule to take such procedural actions. The Court, without analysis, dismissed the petition as moot, allowing the trial to proceed with the new judge.

## **F. Presence and notice**

### **A basic, scheduling omni is not a critical stage at which a defendant must be personally present.**

*State v. Clary*, 2012 MT 26: The in-custody defendant was not transported for his omni hearing. He subsequently claimed a violation of his right to be personally present at all critical stages of the proceedings against him. Because the omni, as conducted here, was a scheduling hearing that did not create the potential for substantial prejudice, the Court held it was not a critical stage. Of note, (1) the omni here was basically just turning in an omni form and (2) defense counsel made no concessions to the defendant's detriment. It is still conceivable that a more active, in-court omni hearing at which defense counsel permanently waived something like a self-defense claim might be a critical stage.

### **Waiver of jury trial upheld for non-appearance at final pretrial conference**

*State v. Trier*, 2012 MT 99: The Court upheld a waiver of jury trial imposed by a justice court when the defendant failed to appear at the final pretrial conferences due to a calendaring mistake by defense counsel. The justice court had repeatedly warned the defendant that such failure would waive his jury trial.

The Court's opinion rests entirely upon the Montana Constitution. I encourage anyone facing such a jury waiver issue to consider U.S. constitutional arguments.

### **Appeal dismissed as moot due to defendant's death**

*State v. Benn*, 2012 MT 33: The Court reversed its prior decision in *Holland*, 1998 MT 67, and held that a defendant's death during direct appeal does not result in the *ab initio* abatement of the underlying charges and proceedings. Rather the underlying conviction is presumed valid, and the direct appeal will be dismissed as moot unless the deceased defendant's personal representative demonstrates that some issue (such as restitution) has not been mooted by the defendant's death. An appeal will not be allowed to continue merely to vindicate the defendant's reputation and innocence.

### **Lack of notice in charging documents defeated by actual notice**

*State v. Hocter*, 2011 MT 251: Hocter argued that the State's charging documents failed to give her notice in a criminal endangerment case that charge was based on her failure to seek aid for her boyfriend's child rather than on allegations that she herself handled the child roughly. The Court rejected this claim without addressing the charging documents by holding that the record (mainly an aborted change of plea colloquy) showed Hocter had actual notice of the facts as to both potential theories.

### **No surprise where additional trial theory is in PC affidavit**

*State v. Lacey*, 2012 MT 52: The Information charged Lacey with SIWC based on the victim being incapable of consent due to being asleep. However, at trial the State argued and got an instruction as to either being asleep *or* intoxicated. The Court found no surprise or error regarding the intoxication theory because the affidavit of probable cause included multiple references to the victim's extreme intoxication.

### **Staff misplacing documents not good cause for missing deadline**

*BNSF v. Cringle*, 2012 MT 143: This is a civil case that I include as a cautionary tale because of the Court's consideration of "good cause" for missing a statutory filing deadline here. The Court *reversed* the district court and held that a legal secretary setting aside the deadline-triggering documents on a particularly busy day and then not noticing them again until after the 14-day deadline *was not* good cause for excusing the missed deadline.

## **7. Writs and Collateral Review Mechanisms**

### **A. Collateral attacks on prior DUIs**

## **South Dakota “suspended imposition of sentence” not a “conviction” for MT DUI purposes**

*State v. Cleary*, 2012 MT 113: In a felony DUI case, Cleary challenged whether a DUI out of South Dakota was a “prior conviction” within the meaning of MT’s statutes. Cleary had pled to what South Dakota calls a “suspended imposition of sentence” in which the court “does not enter a judgment of guilt but exercises its judicial clemency . . . and suspends the imposition of sentence.” After a six-month suspension period, the charge was dismissed and expunged. A separate South Dakota habitual offender statute says that a charge dismissed in this manner shall be considered a prior conviction “for the sole purposes of consideration of the sentence of a defendant for subsequent offenses.”

Relying on this second statute, the MT district court ruled that the South Dakota case counted as prior conviction in Montana. The Court reversed. The Court said South Dakota’s “suspended imposition of sentence” procedure has “no similar counterpart in Montana law” and cannot be equated to a conviction under Montana law. The Court’s analysis is not entirely transparent to me, but what we know is that “a suspended imposition of sentence followed by a statutorily-authorized vacation of sentence and a complete expungement of the judgment from the record” is not a “conviction” in Montana. The Court makes no mention of Montana’s deferred imposition of sentence process. Two justices agreed with the district court’s analysis and dissented.

## **Prima facie showing of unconstitutionality is required to get evidentiary hearing for collateral attack on prior DUI conviction.**

*State v. Chesterfield*, 2011 MT 256: Another reiteration of the new rule from *Maine* that in a collateral attack on a prior DUI conviction both the burdens of production and persuasion are on the defendant who must produce affirmative evidence that his prior conviction was invalid. Here, the defendant alleged that he did not have counsel but failed to allege evidence that he did not make a knowing and voluntary waiver of that right. The district court did not error in denying Chesterfield an evidentiary hearing because Chesterfield’s affidavits and allegations failed to make a prima facie showing that his prior convictions were invalid. Again, silence is not enough. Chesterfield would have had to affirmatively allege and prove that his waiver of counsel was involuntary.

## **Counsel withdrew on day of in absentia trial; resulting conviction invalid**

*State v. Hass*, 2011 MT 296: Hass challenged the validity of one the prior DUIs being used to make his current offense a felony. After the district court

denied this motion, Hass pled out reserving his right to appeal the denial. The Court reversed and invalidated the prior conviction.

The challenged conviction occurred as a result of an in absentia trial during which Hass was not represented by counsel because his court appointed attorney withdrew on the day of trial. The attorney gave as reasons for withdrawing insufficient client contact and the lack of a viable defense. The Court rejected these as legitimate grounds for depriving Hass of his constitutional right to counsel. Proof that Hass was appointed counsel but was not represented by that counsel at trial was affirmative evidence of the resulting convictions invalidity under the recent *Maine/Chaussee* line of cases.

*Conditional plea oddity:* As a remedy the Court returned Hass's case to district court for resentencing as a misdemeanor but refused to allow Hass to withdraw his guilty plea. Although the statute does not appear to have been raised by the parties and was not discussed by the Court, this remedy may contradict MCA 46-12-204(3). With respect to guilty pleas in which the defendant has reserved a pretrial issue for appeal, 46-12-204(3) provides, "If the defendant prevails on appeal, the defendant must be allowed to withdraw the plea."

## **B. Writ mechanisms**

### **Review of district court's denial of a habeas petition is by filing a new habeas petition in MT Supreme Court, not by appeal.**

*Thomas v. Doe*, 2011 MT 283: A district court's denial of habeas petition cannot be appealed to the Montana Supreme Court; however, you can file a new habeas petition in the Supreme Court as an original proceeding. The Court states that it will no longer treat habeas appeals as new petitions. It will dismiss such appeals without consideration of their merits.

### **Supervisory control re: Sentence Review Division**

*Flagen/Drugan v. SRD*, OP 12-0020: Petitioners sought supervisory control relating to SRD's increase of their sentences. Petitioners argued SRD improperly considered matters ("victim impact") outside of the existing sentencing record and used improper or un-specified sentencing rationale. The Court reviewed the SRD proceedings and disagreed. Although this particular petition was unsuccessful, it does appear that a petition for supervisory control is the proper mechanism for challenging SRD actions.

### **Supervisory control is only for purely legal questions.**

*State v. First Jud. Dist. Ct.*, OP 12-0044: The district court dismissed an assault on an officer charge due to the State's destruction of trajectory evidence.

(The police had removed a car window and lanyard hanging from the mirror—both of which had bullet holes—before the defense could conduct its own tests. Expert testimony established that the window and lanyard could not be reinstalled in their precise previous locations.) The State petitioned the Court to reverse the dismissal through a writ of supervisory control. The Court declined, ruling that the district court judge’s “discretionary decision based on the factual evidence before him” was not a purely legal issue and was not, therefore, appropriate for supervisory control.

### **C. Postconviction relief**

#### **Remember to get the underlying file/transcripts into the PCR record.**

*Plebst v. State*, DA 11-0516, Order of December 20, 2011: Plebst is an apparently somewhat difficult pro se litigant. In his appeal from the district court’s denial of his PPCR, he has repeatedly asked the Court for copies of both the PCR file and the underlying criminal case file. The Court actually ordered copies for him of the PCR file (“to extend every courtesy we can to Plebst”) but did not give him copies of the underlying criminal case file or its transcripts because those were not made part of the record on appeal. The Order is, thus, a warning for anyone doing postconviction work that if you want to in any way refer to or rely upon the underlying criminal case’s transcripts or documents, you must put those things before the district court within the separate postconviction proceeding. They are not automatically part of the record.

#### **IAC PPCR denied based on affidavits**

*Sartain v. State*, 2012 MT 164: Sartain filed a PPCR alleging a pro se laundry-list of IAC by both trial and appellate counsel. The district court dismissed Sartain’s PPCR without a hearing. The Court affirmed, rejecting most of the IAC claims as reasonable tactical choices and the rest as not having been shown to be prejudicial.

The opinion is interesting for its heavy reliance upon attorney affidavits during PCR. No evidentiary hearing was ever held, but the Court described the attorneys as having “testified by affidavit in the postconviction proceeding.” Through use of these affidavits the State was able to defeat Sartain’s factual allegations without the district court allowing Sartain an evidentiary hearing.

## **8. Miranda**

**Private questioning of prison inmate about non-prison events is not necessarily *Miranda* “custody.”**

*Howes v. Fields*, 132 S. Ct. 1181: In the context habeas petition, the U.S. Supreme Court held that there was no clearly established rule that a prison inmate is entitled to *Miranda* warnings whenever he is moved into isolation from the general population and questioned regarding conduct occurring outside of the prison. The Majority then went further and held that imprisonment + questioning in private + question about events outside of the prison are not necessarily enough to create *Miranda* “custody.” Here, because the inmate was told he could be escorted back to his cell whenever he wanted, there was no custody.

**No anticipatory *Miranda* invocations; cops can say ‘cut a deal before our other suspect does’; no “two-step interrogation technique” violation where first interview didn’t produce confession**

*Bobby v. Dixon*, 132 S. Ct. 26: In the context of denying a habeas petition regarding a state murder conviction, the Court held that admission of Dixon’s confession was consistent with the Court’s *Miranda* and Fifth Amendment precedent. Specifically, the Court indicated that (1) Dixon’s pre-custody *Miranda* invocation was not effective as to a subsequent custodial interrogation five days later; (2) the “common police tactic” of warning a suspect to “cut a deal” before his accomplice does so is not unconstitutional; and (3) even though police intentionally violated *Miranda* with respect to an initial custodial interrogation, *Miranda* warnings during a second custodial interrogation later that day are not ineffective so long as no actual compulsion was used and the first interview did not produce a confession that was used against the suspect during the second interview. Because Dixon did not confess to the murder during the first unwarned interview, the effectiveness of the second interview’s warnings was not impaired by the sort of “two-step interrogation technique” previously condemned in *Seibert*.

***Miranda* does not apply to investigatory stop where Δ voluntarily exits home.**

*State v. Peters*, 2011 MT 274: The Court affirmed the denial of Peters’s seizure and *Miranda* claims. Police got a DUI report from a named citizen (giving them particularized suspicion), but they didn’t locate Peters until he was already in his house. The officer knocked but did not enter the house and “told Peters she needed to speak with him.” The Court characterized this interaction as Peters “was not commanded” to come out of his house but rather did so voluntarily. He was, thus, not yet in custody for *Miranda* purposes when questioned outside.

**Man meeting cops in his driveway not in *Miranda* custody**

*State v. Labbe*, 2012 MT 76: Elderly brother and sister got in a fight and sister called cops. When the cops show up, brother goes out to talk with them in the driveway and says inculpatory things about slapping sister. Brother was arrested at the end of the conversation. The Court rejected a *Miranda* claim, holding that brother was not in custody primarily because he initiated contact with the officers and they did not use badgering, threatening language.

## **9. Search and Seizure**

### **A. Searches**

#### **No 4<sup>th</sup> problem with strip searching jail inmates**

*Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510: Florence filed a federal 1983 action against two county jails where he was held and strip searched during a six-day confinement after being arrested on a warrant for failing to pay a fine (which he had in fact paid). The Court held at least where the person is being put into the general jail population, such visual strip searches do not require reasonable suspicion. This is true even for folks arrested on the most minor of offenses. However, the Court left open the reasonableness of strip searches that involve touching and of visual strip searches where the arrestee is only being held briefly and is not being put into general population.

#### **Attaching a GPS to a car and using it to monitor movement is a “search.”**

*United States v. Jones*, 132 S. Ct. 945: The Court held that attaching a GPS device to the underside of a car and then using it for four weeks to monitor the car’s movements is a “search.” The Government argued that the defendant had no reasonable expectation of privacy in the car’s underbody or in its location on public roads. The Court declined to address these contentions, holding instead that placing the GPS was a trespass to gather information and, thus, a “search” within the original meaning of the Fourth Amendment. *Katz*’s reasonable-expectation-of-privacy test did not diminish the traditional trespass-based test and is not the exclusive test for Fourth Amendment searches. Nor, however, is every trespass a search. To be a trespass search the trespass must be an attempt to gather information and must be made to a house, paper, or effect. The Court distinguished prior cases where it had held that no violation occurs when the Government puts a tracking device in a container with owner-consent prior to the container coming into the defendant’s possession.

Given the posture of the case, the Court did not address whether attaching the GPS device without a warrant was an unreasonable search, only that it was a search.

Four members concurring in judgment would have held the long-term GPS monitoring in this case to be a search under the reasonable-expectation-of-privacy test.

### **Community caretaker search of purse during medical emergency**

*State v. Anders*, 2012 MT 62: EMTs and police respond to a report of a woman unconscious and face down on the floor of a video store. Because the woman was non-responsive, an EMT asks an officer to look in the woman's purse to see whether there was any medical info or indication of what she might have taken in the purse. The EMT testified that such knowledge would have been useful to determining how to treat the woman. The officer found what appears to be meth. While the woman was being transported to the hospital, the officer does a field test on the suspected drug and confirms it as meth. He called the hospital to report the test, but by then the woman had regained consciousness and left. The woman ends up getting charged with felony possession and moved to suppress the purse search. The Court held that these circumstances justified the officer's warrantless intrusion into the woman's purse under the community caretaker doctrine.

### **Search of diary arguably lacked probable cause but was plain view.**

*State v. Covington*, 2012 MT 31: Investigating the robbery, police obtained a search warrant for Covington's residence to look for certain pawn receipts, stamps, and diaries of criminal activity. The warrant application's basis for the diary search was an officer's stated experience that people sometimes keep written records of their criminal activity. During the resulting search, the police looked in several notebooks and found incriminating statements as to several homicides. Covington moved to suppress, arguing that the officer's people-sometimes-keep-diaries-of-their-criminal-deeds statement did not establish probable cause to justify search of the notebooks. Although not making a holding on the issue, the Court acknowledged that "the officers may have lacked probable cause . . . to search the writings contained within the notebooks." However, that problem was not controlling because search of the notebooks/binders was justified to look for the stamps and pawn receipts. What the officers saw in the notebooks while looking for the stamps and pawn receipts was justified as a plain view search.

## **B. Stops and seizures**

### **Driving on the centerline = particularized suspicion**

*State v. Cameron*, 2011 MT 276: The Court affirmed particularized suspicion where around bar closing time an officer observed a vehicle drive on the centerline four times in the space of five miles. It remains an open question whether driving on the centerline is itself a traffic offense, but this is the second case to hold that it establishes particularized suspicion of impaired driving (at least during drinking hours).

### **Stop for U-turn upheld**

*State v. LeMay*, 2011 MT 323: The officer observed LeMay “on his motorcycle in the northbound lane of Ellery Avenue drive across the double-yellow center line then turn left into the southbound lane.” Even accepting LeMay’s explanation that his bike had been parked at the curb—not driving north—prior to pulling out and making the turn, the Court held that travelling through the double yellow lines to make the turn “by itself was an unusual turn or movement sufficient to establish particularized suspicion.”

### **911 DUI stop upheld despite passage of time and arguable inconsistency**

*State v. Gill*, 2012 MT 36: The Court upheld particularized suspicion where 911-caller reported a drunk driver hitting the median on I-90. Fifty minutes later, an officer located an undamaged vehicle matching the caller’s description at a gas station in the same area. The Court rejected Gill’s arguments that the passage of fifty minutes and lack of any damage to the vehicle defeated particularized suspicion. The Court ruled that fifty minutes did not render the report stale and that because the 911-caller did not say that the vehicle was damaged when it hit median barrier, the lack of damage on the vehicle located by the officer did not rule out the later vehicle.

### **Revisions to the rules governing arrests by out-of-jurisdiction peace officers**

*State v. Updegraff*, 2011 MT 321: An out-of-jurisdiction officer may only make an arrest (unless otherwise authorized by statute) if the circumstances would authorize a private person to make an arrest. That is to say, an out-of-jurisdiction officer needs probable cause and circumstance requiring immediate arrest to make an arrest. However, the Court held (clarifying prior decisions) that once probable cause and the need for immediate arrest exist, then the officer may follow procedures applicable to peace officer in processing the arrest and the officer’s conduct will be judged under the statutory and constitutional rules applicable to peace officers.

This clarification dumps the “dubious fiction” that such an out-of-jurisdiction officer is acting as a private citizen. The effect is that out-of-jurisdiction officers no longer have to comply with 46-6-502(2)’s requirement that a private person making an arrest must immediately notify the nearest available law enforcement agency and give custody of the arrestee to that agency. The Court also held that out-of-jurisdiction officers can rely on the community caretaker doctrine to the same degree that an in-jurisdiction officer could.

### **Probable cause of DUI justifies warrantless arrest.**

*Muller v. State*, 2012 MT 66: In the context of a driver’s license reinstatement challenge, Muller argued that he was subjected to an unlawful warrantless arrest because the “existing circumstances” did not “require immediate arrest” under 46-6-311(1). Police, responding to a citizen complaint, had found Muller out of his vehicle and staggering towards his home’s door. The Court held that the probable cause to believe that Muller had been DUI “by itself posed a concern for public safety,” which in turn established “existing circumstances” sufficient to justify a warrantless arrest under the statute. The Court rejected equating the statutory term “existing circumstances” with the constitutional term “exigent circumstances.” The holding also implicitly indicated that exigent circumstance are not constitutionally required to make a warrantless arrest outside of a home.

## **10. Evidentiary Issues**

### **A. Statements and hearsay**

#### **District court reversed for denying admission of other suspect’s confession to third party**

*State v. Wing*, 2012 MT 176: Cops come upon two drunk guys (Wing and Halverson) broke-down on the side of the road. When they arrest Wing for DUI he begins protesting that he had not been driving. Halverson also tells the cops that Wing was not driving but does not admit to driving himself. Wing was in the driver area when the cops arrived, but they found the keys in the passenger area where Halverson was sitting. At trial, Wing calls Halverson as a witness, but Halverson invokes his Fifth Amendment rights and refuses to testify. Pursuant to Rule 804(b)(3) (statement against interest), Wing sought to introduce testimony from his mother that Halverson had admitted to her that Halverson had been driving. The district court sustained the State’s hearsay objections.

The Court reversed in an unanimous, en banc opinion. Admission of a statement against interest offered to exculpate a criminal defendant requires three elements: (1) the declarant must be unavailable; (2) the statement must subject the declarant to such liability that a reasonable person would not have made the statement unless he believed it to be true; and (3) the statement must be corroborated by circumstances clearly indicating its trustworthiness. Here, (1) was met when Halverson took the Fifth; (2) was met because Halverson's statement that he had been the drunk driver was a confession exposing him to significant criminal liability; and (3) was met because there was other evidence in the case that, although not conclusively establish that Halverson was the driver, corroborated his alleged confession. The Court seems to suggest that when a statement against interest goes to the core issue on trial, judges should lean towards admitting it and allowing the jury to decide its evidentiary weight.

**Hearsay does not apply during judge's preliminary Intoxilyzer admissibility determination.**

*State v. Jenkins*, 2011 MT 287: To introduce an Intoxilyzer BAC result, the State must lay a foundation that the particular Intoxilyzer has been maintained/tested in accordance with the ARMs. During this admissibility determination, the judge can use hearsay evidence (the certification documents) because Rule 104(4) states that the judge is not bound by the rules of evidence in making such admissibility determinations. The Court overruled *White*, 2009 MT 26, to the degree it implied otherwise. However, I would suggest that *White's* hearsay holding remains valid where the State is trying to admit the certification documents as stand-alone, substantive evidence to be considered by the jury.

**Child witness competent; inconsistent statement may include consistent portions of statement.**

*State v. Howard*, 2011 MT 246: The Court rejected several failure-to-object IAC claims. In that context, it held (1) that despite inconsistencies in her prior statement, a child witness was competent because she knew the difference between truth and falsity; and (2) that a recorded interview was properly admitted as an inconsistent statement (despite also including consistent statements).

**B. Character and past acts evidence**

**Defendant's knowledge and reliance required for admission of alleged victim's violent character.**

*State v. Daniels*, 2011 MT 278: The Court held that violent character evidence regarding the alleged victim only becomes relevant once the defendant

establishes that he knew about the victim's violent past and that he relied upon that knowledge in choosing his level of force. This seemingly requires testimony from the defendant as to his thinking at the time. However, the Court declined to consider a claim that this requirement to testify violates the 5<sup>th</sup> Amendment because no such objection was made below.

During defense cross, a State witness gave a reputation opinion that the victim was "a fighter." The defense was denied permission to follow-up on this as to specific instances. The Court affirmed and held that Rule 405(a) only allows cross as to specific instances by the party who is adverse to the witness's character reputation/opinion testimony.

### **Victim's prior violence must be known to defendant**

*State v. Branham*, 2012 MT 1: The Court again affirmed its limitation that prior violent acts of the deceased in a self-defense homicide are only relevant and admissible if they were known to the defendant at the time of the homicide. The Court clarified that the identity of the aggressor is not an essential element of a justifiable use of force defense (although it may be relevant to the reasonableness of a defendant's belief that force was necessary).

### **Evidence of victim's "cutting" irrelevant in self-defense case**

*State v. Hauer*, 2012 MT 120: At trial on assault charges, Hauer offered a justifiable use of force defense and sought to testify that the incident occurred when the alleged victim, Couture, attacked him with a knife after he walked in on her cutting herself. The district court prohibited all "cutting" evidence. The Court affirmed the district court on the merits and rejected a related IAC claim. The Court held that "Under the facts of this case, the *reason* Couture had the knife in her possession was not relevant. She could have been cutting herself or slicing salami." The Court suggested that evidence that Couture was cutting herself may have been relevant if Hauer's defense had been that he had used force to prevent Couture from cutting herself, rather than to ward off an attack against himself. Justice Rice, concurring would have affirmed under 403.

### **Evidence of old forgery charge properly excluded under 608(b)**

*State v. Thompson*, 2012 MT 208: Thompson was found guilty of felony PFMA against his girlfriend, Love. Under 608(b), the district court barred Thompson from introducing a decade-old forgery charge as credibility evidence against Love. The Court affirmed, noting that although forgery does indicate dishonesty, the forgery charge here never produced a conviction and was temporally distant. In affirming the Court also noted that Thompson had been

allowed to attack Love's credibility in other ways and that there was substantial evidence supporting the assault's occurrence.

### **Series of unfortunate evidentiary holdings**

*State v. Hardman*, 2012 MT 70: Hardman was convicted of deliberate homicide for going over to his neighbor's, shooting him, and leaving him to bleed out. Hardman did not formally claim justifiable use of force, but argued that he drew the revolver in fear to ward off the neighbor and that the neighbor then accidentally discharged it into himself while trying to take it away. On appeal Hardman challenged a number of the district court's evidentiary rulings. As listed below, the Court affirmed as to each major ruling. Note that the Court here was reviewing for an abuse of discretion, which means that trial courts do not have to resolve these evidentiary question the same way as here but will not be reversed for doing so.

**Accidental shooting defense makes Defendant's reason for arming himself irrelevant; Defendant's testimony fails 403 in part because it is "self-serving."** Relying on the Defendant's claim of accident, the Court affirmed the irrelevance of testimony as to the words the victim used during a telephone conversation a few minutes before the shooting. The Court similarly affirmed the district court's refusal to admit the conversation under a 403/transaction rule analysis because Hardman's testimony as to what the neighbor had said was of "attenuated relevance." Troublingly, the Court seems to agree that in a homicide case it is okay for the trial court to deem the defendant's testimony to lack "trustworthiness" because where the defendant is the only surviving witness, the State has "no way of cross-examining him" on his purported version. The Court also held irrelevant prior incidents that would have established that the Defendant armed himself out of fear, not intent to go kill.

**State's solicitation of victim's good character (w/o objection) did not open door to impeachment with bad.** The State deliberately and directly elicited testimony from one of its witnesses that the victim was a good guy. Defense counsel did not object, but during cross sought to impeach the witness's opinion with negative facts about the victim know to the witness and with the witness's drug use with the victim. The district court excluded this as improper 404 evidence since the defendant was not raising self-defense. The Court affirmed and stated, "Hardman cannot use his failure to object to the State's question as a backdoor to introduce otherwise inadmissible testimony not at issue in the case." The Court also affirmed a 403 rationale to excluding the impeachment cross.

**Counsel must object to a question before the answer is given.** The State's asked a witness whether the Defendant had a medical marijuana card? The

witness gave the mono-syllabic answer, “Yes.” Defense counsel objected. The district court denied the objection because the objection was not quick enough and question had already been asked and answered. The Court held that the district court’s ruling was not an abuse of discretion in exercising reasonable control over the proceeding.

**Other medical reports not admissible through testifying medical expert.**

Hardman sought to introduce opinion testimony from an ER doc based upon the doc’s subsequent review of another doctor’s report. This was properly excluded because Hardman failed to establish that the ER doc was qualified to present an opinion as to the specific medical topic addressed by the report.

Applying the hearsay rule, Hardman was also properly precluded from introducing testimony from the medical examiner as to the presence of meth in the victim’s blood because the medical examiner had not been the one to do the actual lab work on the blood nor was he a records custodian for the lab report.

**C. Miscellaneous**

**Due Process suggestive identification exclusion only applies to State action.**

*Perry v. New Hampshire*, 132 S. Ct. 716: The Court held that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of eyewitness identification where the suggestive circumstances were not arranged by law enforcement. Such a Due Process Clause claim requires state action. Here, the witness only coincidentally saw the defendant standing next to an officer when she looked out her apartment window; therefore, no Due Process violation. No deterrence purpose would be served by excluding an identification that was not procured through unduly suggestive State action.

**HGN expert qualification bar is very low**

*State v. Bollman*, 2012 MT 49: Noting that trial courts have “great latitude” in ruling on admissibility of expert testimony, the Court held that the district court did not abuse its discretion in admitting as an HGN expert an officer with the following credentials: associates degree in criminal justice with intro courses in anatomy and biology, basic Academy SFST training, yearly SFST recertification, Advanced Traffic Enforcement Academy, 2-day Advanced Roadside Impaired Driving Enforcement course, certified as DRE, 8 hour class re: science of HGN taught by optometrist, 3.5 years as Highway Patrol, “personal study on the science of HGN,” and prior qualification as expert.

**No mistrial for singular, inadvertent mention of “felony” DUI**

*State v. Bollman*, 2012 MT 49: The district court granted motions in limine that there would be no trial discussion of defendant's DUI being a felony. However, during trial an officer testified that this was a felony DUI investigation. The felony bit was not solicited by the State. The defense concluded that a cautionary instruction would only emphasize the info to the jury and instead moved for a mistrial. The district court denied the motion due to insufficient prejudice, and the Court affirmed. The inadvertence and lack of request for cautionary instruction were both important factors to the Court.

## **11. Substantive Offenses, Elements, and Defenses**

### **A. Defenses**

#### **Justifiable use of force is still an affirmative defense.**

*State v. Daniels*, 2011 MT 278: The Court considered the 2009 changes to our self-defense law and concluded that although the burden to prove the absence of justification is now on the State, justifiable use of force remains an affirmative defense. This means defendants must still give written notice of their intention to rely upon it and that defendants still have the initial burden of production. If a defendant fails to "offer evidence of justifiable use of force," the State has no burden to disprove justification. Pre-trial notice of intent to rely upon the defense does not itself satisfy a defendant's burden of production.

#### **No outrageous government conduct**

*State v. LeMay*, 2011 MT 323: LeMay sought dismissal of his DUI, traffic, and assault charges under an outrageous government conduct theory. He argued that the local cops were harassing him because they thought he was a white supremacist and outlaw biker. The Court rejected this argument because Lemay failed to show that the cops participated in or manufacture the criminal conduct of which he was convicted. The Court also noted that Montana's racial profiling statute (44-2-117) only protects "members of minority groups" which apparently don't include white supremacists or biker gangs. A related IAC claim also failed.

#### **False speech can be constitutionally protect**

*United States v. Alvarez*, 132 S. Ct. 2537: The Court struck down the Stolen Valor Act (criminalizing *any* false claim of military honors) as violating the First Amendment. The plurality held that false statements are not categorically excluded from First Amendment protection. The plurality then applied strict scrutiny review, and struck the statute as not actually necessary to protect the

military honors system. The other two votes to invalidate the statute, believing that false speech is entitled to less protection, applied intermediate scrutiny but still found the statute overbroad.

## **B. Insufficient evidence**

### **Possession of precursors offense requires possessing two or more precursors**

*State v. Booth*, 2012 MT 40: Booth was convicted of felony possession of precursors to dangerous drugs under MCA § 45-9-107. On appeal Booth argued the State's evidence was insufficient because although Booth had possessed pseudoephedrine, the State had not shown he possessed a "combination" of precursors as required by § 45-9-107. The Court agreed that the plain meaning of the word "combination" requires possession of at least two of the listed precursors and dismissed the charge. Three concurring Justices got to the same place based on the statute's legislative history.

### **Assault with weapon upheld despite victims not directly seeing gun**

*State v. Kirn*, 2012 MT 69: The Court denied sufficiency of the evidence challenges to two assault on a peace officer convictions. The convictions were based on Kirn causing reasonable apprehension of serious bodily injury to the officers by use of a weapon. Although the officers did not see the gun Kirn was holding until after he dropped it, his belligerent attitude and disappearing into another room and then returning with one hand out of sight was sufficient to prove reasonable apprehension of a gun. Both officers testified that they thought he'd gone to get a gun. "[I]t is not necessary that the victim personally observe a weapon in order to experience reasonable apprehension of serious bodily injury by use of that weapon."

### **Insufficient evidence of accountability for distribution on particular day**

*State v. Davis*, 2012 MT 129: A jury found Davis guilty of accountability for criminal distribution of dangerous drugs. The State's evidence was that on April 16<sup>th</sup> an informant called Davis's girlfriend's roommate looking to buy meth. The meth was stored in a lockbox in Davis's girlfriend's bedroom. In response to the informant's call, the roommate asked Davis to look for the lockbox key. The key could not be found, and Davis then told that the informant, "[roommate] told me to tell you, we don't have a key." The informant told Davis to tell the roommate that he would "catch up with her next week sometime." No drugs changed hands on April 16<sup>th</sup>. On April 19<sup>th</sup>, the informant and the roommate completed a drug deal. Davis was not present during the April 19<sup>th</sup> exchange. The State specifically charged Davis with accountability for the April 19<sup>th</sup> distribution.

On appeal, the Court agreed with Davis's contention that the evidence from April 16<sup>th</sup> was insufficient to establish that he promoted or facilitated the roommate's sale of meth on April 19<sup>th</sup>. The Court held of Davis's April 16<sup>th</sup> looking for the key and his April 16<sup>th</sup> agreeing to relay a message from the informant that "neither was indicative of any role in the April 19 sale." The Court, thus, reversed the conviction and dismissed the charge. (As a cautionary thought, be wary that in a future case a prosecutor might be able to sustain a conviction on the same facts through a more clever charging decision.)

### **Existence of duty to provide aid is a question of law for the judge**

*State v. Hocter*, 2011 MT 251: At trial, Hocter objected to the criminal endangerment jury instruction because it did not identify a legally imposed duty that required her to render medical care to the child. The Court held that whether a legal duty to provide care exists is a question of law for the court. Here, the Court held that Hocter had established a personal relationship akin to that of a parent with the child and, thereby, voluntarily assumed responsibility for the child's welfare. No jury instruction as to the existence of that duty was required as it was a matter of law for the judge.

### **C. Medical Marijuana Act**

#### **CPDD upheld under 2009 law where cardholder obtains marijuana from non-caregiver**

*State v. Johnson*, 2012 MT 101: Applying the then-applicable 2009 version of the Medical Marijuana Act, the Court interpreted 50-46-201 as allowing a CPDD charge where the defendant obtained her marijuana from someone other than her designated caregiver. The Court did not provide an interpretation of the doctor-says-benefits-outweigh-risks affirmative defense at 50-46-206 (2009) because the defendant here did not prove the affirmative defense at trial.

#### **Caregiver to caregiver transfers not allowed under 2009 MMA**

*Medical Marijuana Growers Association v. Ed Corrigan, Flathead County Attorney*, 2012 MT 146: The Plaintiff caregivers sought a declaratory judgment on two issues under the 2009 version of the Medical Marijuana Act (MMA): (1) whether caregivers could exchange marijuana for purposes of supplying qualified patients and (2) whether caregivers could grow for other caregivers? The district court answered no to both questions.

Procedurally, the Court held that the appeal was not mooted by the 2011 amendments to the MMA since some of the Plaintiffs still faced possible criminal prosecution under the 2009 version. The Court also agreed with the Plaintiffs that

their suit was justiciable under the Uniform Declaratory Judgments Act. (Justice Nelson, writing separately, argued that claims seeking declaratory relief regarding the meaning of Montana’s marijuana laws are not justiciable since regardless of the Court’s rulings, marijuana is and will still be illegal under federal law.)

With respect to the merits of the claims, the Court held that the 2009 MMA clearly and unambiguously prohibited caregiver to caregiver transfers and caregivers growing for other caregivers. Like the district court, the Court refused to look beyond the statute’s plain language and would not consider the Plaintiffs’ policy-type arguments.

### **Hashish possession not lawful under 2009 MMA**

*State v. Pirello*, 2012 MT 155: Pirello pled to felony possession of hashish but reserved his right to appeal the district court’s ruling that the 2009 version of the Montana Marijuana Act (MMA) did not allow him to legally possess hashish oil. The MMA authorized possession of “usable marijuana” which it defined as “any mixture or preparation of marijuana.” Pirello argued hashish falls within “any mixture or preparation of marijuana.” However, the Court held that “usable marijuana” incorporates the definitions from the Controlled Substances Act. Those definitions, explicitly exclude hashish from the meaning of “marijuana”— “marijuana” means intact plant matter; hashish is “mechanically processed or extracted” resin. The Court held that before something can be “usable marijuana” it must first meet the definition of “marijuana” which hashish does not. The rule of lenity didn’t help Pirello because the Court held the statutes were not ambiguous.

### **Marijuana card only offers protection if obtained before marijuana possession**

*State v. Stoner*, 2012 MT 162: The appeal involves the 2007 version of the Medical Marijuana Act. The Court held that obtaining a marijuana card *after* getting charged with possession provides no immunity to prosecution.

### **No fundamental constitutional rights implicated by 2011 restrictions on medical marijuana providers**

*Montana Cannabis v. State*, 2012 MT 201: This civil appeal is part of the big Medical Marijuana Act case challenging the 2011 Legislature’s amendments to the 2004 voter initiative. Of relevance here, the district court judge issued a preliminary injunction barring enforcement of the following amendments: providers limited to supplying three cardholders, providers can’t receive payment from cardholders for marijuana, and providers can’t buy or sell plants. The district court’s ruling relied upon its conclusion that these provisions implicated fundamental rights to employment, to seek health, and privacy (and, thus, were subject to strict scrutiny review).

The Court disagreed, and held that no fundamental rights were implicated because the Montana Constitution limits the rights to seek employment and health to doing so “in all lawful ways” and the Legislature can set what is lawful. Similarly, the right to privacy did not create an affirmative right to use marijuana free of the lawful government regulation. The Court declined to reach any other issues in the case and remanded for the district court to reconsider the provisions under rational basis review.

Following his prior dissents, Justice Nelson dissented on the basis that the case does not present a justiciable controversy because all of the medical marijuana business is in any event prohibited by federal law. However, he also disagreed with the Court’s holding that strict scrutiny does not apply and expressed grave concern with the Court’s statements that rights to employment and health can be freely circumscribed by the State’s police power.

## **12. DNs and DIs**

### **At disposition DC can transfer custody to other parent and dismiss DN case w/o hearing evidence**

*In re S.S. and S.S.*, 2012 MT 78: Department removed kids from Mom due to drinking and placed them with divorced Dad. Mom continues drinking. The kids are adjudicated YINC. Placement remains with Dad (regarding whom there are no allegations). At the disposition hearing, Dad moves to dismiss the petition and to have full legal custody granted to him. Mom objected and asked to call witnesses. Ruling that the dismissal was a purely legal question, the district court refused to hear witnesses, granted the dismissal, and gave custody to Dad pursuant to 41-3-438(3)(d). The Court affirmed. Because there had never been any allegations against Dad, at the disposition hearing the district court could transfer full custody to dad and terminate the DN proceeding without taking any evidence as to the kids or how Mom was doing with her treatment plan. The Court says Mom’s remedy is to initiate a separate action for a parenting plan under Title 40.

### **DN dismissal affirmed**

*In re K.H. and K.M.*, 2012 MT 175: The district court in a DN case dismissed at the adjudication stage, ruling that the State had not proven by a preponderance of the evidence that the two children were abused, neglected, or in danger of abuse or neglect. Mother’s third child had been killed by her then-boyfriend in a shaken-baby incident, and the other two children’s fathers had been abusive towards Mother and/or the children. However, the district court was persuaded that Mother had taken appropriate protective action/left the relationship whenever abuse had occurred. The attorney for the children appealed the dismissal

despite the expressed desires of the two children (ages 2 and 5) to be with their mom.

**Attorney for child can appeal DN dismissal and can do so even if contrary to child's wishes:** As a procedural matter, the Court held that the children could appeal the district court's dismissal order. The Court also ruled that the attorney for the children did not act improperly in opposing dismissal of the DN petition despite his clients' expressed wishes to return to their mother. The Court held that the attorney for the children must disclose the children's expressed wishes to the district court, but having done so the attorney can then advocate for the opposite position if he or she believes it to be in the children's best interests.

**Deference to the district courts in DNs does cut both ways:** As to the merits, the Court affirmed the district court's dismissal. Giving deference to the district court's factual and credibility determinations, the Court held that there was sufficient evidence in the record to support the district court's finding that the children were not presently in substantial risk of physical or psychological harm. Justice Morris dissented and would have reversed the district court due to the third child's death and Mother having exposed the children to abusive men.

### **DN custody transfer settlement counts as abandonment**

*In re E.M.S. and C.A.S.*, 2011 MT 307: In 2006 the Department initiated a DN proceeding against Mother on neglect allegations. Mother and the Department resolved the case through a stipulation in which the Department agreed to cease its termination efforts in exchange for Mother agreeing to transfer the children to Father's custody.

In 2009 Father got into his own problems with the Department and in March 2011 relinquished his parental rights. The Department then sought and obtained termination of Mother's rights under the abandonment criteria. The factual basis for the abandonment was Mother's 2006 agreement to transfer custody and that she had not had contact since late 2008.

Relying on *In re T.C.*, 2001 MT 264, Mother argued that as the non-custodial parent during the past four years, she could not have surrender custody that she didn't possess. The Court disagreed and distinguished *T.C.* because the divorced father in *T.C.* never possessed custody, whereas Mother had physical custody up until the 2006 agreement. Take note: the Court counted the 2006 custody transfer stipulation as an act of willful surrender triggering the abandonment statute. Going forward parents must consider such custody-transfer settlements with extreme caution—they may now effectively operate as relinquishment.

### **Transfer to tribal court does not require affirmative acceptance by the tribe**

*In re J.W.C., L.W.C., K.W.C., and C.W.C.*, 2011 MT 312: This case is a reminder of several aspects of ICWA jurisdiction. In a DN involving Indian children not living on their reservation, 25 U.S.C. 1911(b) provides that upon request of a parent, jurisdiction for the case shall transfer to the tribal court absent either an objection by the other parent or the district court finding good cause not to transfer by clear and convincing evidence. The statute also provides that the tribal court may decline jurisdiction; however, the district court must presume that the tribal court will take the case unless affirmatively told otherwise by the tribal court. Critically, it is the tribal *court*, not the tribe or the tribal executive, that has the power to decline jurisdiction.

The district court here erred by requiring affirmative acceptance of transfer by the tribe, rather than transferring in the absence of an affirmative rejection of jurisdiction by the tribal court. The Court reversed mother's termination and remanded for a hearing to consider whether good cause existed not to transfer the case to tribal court.

This appeal also contains briefing as to whether children have a constitutional right to independent counsel in DN cases. Due to its reversal on the jurisdiction issue, the Court did not reach the right to counsel claim. However, the Court noted the apparent conflict in this case between the children's wishes and the GAL's best interest conclusions and ordered the district court to appoint counsel for the children upon remand.

### **Boilerplate civil commitment order reversed for lack of express factual findings**

*In re L.L.A.*, 2011 MT 285: Despite reciting a pretty lengthy list of evidence supporting the need for commitment, the Court reversed L.L.A.'s commitment to Warm Springs because the district court's order (prepared by the State) failed to make actual findings about L.L.A. The order's boilerplate recitation of the statutory criteria for commitment was conclusory and insufficient to satisfy 53-21-127(8)(a)'s requirement for "a detailed statement of the facts upon which the court found the respondent to be suffering from a mental disorder and requiring commitment." Although still somewhat inconsistent (*see B.H.*, 2011 MT 282N), the current Court is willing to act to uphold "the need for strict compliance with statutory requirements in involuntary commitment proceedings." *See also, L.K.-S.*, 2011 MT 21.