2021 Annual OPD Case Summary

(November 4, 2020, through December 31, 2021)
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This document is an editorialized summary of select Montana Supreme Court and United States Supreme Court criminal law decisions that the authors believe may be of interest to Montana state public defenders. It is not a comprehensive account of all opinions from this period.

Topics Included:

1. Sentencing

A. Credit

District courts must credit defendants for each day of incarceration from the date of arrest through the date of sentencing, without considering defendant's other simultaneous incarcerations or holds.

Killam v. Salmonsen, 2021 MT 196:

Killam was arrested for criminal endangerment on May 22, 2019, while out on parole from a prior offense. Bond was set at $25,000. Killam never posted bond and remained incarcerated until sentencing. He pled guilty and was sentenced on September 22, 2020. At sentencing, the district court advised Killam that, because of his parole status, he was not entitled to credit for the time he spent in jail.

Killam filed for habeas corpus relief, asking for more credit for time served. The case was consolidated with *State v. Mendoza*, and Killam was appointed counsel for oral argument.

At the argument, Killam asserted the Court's application of Mont. Code Ann.[1] § 46-18-403(1) in *State v. Kime*, 2002 MT 38, and *State v. Pavey*, 2010 MT 104, violated the plain language of the statute and should be overruled. Killam, like Mendoza, also pointed to § 46-18-201(9) (2017) and asserted that sentencing courts must give credit for pre-trial or pre-sentencing incarceration regardless of whether the defendant was also held in relation to another criminal matter. The State relied on *Kime* and *Pavey* to assert § 46-18-403(1) does not apply in situations where a defendant would not have been released from custody upon posting bail because they were being held on a sentence related to an earlier offense. The State contended Killam's criminal endangerment charge was not a "bailable offense" because even if he had posted bond, he would not have been released, as he was in DOC custody related to his prior conviction.

The Court held that the confusion over § 46-18-403(1) about what constitutes a "bailable offense" had been resolved by the 2017 Legislature with the enactment of § 46-18-201(9). This statute

[1] All statutory citations in this document are to the Montana Code Annotated, unless otherwise noted.

eliminates sentencing courts' need to determine whether a defendant is incarcerated on a "bailable offense." Instead, it provides that upon sentencing, the court *shall* provide credit for time served by the defendant before trial or sentencing in the instant case, *even if* the defendant would not have been released from custody had s/he been able to post bond. District courts may not consider a defendant's other criminal proceedings or DOC incarcerations or holds when determining credit for time served.

Sentence illegally failed to credit defendant for each day of incarceration from the date of arrest through the date sentence was imposed.

State v. Mendoza, 2021 MT 197:

Mendoza was served with a Lake County arrest warrant on December 5, 2017, with bond set at $25,000. In district court, Mendoza asked for 579 days of credit from the date he was served with the warrant through the date of sentencing, regardless of the fact he was also being held on DUI charges in Gallatin and/or Missoula counties for some of that time. The trial court refused to do the math, and it awarded Mendoza 192 days of credit for only the time after his Gallatin County case was resolved.

On appeal, Mendoza argued the district court erred by failing to credit him for each day of incarceration from the date he was served with the Lake County arrest warrant through the date of sentencing. Mendoza pointed out that § 46-18-201(9) (2017) provides that a sentencing court must give credit for pre-trial or pre-sentencing incarceration regardless of whether the defendant was also held in relation to another criminal matter. The State argued Mendoza was not incarcerated on a "bailable offense" under § 46-18-403 because had he posted bond in Lake County, he would not have been released, because he would still have been held on his DUI cases in Gallatin and Missoula counties.

The Court applied § 46-18-201(9) to Mendoza's case and determined he was entitled to credit for each day he was incarcerated from December 5, 2017, to sentencing on July 18, 2019, regardless of the fact he was also being held in connection with other matters in different counties. Mendoza was awarded 579 days of credit.

Street time credit is mandatory absent a record-based finding of a violation.
State v. Tolliver, 2021 MT 34N:

Upon State concession, the Court ordered an additional 357 days of street time credit to Tolliver based upon the State's lack of objection below and the probation officer's unrebutted testimony that Tolliver had had 51 "perfect weeks" of probation prior to his drug relapse. The Court strongly stated that under § 46-18-203(7)(b), revocation courts "have no discretion to deny street time credit absent a record-based finding that the defendant violated a condition of probation during the pertinent time." *See State v. Jardee*, 2020 MT 81.

B. Fines and Fees

Imposition of fines and fees on defendant receiving SSDI affirmed, but DOC cannot collect directly from these benefits.
State v. Ingram, 2020 MT 327:

Ingram pled guilty to felony DUI. The PSI reported his sole source of income was $857 per month in SSDI. Relying on *Eaton*, 2004 MT 283, and 42 U.S.C. 407(a), he argued his SSDI benefits could not be used as "income" to satisfy sentencing obligations. He conceded, however, that under *Mingus*, 2004 MT 24, the ability-to-pay inquiry did not apply to the mandatory $5,000 fine. The district court imposed the $5,000 fine, costs of probation/treatment if financially able, $100 felony fee, and the 10% of fine felony surcharge. The sentence also required Ingram to seek employment.

As to the fine, the Court declined to consider Ingram's constitutional challenge to the mandatory fine statute and his request to overrule *Mingus* because he did not seek to overrule *Mingus* below. As to the SSDI argument, the Court distinguished *Eaton* and held the federal anti-attachment statute does not prohibit imposition of new debt or fines—it just bars sentences that *directly* go after social security benefits to satisfy a debt or that only can be satisfied by such benefits. The Court noted Ingram's sentence required him to obtain employment, he did not challenge his employability, and his financial situation might change.

As to the costs of probation, the Court affirmed this imposition as being properly conditioned upon DOC determining in the future that

Ingram is financially able to pay. The Court noted Ingram's SSDI cannot be applied to these costs. As to the $100 fee, the Court refused to consider an ability-to-pay challenge because none had been made below. The Court again noted the amount "may not be satisfied through invasion of Social Security benefits."

Ingram did object below to his ability to pay the 10% surcharge, so the Court considered that claim and (on State concession) remanded for the district court to consider Ingram's ability to pay that $500.

Rejection of presumptive deferred for first offense, but 35% of market value fine struck where jury verdict did not specify which of several possible quantities the defendant possessed. *State v. Wilkes*, 2021 MT 27:

The State tried Wilkes for Possession with Intent to Distribute based upon 200+ grams of meth found in a Fed-Ex box in the car she was driving with a friend. There was also trial evidence of several separate, small quantities of meth in the car. The jury found Wilkes guilty only of simply Possession. Wilkes sought a deferred sentence, but the district court refused and imposed a suspended.

On appeal, Wilkes argued the district court erred by deviating from the statutory presumption for a deferred on a first-offense Possession. The Court disagreed, holding that despite the jury's rejection of Possession with Intent to Distribute, the district court was within its discretion to determine that the amount of meth far exceeded personal use and to deny a deferred based on that aggravating factor.

The Court did reverse the district court's imposition of a $10,000 fine under § 45-9-130(1)'s 35% of market value fine mandate. The trial evidence showed there were other separate, small amounts of meth in the car, and nothing in the verdict form or instructions established which meth amounts the jury believed Wilkes possessed. "Lacking such a particularized special verdict determination here, due process required that the sentencing court calculate the base fine under § 45-9-130, based on the lowest particular quantum of drugs inherent in the verdict." Here, the lowest amount was de minimis residue, so no 35% of market value fine was allowed. The Court also discussed *Yang*, 2019 MT 266, and reiterated that the 35% fine can only be imposed following an assessment of the individualized proportionality factors at § 46-18-231(3).

State may impose mandatory fines, fees, and surcharges on a defendant whose only income/assets are SSDI payments; discretionary fees and surcharges are subject to ability-to-pay inquiry, but only if objected to; courts may defer to DOC the determination of an offender's ability to pay costs of imprisonment, probation, and treatment.

State v. Yeaton, 2021 MT 312:

Yeaton pled guilty to fifth offense felony DUI. At sentencing, counsel objected to the portion of the PSI setting forth assets and debts as "unknown," indicating the PSI should read "none." Counsel also asked the court to waive the recommended fines and fees because Yeaton receives social security and could not afford to pay.

The Court held that although the State may not collect from social security benefits to satisfy debts for mandatory fines, fees, and surcharges (and the district court may not order that the debt be paid from these assets), the State is permitted to impose such debts on a defendant whose only income is social security disability payments.

As for Yeaton's ability to pay arguments, Yeaton was precluded from arguing for the first time on appeal that the $5,000 fine under § 61-8-731(3) was discretionary and, thus, subject to an ability-to-pay inquiry. Such an argument renders the fine only objectionable, and not illegal. In contrast, the defense preserved the ability-to-pay argument with respect to the $560 portion consisting of an administrative surcharge, DUI surcharge, and court IT fee, which are subject to the ability-to-pay inquiry. The Court reversed and remanded for a "serious inquiry or separate determination" of Yeaton's ability to pay those fees.

The Court also held that the district court properly ordered Yeaton to pay costs of imprisonment, probation, and alcohol treatment "if financially able." Under § 61-8-731(4)(b), the district court was not required to make a finding that Yeaton was employable or otherwise could pay those costs. The district court properly deferred to DOC the determination of Yeaton's ability to underwrite these costs.

Counsel's "general objection" regarding defendant's inability to pay invoked defendant's rights under § 46-18-232 and preserved challenge to ability to pay $500 surcharge.

State v. Steger, 2021 MT 321:

Steger was convicted at trial of DUI, a fourth offense. At sentencing, when the district court was considering whether to impose the public defender fee, counsel informed the district court that Steger relies on SSI, has a bad leg, and would have problems paying costs and fees, especially given the $4,600 fine. The district court waived the public defender fee but later imposed a $500 surcharge, which is subject to a statutory ability to pay inquiry.

The issue on appeal was whether Steger's trial counsel sufficiently objected regarding his ability to pay the surcharge. The conversation about Steger's low income was in reference to whether he could pay the $800 public defender fee, and counsel lodged a "general objection" regarding his ability to pay. The Court held Steger's counsel sufficiently articulated the reasons he objected to the costs, and the trial court should have known that the ability to pay inquiry also applied to the surcharge.

C. Restitution

Montana State Fund was a "victim" under the restitution statutes, but restitution order reversed due to defendant's dire financial situation.

State v. Lodahl, 2021 MT 156:

Lodahl was charged with assault on a peace officer for striking Sergeant Miller. Miller sustained injuries, and as a result made a workers compensation claim. The Montana State Fund (MSF) paid Miller's lost wages and medical expenses. Lodahl entered a change of plea to misdemeanor assault pursuant to a plea agreement that stipulated she would pay restitution, but she later made an oral motion for a special restitution hearing.

Lodahl argued MSF is not a victim under § 46-18-243(a)(iv), because it had not suffered a "pecuniary loss," only "general damages." Both the district court and Supreme Court rejected the argument. The Court ruled, "§ 46-18-243(1)(a) and (2)(a)(iv), MCA, makes plain an entity that insures against an individual's pecuniary

losses—like medical expenses and lost income—is entitled to recover what it pays when that individual is victimized."

Lodahl also argued she should not be ordered to pay restitution, given her "dire financial situation." Lodahl testified at the restitution hearing that she is a single mother of two boys, has mental health issues, receives SSDI, and works part-time. She also presented the district court with a budget indicating she earns less than $20,000 per year, which barely covers her basic necessities.

Lodahl acknowledged that § 46-18-241 requires courts to determine restitution amounts *without* considering a defendant's ability to pay. However, Lodahl argued §§ 46-18-241 through 46-18-249 provide instruction on how restitution can be adjusted or waived and that the statutes must be read in conjunction. Specifically, § 46-18-246 "allows the court to adjust or waive the amount of restitution to be paid if it would be unjust to require payment as ordered."

The Court held that it would be unjust to impose restitution given Lodahl's dire financial situation. The district court's finding that Lodahl had disposable income because she had a phone, internet, and vehicle was "absurd." "To adequately care and provide for her school-aged children, having a phone, internet, and transportation are not merely discretionary luxuries, but minimal requirements." The Court remanded and ordered the district court to waive restitution.

In a footnote, the Court noted that the legislative changes in 2001 and 2003 removed the sentencing court's burden of considering ability to pay prior to imposing restitution and instead places the affirmative obligation on the defendant to raise the issue. The Court found that raising only an oral objection to restitution under this statute was not a fatal flaw but indicated the best practice is to file a written petition for a restitution hearing when arguing imposition is unjust pursuant to § 46-18-246.

Restitution allowed even when a defendant's income consists solely of Army disability benefits

State v. Corriher, 2021 MT 275:

After pleading guilty to criminal endangerment, Corriher left Montana and went to Georgia, and the State extradited him back to Montana for sentencing. The district court ordered Corriher to pay extradition costs as restitution. Corriher objected, as his only source of

income was $3,000 per month he receives as Army disability benefits because of a traumatic brain injury and PTSD from his years of service and multiple deployments.

The Court rejected this argument, reasoning the district court ordered him to pay restitution without specifically referencing his Army disability benefits. The Court suggested if Corriher is unable to pay the restitution, he may petition the district court, pursuant to §46-18-246, to "adjust or waive" the restitution as unjust, based on his financial circumstances.

Restitution order reversed as to certain victim expenses and remanded for additional factfinding to determine which expenses must be paid by the county and which may be recovered in an amended restitution order.

State v. Lamb, 2021 MT 302:

Following a mistrial on a deliberate homicide charge, Lamb pled guilty to an amended charge of negligent homicide. At sentencing, the district court ordered Lamb to pay more than $17,000 in restitution. About $6,800 of total restitution was for the victim's father, Nixon, whom the State had subpoenaed to testify at the mistrial. Nixon's affidavit for restitution included lost wages, lodging, and travel expenses for attending the trial, the sentencing hearing, and meetings with attorneys for the case. On appeal, Lamb argued the district court erred in ordering restitution for Nixon without accounting for statutory witness fees and expenses billable to the county.

The Court rejected the State's argument that § 46-18-243(1)–(2) authorized the restitution because Nixon attended trial as an immediate family member of a homicide victim, and that these provisions were more specific, and thus controlling, over the provisions mandating the county to pay witness fees and expenses at §§ 26-2-501, -506, and 46-15-116.

Interpreting the statutory regime as a whole, the Court concluded that although the statutory provisions "may overlap under certain circumstances", the statutes are not "inherently contradictory and incapable of being harmonized together." Thus, when a crime victim is subpoenaed as a witness for the State, any pecuniary loss to the victim first must be offset by the witness fee and travel allowance paid by the county. Then, if the witness is also a victim, any remaining additional

expenses reasonably incurred in attending the proceedings, as well as lost wages, may be recovered as restitution from the offender. Because the record did not indicate which of Nixon's expenses must be paid by the county versus which may be recovered as restitution, the Court remanded for further factfinding and adjustment to the restitution order as necessary.

D. Other Sentencing Issues

State failed to present sufficient evidence to overcome presumption that defendant was entitled to a deferred sentence.

State v. Doubek, 2021 MT 76:

Following a neighbor's report of gunshots coming from Doubek's home, police responded and spoke to Doubek. Doubek said she was fine and denied that any guns had been fired in her house. After a brief sequence of events, the officers arrested Doubek for methamphetamine and paraphernalia possession. The police found no evidence a gun had been fired in the home. Both before and after this incident, Doubek had on several occasions called the police and requested assistance at her home for things like a reported burglary and help removing her ex-husband from her house.

Doubek went to trial and was found guilty of felony drug possession. As this was her first offense, Doubek requested a deferred sentence. She pointed out that she was presumed entitled to this under § 45-9-102(4) (2017) (which is now § 45-9-102(3)). The district court imposed a suspended sentence instead.

Doubek argued on appeal the State had not presented sufficient evidence to overcome the statutory presumption in favor of a deferred sentence. The Court noted that to overcome this presumption, the State had to show evidence of a "substantial aggravating circumstance" that was "over and above the simple facts of the prima facie case." This could include "post-offense, presentence conduct indicating continued criminal propensity." The State argued Doubek's history of contact with law enforcement and her "lack of accountability" in blaming someone else for the meth overcame this presumption. The Court disagreed. It emphasized repeatedly that Doubek's history of seeking law enforcement assistance could not be considered an "aggravating

circumstance." The Court reversed and remanded for a deferred imposition of sentence.

Facial challenge to lifetime GPS monitoring by DOC rejected.
State v. Smith, 2021 MT 148:

Smith was convicted of sexual abuse of children and sentenced to 100 years MSP with 80 suspended. One of the conditions of his sentence was that DOC monitor him via GPS for the remainder of his life. Smith challenged this condition—imposed under § 45-5-625(4)(b)—as facially unconstitutional, arguing the lifetime monitoring could extend beyond the sentence itself.

The Court held the practical effect of the requirement for a 100-year mandatory prison term in § 45-5-625(4)(a), read together with the requirement for lifetime supervision and GPS monitoring under § 45-625(4)(b), is that a convicted offender must serve a *de facto* mandatory life sentence, and should he be released from prison early, he will still be subject to DOC supervision and monitoring for the balance of that *de facto* life sentence only. The Court held this was not facially unconstitutional to impose mandatory lifetime GPS monitoring concurrent with a *de facto* life sentence.

Prior felony convictions do not automatically preclude someone from a deferred sentence, according to the Alternative Sentencing Authority (ASA) at § 45-9-202.
State v. Wright, 2021 MT 239:

Wright had a prior felony conviction from 24 years ago. While being sentenced for drug charges in this case, defense counsel argued for a deferred sentence. The PSI noted, and the State argued, that Wright was not eligible because of her prior conviction. Defense counsel argued the "may not" language in § 46-18-201(1)(b) was discretionary. Neither party cited, nor was the court seemingly aware of, the Alternative Sentencing Authority (ASA) at § 45-9-202.

The Court found trial counsel ineffective during the sentencing hearing for failing to direct the trial court to the ASA. Importantly, the Court found Wright would have potentially been eligible for a deferred sentence, despite her prior conviction.

No violation of defendant's rights to allocution and due process, even though the district court pronounced sentence without addressing the defendant directly.

State v. McCoy, 2021 MT 303:

At his sentencing hearing for drug possession, McCoy's counsel advised the judge McCoy wished to make a statement before the sentence was pronounced. But the district court proceeded to impose the sentence immediately after counsel made their respective sentencing recommendations and without addressing McCoy directly or giving him the opportunity to make a statement.

On appeal, McCoy challenged the district court's denial of an opportunity for allocution as a due process violation. The Court found this issue was not preserved, but even if it had been, there was no error requiring reversal. The Court reasoned the district court told counsel it would leave the timing of McCoy's statement to counsel, and "there were various, and thus reasonable, opportunities to do so during the hearing." The Court also noted the defense had submitted a sentencing memorandum with McCoy's "Defendant's Statement," which argued mitigating factors for his sentence. The Court thus determined the purpose of allocution was fulfilled by allowing the defendant to bring mitigating circumstances to the attention of the court.

Five-month delay in Montana State Hospital sentencing evaluation upheld.

State v. McCauley, 2021 MT 181N:

McCauley was charged with three counts of assault on a peace officer after a mental health episode in which he was suicidal and holding a knife while talking with police. Upon arrest, he was held at the detention center without substantial mental health services. He pled guilty to two counts with the recommendation of concurrent DPHHS commitments.

At the change of plea hearing, the defense suggested that the court rely on a non-DPHHS-appointed evaluator's recommendations and proceed to sentencing to avoid an anticipated long delay in getting an MSH evaluation. The district court nonetheless ordered a PSI and an accompanying MSH evaluation. McCauley sat five months awaiting the evaluation. He filed a motion to dismiss challenging the delay, which the district court denied. The MSH evaluation ultimately opined

McCauley did not meet the criteria for mental disease or defect, and McCauley was sentenced to suspended DOC commitments.

The Court affirmed the denial of the motion to dismiss. The Court held the district court's misunderstanding of § 46-14-311—that it had to order a PSI and an accompanying MSH evaluation—did not render the court's choice to order a PSI erroneous. Addressing extensive wait times in procuring an MSH evaluation, the Court agreed such delays were "troubling" and "disconcerting," but the Court refused to say the delays were "so egregious" that ordering an evaluation prior to sentencing constituted a "per se" violation of statutory sentencing principles. The Court held the delay did not violate due process or constitute cruel and unusual punishment due to the lack of evidence the delay was purposeful or that state officers were "deliberately indifferent" to McCauley's situation and based on the pre-plea evaluator's assessment that McCauley had somewhat stabilized in custody.

Petition for rehearing and habeas granted to correct illegal sentences that exceeded the five-year DOC statutory maximum

Jangula v. Kowalski, OP 21-0097:

Jangula filed a pro se petition for habeas corpus, arguing his 20 years with 10 suspended to the DOC was an illegal sentence. The Court denied his petition. Jangula then filed a petition for rehearing, through appellate counsel, arguing the denial of his petition for habeas corpus conflicts with controlling precedents of the Court (*Heath*, *Hicks*, *Southwick*, *Deserly*, *Habets*.) Jangula pointed out that the district court had imposed two illegal sentences of 20 years to DOC with 10 suspended and another illegal straight 10-year commitment to the DOC. And yet, the Court had mistakenly held § 46-18-201(3)(a)(iv)(A) did not apply to Jangula's habeas petition even though he clearly received three DOC sentences that exceeded the statutory five-year DOC limitation.

The Court granted Jangula's petition for rehearing, rescinded its order denying Jangula's petition for habeas corpus, and remanded for resentencing.

New sentencing hearing under plain SIWC offense sentencing provision when insufficient evidence to prove enhanced SIWC offense.

State v. Pedersen, DA 20-0042:

Pedersen appealed his 100-year prison sentence for enhanced SIWC and argued: (1) the district court erred by denying his motion to substitute the assigned judge due to late payment of the substitution fee, because the motion was "effective upon filing" without regard to the fee; (2) there was insufficient evidence to convict and sentence Pedersen under § 45-5-503(3)(b) because two or more persons were not "convicted" of SIWC as required by the enhanced sentencing provision; and (3) the level 3 and sexually violent predator designations were erroneous and illegal.

Upon State concession, the Court vacated Pedersen's sentence and remanded for resentencing under § 45-5-503(2) for the lesser-included, plain SIWC offense that the jury also found.

2. Revocations

2017 amendments creating the Montana Incentives and Interventions Grid (MIIG) and revising probation revocation statutes apply only to felonies.

City of Missoula v. Pope, 2021 MT 4:

The 2017 Legislature substantially amended § 46-18-203 and related revocation statutes. Among other things, the amendments created the MIIG, distinguished between minor "compliance" violations and more serious non-compliance violations, and established different standards for revocation for the two types of violations.

Pope violated the conditions of her suspended, misdemeanor sentence by using intoxicants. The municipal court revoked her suspended sentence. Pope objected that the municipal court lacked authority to do so under § 46-18-203 (2017), because she committed only a "compliance" violation, misdemeanor probation had not applied or exhausted the MIIG, and under the plain language of the new revocation statute, there was no authority for a court to revoke for a mere compliance violation absent exhaustion of the MIIG.

On appeal, the Court affirmed the revocation, holding that "the Legislature intended to apply the 2017 amendments to § 46-18-203,

MCA, to felony revocation procedures only, not to misdemeanors." The 2017 amendments to 46-18-203 "pertain only to revocation of felony probation and parole." The Court thus held the distinction between compliance/non-compliance violations did not apply to Pope, and her misdemeanor suspended sentence could be revoked for either and without consideration of the MIIG.

The decision was murky as to what exact statutory authority governs misdemeanor revocations; this was later expounded upon in *Sadiku*, 2021 MT 295.

***Pope* upheld; courts can automatically revoke misdemeanor probation for any violation, regardless of its nature.**

City of Missoula v. Sadiku, 2021 MT 295:

Sadiku pled no contest to misdemeanor sexual assault for groping and kissing his ex-wife, P.K. The court imposed a 6-month deferred sentence, contingent upon Sadiku's compliance with an order of protection that prohibited him from travelling within 1,500 feet of P.K.'s home or place of employment with a few exceptions for specific streets and "businesses such as" Eastgate Albertson's, Pressbox, and Tremper Shopping Center. The City filed a petition to revoke, alleging Sadiku violated the travel condition by driving his son to school on a road that was within 1,500 feet of P.K.'s place of employment and not contained in the exceptions to the condition.

At the revocation hearing, the court found the school was not a similar business as those permitted and determined by a preponderance of the evidence that Sadiku violated the order of protection. The court revoked Sadiku's sentence and sentenced him to six months in jail, all suspended.

On appeal, Sadiku argued that violating the order of protection was a compliance violation, and that his revocation was illegal because there is no statutory authority permitting a court to directly revoke for a compliance violation under § 46-18-203 (2017). Sadiku argued the Court should overrule *State v. Pope*, 2021 MT 4, which affirmed a misdemeanor probation revocation that was based directly on a compliance violation. Alternatively, Sadiku argued his case was distinguishable from *Pope* because he committed his offense after the 2017 revisions to § 46-18-203 took effect but before the *Pope* decision

and thus, unlike Pope, did not have adequate notice that his deferred sentence could be revoked for any violation.

The Court refused to overrule *Pope*, relying on stare decisis and its "thorough" consideration of the 2017 amendments in that case. The Court maintained (in a rather confusing analysis) that even though § 46-18-203(7)(a)(iii) (2017) on its face permits revocation only if "the violation is not a compliance violation," that statutory section authorizes misdemeanor revocations *regardless* of the nature of the violation. This is because the new compliance vs. non-compliance distinction does not apply in misdemeanor cases. Effectively, the Court treated any misdemeanor probation violation as akin to a non-compliance violation in felony probation cases, insofar as it is directly revocable under § (7)(a)(iii).

The Court also rejected Sadiku's attempt to distinguish *Pope*, determining it was unclear that Sadiku's violation was a compliance violation or that he could have known that violating the order of protection was a compliance violation when he violated it.

No habeas relief for incarceration following 2021 revocation of sentence from an April 2017 offense; 2017 revisions to § 46-18-203 did not apply.

Lee v. State, OP 21-0393:

Lee filed a habeas petition requesting release after a March 2021 arrest for a new offense that led to revocation of his conditional release for felony criminal endangerment committed in April 2017. He requested return to his previous release status, contending his incarceration is illegal and raising constitutional, statutory, and DOC policy claims.

The Court determined the 2017 sentencing amendments creating the MIIG do not apply because they became effective after Lee committed the criminal endangerment. The Court also found Lee violated a probationary condition by committing the new offense in March 2021, which led to two misdemeanor convictions by guilty plea. Lee's incarceration on the revocation was not illegal, and his habeas petition was denied.

Habeas denied because parole properly revoked for non-compliance violation even though underlying crime was not prosecuted.

Lell v. Salmonsen, OP 21-0598:

Lell argued his parole was improperly revoked for a compliance violation without exhaustion of the MIIG. The violation that prompted revocation was an arrest for driving while intoxicated. The report of violation stated that Lell "got behind the wheel of a vehicle while intoxicated…was obviously intoxicated and blew at .271 BAC." Although Lell was not charged in district court, the Court concluded that the "new criminal offense" does not need to be prosecuted to conviction to be a non-compliance violation. Since Lell's parole was properly revoked, he did not demonstrate illegal incarceration and was therefore not entitled to relief.

3. Procedural Rights

A. Confrontation

Video testimony from foundational witness violated Confrontation Clause.

State v. Mercier, 2021 MT 12:

A jury found Mercier guilty of Deliberate Homicide. Mercier acknowledged putting his ex-girlfriend in a sleeper hold after she attacked him outside her house for throwing rocks at her car. He argued his conduct was Negligent Homicide, not Deliberate Homicide. He maintained he was only in her house briefly to lay her down in her living room after rendering her unconscious outside. The State presented a neighbor who contradicted Mercier's account by purporting to have seen Mercier in the decedent's kitchen an hour later. After the defense impeached this neighbor and his account, the State—over objection—presented video testimony from a federal agent/cell phone analysist in Colorado, laying the foundation for two photos recovered from the decedent's phone. One of these photos was of the decedent's kitchen, and its electronic timestamp matched the neighbor's account of when Mercier was in the kitchen.

Mercier argued allowing the agent to testify by video violated his right to face-to-face confrontation under *Maryland v. Craig*, 497 U.S.

836. The State argued use of video testimony was authorized under *City of Missoula v. Duane*, 2015 MT 232, because having the witness travel to trial in Montana would be "impracticable" due to expense, or alternately because the agent was a mere foundational witness.

The Court held allowing the video testimony was constitutional error. In doing so, the Court recognized that *Craig* provides the controlling test: denial of in-person confrontation is permissible "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." The Court rejected the existence of a foundational witness exception to Confrontation and further held that government expense is insufficient to satisfy the *Craig* test: judicial economy, standing alone, "must yield to the constitutional rights of the accused."

The lead opinion, however, declined to overrule *Duane*, explaining instead that *Duane*'s talk of "impracticable" did not lower the required showing under *Craig*. Of *Duane*, the opinion explains, "The substantial impracticality of the out-of-state witness's physical appearance in three misdemeanor trials [in *Duane*] satisfied the requirement of *Craig* that use of video was necessary to further an important public policy."

As to prejudice, all members of the Court agreed that any Confrontation violation here was harmless as to the Deliberate Homicide conviction because the photos introduced through the violation were cumulative of the neighbor's testimony.

Reversible error to allow the State toxicologist to appear over video, absent other evidence that defendant was over the legal limit.

State v. Bailey, 2021 MT 157:

Bailey was pulled over after an informant reported a rollover crash and beer cans around the vehicle. Trooper Sutherland saw Bailey driving away from the area with a damaged vehicle consistent with the reported crash, pulled him over, asked him to sit in the back of the patrol vehicle, held him for over 14 minutes, and asked questions about drinking. At trial, the State toxicologist testified via video. Bailey was convicted of DUI *per se*.

The State conceded on appeal that *Mercier* was controlling, and, under it, the justice court's ruling was erroneous. However, the State argued harmless error because the jury was presented with cumulative

evidence that proved Bailey was over the legal limit. The Court held the toxicologist was a material witness, the evidence was not cumulative, and the State failed to demonstrate to the justice court that the video appearance was necessary to further an important public policy. The conviction was reversed, and the case was remanded for a new trial.

Testimonial out-of-court statements of a developmentally disabled 13-year-old alleged SIWC victim were inadmissible. *State v. Tome*, 2021 MT 229:

T.C., a developmentally disabled and deaf thirteen-year-old, disclosed to two counselors at her school that Tome had raped her. After they called law enforcement, T.C. gave conflicting accounts of the alleged incident to the investigating officer, a CPS/forensic interviewer, and a SANE nurse some 24-48 hours after the alleged offense. Tome moved to depose T.C. The district court denied the motion, in part because Tome would be able to fully cross-examine T.C. at trial. However, on the second day of trial, the State indicated it would offer the hearsay testimony of the five witnesses to whom T.C. made out-of-court statements regarding the incident, in the event she was found not competent to testify pursuant to § 46-16-221. The court found T.C. not competent to testify and declared a mistrial.

The district court held an evidentiary hearing under §§ 46-16-220 (child hearsay) and -221 (developmentally disabled person hearsay) and concluded T.C.'s statements were admissible. All five witnesses testified to T.C.'s hearsay statements, and her forensic interview was played for the jury.

On appeal, the Court held testimony from the investigating officer, CPS/forensic interviewer, and SANE nurse were testimonial in that the interviews were conducted 24-48 hours after the alleged offense as part of a police investigation where there was no "on-going emergency, and . . . the primary purpose of the investigation was to establish or prove past events potentially relevant to later criminal prosecution." The interviews were not "informal and spontaneous," and the persons conducting the interviews were all involved in evidence gathering for a future criminal prosecution. That T.C. "might not understand the details of the criminal justice system" and lacked competency to testify at trial was irrelevant: "her statements were

undoubtedly made for the primary purpose of furthering Tome's prosecution."

The Court found *Crawford*'s requirement for cross-examination "dispositive" when the evidence at issue is testimonial. In doing so, the Court explained the statement in the Supreme Court's decision *Idaho v. Wright* that "the Confrontation Clause does not erect a *per se* rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial" was *dicta* that pre-dated *Crawford* and was not applicable to testimonial statements. "Certainly, in cases involving nontestimonial evidence, the *Wright/Roberts* approach may apply. However, in cases such as this, where testimonial evidence is at issue, this Court remains bound by *Crawford*." Because *Crawford* required the prior opportunity to cross-examine T.C. before her testimonial statements could be admitted if she was unavailable for cross-examination at trial, and because Tome was denied the right to depose her pretrial, admission of T.C.'s statements was reversible error.

Right to confrontation violated when the State's witness testified over video; error was harmless.

State v. Martell, 2021 MT 318:

Martell was charged with felony theft for cashing a check issued by Lakefield Veterinary Group (Lakefield). On the morning of trial, the district court granted the State's motion to have Lakefield's accounts payable supervisor testify by video. The State argued it was overly burdensome to fly the witness from Washington State to testify given the distance and expense. Trial counsel objected and correctly relied on Montana's constitutional right to face-to-face confrontation. The district court granted the State's motion after it concluded the witness was offering "more or less foundation type testimony."

The State conceded on appeal that the district court erred by allowing the video testimony but argued it was a harmless error. The Court reiterated that a witness's travel expenses, missing work, and general inconvenience do not render face-to-face confrontation "overly burdensome." Additionally, the district court failed to identify any public policy, beyond judicial economy, for allowing video testimony, as required by *Mercier*. The Court nonetheless held the supervisor's testimony was cumulative of other evidence, and it affirmed on the ground of harmless error.

B. Prosecutorial Misconduct

No mistrial due to prosecutor asking defense witness intimidating question about whether she knew what perjury was.

State v. Krause, 2021 MT 24:

Krause moved for a mistrial for prosecutorial misconduct arising out of the State asking an exculpatory defense witness on cross whether she knew what the crime of perjury was. Krause objected, and the district court ordered the State to not mention perjury anymore, but it denied a mistrial.

The Court affirmed, saying it did not believe the prosecutor's question reached the level of intimidation and did not interfere with Krause's right to present witnesses. The Court also held that even assuming the question was misconduct, it had no effect on the witness's testimony as the witness continued to stand by her exculpatory account.

No plain error for improper prosecutorial statements in closing argument.

State v. Smith, 2021 MT 148:

Smith did not object to the prosecutor's closing argument assertions that Smith lied, references to the forensic interview to corroborate the credibility of the victim, statements of fact that were not in evidence, and statements to the effect that justice demands a conviction.

Although the Court discussed at length whether Smith was denied a fair trial by the prosecutor's statements and found the prosecutor's reference to the forensic interview after being admonished by the district court not to do so was "the most troubling" claim, especially in light of the Court's conclusion that the forensic interview was inadmissible, the Court stated, "we cannot conclude that failing to review the State's allegedly improper argument would" result in one of the three plain error criteria. The Court held Smith thus failed to "sustain his burden to demonstrate that reversal of his conviction for plain error was warranted."

C. Prosecutorial Delays

Defendant's sentence expired six months after the Supreme Court issued remittitur, and the district court could not require execution of the terms of an already expired sentence.
State v. Nelson, 2021 MT 83:

Nelson was charged with a first offense DUI on July 25, 2015. He pled not guilty and, in justice court, filed a motion to suppress which challenged the particularized suspicion of the stop. The justice court granted the motion, and the State appealed to the district court. The district court denied the suppression motion. Nelson pled guilty, reserving his right to appeal. On July 19, 2016, the district court sentenced Nelson to six months of incarceration, with all but 24 hours suspended. The district court "stayed execution of the judgment while his appeal is pending."

The Court affirmed Nelson's conviction on appeal. The Court issued remittitur on October 12, 2017, and the district court notified the parties of remittitur on October 17, 2017. Six months later, the district court issued an order stating the matter had been disposed of and the bond posted exonerated. On April 22, 2019, more than a year after the district court's order which exonerated bond, the State moved to lift the stay and set a status hearing. At the time of the State's motion, 522 days had passed since remittitur had been issued. The district court granted the State's motion to lift the stay, and Nelson appealed.

On appeal, Nelson argued the district court lacked jurisdiction to rule on the State's motion since the maximum sentence of six months had already expired. He also argued execution of the sentence, after such a lengthy delay, violated his due process rights.

The Court held the district court did not lack jurisdiction over the case. However, the Court did hold the district court improperly granted the State's motion to lift the stay of execution and re-impose the July 19, 2016 sentence. It said that when the appeal was decided and remittitur issued, the stay of execution was lifted, and no further orders were necessary to carry the judgment into effect. The onus was on the State to act, after remittitur, to seek Nelson's voluntary surrender or to seek an additional order of commitment from the district court. Nelson's six-month sentence had expired, and the State could no longer execute the terms of the sentence.

State's two-year delay in bringing a probationer to Montana for an initial appearance violated his right to due process and warranted dismissal with prejudice.
State v. Cameron, 2021 MT 198:

Cameron sat in a New York County jail for two years on a Montana warrant. The warrant stemmed from a petition for revocation alleging Cameron absconded from supervision while serving a three-year suspended DOC sentence on a failure to register offense. While awaiting extradition from New York to Montana, the federal government charged Cameron with a federal offense. The Montana prosecutor cancelled the extradition request and did not transport Cameron to Montana until the federal case was dismissed nearly two years later. When Cameron was finally transported to Montana, he filed a pro-se motion to vacate and challenge jurisdiction of the revocation order.

On appeal, Cameron maintained the two-year delay was a due process violation requiring dismissal with prejudice. The Court agreed Cameron's right to due process was violated by "unnecessary delay" in receiving an initial appearance on the Montana bench warrant. Section 46-18-203(4) requires a probationer have an initial appearance "[w]ithout unnecessary delay and no more than 60 days after arrest." The Court dismissed the revocation order and sentence *with prejudice* here because it was the State's indifference or lack of diligence which caused him to be held for so long in New York. The State was wrongly assuming there was a federal hold preventing the State from transporting Cameron to Montana to appear before a judge on the revocation proceeding.

Speedy trial violation when State was responsible for 463 of the 499 days of delay and defendant showed the delay caused her extreme anxiety, financial hardship, and lost work opportunities and impeded her ability to call a witness.
State v. Smith, 2021 MT 217N:

The State charged Smith with DUI in justice court nearly one year after she was involved in a car accident. A warrant was issued the day after the charging documents were filed, but it was not served on Smith for another eight months. Over the next nine months, several mishaps occurred that delayed Smith's trial: Smith's absence at the omnibus

hearing; the State twice requesting continuances due to witness unavailability; Smith's inability to connect with her trial attorney; and the judge *sua sponte* continuing the trial twice. Smith argued the delays violated her statutory and constitutional speedy trial rights. The justice court held an evidentiary hearing and denied Smith's motion, and the district court affirmed.

On appeal, Smith asserted her constitutional right to a speedy trial was violated. Applying *Ariegwe*, the Court reversed. The Court determined the State was responsible for 463 of 499 days of delay, and 169 of those days weighed heavily against the State for its failure to secure an expert witness for trial.

Finding prejudice, the Court pointed to Smith's unrefuted testimony of experiencing ongoing anxiety and frustration throughout her case, that she was seeing a physician and taking medications to address the anxiety, that she experienced financial hardship due to having to pay for drug testing as a condition of her release, and that she lost two work promotions due to the pending charge. The Court also found the delay impaired Smith's defense because her treating physician whom she planned to call had moved out of state during the pendency of the case and was no longer available as a witness.

Writ of mandamus to compel DPHHS to accept custody of an unfit defendant for fitness restoration was not justified where DPHHS was held in contempt in district court and factual questions existed about DPHHS's ability to comply.
Hanway v. Fouts, OP 21-0503:

In August 2021, Hanway was adjudicated unfit to proceed in two criminal matters and committed to the custody of DPHHS to regain fitness. Hanway had previously been adjudicated unfit to proceed in another criminal matter in which the charge was ultimately dismissed due to delays in transport to MSH. In October 2021, Hanway petitioned for a writ of mandamus with the Court to compel DPHHS to immediately accept custody of him. Around the same time, the district court found DPHHS in contempt for not complying with the August 2021 commitment order.

The Court denied the writ. The Court concluded DPHHS had a purely ministerial duty to immediately accept custody of a defendant committed by order under § 46-14-221(2)(a). But the Court concluded an

adequate remedy was available through the contempt proceedings in district court. The Court also cited lengthy factual assertions made in DPHHS's response, which raised fact questions about DPHHS's ability to immediately comply with Hanway's commitment orders.

D. Judicial Substitution

Writ of supervisory control granted; defendant entitled to substitution of judge after district court effectively granted a new trial by allowing defendant to withdraw his mid-trial no contest plea.

Kasem v. Montana Thirteenth Jud. Dist., Yellowstone Cnty., Hon. Ashley Harada, Presiding, 2021 MT 317:

During the defendant's case-in-chief on the third day of trial, a heated exchange occurred between the judge and defense counsel outside the presence of the jury. Defendant then changed his plea to no contest and the matter was set for sentencing. New counsel was appointed and filed an unopposed motion to withdraw the no contest plea under § 46-16-105(2) and for a "new trial." The court granted the motion, set aside the no contest plea, substituted it with a not guilty plea, and set a new trial date.

Kasem then timely filed a motion for substitution of judge under § 3-1-804(11), which allows for substitution "[w]hen a new trial is ordered by the district court." The district court denied the motion, finding no new trial had been granted because the term "new trial" implies there was a previous trial that ended in a verdict.

Citing the principle of double jeopardy law that jeopardy attaches when the jury is empaneled and sworn, the Court concluded the proceeding that commenced and ended by change of plea and unconditional jury dismissal "was as a matter of fact and law a jury 'trial' . . . that categorically and unconditionally ended." The Court explained the new pending jury trial would be a second trial that "will start anew with new jury selection and a full trial in the ordinary course of law." The Court also relied on its decision—and the State's contrary position—in *Terronez*, in which the Court agreed with the State that the district court's grant of a pre-sentencing motion to withdraw guilty plea that had been entered mid-trial had the substantive effect of granting the defendant a new trial—and thus was

effectively an order granting a "new trial" from which the State had the right to appeal. Ultimately, the court held "allowance of a withdrawal of a mid-trial guilty or nolo contendere plea pursuant to § 46-16-105(2), MCA, is also effectively a concomitant grant of a new trial" entitling the parties to substitution of the judge.

E. Double Jeopardy/Multiple Charges

Multiple convictions permitted for multiple child pornography images stored on a single device.

State v. Felde, 2021 MT 1:

Felde was convicted of four counts of sexual abuse of children for possession of child pornography. He argued § 46-11-410(2)(a) prohibits multiple convictions for possession of multiple images discovered at a single time on a single device. This double jeopardy statute bars multiple convictions for offenses committed during a single transaction if one offense is included in another. The sexual abuse statute prohibits possession of a "visual medium" in which a child is engaged in sexual conduct. "Visual medium" means "any disk, diskette, or other physical media that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method." Felde argued that under these definitions, the statute did not create separate offenses for each image because each image was part of the same "visual medium," Felde's hard drive.

The Court disagreed, holding that the sexual abuse of children statute prohibits possession of images and, thus, each separate image is a separate offense even if stored on a single device.

Convictions dismissed with prejudice because district court abused its discretion in declaring a mistrial, and double jeopardy barred a retrial.

State v. Newrobe, 2021 MT 105:

During Newrobe's jury trial on Incest and Bail Jumping, the judge pointed out that the Incest statute does not apply to uncle/niece relationships, dooming the State's case. The following morning on the second day of trial, the court reporter had a medical emergency and the judge *sua sponte* declared a mistrial. Newrobe objected to the mistrial

and moved to dismiss the charges with prejudice, or alternatively for a continuance, which Judge Pinski denied. He set a new trial date. The State then filed an amended charge of SIWC and refiled the Bail Jumping charge, and Newrobe was tried and found guilty.

The Court held no manifest necessity existed to declare a mistrial, and double jeopardy barred the second trial. Mistrial is an exceptional remedy, and sufficient manifest necessity in the double jeopardy context requires a high degree of necessity. Although the court reporter had fallen ill, the district court did not allow time to collect itself from the surprise event and failed to explore options to continue the trial, locate another reporter, or have the jury summoned back after a temporary recess. The Court dismissed both charges with prejudice.

Separate convictions and sentences for Incest and Sexual Assault do not violate double jeopardy protections.
State v. Valenzuela, 2021 MT 244:

Valenzuela was charged, tried, and convicted for Incest and Sexual Assault arising out of one incident of touching his then 6-year-old stepson's penis through clothing. Valenzuela argued that because the stepson was under 14 years old and incapable of consent, Sexual Assault became an included offense to the Incest charge. "Without consent" is not an element necessary to prove Incest.

Exercising plain error review, the Court overruled *State v. Hall* and *State v. Sor-Lokken* to hold "without consent" in the sexual assault charge is still a separate element even when the alleged victim is incapable of consent because of age.

F. Other Procedural Issues

Defendant's challenge to his invalid plea constituted a challenge to an illegal conviction, not an illegal sentence warranting habeas relief.
Gardipee v. Salmonsen, 2021 MT 115:

Gardipee filed a habeas petition arguing that his 2014 no contest plea to felony sexual abuse of children was invalid due to the statutory prohibition against no contest pleas in sex cases. Because the plea was invalid, Gardipee argued the 25-year MSP sentence stemming from the invalid plea was illegal. Gardipee never appealed or sought PCR.

The Court held that Gardipee was not entitled to habeas corpus relief because his alleged error was an invalid plea and thus an illegal *conviction*, not an illegal *sentence*. The Court distinguished an illegal conviction from an illegal sentence and overruled *State v. Hansen*, 2017 MT 280, and *Hardin v. State*, 2006 MT 272, to the extent they establish that an illegal plea renders the resulting sentence illegal. Because Gardipee's 25-year MSP sentence was within the legal range for sexual abuse of children, the Court determined he received a legal sentence.

Conviction reversed after the district court, without input from counsel, allowed the jury during deliberations to rewatch testimonial video footage of the incident and an interrogation. *State v. Hoover*, 2021 MT 276:

The State charged Hoover with PFMA against his sixteen-year-old son based on an incident while the two were cutting and stacking firewood in a forested area. The incident was captured on an audio-video game camera. The game camera footage showed Hoover slapping his son twice on the side of the head, shoving his son, and knocking his son to the ground. It also included audio of numerous vulgar statements by Hoover directed toward his son.

At trial, the State relied heavily upon the game camera footage and a post-arrest interrogation interview between the police and Hoover. After the jury went into deliberations, the jury notified the bailiff they wished to review the game camera footage. The bailiff contacted the judge, and, without notice to the parties, the judge authorized the bailiff to replay the game camera footage for the jury on a laptop computer in the courtroom. Later the next morning, the jurors notified the bailiff they wished to again review the game camera footage and also the interrogation video. Again, without notice to the parties, the judge authorized this request, and the bailiff returned the jurors to the courtroom, with no one else present, and replayed the videos. When defense counsel found this out, they filed a motion for a new trial on the ground that the court erroneously allowed the video playbacks to the jury without notice to the parties. The district court denied the motion.

The Court reversed on appeal. It explained that the district court, upon consultation with the parties, must make an affirmative determination prior to deliberations what exhibits are necessary and proper to go into the jury room. A threshold determination is whether

the evidence is testimonial in nature. Given that the game camera footage included Hoover's nonverbal physical acts of violence toward his son and his contemporaneous verbal statements, and that the interrogation video captured both Hoover's demeanor and his verbal statements in response to a formal police interrogation, the Court held both pieces of evidence were inherently testimonial in nature. The Court then held the district court erred when it failed to confer with the parties, failed to determine which specific portions of the exhibits the jury wanted to review, and failed to carefully "weigh the probative value" against the "danger of undue emphasis" of allowing the playbacks. The Court rejected the State's harmless error argument because the game camera footage and interrogation video were the only evidence presented by the State to prove Hoover's guilt.

Mental disease defense barred because it was not raised pretrial.
City of Whitefish v. Klink, 2021 MT 9N:

Klink was charged with PFMA in municipal court for alleged threats to his mother. He did not list a mental disease or defect defense on the omnibus form and repeatedly told the City pretrial that he would not be relying on such a defense. However, following his mother's testimony at trial, he sought to solicit mental health testimony and present mental disease or defect instructions. The municipal court ruled Klink had failed to raise the issue pretrial and refused to allow a mental disease defense at trial.

The Court affirmed, holding Klink's mental health problems were well known prior to his mother's testimony and nothing in her testimony established good cause for allowing the defense.

4. Marijuana

Five nanogram THC limit upheld under rational basis review.
State v. Jensen, 2020 MT 309:

While driving after smoking marijuana, Jensen collided with and killed a motorcyclist. A blood draw returned 19 nanograms per milliliter of THC. The State charged Vehicular Homicide While Under the Influence. The State relied upon § 61-8-411, which makes driving with a

THC level above 5 nanograms per milliliter a per se impairment violation.

Jensen argued § 61-8-411's per se rule facially violates substantive due process. He presented expert testimony that recent research shows no correlation between THC concentration and impairment and that the per se 5 nanograms limit is scientifically unsupported because regular users can be fully functional with concentrations of 10 to 20 nanograms. The district court denied Jensen's challenge, ruling the 5 nanogram limit was a rational means of curtailing ingestion of THC before driving.

Applying rational basis review, the Court upheld § 61-8-411's constitutionality. That the Legislature could have made a more scientifically based policy choice does not render a statute unconstitutional. The Court held that because the 5 nanogram limit does indicate the driver's use of marijuana and marijuana does cause impairment, the limit is not irrational.

New marijuana expungement provisions do not apply to conduct that would still be considered illegal.

Rairdan v. State, 2021 MT 247:

The Montana Marijuana Regulation and Taxation Act (MMRTA) of 2020 allows for the legal possession and use of limited quantities of marijuana for adults over the age of 21. It also authorizes courts to redesignate or expunge the criminal records of people who have completed sentences for acts now permitted, or for which the penalty is now reduced.

In 2002, Rairdan's landlord found 8 marijuana plants on the landlord's adjacent 40-acre plot. Rairdan received a deferred sentenced for felony production of dangerous drugs. He successfully completed the deferred in 2008, leading to withdrawal of his plea and dismissal of the charge. Rairdan then sought to expunge his conviction under the new MMRTA. The Court held that because Rairdan did not grow the marijuana on his own property and did not have permission to grow the marijuana on the landlord's plot (conduct that is now legal for personal use under the MMRTA), he did not qualify for the retroactive application of the expungement provision.

Sufficient nexus existed between marijuana use and alcohol driving offense to allow probation condition requiring defendant to surrender his medical marijuana card.
State v. Corriher, 2021 MT 275:

Mr. Corriher pled guilty to criminal endangerment after a vehicle accident involving a DUI. The district court ordered Corriher to surrender his medical marijuana card as a condition of his probation. The district court determined Corriher's marijuana use was "contraindicated" for his alcohol addiction and thus concluded "there is a nexus between the use of alcohol and the use of marijuana." On appeal, the Court held the district court did not abuse its discretion in making this determination.

No expungement of conviction for possession of 60 grams of marijuana when defendant did not affirmatively establish the possession was legal under the MMRTA.
Maier v. State, 2021 MT 296:

In 1992, Maier pled guilty to possessing over 60 grams (2.12 ounces) of marijuana. In 2021, Maier petitioned for expungement or redesignation of his 1992 conviction under the MMRTA. The district court denied the petition, holding that he was not eligible for expungement or redesignation because the MMRTA does not permit the marijuana-related conduct for which Maier was convicted.

On appeal, Maier argued his conviction qualifies for expungement or redesignation under § 16-12-106(1)(c)(i). That provision authorizes a person to possess up to two mature marijuana plants and two seedlings and any marijuana produced by the plants in excess of 1 ounce if the marijuana produced by the plants is kept in a locked space on the grounds of a private residence and is not visible to the public eye. Maier argued that at the time of his arrest, his marijuana was in his private residence and not visible to the public.

The Court rejected Maier's argument, emphasizing that a person can only possess an indeterminate amount of marijuana in a private residence if it was produced by plants cultivated within the parameters of § 16-12-106(1)(c). Because Maier's plea agreement and resulting conviction said nothing about the circumstances of his marijuana possession, other than he possessed greater than 60 grams, the Court affirmed the district court's denial of Maier's petition. The Court noted,

however, that even when a conviction such as Maier's does not qualify for expungement "on its face," the lower court may be required to hold an evidentiary hearing to determine the circumstances of the possession to see if the conviction qualifies.

5. Discovery

No *Brady* violation where the evidence was still available for defense examination.

State v. Fillion, 2020 MT 283:

The State charged Fillion with felony Theft and felony Altering an Identification Number for stealing a custom motorcycle and altering the VIN on the bike. When the State returned the bike to its owner, Fillion argued the State had failed to preserve exculpatory evidence in violation of *Brady*.

The Court held Fillion failed establish the *Brady* element that the bike's return suppressed favorable evidence. The Court noted the bike was still available for inspection at the time of trial, defense counsel had inspected the bike, and there were lots of photos of the bike's condition.

Denial of motion to compel *in camera* review of officer's personnel file for prior instances of excessive force was proper, given the defense's failure to demonstrate substantial need for particular information.

City of Bozeman v. Howard, 2021 MT 230:

A few days after breaking up with his girlfriend and being warned by police to stay away from her, Howard followed her in his car as she was walking down the street, and she called 9-1-1. Bozeman Police Officer Thomas Lloyd responded and initiated a stop of Howard's vehicle. Howard exited and approached the patrol car. The officer ordered him to put his hands up, but Howard was slow to respond and questioned the officer's authority. The encounter escalated quickly. Without informing Howard he was under arrest, Officer Lloyd swiped Howard's legs and pushed him face down onto the pavement several times, eventually handcuffing him. Howard was charged with resisting arrest.

Howard indicated his intent to assert a justifiable use of force (JUOF) defense and filed a motion to compel production of Officer Lloyd's personnel files for an *in camera* inspection. Howard asserted the officer had lied about Howard's actions, and that if he had a history of using excessive force, it would support the officer's motive to lie about the events during Howard's arrest. The lower court denied the motion.

On appeal, the Court first noted Howard had failed to preserve any argument under *Brady/Giglio* or § 46-15-322(1)(e). Instead, Howard's motion to compel was focused on § 46-15-322(5), which requires the defendant to make a showing of substantial need of nonexculpatory impeachment evidence. The Court explained that a mere assertion that an officer's personnel file is relevant for cross-examination purposes is inadequate. Howard's admission that he could not demonstrate substantial need without first reviewing the file precluded success on the motion.

State did not suppress evidence in bad faith when sheriff's deputy arranged on his own time to clean up the crime scene. *State v. Fisher*, 2021 MT 255:

Fisher was charged with killing his father in his father's house. The State investigated and gathered evidence from the house, leaving behind evidence it did not think was consequential. After the forensic investigation, the State released the house to Fisher, then arrested Fisher a couple days later. A sheriff's deputy who lived next door (and just so happened to be next in line after Fisher in the father's will) went by the house to care for the animals. He called a cleaning service for the house, and the cleaning service destroyed evidence like blood that the State's forensic investigation had not removed.

Fisher argued the case should be dismissed because the house cleaning destroyed and suppressed exculpatory evidence. The Court was not persuaded the destroyed evidence could have changed the case, finding its relevance speculative and "inessential to the case absent some new revelation." Because the destroyed evidence was only "potentially exculpatory," Fisher had to prove the government acted in bad faith. The Court found Fisher did not prove the State acted in bad faith in its forensic investigation in determining which evidence to collect and which to leave behind. As for the deputy, he was not acting

on the State's behalf when he called the cleaning service, so his actions were not State suppression. The Court affirmed.

Loss of potentially exculpatory evidence not prejudicial where the evidence was photographed before it deteriorated.
State v. Hren and Nelson, 2021 MT 264:

Hren and Nelson had a long-simmering property dispute with their neighbors along a rural road. The neighbors had a prescriptive easement to use the road to access their properties, which Hren and Nelson did not like. Hren and Nelson allegedly and repeatedly tried to block the road by tying off gates with barbed wire, taking down gates and replacing them with fences, and placing rocks in the road. On two occasions, Hren and Nelson built fences across the road using railroad ties, and the neighbors would cut the ties down with a chainsaw. The second time, one of the railroad ties had a 7-inch screw buried inside it, which a neighbor hit with his chainsaw.

For these numerous incidents, Hren and Nelson were charged with and convicted of criminal endangerment and stalking. The first trial ended in a hung jury, so a second trial was held. At the first trial, the railroad tie with the screw was introduced. The tie had a dirt line on it that the defense argued proved the screw had protruded out the top, making it visible to the neighbors (and thus not so dangerous). In between the two trials, the sheriff's office left the railroad tie outside, where it was exposed to the elements, and the arguably exculpatory dirt line faded.

Hren and Nelson argued on appeal that the improper storage of the railroad tie was a reversible *Brady* violation. The Court first addressed the State's argument that the appellants' *Brady* claim was not properly preserved. The Court held that although trial counsel did not say the word "Brady," counsel did argue there was a prejudicial loss of exculpatory evidence. This was enough to preserve the issue for appeal. On the merits, however, the Court deemed any loss in exculpatory evidence was not prejudicial, primarily because the defense still had photographs of the railroad tie in its pre-deteriorated state, and those photographs clearly showed the exculpatory dirt line.

No prejudice in destruction of social worker's handwritten notes, and no error in refusing to allow defense counsel to present evidence related to the destruction of those notes.
State v. Villanueva, 2021 MT 277:

The state charged Mr. Villanueva with two counts of sexual assault and one count of sexual intercourse without consent for acts allegedly committed against his twin seven-year-old daughters. Child and Family Services (CFS) had been involved with the family, for unrelated reasons, prior to the allegations. During defense counsel's interview with the social worker, she indicated she had "possibly" kept her handwritten notes. After obtaining the CFS file and during a second interview, the social worker disclosed she could not locate her handwritten notes and she had likely shredded her notes after she entered the information from the notes into the CAPS database.

Villanueva filed a motion to dismiss. He argued the State failed to preserve and provide him with the social worker's notes, which violated his due process rights under Brady. He argued alternatively that the State had "deliberately shredded" these exculpatory documents. The district court denied the motion.

The Court affirmed and held there was no evidence the social worker acted with any intent to purposefully harm Villanueva's defense, as she was merely acting in accordance with CFS's shredding policy. The Court further found no error since Villanueva was able to obtain "comparable evidence" from the CAPS reports provided to defense counsel by the social worker. The Court similarly rejected Villanueva's argument that the district court erred when it granted the State's motion in limine to prevent argument at trial related to the destruction of the social worker's notes.

Pre-trial disclosure not required for State rebuttal impeachment witness; error for the State to ask that witness about a topic the prosecutor brought up during defendant's cross-examination.
State v. Torres, 2021 MT 301:

Torres went to trial facing two PFMA counts and one strangulation count against his girlfriend, Bri. At trial, Torres testified in his own defense and denied ever choking Bri. He also claimed Bri and a former girlfriend, Meg, cooked up an online smear campaign

against him to destroy his successful career as a musician in a Johnny Cash tribute band with their false allegations of him being a serial abuser. The prosecutor asked Torres several specific questions on cross about whether he had ever choked anyone else besides Bri, and he predictably answered "no." After the defense rested, the State called Meg as a rebuttal witness, over objection, to testify Torres had strangled her five years prior in South Dakota in an alleged incident she did not report and that was not charged. Torres was convicted of the second PFMA count and acquitted of the other two counts.

Torres asserted the State violated §§ 46-15-322 and -327 by not disclosing Meg as a witness before trial. He contended that the prosecutor's questions on cross-examination went beyond the scope of direct examination and were a strategically planned ambush set as a trap to enable the State to introduce prior bad acts evidence through Meg.

The Court first ruled the State did not need to disclose Meg because she was a rebuttal witness called to impeach Torres's credibility, to which he had opened the door through testifying about Meg and Bri's "fabricated vendetta", the online smear campaign, Meg's criminal past, and Meg's desire to retaliate against him.

Then, noting M.R. Evid. 404(b) generally precludes prior bad acts evidence, the Court criticized the prosecutor for engaging in a borderline unethical practice in questioning Torres whether he had strangled anyone in the past, and then using his "no" answer to justify asking Meg about the past strangulation. The Court ruled the prosecutor's questions were error. Nevertheless, the Court found the error harmless. There was substantial evidence supporting the PFMA conviction, and the jury acquitted on the other two charges, which showed it was not particularly inflamed by Meg's testimony.

Supervisory control declined regarding denial of *in camera* review.

Thompson v. First Jud. Dist. Ct., OP 20-0486:

Thompson, charged with Aggravated SIWC, sought *in camera* review of the alleged victims' medical and mental health records. He argued he needed the records so his medical expert could evaluate whether his accuser's preexisting PTSD and drug use at the time in question might have affected her perception and recollection of

events. The district court refused to conduct such review, ruling Thompson did not have substantial need for the records because he already had access to records from the day in question and could ask those medical providers and officers about the alleged victim's ability to perceive and recall.

Thompson petitioned the Court for a writ of supervisory control. The Court declined, noting that "before there is even a basis for the court to conduct a balancing test via in camera review, Thompson must first show a substantial need for the records." The Court was not convinced Thompson had made such a threshold showing of substantial need.

6. Evidence

A. Rule 404(b)

Conviction reversed for cumulative error due to the State's repeated references to defendant's prior crimes and improper presentation of impeachment evidence.

State v. Smith, 2020 MT 304:

Smith was charged with felony PFMA, misdemeanor stalking, and felony solicitation of tampering with a witness. The State dismissed the PFMA and stalking charges after voir dire because the alleged victim had not shown up for trial. The jury found Smith guilty of the solicitation charge. That charge arose out of allegations that Smith made jail calls to his family members in which he encouraged them to convince the alleged stalking/PFMA victim not to testify.

The Court reversed on appeal under the cumulative error doctrine, faulting the State for numerous errors. First, the State's voir dire focused heavily on domestic violence, even though the prosecutor knew the PFMA/stalking witness was missing. The State did not alert the district court or defense of this missing witness until after voir dire, at which point it moved to dismiss those charges. The defense moved unsuccessfully for a mistrial. On appeal, the Court observed that had the PFMA and stalking charges been properly dismissed *before* voir dire, the prosecutor's voir dire questions about domestic violence would have been objectionable. Asking the jury extensive questions about

domestic violence in a trial for one charge of solicitation of tampering with a witness was unduly prejudicial.

Next, during opening statements, the prosecutor emphasized the violent nature of the dismissed PFMA charge, the statements the missing witness/victim made to police, and that the police had witnessed injuries on her. Telling the jury Smith committed violent offenses, as verified by law enforcement, in a trial for a non-violent crime was improper.

During the State's case-in-chief, before Smith even testified, the State attacked his credibility by introducing specific events and statements from the domestic violence investigation that tended to show Smith had lied and was characteristically untruthful. Defense counsel objected. The Court faulted the trial court for allowing this, noting the proper procedure to attack a defense witness's credibility is: (1) let the witness testify; (2) cross-examine the witness; (3) call a rebuttal witness to contradict his testimony and attack his credibility. A defendant's mere *intent* to testify "does not open the door for the State to proactively impeach through other witnesses what it anticipates the defendant's trial testimony will be with evidence of prior instances where the defendant lied to or misled someone."

Then, when Smith did testify, the State questioned him on cross-examination about his prior statements that the State was presenting as lies. But Smith did not get into those statements on direct. Smith's attorney "properly objected to the line of questioning as beyond the scope of direct, not relevant, and inadmissible under M. R. Evid. 404."

The Court noted that once Smith testified, general character evidence of his untruthfulness became admissible. Even so, however, Rule 608 prohibits the State from presenting specific instances of the defendant's conduct through direct examination of its own witness: "Rule 608 admits such evidence only on cross-examination and only if probative of a witness's truthfulness or untruthfulness."

Under 404(b), defendant's characterization of his relationship with his daughters as "awesome" opened the door to limited cross-examination about their prior allegations against him. *State v. McGhee*, 2021 MT 193:

McGhee was convicted of indecent exposure to one of his twin daughters. The allegation came in the context of a "strained"

relationship following a breakup between McGhee and the mother of the twins. It was alleged that McGhee showed his twin daughters his "naughty parts" in their bedroom when they stayed with him. McGhee had successfully moved in limine to bar evidence of a prior allegation from 2015 in North Dakota, when the mother alleged that McGhee sexually abused the girls. The investigation into those allegations resulted in no criminal charges.

At trial, after the State rested, McGhee presented the testimony of his two brothers and long-time girlfriend who described his relationship with the girls as "wonderful," "excellent," and "great." McGhee's girlfriend further testified that, during their six-year relationship, she never saw the girls fearful of McGhee or saw anything "inappropriate." One of his brothers similarly testified that, "all I ever saw was him being a good dad." McGhee himself took the stand and testified that his relationship with the girls was "absolutely awesome."

The State then requested the trial court to reconsider its prior 404(b) ruling barring the North Dakota allegations so the State could refute this defense testimony. The district court agreed with the State, finding McGhee had opened the door to the prior allegations. Without getting into the details of the allegations, the State cross-examined McGhee about the existence of the allegations and the fact they resulted in a restraining order against him.

On appeal, the Court affirmed and agreed McGhee had opened the door to this limited cross-examination about the North Dakota allegations. The Court reasoned the "obvious purpose" of the favorable character evidence the defense presented was to create the impression that McGhee had always been a loving and caring father, to which the subject allegation of indecent exposure was wholly inconsistent, thus supporting a jury inference that he was not guilty of the charged offenses. The Court felt it was only fair to allow the State some latitude to rebut this inference.

Juvenile prior bad acts evidence admissible to show the "motive" of defendant's ongoing sexual feelings toward victim. *State v. Murphy*, 2021 MT 268:

Eighteen-year-old Murphy was charged with SIWC, later amended to Incest, following an incident in which he allegedly raped his 14-year-old half-sister, Q.M. Murphy moved in limine to exclude

evidence of prior bad acts. Specifically, he sought exclusion of a prior admission from 2012 that he sexually touched Q.M. and observed her vagina while she was asleep. During an interview at that time, Murphy said he had ongoing sexual feelings toward Q.M. Murphy further moved to exclude all other evidence of sexual contact between him and Q.M. prior to the earliest date of the current charge. The district court denied Murphy's motion, finding all evidence was admissible under Rule 404(b) and not unfairly prejudicial under Rule 403.

The Court affirmed the district court's denial of the motion in limine. The Court first found the evidence was admissible under Rule 404(b) to show motive, not propensity to commit a sex crime. That is, the evidence was relevant to show Murphy's ongoing sexual feelings were directed exclusively to Q.M. rather than to people generally, based on his 2012 comment about his attraction to Q.M. The Court said Rule 404(b) prevents admission of evidence meant to show "how a person is" but not necessarily "how a person acts." The Court further held the evidence of prior acts was not unfairly prejudicial under Rule 403. The Court reasoned that while some juror hostility or sympathy is inherent in the admission of any evidence of prior bad acts, here none of the prior events were more abhorrent than the current charge which involved penile insertion. Thus, the evidence would not cause a jury to be unduly hostile or sympathetic relative to the evidence of the current charge.

Evidence of flight, including extensive testimony about a high-speed car chase where defendant was only a passenger, upheld as admissible to demonstrate consciousness of guilt; Court faults trial attorney for not making a Rule 403 objection.

State v. Strizich, 2021 MT 306:

The State charged Strizich with aggravated burglary, trespassing, and drug possession for allegedly burglarizing a cabin near Wolf Creek. During the encounter, the cabin owners shot Strizich in the leg. Strizich crawled away in the snow and hid inside a nearby cabin. Officers found Strizich, arrested him for trespassing, and transported him to the local hospital. Strizich had surgery and was taken to Elkhorn Healthcare and Rehabilitation in Clancy. While recovering at Elkhorn, Strizich learned he had an active arrest warrant for the burglary.

With the help of his friend Lamere and two others, Strizich left Elkhorn a couple of weeks later and was a passenger in Lamere's car.

Lamere then got into a high-speed chase with pursuing police, hitting 135 mph before crashing the car. At trial, the State sought to call three witnesses to describe Strizich's flight from Elkhorn, the car chase, and the car crash, all in great detail. Trial counsel objected to the evidence on the grounds that Strizich was a passenger and was not charged with any offense related to a high-speed chase. The State argued the evidence was relevant to show evidence of flight and that Strizich had consciousness of guilt. The district court allowed all the testimony into evidence. The State then asked the district court to take judicial notice and read aloud Lamere's youth court petition and dispositional order about the high-speed chase in front of the jury. Trial counsel said, "I totally object to the introduction of any of this into evidence. So I have I think my continuing objection to that." The district court denied the objection.

The Supreme Court affirmed. It stated that evidence of flight or concealment from arrest or prosecution does not violate Rule 404(b) when admitted to prove consciousness of guilt. Strizich's flight from Elkhorn upon learning he had an arrest warrant was relevant to show his consciousness of guilt. The Court declined to address appellate counsel's Rule 403 argument because trial counsel had not made a Rule 403 objection below. The Court said trial counsel had only argued the evidence was irrelevant, not that the evidence was unfairly prejudicial. The Court, while acknowledging "Lamere's youth court offense added little probative value to the charges Strizich faced," said the district court was not given an opportunity to conduct a balancing test, and that if trial counsel had made a specific objection at trial, the district court could have been persuaded to limit the testimony.

Prosecutor's intentional references to defendant's "felony" probation status and prior stint at the Montana State Prison were inadmissible under M. R. Evid. 404(b), but error was harmless.

State v. Erickson, 2021 MT 320:

Erickson was charged with assault on a peace officer for pulling a knife on his probation officer. At trial, during his opening statements, County Attorney Ben Anciaux told the jury Erickson was on *felony* probation. Later, Mr. Anciaux intentionally elicited testimony that

Erickson had been to prison. Defense counsel moved for a mistrial, which was denied.

The Court found that Mr. Anciaux acted improperly in these two instances. Mr. Anciaux "brought attention to Erickson's criminal history for no other purpose than to define him as a prior felon, in violation of the purpose of M. R. Evid. 404(b) . . . The intended inference was obvious and improper—that Erickson's felony history made him a bad person with a propensity to commit further crimes, such as the current charged felony."

But the Court affirmed on harmless error, concluding the evidence against Erickson was very strong. He made several admissions on the stand, and there were multiple witnesses corroborating the State's case. Despite the inadmissible statements being inherently prejudicial, their *effect* in the context of the overwhelming evidence did not undermine Erickson's right to a fair trial. Therefore, the conviction was affirmed.

The Court closed the opinion by saying, "It is as much the prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one," and, "Here, the prosecutor failed in this duty."

B. Hearsay

Out-of-court statement introduced to explain investigating officer's course of action was not hearsay.

State v. Fillion, 2020 MT 283:

At Fillion's trial for stealing a motorcycle, an officer testified he had received a citizen report that the stolen motorcycle was in Fillion's yard. The officer went to Fillion's residence and observed the motorcycle in the yard.

Fillion objected on hearsay grounds to the officer testifying about the citizen's report saying the stolen bike was in Fillion's yard. The Court affirmed the district court's ruling that the citizen's statement was not hearsay because it was offered for the limited purpose of explaining how the officer came to be at Fillion's residence. The Court held that such testimony explaining an officer's investigative conduct "is not admissible when it '[e]ffectively points the finger of accusation at [the] defendant,'" but here the citizen's "statement was not offered for its truth and it did not point the finger of accusation at Fillion."

Conviction reversed for insufficient evidence because State proved one element of the offense solely through inadmissible hearsay.

State v. Butler, 2021 MT 124:

Butler was charged with negligent vehicular assault and three other offenses following a crash in which he was the driver, and his passenger Webster was injured. Webster did not testify. The State introduced testimony from a trooper, over defense's hearsay objection, about Webster's injuries, of which the trooper learned during his investigation.

At the close of the State's case, Butler said he wanted to make a motion, and the district court said he could make it at the next break. After the break, the defense put on its case and called Webster, and the State cross-examined him about his injuries.

At the next break, Butler moved to dismiss for insufficient evidence, arguing the State introduced no evidence about Webster's injuries, only hearsay from the Trooper. Butler contended that at the time he made his motion, there was no evidence to go to the jury about Webster's injuries, and the admission of the Trooper's testimony concerning the steps he took in his investigation could not be used as a conduit for otherwise inadmissible hearsay. The district court denied the motion on the ground that the Trooper was allowed to testify about the injuries he learned about during his investigation.

The Court reversed the denial of the motion to dismiss. Though the district court's theory of admission for the testimony was not for the truth of the matter asserted about Webster's injuries, "this is precisely how the State used this evidence." The State relied on the trooper's testimony as substantive evidence of Webster's injuries and proof of an element of the offense. The Court cautioned, "Testimony relaying out-of-court statements ostensibly to explain the next steps of law enforcement's investigation, but which go directly toward proving an element of the charged offense and the defendant's guilt, run a substantial risk of misuse and thus may run afoul of M. R. Evid. 402 and 403."

Forensic interview video inadmissible as either a prior consistent or inconsistent statement; error was harmless.
State v. Smith, 2021 MT 148:

The Court held that the district court erred in admitting a video recording of the child victim's forensic interview as a prior consistent statement because it was not made before the alleged motive to fabricate arose. Nor was it admissible as a prior *in*consistent statement that contained "mixed" consistent and inconsistent statements. The victim testified consistently and coherently at trial and did not demonstrate a lack of memory regarding the event or things she had stated during the prior interview. In addition, omissions from one statement in comparison to the other do not necessarily constitute inconsistencies, given the different purposes of the statements and motives of the persons directing them. To the extent there were inconsistencies between her trial testimony and the prior interview, they were relatively immaterial, and could easily have been isolated and played for the jury without playing the other portions.

However, the Court ruled the error in admitting the video was harmless because the State presented ample admissible evidence proving the same facts including "Smith's text messages and voicemails, revealing [his] impassioned expression of contrition."

C. Other Evidentiary Issues

Trial court properly limited evidence of specific instances of lying by complaining witness.
State v. Quinlan, 2021 MT 15:

Quinlan was tried for Incest against his 11-year-old daughter. At trial, Quinlan sought under Rule 608(b) to present extrinsic evidence of specific instances of his daughter lying to challenge her credibility. Observing that the lying instances occurred two years after the alleged crime, the district court allowed Quinlan to ask about them on cross of the daughter but did not allow Quinlan to ask other witnesses about them.

On appeal, Quinlan argued that after the daughter denied the instances of lying, the district court erred by not allowing him to controvert her testimony with extrinsic evidence of those specific lies. The Court disagreed. The Court observed that under Rule 608(b),

the district court could have permitted more extensive cross about the lying incidents, but that rule barred introduction of extrinsic evidence beyond cross-examination of the daughter.

The Court also rejected an argument under Rule 613(b) that the daughter's testimony denying lying authorized introduction of her prior inconsistent statements about those incidents. The Court concluded that the daughter had denied lying but had not testified about the actual underlying events, thus, any prior statements about those events were not inconsistent to her testimony.

Motion for mistrial properly denied over testimony indicating the defendant was in jail.

State v. Denny, 2021 MT 104:

Denny was arrested for driving a stolen vehicle and led police on a high-speed chase through Great Falls. He was charged with felony theft and several misdemeanors. As Denny was being moved back to the jail after the first day of trial, he made intimidating gestures at a state witness in the jail. The witness mentioned this on the stand at trial the next day, resulting in the jury hearing Denny was in "jail." Denny moved for a mistrial for this and another instance in which a State witness characterized an audio recording of Denny as a "jail visitation call."

The Court affirmed. Regarding the testimony from the jail witness, the Court held Denny "put such evidence at issue" by attempting to influence/intimidate that witness during the trial. The Court held there was no error in refusing to give a curative instruction, because that would have only drawn further attention to Denny's status as an inmate. All told, the two jail references were not prejudicial because the remainder of the record "was sufficient to establish Denny's guilt."

No Rule 703 violation or abuse of discretion in prohibiting expert testimony about Derek Thrush crime lab testing.

State v. Brasda, 2021 MT 121:

Brasda was charged with meth and paraphernalia possession. Derek Thrush did the testing on the sample sent to the crime lab, and the State gave notice of Thrush as an expert. After Thrush admitted to stealing meth from the crime lab and using it, the

State had another forensic chemist, Travis Doria, test the substance, who independently confirmed the presence of meth. The State withdrew Thrush as a witness and substituted Doria. At trial, the district court denied Brasda's request to ask Doria about Thrush's prior testing, ruling that Doria lacked personal knowledge about Thrush's criminal acts and termination from the lab.

On appeal, Brasda made two arguments. First, Brasda argued that, as an expert witness, Doria was permitted under Rule 703 to testify to the facts underlying his expert opinion, including the chain of custody of the sample he tested, which in turn included Thrush's prior testing of that sample. The Court disagreed, concluding Doria's opinion concerned only the testing and results of the chemical analysis of the evidence and did not take Thrush's involvement with the sample into account.

Second, Brasda argued Doria's potential testimony about Thrush's involvement was admissible as non-hearsay to explain why he had to retest the sample, and not as truth of the matter asserted (i.e., that Thrush was a drug user and thief). The Court agreed Doria's testimony would have been admissible for this purpose as non-hearsay under Rule 801(c). But because "the thrust of" Brasda's trial request was premised upon speculation about contamination from Thrush's misdeeds, and not focused on this non-hearsay purpose, the Court found no abuse of discretion in barring further inquiry.

7. Attorney-Client Relationship

Immigrants with criminal convictions bear the burden in removal proceedings of proving their conviction is *not* for an offense barring relief; important that their record of conviction reflect this.

Pereida v. Wilkinson, 141 S.Ct. 754:

The U.S. Supreme Court resolved a circuit split over who shoulders the burden in a removal proceeding to prove whether a conviction bars a nonpermanent resident from cancellation of removal, a form of discretionary relief for longtime residents who are otherwise deportable or inadmissible. People with certain convictions, such as for "crimes involving moral turpitude," are statutorily barred from receiving cancellation of removal. Before *Pereida*, some circuits,

including the Ninth Circuit, had held the government must prove whether a particular conviction disqualified someone from cancellation; in other circuits, such as Eighth Circuit, the respondent had to prove a conviction was *not* for a disqualifying offense.

The U.S. Supreme Court held the Immigration and Nationality Act places the burden squarely on the respondent to demonstrate eligibility for relief from removal. *Pereida* overrules Ninth Circuit precedent on which Montana defense counsel previously could rely to negotiate a plea that was ambiguous as to whether the offense was disqualifying. Considering this decision, defense counsel should work to ensure whenever possible that a record of conviction is clear that an offense does *not* preclude access to cancellation of removal under 8 USC § 1229b(b)(1).

District court did not abuse its discretion by proceeding to trial with present counsel after defendant expressed generalized concerns about system.

State v. Dillingham, 2020 MT 310:

Before his trial and eventual conviction of Aggravated SIWC, Dillingham personally suggested a continuance and expressed various concerns to the district court, including that the defense was not ready for trial and that he would not receive a fair trial due to media coverage and racial bias. The district court did not continue the trial or appoint new counsel.

The Court affirmed, holding that Dillingham never directly requested new counsel and that his comments amounted to generalized dissatisfaction with the justice system. Alternatively, the Court held that even if Dillingham's lack of confidence did constitute a request for new counsel and some suggestion of communication problems or disagreements, the district court's extensive inquiries and conversation with Dillingham was an "adequate initial inquiry" that revealed no "seemingly substantial" complaints. The Court similarly held that the district court engaged Dillingham's continuance concerns and was "well within" its discretion to deny a continuance.

The prosecutor cannot be in the courtroom during a *Gallagher* hearing; conviction affirmed due to no objection.

State v. Rodriguez, 2021 MT 65:

The State charged Rodriguez with SIWC of a 15-year-old, alleged to have happened in 2003. The victim disclosed the assault in 2014. Rodriguez was incarcerated for three years before his trial began. During that time, Rodriguez managed to hire, fire, and conflict out five different attorneys. During the *Gallagher* hearings in 2017 and 2018, the State remained present in the courtroom. The defense attorneys did not object to the State's presence.

On appeal, Rodriguez raised a plain error claim that his due process rights were violated by the State's presence during the *Gallagher* hearing, arguing the State was able to listen to his complaints about appointed counsel. The Court agreed with Rodriguez and explained the prosecution's exclusion is necessary to safeguard issues protected by the attorney-client privilege, as *Gallagher* hearings frequently result in the disclosure of confidential communications. The *Gallagher* hearing "should be conducted with the defendant and his/her counsel outside the presence of the prosecution." The Court distinguished *State v. Dethman*, 2010 MT 268, and clarified the prosecutor can only be called in if their input is needed after the initial inquiry. The Court, however, held the violation did not merit reversal under the plain error standard, and affirmed.

Defendant's testimony about privileged communications with former counsel implicitly waived attorney-client privilege and opened the door to former counsel's testimony regarding those communications.

State v. Payne, 2021 MT 256:

Payne was charged with bail jumping. The State subpoenaed Payne's former counsel to testify that he informed Payne of the jumped trial date. Former counsel moved to quash the subpoena, but the district court deferred a decision on the motion until trial. At trial, Payne testified that his former attorney did not tell him the trial date. Payne was advised he might waive attorney-client privilege through this testimony but proceeded to give it anyway. The State then called the former attorney to the stand and moved for a *Gillham* order, which

the court granted. The defense did not object, and the former attorney testified to his communications with Payne about the hearing date.

Payne appealed and argued his attorney-client privilege was violated. The Court affirmed, holding Payne's "words and conduct throughout his trial demonstrated an implicit waiver of his attorney-client privilege." The Court further held the former attorney did not provide ineffective assistance of counsel through the testimony or through failing to move for a continuance of the jumped trial date.

Trial counsel's sentencing memorandum of regrets during representation not sufficient for record-based IAC claim.
State v. Polak, 2021 MT 307:

Polak was convicted of deliberate homicide. After the trial, Polak's lawyer filed a sentencing memorandum containing a section titled "things, I as Mr. Polak's lawyer wish I could have done." Defense counsel listed several shortcomings, such as not offering a lesser included offense instruction, not making certain discovery requests, and failing to object at certain points throughout the trial.

The Court declined to review any claims of ineffective assistance of counsel on direct appeal and said they would have to be brought up in a petition for post-conviction relief. The Court pointed out that while Polak's lawyer presented a list of possible errors she had made, she never alleged her representation to be ineffective, and she did not move for a new trial based on those alleged errors and ineffective actions. Therefore, any IAC claims were not "record-based" and would have to be addressed in PCR.

8. Involuntary Commitments (DIs)

Under § 53-21-140(5)(b), a witness may not appear at a commitment hearing by electronic audio-video communication if the respondent objects.
Matter of N.A., 2021 MT 228:

At the beginning of the commitment hearing, the State proposed to have the court-appointed professional person testify by Vision Net. The defense objected, citing the Confrontation Clause. In response, the State cited § 53-21-140(3) as allowing the use of Vision Net, but did not mention subsection (5), which prohibits the use of Vision Net where the

respondent objects. The defense maintained her objection to Vision Net, but indicated that if the court overruled the objection, she would not be seeking a continuance of the hearing. The district court allowed the video testimony. On appeal, the State did not argue the district court's decision was correct, instead arguing the issue was not preserved and the error was harmless.

The Court reversed and held, "While a professional person may appear by electronic audio-video communication, § 53-21-140(5)(b), MCA, restricts that general rule in instances where the respondent objects." Because the witness was the professional person required to testify both statutorily and by court order in the case, and she was the State's key witness upon whose testimony the district court's order relied to a large extent, the Court declined to apply the harmless error doctrine or to find the error a *de minimis* error that did not prejudice N.A.

The Court also rejected the State's preservation argument, explaining waiver of the statutory prohibition on video testimony where the respondent objects would only occur if the respondent did not object. Here, N.A. clearly objected. The Court stated that N.A. did not acquiesce in the court's incorrect decision when she chose not to seek a continuance. N.A. owed the State no obligation to seek a continuance.

Unobjected-to failure to conduct a post-petition evaluation did not warrant recommitment's reversal.
In re: B.A.F., 2021 MT 257:

The State petitioned for B.A.F.'s recommitment. The State did not complete a post-petition evaluation. B.A.F. did not object to that failure below but appealed it. The Court had previously reversed upon an unobjected-to failure to have a post-petition evaluation in *original* commitment proceedings.

The Court agreed that the commitment statutes require a post-petition evaluation in recommitment proceedings because the recommitment procedure "must be the same in all respects as the procedure on the petition for the original" commitment. But the Court distinguished its original petition precedent because an original petition will not necessarily be accompanied by a pre-petition evaluation, whereas a recommitment petition must be accompanied by a pre-petition evaluation. Thus, not having a post-petition evaluation in a

recommitment is not as consequential to the proceeding and, in addition to the record demonstrating B.A.F.'s continued deterioration, did not justify plain error reversal.

Involuntary commitment order reversed for plain error: waiver of respondent's presence at the initial hearing was statutorily inadequate and, because of the waiver, respondent never received the required judicial rights advisory.
Matter of F.S., 2021 MT 262:

At the initial hearing on the State's petition for F.S.'s involuntary commitment, F.S. was not present. His counsel asked to waive his presence on account of his dementia and hearing problems. The district court accepted this presence waiver and stated it would advise F.S. of his rights at the next hearing (§ 53-21-122 demands this judicial rights advisory occur at the initial hearing). At the subsequent adjudication hearing, the district court neglected to advise F.S. of his rights. F.S. was committed to the State Hospital.

On appeal, F.S. argued the waiver of his presence at the initial hearing was invalid under § 53-21-119. He argued this erroneous waiver was prejudicial because he never heard from the judge what the proceedings were about or what rights he had under the law—things that would typically occur at the initial hearing.

The Court agreed. It noted the waiver statute requires a "finding supported by facts" as to the necessity of the waiver; here, the judge made no such findings. Holding this erroneous waiver was prejudicial, the Court explained, "The probable value of the initial hearing is substantial. It is the first opportunity for a respondent to see the judge and learn about the legal process that could take away the respondent's liberty." Because the district court improperly excused F.S.'s absence at the initial hearing and then failed to ever advise him of his rights or the nature of the proceedings, the Court held this error "compromised the integrity of the judicial process required in commitment proceedings" and warranted plain error reversal.

9. Dependent and Neglect (DNs)

Children properly placed with non-offending parent.
In re J.S.L. & J.R.L., 2021 MT 47:

Mother and Father divorced in 2016 with Mother receiving primary custody. In 2018 Father moved to Colorado while Mother and Children stayed in Missoula. In early 2019, the Department sought and received EPS and TIA based upon domestic violence between Mother and her new boyfriend and Mother's mental health instability. Children were placed with their maternal grandparents. In June 2019, the Department sought to adjudicate Children as YINC. Mother eventually agreed to YINC. Father objected. The district court heard testimony and then took the matter under advisement. In August 2019, Father moved to dismiss the DN and place Children with him. The district court instead found Children YINC, noting that Father's drinking history raised potential safety risks and required further investigation.

The district court then set a dispositional hearing at which the Department sought TLC and Father again requested placement with him. The district court granted the Department TLC but ordered an expedited ICPC process. In January 2020, the district court expressed frustration with "the slow walk of the ICPC" and stated its intent to place Children with Father unless the Department carried its burden to provide reasons not to. In February, the Department moved for placement with Father. Although the ICPC was never completed, by April the Department advised that Father had worked his un-ordered treatment plan and that the Department had no concerns about his ability to safely parent. The district court then dismissed the DN and placed Children with Father.

On appeal, Mother argued that Father's previously alleged risks had not been adequately investigated and that ICPC was required before placement because Father was not a "non-offending" parent under *E.Y.R.*, 2019 MT 189, and *B.H.*, 2020 MT 4. The Court disagreed. "[A]n offending parent is a parent who has had a child removed from the home because of his or her conduct or condition." Here, Father was living in Colorado when Children were removed from Mother due to violence between Mother and her new boyfriend. The Court further clarified that no treatment plan is necessarily required for a non-offending parent and reiterated that placement with a non-

custodial, non-offending parent does not require completion of an ICPC. As the Court summarized, "The Department's investigation of Father found no good cause to not place Children with Father. Therefore, placement of Children with Father was required."

Department must provide reasonable accommodations to ADA parents; termination affirmed because Mother did not object to lack of ICWA expert at the TLC stage.

Matter of K.L.N., 2021 MT 56:

Mother had long suffered from the effects of fetal alcohol syndrome, contributing to choices such as not providing sufficient food and water to her children, failing to change diapers for long periods, and leaving children under the care of known sex offenders. Children are enrolled tribal members. The Department petitioned for TLC but no ICWA expert was called. Nonetheless, Mother stipulated to TLC. After an unsuccessful treatment plan, the Department terminated parental rights. An ICWA expert did testify at the termination hearing.

On appeal, the Court held that the Department must make reasonable accommodations to parents who have a disability under the Americans with Disabilities Act (ADA). The Court concluded, however, that the Department and district court made reasonable accommodations here. The Court held it was error to grant TLC without an ICWA expert; however, the Court chose not to invalidate the termination because Mother stipulated to TLC and never raised an objection to the lack of an ICWA expert during the TLC adjudication stage. Additionally, the Court deferred to the district court's ruling that returning the child to Mother's care would likely result in serious physical or emotional damage to the child.

Termination of parental rights upheld because there was insufficient "reason to know" whether the child was eligible to be enrolled in a federally recognized tribe.

Matter of L.H., YINC, 2021 MT 199:

Mother and Father appealed their YINC judgments terminating their respective parental rights. Among other sufficiency arguments, they challenged the district court's compliance with the Indian Child Welfare Act (ICWA). DPHHS had initiated a YINC adjudication and was awarded temporary legal custody of the baby, L.H. Father

indicated he had an affiliation with the "Lakota Sioux Tribe." The court notified the Bureau of Indian Affairs, as is necessary under ICWA. At the show cause hearing, the Department presented the testimony of a qualified ICWA expert that the parents' continued custody would likely result in serious physical and emotional damage. The Department subsequently awarded temporary legal custody of the baby, and the parents agreed to reunification treatment plans. This TLC expired. The Department initiated a second YINC proceeding alleging Mother and Father had not progressed with their respective reunification treatment plans.

Meanwhile, the Department received correspondence from the Standing Rock Sioux Tribe (SRST) of North and South Dakota, certifying that L.H. was not eligible for SRST enrollment. The district court proceeded with a second YINC adjudication without similar determinations from any of the several other federal recognized tribes who descend from the Lakota Sioux.

The Court held on appeal that there was no non-speculative "reason to know" that L.H. was eligible for membership in any other federally recognized tribe that "descended from the historical Lakota Sioux." Thus, because ICWA applies only when children subject to involuntary foster care and parental rights termination proceedings are eligible for enrollment or are a member of a federally recognized tribe, the district court did not erroneously proceed under the second petition to a YINC adjudication, temporary custody grant, or ultimate termination of parental rights.

10. Youth Cases (DJs)

No express or implicit finding of permanent incorrigibility required before court may sentence youth convicted of homicide to life without parole.

Jones v. Mississippi, 141 S.Ct. 1307:

The U.S. Supreme Court held that youths who commit a homicide can be sentenced to life without parole without the sentencing court first making an express or implicit factual finding of permanent incorrigibility. Interpreting *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), Justice Kavanaugh wrote that for youths convicted of homicide, "a State's discretionary

sentencing system is both constitutionally necessary, and constitutionally sufficient."

The Court reaffirmed, "Youth matters in sentencing." The Court noted the possibility of IAC if counsel fails to make sentencing arguments focused on the defendant's youth. The Court also commented on the possibility of an "as-applied Eighth Amendment claim of disproportionality" regarding the sentence, which Justice Sotomayor wrote should be controlled by *Montgomery*'s holding "that sentencing 'a child whose crime reflects transient immaturity to life without parole . . . is disproportionate under the Eighth Amendment.'"

Juvenile life without parole resentencing remanded for second resentencing that considers Defendant's rehabilitation in prison.

State v. Keefe, 2021 MT 8:

In 1985, Keefe, then 17, murdered a family of three. He was sentenced to three consecutive sentences of life without parole. In 2017, he won the right to a resentencing based on *Miller*, *Montgomery*, and *Steilman*, 2017 MT 310, which combined to say life without parole sentences for youths are unconstitutional in Montana unless the youth is "irreparably corrupt." At the resentencing hearing, Judge Pinski reimposed the three consecutive life without parole sentences.

Keefe raised three claims on appeal: (1) the district court's refusal to appoint Keefe defense psychological and mitigation experts was error; (2) the district court failed to adequately consider the *Miller* factors and the possibility of rehabilitation; and (3) under *Apprendi*, "irreparably corrupt" must be found by a jury.

As to (1), the Court held that the constitutional mandate for a mental health expert in *Ake v. Oklahoma*, 470 U.S. 68, applies only where sanity is at issue. *Ake*, thus, did not apply here because Keefe's youthful mental condition was at issue, but not his sanity.

The Court reversed under issue (2). In the lead opinion (3 justices), this issue turned on the district court's refusal to consider evidence of Keefe's subsequent rehabilitation in prison. The opinion explicitly holds that "evidence of rehabilitation in the years since the original crime must be considered by the resentencing court." The resentencing must consider the aggravating and mitigating circumstance that *exist at the time* of the resentencing. The Court

remanded for a new resentencing because the district court had refused to consider testimony from the independent expert and prison officials suggesting Keefe had matured in prison, had a low risk of violent recidivism, and could now be successfully reintroduced into society.

Chief Justice McGrath and Justice Sandefur, each writing separately, concurred in reversing the sentence but dissented from remanding for resentencing. Both would have simply struck the parole restriction from Keefe's sentences. Chief Justice McGrath would read *Miller* and *Montgomery* as establishing a presumption against life without parole for youths and would interpret the Montana Constitution as prohibiting such sentences. Justice Sandefur would have explicitly held there is an Eighth Amendment (and Montana Constitution) presumption against life without parole for youths. He would have held that the State failed to present evidence overcoming that presumption and that another resentencing hearing is futile in light of that failure.

Absent an affirmative, explicit transfer of jurisdiction from youth court to district court under § 41-5-1605(3), once the youth turns 25, no court has jurisdiction over the matter.

In the Matter of S.G.-H.M., Jr., 2021 MT 176:

S.G.-H.M. was charged in 2006, at the age of 16, with possession of explosives and criminal endangerment. The State had filed a petition in youth court to proceed under the Extended Jurisdiction Prosecution Act (EJPA). S.G.-H.M. received a juvenile sentence of probation and a deferred adult sentence. The adult sentence was stayed on the condition that S.G.-H.M. not violate his juvenile probation.

In 2013, when S.G.-H.M. was 23 years old, the State filed a petition to revoke. The judge implemented the adult sentence, imposing a deferred sentence and placing S.G.-H.M. under the supervision of adult probation and parole. But the judge did not enter any order—or make any affirmative statements on the record—transferring the matter from youth court to district court. The State filed another petition to revoke in 2014, and the Judge revoked S.G.-H.M.'s deferred adult sentence and sentenced him to DOC custody. S.G.-H.M. turned 25 while in custody. In 2017, when S.G.-H.M. was 27 years old and out on probation, the State filed another petition to revoke. S.G.-H.M. filed a

motion to dismiss for lack of jurisdiction, but the court denied the motion and revoked.

On appeal, the Court interpreted the plain language of § 41-5-1605(3), which states that upon revocation of the stay of an adult sentence under the EJPA, "*the youth court shall transfer* the case to the district court." The Court held this statute "does not provide for a self-executing transfer but, instead, unambiguously requires a youth court judge to affirmatively act to move the case to a district court." Because the youth court's jurisdiction ended at age 25—in 2015—and the judge did not explicitly transfer jurisdiction to district court, no court had jurisdiction over the matter after 2015, and S.G.-H.M.'s 2017 revocation was illegal.

Youth court erred when it revoked C.L.'s probation under a consent decree without C.L.'s youth court petition having been reinstated.

In the Matter of C.L., 2021 MT 294:

The State filed a youth court petition accusing 13-year-old C.L. of one count of felony criminal mischief. C.L. and the State entered a consent decree under the Youth Court Act which provided that C.L. would follow various probation conditions for one year. The court approved the consent decree and ordered that the petition against C.L. be suspended. Several months later, the State filed a petition to revoke C.L.'s probation, alleging C.L. violated the conditions and requesting C.L. be committed to Pine Hills. The petition did not seek to reinstate the State's previous youth court petition against C.L.; rather, it requested the youth court "proceed with disposition" under the statutes addressing "consent *adjustments*" (applicable in informal proceedings) not "consent decrees" (applicable in formal proceedings when a formal petition was filed).

C.L. moved to dismiss the petition, arguing the State did not follow the proper procedure under the MT Youth Court Act. Specifically, C.L. argued that because he entered a consent decree, the correct procedure was for the State to reinstate the suspended youth court petition, *not* initiate probation revocation proceedings. The youth court denied the motion. It issued a dispositional order finding that C.L. violated the terms of his probation and was a "delinquent youth" and "serious juvenile offender," and it imposed a suspended commitment to

Pine Hills. Soon after, the State filed a second petition to revoke C.L.'s probation. The court revoked C.L.'s probation and committed him to Pine Hills. Notably, the formal petition against C.L. was never reinstated, and C.L. never received an adjudication on the merits of the charge of criminal mischief.

On appeal, the Court held that under the Youth Court Act, once a youth enters a consent decree under a "formal" proceeding initiated by a youth court petition, the formal proceedings are "suspended," and the youth does not proceed to an adjudication. If the youth violates the terms of the consent decree, the sole disposition available to the State is to reinstate the petition. Commitment to the DOC for placement in a youth correctional facility under a consent decree is not an option. Because the State failed to follow the correct procedure to reinstate the petition—and instead incorrectly filed a petition to revoke—the district court should have granted C.L.'s motion to dismiss. Its failure to do so prejudiced C.L., who was committed to Pine Hills without any actual admission of guilt or adjudication of the merits of the criminal mischief charge. Notably, the Court emphasized that C.L.'s admission of "true" at the consent decree hearing was statutorily required to enter a consent decree and was not a formal "valid admission" to the charges contained in the youth court petition.

Detention subject to release at youth court probation officer's discretion does not satisfy right to "bail."

D.M.K. v. Weber, OP 21-0068:

D.M.K. was being held on a youth court detention order and petitioned for habeas relief. The youth court had ordered that D.M.K. "shall be detained at a juvenile detention facility" but that "Youth Probation may at their discretion move the youth to less restrictive placement." The Court dismissed the habeas petition on procedural grounds because it was not verified by oath or affirmation as required by § 46-22-201(3), and because a party may not file pro se pleadings while represented by appointed counsel.

However, before dismissing, the Court made two important points: (1) the Youth Court Act "expressly contemplates the availability of bail to detained youths" and (2) "As a matter of law, the otherwise lawful detention of a Youth in a secure detention facility subject to the discretion of a youth probation officer to place the youth in a less

restrictive setting is not 'bail' as referenced in Article II, Section 21 of the Montana Constitution." "[T]hus," the Court observed, D.M.K. is "seemingly being 'detained in custody on [a] criminal charge for want of bail,' as referenced in § 46-22-103, MCA."

11. Elements, Offenses, and Instructions

A. Jury Instructions

No abuse of discretion in denying specific unanimity instruction and "witness presumed to speak the truth" instruction.

State v. Wells, 2021 MT 103:

At his felony DUI trial, the State presented two alternate theories of Wells's guilt: Wells drove the vehicle until it ran out of gas, and Wells took actual physical control of the vehicle after it ran out of gas (there was a gas can in the vehicle rendering it operable). Wells sought "to provide a specific unanimity instruction preventing the jury from finding Wells guilty 'unless you all agree that the State has proved beyond a reasonable doubt that . . . he was driving the vehicle, or you all agree that he was in actual physical control of the vehicle, while under the influence.'" He also sought an instruction that "[a] witness is presumed to speak the truth."

The Court held driving and being in actual physical control of a vehicle are merely alternate means of committing a single offense, thus no specific unanimity instruction was necessary. And when several possible overt acts are alleged that could constitute the crime charged, no specific unanimity instruction is necessary where "acts are so closely related in time, location, and nature that they form part of the same transaction or course of conduct, rather than completely independent occurrences." The Court noted "the most prudent path may be for a court to provide a specific unanimity instruction whenever multiple acts are alleged under a single count," but held no abuse of discretion here.

The Court held the district court also did not abuse its discretion by failing to give an instruction that witnesses are presumed to speak the truth. The Court noted the jury was properly instructed it "could assess factors related to witness demeanor, potential bias, other witness

testimony, and potential false and mistaken testimony in assessing each witness's believability."

Unauthorized use of a motor vehicle is not a lesser-included offense of theft by possession of stolen property.
State v. Denny, 2021 MT 104:

Denny was charged with felony theft by possession of stolen property under § 45-6-301(3)(c). At trial, he was denied a lesser-included offense instruction for unauthorized use of a motor vehicle under § 45-6-308(1).

Denny appealed, and the Court affirmed. It held unauthorized use of a motor vehicle is not a lesser-included offense of theft by possession of stolen property. This is because, unlike theft by possession of stolen property, unauthorized use of a motor vehicle does not have an element requiring the automobile be obtained by theft, nor does it require an intent to deprive the owner.

Defense counsel ineffective for failing to object to incorrect jury instruction for definition of "knowingly" mental state.
State v. Secrease, 2021 MT 212:

Secrease went to trial on felony DUI and misdemeanor obstructing a peace officer charges. None of Secrease's three attorneys proposed jury instructions. When settling the instructions, the defense did not object to the State's proposed instruction using the conduct-based definition of "knowingly" in § 45-2-101(35) for the obstructing charge. The problem is that the result-based definition of knowingly applies to obstruction of a peace officer under § 45-7-302(1) (*see State v. Johnston*, 2010 MT 152). Without objection, the district court gave the wrong knowingly instruction, and Secrease was found guilty. The jury submitted a written question expressing confusion about the obstruction charge, and with defense concurrence, the district court simply referred the jury back to the incorrect instructions.

On appeal, Secrease argued he received ineffective assistance due to counsel's acquiescence in an incorrect definition of knowingly that caused him prejudice. The Court agreed, ruling counsel's performance was deficient because there was no plausible justification for failing to seek the correct instruction. The Court was unpersuaded by the State's argument that the wrong instruction caused no prejudice because the

prosecutor used the correct result-based definition during closing argument. The Court emphasized prosecutor argument is not evidence and is no substitute for written instructions from the trial judge. The Court pointed to the jury's confusion about the instructions as evidence of prejudice.

Defendant's proposed instructions on justifiable use of force properly denied where the defense put on no evidence, and the State's evidence supported only the inference that the defendant was the sole aggressor.

State v. Marquez, 2021 MT 263:

Marquez was charged with assault on a peace officer for a scuffle that occurred while he was in custody on other charges. When a detention officer transported a handcuffed Marquez out of his cell, Marquez allegedly tried to headbutt the officer. The officer responded by pushing Marquez against a wall, grabbing him by the hair, and pushing him down onto a bench. Marquez's knee at one point hit the officer in the chest, causing the officer pain. The officer then pinned Marquez to the bench, hurting Marquez's neck.

The State's case-in-chief included the officer's testimony, the officer's body camera footage of the incident, and a surveillance video showing a different angle of part of the incident. The defense called no witnesses. The defense argued Marquez did not intentionally strike the officer but did so inadvertently while trying to free himself from a painful position. At the settling of instructions, Marquez proposed to instruct the jury on the defense of justifiable use of force. The district court declined to do so.

The Court affirmed. Seemingly faulting the defense for not putting on evidence, the Court concluded the State's evidence did not support a JUOF instruction. The Court noted, "JUOF is a defense that admits doing an act but seeks to justify it." Because Marquez denied the act, the Court held the JUOF instructions were not warranted. The Court also emphasized the evidence showed Marquez was the aggressor and the officer did not deliberately try to hurt Marquez. The Court glossed over Marquez's argument that even if he was the aggressor, § 45-3-105(2)(a) allowed him to use defensive force if he reasonably believed he was in "imminent danger of death or serious bodily harm." The Court simply concluded it was not "self-evident that Marquez could

reasonably think defensive force was necessary in response" to the officer's actions.

Counsel was ineffective for failing to seek the correct result-based jury instruction of "knowingly."
State v. Huggler, 2021 MT 290N:

Huggler went to trial for allegedly obstructing a peace officer. The jury instructions included an incorrect conduct-based, rather than result-based, instruction for the "knowingly" mental state. The incorrect instruction here required the jury to disregard the defendant's explanation for his actions and allowed the conviction without regard for the defendant's intent. Reversed and remanded for a new trial. This is a non-cite but relies on the holding in *State v. Johnston*, 2010 MT 152; *see also Secrease*, 2021 MT 212.

B. Elements and Offense-Specific Issues

Private, un-gated parking lot was sufficient for jury to find DUI's way-of-the-State-open-to-the-public element.
State v. Krause, 2021 MT 24:

Krause was convicted of felony DUI after being found passed out in a parked car. The spot was in the lot of a public housing apartment complex. The spot required a special resident permit, which the car had, and a sign threatened towing of any unpermitted cars. Krause argued this evidence was insufficient to prove DUI's "upon the ways of this state open to the public" element, because the private parking spot was not intended for public use.

The Court disagreed. The Court held that "whether a space is private is not dispositive" and that the test instead looks to "all of the surrounding circumstances in each case to determine whether it would be reasonable to expect a member of the public to be using the drive." Here, the space was near various public roads and spaces, and nothing physically prevented the public from ignoring the towing warning and parking there. The Court held only that there was enough evidence for the question to go to the jury, not necessarily that this spot was, as a matter of law, within the ways of the state open to the public.

Privacy in communications statute at § 45-8-213(1)(a) is not facially overbroad, not a content-based restriction on speech, and can cover threats involving third parties, not just the recipient of the communication.

State v. Lamoureux, 2021 MT 94:

Following his conviction for three counts of violating privacy in communications, Lamoureux appealed and challenged the constitutionality of the privacy in communications statute as overbroad and curtailing protected speech. Lamoureux argued the Court's holding in *Dugan* was manifestly wrong and asked the Court to reconsider and overrule its decision. The Court rejected the overbreadth argument and re-affirmed *Dugan*. The Court concluded the statute was "narrowly tailored" to accomplish the State's asserted purpose of fully protecting caustic, abusive, and robust speech until it rises to the level of threats which cause harm to society. The Court held the challenged statute "curtails no more speech than is necessary to accomplish its purpose."

Lamoureux also argued § 45-8-213(1)(a) is a content-based restriction on free speech because the statute classifies electronic communications by the topic discussed or the idea or message expressed. The Court rejected that argument and reasoned the fact that § 45-8-213(1)(a) identifies obscene, profane, lewd, and lascivious language does not render it a content-based regulation on speech. Rather, the Court construed this statute as a regulation of conduct—of uttering speech with the purpose and specific intent of intimidating, threatening, or harassing another person. The Court concluded the law was narrowly tailored to control conduct without reaching a substantial amount of protected speech.

Lamoureux argued for the dismissal of Count 2—which charged threats to a third party—claiming it failed to charge an offense. Lamoureux argued the conduct of "threatening to inflict injury or physical harm to the person or property of the person" contemplated threatening communication made to the *recipient* of that communication, not to a third party. The Court rejected this argument and concluded Lamoureux's threat to kill the recipient's daughter fell within the plain meaning and substance of the statute proscribing "threat[s] to inflict injury" that are communicated electronically with the purpose to terrify, intimidate, threaten, harass, annoy, or offend.

Firing a gun indoors, through a hotel window into a parking lot, is sufficient to support probable cause for the State to charge the defendant with criminal endangerment.

State v. Giffin, 2021 MT 190:

The State charged Giffin with criminal endangerment, by Information, after Giffin fired a shotgun from inside a hotel. The rounds went through the hotel window and into the outside parking area. Although the parking area is "commonly used" by hotel patrons, at the time of the offense no people were in the parking lot and no specific victim was alleged in the charging document. Giffin filed a motion to dismiss and argued no facts established probable case he had committed the offense of criminal endangerment. The district court granted the motion to dismiss, and the State appealed.

On appeal, the Court reversed and held no specific victim must be identified to charge a defendant with criminal endangerment. The Court also held the facts alleged were sufficient to show, for purposes of the charging documents, that Giffin knew of the high probability firing a gun into the hotel's parking lot would create a substantial risk of death or serious bodily injury to another. The Court also held the standard of review for a motion to dismiss a charging document should be *de novo* since such review is often a mixed question of law and fact.

Evidence sufficient to support resisting arrest charge because circumstances indicated defendant acted knowingly.

City of Bozeman v. Howard, 2021 MT 230:

Howard appealed his conviction for resisting arrest, arguing in part that the City had failed to present sufficient evidence to support the conviction. Howard was warned by police to stay away from his ex-girlfriend, but he did not. Howard followed his ex-girlfriend in his car, and she called 9-1-1. Howard was then pulled over by police. He got out of his car and approached the patrol car, and the officer told him to put his hands up. Howard did not, and he instead questioned the officer's authority. The officer swiped Howard's legs, pushed him face down onto the pavement, and handcuffed him without first informing him he was under arrest.

On appeal, the Court concluded the City presented sufficient evidence that Howard knowingly resisted arrest, because there was evidence to suggest he was aware of the circumstance that Officer Lloyd

was attempting to arrest him. The Court pointed to the evidence that the police had told Howard to stay away from his ex, he refused and followed her around town, he knew she called someone, he expected she would call the cops and he would have to explain himself eventually, and the police pulled him over shortly after his ex-girlfriend's call. Under the circumstances, a reasonable jury could have found Howard knew he was or would soon be under arrest at the point that he was pulled over and resisted the officer's commands.

Evidence sufficient for jury to convict defendant of criminal distribution of dangerous drugs based solely on testimony of minor who claimed defendant gave him meth.

State v. McCoy, 2021 MT 303:

McCoy's home was a location known to the Drug Task Force as a place frequented by "people immersed in the drug culture." McCoy had an adult stepdaughter who lived with him and whose minor son, L.B., often visited McCoy's house. In August 2018, L.B. told a detective he began using meth with McCoy at McCoy's house in June 2017, when L.B. was 13 years old.

On appeal, McCoy challenged his conviction for criminal distribution of dangerous drugs for insufficient evidence. McCoy argued the State's evidence did not prove beyond a reasonable doubt the substance L.B. claimed McCoy provided was in fact meth. The State failed to present any medical or expert testimony regarding the substance; L.B. was the only witness who testified to seeing the substance in question; and the substance itself was never obtained or tested by law enforcement.

The Court affirmed, observing that its decisions involving identification of a drug substance not tested by law enforcement are fact specific. Here, the Court noted L.B.'s testimony at trial was detailed and extensive, and other testimony about general drug use at the house corroborated details of L.B.'s testimony. Though L.B. was the only witness to directly testify McCoy provided him meth, the Court said the jury was properly instructed the evidence presented by one witness whom it believes is sufficient for proof of any fact in the case. The Court ruled a rational juror could believe L.B.'s story McCoy gave him meth.

The State presented insufficient evidence of attempted deliberate homicide, because having a knife and making a threat—absent the defendant confronting his accuser—did not constitute an overt act towards commission of the offense.
State v. Boyd, 2021 MT 323:

Boyd was charged with attempted deliberate homicide with a weapon enhancement and assault on a peace officer. Boyd was asked to leave the Olive Bar in Miles City by its owner, Jess Nelson. Boyd tried to goad Nelson into a fist fight but eventually walked across the street to his apartment. Officer Ketchum passed by and inquired about the night's events. After speaking with Officer Ketchum, Nelson motioned for Boyd to come downstairs. Boyd and Officer Ketchum spoke while Nelson returned across the street. Officer Ketchum called for backup and Boyd "swatted" at his hands. Boyd resisted arrest. Nelson, who was a foot taller and 100 pounds heavier than Boyd, ran over to help and pressed Boyd's face onto the pavement. Upon being searched, a large kitchen knife was found in Boyd's pants. Nelson asked Boyd what he was planning to do with the knife. Boyd responded, "stab you in the heart." He was convicted of attempted deliberate homicide, in addition to assault on a peace officer. He was not convicted of the weapons enhancement.

On appeal, the Court held Boyd did not commit any "overt act" that commenced an actual attempt to kill Nelson. The State could not prove that, unless interrupted, Boyd would have killed Nelson. Leaving the fight, getting a knife, and hiding it may have shown preparation, but that is not the same as commencing a crime. The Court held the evidence was insufficient, and it reversed the conviction and dismissed with prejudice.

No plain error under *Apprendi* in aggravated kidnapping conviction where defendant was sentenced to 40 years without a jury finding he did not voluntarily release the victim.
State v. Parisian, 2021 MT 202N:

Parisian was convicted of aggravated kidnapping and assault with a weapon after an altercation with his then-girlfriend, Peggy. The two broke up while walking home from a store together, and a resulting argument between them spanned an evening and ended in a Great Falls police officer shooting Parisian in his home. Parisian received a

40-year sentence to MSP on the aggravated kidnapping charge, with 20 suspended.

The statutory maximum sentence for aggravated kidnapping is 100 years, unless the defendant "voluntarily release[d] the victim alive, in a safe place, and with no serious bodily injury," in which case the maximum is just 10 years. § 45-5-303(2). Parisian appealed his sentence, arguing that under *Apprendi*, the State was required to prove beyond a reasonable doubt he did *not* voluntarily release the victim. Because Parisian's jury made no such finding, he argued his 40-year sentence exceeded the statutory maximum of 10 years.

Parisian urged the Court to reach the issue under plain error review. The Court declined, reasoning there would be no manifest miscarriage of justice in leaving the sentence alone because, despite no jury finding, the trial testimony "strongly suggest[ed]" Parisian did not voluntarily release Peggy.

Somewhat enigmatically, the Court also stated, "Parisian misapplies *Apprendi* to the facts of this case." This seems to suggest the Court's skepticism of the argument that the State must prove beyond a reasonable doubt that the defendant did *not* voluntarily release the victim to apply the 100-year maximum sentencing range. It suggests the Court instead may believe it is the defendant's burden to show he *did* voluntarily release the victim if he wants the 10-year max rather than the 100-year max. It may be wise to propose a special question on the verdict form in aggravated kidnapping cases to the effect of, "Did the defendant voluntarily release the victim alive, in a safe place, and with no serious bodily injury?" If the jury answers "yes," then the 10-year maximum would clearly apply.

Right to seek independent blood test not violated.
State v. Weber, 2020 MT 325N:

Appealing his felony DUI conviction, Weber argued the arresting officer unreasonably impeded his right to obtain an independent blood test. After blowing a 0.20, Weber asked the officer for an independent blood draw. The officer said he would see what he could do and then spent about 30 minutes making phone calls. The usual testing place was closed due to the late hour, and its on-call number was not working. The hospital refused without a doctor's note (or an officer request), and the county jail staff had no other ideas.

After making these calls, the officer told Weber that he would be unable to find a provider. Weber repeated his requests for an independent draw, and the officer's supervisor told Weber the hospital would do one if he had a doctor to order the test and $150 in cash to pay for it. During this conversation, the officer said, "it is not a right if it costs money." Weber only had $45 cash in his wallet but said he could get the money from an ATM. He said he did not have a personal doctor to order the test. Despite intermittent access to his cell phone, Weber made no calls towards obtaining a test. Weber moved to dismiss the charge based upon impedance of his right to obtain an independent blood test. The district court denied the motion.

The Court affirmed, holding that Weber had not met the "high bar" of demonstrating the officers unreasonably impeded his right to seek an independent test. Given the lack of a doctor's note, the Court saw no reasonable probability that the hospital would have administered a test if Weber had been transported there. The Court also rejected Weber's argument the officer could have requested the hospital to perform a test for Weber. The Court reasoned that under § 61-8-405(2), an independent test categorically cannot be requested by an officer even with defendant consent. The Court held the "it is not a right if it costs money" comment and the suggestions that Weber needed to pay with cash did not actually impede Weber's access, because he did not have the required doctor's note even if he could pay, and because neither the officer nor Weber appeared to treat the cost as a roadblock. The Court also reasoned that Weber was not unreasonably denied access to his cell phone, and he never attempted to make any calls.

12. Sex Offenses

Evidence of alleged victim's prior prostitution irrelevant in Promoting Prostitution case due to defendant's admissions. *State v. Thomas*, 2020 MT 281:

Thomas was found guilty of Promoting Prostitution regarding two girls, 17 and 19. Thomas admitted to police that he had posted an ad for the two girls, given them rides to "dates," and accepted some of their proceeds. His defense was that he had only provided technical assistance to the two girls who independently wanted to prostitute.

Thomas appealed the district court's grant of a State motion in limine barring him from offering evidence of one of the girls' prior prostitution. Thomas argued § 45-5-511(2) (rape shield) does not apply to prostitution prosecutions, because prostitution offenses are codified in Title 45, Chapter 5, Part 6, and § 45-5-511(2) purports to apply only to offenses under Part 5.

The Court sidestepped this argument by affirming the district court's ruling under Rules 402, 403, and 404(b). The Court held that the girl's prior prostitution was not relevant to any issue in the case because Thomas's own admissions showed, at minimum, that he encouraged the girls to remain prostitutes in violation of Promoting Prostitution statutes. The Court held the evidence violated 404(b) because it was being used for the propensity purpose of showing that the girl engaged in prostitution during times of financial strain. The Court also rejected Thomas's argument that the girl's past prostitution was admissible for the non-propensity purpose of showing that the girls were knowledgeable of prostitution and, thus, that they came up with the prostitution idea on their own. The Court agreed this was a non-propensity theory of relevance but held it was inconsistent with Thomas's admissions of encouraging prostitution by posting ads and giving rides.

District court improperly excluded educational defense expert regarding false reports of sexual abuse, warranting new trial. *State v. Reams*, 2020 MT 326:

The State charged Reams with incest against his 10-year-old stepdaughter. Pre-trial, the State gave notice of its intent to call background expert witnesses (including Wendy Dutton) to educate jurors regarding the general characteristics of child sexual abuse victims and disclosures. Reams sought to call his own educational expert witness (a psychology professor) to educate jurors regarding the causes and phenomenon of false reports of sexual abuse. On State objection, the district court excluded Reams's expert as unqualified to be a child credibility expert under the criteria of *Scheffelman*, 250 Mont. 334.

The Court reversed. It held the district court erred in applying the heightened *Scheffelman* criteria to Reams's proffered educational expert. Even if an expert is offered for the purpose of undermining or

supporting a child's credibility, the *Scheffelman* requirements apply only where the expert *directly* comments on the specific child's credibility. Background expert testimony that only indirectly bears on credibility is governed by normal Rule 702 analysis: It is admissible if it is specialized knowledge that will help the jury understand some fact in issue. The Court recognized that the testimony sought by Reams regarding why children might make false reports "is not qualitatively different from testimony the State elicited from Dr. Dutton [about] why a child may delay reporting sexual abuse."

The Court also rejected the State's harmless error argument that Reams was able to elicit the same information from the State's experts on cross. The Court emphasized that defendants have both the right to confront the witnesses against them and the right to present a complete defense and that the two rights are "not an either/or proposition" in which exercising the right to cross a State witness gives up the defendant's right to call his own witnesses. Depriving Reams of presenting his own educational expert in his case-in-chief and of using his own expert to rebut the State's expert required reversal and remand for a new trial.

Blind expert in child sexual abuse cases may testify about general causes of false reports, so long as the expert does not provide statistical data.

State v. Sinz, 2021 MT 163:

Sinz was charged with several sexual offenses based on allegations he had sexually abused his eight-year-old twin nieces. The State called Wendy Dutton as a blind expert to testify regarding child sexual abuse disclosures. In discussing false allegations, Dutton testified incidents of "malicious false reports" tend "to be rare." Sinz did not object to Dutton's testimony.

On appeal, Sinz argued under plain error that Dutton's testimony amounted to "recitation of statistical data" which undermined his presumption of innocence. The Court disagreed. It distinguished allowable "educational testimony regarding general causes of false reports" from "statistical testimony regarding false reports" which is disallowed. The Court concluded Dutton's testimony was educational, not statistical, in nature and did not comment on the facts of the case, and thus it was not improper.

Rape shield statute overcome by "straight-line connection" between third party abuse and allegations against defendant.
State v. Twardoski, 2021 MT 179:

Twardoski was charged with sexual crimes against a 13-year-old involving a "truth or dare" game. Thirteen days before the alleged sexual conduct by Twardoski occurred, the victim and a 40-year-old neighbor engaged in strikingly similar sexual conduct during a "truth or dare" game as part of a "normal boyfriend-girlfriend relationship." The neighbor was eventually charged with sexual crimes against the victim and pled guilty. The district court conducted an *in camera* review of the criminal file on the neighbor abuse and turned over 12 pages of the offense report. The district court excluded evidence of the neighbor abuse during trial under the rape shield statute.

The Court reversed and remanded for a new trial, concluding the exclusion of the neighbor abuse evidence misapplied the rape shield statute and violated Twardoski's right to present a defense. There was a "straight line connection" between the neighbor's abuse and the allegations against Twardoski. The allegations were unique but similar and were consistent with the defense theories that the victim had a motive to fabricate the allegations against Twardoski (who was her mother's drug dealer) and that she gained sexual knowledge from the neighbor, not Twardoski. Along the way, the Court held the standard of review for rape shield rulings pertaining to the right to present a defense is de novo.

Reversible error where the State repeatedly sought testimony that bolstered the alleged victim's credibility.
State v. Byrne, 2021 MT 238:

Byrne was tried and convicted of three counts of SIWC. Prior to trial, defense counsel moved in limine to prevent the State from seeking witness testimony that bolstered the alleged victim's credibility. The State stipulated, and the court granted the defendant's motion. During trial, the State called Wendy Dutton, who testified that malicious false reports are extremely rare. Two therapists and a nurse/forensic interviewer testified that they did not see any unusual signs of manipulation or lying from the victim.

The State argued the issue was not preserved for appeal because trial counsel did not object during trial. The Court found the issue was

preserved by the motion in limine, and when the State stipulates and subsequently reneges on its word, "resolving any doubt . . . in favor of the prosecution would be inappropriate."

The Court held the State improperly elicited testimony from the therapists, nurse, and Dutton that bolstered the alleged victim's credibility. Importantly, the Court emphasized that Dutton's testimony that false reports are "rare" implied that M.G. was telling the truth and this type of credibility-boosting expert testimony is improper. The prosecutor also engaged in burden shifting by asking repeatedly throughout trial, "why would the victim lie?" This implied Byrne had an obligation to answer the question and that if he couldn't, the jury should assume the victim must be sincere.

District court allowed to limit testimony of defense expert witness concerning discrepancies in children's forensic interviews, because testimony deemed a commentary on children's credibility.

State v. Villanueva, 2021 MT 277:

Villanueva went to trial on sexual assault and SIWC charges against his two seven-year-old daughters. At trial, the district court restricted the scope of testimony from the defense expert witness, Dr. Veraldi. Dr. Veraldi had reviewed the transcripts of the forensic interviews with the girls and had noted discrepancies in each child's statements during these interviews. Villanueva sought to have Dr. Veraldi provide information for the jury to evaluate the reliability of the girls' statements based upon the circumstances of the disclosure and the suggestively leading questioning by the mother. Although defense counsel did not want Dr. Veraldi to testify as to the credibility of the girls, but rather to show that the method used to develop the statements was something to consider when evaluating whether the statements were reliable and based on true memories, the district court did not make this distinction and determined Villanueva wanted Dr. Veraldi to offer an opinion on the credibility of the girls. Ultimately, the district court allowed the State to call Wendy Dutton as a blind expert to testify regarding general patterns when children disclose sexual abuse and limited Dr. Veraldi's testimony in the same manner.

On appeal, the Court upheld the district court's decision to prevent Dr. Veraldi from commenting on the specific facts of

Villanueva's case as "wholly consistent with Montana's longstanding rule that expert witnesses may not comment on the credibility of alleged victims."

Counsel was ineffective for failing to object when the statute upon which a charge was based did not go into effect until after one of the alleged incidents occurred.

State v. Tipton, 2021 MT 281:

One of three felony counts against Tipton charged Indecent Exposure on a Minor that allegedly occurred either in July 2015 or July 2016 against Tipton's minor grandniece. The "Minor" portion of Indecent Exposure on a Minor was not delineated as a separate offense subject to a maximum 100-year sentence until October 2015 when § 45-5-504(3) went into effect. The prior version of § 45-5-504 set forth a less severe punishment for simple Indecent Exposure, first offense. Defense counsel did not object when the State, via an amended information, added the July 2015 conduct to the charge. The State presented evidence at trial of both incidents and told the jury it could convict for either.

Although challenged under both plain error and ineffective assistance of counsel, the Court only addressed the ineffective assistance claim. The Court held the application of § 45-5-504(3) (2015) to conduct that occurred prior to its enactment was an *ex post facto* application of the law. There was no legitimate reason for counsel to allow an *ex post facto* application of the law that subjected the client to a substantially more severe sentence than he would otherwise be subject to. The Court held deficient performance occurred and concluded the mistake was prejudicial, citing weaknesses in the State's case as to the July 2016 incident, the State's closing argument that argued either charged act required a guilty conviction, and the non-specific jury verdict form.

The Court remanded for a new trial. Tipton had argued the remedy was to remand for resentencing under pre-October 2015 law. The Court rejected that argument due to its inability to ascertain what conduct Tipton was found guilty of.

The two other charges against Tipton, and for which he was also found guilty, alleged Sexual Abuse of Children based on the allegations that Tipton showed pornography to a different minor grandniece and a

minor grandnephew in July 2016. Tipton was charged and convicted under the October 2017 version of Sexual Abuse of Children, which made it a stand-alone crime to show a minor sexually explicit material like pornography. The parties agreed the application of October 2017 law to Tipton's July 2016 conduct was an illegal *ex post facto* violation but disagreed on the remedy. The Court held the proper remedy was not acquittal but to remand for a new trial. The Court rejected that the *ex post facto* violation led to insufficient evidence justifying acquittal. The Court framed the error as arising from defective charging documents and held the State "simply relied on the wrong statute."

13. Search and Seizure

A tribal officer has the authority to detain and search a non-Indian traveling on a public right-of-way running through a reservation for potential violations of state or federal law.
United States v. Cooley, 141 S.Ct. 1638:

Cooley was parked on the side of a public right-of-way within the Crow Reservation in Montana. Officer Saylor of the Crow Police Department stopped and spoke to Cooley, who appeared to be non-Native and had watery, bloodshot eyes. Saylor saw two semiautomatic rifles, a glass pipe, and methamphetamine inside the vehicle. Saylor ordered Cooley out of the truck to do a pat-down search. Other officers arrived, including an officer from the federal Bureau of Indian Affairs. Saylor was directed to seize all contraband in plain view, leading him to discover more meth. Saylor eventually took Cooley to the Crow Police Department where federal and local officers further questioned him. Subsequently, a federal grand jury indicted Cooley on drug and gun offenses.

The federal district court granted Cooley's motion to suppress the drug evidence, and the Ninth Circuit affirmed. The Ninth Circuit reasoned that a tribal officer could stop a non-Indian suspect if the officer first tries to determine whether the suspect is non-Indian and, in the course of doing so, finds an apparent violation of state or federal law. The Ninth Circuit concluded that Saylor failed to make that initial determination.

The U.S. Supreme Court vacated the Ninth Circuit's decision. The Court unanimously held that tribal officers have the authority to

temporarily detain and search a non-Indian traveling on a public right-of-way through a reservation for potential violations of state or federal law. The Court relied on an exception to the general proposition that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" found in *Montana v. United States*, 450 U.S. 544, 565: a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." The Court said that the exception "fits the present case, almost like a glove."

Pursuit of fleeing misdemeanor suspect does not *automatically* establish exigent circumstance to enter a home without a warrant.

Lange v. California, 141 S.Ct. 2011:

Lange was honking his horn and playing loud music in his car. An officer lit up Lange about four seconds away from Lange's home. Lange did not respond to the blue lights and continued into his garage. The officer pursued Lange into his garage and observed signs of intoxication. Lange moved to suppress based on the officer's warrantless intrusion into the home. The government argued pursuit of a suspect who flees from a misdemeanor into the home necessarily constitutes exigency justifying a warrantless intrusion into the home.

The U.S. Supreme Court rejected that categorical rule in favor of the regular, case-by-case exigent circumstances analysis. Specifically, police may enter under the exigent circumstances requirement without a warrant only "[w]hen the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home." While there may often be additional facts establishing such an emergency when a suspect flees a misdemeanor into the home, the point is that courts must look at the totality of the circumstances, including the nature of the misdemeanor. The Court vacated and remanded for the lower court to apply the right standard. (The Court left open the question whether pursuit of a suspect fleeing a felony automatically establishes exigency for a warrantless entry of the home.)

No reasonable expectation of privacy in text messages sent to undercover agent posing as a sex worker.
State v. Staker, 2021 MT 151:

Staker responded to a prostitution advertisement by texting the specified number and setting up an appointment. Unbeknownst to Staker, he was texting with a federal agent, and when he showed up at the appointed hour, he was arrested and charged with patronizing prostitution. Staker moved to suppress his text message conversation because the federal agent did not have a warrant for that "search."

On appeal, the Court held there was no search at all because Staker's expectation of privacy in the text message conversation was not objectively reasonable. The Court distinguished cases like *State v. Goetz*, 2007 MT 296 (holding the government's surreptitious recording of a seemingly private conversation is a search), reasoning the text message conversation here was not separately and surreptitiously recorded. All that was left was Staker's "misplaced trust" that the recipient of his texts was who she said she was and that she would not share those texts with others. The Court likened the situation to sending a letter to another, in which case the sender loses a reasonable expectation of privacy as to the letter's contents once it is in the recipient's control.

Frisk deemed illegal where the only basis for it was that the officer would be in "close proximity" to the defendant for a while; evidence seized from subsequent vehicle search allowed because that search was sufficiently attenuated from the illegal frisk.
State v. Laster, 2021 MT 269:

Laster, a Black man, was stranded when his car got stuck in a snowbank in Billings. Someone called the police to report this "spooky looking" man walking up and down the block like he was "casing" vehicles and houses; the caller added Laster looked like a "wanna-be gang banger." Based on the caller's comments, a responding police officer conducted a pat-down search of Laster upon arrival at the scene, reasoning that he was going to be in "close proximity" to Laster while sorting out the situation with the stranded car. The frisk produced a meth pipe. The officer then obtained Laster's consent to search his vehicle, which uncovered further evidence of drug activity. Laster

moved unsuccessfully to suppress evidence seized because of the pat-down and vehicle searches.

The Court determined on appeal the initial investigative stop was justified because Laster was committing a traffic offense by being stuck in the middle of the road. But it held the protective pat-down search was *not* justified under *Terry* or § 46-5-401(2)(b), because the officer articulated no specific facts to justify suspicion Laster was armed. Simply being in Laster's close proximity for a while was not enough to justify the frisk. The Court thus concluded evidence seized from the pat-down search (the meth pipe) must be suppressed.

The Court held, however, that the vehicle search was permissible because Laster's consent to that search was "sufficiently distinguishable and attenuated" from the initial illegal frisk. The Court noted it was Laster's "intervening free will choice" that resulted in the vehicle search, not some ill-obtained evidence from the illegal frisk. The evidence from the vehicle came from an independent, untainted source and did not require suppression.

Man's gas station encounter with police was a seizure, not a voluntary conversation; and the fact the man was Vietnamese and traveling on I-94 did not create particularized suspicion he might be trafficking drugs.

State v. Pham, 2021 MT 270:

Pham was driving from Butte to his home in Minnesota when he stopped in Miles City for gas. He bought some noodles and was using the gas station's microwave to heat them when in walked a DCI officer, Smith. Smith was traveling with two troopers who were driving a marked van "stuffed all the way full to the ceiling with bulk marijuana" for evidence storage in Billings. Pham looked too long out the window at the police van stuffed with marijuana as he waited for the microwave to finish heating his noodles. This and his "overt nervousness" caused Smith to believe Pham was either lost or committing a crime, so when Pham returned to his car, Smith engaged a conversation.

Smith says he and Pham were just having a cordial conversation, during which he asked whether Pham had any guns, knives, drugs, or child pornography and whether it would be alright to look inside Pham's trunk, and then inside some boxes inside the trunk. Smith says Pham consented, and Smith found 19 pounds of marijuana.

The Court was skeptical anyone would willingly have this sort of conversation at a gas station with three strangers unless they were police officers and the person believed they were not free to leave. Pham, who immigrated to the United States in 1983, spoke primarily Vietnamese with his friends and family. He grew up in an environment that encouraged deference to police officers. The Court found a reasonable person in those circumstances would not feel free to leave, and Smith's conversation was thus a seizure.

The Court found the seizure was unlawful because Officer Smith lacked particularized suspicion that Pham was committing a crime. The only objective information Smith possessed was that he saw a Vietnamese person traveling along a route where other Vietnamese people have been arrested for drug trafficking. That was insufficient to establish particularized suspicion.

Defendant's expectation of privacy became reasonable and "unmistakably apparent" when he told the officer to leave his driveway, that he was trespassing, and to get a warrant.
State v. Smith, 2021 MT 324:

Quincy Smith and his friend were driving back to their home when Deputy Monaco observed them speeding. Deputy Monaco activated his lights and turned to pursue them. He was behind them for only a few moments before they turned and entered their driveway. Deputy Monaco followed them up the 350-foot-long driveway, passing two open gates and trees/foliage intended to create privacy. Deputy Monaco requested their identification. Smith and his friend told the deputy he was trespassing, to leave, and to return with a warrant. Deputy Monaco stayed, and the investigation ripened into a DUI investigation. Smith moved unsuccessfully to suppress the evidence in justice court and then again in district court. He was convicted of DUI, speeding, obstructing, and resisting.

On appeal, the Court distinguished this case from *Bullock*, where the defendant had an expectation of privacy beyond the curtilage of his home because he intentionally moved his house away from the road, posted no trespassing signs, and erected a fence. Here, neither Smith nor his friend "took measures" to evidence their expectation of privacy or initially communicate that entry was not allowed. Their driveway gates were open, and they had not posted any "No Trespassing"

signs. Therefore, their expectation of privacy in the driveway was not reasonable. Deputy Monaco was permitted to enter the driveway.

However, once Smith asserted his right to privacy by telling Deputy Monaco he was trespassing and needed a warrant, his expectation of privacy became reasonable, and that privacy expectation should have been "unmistakably apparent" to Deputy Monaco. Telling Deputy Monaco he needed a warrant was akin to posting a "No Trespassing" sign, like in *Bullock*. No exigent circumstances existed that would justify a warrantless entry: the State did not demonstrate Smith would have escaped, harmed the officer or another person, or that Deputy Monaco was unable to get a warrant. All evidence collected after Smith told Deputy Monaco to get a warrant was ordered suppressed.

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