

Recent Developments Affecting the Criminal Law Practitioner

Andrew King-Ries

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1. 2009 Montana Legislative changes
2. Federal decisions
3. State decisions

2009 Montana Legislature

Changes to the Criminal Code

1. Gender neutrality throughout code
2. Justifiable Use of Force
3. Burglary
4. Statute of Limitations
5. Sexual Abuse of Children
6. Increased levels for felonies
7. Damage to rental property
8. Commonly domesticated hooved animals
9. Criminal Use of Office
10. Possession of Paraphernalia and Medical Marijuana
11. Electronic Recording of Custodial Statements
12. Preservation of Firearms
13. Costs of Prosecution

Justifiable Use of Force

45-3-102 Use of force in defense of person-2009

No Change from 2007

A person is justified in the use of force or threat to use force against another when and to the extent that the person reasonably believes that the conduct is necessary for self-defense or the defense of another against the other person's imminent use of unlawful force.

However, the person is justified in the use of force likely to cause death or serious bodily harm only if the person reasonably believes that the force is necessary to prevent imminent death or serious bodily harm to the person or another or to prevent the commission of a forcible felony.

45-3-101. Definitions – 2009

No changes

(1) "Force likely to cause death or serious bodily harm" within the meaning of this chapter includes but is not limited to:

(a) the firing of a firearm in the direction of a person, even though no purpose exists to kill or inflict serious bodily harm; and

(b) the firing of a firearm at a vehicle in which a person is riding.

(2) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

45-3-111. Openly carrying weapon -- display -- exemption -- 2009

(1) Any person who is not otherwise prohibited from doing so by federal or state law may openly carry a weapon and may communicate to another person the fact that the person has a weapon.

(2) If a person reasonably believes that the person or another person is threatened with bodily harm, the person may warn or threaten the use of force, including deadly force, against the aggressor, including drawing or presenting a weapon.

(3) This section does not limit the authority of the board of regents or other postsecondary institutions to regulate the carrying of weapons, as defined in 45-8-361(5)(b), on their campuses.

45-3-103. Use of force in defense of occupied structure -- 2007

A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon an occupied structure.

However, he is justified in the use of force likely to cause death or serious bodily harm only if:

(1) the entry is made or attempted in violent, riotous, or tumultuous manner and he reasonably believes that such force is necessary to prevent an assault upon or offer of personal violence to him or another then in the occupied structure; or

(2) he reasonably believes that such force is necessary to prevent the commission of a forcible felony in the occupied structure.

45-3-103 Use of force in defense of occupied structure -- 2009

- (1) A person is justified in the use of force or threat to use force against another when and to the extent that the person reasonably believes that the use of force is necessary to prevent or terminate the other person's unlawful entry into or attack upon an occupied structure.
- (2) A person justified in the use of force pursuant to subsection (1) is justified in the use of force likely to cause death or serious bodily harm only if:
 - (a) the entry is made or attempted and the person reasonably believes that the force is necessary to prevent an assault upon the person or another then in the occupied structure; or
 - (b) the person reasonably believes that the force is necessary to prevent the commission of a forcible felony in the occupied structure.

45-3-105. Use of force by aggressor – 2009

No change from 2007

The justification described in 45-3-102 through 45-3-104 is not available to a person who:

- (1) is attempting to commit, committing, or escaping after the commission of a forcible felony; or
- (2) purposely or knowingly provokes the use of force against the person, unless:
 - (a) the force is so great that the person reasonably believes that the person is in imminent danger of death or serious bodily harm and that the person has exhausted every reasonable means to escape the danger other than the use of force that is likely to cause death or serious bodily harm to the assailant; or
 - (b) in good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that the person desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.

45-3-110. No duty to summon help or flee-2009

- Except as provided in 45-3-105, a person who is lawfully in a place or location and who is threatened with bodily injury or loss of life has no duty to retreat from a threat or summon law enforcement assistance prior to using force. The provisions of this section apply to a person offering evidence of justifiable use of force under 45-3-102, 45-3-103, or 45-3-104.

45-3-112. Investigation of alleged offense involving claim of justifiable use of force-2009

When an investigation is conducted by a peace officer of an incident that appears to have or is alleged to have involved justifiable use of force, the investigation must be conducted so as to disclose all evidence, including testimony concerning the alleged offense and that might support the apparent or alleged justifiable use of force.

45-3-115. Affirmative defense –2009

No change from 2007

- A defense of justifiable use of force based on the provisions of this part is an affirmative defense.

Burglary

45-6-204 Burglary -- 2007

(1) A person commits the offense of burglary if he knowingly enters or remains unlawfully in an occupied structure with the purpose to commit an offense therein.

(2) A person commits the offense of aggravated burglary if he knowingly enters or remains unlawfully in an occupied structure with the purpose to commit an offense therein and:

(a) in effecting entry or in the course of committing the offense or in immediate flight thereafter, he or another participant in the offense is armed with explosives or a weapon; or

(b) in effecting entry or in the course of committing the offense or in immediate flight thereafter, he purposely, knowingly, or negligently inflicts or attempts to inflict bodily injury upon anyone.

45-6-204 Burglary -- 2009

- (1) A person commits the offense of burglary if the person knowingly enters or remains unlawfully in an occupied structure and:
 - (a) the person has the purpose to commit an offense in the occupied structure; or
 - (b) the person knowingly or purposely commits any other offense within that structure.

- (2) A person commits the offense of aggravated burglary if the person knowingly enters or remains unlawfully in an occupied structure and:
 - (a) (i) the person has the purpose to commit an offense in the occupied structure; or
(ii) the person knowingly or purposely commits any other offense within that structure; and
 - (b) in effecting entry or in the course of committing the offense or in immediate flight after effecting entry or committing the offense:
 - (i) the person or another participant in the offense is armed with explosives or a weapon; or
 - (ii) the person purposely, knowingly, or negligently inflicts or attempts to inflict bodily injury upon anyone.

Statute of Limitations

45-1-205

New sections:

- (10) A prosecution for reckless driving resulting in death may be commenced within 3 years after the offense is committed.
- (11) A prosecution of careless driving resulting in death may be commenced within 3 years after the offense is committed.

45-5-625 Sexual Abuse of Children

Criminalizes additional conduct:

- (h) knowingly travels within, from, or to this state with the intention of meeting a child under 16 years of age or a person the offender believes to be a child under 16 years of age in order to engage in sexual conduct, actual or simulated; or
- (i) knowingly coerces, entices, persuades, arranges for, or facilitates a child under 16 years of age or a person the offender believes to be a child under 16 years of age to travel within, from, or to this state with the intention of engaging in sexual conduct, actual or simulated.

Increased levels for felonies

\$1000 to \$1500

- Criminal Mischief
- Arson
- Desecration of capitol, place of worship, etc.
- Theft
- Failure to return rented or leased personal property
- Unlawful use of a computer
- Unauthorized acquisition or transfer of food stamps
- Medicaid fraud
- Issuing a bad check
- Deceptive practices
- Forgery
- Theft of identity
- Money laundering
- False claim to public agency

45-6-106

Damage to Rental Property

New crime

- (1) A tenant commits the offense of damage to rental property if the tenant purposely or knowingly destroys, defaces, damages, impairs, or removes any part of the premises with a value of at least \$1,000 over the amount of any damage deposit or, if no damage deposit was paid, a value of at least \$1,000 in violation of 70-24-321(2) or 70-33-321(3).
- (2) A person convicted of the offense of damage to rental property shall be fined an amount not to exceed \$1,000 or be imprisoned in the county jail for a term not to exceed 6 months, or both.
- (3) (3) A person convicted of damage to rental property must be ordered to make restitution in an amount and manner to be set by the court pursuant to 46-18-201(5) and 46-18-241 through 46-18-249.
- (4) (4) A prosecution under this section is independent of and does not constitute a waiver of any of the rights, duties, obligations, and remedies otherwise provided for under Title 70, chapter 24 or 33.

Commonly Domesticated Hoofed Animals

45-6-301(8)(b)

Theft of Domesticated Hoofed Animal

- (ii) A person convicted of the theft of any commonly domesticated hoofed animal shall be fined an amount of not less than \$5,000 or more than \$50,000 or be imprisoned in a state prison for a term not to exceed 10 years, or both. If a prison term is deferred, the court shall order the offender to perform 416 hours of community service during a 1-year period, in the offender's county of residence. **In addition to the fine and imprisonment, the offender's property is subject to criminal forfeiture pursuant to 45-6-328 and 45-6-329.**

45-6-327. Illegal branding or altering or obscuring of brand.

- (1) A person commits the offense of illegal branding or altering or obscuring a brand if the person marks or brands any commonly domesticated hoofed animal or removes, covers, alters, or defaces an existing mark or brand on any commonly domesticated hoofed animal with the purpose of obtaining or exerting unauthorized control over the animal or with the purpose of concealing, misrepresenting, transferring, or preventing identification of the animal.
- (2) A person convicted of the offense of illegal branding or altering or obscuring a brand shall be imprisoned in the state prison for a term not to exceed 10 years or be fined an amount of not less than \$5,000 or more than \$50,000, or both. If a prison term is deferred, the court shall order the offender to perform 416 hours of community service during a 1-year period, in the offender's county of residence. **In addition to the fine and imprisonment, the offender's property is subject to criminal forfeiture pursuant to 45-6-328 and 45-6-329.**

45-6-328. Forfeiture for theft of commonly domesticated hoofed animal or illegal branding or altering or obscuring of brand

- (1) The following property is subject to criminal forfeiture under this section:
 - (a) money, raw materials, products, equipment, and other property of any kind that is used or intended for use in the theft of a commonly domesticated hoofed animal or illegal branding or altering or obscuring a brand;
 - (b) property used or intended for use as a container for property enumerated in subsection (1)(a);
 - (c) except as provided in subsection (2), a conveyance, including an aircraft, vehicle, or vessel, used or intended for use to facilitate the theft of a commonly domesticated hoofed animal or illegal branding or altering or obscuring a brand;
 - (d) books, records, research products and materials, formulas, microfilm, tapes, and data used or intended for use in connection with the theft of a commonly domesticated hoofed animal or illegal branding or altering or obscuring a brand;
 - (e) everything of value furnished or intended to be furnished in exchange for a commonly domesticated hoofed animal in violation of 45-6-301 or 45-6-327 and all proceeds traceable to the exchange;
 - (f) money, negotiable instruments, securities, and weapons used or intended to be used to facilitate a violation of 45-6-301 or 45-6-327; and
 - (g) personal property constituting or derived from proceeds obtained directly or indirectly from theft of a commonly domesticated hoofed animal or from illegal branding or altering or obscuring a brand

45-6-329. Disposition of property and proceeds of sale

- . (1) If the court finds that property seized pursuant to the theft of a commonly domesticated hooved animal or illegal branding or altering or obscuring a brand was not used for the purpose charged or that the property listed in 45-6-328(1) was used without the knowledge or consent of the owner, it shall order the property released to the owner of record as of the date of the seizure.
 - (2) If the court finds that the property was used for the purpose charged and that the property listed in 45-6-328(1) was used with the knowledge or consent of the owner, the property must be disposed of as follows:
 - (a) If proper proof of the claim is presented at the hearing by the holder of a security interest, the court shall order the property released to the holder of the security interest if the amount due the holder of the security interest is equal to or in excess of the value of the property as of the date of seizure. If the amount due the holder of the security interest is less than the value of the property, the property, if it is sold, must be sold at public auction by the department of livestock in the same manner provided by law for the sale of property under execution or the department of livestock may return the property to the holder of the security interest without proceeding with an auction. The property may not be sold to an officer or employee of the department of livestock or to a person related to a department officer or employee by blood or marriage.
 - (b) If no claimant exists and the department of livestock wishes to retain the property for its official use, it may do so. If the property is not to be retained, it must be sold as provided in subsection (2)(a).
 - (c) If a claimant who has presented proper proof of a claim exists and the department of livestock wishes to retain the property for its official use, it may do so if it compensates the claimant in the amount of the security interest outstanding at the time of the seizure.
 - (3) In making a disposition of property under this section, the court may take any action to protect the rights of innocent persons.
 - (4) Whenever property is seized, forfeited, and sold under the provisions of this section, the net proceeds of the sale must be distributed as follows:
 - (a) to the holders of security interests who have presented proper proof of their claims, if any, up to the amount of their interests in the property; and
 - (b) the remainder, if any, to the credit of the department of livestock to be used in enforcement activities related to the theft of commonly domesticated hooved animals and illegal branding or altering or obscuring a brand.

Criminal Use of Office

45-7-103

45-7-103. Criminal use of office or position

(1) An elected official or other public servant commits the offense of criminal use of office or position if the person knowingly solicits, accepts, or agrees to accept any pecuniary benefit accruing to the person, the person's political campaign, or the person's political party for giving or offering to give a decision, opinion, recommendation, or vote favorable to another, for exercising or offering to exercise a discretion in another's favor, or for violating or offering to violate the person's duty. A person commits an offense under this section if the person knowingly offers, confers, or agrees to confer compensation that is prohibited by this section.

(2) A person convicted under this section shall be fined an amount not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

- Used to be called Compensation for Past Official Behavior
- Slightly broader

Medical marijuana

- 50-46-101 et seq.

45-10-103. Criminal possession of drug paraphernalia

Except as provided in Title 50, chapter 46, it is unlawful for a person to use or to possess with intent to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a dangerous drug. A person who violates this section is guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail for not more than 6 months, fined an amount of not more than \$500, or both.

Recording of Custodial Interrogations

46-4-406-411

- **46-4-406. Purpose.** The legislature intends to require the electronic recording of custodial interrogations in felony cases based on the finding that properly recorded interrogations:
 - (1) provide the best evidence of the communications that occurred during an interrogation;
 - (2) prevent disputes about a peace officer's conduct or treatment of a suspect during the course of an interrogation;
 - (3) prevent a defendant from lying about the account of events originally provided to law enforcement by the defendant;
 - (4) spare judges and jurors the time necessary and the need to assess which account of an interrogation to believe;
 - (5) enhance public confidence in the criminal process; and
 - (6) have been encouraged by the Montana supreme court in a written opinion of that court.

46-4-408. Recordings required.

- Except as provided in 46-4-409, all custodial interrogations must be electronically recorded. The recording must contain a peace officer advising the person being interviewed of the person's Miranda rights, a recording of the interview, and a conclusion of the interview.

46-4-407. Definitions

As used in 46-4-406 through 46-4-411, the following definitions apply:

(1) "Custodial interrogation" means an interview conducted by a peace officer in a place of detention for the purpose of investigating a felony or, in the case of a youth, an offense that would be a felony if committed by an adult if the interview is reasonably likely to elicit a response from the person being interviewed that may incriminate the person being interviewed with regard to the commission of an offense.

- (2) "Electronic recording" or "electronically recorded" means an audio recording, visual recording, or audiovisual recording, if available, that is an authentic, unaltered record of a custodial interrogation.

- (3) "Place of detention" means a jail, police or sheriff's station, holding cell, correctional or detention facility, office, or other structure in this state where persons are held in connection with criminal charges or juvenile delinquency proceedings.

- (4) "Statement" means an oral, written, sign language, or nonverbal communication.

46-4-409. Exceptions to custodial recording requirements.

- A judge shall admit statements or evidence of statements that do not conform to 46-4-408 if, at hearing, the state proves by a preponderance of the evidence that:
 - (1) the statements have been made voluntarily and are reliable; or
 - (2) one or more of the following circumstances existed at the time of the custodial interrogation:
 - (a) the questions put forth by law enforcement personnel and the person's responsive statements were part of the routine processing or booking of the person;
 - (b) before or during a custodial interrogation, the person unambiguously declared that the person would respond to the law enforcement officer's questions only if the person's statements were not electronically recorded;
 - (c) the failure to electronically record an interrogation in its entirety was the result of unforeseeable equipment failure and obtaining replacement equipment was not practicable;
 - (d) exigent circumstances prevented the making of an electronic recording of the custodial interrogation;
 - (e) the person's statements were surreptitiously recorded by or under the direction of law enforcement personnel;
 - (f) the person's statement was made during a custodial interrogation that was conducted in another state by peace officers of that state in compliance with the laws of that state; or
 - (g) the person's statement was made spontaneously and not in response to a question.

46-4-410. Cautionary jury instruction.

- If the defendant objects to the introduction of evidence under 46-4-408 and the court finds by a preponderance of the evidence that the statements are admissible, the judge shall, upon motion of the defendant, provide the jury with a cautionary instruction.
- Should that read 46-4-409?

Preservation of Firearms

46-5-313. Firearm not to be destroyed.

- If a firearm possessed by a law enforcement agency was not purchased by the agency for agency use, if it is legal for a private person to own and possess the firearm, and if the legal owner cannot be determined by the agency, the agency may not destroy the firearm and shall sell the firearm to a licensed dealer. The proceeds of the sale must be deposited in the general fund of the governmental entity of which the agency is a part.

Costs of Prosecution

46-18-230. Legislative findings -- cost of criminal proceedings

With respect to the cost of criminal proceedings, the legislature finds that:

- (1) the vast majority of the cost of the criminal proceedings in the state is borne by the general taxpaying public;
- (2) it is in the state's best interest to attempt to recover as much as possible of the cost of criminal proceedings from individuals who have been convicted of violating state laws;
- (3) various courts in the state of Montana have recently held that certain reasonable fees imposed upon defendants in criminal proceedings in the state, such as fees for general cost of prosecution, pretrial supervision, and community service supervision, were unlawful because there was no specific statutory authorization for the imposition of the costs on the defendant; and
- (4) the costs of prosecution and supervision of criminal defendants is a shared responsibility of the state and the counties.

Federal Cases

Melendez-Diaz v. Massachusetts

129 S.Ct. 2527 (2009)

- *Latest Confrontation Clause case*

- D arrested for drug offense
- Drugs sent to Crime lab for testing
- Forensic scientist determined drugs were cocaine and submitted report to that effect
- At trial, State introduced certified copies of the lab report without testimony from the forensic scientist
- D's Confrontation Clause objection overruled

USSC Holdings:

- (1) analysts' certificates of analysis were affidavits within core class of testimonial statements covered by Confrontation Clause;
- (2) analysts were not removed from coverage of Confrontation Clause on theory that they were not “accusatory” witnesses;
- (3) analysts were not removed from coverage of Confrontation Clause on theory that they were not conventional witnesses;
- (4) analysts were not removed from coverage of Confrontation Clause on theory that their testimony consisted of neutral, scientific testing;
- (5) certificates of analysis were not removed from coverage of Confrontation Clause on theory that they were akin to official and business records; and
- (6) defendant's ability to subpoena analysts did not obviate state's obligation to produce analysts for cross-examination.

State v. Carter, 326 Mont. 427 (2005)

- Montana Supreme Court held that DUI certification reports are not testimonial

- The State argues that the certification reports used at Carter's trial are nontestimonial evidence because they do not fall within the core group of statements which the Confrontation Clause was meant to address, and thus do not implicate Carter's right of confrontation. We agree. As we stated in *Delaney*, such certification reports are not substantive evidence of a particular offense, but rather are foundational evidence necessary for the admission of substantive evidence. In other words, the certification reports are nontestimonial in nature in that they are foundational, rather than substantive or accusatory. In the same way that the defendant's confrontation right was not implicated in *Delaney*, Carter's confrontation right was not implicated by the use of these certification reports, despite the fact that the authors of the reports were not present to testify and be confronted.

Search Incident to Arrest

Arizona v. Gant,
556 U.S. ----, 129 S.Ct. 1710, 173
L.Ed.2d 485 (2009)

- New rule for Search Incident to Arrest

New York v. Belton,
453 U.S. 454 (1981)

- Supreme Court held that when an officer lawfully arrests the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of the car and any containers therein.
- Purpose of SIA is
 1. Safety of officer
 2. Prevent destruction of evidence

- Bright-line rule:

- No consideration either:

1. Officer's subjective believe that D has a weapon or that there is potential evidence to be destroyed

Or

2. Defendant's actual ability to obtain a weapon or destroy evidence

Arizona v. Gant

- Search incident to arrest warrant exception only applies when either
- (1) the arrestee is unsecured and within reaching distance of the passenger compartment, or
- (2) the officers reasonably believe that evidence relevant to the crime of arrest might be found in the car.

§ 46-5-102, MCA Scope of search incident to arrest.

When a lawful arrest is effected, a peace officer may reasonably search the person arrested and the area within such person's immediate presence **for the purposes of:**

- (1) protecting the officer from attack;
- (2) preventing the person from escaping;
- (3) discovering and seizing the fruits of the crime; or
- (4) discovering and seizing any persons, instruments, articles, or things which may have been used in the commission of or which may constitute evidence of the offense.

State v. Hardaway,
2001 MT 252, 307 Mont. 139

- Court held SIA requires exigent circumstances

Montana Supreme Court Cases

Exclusionary Rule

Three Recognized Exceptions

1. Attenuation of Taint
2. Independent Source
3. Inevitable discovery

Inevitable Discovery

- Matter of BAM, 346 Mont. 49 (2008)
- State v. Hixen, 346 Mont. 427 (2008)
- State v. Lacey, 349 Mont. 371 (2009)
- State v. Hilgendorf, 350 Mont. 412 (2009)

Sex offenders

State v. Samples, 347 Mont. 292 (2008)

- D convicted of sex assault, given suspended sentence
- D's sentence revoked and D committed to DOC
- D's sentence discharged and DOC designates D a level 3 sex offender

- D registered and always updated registration upon change of address.
- D lives at homeless shelter for period of time and registers there
- D leaves shelter and becomes homeless
- D does not register a change of address upon becoming homeless
- D charged and convicted of failing to register

- Court affirms conviction, finding that statute was not vague and that becoming homeless constitutes a change in residence for purposes of statute

- Court also found that D's constitutional Procedural Due Process rights were violated when he was designated a level 3 sex offender

- Procedural Due Process: no one shall be deprived of life, liberty, or property without due process of law
 - If life, liberty or property interest, then State must give D:
 1. notice of action
 - and
 2. opportunity to be heard

- Court determines that risk level designation is a liberty interest
- And
- D was not given notice by DOC or an opportunity to be heard

State v. Hill, 350 Mont. 296 (2009)

- Court established that sex offender status level determinations will be reviewed under abuse of discretion standard

Felony Murder

State v. Russell, 347 Mont. 301 (2008)

- D and friend stab two sleeping homeless people: one dies (Gewanski), one survives (Wallin)
- D charged and convicted of:
 1. Deliberate Homicide (f-m) of Gewanski
 - Agg. Ass. Of Wallin (predicate felony)
 2. Agg. Ass. of Wallin
 3. Robbery by accountability
 4. Agg. Ass by accountability of Gewanski

- D claims District Court should have dismissed aggravated assault conviction because conviction for Deliberate Homicide-Felony Murder with aggravated assault predicate and aggravated assault violates double jeopardy

45-5-102. Deliberate homicide

(1) A person commits the offense of deliberate homicide if:

(a) the person purposely or knowingly causes the death of another human being; or

(b) the person attempts to commit, commits, or is legally accountable for the attempt or commission of robbery, sexual intercourse without consent, arson, burglary, kidnapping, aggravated kidnapping, felonious escape, assault with a weapon, aggravated assault, or any other forcible felony and in the course of the forcible felony or flight thereafter, the person or any person legally accountable for the crime causes the death of another human being.

- **46-11-410. Multiple charges.**

(1) When the same transaction may establish the commission of more than one offense, a person charged with the conduct may be prosecuted for each offense.

(2) A defendant may not, however, be convicted of more than one offense if:

(a) one offense is included in the other;

46-1-202(9) "Included offense" means an offense that:

(a) is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

Court held:

- In felony murder, predicate felony is an included offense, as well as element of the felony murder
- Assuming same transaction, then conviction for both assault on Wallin and killing of Gewanski is precluded by 46-11-410(2)(a)
- Agg. Assault conviction merges into DH

Justice Nelson, concurring & dissenting

- Deliberate homicide-felony murder is invalid because the death did not occur “in the course of the forcible felony or flight thereafter”
 - Assault on Wallin and killing of Gewanski were two separate acts
 - death must be “natural and probable consequence” of the felony activity; not mere coincidence of homicide and felony

Justice Rice, dissenting joined by Chief Justice Gray

“However, in a stupefying leap unsupported by any authority, and without so much as a thought about whether the statutes might be deemed to conflict and thus require reconciliation, the Court concludes that the Legislature has somehow eliminated multiple punishments in felony murder cases-despite the careful explanation to the contrary in Close and despite hundreds of years of common law to the contrary-by virtue of the enactment of the statutes generally addressing lesser included offenses and multiple prosecutions. I cannot agree.”

- “The Court's decision not only rejects legislative intent and our precedent, it defies any common sense-that Russell could stab one victim and kill another but be limited to only one sentence. I could not be more confident that the Legislature did not intend this result.”

“Reasoning that because ‘a defendant cannot commit the offense of felony homicide without committing a predicate felony offense,’ the Court holds, obliquely, that the predicate offense must *always* merge with the homicide and under no circumstances can a defendant be punished for both crimes. It blames the prosecutor for this predicament, and suggests that Russell should have been charged with aggravated assault as a stand-alone charge, and robbery should have been used as the predicate offense. Of course, under the Court's approach, Russell could never be punished for the robbery, but more to the point, the prosecution should not be faced with this choice.”

Speedy Trial

Wrestling with *Ariegwe*

- State v. Billman, 346 Mont. 118 (2008)
- State v. Rose, 348 Mont. 291 (2009)
- State v. Hardaway, 2009 MT 249

- State, defendants, district courts, and Supreme Court all having difficulty applying Ariegwe's test.

Probation Conditions

**State v. Ashby, 342 Mont. 187,
2008 MT 83**

Last year's new test

- a sentencing judge may impose condition so long as the condition has a nexus to either the offense for which the offender is being sentenced, or to the offender herself
- If looking to impose alcohol prohibition on D, it must either relate to the offense, to how the offense was committed, or to the D's history which must be "recent, significant, or chronic"

State v. Sadowsky, 347 Mont. 192 (2008)

- D pled to theft.
- D long-term meth problem
- District Court judge imposes no alcohol condition
- Court affirms: “A history of chemical dependency represents a sufficient offender nexus to support a no alcohol condition”

State v. Stiles, 347 Mont 95 (2008)

- Court clarifies Ashby
 - Sentencing conditions are reviewed:
 - 1st: legality
 - then
 - 2nd: abuse of discretion
 - whether sufficient nexus falls under abuse of discretion

Justice Nelson, dissenting

“in adopting this new approach to legality review, the Court explicitly relegates our traditional legality test-the nexus test-to the second, abuse of discretion prong of our standard of review. In other words, the Court holds that the nexus requirement is a limit on the sentencing court's *discretion*, not its *authority*. For the reasons which follow, this new approach contradicts years of precedent and is inconsistent with the language of the statutes.”

State v. Nelson, 346 Mont. 366 (2008)

- Search warrant of house reveals marijuana grow operation and meth lab
- D pleads guilty to possession/manufacture of dangerous drugs
- D has degenerative disc disorder and obtained license for medical marijuana use
- D receives deferred sentence upon conditions

Condition 9:

The Defendant shall comply with all city, county, state, federal laws, ordinances, and conduct himself as a good citizen.

Condition 10:

The Defendant will not possess or use illegal drugs or any drugs unless prescribed by a licensed physician. Although the Defendant states he has a medical use exception which allows him to possess marijuana, the Defendant may not possess marijuana except in pill form and only then by prescription from a licensed physician. The prescription may not be more than 6 months old. The Defendant may not have a prescription older than 6 months in his possession. The Defendant will not be in control of or under the influence of illegal drugs, nor will he have in his possession any drug paraphernalia.

Medical Marijuana Act: 50-46-102(5)

(1) A qualifying patient or caregiver who possesses a registry identification card issued pursuant to 50-46-103 *may not be arrested, prosecuted, or penalized in any manner or be denied any right or privilege, including but not limited to civil penalty or disciplinary action by a professional licensing board or the department of labor and industry, for the medical use of marijuana* or for assisting in the medical use of marijuana if the qualifying patient or caregiver possesses marijuana not in excess of the amounts allowed in subsection (2).

Holdings:

- (1) trial court exceeded its statutory authority in imposing a condition that prohibited defendant from possessing marijuana except in pill form and only then by prescription, and
- (2) trial court exceeded its statutory authority in imposing a condition that required defendant to comply with all federal laws insofar as condition related to enforcing federal Controlled Substances Act at expense of state Medical Marijuana Act.

“We recognize that some find the very idea of medical marijuana a hard pill to swallow, given that use of marijuana is generally illegal and has been so for some time. . . . Simply put, whether or not medical marijuana is ultimately a good idea is not the issue before the Court. Instead, our concern is solely with the plain language of the MMA and the sentencing authority of the District Court in this case.”

“A sentencing court is free to impose limitations on the place of use, and may certainly order that marijuana not be used in the presence of children. Moreover, just as a sentencing court may impose a condition that prohibits a defendant from *abusing* lawfully-obtained prescription drugs, so may a court prohibit a defendant from abusing medical marijuana. However, an outright ban on the “medical use” of marijuana as contemplated by the MMA exceeds the statutory authority of the District Court.”

Miranda

St. v. Clark, 347 Mont. 354 (2008)

- D stopped upon suspicion of DV and DWLS
- D consents to search of car
- Search reveals prescription drugs
- D charged possession
- D moves to suppress based—in part—on failure to give Miranda prior to consent

- Court holds Miranda warnings not required prior to asking for consent to search
- Miranda required when custody + interrogation
- Consent to search does not constitute interrogation because not an incriminating statement

Right to Counsel

St. v. Schneider, 347 Mont. 215
(2008)

- D and friend stopped in Arizona on way to Mexico
- Friend confesses to homicide in MT
- D and friend arrested
- D on probation with condition of not leaving MT without PO's permission
- Arizona charges D with being a "fugitive"
- D arraigned and AZ public defender appointed
- D interrogated by AZ and MT cops in AZ
- D's public defender not notified and not present
- D advised and waives Miranda
- D incriminates self in murders
- D pleads guilty to deliberate homicide in MT

- D asserts that Art II Section 24 violated when interrogated without notification to his attorney

6th Amendment

- 6th Amendment right to counsel attaches when judicial proceedings initiated, as by charging, or arraignment

Texas v. Cobb, 532 US 162 (2001)

- The Sixth Amendment right to counsel is “offense specific,” meaning that it only applies with respect to the charged offense and “it cannot be invoked once for all future prosecutions....”
- The Court held that statements, which result from a defendant's un-counseled interrogation regarding offenses for which the defendant has *not* been charged, are “admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses,” and despite the fact that the defendant's counsel for the charged offense may not have been present at, or informed of, the interrogation.

- Court interprets Art II, Section 24 as synonymous with 6th Amendment
- Court refuses to expand MT right to counsel

Other implications

- State v. Mizenko, 2006 MT 11 (Justice Nelson, dissenting):

“Thus, by affirming the District Court's admission of this hearsay testimony, the majority perpetuates the District Court's denial of Mizenko's fundamental right ‘to be confronted with the witnesses against him,’ as guaranteed by the Sixth Amendment of the United States Constitution, and his even greater fundamental right ‘to meet the witnesses against him *face to face*’ under Article II, Section 24, of Montana's Constitution”

Search and Seizure

Consent to search

State v. Ellis, 351 Mont. 95 (2009)

- Police respond to residence after 911 call of sexual assault
- V, 13 years old, tells officer that her dad drugged her and sexually assaulted her the night before
- V takes cop into bedroom where sheets, pajamas and underwear are recovered.
- D's semen is present on the sheets

- D moves to suppress evidence based on V's inability to consent to search of D's house
- Following State v. Schwarz, District Court granted motion to suppress

State v. Schwarz, 2006 MT 120

- Officers attempting to arrest Lowe go to D's house where Lowe had been staying.
- D's 13 year old daughter gives officers consent to search house for Lowe.
- During search, officers discover drugs.
- D arrived and admitted drugs hers.
- D moved to suppress for illegal search

- Court creates a per se rule that youth under 16 cannot have actual authority to consent to search of parent's home.

State v. Ellis

- State argued that Schwarz should not apply when juvenile is also a victim of an offense
- And
- If Schwarz applied, discovery of the evidence was still admissible under inevitable discovery

- Court rejected both arguments:
 1. No child victim exception
 1. Not child's right to waive
 2. Cops can still get warrants
 2. Not inevitable discovery
 - to “excuse the failure to obtain a warrant merely because the officers had probable cause and could have obtained a warrant would completely obviate the warrant requirement.”

Justice Leaphart dissents (Morris joins)

- Drafter of State v. Schwarz
- V had expectation of privacy in her underwear, pajamas and sheets; D did not
- No search occurred, as V gave the items to the cops
- “I would endorse a victim's exception to the per se rule that a minor cannot consent to the search of her parents' home. The exception would be limited to crimes against the person, Title 45, chapter 5, MCA, that were alleged to have been committed against the minor which occurred in the home in question.”

Judge Simonton (sitting in for Rice) dissents

- Would overturn Schwarz.

Exigent Circumstances

State v. Saale, 350 Mont 64 (2009)

- D crashes car
- D's husband arrives and takes D home
- Cops go to D's house and husband refuses entry and refuses to bring D out
- Believing they had exigent circumstances, Cops remove husband and enter house and remove D
- D intoxicated but uninjured

Exigent circumstances

- Things that would cause a reasonable person to believe that entry (or other prompt action) was necessary to prevent:
 1. physical harm to the officers or other persons,
 2. destruction of relevant evidence,
 3. escape of the suspect, or
 4. some other consequence improperly frustrating legitimate law enforcement efforts.

- State argued that preservation of blood alcohol was exigent circ
- Court disagreed:
 1. Blood alcohol not evidence until sample given, so no exigency to prevent destruction of “potential evidence”
 2. No real medical exigency because cops knew D not injured, husband was aware of D’s condition, and cops didn’t take D to hospital

Particularized Suspicion

State v. Cybulski, 349 Mont. 429 (2009)

- D drives wrong way on highway for 50 miles, pursued for 6 miles by cops, driver non-responsive to police
- D refused most FSTs and BAC
- D convicted of DUI and criminal endangerment

- D challenged probable cause for arrest on grounds that officer was inexperienced

- particularized suspicion requires that the “information available to the investigating officer-whether a rookie or a veteran-be sufficient to allow a hypothetical ‘experienced’ officer to have either particularized suspicion for a stop, or probable cause for an arrest.”

- for a peace officer to have particularized suspicion or reasonable grounds for an investigatory stop, the peace officer must be possessed of: (1) objective data and articulable facts from which he or she can make certain reasonable inferences; and (2) a resulting suspicion that the person to be stopped has committed, is committing, or is about to commit an offense.

While a peace officer's experience and training may be a factor in determining what sort of reasonable inferences he or she is entitled to make from his or her objective observations, experience and training will not necessarily be the defining element of the test.... The courts will look to the facts and to the totality of the circumstances of each case.