

THE MONTANA DUI HANDBOOK

Revised September 2014



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Steve Bullock, Governor



2701 Prospect, PO Box 201001
Helena MT 59620-1001
Phone: (406) 444-6201, TTY: (800) 335-7592
www.mdt.mt.gov

215 N Sanders, PO Box 201401
Helena, MT 59620-1401
Phone: (406) 444-2026, TTY: (406) 444-9429
www.doj.mt.gov

December 3, 2014

Subject: 2014 DUI Handbook

Dear Prosecutor,

Montana has made great strides in strengthening Driving Under the Influence (DUI) laws, however DUI's continue to be a significant traffic safety issue in Montana. Montana remains one of the top states in the nation for alcohol-impaired fatalities, with a rate that is almost twice the national average.

The DUI Handbook was developed in support of your role as prosecutors, and your efforts toward consistent identification, arrest, prosecution, and sentencing in countering impaired drivers. The updated handbook provides current case law, updated laws, and practical elements to assist you in preparing for and conducting DUI trials.

We appreciate your dedication in prosecuting DUIs to the full extent of the law, as a means to improving safety on Montana's roads. Your efforts help us to support the Vision Zero initiative for Montana which has the goals of zero fatalities; zero injuries and all highway users arrive safely at their destination.

Please let us know if there is anything else we can do to support your important work.

Sincerely,

Mike Tooley, Director of Transportation
Governor's Representative for Highway Safety – Montana

Tim Fox
Montana Attorney General

June, 2014

Dear Prosecutor,

DUI cases continue to be among the most challenging crimes to prove in Montana. Large case loads, complex statutes, and sympathetic juries are often difficult to overcome. Thanks to Montana Department of Transportation funding, the Montana TSRP program has produced and now updated this comprehensive and time-saving *Prosecutor's DUI Handbook* to assist you in effectively preparing for and prosecuting DUIs.

This *Handbook* is intended for all levels of experience, whether you are a novice prosecutor reviewing your first DUI case, a part-time prosecutor handling DUIs sporadically, or a seasoned prosecutor dealing exclusively with DUIs on a full time basis. It is intended to place at your fingertips "hard to find" statutes and cases for easy reference. This *Handbook* should also be used as a guide to statewide uniform prosecution.

Effective prosecution requires a strong working relationship between law enforcement and prosecutors, and in Montana we are fortunate to have dedicated law enforcement personnel working with us. They have as much ownership in a DUI case as you do, and an impaired driver will never be convicted without a proper professional investigation. I encourage you to share information in this *Handbook* with your officers, deputies, and troopers to ensure the strongest arrest and prosecution possible.

I would like to thank everyone who has assisted in the development and revision of this *Handbook*, especially David Carter, Jared Olson, Deena Ryerson, Courtney Popp, Moses Garcia, Jake Bushnell, Kelly Mantooth, Kurt Sager, L. Jeanine Badanes, Joseph McCormack, Tom Kimball, Ben Vetter, Joanne Michaels, Mark Neill, Matt Cochenour, Ole Olson, Chad Parker, law enforcement and prosecutors throughout the state, and the hard working people at the Montana Department of Transportation. Most of all I would like to recognize and thank Barb Watson, who continues to research and update this *Handbook*.

Erin T. Inman

Montana Traffic Safety
Resource Prosecutor

Executive Summary

The consequences of impaired driving can be severe and irreversible. Responding to crashes involving impaired drivers consumes taxpayer and public resources at multiple levels, including law enforcement, emergency responders, detention facilities, prosecutors, and the judicial system. This doesn't take into account the emotional impact to families, and the cost to our medical and insurance systems.

QUANTIFYING THE PROBLEM

The following 2012 data illustrates the scope of the problem in Montana:

- Alcohol and/or drugs were a factor in 2,050 crashes, 1,432 injuries, and 116 deaths.¹
- The average BAC in fatal crashes for 2012 was 0.17.²
- 73 of the drivers involved in a fatal crash had a BAC of over 0.08 BAC.³
- 56 of the drivers involved in a fatal crash had a BAC of 0.15 or higher.³

After alcohol, the next most frequently found drug involved in DUI cases is marijuana.

- 47 of the drivers involved in a fatal crash had THC in their system.³

Nationally, people identified as “hard core drinking drivers” – those with high blood alcohol concentration (BAC) levels of 0.15 percent or greater or who are repeat offenders with a drunk driving arrest or conviction in the past 10 years – were involved in more than 70 percent of the alcohol-impaired driving fatalities and more than 22 percent of the total highway deaths. Between 1982 and 2009, more than 251,000 people died across the USA in crashes involving hard core drinking drivers.⁴

In Montana, many individuals have escaped detection as “hard core drinking drivers” because of the lack of BAC evidence, and a limited short look-back period to identify repeat offenders, until they reached felony DUI offender status.

In 2012, approximately 10,000 impaired driving charges were filed in Montana's FullCourt database.⁵ This likely underrepresents the full scope of impaired driving activity within the state. Many impaired drivers arrive at their destination before detection by law enforcement, or prosecutors may not have an adequate investigation upon which to pursue a conviction.

¹ Source: Montana Safety Management Information System – MDT (2012 is most current certified data)

² Source: NHTSA's Fatality Analysis Reporting System. Results for 2012 show 206 of the 250 drivers (82.4%) involved in a fatal crash were tested for blood alcohol concentration. 88 people had a BAC greater than zero, with an average BAC of 0.169, rounded to **0.17**.

³ Source: NHTSA's Fatality Analysis Reporting System

⁴ Safety Alert published by the National Transportation Safety Board (NTSB) in November 2010

⁵ Source: Office of Court Administrator. The total number of impaired driving charges noted in FullCourt for 2012, including those given to drivers under the age of 21 and commercial drivers, totals 10,155.

Interviews of felony DUI offenders revealed that they drove DUI an average of 369 times between each DUI conviction.⁶

THE STAGGERING MONETARY COST TO THE TAXPAYERS OF MONTANA

Results of a study conducted by the University of Montana's Bureau of Business and Economic Research, released in 2009, show that alcohol abuse costs the state's economy more than half a billion dollars per year in lost wages and productivity, alcohol treatment costs, medical costs, and other public and private spending. Of that number, \$49.1 million was spent on "extra police, judges and prison cells needed to protect citizens and enforce the laws that are broken because of the impairing impacts of alcohol." A subsequent study, released in January 2010, noted that the addition of alcohol related crashes with injuries represent an additional \$131 million, bringing the total economic cost of alcohol abuse to \$642 million.

THE SOLUTION

The solution begins with recognition that these losses are both unnecessary and entirely preventable. Clearly, impaired drivers do not have a right to get behind the wheel of a vehicle, and take away the rights of others to safe passage on Montana's roads.

Unity - The response of Montana's criminal justice system to the DUI offender must be consistent, swift, just, and facilitate the rehabilitation of those with chemical dependency disorders.

Deterrence is a major part of the solution: to discourage DUI offenders from continuing to drive when impaired. Deterrence can only be achieved through unity: whether individuals choose to seek treatment for addiction, or to seek a safe & sober ride home after ingesting impairing substances, a united response from the criminal justice system is imperative for forging a cultural norm in Montana whereby drivers are certain that it is simply *not* worth the risk of getting behind the wheel of a vehicle when impaired by drugs and/or alcohol.

New laws - The 2013 Legislature enacted laws that are expected to assist law enforcement and prosecutors in responding to DUI cases:

- Legislation codified as § 61-8-411, MCA creates a new crime for a per se limit of 5 ng/ml of Delta-9-Tetrahydrocannabinol in blood. This law allows law enforcement officers to obtain a warrant for a first-time marijuana registry cardholder suspected of DUI who refuses to provide a blood sample.
- HB 355 was signed into law and increased the look-back period from five years to 10 years for second offense DUI, and eliminated look-back for third offense DUI (§ 61-8-734, MCA). It also expands those look-back periods for Aggravated DUI (§ 61-8-465, MCA).
- A new offense of criminal child endangerment was created under § 45-5-628, MCA, to include driving DUI with a child under the age of 14 in the vehicle.

⁶ Source: *To Drink is to Drive* – Final Report to the Montana Legislature on Multiple Offender Drunk drivers' Prevention Strategy Ideas by Kimberly Spurzem and Dr. Timothy Conley. February 28, 2011. Online at www.mdt.mt.gov/safety/docs/ToDrinkisToDrive.pdf.

DUI Handbook - As we know, the value of laws is only as good as the enforcement of those laws. The goal of this updated handbook is to provide line prosecutors with current case law, updated laws, and practical elements to assist them in preparing for and prosecuting DUI cases. Besides serving as a guide to encourage consistent prosecution statewide, this handbook is also a valuable resource for law enforcement officers.

Technical assistance and training - In addition to this handbook, the Montana's Traffic Safety Resource Prosecutor is available to provide technical assistance and training to expand upon and reinforce any aspect discussed in this document. Please contact the Montana Department of Transportation (MDT) (406) 444-7411 to make arrangements.

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CHAPTER ONE

CHARGING

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❖ 1.1 GENERALLY

The first major duty in a DUI proceeding is to carefully examine the charging document and, if necessary, amend it. Be certain that all of the elements needed are present at the beginning of the case. This will make it easier to present even if the trial takes place months after the arrest. Never wait until the trial to review the charging document. Also, with careful screening procedure, factual shortcomings and legal obstacles can be dealt with at the beginning of the case. Working every DUI case as if it was a complicated Vehicular Homicide will make the Homicide case become easy when it happens.

❖ 1.2 CHARGING

The requirements for filing a proper Complaint are found in Montana Code Annotated Section 46-11-401 (2013), and the requirements for filing a proper Information are found in Montana Code Annotated Section 46-11-201 (2013). The officer may charge both DUI and DUI Per Se in the alternative on the same complaint or on separate complaints. The defendant may be convicted of one or the other, or neither, but not both offenses. Mont. Code Ann. §61-8-408 (2013).

An outline of the DUI and related charges found in Montana Code Annotated (2013) follows:

- §61-8-401 Driving Under the Influence of Alcohol or Drugs (DUI)

- §61-8-406 Operation of a Noncommercial Vehicle With an Alcohol Concentration of .08 or More, Operation of a Commercial Vehicle With an Alcohol Concentration of .04 or More (commonly known as DUI Per Se)

§61-8-410	Operation of vehicle by person under twenty-one with alcohol concentration of 0.02 or more
§61-8-411	Operation of noncommercial vehicle or commercial vehicle by person under influence of delta-9-tetrahydrocannabinol
§61-8-465	Aggravated DUI
§45-5-106	Vehicular Homicide
§45-5-104	Negligent Homicide
§45-5-205	Negligent Vehicular Assault (Misdemeanor and Felony provisions)
§45-5-207	Criminal Endangerment (consider charging if there is a minor passenger (less than 16 years old), see also Criminal Child Endangerment (§45-5-628(e)), see also enhancement (§61-8-714, §61-8-722), or in addition to and/or in lieu of a misdemeanor DUI if a crash occurs, defendant drove the wrong direction on a divided highway, or the defendant has prior conduct that offers specific knowledge of the danger – i.e. prior crash or homicide as a drunk driver)
§45-5-208	Negligent Endangerment
§45-5-624	Minor in Possession (Unlawful Attempt to Purchase or Possession of Intoxicating Substance)
§45-5-628(e)	Criminal Child Endangerment
§61-8-460	Open Container
§61-7-101 -118	Uniform Accident Reporting Act
§46-18-501-502	Persistent Felony Offender

Other related offenses regarding over service, sales to minors, etc. are attached in Appendix III for your convenience.

Under the Influence

§61-8-401- “Under the influence means that as a result of taking into the body alcohol, drugs, or any combination of alcohol and drugs, a person's ability to safely operate a vehicle has been diminished.” The State may not rely solely on the presence of a legal or illegal drug in the person’s system to prove this element. It is not a defense that the defendant has or had a prescription for the drug and possesses it lawfully. Mont. Code Ann. §61-8-401(2) (2013); Mont.

Code Ann. §50-46-205(1)(a) (2013) (Medical Marijuana Act/Card is not an excuse or defense to DUI).

Ways of the State Open to the Public

§61-8-101(1) –“The phrase "ways of this state open to the public" means any highway, road, alley, lane, parking area, or other public or private place adapted and fitted for public travel that is in common use by the public.”

- State v. Weis, 285 Mont. 41 (1997) (gravel one-lane roadway on a privately maintained easement, which was adapted and fitted for public travel, and did not apparently limit public use or access was considered a “way of this state open to the public”).
- See also:
Parking lots – Santee v. State, 267 Mont. 304 (1994),
Parking garages – City of Billings v. Peete, 224 Mont. 158 (1986).
Borrow pit – State v. Taylor, 203 Mont. 284 (1983).
Driveway – See State v. Sirles, 2010 MT 88.

Actual Physical Control

- State v. Hagen, 283 Mont. 156 (1997) (“A person has actual physical control of a vehicle when he ‘has an existing or present bodily restraint, directing influence, domination or regulation, of an automobile.” (Citation omitted.))
(Facts: being in the passenger compartment with the keys to the vehicle constitutes actual physical control).
- State v. Robison, 281 Mont. 64 (1997) (“ . . . DUI is directed at the driver of the vehicle, not at other persons who, while intoxicated, might legitimately happen to be passengers in the vehicle.”).
- State v. Turner, 244 Mont. 151 (1990) (stating dominion of a motor vehicle is sufficient to constitute actual physical control) (Facts: pushing a motorcycle with a broken clutch down a public street with its headlight on, without starting the engine or coasting, was sufficient).
- State v. Taylor, 203 Mont. 284 (1983) (finding movement of the vehicle is not necessary to establish actual physical control of a motor vehicle).

Strict Liability Offense

DUI and DUI Per Se are strict liability offenses, so the State need not prove a mental state. See Mont. Code Ann. §61-8-401(7) (2013) and State v. Weller, 2009 MT 168. In other words, a claim by the defendant that he/she is unaware that he/she is under the influence does not negate the DUI.

An element of every crime, however, is a volitional act. Therefore, if a defendant can prove they did not drive of their own volition, it is a defense. See City of Missoula v. Paffhausen, 2012 MT 265. So, be careful not to confuse involuntary intoxication with lack of volitional act. One is not a defense, and the other is.

❖ 1.3 SECOND AND SUBSEQUENT OFFENSES

Montana Code Annotated provides sentencing enhancements for multiple DUI convictions. A fourth or subsequent lifetime offense is a felony. Thus, when charging it is important to understand the enhancement provisions, so the proper court (District Court or a Court of Limited Jurisdiction) hears the case.

Misdemeanor DUI and DUI Per Se (alcohol or marijuana)

A third DUI or DUI Per Se (alcohol or marijuana) occurs when the present offense is the third lifetime DUI or DUI Per Se (alcohol or marijuana) conviction. Mont. Code Ann. §61-8-734(1)(b) (2013). A second DUI or DUI Per Se (alcohol or marijuana) occurs when the present offense is within ten years of the previous DUI or DUI Per Se (alcohol or marijuana) conviction. Id. A conviction occurs the day a sentence is entered⁷ or bail is forfeited. Mont. Code Ann. §61-8-734(1)(a) (2013). All previous DUI and DUI Per Se convictions count as priors whether the current charge is DUI or DUI Per Se. Mont. Code Ann. §61-8-734(1)(c) (2013). To prove prior convictions at sentencing, present a certified copy of the defendant's driving record. Mont. Code Ann. §61-11-102(6) (2013).

Use the checklist on page 1-8 for establishing the validity of previous DUIs. This is especially useful when determining whether to charge felony DUI.

⁷ "Entered" is not statutorily defined. Review Montana Code Annotated Title 46 Chapter 18 Parts 1 and 2 and their subsections to verify appropriate sentencing recommendation/ considerations.

Felony DUI and DUI Per Se (alcohol or marijuana)

§61-8-731(1)- A felony occurs when the defendant has one previous conviction of Vehicular Homicide under Section 45-5-106 or has three prior valid convictions of any combination of the following offenses:

§61-8-401	DUI
§61-8-406	DUI Per Se
§61-8-411	DUI Per Se Marijuana
§45-5-104	Negligent Homicide (occurred while defendant was under the influence)
§45-5-205	Negligent Vehicular Assault
§61-8-465	Aggravated DUI

State v. Blue, 2009 MT 304 (three priors, none of which are “third offense” each count as a prior conviction for sentencing felony DUI).

Prior convictions must be valid for them to count towards enhancement and felony jurisdiction. A prior conviction is valid if it 1) has not been or is not subject to expungement⁸, 2) is constitutionally firm, and 3) is substantially similar to Montana’s DUI offenses, if the offense occurred in another state or federally recognized Indian reservation. For a better understanding of how to count prior convictions and determine whether a prior conviction is valid, review the flow chart attached at the end of this chapter.

DUI and DUI Per Se Resulting in Serious Bodily Injury or Death

There are a variety of felony crimes that may be charged in the event of a crash resulting in serious bodily injury or death. See a list of those charges in Section 1.2 above. Montana law (statutes and case law) is confusing and evolving with regard to these statutes. Before charging under these circumstances, be sure to review the following cases and corresponding statutes:

⁸ Expungement is an archaic term under Montana law. However, it is still relevant in DUI cases when an offender has a long history of DUI offenses. For an understanding of the history of the term “expungement” and its modern significance in Montana, read State v. Lorash, 238 M 345, 777 P2d 884 (1989); State v. Reams, 284 M 448, 945 P2d 52, 54 St. Rep. 972 (1997) (Expungement provision deleted in 1989). State v. Bowles, 284 M 490, 947 P2d 52, 54 St. Rep. 962 (1997); State v. Weldele, 2003 MT 117, 315 M 452, 69 P3d 1162 (2003); See also Mont. Code Ann. §46-18-204 and Mont. Code Ann. §61-8-714 (notes).

- State v. Thompson, 207 Mont. 433 (1984) (statutory Implied Consent laws do not apply to a charge of Negligent Homicide).
- State v. Stueck, 280 Mont. 38 (1996) (incorporated the Implied Consent laws (and the obligations and responsibility of those statutes) into the crime of Negligent Vehicular Assault).
- Subsection (10) of 61-8-402, enacted in 1997, provides: “This section does not apply to blood and breath tests, samples and analyses used for purposes of medical treatment or care of an injured motorist or related to the lawful seizure for a suspected violation of an offense not in this part.” Argument exists that this statutory change abrogated Stueck as noted above.
- §45-5-106- Vehicular Homicide While Under Influence.
- State v. Schauf, 2009 MT 281 (discussing in dicta the applicability of Stueck logic to §45-5-106, Vehicular Homicide While Under Influence).
- State v. Saale, 2009 MT 95 (finding community caretaker doctrine and exigent circumstances exceptions to the warrant requirements did not apply under the circumstances).

❖ **1.4 AMENDING**

The purpose of a complaint is to provide the defendant with sufficient notice of the offense charged. Thus, it is best practice to amend a complaint as soon as possible. When a person other than yourself authors the complaint, it is especially important to review it and ensure no defects exist. Amendments should be made well before trial and must be done at least five days before trial. Mont. Code Ann. §46-11-205(1) (2013).

The defendant may move to dismiss before trial because of an alleged defect. If the defect goes to the substance of the offense, such that an amendment would charge a different or additional offense, then the defect might be fatal. But when the amendment merely goes to form such as the deletion of the words “or drugs” from a complaint alleging “driving under the influence of alcohol or drugs,” the defect is not fatal and the amendment should be allowed. See State v. Handy, 221 Mont. 365 (1986).

Is a fatal defect capable of definition? Generally, a complaint must contain all of the elements set forth in Section 46-11-401. An amendment which would substantially prejudice the rights of the defendant should not be allowed.

Keep in mind that the main purpose of the complaint is to provide the defendant with notice of the offense charged so that he may properly prepare a defense. A wrong statutory citation might not allow him to do that. However, if the defendant has filed a motion for production of a breath or blood sample, or a motion to suppress roadside physical maneuvers, then it is arguable that the defendant knows full well what charge he is facing, regardless of any alleged defects.

If the Complaint is amended, there should be another arraignment. Another error that might be considered jurisdictional is the designation of a court holiday, or a weekend date, for a defendant to appear. Since the court might well find such a complaint void for lack of jurisdiction, it is best to move to dismiss as soon as possible and to have the officer making the error serve a new notice to appear and complaint on the defendant.

Flow chart for validity of previous DUIs

(Use when determining whether to charge felony DUI)

Begin by asking if the defendant has been convicted of a total of at least three prior DUIs in Montana and any other state. If so, each of the following three questions should be asked about each prior conviction to determine whether it was valid.

1. Should the conviction be expunged⁹? If so, it is not a valid conviction.

Montana convictions for DUI

(A) Did the prior offense (actual act) occur prior to October 1, 1989?

- No – valid conviction
- Yes – go to question B

(B) Did the defendant have a subsequent conviction within 5 years of the original conviction?

- Yes – valid conviction
- No – conviction should be expunged, conviction not valid

Montana convictions for DUI Per Se

(A) Did the offense (actual act) occur prior to October 1, 1995?

- No – valid conviction
- Yes – go to question B

(B) Did the defendant have a subsequent conviction within 5 years of the original conviction?

- Yes – valid conviction
- No – conviction should be expunged, conviction not valid

2. Is the conviction constitutionally firm? If it is not constitutionally firm, it is not valid.

- (1) a rebuttable presumption of regularity does attach to prior convictions;
- (2) that presumption may be overcome by affirmative evidence (self-serving statements insufficient) of irregularity; and
- (3) The defendant bears the burden of production and the burden of persuasion and must prove the invalidity of the conviction by a preponderance of the evidence. *State v. Maine*, 2011 MT 90, *State v. Chaussee*, 2011 MT 203.

Also consider the following cases:

State v. Joseph, 2003 MT 226;
State v. Wolfe, 2003 MT 222;
State v. Keenan, 2003 MT 190;
State v. Weldele, 2003 MT 117;
State v. Kvislen, 2003 MT 27;
State v. Howard, 2002 MT 276; and
State v. Okland, 283 Mont. 10 (1997).

3. If the conviction occurred in a state other than Montana, is the offense for which the defendant was convicted substantially similar to Montana's DUI or DUI Per Se laws? If the answer to this question is "no," the conviction is not valid. For a good discussion about whether the offense for which the defendant was convicted is substantially similar to Montana's DUI or DUI Per Se laws, read Section 61-8-734(1)(a), *State v. McNally*, 2002 MT 160, *State v. Polaski*, 2005 MT 13, *State v. Cleary*, 2012 MT 113, and *State v. Young*, 2012 MT 251.

⁹ See Footnote 8.

CHAPTER TWO

CHEMICAL TESTS

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❖ 2.1 Mont. Code Ann. §61-8-404 EVIDENCE ADMISSIBLE CONDITIONS

Breath alcohol test results are enormously helpful in obtaining convictions in DUI cases. Therefore, it is of vital importance that prosecutors know the law, the apparatus, and the basic chemistry involved in this scientific area. Generally, this evidence is admissible under Montana Code Annotated Section 61-8-404 (2013). Intoxilyzer® and blood results are admissible to prove the BAC level, whereas PBT results are typically only admissible as proof of the presence of alcohol.

- State v. Delaney, 1999 MT 317 (“[I]n order for the results of a defendant's breath test to be admitted into evidence in a criminal trial, the State must lay a proper foundation by establishing that the instrument used for the test complied with the ARM requirements.”).
- State v. Strizich, 286 Mont. 1 (1997) (denying admissibility of PBT results as substantive evidence, but allowing to show presence of alcohol).
- State v. Damon, 2005 MT 218 (admitting PBT evidence, if the proper foundation has been laid in accordance with Mont. R. Evid. 702).
- State v. Lozon, 2012 MT 303 (State must lay the foundation for PAST in order to play video of test)
- Admin. R. Mont. 23.4.201-23.4.225- Montana’s administrative rules regarding the Intoxilyzer®, PBTs and blood draws.

Montana's Implied Consent Law must have been followed before a court will allow admission of Intoxilyzer[®] or blood results. Chapter 11 discusses these laws in greater detail.

❖ **2.2 CHEMICAL TESTING – INTOXILYZER[®] 8000**

A. GENERALLY

The standard approved breath testing instrument in Montana is the Intoxilyzer[®] 8000, manufactured by the CMI Corporation. We recommend calling the Intoxilyzer[®] an instrument rather than a machine as this implies that it is a scientific apparatus. Get a hard copy of the manual or contact the CMI via the Internet (<http://www.alcoholtest.com/>) to familiarize yourself with the instrument. Also be familiar with the promotional data for the instrument.

The Intoxilyzer[®] 8000 walks the processor through a series of questions with test samples prior to and following the subject giving a proper sample. This assures the processor has performed the test properly and the instrument has read the sample correctly. The subject is required to give two breath samples to ensure a proper test. If the subject cannot give two samples, then it is considered a refusal.

The heart of the Intoxilyzer[®] 8000, utilizes a technique called infrared spectrometry. This process is the most widely accepted evidential form of breath alcohol testing and has been supported by case law more than any other type of alcohol testing analysis.

In simple terms, the Intoxilyzer[®] 8000, measures alcohol in breath by detecting the decrease in intensity of infrared energy passing through the breath sample. (Infrared rays are beyond the red end of the visible spectrum; they are longer than visible light, but shorter than radio waves.) This newest technology assures that only "deep lung" air is tested and it will not give false positives that might result from alcohol being present only in a subject's mouth.

In scientific terms, the basic premise of infra-red (IR) technology is that all things will absorb electromagnetic radiation in a unique and consistent manner. Molecular chemistry tells us that all substances, including the alcohol molecular structure, have a unique and consistent quality. Furthermore, the bond between one atom and another establishes that substance's sensitivity to various wavelengths of electromagnetic radiation and specifically, to infrared light energy. Since

no two substances have the same molecular structure, it is possible to analyze or detect a substance's presence due to the manner in which that substance will absorb the various wavelengths of the infrared spectrum. This absorption or "sensitivity" is caused by the resonating of the molecular bonds when exposed to the infrared energy. The IR energy is absorbed by these resonating bonds and is depleted. Therefore, it is possible to measure the amount of energy that is used due to the unique and consistent manner in which it occurs. Since these bonds will resonate to different degrees at different wavelengths of IR light, a "fingerprint" of that substance's absorption or sensitivity to those wavelengths is created. This fingerprint is most commonly expressed in percent transmittance, which depicts the loss of IR light able to pass through the molecule.

B. WORDS OF CAUTION ABOUT INTOXILYZERS

There are several defenses used to attack the Intoxilyzer[®] 8000. Ben Vetter, with the Montana Crime Lab, has written a paper on these common defenses. His entire paper is included in Chapter 10 for reference and his arguments have been synopsisized for a quick review.

Some of the defense arguments attack **mouth residues** such as gum, mouthwash, burping, belching, and stomach acids. This argument concerning these residual mouth alcohol contaminations can be negated by utilizing the required 20 minute deprivation period.

Another argument is the **acetone or acetaldehyde** that can naturally be found in a person's body. Acetone is keyed upon in the Intoxilyzer[®] 8000 and will advise the operator of the presence of acetone, thus prompting the operator to ask the subject if he has any medical conditions. The Intoxilyzer[®] 8000 can distinguish between alcohol and acetone and will process the sample to give only an alcohol reading.

Breath to Blood Ratio Breath to Blood ratio may be brought up; but most arguments are detrimental to the defense.

First, an argument from the defense claiming the ratio is misleading is irrelevant in Montana, because the ratio is statutorily mandated. Mont. Code Ann. 61-8-407 (2013).

Second, the ratio used by the state of 2100 ml of alveolar breath per 1 ml of pulmonary arterial blood (2100: 1) is a biological average scientifically determined by Dr. Rolla N. Harger in the early 1900's. It applies to alveolar air as opposed to the deep lung air provided during a breath test and to pulmonary arterial blood which supplies the alveoli in the lungs as rather than venous blood samples taken for DUI alcohol testing.

In actual breath testing that ratio is very difficult to reach because it is the ratio of alcohol in the air versus the alcohol in a blood sample in a sealed container. Obviously, living human beings are not sealed containers (we are not closed systems). After some time in that sealed container at 34 degrees Celsius (the temperature of breath) the concentration of alcohol in the air and blood reaches equilibrium at a ratio of 2100:1. (There is 2100 times more alcohol in the blood than in the airspace above it in the container.)

Since persons providing samples are not required to hold their breath for any amount of time, the air sample in that person's lungs is diluted with ambient air which is effectively alcohol free. Because a person can breathe normally during the testing process, the ratio of 2100:1 is not reached.

Taking the sealed container example, this would be like removing the seal and letting outside air in. This would result in a change in the ratio – with now less alcohol in the air.

In published scientific literature, tests comparing breath samples to venous blood samples taken at the same time give a ratio closer to 2400:1. By using 2100:1 for breath tests (as we do in Montana) results for breath tests are generally lower than what the results of a subject's blood results would be if they were taken at the same time. Therefore, using the ratio 2100:1 is beneficial to the defendant.

Breathing Problems such as asthma, smoking, emphysema are prone to occur when testing a subject. If the operator determines the subject has a breathing problem that may prevent him/her from testing on the Intoxilyzer[®] 8000; the operator should have the subject give a blood alcohol test.

Increased Body Core Temperature is an interesting phenomenon. When a subject is sick and has an increased temperature of over 102 degrees F; the subject's breath alcohol concentration (BrAC) test will produce a higher reading than a person with a normal temperature. A defendant may argue at trial that he was sick, and that was the cause of his high test result. This is countered with two obvious observations. First, the operator will be able to visibly see how sick the person is and document this medical condition. Secondly, the higher the body temperature, the greater the effect alcohol will have on the subject.

The defense may attack the Intoxilyzer[®] 8000 with questions concerning **Radio Frequency Interference (RFI), Slope Detection, and Random and Systematic Errors**. Basically, these three concerns are countered with a cage, circuit and filter to prevent RFI interference, a 15 minute deprivation to prevent any Slope Detection and the instrument performing correctly when showing any problems with the system, not a malfunction with the system when showing an internal message.

❖ **2.3 PRELIMINARY BREATH TESTING**

The PBT is an excellent tool for assisting the officer out on the road with the decision to arrest or not arrest a subject for a DUI violation. The PBT is part of the third phase of DUI Detection (vehicle in motion, personal contact and pre-arrest screening.) Combined with the other evidence the officer has collected, the PBT provides an on scene confirmation that alcohol is the cause of the subject's impairment. The officer must wait the 20 minute deprivation period before having the subject blow.

A. HOW DOES THE PBT WORK?

Let's begin with how the PBT works. There are several different PBT's used statewide – so check with your local departments and keep a copy of their PBT instruction booklets in this manual. The Forensic Science Division has approved the following instruments for use as probable cause testing instruments: CMI Inc: The SD2, the SD5, the I300 and the I400; Intoximeters: The Alcosensor III, III+, and Alcosensor IV; and from LifeLoc: The FC-10.

1. The fuel cell theory

A fuel cell is defined as a type of device which when exposed to certain chemicals will, through the process called oxidation, produce electrical energy. This is accomplished due to the fact that when a chemical is exposed to the ACTIVE surface of a fuel cell, the chemical will “give up” one of its electrons. The now “free” electron will flow along a conductive surface and exit the fuel cell. The remaining chemical left on the fuel cell will then dissipate and the reaction is complete.

2. Construction of a fuel cell

The fuel cell is remarkable in its simplicity of design and construction. It is comprised of five layers of material compressed into a wafer, soaked with an electrolytic and covered in a plastic housing.

The central portion of the fuel cell is the CORE. This core can be made from many different materials, its main requirement being that it is porous and can retain this porous quality throughout a number of reactions. On the outside of the core is the CONDUCTOR. The material most generally used as the CONDUCTOR is gold, since gold offers little resistance to electrical flow. The conductor is layered on both sides of the core. The next layer is the ACTIVE SURFACE and is affixed directly on the top of the conductor surfaces. The active surface is made from a material called PLATINUM BLACK. Platinum black is an extremely finely divided form of platinum. It is so finely divided that one gram of platinum black will provide a reactive surface area of 20 square meters. In fact the fuel cell which is approximately the size of a half dollar will have an active surface area of 2-3 square meters (or approximately 36 square feet). The final stage is to soak the cell in SULFURIC ACID, which acts as an ELECTROLYTIC for the reaction. Two PLATINUM CONDUCTOR LEADS are used for directing the electrons in to the circuitry of the device. Platinum is used because of its low resistance quality and for the fact that platinum when attached to gold will not set up an appreciable radio frequency field.

3. Application

The fuel cell allows for the detection of only alcohol, since its specific configuration will not allow for reactions with other substances which may occur in the breath. The reaction is as follows:

1 MOLECULE ETHANOL + FUEL CELL = 1 MOLECULE ACETIC ACID + 1 “FREE” ELECTRON

Therefore:

“X” MOLECULES ETHYL ALCOHOL = “X” ELECTRONS = “X” AMOUNT OF CURRENT

Therefore:

THE CURRENT PRODUCED BY THE FUEL CELL IS DIRECTLY PROPORTIONAL
TO THE AMOUNT OF ALCOHOL IN THE SAMPLE

At first glance, this would seem to be straightforward and simple, but many things combine to make the actual output current from the cell a rather complex function of time and temperature which is not totally explainable on the basis of the simplistic explanation of the chemistry of the cell given above. Each phase of the conversion described has a different rate of completion: i.e.

- a. All of the molecules of alcohol in the gaseous sample must reach the electrolyte-wetted platinum surface and be captured by that surface.
- b. The captured alcohol molecules must reach selected, non-occupied points on the platinum surface called “active sites”, where the conversion to acetic acid can take place.
- c. The rate of completion of the reaction is slowed by the accumulation of negative charge on the surface.
- d. The drift of H⁺ ions through the electrolyte is a relatively slow process.

4. Temperature

The operational temperature range of the fuel cell is quite large, and temperature (unless extreme) does not have a significant effect on the accuracy of the reading. However, testing should only be done when the temperature is visibly displayed on the unit. Temperature will however, affect the response time of the reaction; the higher the ambient temperature the faster the reaction.

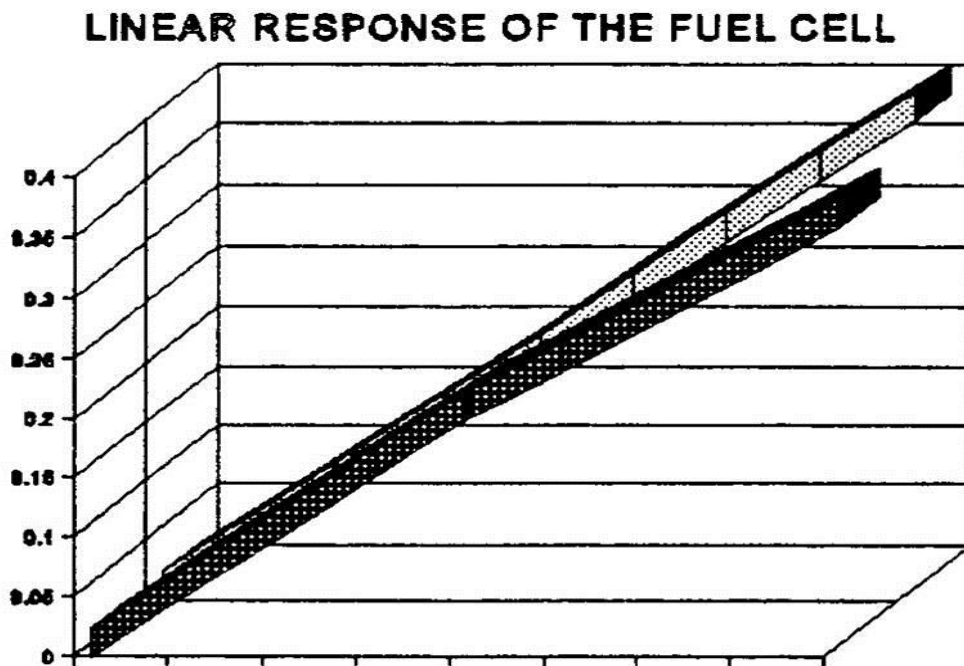
5. Measuring the alcohol concentration-peak alcohol style fuel cell

The measurement of the alcohol concentration is a function of the maximum or peak voltage produced by the fuel cell; the higher the alcohol concentration, the greater the voltage output.

The time for the rise to peak will vary from one fuel cell to another, according to the number of active sites available, the age of the cell and the operational temperature and the alcohol concentration of the sample. The peak height is indicative of the voltage level produced by the alcohol, the higher the peak, the greater the voltage output, the higher the alcohol concentration.

6. Linear response to alcohol concentration

The linear response of the fuel cell is extremely good for values from zero to about .150 AL (better than 2%). As concentration rises above this value, the fuel cell output diminishes slightly, and is in the neighborhood of 5% low at .300 AL. The following graph illustrates the deviation of the fuel cell response from perfect linear over the range of interest for breath alcohol devices.



7. Specificity of the fuel cell

The fuel cell has a direct specificity for alcohol. Due to its unique composition, the platinum black and the sulfuric acid, as it's electrolytic, the fuel cell will react only to the alcohol molecule.

8. Cleanup of the fuel cell after a positive alcohol test

If several measurements are to be done in succession with a fuel cell, it is important that all residual charge from a previous test be eliminated before the next test is attempted. In order to speed this process, the fuel cell must be shorted out as soon as a test is completed. This quickly returns the output of the cell to zero before the next test is initiated.

9. Effects of age on a fuel cell

Fuel cells on average have a fairly long life expectancy under normal operating conditions. "Catastrophic" failure of a fuel cell such as mechanical damage (broken leads, ruptured case) or chemical "poisoning" (raw cigarette smoke, submersion in water) is infrequent but does occur. Except for these abusive failures, fuel cells normally slowly change in characteristics over an extended period of time. The response time becomes longer, the peaks are lower and slower, and cleanup requires a longer waiting period between tests. As long as the output is high enough for the unit to be calibrated, fuel cell life in screening applications becomes limited by the patience of the user to tolerate the longer test times. Since frequency of use does not seem to be a significant factor in the life of the cell, it is generally felt that long term changes in the platinum surface are primarily responsible for aging effects. An effect similar to aging, but to a certain extent reversible, is the "drying out" of the electrolyte by continuous exposure to extremely low humidity coupled with relatively infrequent use.

10. How long does a fuel cell last?

The simple answer is that there is no simple answer. Too many times answers have been given based on "best-case" scenarios ("I know someone who has a five-year-old cell who wouldn't trade it for anything.") and repair records (the majority of which are screeners, and some of which were either not used at all, or were used by people in very non-critical situations). Because of the cost of a fuel cell replacement, if a fuel cell does not fail within the warranty period, the tendency is to "use it" until it quits. This also contributes to the long life-spans indicated by repair records. With

this experience, the manufacturers have over the years tended to increase their estimate of fuel cell life to the point where they now casually reply “three to five years” without any qualification.

We do, however, need to qualify this answer based on:

- a. Whether the application is screening or evidential.
- b. Whether the cell has been used or stored under environmental extremes of temperature or humidity.
- c. The rate of change in characteristics with time being a statistical variable within any given group of cells.

11. Peak v. Integration

The majority of fuel cell instruments use the peak voltage method of establishing the alcohol concentration. This works very well, but with one major drawback. The number of positive samples analyzed in rapid succession had to be strictly limited, or the so-called “memory effect” would cause successive readings to be in error beyond the acceptable limits for evidential measurement. In a typical PEAK reading unit, ten successive measurements of .100 g/210L at 3 minutes between readings might result in the tenth reading being .095 or .094 (5-6% low). To maintain evidential accuracy, the instrument operating instructions call for no more than 5 positive tests per hour. This restriction did maintain the quality of results, but was satisfactory only in those situations where a relatively small number of tests were required.

In addition, once the fuel cell output had decreased due to repeated testing, an extended period of time up to 16-24 hours was required before the cell fully recovered its initial output capabilities.

In 1986 research was begun which focused on the supposition that the entire signal from the fuel cell, rather than just the peak value, might contain enough information so that, when properly analyzed, the effects of memory and high alcohol non-linear might be minimized.

B. LIMITATIONS OF THE PBT

Preliminary breath testing may have both evidentiary limitations and accuracy limitations. Evidentiary limitations vary with specific laws. In Montana, PBT results are typically admissible as evidence in a “detected the presence of alcohol” response.

PBT instruments have accuracy limitations. Although all PBT instruments currently used by law enforcement are reasonably accurate, they are subject to the possibility of error, especially if they are not used properly. There are factors that can affect the accuracy of preliminary breath testing devices. Some of these factors tend to produce “high” test results; others tend to produce “low” results.

Radio frequency interference (RFI) can produce either high or low test results, or can prevent a breath test device from producing any result. Care should be exercised when utilizing a PBT around radio equipment.

1. There are two common factors that tend to produce high results on a PBT

- a. Residual mouth alcohol - After a person takes a drink; some of the alcohol will remain in the mouth tissues. If the person exhales soon after drinking, the breath sample will pick up some of this left-over mouth alcohol. In this case, the breath sample will contain an additional amount of alcohol and the test result will be higher than the true BAC. It takes approximately 15 minutes for the residual alcohol to evaporate from the mouth. The only sure way to eliminate this factor is to make sure the suspect does not take any alcohol for at least 15 to 20 minutes before conducting a breath test. Remember, too, that most mouthwashes, breath sprays, cough syrups, etc... contain alcohol and will produce residual mouth alcohol. Therefore, it is always best not to permit the suspect to put anything in their mouth for at least 15 to 20 minutes prior to testing.
- b. Breath Contaminants - Some types of preliminary breath tests might react to certain substances other than alcohol. For example, substances such as ether, chloroform, acetone, acetaldehyde and cigarette smoke conceivably could produce a positive reaction on certain devices. If so, the test would be contaminated and its result would be higher than the true BAC. Normal characteristics of breath samples, such as halitosis, food odors, etc., do not affect accuracy.

2. There are two common factors that tend to produce low PBT results

- a. Cooling of the breath sample - If the captured breath sample is allowed to cool before it is analyzed, some of the alcohol vapor in the breath may turn to liquid and precipitate out of

the sample. If that happens, the subsequent analysis of the breath sample will produce a low BAC result.

- b. The composition of the breath sample - Breath composition means the mixture of the tidal breath and alveolar breath. Tidal breath is breath from the upper part of the lungs and the mouth. Alveolar breath is deep lung breath. Breath testing should be conducted on a sample of alveolar breath, obtained by having the subject blow into the PBT instrument until all air is expelled from the lungs.

❖ **2.4 BLOOD ANALYSIS AND VENIPUNCTURE**

Blood analysis must be done, according to Section 61-8-404, MCA, and the current Administrative Rules of Montana. Note: the current administrative rules are much less strict than previous ones.

There are two methods utilized and which, for the purposes of presentation here, shall be designated the head space method and the whole blood method.

The name head space method is derived from the fact that air is collected from inside a sealed container of blood which has been allowed to stand for approximately fifteen minutes. The air between the liquid (blood) and the stopper is called head space. The head space air is withdrawn through the stopper by use of a hypodermic needle and injected into a gas chromatography just as if the subject had blown into the machine. The air above the enclosed liquid will achieve the exact proportions of the mixture percentages as that of the liquid—Temperature and pressure being normal.

The second method—whole blood method—derives its name from the process whereby a specific volume of blood and sometimes a standard such as butinon, are injected directly into the gas chromatography for the determination of blood alcohol content.

In an instance where a standard is used, two peaks will show up—with the standard being readily recognizable as possessing a known peak. Bypassing the valve measurement creates no problem since the amount injected is that of a specifically measured quantity.

THE INTOXILYZER® CHECKLIST

1. Instrument field certified
2. Operator certified
3. Senior Operator certified
4. Printouts signed
5. Gas solution certified
6. Laboratory Certification

CHAPTER THREE

SEARCH WARRANTS FOR BLOOD DRAWS

3.1	REASON FOR ALLOWING SEARCH WARRANTS	page.....3-1
3.2	APPLICATION OF SEARCH WARRANT	page.....3-1

❖ 3.1 REASON FOR ALLOWING SEARCH WARRANTS

In 2010, over 3000 refusals were made in Montana during DUI investigations. Statistically, those with prior DUI convictions are drastically overrepresented. Evidence of a relatively high alcohol concentration is the best evidence of impairment at trial or during plea negotiations. Trial preparation and testimony takes 15 to 20 times longer than getting the search warrant.

The 4th Amendment of the U.S. Constitution and Article 2 §11 of the Montana Constitution both protect us from unreasonable searches and seizures. Searches and seizures are lawful when performed pursuant to a warrant issued by an impartial magistrate and based on probable cause. Despite this safeguard, prior to 2011 law enforcement in Montana was prohibited from obtaining a warrant for blood of a DUI suspect based on probable cause if the suspect refused to provide a sample under the Implied Consent law. The 2011 Legislature changed the law, and now search warrants to obtain blood of DUI suspects are allowed under some circumstances. The new Montana Law, Mont. Code Ann. §61-8-402 (2013) allows for a warrant in DUI cases that meet the criteria outlined in 13.2 (B) (below).

❖ 3.2 TELEPHONIC APPLICATION OF SEARCH WARRANT

A. MONT. CODE ANN. §46-5-222 (2013) allows LEOs to gain a search warrant by phone when reason exists to justify immediate issuance. Also:

1. Information must be electronically recorded
2. The recording must be retained in court records and must be transcribed verbatim

3. The recording must be retained in the court records.

B. CRITERIA for a warrant are based on the fact that the suspect has either:

1. Suspect has refused to provide a breath or blood test after being read the Implied Consent Advisory, and
2. Suspect has been advised of the right to an independent blood draw (also part of the Implied Consent Advisory), and
 - Suspect has a prior refusal (PBT, Intoxilyzer, or blood) or,
 - Suspect has a prior conviction or pending charge for one of the following offenses in Montana or other state:
 - DUI: §61-8-401, or
 - DUI (Per Se), above .08 (Mont. Code Ann. §61-8-406 (2013)), or
 - Vehicular Homicide (Mont. Code Ann. §45-5-106(2013)), or
 - Negligent Vehicular Assault (Mont. Code Ann. § 45-5-205(2013)), or
 - Negligent Homicide (Mont. Code Ann. §45-5-104(2013))
 - **Note: Some prosecutors require law enforcement to have date of conviction of refusal or confirmation of sentence imposed. Others accept other competent evidence of refusals or convictions**

C. PROCEDURE

A nurse or other legally competent person to draw blood

- Mont. Code Ann. § 61-8-405 (2013)
- State v. Merry, 2008 MT 288.

CHAPTER FOUR

JURY SELECTION

4.1	GENERALLY	page..... 4-1
4.2	VOIR DIRE FUNDAMENTALS	page..... 4-2
4.3	VOIR DIRE LAWS	page..... 4-4
4.4	SAMPLE AREAS FOR QUESTIONING	page..... 4-8

❖ 4.5 GENERALLY

The Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee a defendant's right to a fair and impartial jury. To that end, the primary goals of *voir dire* are to **1.** pick a fair and impartial jury, and **2.** ensure each juror is qualified to serve in the particular case. It is the obligation of the court, the prosecutor, and the defense attorney to make sure that happens. This chapter provides an outline of pertinent Montana law regarding *voir dire* in DUI cases.

Voir dire is also the prosecutor's first chance to talk to the jury about the case and make a favorable impression on them. Thus, a prosecutor should take the opportunity to:

- Establish credibility,
- Earn the trust of each juror,
- Educate the jurors about DUI, and
- Present the case theory, and
- Identify and remove jurors who will render a decision based on something other than the facts of the case (such as bias).

This chapter provides suggestions for achieving these goals. While the tips below give guidance in working toward these goals, you must find your own style and discover what works best for you. Don't be afraid to try something different to improve your effectiveness.

❖ 4.2 VOIR DIRE FUNDAMENTALS

A. BE PREPARED

1. Do Your Homework Even though you may not know the jurors, much can be done pre-trial to determine which jurors are of most interest to you. Begin by reviewing the juror questionnaires. If you have reason to believe there is a likelihood the jurors are biased (i.e. highly publicized case), request permission from the court to submit a more extensive juror questionnaire and/or conduct individual *voir dire*. Ask associates, officers, and other witnesses to go over the list with you and see who they know. Their information may be invaluable. Furthermore, knowledge of personal relationships between jurors the prosecution (including staff) and the witnesses is imperative and may result in reversible error if not uncovered.

- State v. LaMere, 2005 MT 118 (stating failure of defense attorney to recognize that juror was a retired police officer and mother of paralegal sitting at the prosecution table during the trial was ineffective assistance of counsel resulting in structural error and reversal of conviction).

2. Make An Outline Prepare an outline of the topics and questions you plan to discuss with the jurors pre-trial. Keep in mind the facts and nature of the case. Each case will require a different approach and a different line of questioning. For example, the line of questioning for a refusal case will be different from a BAC case. Don't forget to prepare for and address likely defense attacks and sympathies. A sample of *voir dire* topics and questions are included at the end of this chapter to assist in formulating your outline and questions.

3. Prioritize Your Topics You will not be able to spend as much time on *voir dire* as you might like. Courts will put time limits on the duration of your questioning. Be aware of this while planning your *voir dire*. Identify the major topics you need to address. You can count on the defense attorney asking questions about bias toward the state (i.e. "anyone who drinks and drives should go to jail"), so don't waste your allotted time on topics opposing counsel should cover.

4. Have a System There several ways to track your jurors during *voir dire*. Many prosecutors use sticky-notes with jurors' names on them to track background information and responses. Some have a page per juror. Find a system that works for you. If you are working with another

attorney or have a paralegal, have them take notes about juror responses, so you can focus on your conversation.

B. REMEMBER: JURORS ARE PEOPLE

Jury selection is meeting people and attempting to learn something about them through questioning. While you are conducting *voir dire*, jurors are forming an opinion of you. Make it to be a favorable one. Be polite, courteous, and sensitive to their feelings and avoid creating embarrassment for a juror in front of other jurors. Show your respect by referring to them by name. Look at them. Listen to them. Don't invade their space. If your court allows it, don't stand behind the podium.

C. HAVE A THEME

You should have a theme for every case you try, and a DUI trial is no exception. Here are some examples:

- You drink, you drive, you lose
- It's not the drink, it's the decision
- Totality of the circumstances
- He could have just said NO
- Therapeutic concentration is not synonymous with safe driving

D. POWER OF VOCABULARY/WORD CHOICE

The words you use and how you use them can have a dramatic impact on the jurors. For example, "accident" implies no fault, which is contrary to the conclusion you may want the jury to reach. On the other hand "crash" removes the blamelessness, and more accurately depicts a collision resulting from a DUI. Therefore, in *voir dire* and throughout the trial, be cognizant of your word choices. Always refer to victim by name, and talk about the age of the victim. Use legal terminology they will hear as often as possible, so the jurors have the opportunity to better understand your message. *Voir dire* is a conversation not a lecture, and a DUI trial is about helping the trier of fact understand why the investigating officer came to the conclusions he/she did (the defendant was under the influence). You want the jury to come to the same conclusion, so choose your words to achieve that end. And: repeat, repeat, and repeat!

E. YOU GO FIRST: TAKE ADVANTAGE

The state asks questions before the defense does. This gives you a tremendous opportunity to characterize the facts and the law for the jury. Describe reasonable doubt. Obtain a commitment from each juror that he or she will return a guilty verdict, if he/she is confident, after hearing all the evidence, the defendant committed the crime. Also talk about the weaknesses in your case before the defense can; Take the wind out of defense's sail by showing confidence in the case despite weaknesses. If a juror has a bias based on that weakness, make a note and remove him/her.

❖ 4.3 VOIR DIRE LAWS

A. CHALLENGES FOR CAUSE

Montana Code Annotated Section 46-16-115 (2013) provides the grounds for challenging for cause in criminal cases in justice and city courts. If any of the circumstances listed in Section 46-16-115 exist with regard to a particular juror, that juror may be challenged for cause. If a juror can demonstrate to the satisfaction of the court that he/she can set aside a certain possibly prejudicial view and render a verdict according to the evidence, a challenge for cause will be overruled.

Section 46-16-115 reads as follows:

A challenge for cause may be taken for all or any of the following reasons or for any other reason that the court determines:

(a) having consanguinity or relationship to the defendant or to the person who is alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;

(b) standing in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, or debtor and creditor with or being a member of the family or in the employment of the defendant or the person who is alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;

(c) being a party adverse to the defendant in a civil action or having complained against or been accused by the defendant in a criminal prosecution;

(d) having served on the grand jury that found the indictment or on a coroner's jury that inquired into the death of a person whose death is the subject of the indictment or information;

(e) having served on a trial jury that tried another person for the offense charged or a related offense;

(f) having been a member of a jury formerly sworn to try the same charge, the verdict of which was set aside or which was discharged without verdict after the case was submitted to it;

(g) having served as a juror in a civil action brought against the defendant for the act charged as an offense;

(h) if the offense charged is punishable with death, having any conscientious opinions concerning the punishment as would preclude finding the defendant guilty, in which case the person must neither be permitted nor compelled to serve as a juror;

(i) having a belief that the punishment fixed by law is too severe for the offense charged; or

(j) having a state of mind in reference to the case or to either of the parties that would prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of either party.

- State v. Allen, 2010 MT 214 (finding the District Court abused its discretion when it did not remove a juror for cause, when that juror indicated a strong bias for the State and law enforcement, and recantation was coaxed).

- State v. Crosley, 2009 MT 126 (“A criminal defendant's right to trial by an impartial jury is guaranteed by the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution . . . Structural error requiring automatic reversal occurs when a district court abuses its discretion by denying a defendant's challenge for cause, the defendant uses a peremptory challenge to dismiss the challenged juror, and the defendant exhausts all available peremptory challenges” and discussing cases regarding challenges for cause) (abrogated in part by Robinson v. State, 2010 MT 108).
- State v. Hart, 2009 MT 268 (“We will reverse a district court's decision and grant a defendant a new trial if three elements are met: (1) the court abused its discretion; (2) the defendant removed the prospective juror with a preemptory challenge; and (3) the defendant exhausted all of his preemptory challenges.” Also deciding the trial court properly denied challenge for cause when potential juror was able to distinguish between his personal beliefs about drinking and driving and the law, and would hold the State to its burden).
- State v. Golie, 2006 MT 91 (finding court abused its discretion when it denied challenge for cause of juror who stated DUI was a “sore subject.”).

B. PEREMPTORY CHALLENGES

In addition to challenges for cause, each party may make peremptory challenges. Montana Code Annotated Section 46-16-116 (2013) provides each party six peremptory challenges when there are twelve jurors, and three peremptory challenges when there are six jurors. Never exclude jurors solely on the basis of their membership in a particular group; for example, race, gender, age, etc. This is not the forum to exhaustively explore this complicated area of law. However, awareness of some fundamental principles is necessary to every jury selection.

In Batson v. Kentucky, 476 US 79 (1986), the Supreme Court prohibited racial discrimination in the use of peremptory challenges. The Batson standard also applies to the defense. This is a very sensitive and difficult area. Be aware of your office’s protocol if you are accused of discrimination in jury selection. If a party alleges that a challenge has been used in a discriminatory matter, there is a three step process that the court must follow in determining the truth of the allegation. State v. Parrish, 2005 MT 112.

First, the party making the motion must make a *prima facie* showing of discrimination. Examples of discrimination can be found in the types of questions asked one group of jurors versus those asked of another group or the absence of questioning altogether; a comparison between who was chosen and who was excluded; and most frequently, a pattern of exclusions. Leaving one member of the “excluded group” on the jury while challenging several others will not necessarily defeat a Batson motion.

Second, if a *prima facie* showing is made, the party accused of the discrimination must provide a neutral explanation for the exclusion. It is incumbent therefore, to keep copious notes regarding a juror’s responses; body language, attentiveness, etc. so that it can be accurately restated to the judge if an inquiry were to arise. The burden of persuasion remains with the moving party who must then articulate sufficient facts and circumstances that the “neutral” explanation given is a pretext to hide a discriminatory objective.

Third, the court must make a “finding” on the record on whether the explanation is a pretext and the challenge was discriminatory. The judge’s willingness to accept or reject the accused party’s explanation is obviously subjective. If the court makes a finding that discrimination has occurred, the court can either reseal the juror or declare a mistrial and begin again. Where the prosecution is accused of the discrimination, neither situation is desirable. There are a myriad of logistical and appellate issues that arise under this circumstance. While it is sometimes inescapable, every effort should be made to avoid the accusation.

C. OTHER CASES, STATUTES, AND OTHER RESOURCES

- ABA Criminal Justice Standards: Trial by Jury, 15-2.4 (available online at www.abanet.org/crimjust/standards/jurytrial_toc.html).
- Whitlow v. State, 2008 MT 140 (finding defense counsel adequately queried the jury about potential biases, so the defendant had effective assistance of counsel).
- State v. Michaud, 2008 MT 88 (finding no abuse of discretion in DUI case under circumstances when trial court imposed time limit on *voir dire*).

❖ **4.4 SAMPLE AREAS FOR QUESTIONING**

You **will not** have time to use all of these questions/ topics.

- A. Refusals and driver's license
- B. Alcohol consumption
- C. Acceptance of the law
- D. DUI consequences
- E. Attitude about police
- F. Proof

These are provided to generate ideas. Prioritize your topics and develop your own questions.

REFUSALS AND DRIVER'S LICENSE

In refusal cases it is important to establish that the defendant was not exercising a right, but actually hiding evidence.

Questions:

Would each of you take your driver's license out of your wallet or purse and look at it for a moment?

Does everyone see the date of expiration on your license?

What are some of those dates?

Sir, you indicated your license expires _____. How long have you had a license to drive?

Have any of you ever lost your license? Left it at home, misplaced, etc

Has anyone?

When you realized you did not have it with you, what were your thoughts?

What did you do when you realized you had lost it?

What was the longest time you have ever been without the license?

Have any of you ever needed to get somewhere, but could not drive?

Why could you not drive? (illness, same day surgery, broken foot)

Have you needed to get somewhere when your car was not running?

What did you do?

Does anyone remember when you first got your license?

Do you remember what you had to do to get it?

Were you tested? Do you read the rules of the road?

Do you know that having a driver's license is a privilege, not a right?

List some rights and compare.

You have no right to drive. Only qualified people are given a license. Understand?
List some licenses (medical, law, construction, accounting) only qualified people can get a license.

How do you use your license to drive? (grocery, church, work etc)

About how many miles do you drive each week? (bounce this to all jurors)

(Pick the juror who drives the most)

If you had to pay someone to drive you everywhere you went for a month, what would it cost?

How would you feel about being dependent on a driver?

Do you enjoy driving?

Is there a value you would place on having a license?

Can you think of any reason you would give up your license today?

When we all got our license to drive, we agreed to have our blood tested if stopped for DUI. Did you realize that?

The legislature permits us to refuse to have our blood tested, but there is a penalty.

The penalty is we lose our license to drive for one year.

Can you think of any good reason to refuse a chemical test if you knew you would lose your license for a year if you refused?

ALCOHOL CONSUMPTION

The purpose of this section of the *voir dire* is to help jurors understand the relevance of officer observations. Lay people make the same type observations of impaired people.

Questions:

Have any of you ever seen a person who has had too much to drink?

Mr(s). ____ are you thinking about one person and one time?

About how long ago did you see someone drink too much?

Where were you?

Why do you think the person had too much?

What did he look like?

What did he sound like?

What did he do?

Etc.

Do you think that person was under the influence?

Do you think your opinion or conclusion was fair?

Would you have drawn the same conclusion if you had never met the person before?

Did you know how many drinks the person had consumed?

Has anyone else ever seen the effects of a person drinking too much?

Why do you think that person drank too much?

(Repeat this until you get plenty of stories about problems walking, talking etc.)

Do you think that person would be a safe driver?

You didn't see him drive, but you believe he'd be unsafe. How come?

When you drive, what senses do you use?

What parts of your body?

If you are coming to a stop light, how do you decide whether to stop or go?

Do you think that decision making could be affected by alcohol?

Do you think it is important for the police to determine if a person's ability to follow instructions is impaired in a DUI situation?

Do you think the police should look for the same type things you observed like smell, sound balance to decide if someone is under the influence?

A person can have a drink and legally drive. No one can have so much to drink that it effects his ability to drive safely. Do you understand the difference?

What does it mean to drive safely?

- (a) Does driving safely include driving defensively?
- (b) Does it include reacting quickly in turning the wheel or applying brakes to avoid a collision?
- (c) Is eye-hand-foot coordination important?
- (d) Is peripheral vision important?

Consuming alcohol is not the crime involved in this case. How many of you occasionally consume an adult beverage?

How many of you never consume alcohol?

Why not?

Driving after consuming enough alcohol to cause impairment is the crime of DUI. Do you understand?

ACCEPTANCE OF THE LAW

Questions:

Does anyone here follow NASCAR?

Can you tell us how the rules regarding a race are made?

Who makes the rules?

Are they made before the season begins?

Are they sometimes changed during the season?

Are any of the rules changed during a race?

Can the drivers change the rules?

Can the pit crews?

Can the car owner?

So is it safe to conclude that the rules are in place before the race begins and no one can change them once the race begins?

Note: Do not ask the following questions if they don't feel right for your jury.

Has anyone here taken a civics or political science class in the last few years?

Has anyone helped a boy scout or girl scout get a citizenship merit badge?

Does anyone ever watch CSPAN coverage of the Senate or House?

(Assuming someone says yes go on)

How is a law made?

Who writes the laws?

Where are they voted on?

In this case you will learn from the Judge about the laws concerning DUI.

Do you recognize that no one here makes the law?

Our elected officials write the laws. In this courtroom the question is whether the defendant broke the law. Understand?

(If there is a test)

One of the laws our legislature passed concerns blood alcohol content. The level of Blood Alcohol Content for which you can presume impairment is .08. Has everyone heard of the .08 level?

Will anyone choose to ignore the law concerning .08 for any reason?

A person does not have to be drunk to be guilty of DUI, but must be under the influence. Do you understand the difference? Example: judgment or motor skills or driving?

Does anyone think the law of DUI should only apply to those that are extremely intoxicated?

The law does not require that the impaired driver crash or cause a collision. Does anyone feel the law should only apply to those that crash or cause a crash?

DUI CONSEQUENCES

Questions:

Has anyone here ever been in a traffic crash where you suspect that the other driver was under the influence?

If there is no response...Does anyone here know someone who has been in such a traffic crash?

What happened? Was anyone hurt? How long ago? Were there any long-term consequences?

As the Representative of the People I have a duty to make sure this is a fair trial for both sides. Is there anything about your experience that would cause to be unable to be fair to the defendant in this case?

Has anyone here had a family member or friend injured by an impaired driver? What happened? How long ago? Were there long term consequences?

Can you be fair to both sides in this case?

Has anyone here ever taken care of a person with an alcohol problem? Where, when, why, how did this affect your life?

Has anyone been a passenger with an impaired driver?

How long ago? How did you feel?

Has anyone had a relative or friend charged with DUI?

What happened? Was there an accident? Was there a breath or blood test?

Were the police effective? What was the result? Do you think that the result was fair?

Have you ever served as a designated driver? Who (without naming names) were your passengers? Would you have allowed any of them to drive? Why not?

Have you ever used a designated driver or called a cab after drinking? Why?

ATTITUDE ABOUT POLICE

In most DUI cases, the State will present one witness: law enforcement. Potential jurors who have prejudices against law enforcement must be flushed out.

Questions:

Why do you think a person becomes a police officer? (listen)

Has anyone ever gotten a speeding ticket?

When you got your ticket, did you deserve it?

Was the officer professional?

Was the officer polite?

Did the officer do a good job?

Mr. Jones, I understand that you're a school teacher? Would you agree that there are good teachers just as there are bad teachers? And there are good lawyers and bad lawyers—good doctors and bad doctors? Would you think it fair that a person prejudge all teachers as bad based on having had experiences with one bad teacher? [No] Then I assume you would not be prejudiced against the police in this case? And although I'm sorry to hear of your bad experience, you would put it in proper perspective of having nothing to do with this case, right?

Has anyone here ever needed a police officer's help? Did you get help?

What type of situation was it?

Does anyone think a person becomes a police officer so he can come to court and testify?

Has anyone here ever been or tried to become a police officer?

Has anyone ever been to an officer training?

Do you think that the training an officer receives would help him/her in his/her job?

Do you think an officer's experience would help?

Do you think officers see a large number of people under the influence?

Do you think training and experience make the officer more capable of observing signs of impairment?

PROOF

Questions:

It is the duty of the State to prove the defendant guilty beyond a reasonable doubt. Has everyone heard that term?

The State does not have to prove every fact beyond a reasonable doubt. Do you understand?

We must prove the elements of the crime, not every fact. Are you with me?

Would it matter if we could not prove whether the defendant was wearing red Converse tennis shoes or white Nike's the night of the crime?

Shoe type is not an element of the crime. How would it affect you if we could not prove the defendant was impaired?

Does everyone understand the difference?

We can prove elements by circumstantial or direct evidence. Does anyone know what circumstantial evidence is?

Mr(s). _____ when you walked from the parking lot into the court house, did you come up some steps?

How many steps did you come up? (assuming he does not remember)

The fact is you came up the steps; right?

If we had to prove you came up the steps, we could show you got out of your car and you are now in this courtroom. The only way to get here was through the door at the top of the steps. The circumstantial evidence of you moving from the car to here would prove you came up the steps.

Direct evidence would prove the same thing if an eyewitness saw you go up the steps. Either way you came up the steps. Will everyone accept direct and circumstantial evidence to prove any element of the crime?

Is there any reason anyone cannot sit and listen to this case? (health problems, sick kids at home or any other reason)?

Do each of you think that you will be fair to both parties and render a verdict that is just?

CHAPTER FIVE

OPENING STATEMENTS

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❖ 5.1 THE IMPORTANCE OF THE OPENING STATEMENT

Your opening statement is the first opportunity for the jury to hear a comprehensive statement of the facts. The opening statement allows you to orient the jury to the evidence so they understand its importance as it's introduced. The opening statement must show that you have a winning case, and that you, through your conduct and attitude, believe in it. Given human nature, a compelling opening statement allows jurors to form a tentative conclusion that should remain until the verdict. One study indicates that 80% of jurors decide the case consistently with how they are persuaded during opening statement. Another study suggests this is because people who have formed an initial belief will remember evidence that supports that belief and will tend to disregard or forget evidence that does not support that belief.

Opening statement is also an opportunity for jurors to form an opinion about counsel. Your preparation, organization, confidence, and manner are all showcased for the jury.

Work backwards. Plan your closing statement, then your opening. If it's not important enough to mention during closing, it's probably not necessary in opening.

❖ **5.2 FORM**

A good opening statement is a non-argumentative description of the facts in the form of a story. While the opening statement is advocacy, exclude obvious argument while making reasonable inferences in relating your story. In building your story, you are allowed to emphasize favorable facts, dramatize key points, and undermine the opposing story.

❖ **5.3 THEME**

A theme is crucial in the opening statement. Jurors will forget random facts in a matter of minutes. Providing a cohesive story for organizing facts and providing a compelling and interlocking story allows the juror the tools for remembering facts crucial to your case. Providing demonstrative exhibits, pictures, and other visual evidence enhance the likelihood the jury will remember your story. Also crucial is relating your story and your evidence in the same order. Studies show overwhelmingly that reinforcing the story order with the witness order leads to a more understandable and persuasive story.

Jurors have short attention spans. If you can capture their attention, you may be able to hold it five to seven minutes (the average adult attention span). But if you lose them, it is difficult to draw them back.

❖ **5.4 OUTLINE**

The best practice for opening statement is to outline your opening statement, relying upon your most recent sources of information to direct your choice of content. If you write out your entire opening statement, do not read it to the jury. Depending upon a written statement of the case won't allow you to lock eyes with the jury, which weakens your delivery. It also suggests you are not prepared and/or lack confidence.

Have your introduction paragraph and your exit strategy completely thought out. Other than the first and last paragraph of your opening, rely upon *preparing* your opening statement to provide the order in which you will proceed and the major points you will cover. Just as in law school, the most important tool is preparing your notes, not the notes themselves. If you lose your train of

thought in opening, the notes will reorient you. Keep them close in opening and before launching your closing paragraph; scan the outline to make sure you didn't skip a key item.

Limit your outline to one legal page. It should be in bold print, with the same labels and buzz words you plan on using in your opening. If you plan on using a visual during your opening, include cues in your opening to remind you when to bring them up. Be sure to have a Plan B if your visual cue fails to materialize (no screen, no easel, no power cord, etc.). If you tend to lose paperwork, tape your opening statement inside a manila folder. This makes it difficult to miss, it won't blow away, and it stays flat at the podium and on the desk.

❖ **5.5 PRACTICAL POINTERS**

A. BE EFFICIENT

Most people make their mind up quickly about an issue. Either engage the jury or expect they are deciding the case without the benefit of your assistance. Get to the point immediately, focusing upon your theme. People remember what they first heard and what they last heard, so make sure your first and last points are important. Don't use boilerplate terms or hackneyed expressions at any time, it wastes valuable time and takes you nowhere. The opening is a summary, so leave out the trivia.

B. SPEAK WITH AUTHORITY

Command the attention of the jury. Do it with a loud voice, a soft voice, or by simply standing there—but get them to focus all their attention upon you before you begin. Once you have it, don't waste it by looking at notes or moving around. You should be as close to the jury as necessary to be clearly audible and where your visuals will be easily seen and appreciated.

C. USE LABELS FOR THE PARTIES

Figure out in advance what you will call everyone. Many times it will just be “defendant” or “victim” but not always. You may have a “911 caller” an “investigating officer” who did the initial stop, plus an “arresting officer.” Having labels helps the jury remember the evidence and the importance of the witness without having to remember names. Date and times are often irrelevant in opening. So labels like “last January” and “just after closing at Moe's bar” should be sufficient.

D. AVOID LEGALESE

Speak in a conversational style. Avoid legal terms like “probable cause” and “Terry stop” unless you plan to explain the term and stress its importance.

E. REFUTE THE DEFENSE

In presenting the strengths of your case, you must address the weaknesses also. The defense’s entire opening statement will likely be focused upon emphasizing the weakness in your case. So craft your narrative and your issue summary to refute the defense position—without ever directly referencing the defense argument. If you have a weakness that you know the defense will exploit, decide if you will mention it. Perhaps a witness no longer remembers the event, but she wrote a statement. Or one officer is present, but another officer is in Iraq. These are potential weaknesses that you can explain to the jury before the defense gets a chance to exploit them.

F. BE METHODICAL, BUT QUICK

An opening statement should be good theatre. As the orator, you need to speak in a cadence that is easy to follow, neither quick nor slow. A typical DUI opening should not consume more than 15 minutes. In a complex case, be sure to break the opening up into smaller segments by giving intermediate signposts, changing position in the court, and changing your voice or style.

G. ANTICIPATE OBJECTIONS

If you plan to present visual evidence or the BAC result in your opening; you may want to raise this to your judge’s attention in advance of trial to avoid the bother of an objection. Otherwise, there is no need to unnecessarily alert the defense regarding your opening statement. If you do get an objection, it is usually a claim of “argumentative” and the solution is to simply rephrase the statement. Planning what key evidence you plan to reveal in opening helps develop key phrases for summarizing that evidence in advance, avoiding objections. In general, defense attorneys don’t like to object in opening statements. However, once you do get an objection, you can expect them to continue objecting every time a target presents itself.

❖ **5.6 PLANNING YOUR OPENING STATEMENT**

A. PREPARATION

What do you need to do before preparing the Opening?

- Review jury instructions
- Review case file and highlight key facts
- Review file notes and consider likely defense strategies
- Finalize exhibit list and tie to key facts
- Finalize witness list and order of witnesses
- Prepare closing argument with theme and reference to exhibits

B. CONTENT

What goes into the Opening Statement?

1. The Introduction

Prepare a single short introductory paragraph that states your theory of the case, your theme, and introduces you and your client (city, county, state).

2. The Legal Theory

Think about the critical legal points that encapsulate your legal theory. How do you phrase the legal theory so it's not objectionable? ("We will show the defendant was impaired by alcohol and driving a motor vehicle, which is illegal in this state")

3. The Theme

- What is the theme you developed from closing?
- How do you state the theme for the first time in opening?
- Does your theme invite a defense theme undermining your case?
- Does the evidence support your theme in multiple ways?

4. Signposts

- How will you tell the jury what you are going to say?
- Is the signpost short, simple, and easy to understand?

5. Telling the story

- What story-telling device will you use? (chronology, flash-back, hypo?)
- Is your method the best way to organize facts?
- Is your method too novel or confusing for the jury to follow?
- Is the order of facts in your story the same as during trial?
- Will you use any visual exhibits during trial?
- Do you have an alternative if the visual cannot be used?

6. Factual Points

- How can you label the witnesses so it supports your theme?
- What critical facts do you need to include in the opening?
- Are there any exhibits or visuals that should be used in opening?
- How can you state your facts without drawing an objection?

7. Weaknesses

- What factual or legal weaknesses do you need to address in opening?
- What theme(s) will the defense use that you can attack in your opening?
- Are you overstating what you can reasonably show at trial?

8. Timing

- Can you complete your opening within the time allotted by the court?
- Is your opening too long?
- If the closing is more than 10 minutes, have you broken it up?
- How will you emphasize the end of one segment and start of a new one?
- Do you have a one sentence summation if the judge cuts you off?

C. ETHICAL CONSIDERATIONS

Avoid mistrial and reversal.

- Does any part of the opening state your personal opinion?
- Are your factual statements reasonable inferences from the facts?
- Do you have a good faith basis your factual evidence will be admitted?
- Does any part of your opening mislead the jury?
- Are you appealing to the sympathy or prejudice of the jury?
- Is there anything that you plan that you should discuss with the judge?

- Is there anything that opposing counsel might do that you should address?

❖ **5.7 ABA STANDARD**

ABA Prosecution Function Standard 3-5.5 Opening Statement provides guidance:

“The prosecutor's opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible. A prosecutor should not allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.”

CHAPTER SIX

DEMONSTRATIVE EVIDENCE

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❖ **6.1 THINKING ABOUT DEMONSTRATIVE EVIDENCE**

Many people think visually. Some require a chart, graph, drawing, photograph, or a demonstration in order to fully grasp what is being said. Demonstrative evidence helps to reach such individuals, either to prove a material fact at issue or to explain and illustrate the testimony of a witness. Stop and think specifically if there are any demonstrative aids you can use. You cannot emphasize everything, but do emphasize the important things. Consider preparing standard charts for commonly encountered situations that you will use over and over. Ask yourself: “Can the complexities be boiled down to a single chart that will stick in the mind of the jury longer than an array of different charts?”

❖ **6.2 TYPES OF DEMONSTRATIVE EVIDENCE**

PHOTOGRAPHS (MRE 1002) Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required; except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state. Mont. Rule Evid. 1002 requires an original, but given the definition of original the requirement is easily met. A photograph need not be taken by a skilled photographer to be admissible; it is only necessary that it fairly and accurately depicts the object which it purports to represent.

Photographs are subject to rulings as to their inflammatory nature “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”(Mont. Rule Evid 403-Excision of relevant evidence on grounds of prejudice, confusion, or waste of time)

CHARTS, GRAPHS AND MAPS

Oral testimony alone about a street, highway, or interchange, however detailed as to directions, spatial relationships, colors, and other conditions such as traffic congestion, pedestrian crossings, etc., can fail to adequately paint the necessary picture for the jury. Having a chart, graph or map for the witness to refer to as he/she testifies, will connect the visual picture to the information for the jury to take hold of the whole story.

DEMONSTRATIONS BY OFFICERS The most common demonstrations are the physical maneuvers made at roadside. However, make sure that the officer can do the tests just as the manual explains it.

Where the officer had ample opportunity to observe the defendant walking at the time of arrest and at trial had a good recollection of how the defendant walked when arrested, an adequate foundation existed to allow a demonstration of how the defendant walked when arrested. Defendant had ample opportunity to cross-examine the officer. There was no abuse of discretion. State v. Anderson, 171 Mont. 188 (1976).

AUDIO AND VIDEO TAPES See State v. Warwick, 158 Mont. 531 (1972).

❖ 6.3 THINGS TO CONSIDER

Make certain each member of the jury has clear visual access to your evidence. You may want to keep physical evidence from the jury’s view until the last and most dramatic moment for presentation to the jury.

- Is the exhibit accurate in detail and scope?
- Does it identify an element at issue?

- Is it clear, concise, comprehensive?
- Will it influence most jurors?
- Can it be easily seen?
- Is it in color?
- Does it require electricity? (If so, do you have an extension cord?)
- Does the projector work and do you know how to operate it under pressure?
- Must the courtroom be darkened? (Where possible, use only that equipment or material that is equally good in a well lighted room as in a darkened room. Time delays while setting up can work to your disadvantage.)
- What is the exhibit's evidentiary weight?
- Does it require chain of custody documentation or testimony?
- Who should make the courtroom demonstration?
- Does it stand alone or must you explain it? (The best demonstrative evidence speaks for itself.)
- Think! When will you introduce each exhibit? (Right after lunch is a good time.)

❖ **6.4 ADMITTING DEMONSTRATIVE EVIDENCE**

Attention to the mechanical aspects of moving an exhibit into evidence before the trial is often neglected. You may consider requesting a pre-trial waiver of foundation. However, sometimes a full foundation will carry more weight with the jury.

- Mark each exhibit prior to trial.
- Which witness will most effectively introduce the exhibit?
- Present the exhibit to the witness and build your foundation for it through testimony. Make the testimony interesting.
- Avoid showing an exhibit to the jury before its admission.
- Necessary foundation for exhibits is summarized in Evidentiary Foundations, by Imwinkelreid.

State v. Warwick, 158 Mont. 531 (1972). Admissibility of recordings quoting 58 A.L.R.2d 1024, Admissibility of Sound Recordings in Evidence, §2, pp. 1027, 1028:

“The cases are in general agreement as to what constitutes a proper foundation for the admission of a sound recording. They also indicate a reasonably strict adherence to the rules prescribed for testing the admissibility of recordings, which have been outlined as follows:

- (1) a showing that the recording device was capable of taking testimony,
- (2) a showing that the operator of the device was competent,
- (3) establishment of authenticity and correctness of the recording,
- (4) a showing that changes, additions, or deletions have not been made,
- (5) a showing of the manner of the preservation of the recording,
- (6) identification of the speakers,
- (7) a showing that the testimony elicited was voluntarily made without any kind of inducement.”

“...we now join other jurisdictions which have held, provided the proper foundation is laid, that both motion pictures and video tapes relevant and material to contested issues may be admitted into evidence in the sound discretion of the trial judge. See Annot., 62 A.L.R.2d 686, 701-703, §7. This is a logical extension of this Court’s holdings that sound recordings, State v. Warwick, 158 Mont. 531, 494 P.2d 627, and photographs, State v. Harney, 160 Mont. 55, 499 P.2d 802, may be admissible in evidence.” State v. Finley, 173 Mont. 162, 566 P.2d 1119 at 1121-1122 (1977).

On *voir dire* for demonstrative evidence, Defense counsel is entitled to ask a witness only those questions which pertain to the foundation for the exhibit. Thus, object to any questions posed by defense counsel which go beyond the exhibit. Any such questions constitute cross-examination and are improper at this time.

Most likely objections by defense counsel to demonstrative evidence:

- **Foundation** - If the objection goes to foundation, ask additional questions of the witness to provide an adequate foundation.
- **Relevance** - If the objection pertains to relevance, respond with an offer of proof and describe how the evidence is relevant to the case.

CHAPTER SEVEN

WITNESSES

This section on Witnesses is divided into three parts, one for each of the main types of witnesses that you will encounter in a DUI Prosecution. For sample questions, see Appendix I.

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❖ 7.1 LAW ENFORCEMENT WITNESSES

A. PREPARING THE OFFICER FOR DIRECT EXAMINATION

In DUI cases your officer is typically your primary witness. Your officers should be proficient at conducting standardized field sobriety tests (SFST) in accordance with their training, and they should be competent to explain those tests while testifying. For these reasons, proper training of law enforcement officers is the key to effective DUI prosecution. Have regular training sessions with local officers so that they know what you expect from them. Also encourage them to obtain SFST refresher training regularly. If these steps are taken, it will make all the difference in court.

Prior to trial meet with the officer to review his/ her testimony. By this time, you should have gathered all evidence and paperwork from the investigating officer. Prior to the interview prepare yourself. Review the case file and the SFST Manual. For an electronic copy of the SFST Manual, go to <http://breathtest.wsp.wa.gov/DREPopup.asp>. If you haven't already, visit the scene with the

officer and go through the entire sequence of events. Make certain that you both have a clear mental picture of what took place.

During the interview review all exhibits and ask the officer to contribute suggestions that may make them more persuasive. Discuss the procedure/ line of questions that will be used for admitting evidence through him/her. Explain which elements of the offense you need discussed during his/her testimony. Tell him/her of evidence that should not be discussed (i.e. suppressed evidence or PBT results). Review courtroom decorum and expected attire. Finally, ask the officer the questions you plan to ask him/her during trial. Direct examination should not be a surprise to the officer.

An outline of common direct examination questions is included at the end of this chapter to assist you in preparing your own questions.

B. PREPARING THE OFFICER FOR CROSS EXAMINATION

The most effective way to prepare your officer for cross-examination is by cross-examining him/her yourself during the pre-trial interview. Through the course of your preparation, you will have identified weak points in your case and anticipated likely defenses. Decide what you would do if you were defending the case and anticipate the kind of questions that will be addressed to your witnesses by defense during cross-examination. Ask other prosecutors what common strategies are used by the defense attorney in other cases. Remind the officer to maintain his composure and answer questions honestly.

❖ 7.2 EXPERT WITNESSES

DUI trials often require calling an expert to testify. Common experts include toxicologists, breath test scientists, crash reconstructionists, and drug recognition experts. Experts are an important ingredient in helping the jury understand material elements of the crime such as impairment, accuracy of instrumentation, who was driving, and how a crash occurred. If your case is such that an expert is appropriate, **file a notice of your intent to call a particular expert to testify on a certain matter.**

Courts allow an expert to share his/her special knowledge with the court and jury. Special knowledge is acquired by professional, scientific, or technical training, or by practical experience in some field of human activity that is not shared by people in general. Mont. R. Evid. 702-705. Montana Rules of Evidence 701, et. Seq. have a two-pronged foundational requirement: 1. The subject matter must be sufficiently complex so as to be susceptible to opinion evidence, and; 2. The witness must be properly qualified to give his/her opinion. Although an expert witness is allowed to give an opinion as to the ultimate facts in a trial, the jury is not bound to accept the testimony or opinion of an expert. See Jury Instruction on Experts.

As a general rule, you should not allow the defendant to stipulate to the qualifications of an expert witness. It may be a time-saver, but you lose an opportunity to educate the jury about the expert's qualifications/ testimony.

Come to the pre-trial interviews/ meetings prepared. Have a copy of all of your reports available for your expert well before trial. Often the expert will inform you of problems or of ways to present the evidence that may not have occurred to you. Take full advantage of such information as you prepare your case and organize your thoughts. As with all witnesses, review questions, exhibits, and go over anticipated cross examination questions.

Check your chain-of-custody prior to trial. Get the opinion of your expert witness as to its adequacy or completeness and never put your expert in a position of having to make on-the-spot judgments as to the identity, form, test tube, or substance of evidence while in the courtroom under pressures of the trial itself.

❖ **7.3 LAY WITNESSES**

Advise your witness that it is perfectly all right and acceptable to discuss the case with the prosecutor before trial. Some people carry the impression that it is somehow prejudicial to the case to discuss it with anyone prior to the trial—a myth no doubt gained through hours of television courtroom drama. Also advise the witness that he/ she should be prepared for the defense to contact him/ her. Witnesses of crimes have statutory rights, and it is the prosecutor's obligation to honor those rights as well as advise the witness of those rights. A copy of a witness rights notification letter is included at the end of this chapter.

A. PREPARING THE WITNESS FOR DIRECT EXAMINATION

Unlike law enforcement and expert witnesses, the lay witness will likely be unfamiliar with court proceedings and courtroom decorum. Familiarize the witness with the trial procedure to help reduce any uncertainty or potential for courtroom surprises. Tell the witness how to find the courthouse. Familiarize him/her with the physical layout of the courtroom—the location of the witness stand, the jury box, and the lectern. Advise the witness how he/she should dress and what behavior is most appropriate for the courtroom.

Prepare for direct examination by reviewing the topics you intend to ask about. Let the witness know if there are subjects he/ she are not allowed to discuss during trial. Ask lay witnesses to wear what they normally wear to work or church.

Talk about objections. Explain what “sustained” and “overruled” mean. This should prevent a witness from answering a defense question to which your objection has been sustained. If the witnesses are to be excluded from the courtroom, explain why.

B. PREPARING FOR CROSS EXAMINATION

It is often productive, particularly with essential witnesses, to go through a short role-playing situation during the pretrial meeting. After reviewing what you expect the witness to say, simulate what he will actually experience on the witness stand. Question him in a manner similar to the way in which you will question during trial. You may want to take an especially shy person to the actual courtroom. Discuss these areas of vulnerability to discourage the witness from holding back any information.

DUI TRIAL NOTEBOOK – LAW ENFORCEMENT WITNESS TESTIMONY

1. Venue: _____

2. Identification: _____

3. Driving: _____

4. Intoxication:

A. Officer's Observations of Driving Behavior at Scene:

(1) _____

(2) _____

(3) _____

B. Chemical Test: _____

C. Personal Appearance and Behavior—Including Roadside Physical Maneuvers:

(1) _____

(2) _____

(3) _____

D. Officer's Experience and Training in Observation/Handling of Intoxicated Individuals:

(1) _____

(2) _____

(3) _____

5. Prepare questions. Focus on credibility and the elements the witnesses are most familiar with:

DUI TRIAL NOTEBOOK – CHECKLIST FOR EXPERT WITNESS INTERVIEW

Get a copy of the witness's Curriculum Vitae _____

Does he have copies of all the documents needed? _____

What will he/ she testify to?

What are the problem areas?

Foundation for testimony:

Explain direct examination to witness: _____

Explain objections and what to do: _____

Explain cross-examination and likely areas of questions: _____

Give a copy of the Expert witness Handout to him/ her: _____

Prepare questions (focus on credibility and the elements that the witness is most familiar with)

DUI TRIAL NOTEBOOK – LAY WITNESS INTERVIEW

Name: _____

Address: _____

Phone (work): _____ (home) _____

What happened:

If the witness has a statement, review it: _____

Explain what will happen at trial: _____

Prepare for direct examination: _____

Go over any exhibits or diagrams that will be used: _____

Prepare for cross-examination: _____

Do they know anyone else who knows about the case?

Give a copy of “suggestions for witnesses”: _____

SUGGESTIONS FOR WITNESSES

If asked if you have discussed the case with the prosecutor, tell the truth. The truth is what you know—not what you believe. The truth is what you have seen, heard, smelled, touched, or tasted.

Listen to the entire question before beginning to respond. If you do not understand the question, or do not hear part of it, it is absolutely appropriate to ask that it be repeated or clarified.

Respond as directly as is possible to any question and, particularly on cross-examination, do not volunteer information. If you cannot remember some piece of information: “I don’t remember.” is acceptable.

If you do not know something, then say you do not know.

A neat appearance and proper dress in court are important.

When taking the oath, stand upright, pay attention, and say “I do” clearly.

Avoid any distracting mannerisms, such as chewing gum.

Don’t try to memorize what you are going to say because your testimony will not be as believable to the judge or jury if it sounds “too pat.”

Never answer a question you don’t fully understand.

Explain your answer, if necessary. Give the answer in your own words, and, if a question can’t be truthfully answered with a -yes or “no,” you have a right to explain the answer.

Answer directly and simply only the question asked of you and then stop. Do not volunteer information not asked for.

If you misspeak yourself, correct your answer immediately. If your answer was not clear, clarify it immediately.

The judge and the jury are only interested in the facts. Therefore, do not give your conclusions or opinions.

Always be courteous, even if the lawyer questioning you appears discourteous.

You are sworn to tell the truth. Tell it. Every material truth should be readily admitted, even if not to the advantage of the side which calls you as a witness. Do not stop to figure out whether your answer will help or hurt your side. Just answer the questions to the best of your memory without exaggeration.

Stop instantly when the judge interrupts you, or when an attorney objects to a question. Do not try to sneak your answer in or finish the sentence you have started.

Give positive, definite answers when at all possible. Avoid saying “I think,” “I believe,” or “in my opinion,” if you can be positive. If you do know, say so. Do not make up an answer. You can be positive about important things which you naturally would remember. If asked about little details which a person naturally would not remember, it is best just to say so if you don’t remember. But don’t let the defense lawyer get you in a trap of answering question after question with “I don’t know.”

Try not to seem nervous. Avoid mannerisms which will make the judge or jury think you are scared, or not telling the truth, or not telling all that you know.

Do not lose your temper. Remember that some attorneys on cross-examination will try to wear you out so you will lose your temper and say things that are not correct, or that will hurt you or your testimony. “Keep your cool.”

If you don’t want to answer a question, don’t ask the judge whether you must answer it. If it is an improper question, the lawyer trying the case will take it up with the judge. Don’t ask the judge for advice.

Don’t look at the lawyer or at the judge for help in answering a question. If the question is improper, the lawyer will object. If the judge wants you to answer it, do so.

Do not hedge or argue with the defense attorney.

Do not nod your head for a yes or no answer.

When you leave the witness stand after testifying, wear a confident expression, but don’t smile, smirk, or appear downcast.

The most important thing to remember is to tell the truth as clearly as possible.

MPLE VICTIM LETTER

Date

Victim Name

Victim Address

Victim Address

RE: State of Montana v. Defendant **XXXXXXXX**

CASE NUMBER: **XXXXXXXX**

CHARGE: I. **XXXXXXXX**

Dear **Victim**:

You have been referred to the **XXXX** County Attorney's Office as the victim in the above-entitled case. Successful prosecution requires that you be available for pretrial interviews and trial appearances. We will make every effort possible to minimize the time you will have to be available, and we will give you as much advance notice as possible. For hearings that you are required to attend, you will be notified by a subpoena.

Due to the extensive number of cases, it is sometimes necessary for the Court to change the trial date or any other hearings. Please contact this office before any hearings to confirm the date and time. If this case does not go to trial, you will be notified of the date of sentencing.

To aid in our trial preparation, we would like to ask you to do two things. First, if you do move or change your phone number, please notify us immediately. Being able to locate you is essential to the prosecution of this case. If we are unable to locate you these charges may have to be reduced or dismissed. Second, if you have suffered a financial loss due to these charges please send our office a copy of the bills or receipts of the bills. **A copy of these bills or receipts must be in our file immediately. Failure to provide us with a copy of the actual bill or receipt will result in the Judge denying any possible restitution claims by you or your insurance company.** If you have already submitted your receipts to the investigating law enforcement agency, we will obtain a copy of the receipts from that agency.

Finally, the defendant's lawyer or private investigator may contact you to request an interview. It is entirely your decision whether or not to talk to the defendant's counsel or private investigator. The Public Defender's office often uses **List specific names** (Public Defender Criminal Investigators) to conduct their interviews. However, if you want the County Attorney's Office present during any interview please call and advise us of the time and place of the interview. **We would prefer to be present during all discussions with the defendant's counsel or private investigator, but again, the decision is yours.**

If you have any questions, feel free to contact County Attorney **XXXX** at (406) **XXX-XXXX**. Please refer to the defendant's name and case number to assist us in handling your questions. Please submit any mail to **ADDRESS**.

Sincerely,

By: _____

Name

Title

Other Optional Language

This is to advise you that a guilty plea has been entered by the defendant in the case in which you were a victim. Attached is a copy of the Court's Order setting the sentencing date in this matter.

Please be advised that the Adult Probation and Parole Office may be contacting you for a Victim's Impact Statement. You need to give the officer the information that is necessary so that we can ask the Judge for restitution on your behalf if you were damaged by this case. If you prefer, you may contact Adult Probation and Parole at (406) xxx-xxxx to insure that you are included in the Victim's Impact Statement process. If you have not already done so, you can also mail any receipts or requests for restitution to this office. All requests for restitution must be received prior to the sentencing hearing. Please be sure to write the Cause Number and Defendant name on any documents.

You are also welcome to attend the sentencing hearing. Due to the fluctuations in the Court's calendar, we suggest that you contact our office the day before the hearing to confirm that the hearing will go as scheduled.

Please feel free to contact our office if you have any questions.

CHAPTER EIGHT

CROSS EXAMINATION

8.1	OVERVIEW	page..... 8-1
8.2	THE USUAL PLAYERS	page..... 8-1
8.3	ELEMENTS FOR CROSS EXAMINATION	page..... 8-2
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❖ 8.1 OVERVIEW

The two major purposes of cross-examination:

- Elicit favorable testimony
- Undermine the defense position

Simply because the defense called the witness doesn't mean everything the witness can say favors the defense. If you cross-examine the witness, you should begin with questions that the witness is likely to agree are true and which favor your theory of the case. Next, begin destructive cross examination on issues that demonstrate bias, credibility, lack of knowledge, etc.

❖ 8.2 THE USUAL PLAYERS

- *The defendant* is the prime target. You need to prepare for crossing the defendant in case they testify. In general, if the defendant has no priors, is attractive, well spoken, or sympathetic, then they are very likely to testify. Even if the defense insists they will not call the defendant at trial, in writing, prepare for a possible cross-examination.
- *Friends of the defendant* are common witnesses. They are often called to corroborate the defendant's story by confirming the timing and quantity of drinks they observed.

- ***The bartender or waitress*** who served the defendant shows up occasionally. They are trained not to over-serve patrons, so they are generally biased against the prosecution's claim since we are normally asserting the defendant left the bar intoxicated. The employee doesn't want to be in court for either side, so they often fail to appear. When they do appear, if they can recall any facts, they will usually say the defendant was not visibly intoxicated when they served them.
- ***The spouse or girlfriend/ boyfriend*** of the defendant shows up occasionally. Although rare, the defendant's partner may show up to support the defendant's story. Often they were with the defendant before the event, during the event, or after the event.
- ***The expert witness.*** A rare feature for most trials, experts have three common targets:
 - Challenging the administration of the field tests
 - Medical explanations other than alcohol/drugs for the apparent impairment
 - Problems with the test instrument(s) that suggest a flawed test.

❖ **8.3 ELEMENTS FOR CROSS EXAMINATION**

A. ORGANIZATION

- ***Identify exactly what you want to get from the witness.*** Every witness has a potential laundry list of facts you could mine. Prioritize the points you want to make and decide if this witness is the best witness for those particular points. If the witness neither helps nor hurts your case, don't cross.
- ***Make your strongest points at the beginning and end.*** The first point and the last point are usually remembered by jurors. Less important information should be sandwiched by the most important points.
- ***Vary the order of your subject matter during questioning.*** Avoid too logical a progression of questions. If the witness can predict your strategy, they can develop responses that avoid your traps and tailor their answers. They also become more confident and persuasive.
- ***Don't repeat the direct examination!***

B. RULES

- ***Start and end strong.*** When you start cross, the jury expects it to be noteworthy. Don't begin with throat clearing statements like "I only have a few questions for you." If cross examination is boring or repetitive, the jury will assume it's not important and tune out.
- ***Be brief.*** Since you know exactly what you want from the witness, figure out how to get the information with a few questions on each point.
- ***Use short questions.*** Short questions are easy to understand and witnesses have a difficult time avoiding a direct answer. Short questions are direct questions, which helps the jury follow every point you make.
- ***Use leading questions.*** The leading question is the most effective way to control a witness during cross and absolutely essential for a hostile witness. The leading question can be as gentle or as rough as necessary, but avoid bludgeoning your witness to the point that the jury concludes you are "putting words in the witnesses mouth."
- ***Know the likely answer to your questions.*** Be safe; don't give the witness a chance to hurt you by asking questions that may lead to unexpected answers. On the other hand, you can plan strategies for more than one answer, so don't reject questions that have multiple possible answers as long as you can pursue and benefit from any foreseeable answer.
- ***Listen to the answer.*** Don't focus on your notes, focus on the witness. Witnesses often surprise us with admissions and new facts. Hesitation, fear, smirks, smiles, and anger may flit across a face and give you clues for further examination.
- ***Don't argue with the witness.*** The jury is more likely to be sympathetic with the witness than with you. You lose credibility with the jury when you belabor a point with a witness and show you are not in control.
- ***Avoid asking one-question-too-many.*** When you have all the ammo you need to make the point you wanted in closing argument, stop questioning! If you ask the next question, you risk undoing your work by allowing the witness to explain away whatever favorable point you made. Worse, now that the defense attorney knows the attack you wanted to make, they will certainly discuss the issue again on re-direct, further eroding your case.

C. APPROACH

- ***Be firm but fair.*** The defense witnesses may or may not be credible, but attacking them or appearing unfair will almost certainly backfire and make them sympathetic to the jury and make you look like a jerk. Whatever point you wish to make can be made with a firm, but even, hand.
- ***Let the witness answer.*** Once you ask your question, you bear the responsibility for the answer. Don't interrupt. If the answer is lengthy, ask a better question next time. If the answer is off-topic, wait until the witness stops, clarify your question, and then ask again.
- ***Control the difficult witness.*** A witness that is determined not to answer your questions and takes every opportunity to inject damaging testimony into the record requires special handling. Your goal is not to convert the difficult witness, it is merely to force the witness to address the few specific points you have and move on. If the witness evades your questions, be persistent. Ask the witness if they heard the question, repeat the question, or rephrase the question. Some prosecutors resort to asking the court to instruct the witness to answer the question. Be cautious in doing so; This could backfire and give the appearance that you are unable to control the witness—a bit like asking mom for help.

Difficult witnesses are easy to spot and the jury sees them for what they are—biased. This makes addressing them in closing pretty easy, even if they don't give you any helpful information. (“Ms. Jones...well Ms. Jones is the defendant's wife—even though she was not with him all evening—she insists....”). This can change if you lose control of the situation and show your frustration or anger through sarcasm or disrespect. You cannot afford to alienate the jury or create sympathy for the defense. Be sure to have an exit strategy for the difficult witness—one question that they cannot evade and whose answer favors your case. Once you get that favorable answer to your exit question, end the questioning.

❖ **8.4 STRATEGY**

For every defense witness that takes the stand, you must ask three questions of yourself. These three simple questions determine how you will proceed. The questions are:

- 1) **Can and will the witness help my case?**
- 2) **Did the witness hurt my case?**
- 3) **Did the witness lie?**

The first strategic decision is whether you will question the witness at all. If the answer to all three questions is “No,” then you should pass the witness. Ask no questions and explain in closing the witness’s complete lack of value to the case and issues.

Question 1 - Can and will the witness help my case?

If the witness can help your case, your first set of questions is aimed at getting consensus on any fact that helps you. Consensus based cross examination is about eliminating issues by finding every scrap of agreement – then addressing contentious issues later. But simply because a witness **CAN** help you doesn’t mean they will help you. Evaluate the witness to make sure they will concede at least some of the issues you will inquire into. Otherwise the witness makes you look weak and unprepared. Conversely, if you frame simple direct questions that the witness refuses to answer—you can insure the witness establishes they are completely biased. E.g. Q: “Was it raining during the fight?” A:”What do you mean?”

Question 2 - Did the witness hurt my case?

If the witness *did not* hurt your case, you can still use consensus-based questions to bolster your case.

If the witness *did* hurt your case, address the specific point that hurt you. Address only the underlying bias, sympathy, or assumptions the witness made that led to the incorrect conclusion. Q: “You said he had two drinks at the party?” A:”Yes.” Q:”Didn’t you also say you were drinking?” “Are you saying you watched the defendant?” the entire 2 hours?” “You have no idea if the D was drinking before the party either?” .

Question 3 - Did the witness lie?

If the witness lied, and you can demonstrate that point, you should impeach using the methods outlined below. Always reserve impeachment for the final blow. The witness will not be cooperative with consensus based cross-examination if you already beat them up with impeaching evidence.

Impeachment is specialized cross-examination with very formal rules. Prior criminal convictions, prior admissions, confessions, admission by adoption, prior testimony and a host of other possible bases have specific evidence rules governing content. You must understand the precise chain of questions before attempting to introduce impeachment evidence against a witness. In general, impeachment is the last series of questions offered against a defense witness. If you lead with impeachment, you risk antagonizing the potentially helpful witness. If the witness is already antagonistic, you may want to limit questions to only impeachment.

Before impeaching the witness, the jury must understand what they are about to hear. Typically, this means the witness must be asked if they recall they are under oath. That not telling the truth is perjury, punishable by jail, etc. Once you have the jury's attention, ask the witness about the impeaching evidence. If they admit the facts of the impeaching evidence, impeachment is complete. Move on. In closing, you will refer back to these facts in support of your argument that the witness is not credible. Review Montana Rule of Evidence 608 and 609 in preparation for impeaching a witness.

❖ 8.5 OPENING-THE-DOOR DOCTRINE

During direct examination, the defense may accidentally open-the-door to previously inadmissible evidence. If the court agrees the defense opened the door, make sure the evidence is something that actually benefits you before lunging through the open door.

Depending upon the strength of your case, you may wish to forego or minimize your dependence upon this lucky occurrence. More than one trial judge has granted a mistrial after a defense counsel blunder that opens the door to inadmissible evidence. Likewise, appellate courts may conclude that extraordinarily damaging and normally inadmissible information that came in via the back door may be ineffective assistance of counsel—resulting in a new trial.

CHAPTER NINE

SUMMATION AND REBUTTAL

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9.2	CONSTRUCTION OF CLOSING ARGUMENTS	page..... 9-2
9.3	ETHICAL CONSIDERATIONS	page..... 9-5

❖ 9.1 GOALS OF CLOSING ARGUMENTS

The prosecutor's first goal in closing argument is to persuade the jury. This is done by using factual content. The prosecutor is trying to persuade the jury that the State's version of the facts is the accurate set of facts for them to use in deliberation. The prosecutor is also trying to demonstrate that he or she has been successful in meeting the burden of proof. Being mindful, and remind the jury, of the fact that the State must prove beyond a reasonable doubt the elements of the crimes charged and not any tangential facts, which, while interesting, are not elements of the crimes charged.

The prosecutor is also trying to demonstrate that the defense theory or the defense case that has been presented is less than believable. This is done by attacking the defense theory and the defense evidence. Point out the defendant is an interested witness. This is the time to mount an attack on the hired gun expert and to deal with character witnesses who have appeared on behalf of the defense. Remember that you must not comment on the fact that the defendant chose not to testify or not to present a defense at all.

The last goal of the prosecutor's summation is to awaken the jurors desire to convict the defendant of the crimes charged. In this endeavor, you will evoke the emotional content of your case and the societal harm of the defendant's conduct as it relates to the facts of the case.

❖ 9.2 CONSTRUCTION OF CLOSING ARGUMENTS

A. METHODOLOGY OF YOUR SUMMATION

The following general principles should be followed and incorporated into your summation:

1. Have a Theme and Use It This refers to your overall theme of the case which has been developing in your mind from the first time you read over the file and the seeds of which you have been sowing with the jury since *voir dire*, through opening, the case in chief, and your cross examination of the defendant's witnesses.

2. Primacy: The Attention Step This is the well-planned, well thought out, well-designed opening salvo, which you have prepared and rehearsed for the moment when you begin your summation. If you feel the need to thank the jury, think about moving the thank you to the end of your summation or better still, thank the jury, **STOP** and then when they are all looking at you, wondering what you are going to do next, launch into the attention step. It is wise to step away from the lectern after the thank you and before the attention step to heighten the jury's anticipation and therefore attention.

3. Recency: The Call to Arms or Exit Line This again will be a well thought out, well-planned and rehearsed line, story, or exhortation, which you use to conclude your summation and rally the jury to set out on the trail to conviction.

4. Use of Visuals You should incorporate into your closing argument visuals to enhance the attention step and to change the pace of your argument and make it more "listenable" for the jury. Do not overlook the possibility of using visuals to attack the defendant's statements and the defense evidence in general.

5. Use of Speech Devices The National College of District Attorneys has a whole list of useful speech devices. Consider using rhetorical argument, alliteration, sarcasm and even perhaps anecdotes or stories on particular points or demonstrating particular principles.

B. STRUCTURE OF THE CLOSING ARGUMENT

Have a plan and follow it. You should use a design or plan in summation with which you are comfortable. There are certain things that you will certainly want to include and they are:

1. The attention step;
2. Some reference to the legal principles of the case;
3. Some reference to the jurors' obligation to work together to come to a consensus as to the guilt of the defendant;
4. A review of the State's proof;
5. An attack on the defense proof; and
6. The call to arms or exit line.

C. THE COMPONENTS

1. The Attention Step A brief dramatic statement, hopefully augmented by a visual or physical action by the speaker which is designed and used to refocus the jury's attention on the case. Contrast with what defense attorney has just finished doing and continue your opening theme. Employ a direct and distilled assertion of guilt pointed right at the defendant. Not fired from the hip, but thought out, planned, practiced and then executed.

2. The Law Keep focused on important concepts, and define them in terms of the case and what the jury will hear from the judge. You may focus on levels of criminal culpability; the defendant as interested witness; expert witnesses, especially if you have scored against theirs and they have not scored against yours, or to nullify a battle of the experts. Start the unification process by referring to the judge's instructions as "the tools of trade" which the jurors must use.

3. Unification The jurors deliberate several factors together and cooperatively. They will act as one mind in considering the common experience of the trial. Those experiences include jury selection, openings, proof, witness demeanor, the instructions, and other legal rules... Remember, the verdict is a collective project and ask jurors to use common sense.

4. The Attack on the Defense This is also an opportunity to narrow the scope vis-à-vis the elements of the crime. Charts or testimony excerpts as well as reference to physical exhibits fit in well here. Demonstrate a lack of dispute. Respond to only the most important defense claims. Don't feel the need to rebut every point defense counsel makes. Try your own case, not the

defendant's. Directly meet the important defense claims and use your evidence, and your delivery to neutralize them. With caution challenge the jury on really significant points on which the defense seems to make sense but which you, as the proponent of truth and justice know do not make sense. Dismiss with a broad-brush defense expert claims. Use a story only if you are comfortable with it and can deliver it well.

5. The State's Proof Humanize your witnesses at every opportunity you get. Draw and offer the jury inferences and conclusions and explain how they are reasonable and comport with common sense. Give those jurors who you believe are with you tools to argue your points with the entire panel. Direct your best arguments from your case in chief at the jurors who you believe are on the fence or even leaning toward the defense. Use physical evidence coincident with your argument to demonstrate how the State's proof matches the hard, cold, observable, physical facts. This is especially important in un-witnessed events and proof by reconstruction. Show how your witnesses, lay people and experts, gave testimony that squares with physical reality.

6. The Wrap-Up Recap how the State's proof establishes the elements. Recap and humanize the individual witnesses. Link their testimony to one another and to the process. Lay out the process and its participants.

7. The Exit Line Reasoned, well planned and practiced. This is a good place to link up a visual, either universal or case specific.

D. TECHNIQUE

Most importantly, be yourself. Develop and cultivate your own style and presence. Do not act or feign emotion. Remember, your relationship with the jury is based on trust and they know you after watching you throughout the trial. Try to be conversational not pedantic or didactic. Avoid speaking down to the jurors or ranging too far from the point. Don't rush. Don't read from a prepared summation or be bound to the lectern. Use your physical presence and approach the jury for emphasis and to keep their attention level up. Approach the defendant for emphasis or to provoke reaction (use judiciously). Use physical evidence, exhibits, visuals and demonstrations.

Relax and enjoy your opportunity to answer the questions, re-focus their attention and drive your case home.

❖ **9.3 ETHICAL CONSIDERATIONS**

Knowing the ethical considerations is a basic requirement of preparation for closing argument. ABA, “Standards for Criminal Justice Relating to the Prosecution Function” Standard 3-5.8. Argument to the Jury:

- (a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.
- (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
- (c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.
- (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

The four broad categories of potential error most frequently found in closing statements are the following:

1. Comment of defendant’s failure to testify, produce evidence, or the defendant’s silence. Do not comment, even indirectly, on the silence of the defendant. See State v. Wagner, 2009 MT 256.
2. Expressions of opinion or personal views regarding the guilt or innocence of the defendant and the credibility of witnesses. See State v. Lindberg, 2008 MT 389.
3. Personal attacks on either the defendant or opposing counsel. See State v. White. 151 Mont. 151, 440 P.2d 269 (1968).
4. Getting away from the record and into claimed facts or unwarranted semantic leaps. Griffin v. California, 87 S.Ct. 1222 (1965).

Be aware of these four categories and avoid them in your closing.

CHAPTER TEN

INSTRUCTIONS

Prosecutors should ascertain that the instructions are accurate and complete. Even if the judge takes on the job of providing most of the instructions, prosecutors need to make sure that none of the mandatory instructions are left out. Be sure to provide the court and the defense counsel with a full set of all instructions before trial. Do not label the instructions or individual pages for the jury. The judge will number instruction pages prior to giving them to the jury.

Instructions are divided into two broad categories:

1. Mandatory stock instructions for all cases.
2. Specific instructions applicable to particular charges involved, defenses, and facts of the case.

The Montana Criminal Jury Instruction Commission adopted jury instructions and [verdict forms](#) on June 23, 2009. These include stock instructions as well as DUI jury instructions and can be found at the Montana Department of Justice web page at www.doj.mt.gov/resources/criminaljuryinstructions.asp.

Also review State v. Stanczak, 2010 MT 106, where the court approved the following two jury instructions:

1. In Montana a defendant has no right to speak with an attorney before a sobriety test or to have an attorney present during a test. He must decide whether to submit to a BAC test before he has the right to an attorney. A continual request to speak to an attorney before submitting a BAC test is deemed a refusal to take the test.
2. You are instructed that if a person under arrest for the offense of driving under the influence of alcohol refuses to submit to a test which detects the presence of alcohol, proof of that refusal is admissible in a trial of that offense. The jury may infer from the refusal that the person was under the influence. That influence is rebuttable.

CHAPTER ELEVEN

COUNTERING COMMON DEFENSE STRATEGIES

11.1 INTRODUCTION **page 11-1**

Overcoming Impaired Driving Defenses **page 11-2**
American Prosecutors Research Institute

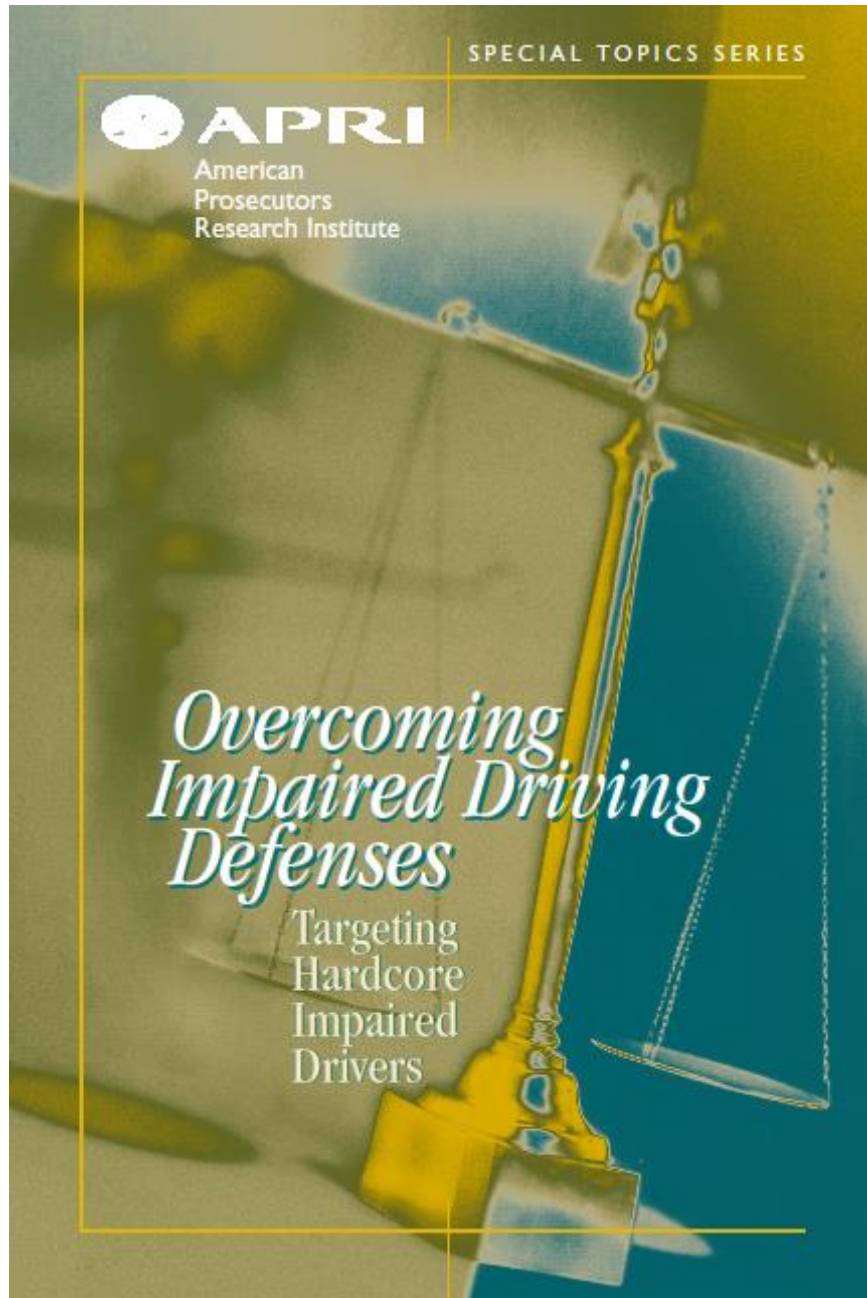
Countering Common Defense Strategies: Mouth Breath Alcohol **page 11-3**
Ben Vetter, Forensic Scientist – Montana Department of Justice

❖ 11.1 INTRODUCTION

The following documents, *Overcoming Impaired Driving Defenses, Targeting Hardcore Drinkers and Drivers* and *Countering Common Defense Strategies: Mouth Breath Alcohol* are reprinted with permission from the authors.

Click on the image to access the first publication, *Overcoming Impaired Driving Defenses, Targeting Hardcore Drinkers and Drivers*. Since publication of *Overcoming Impaired Driving Defenses, Targeting Hardcore Drinkers and Drivers* in 2003, the American Prosecutors Research Institute has merged with the National District Attorneys Association. Any inquiries regarding the material should be directed to the National Traffic Law Center (also with the National District Attorneys Association). They are found at http://www.ndaa.org/ntlc_home.html.

Ben Vetter, author of *Countering Common Defense Strategies: Mouth Breath Alcohol*, is now the Director of the Breath Analysis Section at the Montana Department of Justice, Forensic Science Division.



Overcoming Impaired Driving Defenses

Please double-click on the image above to view the document

(a PDF file)

Countering Common DUI Defense Strategies:
Montana Breath Alcohol Section

By: Benjamin N. Vetter
Forensic Scientist
Montana Department of Justice
Forensic Science Division
November 30, 2010

Defending DUI violators is a big business in this country. Defense lawyers now hold classes all over the country on the best DUI defense strategies. Much of what is discussed involves some aspect of the breath analysis process; whether it is the instrument performing the analysis, the foundation of the method of that analysis, or simply anything that could possibly cloud a juror's mind. The following is a discussion of the most common defense strategies and how the state might counter them. I have chosen to group these various strategies by the categories in which they fall.

Sample Contamination

Mouth Alcohol

Contamination of this nature occurs when raw alcohol, which is of a higher concentration than the current Blood Alcohol Concentration (BAC) of the subject, enters the mouth just prior to a breath test. If mouth alcohol is present in this manner the resulting Breath Alcohol Concentration (BrAC) could be falsely elevated.

There are various mechanisms to introduce mouth alcohol, but most of them fall under specific categories:

Ingestion is the first source of possible mouth alcohol contamination. This occurs when the subject takes something into the mouth cavity that contains alcohol. Mouthwashes, breath fresheners, and alcoholic beverages fall into this category. There may be other things brought up in court, such as lip balms, chewing gum, or tobacco, but these should all be discounted, as they do not contribute to mouth alcohol contamination.

Regurgitation, belching, or burping, are other sources of possible mouth alcohol contamination. This only occurs when raw alcohol from stomach contents is brought up into the mouth cavity. If the subject burps or belches and no stomach contents are brought into the mouth cavity, then there has been no mouth alcohol contamination. Also, it must be noted that alcohol passes through the stomach quite quickly. In most cases alcohol is removed from the stomach in 90 minutes or less. Therefore, a person's last drink *must* have occurred less than 90 minutes from the alleged regurgitation to have any bearing on the breath analysis.

Gastro-Esophageal Reflux Disease (GERD) occurs when the subject's lower esophageal sphincter has deteriorated and the stomach contents readily rise into the throat. While this could be a possible area of mouth alcohol contamination, it should be remembered that the stomach contents must travel into the mouth cavity. Current research shows that

people suffering from GERD very rarely bring up stomach contents into the mouth, even under extreme conditions¹⁰.

Dentures and tongue studs may be brought up as other areas of possible mouth alcohol contamination. It is claimed that the dentures, or the denture adhesives, trap raw alcohol in the mouth and contributed to a falsely elevated BrAC result. Tongue studs have also been blamed for trapping raw alcohol in the mouth through the piercing in the tongue. Current research shows that dentures, or denture adhesives¹¹, or tongues studs¹² do not bias BrAC results as long as the 20-minute deprivation period protocol is followed.

There are two ways to counter these possible mouth alcohol defense strategies.

First, the breath analysis instrument utilized in Montana, the Intoxilyzer[®] 8000, is equipped with a 'Slope Detection System'. The instrument constantly reads the incoming sample and insures that the sample is generating a proper alcohol slope, i.e. a positive slope. If the slope detector encounters a negative slope during analysis, caused by mouth alcohol contamination, the instrument will immediately halt the test and notify the operator.

Second, and even more important, every subject tested in Montana on an evidential breath analysis instrument is given a 20-minute deprivation period. During this time the subject is told to remove anything from their mouth (excluding dentures) and asked not to burp or belch during the deprivation period. If the subject does take something into the mouth or burps, belches, or regurgitates, the 20-minute deprivation period starts over. The reason this 20-minute deprivation period is in place, and strongly adhered to, is simple; it eliminates any mouth alcohol contamination. Research has shown that 20 minutes is sufficient to dissipate any type of mouth alcohol that could bias the BrAC result against the subject¹³. Therefore, with the 20-minute deprivation period in place the defense strategy of mouth alcohol contamination is rendered a non-issue.

Other Sources of Sample Contamination

Sample contamination also occurs from compounds other than alcohol, which could possibly be found on the breath. However, in order to act as a contaminant, these compounds must be volatile in nature, react in the same infrared wavelengths as alcohol, and be present in sufficient quantities to interfere with the breath analysis.

¹⁰ *Breath Alcohol Analysis in One Subject with Gastroesophageal Reflux Disease*, Rod G. Gullberg, Journal of Forensic Sciences, vol. 46, no. 6, 2001.

¹¹ *The Effect of Dentures and Dentrue Adhesives on Mouth Alcohol Retention*, Patrick Harding, Journal of Forensic Sciences, vol. 37, no. 4, 1992.

¹² *Lack of Effect of Tongue Piercing on an Evidential Breath Alcohol Test*, Barry K. Logan and Rodney G. Gullberg, Journal of Forensic Science Vol. 43, pp. 239-240, 1998.

¹³ *The Elimination Rate of Mouth Alcohol: Mathematical Modeling and Implications in Breath Analysis*, Rod G. Gullberg, Journal of Forensic Sciences, vol. 37, no. 5, 1992.

These types of contaminants can be broken into two categories, which are Endogenous Breath Volatiles and Exogenous Breath Volatiles.

Endogenous Breath Volatiles refers to any organic volatile compound that can be found naturally on the human breath. Acetone and acetaldehyde are the most common of these compounds. Of the two, acetone presents the most problems because it can meet the three requirements listed above and interfere with a breath analysis. Two types of subjects can produce acetone in sufficient volume to contaminate a breath analysis: un-medicated diabetics and persons on a restrictive, fasting diet that incorporates high protein, low fat, and very low carbohydrates.

While acetaldehyde will react in the same infrared wavelength as alcohol, the toxicity of acetaldehyde would not permit sufficient compound volume to build up in the subject's breath. Research has shown that even under extreme conditions, such as drinking while taking the drug "Antabuse", does not create interference with breath analysis¹⁴. Therefore, acetaldehyde is a non-issue with regards to sample contamination.

Exogenous Breath Volatiles refers to any organic volatile compound that a subject can come into contact with through the environment. These compounds are usually found in work related environments where large levels of the compound are present at most times. Painters, car mechanics, and other industrial chemical workers are often exposed to compounds. While there are numerous compound types in use, the focus usually falls on a few that are known to react in the same infrared wavelength as alcohol, toluene being the most common.

Countering these defense strategies involves various methods. First and foremost, it must be remembered that the volatiles, whether endogenous or exogenous, have to meet three requirements before they can be considered a possible contaminant. The compounds must be volatile in nature, react in the same infrared wavelength as alcohol, and be present in sufficient volume to cause interference with the breath analysis. Since most of the compounds that meet the first two requirements are extremely toxic, they can never be found in sufficient volume to interfere with a breath analysis¹⁵. Acetaldehyde and toluene, along with most other ketones, all fall into this toxic category and, cannot be possible sample contaminants.

Second, even if such a compound could meet all three requirements, such as acetone under certain restrictive circumstances, the breath analysis instruments in Montana are

¹⁴ *Medicolegal Aspects of Alcohol*, James C. Garriott, 1996, pp 97-99.

¹⁵ *Solvent Inhalation and 'Apparent' Alcohol Studies on the Lion Intoximeter 3000*, R. C. Denney, Journal of Forensic Science Society, 1990, vol. 30, PP 357-361.

equipped with multiple infrared filters. The instruments monitor the incoming sample at different infrared wavelengths to insure that no other substance is present in the sample. When any other compound is present, the separate wavelengths created by the different filters will react in a dissimilar manner than when alcohol is the only compound present. In the case of acetone, the instrument can detect the effect acetone produces and notify the operator of an 'interferent detection' so the officer knows to inquire about possible medical conditions affecting the subject¹⁶. No alcohol result will appear and a blood test must be done. Therefore, with the use of multiple infrared filters, the issue of breath volatiles other than alcohol, as possible sample contaminants, is rendered moot.

Variation in the Breath to Blood Ratio

Breath analysis was first contemplated in the late 1920's and early 1930's. Police wanted to be able to test a person's alcohol level in a quick, easy manner. Since blood alcohol tests are somewhat intrusive, slow, and expensive; the scientific community looked for an easy method of measuring a person's alcohol consumption. Breath was the natural choice, but in order to properly design, build, and calibrate a breath analysis instrument scientists had to know the ratio between the amount of alcohol in the blood to the amount of alcohol in the breath. Dr. Rolla Harger researched this matter and, using data he collected and Henry's Law, which states that a volatile water solution in a closed container will reach a fix and constant ratio with volatile in the headspace of that container as long as temperature and pressure are constant. He came to the conclusion that the average breath to blood ratio for humans was 2100:1. He stated definitively that the same weight of alcohol presents in 2100 ml of alveolar breath as presents in 1 ml of pulmonary arterial blood.

Defense lawyers attack this ratio because it represents a biological average, which differs from person to person. They argue that the subject has a lower breath to blood ratio than this average, causing the breath analysis instrument, which was calibrated using 2100:1, to report a falsely elevated BrAC result.

Countering this defense strategy involves a number of tactics. First, while it is true that everyone has a different breath to blood ratio and 2100:1 is only a biological average, recent research shows that this ratio favors in excess of 99% of the population¹⁷. Current studies show the actual average breath to blood ratio is around 2350:1. Therefore, a calibrated instrument using 2100:1, will result in a BrAC that is 10% or lower than the subject's actual BrAC for virtually everyone.

¹⁶ *Response of Breath-Alcohol Analyzers to Acetone*, Kurt M. Dubowski, Journal of Analytical Toxicology, vol. 7 September 1983.

¹⁷ *Dilemma of a Constant Blood/Breath Ratio of Ethanol in Chemical Test Evidence of Intoxication*, Alan Wayne Jones, International Conference on Alcohol, Drugs, and Traffic Safety, National Safety Council, Chicago, 1990.

Next, it must be noted that the 2100:1 ratio first described by Dr. Harger was based on a specific type of breath and a specific type of blood. The type of breath Harger refers to is alveolar breath and the type of blood is pulmonary arterial blood. For legal and safety reasons, these two types of samples are impossible to obtain. Consequently, we obtain the next best thing, deep lung air and venous blood. Deep lung air contains only 75-80% alveolar air under the best conditions. Therefore, the sample being analyzed is 'diluted' and the resulting BrAC is again lowered in favor of the subject.

A more direct approach would be to look at the statute concerning the offense. In most states, Montana included, amended DUI statutes allow both BAC and BrAC results. Since the 2100:1 ratio is *only* relevant when reporting a BrAC as a BAC, then the new statute should end all defense arguments on this issue.

Pulmonary Function

Chronic Obstructive Pulmonary Disease refers generally to a number of common breathing problems. These can include asthma, emphysema, and any damage done to the lungs that affects their functioning (i.e. smoking).

Since people with this type of condition have less lung capacity, defense lawyers argue that any breath analysis done on these people will be falsely elevated. The defense states that since there is less lung area the alcohol will concentrate in the lungs of these people and result in a falsely elevated BrAC result.

Also, the defense may argue that the subject may not be able to meet certain minimum requirements of the instrument, although this is very rare. In these instances the instrument will report an invalid sample. In these rare circumstances the officer should take the subject in for a blood alcohol test.

Countering this type of attack is straightforward. The idea that a smaller lung capacity will lead to an elevated BrAC result is simply wrong. Just because someone has less lung capacity does not mean that alcohol will concentrate in the lungs. In fact, the only effect this type of condition will have on a breath analysis is to lower the result because the deep lung air is not as accessible, thus lowering the alveolar air concentration in the sample. Also, it may arise in court that subjects with these types of conditions are taking medication that is inhaled directly into the lungs. A defense lawyer is going to claim that these medications will affect the BrAC results, but if there is a 20-minute deprivation period in place the argument is void¹⁸.

Breathing Patterns

¹⁸ *The Effect of Respiratory Aerosol Inhalers and Nasal Sprays on Breath Alcohol Testing Devices Used in Great Britain*, P.J. Gomm, *Medicine, Science, and Law*, Vol. 30, No. 3.

Certain breathing patterns could affect a breath test if they are present in the extreme. These fall under two categories, which are Hypoventilation and Hyperventilation. Hypoventilation refers to a very slow breathing pattern where air is held in the lungs for extended periods of time between breaths. Defense lawyers will claim that when this type of breathing pattern is present, the BrAC results will be elevated. They state that since the breath is held for an exaggerated time in the lungs the alcohol will concentrate and result in a falsely elevated BrAC.

Hyperventilation refers to a very rapid breathing pattern where the air is kept in the lungs for as little time as possible between breaths. Again, defense lawyers will claim this will bias the BrAC result against the defendant.

Countering these types of strategies involves agreeing with the defense's statements, in part. It is true that hypoventilation will allow the air in the lungs to absorb more alcohol, but this will only occur until all of the air in the lungs has equilibrated to the BAC. So, the subject may reach a higher BrAC than if a normal breathing pattern were used, but only because the subject allows the breath to reach an alcohol saturation point. In a sense, under hypoventilation conditions, the percentage of alveolar air rises dramatically. The point here, though, is that the BrAC result is in no way falsely elevated. In fact, this result shows a more accurate analysis of the subject's BrAC, due to the higher concentration of alveolar air.

Hyperventilation, on the other hand, has the opposite effect. Under these types of conditions the percentage of alveolar air in the sample is decreased dramatically. Therefore, the BrAC result is somewhat lower than if a normal breath pattern is followed. Since this is beneficial for the subject, the defense should not have any arguments concerning hyperventilation.

Body Core Temperature

As stated, breath analysis uses certain scientific principles. Henry's Law states that under constant temperature and pressure, and in a closed container, a volatile compound in water will reach equilibrium with a volatile compound in the headspace. The human body follows these requirements to a great degree, but at times deviations can occur. These deviations usually come in the form of temperature changes. When we get sick the body can react by increasing temperature to help fight off the illness.

The defense will argue that this increase in temperature will cause an increase in the BrAC result. While this has been true for simulations of core body temperature change, some stipulations need to be made.

Countering these claims can be more difficult because, in this case, it is impossible to get data of a pure nature since it is too dangerous to experiment on people who have elevated body temperatures from illness. Therefore, the only data that can be gathered

comes from research where the body is heated from the outside, which is not how body core temperature changes naturally. However, when the extent of the 'experimental' increase that can occur is examined, the argument may still have little bearing. Typically this type of research has shown that the BrAC result will increase or decrease about 6.5% with every one degree Centigrade change of body temperature¹⁹. So, a subject running a two degree Centigrade (C) fever will have a 13% high BrAC result.

However, if Centigrade is converted to Fahrenheit (F) a much different picture is revealed. One degree C converts to 1.8 degrees F, so a change of just two degrees C will result in a body temperature of about 102.2 F. Anyone who has had a temperature this high will readily agree that it is quite incapacitating. Therefore, it is up to the officer to note if the subject appears to have any appreciable signs of a fever at the time of the test. If this is done properly, then the jury should be able to see *through* this type of argument and weigh it appropriately.

Also, it must be noted that a sick person is much more susceptible to the effects of alcohol. When a sick person drinks alcohol they will become impaired at a much lower level than if that person was healthy. Consequently, the issue of higher body core temperature should always be addressed with the issue of heightened impairment resulting *from* that higher body core temperature.

Instrumentation

There are certain aspects of instrumentation that defense lawyers may try to attack directly. Most of these strategies involve confusing the jury with 'high tech' talk or trying to make the instrument appear inaccurate and imprecise. These arguments usually center on three aspects of the instrument, which include Radio Frequency Interference (RFI), Slope Detection, and Random or Systematic Errors:

Radio Frequency Interference (RFI) refers to any type of radio wave energy in the general area of the instrument. It is claimed that RFI can have a biasing affect on a BrAC result by interfering with the internal electronics during analysis. The defense will point out that police officers have numerous devices which emit radio waves, such as hand held radios, cell phones, and cordless microphones.

The Slope Detection system refers to the ability of the instrument to analyze the incoming sample to check for possible contamination. The defense may argue that this system does not work all the time and can be fooled under the right circumstances.

Random or Systematic Errors refers to the instrument's ability to abort any test at any time if certain problems arise during the test. These problems can range from internal

¹⁹ Effect of Hyperthermia on Breath-Alcohol Analysis, Glyn R. Fox, Journal of Forensic Sciences, vol. 34, no. 4, 1989.

electronic failures to improper sample delivery patterns given by the subject. The defense may claim that these errors occur frequently and point to a fault in the instrument.

Countering these arguments involves explaining various operational and technical aspects of the instrument, as well as training of the officers. The RFI argument can be quelled with a brief explanation of the instrument casing, the RFI detection circuit inside the instrument, and the AC RFI filter.

First, the instrument is surrounded by a Faraday cage, which means that the casing is made of metal and all the openings in the instrument are covered with a metal mesh screen. A Faraday cage blocks out all forms of RFI by grounding out the signals before they can even enter the interior of the instrument.

Second, the instrument is equipped with a specific RFI detection circuit that allows the instrument to shut down if any RFI is detected in the operational environment. In essence, the instrument is manufactured so RFI can never affect the analysis, but the RFI detection circuit is in place as further protection. Also, this circuit is a 'fail-safe' circuit, which means that if it fails, the instrument automatically goes into an inhibited mode until the circuit is repaired.

Thirdly, the incoming AC power is run through an RFI filter that eliminates any RFI that could occur through the incoming power supply. Finally, all police officers are trained to turn off any type of RFI emitting device while performing a breath analysis. This further eliminates any chance of RFI interference.

As previously mentioned, the Slope Detection system works to detect mouth alcohol contamination; however, it has been shown that this detection system is not perfect. With the 20-minute deprivation period in place, the issue of whether the slope detection system is flawless becomes moot. Any form of mouth alcohol contamination is eliminated within this time frame.

Random or Systematic Errors are not 'errors' in the common sense. In fact, finding them usually means that the instrument was in proper working order at the time of the test. For example, the defense may claim that an instrument, which aborted a test and reported 'Ambient Fail' three times before accepting the subject's sample, is malfunctioning. In this case the opposite is true; the instrument simply detected an operational environment that contained an unacceptable amount of contamination, which could actually be originating from the subject's own alcohol laden breath. When this unacceptable level is detected, the instrument does what it is designed to do and aborts the test. This does not reflect an instrumentation problem, but rather an environmental problem, which is easily eliminated with proper officer training.

Other Defense Strategies

There are other common defense strategies that do not fall into a single category. These strategies include: The 'Small Sample Syndrome'

This refers to the idea that the amount of alcohol the instrument is analyzing is so small, that the analysis cannot possibly be accurate. Here the defense will stress that the instrument is reporting in grams of alcohol per 210 Liters of breath (g/210L), but only measures minute amounts of alcohol from one breath sample. They will often give the analogy of measuring a tiny bit of alcohol (81cc, which is the sample chamber volume) in a 50-gallon oil drum. This type of strategy is aimed at confusing juries with mathematical conversions.

Countering this type of argument involves explaining why the breath analysis results are reported as g/210L. This goes back to the breath to blood ratio, which was previously discussed. Since the laws in this country were traditionally based on a BAC, the breath alcohol instruments needed to report results in a manner that would be consistent with the way blood alcohol results were reported, which was grams of alcohol per 100 milliliters of blood (g/100ml). Therefore, the breath alcohol results need to be 'converted' from g/210L so that they match the BAC results of g/100ml, which they do because of the 2100:1 ratio. This does not mean that the instrument needs to measure 210L of breath to be accurate. This reporting method is in place to simplify the DUI laws, so that 0.100 g/100ml will match 0.100 g/210L and no further conversions would be necessary. The idea that the instrument is reading a minuscule amount of alcohol in a large sample is irrelevant, since this is the task for which instrument was designed. This is akin to saying that the Hubble telescope cannot accurately locate objects in space because the objects are such a small part of the universe.

Conclusion

While the DUI defense strategies shown here are the more common in use, there are many more available for the eager defense lawyer. One must listen carefully to all questions before answering and fully understanding the argument the defense is trying to use.

It should also be noted that language is a considerable part of the adjudication process. For example, defense lawyers constantly refer to the breath analysis instrument as a 'machine' to try and impress how unreliable it is into the jury's minds. If one refers to it as an 'instrument', it will reiterate the *accuracy* and *reliability* of these types of devices. One must always try to explain concepts to the jury in understandable layman's terms and do not let them become lost in the scientific 'jargon' that surrounds breath analysis.

CHAPTER TWELVE

MONTANA TRAFFIC AND DUI CASE

OUTLINE

(Compiled primarily from the Annual Supreme Court Update)

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❖ **12.1 JURISDICTION**

City of Cut Bank v. Bird, 2001 MT 296. City police attempted to pull over DUI suspect within his jurisdiction, but vehicle proceeded onto Blackfoot Reservation. City officer notified county sheriff, and they eventually caught up with the vehicle after it crashed on the reservation. Tribal police officers were notified and took occupants into custody. Bird was eventually charged with reckless driving in city court for eluding a police officer. The district court granted Bird's motion to suppress, ruling that neither the city nor county officer had jurisdiction to effectuate an arrest on the reservation. The Supreme Court disagreed on the basis of U.S. v. Patch, (9th Cir. 1997), 114 F.3d 131, which held that "under the doctrine of hot pursuit, a police officer who observes a traffic violation within his jurisdiction to arrest may pursue the offender into Indian County to make the arrest." Bird also argued that his extradition from the reservation was illegal, which the Supreme Court rejected.

Justice Nelson, concurring, pointed out that the majority need not have considered that issue since irregularities in extradition proceedings must be made in the asylum state, i.e., tribal court. Justice Trieweiler, dissenting, concluded that the district court properly suppressed all evidence of conduct which occurred on the reservation because that conduct was irrelevant to the charge of eluding a police officer within city limits.

❖ **12.2 STATUTE OF LIMITATIONS**

State v. Moga, 1999 MT 283. A felony charge of 4th offense DUI was amended to a misdemeanor 3rd offense DUI when one of Moga's prior convictions was found to be invalid for enhancement purposes. Moga then moved to dismiss the Amended Information, claiming the misdemeanor charge was untimely. The Court rejected the claim, finding that the running of the statute of limitations was tolled by the original Information and, therefore, the amendment of the Information did not deprive the district court of jurisdiction.

❖ **12.3 SEARCH AND SEIZURE**

A. SEARCHES

1. PERSON

a. Field Sobriety Tests

Hulse v. State Driver's License Improvement Bureau, 1998 MT 108. State v. Purdie overruled. Field sobriety tests constitute a search pursuant to the Montana Constitution and the Federal Constitution. The appropriate standard to evaluate the legality of these searches is particularized suspicion rather than probable cause because field sobriety tests occur during the course of an investigative stop and the State has a compelling state interest in getting drunk drivers off the road. The Court clarified that the foundational guidelines set forth in Daubert v Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), only apply to novel scientific evidence. The horizontal gaze nystagmus test is not novel scientific evidence. In order for the HGN test results to be admissible the State must establish through one of its witnesses the correlation between alcohol ingestion and nystagmus.

State v. Steinmetz, 1998 MT 114. The arresting officer did not coerce Steinmetz into performing field sobriety tests by telling him to step to a certain location, at which time the officer instructed Steinmetz on how to perform certain field sobriety tests. In light of its decision in Hulse, the Court remanded the case to the district court for a determination of whether the officer's request of Steinmetz to perform field sobriety tests was based on a particularized suspicion that he was driving under the influence of alcohol.

b. Frisk

Matter of D.R.B., 2004 MT 90. An officer saw D.R.B. late at night near a vehicle parked in front of a residence, and she thought he was stealing a license plate. She stopped and asked him what he was doing, and he said he was putting a plate on the vehicle. She recognized D.R.B. from prior contacts and knew that he didn't live at the residence or own a vehicle. She conducted a pat-down search and found a marijuana pipe. The Court held that the officer had particularized suspicion to conduct an investigative stop, that the officer did not exceed the permissible scope of the investigative stop, and that the officer had reasonable cause to conduct the frisk. Chief Justice Gray, joined by Justices Leaphart and Regnier, dissented as to the reasonableness of the frisk, stating that a police officer does not need to feel threatened when confronting a teenager in baggy clothing late at night and that the frisk should be justified by something more than the officer's standard procedure under such circumstances.

c. Search Incident to Arrest

In re Z.M., 2007 MT 122. Because the officer smelled alcohol on Z.M., Z.M. had been missing from home overnight, was truant from school, and his mother and the school's resource officer had requested that he be picked up, the officer had probable cause to arrest Z.M. for the offense of consuming or possessing alcohol and, incident to arrest, the officer was entitled to search Z.M. and the area within his reach. Thus, the alcohol and money found on Z.M. was lawfully seized.

State v. Cooney, 2006 MT 318. Officers performed a search of Cooney incident to a lawful arrest at a residence which was being searched pursuant to a search warrant. Before placing Cooney in the patrol vehicle, another officer, who had been told that a more thorough search was required for officer safety, conducted another pat down to make

certain that Cooney had no weapons. The latter search resulted in the discovery of a pipe used to ingest methamphetamine. The Court held that the search was lawful, reasoning: “We do not read § 46-5-102(1), MCA, to require a police officer to trust his personal safety to a perfunctory search performed by other officers when those same officers have advised him that their initial search was insufficient to ensure the safe transport of the prisoner.”

State v. Galpin, 2003 MT 324. The search of the defendant’s coat and duffel bag incident to the execution of an arrest warrant was reasonable for purposes of the Fourth Amendment and Article II, Sections 10 and 11, of the Montana Constitution. First, the coat and duffel bag were located within four to six feet of the arrestee or within his “grab area.” Despite the fact that the defendant was handcuffed before the items were searched, “[i]n the darkness of the early morning hours . . . it would have been readily possible for Galpin to access a weapon hidden among his possessions or discretely eliminate evidence.” Thus, the search was permissible under Mont. Code Ann. §§ 46-5-102 (1) and (3) both as a means of officer protection and to discover and seize fruits of the crime. Second, the search was proper under Mont. Code Ann. § 46-5-102 (4) due to exigent circumstances at the time of the arrest. The duffel bag search was justified because the arresting officers reasonably suspected that it could contain highly toxic and volatile chemicals. The search of the coat was justified because an individual, who was not arrested, was entitled to remain in the residence after the officers departed, “thereby subjecting the evidence to . . . possible disposition and destruction.”

d. Exigent Circumstances

State v. Saale, 2009 MT 95. The Court rejected the State’s exigent circumstances argument and found that the district court should have granted Saale’s motion to suppress. Law enforcement officials had entered the defendant’s house over the objections of her husband after she had left the scene of a serious one-vehicle accident shortly before.

The Court effectively overruled long-standing Montana precedent that the reduction of alcohol in the blood constitutes the “potential destruction of evidence” as a factor in determining whether exigent circumstances exist. The Court said that “[w]ithout a sample previously extracted from the body, there was simply no physical evidence to

destroy. Thus, no exigent circumstances arising from the potential destruction of evidence existed.”

The Court also rejected the State’s argument that the prospect of the defendant’s having sustained serious injuries justified the warrantless entry, saying that officers had already been informed by witnesses that she did not appear to be seriously injured, and that her husband was evidently aware of her condition.

Editor’s Note: The officers’ actions after entering the home appear to have weighed heavily in the Court’s ruling. The defendant was taken to the scene of the accident and placed in the backseat of the patrol car for 45 minutes while the officers investigated the scene. The Court indicated that the “ostensible” justifications for the warrantless entry were belied by the fact that the officers did not administer a breath test for 45 minutes, and did not take the defendant directly to the emergency room.

e. Inevitable Discovery

State v. Hilgendorf, 2009 MT 158. After Hilgendorf’s arrest for possession of drug paraphernalia, an officer opened a closed container found on Hilgendorf and discovered marijuana. Hilgendorf argued the officer was not justified opening the closed container without a warrant. The Court disagreed and concluded that, as Hilgendorf was going to jail for possession of drug paraphernalia, the contents of the closed container inevitably would have been discovered during the inventory search at the jail.

2. AUTOMOBILE

a. No General Automobile Exception

State v. Elison, 2000 MT 288. “[A] warrantless search of an automobile requires the existence of probable cause as well as a generally applicable exception to the warrant requirement such as a plain view search, a search incident to arrest, or exigent circumstances.”

b. Consent

State v. Hixon, 2008 MT 365. Hixon was arrested for DUI and an officer called a tow company to have Hixon’s truck moved. By the time the tow truck driver arrived, Hixon

had consented to the search of his truck. He moved to suppress evidence seized from the truck, arguing that the truck was seized when the officer ordered that it be towed. The Court noted that the county had a policy of towing vehicles in under these circumstances for liability purposes and declined to decide when the truck was seized because Hixon consented to the search before the tow truck driver arrived.

A person can consent to the search of a vehicle that he/she does not own, and consent expands the scope of an investigative stop.

State v. Clark, 2008 MT 419. Clark was stopped on the highway based on information that he and his girlfriend had been involved in a domestic disturbance, were traveling in a particular direction, were driving a vehicle specifically identified by description and license plate number, and neither occupant had a valid driver's license. Police read Clark his Miranda rights, and he consented to the search of the vehicle. Police found five prescription drug pills in bindles, for which Clark admitted he did not have prescriptions.

Officers did not exceed the scope of the stop because Clark's voluntary consent to search the vehicle was a valid expansion of the original purpose of the investigative stop. Clark had valid authority to consent to search the vehicle--which he did not own--because ownership is not the exclusive factor in such authority, and Clark had exercised possession and control over the vehicle for both employment and personal purposes.

State v. Shaw, 2005 MT 141. Shaw was stopped for speeding, and the officer discovered that her license had been suspended and that she had no proof of insurance. He detected the odor of alcohol. He asked her consent to search the car, which she gave, and he discovered an open container of an alcoholic beverage, a marijuana pipe, and a set of scales.

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

would avoid incarceration or make any threats.

c. Inevitable Discovery

State v. Hixon, 2008 MT 365. Hixon was arrested for DUI and an officer called a tow company to have Hixon's truck moved. By the time the tow truck driver arrived, Hixon had consented to the search of his truck. He moved to suppress evidence seized from the truck, arguing that the truck was seized when the officer ordered that it be towed. The Court did not address the timing of the seizure because, before the tow truck arrived, Hixon consented to a search of his truck, the officer observed tennis shoes (which matched prints at the scene), and officers subsequently obtained a search warrant for the vehicle. The Court determined that it would be reasonable to assume that, as the district court did, that Hixon's shoes would have been inevitably discovered, notwithstanding any alleged constitutional violations.

Inevitable discovery applies to items that would be found in an inventory search.

B. SEIZURES

1. Investigative Stops

a. Consensual Encounters/ Not a Stop

State v. Wilkins, 2009 MT. The Court affirmed the denial of Wilkins's motion to suppress, concluding that the district court reached the right result for the wrong reason. An officer saw Wilkins parked on a remote street in Billings late at night when it was near or below freezing. The officer approached Wilkins and, while talking to her, observed signs that she was under the influence. Wilkins was subsequently arrested for DUI. Wilkins moved to have the evidence suppressed, arguing that the officer who stopped her did not have a particularized suspicion to justify the stop. The district court concluded that a seizure had occurred, but that the encounter was justified due to the existence of particularized suspicion and was justified under the community caretaker doctrine.

The Supreme Court did not reach the question of whether the stop was justified under particularized suspicion or the community caretaker doctrine. Instead, the Court held that Wilkins was not seized because there was only one officer, and he did not activate his emergency light, display a weapon, or employ threatening tones. The Court relied on the

factors set out by the United States Supreme Court in United States v. Mendenhall, 446 U.S. 544, 553-54 (1980), to determine whether a person has been seized: “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”

b. Particularized Suspicion

State v. Roy, 2013 MT 51, 369 Mont. 173. Particularized suspicion of a marijuana offense existed when the officer had reliable information about the particular vehicle travelling a particular route at a particular speed transporting marijuana and the vehicle reeked of car deodorizer. The officer asking the driver to exit a vehicle to exit the vehicle to separate the driver from the strong masking odors present was not an illegal or unconstitutional extension of the stop.

State v. Cameron, 2011 MT 276. An officer stopped Cameron after observing Cameron drift onto the centerline four times early on a Saturday morning. The district court denied Cameron’s motion challenging the stop. Cameron appealed, arguing that the district court erred in relying on Weer v. State, 2010 MT 232, rather than Morris v. State, 2001 MT 13, and State v. Lafferty, 1998 MT 247, in part because Weer was a civil case involving the reinstatement of Weer’s driving privileges.

The Supreme Court affirmed, pointing out that it had recently explained that Morris and Lafferty are flawed and the Court will no longer rely on them. Applying Weer, the Supreme Court concluded that totality of the circumstances, including the time of night, were sufficient to justify the investigative stop.

State v. Flynn, 2011 MT 48. “A defendant’s subsequent, valid explanation for conduct that objectively appeared suspicious may affect his or her ultimate liability for a charged offense, but it cannot affect the validity of a stop properly based on particularized suspicion. Lincolnshire v. Dispirito, 552 N.E.2d 1238, 1241 (Ill. App. Ct. 2d Dist. 1990); State v. Kinkead, 570 N.W.2d 97, 101 (Iowa 1997). The particularized suspicion inquiry is a fact based assessment of the objective quantity, content and reliability of information “available to the officer.” State v. Clawson, 2009 MT 228, ¶ 11, 351 Mont. 354, 212 P.3d

1056 (emphasis added). An officer in the field need not consider every possible innocent explanation or legal exception before concluding that particularized suspicion exists. State v. Clark, 2009 MT 327, ¶ 13, 353 Mont. 1, 218 P.3d 483.”

State v. Murray, 2011 MT 10. Affirmed in part, reversed in part, and remanded for further proceedings, Wheat, M. Dissented McGrath and Nelson. Rural unpainted road was sufficiently wide for violation of Montana Code Annotated Section 61-8-321 (2009) (failing to drive to the right side of the roadway) to occur, so particularized suspicion (and the higher standard of probable cause) existed when pickup drove on the left side of the road.

Weer v. State, 2010 MT 232 Affirmed, Cotter, P. Particularized suspicion existed when Weer swerved twice toward the center line, then touched the center line on third swerve.

State v. Larson, 2010 MT 236. Particularized suspicion existed when defendant “screached his tires and revved his engine continually, while crossing a busy intersection” and had a potential mud-flap violation. Miranda need not be read during investigatory phase of DUI stop. Only expert witness can testify that certain drugs caused impairment. Officers were not qualified as experts in this case.

Editor’s note: *Do not be confused when reading this case by the defense questions and officer’s testimony. Poor performance on SFST’s has been linked to impairment by marijuana and/or other drugs.*

Brown v. State, 2009 MT 64. Brown challenged the district court’s order denying the reinstatement of his driver’s license, claiming that the officer did not have reasonable grounds to believe he was DUI because the officer had insufficient experience to make inferences regarding DUI and the officer relied on “subjective” data to justify the stop.

The notion that an officer must have a certain level of “experience” to make inferences is rooted in the Court’s early “interpretations, or misinterpretations” of the United States Supreme Court’s decision in United States v. Cortez, 449 U.S. 411 (1981). The Montana Supreme Court clarified that “the test for particularized suspicion simply 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.” The Court stated that, though an officer’s experience and training may be a factor, it will not be the defining element of the test. The Court emphasized that courts should examine the facts and the totality of the circumstances of each case.

As part of its holding, the Court set forth the following standard for particularized suspicion or reasonable grounds to justify an investigative 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.” **(This new standard removes the reference to the “experienced” officer.)**

Rejecting Brown’s claim that the officer relied on subjective data, the Court noted that the objective data included Brown’s vehicle “barely moving” on a public road at 2:51 in the morning. The vehicle had its lights on and then suddenly pulled over, stopped, and shut off its lights. Once he made contact with the driver, the officer’s particularized suspicion ripened into probable cause based on observations such as the odor of alcohol, slurred and slow speech, and staggering.

State v. Ross, 2008 MT 369. The Court affirmed the district court’s decision upholding the municipal court’s determination that the arresting officer had particularized suspicion to justify the investigatory stop of Ross’s vehicle. The officer observed Ross’s car swerve within its lane and touch both the dividing line and the fog line, cross the dividing line, and strike its tires on the curb during a right hand turn. The officer believed this was “suspicious driving behavior;” it appeared the driver was distracted; the officer normally would have stopped someone exhibiting similar driving behaviors, and this was the type of behavior the officer had observed in previous DUI stops. These facts distinguished this case from Lafferty and Morris, in which particularized suspicion failed not because the traffic deviations were minor, but because the minor deviations observed did not raise suspicion of either a traffic infraction or DUI. The Court was not swayed by Ross’s explanation that she was swerving to avoid manhole covers because “it makes your vehicle bounce” and she does not like hitting them.

State v. Ditton, 2009 MT 57. Affirming the denial of Ditton’s motion to suppress, the Court concluded that the odd angle of Ditton’s car, the fact that he was leaving a bar late at night, his ensuing driving behavior, and his failure to properly make a right hand turn, provided objective data from which an experienced officer could suspect that Ditton was driving under the influence. Whether or not Ditton’s driving behavior was technically “legal,” the totality of the circumstances provided a sufficient basis for particularized suspicion to justify the stop.

State v. Cooper, 2010 MT 11. An officer’s failure to tell a motorist all the reasons for the traffic stop will not provide a sufficient basis to disregard the officer’s pre-stop observations. While Cooper had committed numerous traffic offenses before the officer stopped her, the officer told her he stopped her because her license plate was obscured by snow, a citable offense under Mont. Code Ann. § 61-3-301 (stating a person may not operate a motor vehicle on Montana highways unless the vehicle has license plates that are “conspicuously displayed” on the vehicle). Cooper did not dispute her license plate was totally obscured by snow. She argued that the officer had no particularized suspicion since it was not her fault snow naturally obscured her plate. Her multiple other traffic infractions, she argued, should be disregarded since the officer did not enumerate those other grounds to her when he stopped her. To support this argument, Cooper cited Mont. Code Ann. § 46-5-401(1) (providing that an officer conducting an investigative stop “shall as promptly as possible inform the person of the reason for the stop”). The Court rejected Cooper’s argument and reasoned that an investigating officer need not identify a particular statutory violation or even cite a defendant for a moving violation in order to establish particularized suspicion.

Justice Nelson, while agreeing with the majority’s decision that sufficient particularized suspicion justified the stop of Cooper’s car, repeated his “obscured plate” concern from State v. Rutherford, 2009 MT 154, ¶ 25, 350 Mont. 403, 208 P.3d 389 (Nelson, J., concurring). Citing the potential for law enforcement abuse, Justice Nelson would declare that the fact that a motorist’s rear license plate might be obscured by snow or other “natural accumulation of the elements or driving conditions” cannot, standing alone, constitute particularized suspicion for a traffic stop.

c. Citizen Tipster

City of Missoula vs. Moore, 2011 MT 61.. There was particularized suspicion for the stop of Moore based on citizen informant report. The information was reliable under the Pratt test when 1. the informants identified themselves to the dispatcher. 2. the reports were based on personal observations, and 3. the officers corroborated the reports when she observed Moore driving in a vehicle matching the reported description and location.

State v. Rutherford, 2009 MT 154._ The Court affirmed the district court's finding that particularized suspicion existed to stop Rutherford based on a citizen-informant's tip.

The Court applied the three-part Pratt test to assess the informant's reliability: (1) whether the informant identified himself or herself to law enforcement; (2) whether the report was based on personal observations; and (3) whether the officer's observations corroborated the informant's information. Rutherford challenged the last two factors.

First, the Court rejected Rutherford's claim that the officer could rely on only information that he knew personally. The Court also explained that corroboration does not require an officer to observe illegal activity. Corroboration occurred here when the officer located the vehicle matching the detailed description and location.

Editor's Note: The State presented two arguments under which the Court could affirm: (1) the Pratt test; and (2) a motor vehicle violation--a license plate obstructed by a trailer hitch, in violation of Mont. Code Ann. § 61-3-301. Though the majority did not entirely discount the obstructed license plate as a justification for the stop, it did not rely on that justification and the holding was based on the Pratt test.

State v. Clawson, 2009 MT 228. The Court affirmed the district court's finding that particularized suspicion existed to stop Clawson based on a citizen-informant's tip. The Court determined that the three-part test from State v. Pratt, 286 Mont. 156, 951 P.2d 37 (1997), was satisfied because the informant identified herself to dispatch; the informant relayed her personal observations about Clawson's appearance, his vehicle, and his direction of travel; and the officer corroborated the informant's information by locating a vehicle and person matching the informant's description in the area indicated by dispatch.

The Court clarified that all the information that a citizen-informant provides to dispatch is relevant when justifying a stop, regardless of whether dispatch relays the information to the officer in the field. The Court stated that an officer personally does not have to determine whether the tip is reliable: “Effective law enforcement often depends upon officers acting on the directions and information transmitted swiftly from one to another and „officers cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information.” Clawson, ¶ 12.

The Court also noted that the officer saw Clawson committing a traffic offense--his vehicle was parked with the door open in the travel lane of a road. The Court emphasized that the officer was not required to observe DUI-related behavior before initiating a stop, and observed that “the point” of an investigative stop is “to allow the officer to make a determination as to whether further investigation is warranted.” Clawson, ¶ 14.

d. Anonymous Tipster

State v. Brander, 2004 MT 150. The fact that the anonymous tip did not meet the requirements of Pratt for purposes of establishing its reliability was inconsequential. The officer followed the vehicle for several miles and made independent observations that gave rise to a particularized suspicion the defendant was driving under the influence of alcohol. These facts included excessively slow speed and meandering across the fogline.

State v. Fisher, 2002 MT 335. Officer was not justified in stopping defendant’s vehicle based on an anonymous tip that three or four persons were in an alley with a gun, where the tip was not corroborated and none of the persons in defendant’s vehicle matched the persons described in the tip. Fact that stop was made in high crime area, or that defendant was driving in a “suspicious” manner did not give rise to particularized suspicion. Once officer verified that temporary registration sticker was valid, his initial suspicion regarding the sticker did not justify the stop either.

State v. Lee, 282 Mont. 391 (1997). Anonymous citizen informant’s **belief** that Lee was under the influence of alcohol and speeding, along with informant’s description of the car and the direction he was traveling, did not support a particularized suspicion that Lee had

engaged in any wrongdoing. Investigative stop not justified pursuant to Mont. Code Ann. § 46-5-401.

e. Pretextual Stops

State v. Farabee, 2000 MT 265. Officer stopped defendant's vehicle believing that it was missing a headlight. Defendant argued that the stop was unjustified because it was broad daylight and officer could not have been certain about the headlight's functioning. Supreme Court rejected this argument, as well as defendant's claim that the stop was pre-textual because particularized suspicion does not require **certainty** on the part of the officer.

f. Suspended/ Expired Driver's License/ Arrest Warrants

State v. Hatler, 2001 MT 38. Upon learning that a driver had an expired Montana driver's license, an MHP officer effected a traffic stop and determined the driver was DUI. In a motion to suppress, the driver argued that the officer lacked particularized suspicion because he did not first rule out the possibility the driver may have possessed a valid license from another state. On appeal, the Court held the officer need not have investigated further, since he is only required to have particularized suspicion, not proof beyond a reasonable doubt, that an offense has been or is being committed.

State v. Neil, 2009 MT 128. An officer stopped the vehicle Neil was driving after the officer ran a check on Neil's license plate number and discovered that Neil was the registered owner of the vehicle and he had a suspended or revoked license. Neil later moved to suppress evidence obtained from the stop, arguing that the officer did not have particularized suspicion to stop him because the officer did not know that he was the driver of the vehicle. Relying on City of Billings v. Costa, 2006 MT 181, ¶ 21, 333 Mont. 84, 140 P.3d 1070, the Court noted: "an officer may rationally infer the driver of a vehicle is the vehicle's registered owner unless the officer is aware of any facts that would render that inference unreasonable." The Court upheld the stop in this case because there was no evidence the owner was not the driver.

City of Billings v. Costa, 2006 MT 181. An officer had particularized suspicion to stop a vehicle where he knew there was an arrest warrant for the registered owner of the vehicle

and the driver was the same gender as the registered owner (female). The officer did not need to obtain a physical description of the registered owner and compare it with the driver's appearance before initiating the stop. The fact that vehicle owners sometimes lend their vehicles to others did not make the officer's inference that the vehicle was being driven by the registered owner unreasonable.

2. Arrests/Probable Cause

State v. Hafner, 2010 MT 233. Probable cause of DUI existed without SFST evidence based on the following: defendant's car was stuck in a ditch, both he and the vehicle smelled strongly of alcohol, he appeared to have urinated on himself, he couldn't keep his balance, his "eyes were glassy and bloodshot, his speech was slurred, and he had trouble understanding and responding to the simple instruction of getting out of the vehicle by way of the passenger side." The court encouraged officers to conduct SFSTs whenever possible (inclement weather prevented the officer from asking Hafner to perform the tests, in this case).

State v. Schubert, 2010 MT 255. Construction zone flagger had probable cause of DUI for citizen arrest after receiving a report of a drunk driver from a known source and observing a vehicle consistent with the report driving in an erratic manner.

In re License Suspension of Cybulski, 2008 MT 128. The Court upheld the traffic stop, concluding that the arrest was legal even though the arresting officer was relatively inexperienced. The test for probable cause is whether the information available to the arresting officer--whether a rookie or a veteran--is sufficient to allow a hypothetical "experienced" officer to have probable cause.

Considering "the egregious circumstances"--"the flagrant nature of Cybulski's traffic violation (driving the wrong way on the interstate for over 50 miles), her absolute obliviousness to her surrounding environment, and her delayed response to the officers' attempts to pull her over," the arresting officer had probable cause to arrest her "immediately" for driving under the influence, notwithstanding Cybulski's arguments that the officer did not see her bloodshot eyes, smell alcohol on her breath or conduct sobriety tests before the arrest.

3. Community Caretaker Doctrine

State v. Spaulding, 2011 MT 204. Community Caretaker Doctrine is an exception to the warrant requirement. Thus, the stop of Defendant's car was constitutionally reasonable when it was "based on objective, specific, and articulable facts from which an officer would suspect that a citizen is in need of help or is in peril . . . and . . . the stop actually involve[d] a welfare check." ¶ 24 (citation omitted). The subjective intent of the officer need not be "solely and exclusively to conduct a welfare check." *Id.* Deputy's use of overhead rear emergency lights did not elevate the stop to something more than a welfare check. ¶ 26.

State v. Graham, 2007 MT 358. The Court reversed the denial of Graham's motion to suppress. A deputy on patrol observed Graham's vehicle parked in the middle of the day in a dirt pullout next to a remote county road where she had never before seen anyone parked. She also observed the vehicle's occupants kissing and then the passenger "mounting" the driver. The deputy activated her overhead lights, approached the vehicle, and saw a fresh beer can on the ground next to the driver's door. Upon making contact, the deputy determined that the occupants were consenting adults, their pants were down, and they were intoxicated. The deputy arrested Graham for felony DUI (his fourth).

The Court concluded that particularized suspicion "requires far more" than what the deputy observed in this case. Because the Court concluded that the kissing and mounting was lawful conduct and that the deputy did not believe a crime was being committed, (but only thought the behavior was "inappropriate" and she wanted to "move them along"), there was no legal justification for the stop. Regarding the community caretaker doctrine, the Court recognized the deputy's concern that the unusual location of Graham's vehicle indicated the possibility of vehicle problems, but concluded such concern was "obviated" by the deputy's subsequent observations as she passed by. The Court concluded that it was "clear they were not parked there because they were in peril, and nothing observed by [the deputy] suggested otherwise."

State v. Litschauer, 2005 MT 331. Police received a 911 call reporting a domestic altercation and a woman with possible injuries leaving the scene in a car, which the caller described. An officer located the car and pulled it over to check on the woman's welfare. The driver, Litschauer, was drunk and was eventually arrested for DUI. Litschauer moved to suppress all evidence on the ground that the officer was not justified in stopping her car. The Court concluded that the stop was

justified under the community caretaker doctrine set forth in State v. Lovegren and State v. Nelson. Although those cases involved parked vehicles, the analysis nonetheless applied to moving vehicles. The Court did not discuss the officer's imputed knowledge of the domestic incident, finding that the 911 dispatcher had conveyed sufficient information to the officer to justify the "community caretaker" stop of Litschauer's car.

State v. Seaman, 2005 MT 307. Seaman stopped her car on an I-15 off-ramp north of Great Falls. An officer saw the parked vehicle and stopped to see if the driver needed help, since the weather was cold and the location was remote. As he pulled up behind Seaman's car, the officer saw Seaman outside the car on the passenger side. Seaman walked around to the driver's side, got back in the car, and activated her turn signal. The officer approached the car, made some inquiries about Seaman's welfare, smelled alcohol on her breath, and eventually arrested her for DUI. The justice court denied Seaman's motion to suppress after an evidentiary hearing, but on appeal the district court reversed the order and suppressed the evidence, reasoning that once Seaman got back into her car and turned on the indicator, the officer had no reasonable basis for believing his assistance was needed. The Court applied its rationale in State v. Lovegren, which discusses the community caretaker doctrine, and concluded that the officer had sufficient information suggesting Seaman might be in need of assistance and that the officer, therefore, had the duty (and the latitude) to follow up his observations and to check on Seaman's welfare under the circumstances.

State v. Wheeler, 2006 MT 38. The Court applied the elements of the community caretaker doctrine and found that the district court did not abuse its discretion in finding that the police officer was justified in stopping Wheeler's car to investigate. The first prong of the community caretaker doctrine was met when the police officer noticed that Wheeler's car was in an unusual location that could have caused an accident. In addition, the officer noticed that the driver appeared emotionally excited and thought that she might need assistance. Thus, considering the circumstances as a whole, there existed objective, specific, and articulable facts from which an experienced law enforcement officer would suspect that someone in the car needed help. After determining that the occupants of the car were not in peril, however, the driver's slurred speech and the smell of alcoholic beverage on the driver's breath created particularized suspicion for the police officer to conduct a further investigatory stop which eventually led to Wheeler's arrest for DUI.

❖ **12.4 SELF INCRIMINATION/ MIRANDA**

A. CUSTODY

State v. Wrzesinski, 2006 MT 263. The district court properly denied the Defendant's motion to suppress statements he made to the arresting officer during an investigative stop. Since the Defendant was the subject of a traffic stop that was public and temporary in nature, his statements were made in a non-custodial setting even though he was not free to leave.

State v. Marvin Van Kirk, 2001 MT 184. The Defendant did not have a right to counsel before submitting to a breath test and field sobriety tests. The officer properly read the Defendant Montana's implied consent advisory form before asking the Defendant to submit to a breath test. A mere request that a suspect perform sobriety tests without interrogation of the suspect does not constitute a custodial interrogation.

State v. Allen, 1998 MT 293. An investigative stop for a traffic violation, which evolved into a DUI conviction, was not custodial and, therefore, Miranda does not apply. Following the Supreme Court's opinion in Berkemer v. McCarty, and analogizing an investigatory stop to a "Terry" stop, the Court held that a public, routine and temporary stop is not custodial although the suspect is temporarily not free to leave. In addition, "[b]ased on the odor of alcohol detected after the stop, . . . [the officer] was justified in further investigation, including brief questioning and field sobriety tests.

B. INTERROGATION

State v. Zito, 2006 MT 211. Although Zito was in custody when he stated that he had a "medical grow," Zito was not questioned by any law enforcement officer or otherwise coerced or induced to make the statement in question. Because there was no interrogation, the statement was admissible.

State v. Damon, 2005 MT 218. During field sobriety tests, Damon spontaneously told the officer to "just give me the DUI" and "I'm already drunk." Damon sought to suppress these statements because they were made before the officer had given Damon the so-called Krause advisories for investigative stops required by then-existing law. The Court agreed with the district court that the statements were not made in response to any specific questioning by the officer and were, therefore, admissible.

C. INVOCATION OF RIGHT TO COUNSEL

State v. Clark, 2008 MT 419. The Court held that Clark’s remark to his girlfriend, who was in a vehicle with him when they were stopped, to “call an attorney now,” was not directed to police and did not invoke his right to counsel, regardless of whether the request for consent to search constituted a custodial interrogation.

❖ 12.5 IMPLIED CONSENT

Ditton v. Dept. of Justice Motor Vehicle Div., 2014 MT 54. There is no requirement in Montana Code Annotated Section 61-8-403 that the State answer to a petition for reinstatement of driver’s license, so default judgment is not appropriate. Acquittal in the underlying DUI case does not preclude license suspension.

Nichols v. Mont. Dept. of Justice, 2011 MT 33. The seizure of a Nichols’ driver’s license in accordance with the Implied Consent statute after refusal is not an unlawful seizure, and the “threat” of suspension is not an unlawful search. Also, the Implied Consent statute is not an exception to the warrant requirement.

State v. Beanblossom, 2002 MT 351. Mont. Code Ann. § 61-8-402(2) does not create a mandatory duty upon arresting officers to conduct a breath test pursuant to the implied consent law. A due process violation occurs only when an accused requests, and is then denied, an independent sobriety blood test.

Neal v. State, 2003 MT 53. A petitioner who successfully challenges a license suspension or revocation is entitled to costs.

State v. Rumley, 194 Mont. 506 (1981). Blood Alcohol Test - consent unnecessary where defendant incapacitated and incapable of refusing consent.

❖ **12.6 CHEMICAL TESTS**

A. PBTs

State v. Toth, 2003 MT 208. Toth argued that law enforcement officers must establish probable cause prior to requesting a breath sample for a preliminary breath test. The Court disagreed. Citing Mont. Code Ann. § 61-8-409(1) and its prior decisions, the Court stated an officer needs only particularized suspicion to request a breath sample for preliminary breath test analysis.

State v. Feldebrugge, 2002 MT 154. Due process does not require arresting officer to inform defendant of his right to an independent blood test before the officer requests a preliminary breath test (PBT).

B. INTOXILYZER®

State v. Peters, 2011 MT 274. Manufacturer's (CMI) requirement that Defendants view the Intoxilyzer® 8000 source code at CMI's headquarters in Kentucky is not an undue hardship as outlined in Mont. Code Ann. § 46-15-322(5) (2009). Defendants' discovery request regarding data from all Intoxilyzer® 8000s in the state was "unreasonable and oppressive." Id. at ¶ 40.

State v. Johnston, 2011 MT 184. Breath test results from Intoxilyzer®-8000 were admissible when the instrument was field certified within 31 days, as required by Montana Administrative Rules. A. R. M. 24.4.213. This reflects the current Montana Administrative Rules, which were amended in 2007. The court clarified its reference to "weekly" field certifications in State v. Gieser, 2011 MT 2, was dicta and, therefore, not precedential.

State v. Slade, 2008 MT 341. Refusal to submit to the test are not communications protected by the Fifth Amendment. Citing City of Missoula v. Forest, 46 St. Rep. 237 (1989) (finding neither the results of the breathalyzer test nor a defendant's refusal to submit to the test are communications protected by the Fifth Amendment.).

State v. Michaud, 2008 MT 88. Michaud appealed from his conviction for misdemeanor DUI. The Court held that the rebuttable inference under Mont. Code Ann. § 61-9-404(2), did not deny the defendant his right to counsel at a critical stage of the prosecution or violate his right not to be compelled to give testimony against himself. The absence of counsel when the breath test was

requested was not a critical stage because driving is a privilege; one consents to the tests by driving, and the inference cannot be the sole evidence for conviction.

Anderson v. State, 2007 MT 225. An implied consent advisory does not misstate the law or mislead a DUI arrestee where the given advisory sufficiently explained the potentially serious consequences of refusal to submit to testing even though the advisory did not contain exact wording that fit the arrestee's circumstances.

Montana resident Anderson was stopped by a sheriff's deputy who mistakenly read an advisory pertinent to nonresident drivers. Anderson argued he was confused and was never aware of the "potentially serious consequences" of refusing the breath test because he was only told the consequences a nonresident driver would face upon refusal. Implied consent statutes do not specifically require that advisories detail the ramifications of refusal. An advisory that provides sufficiently accurate information to a person about the ramifications of a refusal is enough.

Dissent; Gray, C.J. Anderson was not informed that his Montana driver's license would be seized and suspended and, consequently, he was not informed of the potentially serious consequences of refusing the test. The majority relies on some phrases in Anderson's advisory that are not indications about consequences for refusal that would be obvious to "a driver supposedly impaired by alcohol." Anderson, ¶ 21.

C. BLOOD

City of Billings v. Grela, 2009 MT 172. The city charged Grela with DUI. The municipal court denied Grela's motion to suppress the results of a blood test taken at a local hospital after Grela's accident. Grela maintained that the officer wrongly ordered his blood drawn because he was conscious and capable of refusing the blood test. The officer, who was also a trained paramedic, ordered the blood test because Grela had been in a serious accident, was taken to the hospital where he was sedated and appeared to be unconscious, and thus was incapable of refusing the test.

Grela argued that a medical expert's opinion is required to establish that a person is unconscious or otherwise in a condition rendering him able to refuse a blood test.

The Court held Mont. Code Ann. § 61-8-402 does not require medical expert testimony to establish the person in question is incapable of refusing a blood test. The officer in this case was not testifying as an expert.

State v. Merry, 2008 MT 288. During a DUI investigation, Merry blew a .136 breath sample. Merry was taken to the McCone County Health Center for a blood draw. The on-duty LPN performed the draw at the officer's request. An RN and a physician's assistant were on-call, but were not physically present at the health center.

Montana Code Annotated § 61-8-405 governs the admission of blood tests and provides that only a physician, RN or "other qualified person acting under the supervision and direction of a physician" or RN may perform the blood draw. After analyzing the statutes and legislative history, the Court concluded that the statute contemplates "general" supervision. Thus, a "qualified person" who performs a blood draw while subject to "offsite or on-call supervision can satisfy" the statutory supervision requirement.

D. RIGHT TO INDEPENDENT BLOOD TEST

State v. Schauf, 2009 MT 281. The Court affirmed Schauf's convictions of negligent homicide, negligent vehicular assault, and criminal endangerment, holding:

Failure to Advise of Right to Independent Blood Test: The trial court was not required to dismiss the case on the grounds Schauf had not been advised of her right to an independent blood test. Dismissal is a "severe sanction" that is only appropriate if an officer actually impedes the accused's right to an independent blood test. If the officer simply neglects to give the advisory, as in this case, then suppression of the State blood test is the appropriate remedy. (Here, the State conceded to suppression at trial.)

Admission of Hospital Blood Test: The trial court properly admitted medical records that showed Schauf's blood alcohol level. The records had been lawfully obtained by subpoena, and there was no evidence that the hospital had been acting as the State's agent in taking the blood sample.

Note: Because the State had conceded below that the officer should have advised Schauf of her right to an independent blood test, the issue of whether the usual DUI advisories must be given in the case of suspected Title 45 criminal offenses was not squarely presented on appeal. See *Mont. Code Ann. § 61-8-402(10)*. Nevertheless, the Court cited its holding in *State v. Stueck*, 280 Mont. 38, 929 P.2d 829 (1996), that the implied consent provisions of Title 61 apply to any crime that includes DUI as an element.

State v. Smerker, 2006 MT 117. Smerker was convicted of felony driving under the influence of alcohol, fourth or subsequent offense. On appeal, he argued that the officer violated his due process rights when he improperly frustrated Smerker's ability to obtain an independent blood alcohol concentration examination. The Court held that the officer "clearly informed Smerker of his right to obtain an independent BAC test," thereby fulfilling his obligation under State v. Strand, 286 Mont. 122, 951 P.2d 552 (1997). The Court noted that nowhere in its holding in Strand did the Court state that an officer "must ensure that the accused understands all the nuances of what the right to an independent test entails." Rather, the officer had properly told Smerker he was more than welcome to obtain a urine test at his own expense, and the officer in no way impeded Smerker's ability to obtain such a test.

State v. Stueck, 280 Mont. 38 (1996). Defendant's blood test was improperly taken without his consent in a negligent vehicular assault case. Even though the Implied Consent law specifically applies to arrests for DUI, the Court held that, because negligent vehicular assault includes the element of driving under the influence, the implied consent shield applies.

E. HOSPITAL BLOOD

State ex rel. McGrath v. District Court, 2001 MT 305. **Order granting State's request for writ of supervisory control; remanded for further proceedings.** Defendant refused a BAC test at hospital following a car accident. Officer obtained an investigative subpoena to access her medical records, which showed a BAC of above the legal limit. District court refused to allow the State to use those results because of the Defendant's refusal, which would permit an "end run" around implied consent statutes. The Supreme Court held that district court was proceeding under a mistake of law and granted the writ. The Court held on the basis of its decision in State v. Newill, 285 Mont. 84, 946 P.2d 134 (1997), that the implied consent law does not apply to diagnostic blood tests taken for medical treatment purposes. The only question for the district court is whether the evidence is competent under Mont. Code Ann. § 61-4-404(3), and the Supreme Court remanded for that inquiry. Triewiler dissented, concluding that Mont. Code Ann. § 61-8-402 requires the defendant's consent before medical tests can be obtained for purposes of DUI prosecution. He would overrule Newill.

❖ **12.7 EVIDENCE/ ADMISSIBILITY**

A. REFUSAL OF SFSTS

State v. Hudson, 2005 MT 142. The Court ruled that the district court correctly instructed the jury regarding the admissibility of Hudson’s refusal to submit to field sobriety tests. Evidence of a refusal to submit to field sobriety tests, including the breathalyzer, remains admissible in any criminal action or proceeding. Hudson argued that evidence of his refusal tends to be only marginally probative as to the ultimate issue of guilt, similar to the flight instruction that the Court suggested should be left for argument, rather than for the district court to instruct the jury, in State v. Hall, 1999 MT 297, ¶ 46, 297 Mont. 111, 991 P.2d 929. The Court rejected that argument, stating that Hall was inapposite because a statute specifically provides that evidence of refusal remains admissible. Mont. Code Ann. § 61-8-404(2). Moreover, the district court instructed the jury that evidence of refusal simply constitutes another factor to be considered along with all other relevant, competent evidence in determining whether a person is guilty. The jury instruction mirrored the language of the statute and thus correctly set forth the law applicable to the case.

B. HGN

State v. Rodriguez, 2011 MT 36. Deputy administering tests was qualified as an expert to testify that he 1. was trained to perform the HGN test and 2. administered the HGN test in accordance with his training. His prior training at the Law Enforcement Academy and his advanced operator training addressed HGN administration and this combined with his detailed testimony was sufficient foundation for him to qualify as an expert.

Note: The court did not address the Deputy’s qualifications as an expert to explain the correlation between alcohol consumption and horizontal gaze nystagmus.

State v. Harris, 2008 MT 213. The municipal court did not err when it allowed an officer to testify as an expert on the horizontal gaze nystagmus (HGN) test. The Court clarified that, though it recounted the officer’s “litany of credentials” in State v. Crawford, 2003 MT 118, 315 Mont. 480, 68 P.3d 848, it did not “set forth seven essential requirements that a witness must possess to testify as an expert on HGN” in that case, as Harris claimed on appeal. On the contrary, the Court noted that trial courts are “vested with great latitude in ruling on the admissibility of expert testimony.” Here, the testifying officer “presented credentials similar” to those in Crawford, such

as: seven years as a detective; completion of an eight-hour course in field sobriety tests; completion of an eight-hour course on the anatomy of the eye, focusing on HGN; and completion of a three-week Drug Recognition and Evaluation (DRE) program. Thus, the district court did not abuse its discretion.

State v. Marvin Van Kirk, 2001 MT 184. The district court erred by allowing the arresting officer to testify about the Defendant's performance on the HGN test when the testimony did not establish that the officer was specially trained or educated, or that he had adequate knowledge to qualify as an expert able to explain the correlation between alcohol consumption and nystagmus. The court's error was harmless. The first step in the harmless error inquiry is whether the error was structural error or trial error. If the error is structural, it is not amenable to a harmless error analysis. If the error is trial error, the next inquiry is whether there is a reasonable probability that the inadmissible evidence might have contributed to the conviction. The Court abandons the use of the "overwhelming evidence" test and from this point forward will employ the "cumulative evidence" test. Under this test, the State must demonstrate that admissible evidence proved the same facts as the inadmissible evidence and must demonstrate that the quality of the inadmissible evidence was such that there was no reasonable possibility that it might have contributed to the Defendant's conviction. In the instant case, qualitatively, and in comparison to the admissible evidence presented proving the Defendant was under the influence of alcohol, there is no reasonable possibility that the HGN testimony contributed to the Defendant's conviction.

C. PBT

State v. Chavez-Villa, 2012 MT 250. Audio recording which indirectly tells the jury the implied results of PBT and HGN is inadmissible without the proper foundation. Evidence of PBT results requires testimony establishing the reliability of the instrument and HGN evidence requires 1. The officer administering the test was trained in HGN administration, 2. The officer administering the HGN did so in accordance with his/ her training, and 3. An expert must explain the correlation between consumption/ use of the intoxicant and HGN.

State v. Lozon, 2012 MT 303. Admission of video of PAST being used and shown to Defendant followed shortly by his arrest was prejudicial error when the jury could infer from the video that Defendant failed the test and the proper foundation for admission of PAST evidence was not laid.

State v. Reavely, 2007 MT 168. The district court's decision to preclude the defendant from introducing evidence of his preliminary alcohol screening test (PAST) result--to prove that his blood alcohol was rising at the time of the accident--was a proper exercise of discretion because the defense did not lay a foundation for the reliability of the PAST result. Whether PAST evidence is sought to be admitted by the State or the defense, State v. Snell requires the proffering party to lay a proper foundation.

State v. Damon, 2005 MT 218. The district court did not abuse its discretion when it determined that the Preliminary Breath Test (PBT) result was sufficiently reliable to be admitted as substantive evidence at trial. The district court conducted a hearing and received expert testimony regarding the reliability of the Alco-Sensor III, the instrument used in Damon's PBT. The two expert witnesses, Macquorn Forrester for the prosecution and Dewayne Beckner for the defense, agreed that the Alco-Sensor III accurately measures breath alcohol concentration within the accepted margin of error, provided that the operator follows certain field protocols. The Court held that district courts must conduct a conventional Rule 702 analysis before allowing PBT results as substantive evidence, and the results must be demonstrably accurate and reliable as well as meet all other admissibility requirements. The Court distinguished its earlier decisions in State v. Strizich, State v. Weldele, State v. Crawford, and State v. Snell, in which the PBT results were held to be inadmissible at trial, and left for another day the issue of the efficacy of the administrative regulations governing the PBT.

D. INTOXILYZER® REFUSAL

State v. Slade, 2008 MT 341. Slade was arrested for DUI and refused to take a breath test. The district court did not abuse its discretion and unconstitutionally shift the burden of proof when it instructed the jury, pursuant to Mont. Code Ann. § 61-8-404(2), that the jury may infer from Slade's refusal to take the breath test that he was under the influence. The prosecutor's comments during closing argument about the rebuttable presumption arising from Slade's refusal did not violate Slade's right to a fair trial by undermining the presumption of innocence and shifting the burden of proof. The Court also rejected Slade's claim that the district court should have suppressed evidence of his refusal to take the test because he was not given a Miranda warning before he was asked to take the test.

State v. Miller, 2008 MT 106. Miller was found guilty of Felony DUI. Over Miller's objection, the district court read the following instruction to the jury based on Mont. Code Ann. § 61-8-402(2):

If a person refuses to submit to a physical test or a test of their breath or blood for alcohol concentration, such a refusal is admissible evidence. You may infer from the refusal that the person was under the influence. The inference is rebuttable.

On appeal, Miller argued the above instruction was deficient because it did not tell the jury that the State was required to produce other competent evidence of DUI and, as a result, Miller claimed the instruction had the effect of transforming the permissive inference allowed by Mont. Code Ann. § 61-8-402 into a mandatory presumption that he was under the influence in violation of his right to due process and the presumption of innocence. The Court disagreed, explaining that nothing about the instruction required the jury to infer from Miller's refusal that he was under the influence since the instruction told the jury the presumption was rebuttable and that it "may" infer from the refusal that the person was under the influence.

In rejecting Miller's claim that the instruction unconstitutionally shifted the burden of proof to Miller, the Court also emphasized the district court's other instructions to the jury.

City of Helena v. Kortum, 2003 MT 290. The defendant's refusal to provide a breath sample is competent evidence of his intoxication under Mont. Code Ann. §§ 61-8-401(5) and -404(3). Whether the test was administered in accordance with proper police procedure goes to the weight of the evidence, not its admissibility. The district court did not abuse its discretion when it allowed into evidence the DOT pamphlet entitled "BAC and You," but did not allow defense counsel to use the pamphlet as substantive evidence.

E. INTOXILYZER® FOUNDATION

State v. Jenkins, 2011 MT 287. Overruled State v. White, 2009 MT 26. State need not prove an exception to hearsay rule for the foundational documentation establishing certification of Intoxilyzer®.

State v. Russette, 2002 MT 200. District court properly excluded defense expert's testimony regarding reliability of Intoxilyzer[®] 5000 where defense counsel failed to lay proper foundation, under Mont. R. Evid. 702, establishing that the expert had adequate knowledge upon which to challenge the "fact in issue."

State v. Delaney, 1999 MT 317. After Delaney was arrested for DUI, the Intoxilyzer[®] measured his breath alcohol concentration at .168. Before trial, Delaney moved to exclude the results of the breath test, claiming the State could not provide an adequate foundation regarding the certification of the instrument. The district court accepted the written certification as the proper foundation, over Delaney's objection that the certification had to be admitted as evidence at trial, and had to meet one of the exceptions to the hearsay rule in order to be admitted. On appeal, he claimed the foundation for the breath test result was not met because the certification did not meet the business records exception to hearsay since Phil Lively, the person who performed the certification, was not present to testify as to the correctness of the certification. The Supreme Court held: A district court has the discretion, under Mont. R. Evid. 104(a), to determine whether adequate foundation existed for the admissibility of the proffered evidence, even though the foundation itself may not be admissible. Specifically, the Court held that the district court is authorized "to consider the annual certification form in determining whether an adequate foundation existed for admission of the Intoxilyzer[®] results without regard to whether the form itself was hearsay."

F. PRIOR CRIMES

State v. Bingman, 2002 MT 350. Evidence of defendant's prior DUI convictions were properly admitted after defendant testified on direct examination that he would never operate a motor vehicle after drinking alcohol.

G. COURT'S AUTHORITY TO LIMIT CROSS

State v. Slade, 2008 MT 341. Slade was arrested for DUI and refused to take a breath test. The Court found no abuse of discretion in the district court limiting Slade's cross-examination of the investigating officer and preventing Slade from questioning the officer about the breathalyzer machine and hypothetical results and presumptions.

H. OTHER EXPERT TESTIMONY

State v. Ditton, 2006 MT 235. When a proper foundation is laid, law enforcement officers may testify as experts regarding the cause of an accident and whether the driver was under the influence of alcohol. Whether officers are qualified to distinguish between the symptoms of diabetes and alcohol impairment is a matter for cross-examination. Thus, the jury was properly instructed regarding opinion testimony.

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

State v. Nobach, 2002 MT 91. Officer arriving on scene of a single car accident observed defendant’s bizarre behavior, leading him to believe Defendant was under the influence of drugs or alcohol. Alcohol was ruled out, and a blood test later revealed that Defendant had ingested a combination of prescription drugs. At trial, officer testified about Defendant’s behavior, and was asked to give his opinion about whether Defendant’s ability to safely operate a vehicle would be diminished by his consumption of drugs. Supreme Court held that this calls for an expert opinion, which the officer was not qualified to give (his basic training covered illegal substances, not combined effect of prescription drugs). The error in admitting his testimony was harmless, however, since the State’s pharmacological expert offered the same testimony and was clearly qualified to do so.

❖ **12.8 ELEMENTS OF DUI/ PER SE**

A. INTENT

State v. Weller, 2009 MT 168. At Weller’s trial for DUI, he claimed that he had consumed punch that he had been told was nonalcoholic, but must have been spiked. The district court refused to give his proposed jury instruction stating that intoxication is not a defense “unless the Defendant proves that he did not know it was an intoxicating substance when he consumed or otherwise ingest[ed] the substance causing the condition.” The jury convicted him of DUI. Weller’s proposed instruction was based on Mont. Code Ann. § 45-2-203, which states that intoxication is not a defense, but it may be taken into consideration in determining the existence of a mental state in cases where a mental state is an element of the offense. Because Mont. Code Ann. § 61-8-401(7) provides that DUI is an absolute liability offense, the district court did not abuse its discretion by refusing to give Weller’s request for the involuntary intoxication instruction.

B. UNDER THE INFLUENCE

In re License Suspension of Cybulski, 2008 MT 128. “[A]n experienced officer could infer that Cybulski was driving under the influence from the sheer length of time that Cybulski traveled on the wrong side of the interstate, and her apparent obliviousness to oncoming traffic traveling in the same lane.” Reason to believe she was under the influence was further bolstered “[w]hen this was paired with Cybulski's unusually delayed response to the officer's emergency signals, spotlights, and sirens.” Thus, the officer had particularized suspicion to believe that Cybulski was driving under the influence.

C. WAYS OF THE STATE OPEN TO THE PUBLIC

State v. Sirles, 2010 MT 88. Sufficient evidence existed to prove Defendant was on a way of the state open to the public when he was found parked on a private ranch but was not there fifteen minutes prior and he admitted having driven to the ranch. The court did not address whether the ranch’s driveway was a way of the state open to the public.

State v. Hayes, 2005 MT 148. The Court affirmed the district court’s conclusion that the Caboose parking lot was a “way of this state open to the public.” Hayes challenged the suspension of his driver’s license on the basis that his vehicle was not located on a “way of this state open to the public” when he was arrested. Specifically, he argued, that the Caboose parking lot was not

“adapted and fitted for public travel.” The Court rejected his argument and agreed with the State’s position that, even though the parking lot was in bad shape, it was in common use by members of the public patronizing the Caboose and was also used by flower and Christmas tree vendors.

State v. Krause, 2002 MT 63. In this appeal of a license reinstatement denial, the Court refused to address the issue whether a driveway is a way of this State open to the public because there was ample evidence in the record to support the district court’s conclusion that the Defendant had been driving or was in actual physical control of a vehicle upon a way of this State open to the public.

State v. Schwein, 2000 MT 371. Schwein was arrested for DUI after he was found asleep in the driver’s seat of his car, which was parked in a parking lot between a bar and a business which Schwein owned. The Supreme Court held that the parking lot was a "way of the state open to the public," even though the parking space was in front of Schwein’s own business. In addition, the district court properly denied Schwein’s motion for a mistrial, based upon the court’s reference in its preliminary instructions to the fact that the DUI charge was a felony, because the objection to the reference came too late and Schwein’s own attorney had also referred to the felony nature of the charge.

E. ACTUAL PHYSICAL CONTROL

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

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

developed by judicial interpretation. Further, the offense of driving while under the influence remains a strict liability offense that does not require an intent element.

F. PER SE

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

G. DOUBLE JEOPARDY

State v. Condo, 2008 MT 114. Condo was drinking in a Butte bar with his brother and stepfather. After leaving the bar, Condo backed his car out of a parking spot and accidentally struck his stepfather. Condo was charged with several misdemeanors in city court, including DUI. Condo pled guilty to the DUI in city court. Condo was also charged in district court with negligent vehicular assault.

Condo filed a motion to dismiss in district court, arguing that his guilty plea to the DUI in city court prohibited the State from charging him in district court with negligent vehicular assault, as doing so would violate his right against double jeopardy prosecutions. The district court denied the motion.

The Court found no violation of the double jeopardy statute set forth in Mont. Code Ann. § 46-11-503. Relying on State ex. Rel Booth v. Mont. Twenty-First Judicial Dist. Court, 1998 MT 344, 292 Mont. 371, 972 P.2d 325, the Court concluded that the offenses of DUI and Negligent

Vehicular Assault did not arise from the “same transaction” because they do not share the same purpose, motivation, and criminal objective.

The Court declined to address Condo’s double jeopardy claim under Mont. Const. Art. II, § 25, because Condo failed to support his argument with any relevant authority or legal analysis.

H. VOLITIONAL ACT

City of Missoula v. Paffhausen, 2012 MT 265. An element of every crime is a voluntary act, so defendant in DUI case is allowed to assert the affirmative defense of automatism when she claims to have been surreptitiously given the date rape drug.

❖ 12.9 SENTENCING/ FELONY ENHANCEMENTS

A. PRIOR CONVICTIONS

State v. Calvert, 2013 MT 374. Nevada’s 1996 DUI statute, which includes a traditional “under the influence” provision, a greater than 0.10 *per se* provision, and a 0.10 within 2 hours of driving provision, is sufficiently similar to Montana’s 1995 DUI statutes to consider them prior offenses in Montana under Montana Code Annotated Section 61-8-734 (2012). The fact that Nevada allowed for a conviction when the level was measured up to two hours after the driving (Nevada) as opposed to while driving (Montana) “was not significant for purposes of §61-8-734(1)(a). . . .”

State v. Darrah, 2009 MT 96. A youth court’s declaration that the defendant’s first-offense DUI was “expunged” upon completing a drug court program did not justify reducing a subsequent DUI from 3rd offense to 2nd offense. First, the youth court does not have the power to “expunge” a DUI. Second, the State was not “judicially estopped” from relying on the “expunged” conviction, because the prosecutor did not take a position at the drug court graduation that was inconsistent with the use of the DUI in a subsequent proceeding. Finally, the Court noted that “[i]t was Darrah’s own unlawful conduct occurring after the Youth Court proceedings that has caused him detriment. Darrah cannot, as a matter of public policy, claim a judicial estoppel right to reoffend and receive a lesser penalty than the law provides.”

State v. Faber, 2008 MT 368. The Court determined that the district court did not err in relying on a 2001 DUI conviction even though the original justice court record of the conviction could not be

found. Other records of the conviction, the testimony of the JP as to her routine practice to advise DUI suspects of their right to counsel, and evidence that the defendant had waived his right to counsel in a DUI case eight months earlier, sufficiently proved that the 2001 conviction did not violate his rights.

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

State v. McNally, 2002 MT 160. McNally’s Colorado conviction for DWAI (driving while ability impaired) could not be used to enhance his Montana DUI conviction because the statutes defining the offenses are not substantially similar. Colorado’s DWAI statute allows a conviction where the person’s ability to drive is affected to the “slightest degree,” while Montana law does not permit a similar gradation of culpability, overruling Montanye v. State, 262 Mont. 258 (1993).

B. CONSTITUTIONALITY OF PRIOR CONVICTION

State v. Maine, 2011 MT 90, State v. Chaussee, 2011 MT 203. Changed the means by which a defendant must prove a prior invalid conviction:

- (1) a rebuttable presumption of regularity does attach to prior convictions;
- (2) that presumption may be overcome by affirmative (*no longer direct*) evidence (self-serving statements insufficient) of irregularity; and
- (3) The defendant bears the burden of production and the burden of persuasion and must prove the invalidity of the conviction by a preponderance of the evidence (*the burden no longer shifts to the State*).

State v. Sirles, 2010 MT 88. Sirles’ affidavit alleging forms used in Wyoming failed to give him proper notice as required by Montana law prior to accepting a guilty plea was not sufficient to overcome the presumption of validity of his prior conviction.

State v. Robinson, 2009 MT 170. Robinson appealed the denial of his motion to withdraw his guilty plea to felony DUI. Robinson claimed that his prior 1993 DUI conviction was constitutionally infirm and, as a result, his felony DUI conviction should be reversed. The Court rejected Robinson's claim, noting the presumption of regularity that attaches to a prior conviction, and that Robinson failed to present any direct evidence in the district court that his prior conviction was infirm.

State v. Allen, 2009 MT 124. Allen sought to dismiss a felony DUI by challenging a prior DUI conviction. Allen's statement that he cannot recall being advised of his right to counsel prior to pleading guilty to his previous DUI is not direct evidence sufficient to rebut the presumption of regularity of the conviction. Further, one of the city court documents the State presented included the judge's handwritten comments that Allen "waived counsel." The city court judge also checked items on a court form indicating that he advised Allen of his rights and what rights he would waive by pleading guilty. The judge did not check the line of the form for a defendant's request for court-appointed counsel. The Court also rejected Allen's claim that, under Mont. Code Ann. § 41-5-511, he could not waive his right to counsel without his parents' consent; this statute was not applicable because the youth court does not have concurrent jurisdiction with the city court over traffic violations, including DUI.

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

C. RESTITUTION

State v. Aragon, 2014 MT 89. Restitution for repairs of damage to a house cause by a DUI driver crash was not supported by a preponderance of the evidence. Two different written estimates- one from a contractor and one from an insurance adjuster- were presented to the court with no testimony or other explanation. Without evidence supporting the additional cost of the higher estimate, the evidence was insufficient to support the higher cost rather than the lower cost.

State v. LaTray, 2000 MT 262. Drunk driver struck another vehicle, then led law enforcement on a high-speed chase, and ended up rolling his car in a ditch. He was transported via ambulance to the hospital and his car was towed. At sentencing, he was ordered to pay restitution to the ambulance and towing companies. On appeal, he claimed the district court lacked the authority to order him to pay restitution to those companies since they allegedly are not "victims." The Supreme Court disagreed, noting the unambiguous language of the statute requires courts to order offender to make full restitution to "any victim of the offense who has sustained pecuniary loss as a result of the offense, including a person suffering an economic loss as a result of the crime." The Court held that the term "any victim" includes the towing and ambulance companies, since they both suffered an economic loss and the expenses were a result of the defendant's criminal conduct.

❖ **12.10 MISCELLANEOUS**

A. TAMPERING WITH EVIDENCE

State v. Peplow, 2001 MT 253. Peplow drove drunk, wrecked his truck on a desolate stretch of road, then walked to a bar and inebriated himself more heavily to thwart the integrity of any sobriety testing. Peplow argued, among other things, that the trial court erred by denying his motion for a directed verdict on the tampering with evidence charge. The Supreme Court held that the trial court had erred because consuming alcohol after a vehicle accident did not constitute tampering with physical evidence; Mont. Code Ann. § 61-8-404 did not contemplate that potentially measurable amounts of alcohol, still within the human body, constituted evidence, and until one's breath or blood had been obtained or collected for analysis, it could not be considered physical evidence, under Mont. Code Ann. § 45-7-207, or a thing presented to the senses, as explained in Mont. Code Ann. § 26-1-101(2). *Note: Mont. Code Ann. §46-5-224 was amended in 2011 to state the level of alcohol in the blood is evidence. While this language was added to clarify the propriety of collection blood pursuant to a warrant under §61-8-402, some prosecutors argue this addresses the issue in Peplow. The supreme court has yet to address a case addressing this argument.*

B. SUSPENDED LICENSE

State v. Bessette, 2008 MT 346. Bessette was charged with driving while suspended. She moved to dismiss the charge based on City of Billings v. Gonzales, 2006 MT 24, 331 Mont. 71, 128 P.3d 1014, arguing that her suspended license had expired six months earlier and she did not have a license at the time of the charge. The Court concluded that the charge was proper, since the suspension of Bessette's license continued indefinitely, even beyond its expiration, until she paid the reinstatement fee required by Mont. Code Ann. § 61-2-107(1). Justices Leaphart, Warner, Rice, and Morris joined the opinion.

State v. Clark, 2000 MT 40. Clark claimed that the district court erred when it denied his motion to dismiss the charge of driving while license suspended or revoked. Under Mont. Code Ann. § 61-2-107(1), a license will remain suspended or revoked until the driver pays a reinstatement fee. Clark never paid the fee and, thus, his license was still revoked.

C. CRIMINAL ENDANGERMENT

State v. Cybulski, 2009 MT 70. Cybulski was convicted of criminal endangerment and DUI after driving her vehicle nearly 50 miles on the wrong side of the interstate, from Glendive to Miles City. There was sufficient evidence to prove Cybulski had acted knowingly where a rational juror could have concluded beyond a reasonable doubt that either she was aware of her conduct and the risk it was creating, or she was unaware solely because of her intoxicated condition. Some of the factors the Court noted were the length of time she drove on the wrong side of the interstate, her apparent obliviousness to oncoming traffic in the same lane, her unusually delayed response to the officer's emergency signals, spotlights, and sirens. Additionally, Cybulski was familiar with that stretch of interstate, having driven it many times, and there were numerous indicators that she was traveling in the wrong lane, including billboards and highway signs facing the wrong way; vehicles approaching and swerving from her lane of travel; and the flashing lights and honking by approaching vehicles.

D. NEGLIGENT HOMICIDE

State v. Schipman, 2000 MT 102. A jury convicted the defendant of negligent homicide and negligent endangerment. In the dark, rainy hours of an early morning, the defendant was driving home from a bar, where he admittedly had been drinking. He hit a horse, but rather than stopping to determine the location of the horse, he continued home because he was afraid of being arrested

for a DUI. Another citizen had seen the horse running loose just prior to the defendant's hitting it and went to notify law enforcement. Upon his return, he found the horse dead in the roadway. This citizen, along with another passerby, put on hazard lights to warn oncoming traffic. Two young women were on their way home when they saw these two men waving their arms and yelling. The women were frightened, chose not to stop, hit the dead horse, and the passenger died from the resulting injuries. On appeal, the defendant argued there was insufficient evidence to convict him of negligent homicide because his conduct of leaving the scene after hitting the horse did not cause the death of the passenger in the other vehicle. The Court was persuaded by the defendant's version of the facts, even though the State's evidence contradicted his version, and concluded that although the defendant did not stop at the scene of the accident, others did. Those who stopped made reasonable efforts to warn oncoming motorists that a hazard existed on the road. According to the majority, had the defendant stopped he could not have done more. Thus, the majority concludes, without citing a standard of review, that the State failed to prove that the defendant caused the death of the victim.

E. CONSPIRACY TO OBSTRUCT JUSTICE

State v. Fey, 2000 MT 211. Fey's drunk driving resulted in a roll-over crash on a dirt road that killed one of his passengers. Before Fey ran for help, he instructed his buddy to hide the beer and whiskey. He was charged with and convicted of (among other things) conspiracy to obstruct justice. On appeal, he claimed there was insufficient evidence to corroborate the testimony of the accomplice (Fey's buddy) who hid the booze out in the field. However, a few days after the crash, Fey returned to the crash site and walked into the field where the booze had been discovered. He claimed he "saw something out there and it looked interesting," but the State contended he was really looking for the booze to dispose of for good. The Supreme Court held that this evidence, while possibly consistent with innocent conduct, was sufficient since it was up to the jury to weigh the evidence and determine the credibility of the witnesses.

F. INEFFECTIVE COUNSEL

State v. Gieser, 2011 MT. 2. Ineffective assistance of defense counsel existed when no objection was made to the lack of foundation for either 1) testimony about the correlation between intoxication and HGN or 2) reliability of preliminary alcohol screening test instrument.

G. JURY INSTRUCTIONS

State v. Shegrud, 2014 MT 63. Defendant drove with his five-year-old daughter in his truck. He appeared intoxicated and admitted he drank alcohol and took oxycodone. The court found he was entitled to a lesser included jury instruction of negligent endangerment in his criminal endangerment case. “A defendant is entitled to a lesser included offense instruction if two criteria are met: (1) the offense is a lesser included offense as defined by § 46-1-202(9), MCA; and (2) there is sufficient evidence to support an instruction on the lesser included offense.” There is sufficient evidence to support a lesser instruction if “the jury, based on the evidence, could be warranted in finding the defendant guilty of a lesser included offense.” Citation omitted. The court found (1) negligent endangerment is a lesser included offense of criminal endangerment, and (2) the jury could have inferred the lower mental state (negligence) from the fact that the defendant drank two tall boys and consumed oxycodone.

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APPENDICES

I. DUI Predicate Questions

Arresting Officer

Breath Test Operator

Breath Test Specialist/Senior Operator Certification

Toxicologist

Chemist

Blood – Arresting Officer

Blood draw – Phlebotomist

Blood – Toxicologist

DRE Officer (abbreviated version)

DUI/DRE Predicates (extended version)_

II. *Understanding gaze nystagmus*Drs. Karl Citek and Robert L. Yolton, PhD, OD

**III. *Liquor Violation Codes* Montana Department of Revenue,
Liquor Control Division, Liquor Education**