

***State v. Seiffert*, 2010 MT 169, 357 Mont. 188, 237 P.3d 669 (Carbon). Affirmed; Leaphart, J.** Seiffert challenged his DUI conviction, alleging a Brady violation. Prior to his one-vehicle accident and arrest for DUI, Seiffert had been at the Silver Strike Casino. As part of the investigation, the investigating officer located a closed circuit television (CCTV) recording at the casino which showed Seiffert gambling and walking within the casino over the course of an hour immediately preceding the accident. The officer never took possession of the CCTV recording. The officer and casino owner later testified that there was no evidence on CCTV recording that Seiffert was intoxicated. Over three months later, Seiffert attempted to obtain a copy of the CCTV recording, but it had been erased.

Seiffert argued that since the State knew the CCTV recording would be erased, the State's failure to timely inform him of its existence was a Brady violation. The Court disagreed. First, the Court concluded that if Seiffert had exercised reasonable diligence he could have gone to the casino and requested to view the CCTV recording himself. Second, the Court concluded that Seiffert "failed to establish that the State suppressed CCTV recording or that had it been disclosed, a reasonable probability exists that the outcome of the proceeding would have been different."

***State v. Christiansen*, 2010 MT 197, 357 Mont. 379, 239 P.3d 949 (Hill). Reversed; Wheat, J.** The Court reversed Christiansen's conviction for felony DUI because of an erroneous jury instruction, and remanded for a new trial. The district court, apparently concerned that the pattern jury instruction for "actual physical control" was confusing in the context of a defendant who was found asleep at the wheel of a parked vehicle, gave the following instruction: "The Defendant is in actual physical control of a motor vehicle if the Defendant . . . has an existing or present bodily function that exercises a restraint or directs influence, domination, or regulation of a vehicle." The Court found that this instruction "did not clearly state the law" and confused the jury, which had asked for clarification during deliberations. The Court reaffirmed the Model Criminal Jury Instruction, which states that an individual is in "actual physical control" if he or she is "in a position to, and has the ability to operate the vehicle in question."

***State v. Allen*, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045 (Hill) (Oral Argument). Reversed and remanded; Leaphart, J.** The Court reversed Allen's convictions for assault with a weapon and criminal endangerment. The Court addressed three issues and remanded for further proceedings. The Court was unanimous on issues 1 and 3. On issue 2, Justice Nelson concurred and Justice Rice dissented.

Issue 1 - Voir Dire Challenge for Cause:

The Court held that a prospective juror's comments that he had made up his mind about the case, that he was a "law and order" person, and that he would be partial to the

officers' testimony, combined with his unwillingness to consider all the evidence before making up his mind, raised serious doubts about the prospective juror's ability to be fair and impartial.

The Court emphasized that spontaneous and unprompted statements are the most meaningful when evaluating whether a juror can be impartial. The Court also stated that open-ended questions are appropriate to clarify suspect statements, but "coaxed recantations" in response to leading questions are insufficient to show impartiality.

Issue 2 - Electronic Monitoring of Cell Phone Conversations:

Though recognizing that 30 years of precedent condoned warrantless participant recording of telephone conversations, the Court found its "existing precedent on the dispositive issue wanting." Thus, the Court addressed the issue anew and extended Goetz to telephone conversations.

A. Allen had a subjective expectation of privacy

The Court concluded that "Allen had a subjective expectation of privacy that the conversation was not being surreptitiously recorded by a police informant." ¶ 49. Allen testified that he believed the conversation was private, that he didn't know it was being recorded, and that he didn't think it was being overheard on a speaker phone or extension line. The Court also focused on the "degree of public exposure" and stated that, because it was a telephone conversation, half of the conversation was inaudible and thus would be "poorly intelligible, at best," to an outside listener. Additionally, because Allen was moving while having the conversation, it was highly unlikely that an outside listener would learn any intelligible information from hearing a "passing snippet." The Court further explained that when other people were around, Allen limited his words to "innocuous platitudes" and did not discuss topics relating to the assault.

B. Society is willing to Accept Allen's subjective expectations as reasonable

The Court overruled its precedent and held that "society is willing to recognize as reasonable the expectation that private cell-phone conversations are not being surreptitiously monitored and recorded by government agents." ¶ 57. The Court stated that, though Goetz's holding was limited to the facts of that case, the rationale in Goetz was "in no way limited to face-to-face conversations and logically extends to telephone conversations, as here, where one party maintains a subjective expectation of privacy." ¶ 53. Thus, the Court held that the recording of the conversation by the CI constituted a search.

C. Nature of the State's Intrusion

Following the Goetz Court's interpretation of the consent exception, the Court held that the exception did not apply. The Court reasoned that "even though Allen was available to consent (or object) to the recording of the conversation, police did not give him the opportunity to do so." Thus, the exception did not apply. There was no search warrant,

and the State did not argue another exception; therefore, the search was unreasonable and violated Allen's constitutional rights.

Issue 3 - Accomplice Jury Instruction:

An accomplice instruction should be given in "all proper occasions." The Court stated that the instruction is proper when (1) an accomplice gives direct testimony; (2) the defendant requests an accomplice instruction; and (3) the instruction is not inconsistent with the Defendant's claim of innocence.

Regarding the 1st factor, whether a person is an accomplice is a jury question, unless it is undisputed. The Court determined there was "ample" evidence available for the jury to determine the CI was an accomplice. Further, Allen requested the instruction, and the instruction was not inconsistent with his innocence claim (he admitted assaulting the victim, but denied using a weapon). Allen is entitled to the instruction on remand.

Justice Nelson concurring: In a 47-page concurrence, Justice Nelson set forth his views on privacy and search and seizure. Among his comments: In addition to suppressing the recordings, he would also suppress the testimony of the CI. Additionally, after reconsidering Montana's search and seizure jurisprudence, Justice Nelson would abandon the Katz test as a tool for determining whether a search occurred, and instead view any government conduct that is "designed to find, extract, acquire, or recover evidence" as a search. If the search implicated an individual's person, papers, homes, or effects, a warrant or warrant exception would be required.

Justice Rice dissenting: Justice Rice concluded that Allen had no intent to have a private conversation with the CI because "what a person knowingly exposes to the public is not protected." Rice faulted the majority for ignoring U.S. Supreme Court precedent; overruling long-standing, well-established Montana precedent; and disregarding the "clearly expressed intentions" of the delegates to the Montana Constitutional Convention. Justice Rice noted that the majority faults earlier decisions of the Court for "analytical shortcomings," and then overturns them "on the notion that the current Court has discerned the correct meaning of the Montana Constitution."

***State v. Reichmand*, 2010 MT 228, 358 Mont. 68, 243 P.3d 423 (Butte-Silver Bow). Reversed; Leaphart, J.** The Court reversed the drug distribution convictions of Dallas Reichmand, applying State v. Goetz retroactively to the direct appeal. Reichmand sold drugs on two occasions to an informant who had been equipped with a warrantless body wire. Reichmand did not move to suppress the recordings of the transactions, and they were played at trial. Five months after the trial but before sentencing, Goetz was decided, and Reichmand moved to set aside the jury verdict. The district court denied the motion based on State v. Foster-DeBerry, 2008 MT 397, ___ Mont. ___, ___ P.3d ___, which

held that a defendant is not entitled to the retroactive application of Goetz's new rule unless he is "similarly situated" by having raised the issue in the trial court and preserving it for appeal. The Supreme Court overruled Foster-DeBerry and a similar case, State v. Foston, 2009 MT 191, ___ Mont. ___, ___ P.3d ___, and extended Goetz retroactivity to all cases pending on direct review or not yet final, regardless of whether the defendant made a Goetz objection below. The Supreme Court further concluded that the error was not harmless, since the State failed to demonstrate there was no reasonable possibility that the recordings might have contributed to the defendant's conviction.

Chief Justice McGrath, joined by Justice Nelson, filed a concurring opinion stating his view that Reichmand's Goetz issue could be noticed on appeal under Mont. Code Ann. § 46-20-701(2)(a). Justice Rice filed a dissenting opinion, objecting to the Court's review of the retroactivity issue in the absence of the defendant's preservation of the Goetz issue at trial.

***State v. Yuhas*, 2010 MT 223, 358 Mont. 27, 243 P.3d 409 (Broadwater). Affirmed; Wheat, J.**

Sufficiency of the Evidence Stalking

A city court jury convicted Yuhas of stalking. Yuhas appealed to district court. Following a bench trial, the court found Yuhas guilty. There is sufficient evidence to sustain Yuhas's stalking conviction. The actual notice Yuhas received in a no contact letter constitutes prima facie evidence that Yuhas acted purposely or knowingly when he appeared at a homecoming bonfire and two high school football practices, stood near and watched the victim. The record contains sufficient evidence that the victim, a high school student, suffered substantial emotional distress as a result of Yuhas's presence at his football practices and the homecoming bonfire. The victim described himself as being "really scared and intimidated" after Yuhas appeared at his football practices and homecoming bonfire. In addition, others who knew the victim described him as being beside himself, upset, slightly panicked and distraught. A stalking victim need not have exhibited physical symptoms or experienced substantial changes in his life to establish substantial distress. The victim's distress was reasonable because he knew Yuhas was not supposed to contact him. There was also sufficient evidence in the record that Yuhas repeatedly watched the victim in order to intimidate and/or harass him and the victim felt intimidated or harassed.

***State v. Ankeny*, 2010 MT 224, 358 Mont. 32, 243 P.3d 391 (Deer Lodge). Affirmed; Nelson, J.** The Court affirmed Ankeny's conviction for felony partner and family member assault (PFMA). The Court concluded that there was sufficient evidence presented to prove that Ankeny and his victim (Carter) were "partners"; that the District

Court correctly admitted expert testimony that domestic violence victims often recant; and that Ankeny's IAC claims were either conceded or not record-based.

Sufficiency of the Evidence--Despite the testimony of Ankeny and Carter that the night in question was their "first date," the evidence showed that there was a longer relationship between the two than just one date and the jury could infer that their relationship was more than likely "intimate." Among other evidence, Carter referred to Ankeny as her "boyfriend" and admitted they had been seeing each other for about a month. Thus, there was evidence satisfying the statutory definition of "partner," in relevant part meaning "persons who have been or are currently in a *dating or ongoing intimate relationship* with a person of the opposite sex." Given the plain meaning of these terms the Court did not apply other means of interpreting the statute, such as the out-of-state court cases suggested by Ankeny. The terms of the statute were not ambiguous, obscure, or incomprehensible, but were terms of common usage and readily understood by a reasonable person of average intelligence.

Expert Testimony--The State filed a notice of expert testimony on domestic violence issues. Ankeny filed a motion in limine to exclude the testimony on three grounds, which the District Court denied. At trial, the State called Joe Thompson, a social worker, who was qualified as an expert without objection by Ankeny. Thompson testified that, in general, it was not unusual for domestic violence victims to recant allegations of abuse. Thompson was not asked to offer any opinion or testimony relative to the facts or parties involved in this case.

Despite considering the arguments Ankeny made in his motion in limine (which he did not expressly raise on appeal), the Court concluded the expert testimony was properly admitted, because the State presented sufficient foundational evidence for the expert testimony under Stringer and the testimony was not offered to bolster or comment on Carter's credibility. The testimony simply provided the jury with an explanation for the inconsistencies in Carter's testimony. In addition, Carter's inconsistent statements (allegedly the basis for the expert opinion) were not hearsay because she testified at trial subject to cross-examination, and Ankeny did not object to Thompson's qualifications as an expert.

Ineffective Assistance of Counsel-- Ankeny complained that his trial counsel failed to object to the admission of hearsay statements allegedly made by Carter to her ex-boyfriend; the admission of 9-1-1 tapes of the calls made by the ex-boyfriend; and the prosecutor's alleged references in closing argument to a belief in Ankeny's guilt. As to the first point, Ankeny conceded (at trial and in his Reply Brief) that Carter's statements to the ex-boyfriend were not hearsay because they were prior inconsistent statements. Regarding the other IAC claims, the Court concluded the record contained no information on whether the failure to object was reasonable under the circumstances or

due to deficient performance. Therefore, the Court dismissed them without prejudice to being raised in a postconviction proceeding.

***State v. Spotted Eagle*, 2010 MT 222, 358 Mont. 22, 243 P.3d 402 (Hill). Reversed; Wheat, J.** Where the Information only charged defendant with a PFMA based on “bodily injury,” the jury instructions the State offered during trial on a PFMA based on “reasonable apprehension of bodily injury” effectuated a time-barred substantive amendment of the charge, causing prejudice to the defendant’s substantial rights and requiring a new trial.

The Information generally cited Mont. Code Ann. § 45-5-206 (PFMA) but expressly asserted Spotted Eagle “caused bodily injury to his partner” which falls under subsection (1)(a) of § 45-5-206. No subsection was cited. The affidavit attached to the Information, however, spelled out facts later proven at trial that Spotted Eagle both struck his common law wife on the left side of her face, and immediately afterward, she ran from him. Spotted Eagle’s trial defense was that he made no assaultive behavior toward his wife at any time and that her injuries happened somewhere else. After both sides rested, and over defense objection, the district court gave two supplemental jury instructions offered by the State on the reasonable apprehension of bodily injury under subsection (1)(c) of the statute. The trial court stated the instructions constituted a permissible amendment of the original information as to form, not substance. The instructions went to the same charge involving “the same victim, the same date, the same set of circumstances, [and] the same facts that came about.”

The Court found the instructions changed the essential elements of the charge, replacing bodily injury with reasonable apprehension of bodily injury. The court reasoned that the State, having chosen to charge Spotted Eagle under subsection (1)(a) (bodily injury), by the plain language used in the Information, despite not specifically citing that subsection, it would elevate form over substance to allow the State to proceed on any theory under that PFMA statute while leaving the defendant guessing. Generally citing § 45-5-206 cannot overcome the specific language the State chose when charging Spotted Eagle.

***Weer v. State*, 2010 MT 232, 358 Mont. 130, 244 P.3d 311 (Missoula). Affirmed; Cotter, J.** Particularized suspicion for a DUI investigative stop existed where the officer testified he saw Weer twice swerve within his own lane in a short distance and then drive onto (but not over) the double-yellow centerline on a two-lane highway.

The Court affirmed the denial of Weer’s petition for reinstatement of his driver’s license. The court distinguished *State v. Lafferty*, 1998 MT 247, 291 Mont. 157, 967 P.2d 363, and *Morris v. State*, 2001 MT 13, 304 Mont. 114, 18 P.3d 1003. Unlike Lafferty, Weer did not testify he saw the officer drive up behind him, and contrary to *Morris*, Weer did

not testify the road was rutted. In fact, Weer proffered no explanation of his driving behavior. Unlike the patrolman in Lafferty, the officer here testified that weaving in the driver's own lane on a straight road is an indicator that the driver is potentially impaired or distracted, or there is a mechanical problem with the vehicle. The officer also testified that there is a greater probability of impaired drivers on the road during the early morning hours on a Saturday, the time of the stop at issue here. Lastly, the officer's testimony, corroborated by his dashboard video, supported his concern that Weer might collide with another vehicle and potentially hurt himself or somebody else.

***State v. Hafner*, 2010 MT 233, 358 Mont. 137, 243 P.3d 435 (Missoula). Affirmed; Cotter, J.** Overt objective evidence of intoxication can provide probable cause to arrest a suspect for DUI even where an officer conducts no standard field sobriety test (SFST).

Hafner on appeal contended that without SFSTs no probable cause for his arrest existed. The Court disagreed. Sufficient objective facts supported probable cause regardless of such tests. In so holding, the court restated its rule from a line of cases, exemplified by Missoula v. Forest, 236 Mont. 129, 769 P.2d 699 (1989), that SFSTs are tools and the absence of such tests do not "fatally flaw the probable cause determination." See Hafner, ¶ 16 (quoting Forest).

On appeal, the State urged the Court to go further. Absent SFSTs are immaterial to probable cause determinations. Those determinations, by necessity and law, involve fact-bound threshold determinations of relevant data presented before arrest, not data potentially knowable but yet discovered. The court did not directly address this argument. Instead, the court opted to "urge officers to conduct such field tests as are possible and appropriate prior to arrest." Id. at ¶ 19.

***State v. Schubert*, 2010 MT 255, 358 Mont. 286, 244 P.3d 748 (Gallatin). Affirmed; Rice, J.** The Court held that the probable cause required to support a citizen's arrest may be based, in part, on reliable third party information.

At approximately 2 a.m., Shirley, a road construction flagger, received a radio call from Amanda, another flagger, that a possible drunk driver was heading in Shirley's direction. Several minutes later, Shirley observed a vehicle coming toward her swerving from lane to lane. The vehicle matched the description provided by Amanda. Shirley flagged the vehicle down and asked the driver to pull to the side of the road. After pleading guilty to DUI, the driver appealed and challenged the lawfulness of his arrest.

Assuming, for the sake of argument, that a citizen's arrest had occurred, the Court analyzed whether probable cause supported the arrest. After considering prior case law involving arrests by out-of-jurisdiction law enforcement officers as well as legislative

changes to the citizen's arrest statute, the Court concluded that it was consistent with general probable cause principles to consider third-party information from a reliable source.

The Court stated that, though it could "easily conceive of circumstances where a citizen's arrest based upon third party information would lack probable cause," it could not conclude that the district court erred, as a matter of law, when it concluded that the report of a citizen informant could be considered when determining whether a private citizen's arrest was supported by probable cause.

***State v. Dethman*, 2010 MT 268, 358 Mont. 384, 245 P.3d 30 (Powell). Affirmed; Cotter, J.**

Right to Counsel. The district court did not abuse its discretion when it denied Dethman's motion for substitution of counsel and allowed him to proceed pro se. The district court had conducted an adequate initial inquiry into Dethman's complaints about his public defender, and, relying in part on the court's own knowledge of defense counsel's performance, properly found no reason for substitution. "So long as appointed counsel is rendering effective assistance, a defendant may not demand dismissal or substitution simply because he or she lacks confidence in, or does not approve of, his or her appointed counsel." Dethman therefore had two choices--continuing with current counsel, or proceeding pro se. He could not refuse to cooperate with counsel, and, at the same time, argue that he was being forced to represent himself. Here, the record shows that Dethman "unequivocally, knowingly, and voluntarily" chose to represent himself. In addition, the public defender was assigned as standby counsel, and "[a]t no point in Dethman's case was he without the benefit of counsel whenever he chose to utilize it."

Instructions. The Court declined to conduct plain error review of the pattern jury instructions establishing the elements of the crime of assault on a peace officer. Dethman had argued on appeal that the instructions were erroneous because they failed to state specifically that a finding was required that the defendant knew the victim was a peace officer.

***State v. Gieser*, 2011 MT 2, 359 Mont. 95, ___ P.3d ___ (Gallatin). Reversed; McGrath, C. J.** A jury convicted Gieser of DUI. At trial, defense counsel did not object to the arresting officer's testimony that Gieser's BAC as tested on an un-certified PBT apparatus was .182. Defense counsel also did not object to the arresting officer's testimony about the administration and results of the HGN test. The prosecution did not offer any expert testimony demonstrating the scientific reliability of HGN test results. On appeal, the State conceded ineffectiveness but argued that Gieser was not prejudiced given other considerable evidence of DUI. The Supreme Court held that defense counsel

provided ineffective assistance and that Gieser was prejudiced because it was reasonably probable that he would not have been convicted absent his counsel's ineffectiveness.

***State v. Larson*, 2010 MT 236, 358 Mont. 156, 243 P.3d 1130 (Missoula). Affirmed; McGrath, C. J.** Trial testimony that a defendant's driving was impaired due to marijuana consumption is an expert opinion that requires an adequate foundation under Mont. R. Evid. 702.

This case slightly expands the holding in State v. Nobach, 2002 MT 91, ¶¶ 8-22, 309 Mont. 342, 46 P.3d 618 (declaring testimony by police officer regarding the effect of prescription drugs on a motorist's ability to drive safely was expert testimony that required proper foundation). Here, the Court decided that the trial court erroneously admitted expert opinions by two police officers at Larson's trial for driving under the influence of alcohol and/or drugs. Pursuant to Mont. R. Evid. 701, the two officers could have testified about their personal observations that Larson's driving was impaired. But, additional testimony that Larson's driving was impaired by marijuana invoked the foundational requirements of Mont. R. Evid. 702. "Time may come where the average lay person will be able to opine as to the effects of marijuana consumption on motor vehicle operation, but for now the reasoning of Nobach is sound." Op. at ¶ 41.

The court concluded the error was harmless since other, competent corroborative evidence from the officers about Larson's "clear lack of judgment" demonstrated his marijuana-impaired driving. Larson drove while screeching his truck tires and revving his engine continuously through a downtown Missoula intersection directly in front of where the officers had already stopped their two patrol vehicles with activated light bars while conducting a traffic stop of another motorist. After the officers stopped Larson, he emanated a marijuana odor, had bloodshot and glassy eyes, slow and slurred speech, showed a delayed reaction time, voluntarily produced a pipe and marijuana, and then admitted to smoking marijuana just before being stopped.

***In re S.F.*, 2010 MT 244, 358 Mont. 185, 244 P.3d 316 (Lake). Affirmed; Cotter, J.** Held: A perpetrator's knowing, unauthorized possession of an automobile that deprives the rightful owner of the property for a significant time is sufficient proof of theft even if during the unauthorized possession the automobile afterward sustained unintentional damage.

Defendant was present when the co-defendant snuck into the victims' house and stole keys to a van. Defendant and co-defendant then drove the van around for several hours before the co-defendant fell asleep and drove the van into a tree, totaling the vehicle. The State charged defendant with burglary and felony theft but not theft by accountability. On appeal, defendant claimed he could not have committed felony theft in violation of Mont. Code Ann. § 45-6-301(1)(a) because that statute contemplates an "actual taking"

rather than mere possession of stolen property. Defendant emphasized he did not take the van keys, did not drive away with the van, did not drive the van at all except for a few minutes, and certainly did not drive the van into the tree. The Supreme Court found that defendant knowingly participated in taking the victims' van, knew the van did not belong to him or his accomplice, and knew the accomplice obtained the keys. They both left the residence in the van, and defendant knew that during their possession of the van, the rightful owners did not have possession of or use of their van, thereby depriving the owners of their property. Sufficient proof showed defendant's guilt, and he was jointly and severally liable for full restitution for damage to the van.

***State v. Murray*, 2011 MT 10, 359 Mont. 123, ___ P.3d ___ (Jefferson). Affirmed in part and reversed in part; Wheat, J.** The Court affirmed the District Court's denial of Murray's motion to suppress evidence of DUI, and reversed and remanded to correct the concededly illegal sentence for driving without liability insurance.

Illegal Sentence--Concession. The State conceded--and the Court ordered--that remand was appropriate to give the District Court the opportunity to correct the illegal provision in Murray's sentence as to his conviction for misdemeanor driving without liability insurance. The statute provides for "imprisonment in the county jail for not more than 10 days," but Murray was sentenced to six months.

Probable Cause of Traffic Violation Justified Investigative Stop that Ripened Into DUI Arrest. Although there was no painted center stripe, the officer observed Murray's vehicle driving over the center of the road in violation of the statute requiring that vehicles "must be operated on the right half of the roadway." The officer followed Murray for a short time and, before he could activate overhead lights, Murray turned into a church parking lot and stopped his pickup. The officer pulled in behind Murray, blocking his exit. While he called dispatch, Murray exited the vehicle and started walking his dogs. After first making contact with the passenger, the officer yelled to Murray to return, which he did. The subsequent interaction led to Murray's arrest for DUI.

This Court agreed with the District Court that the officer had probable cause that Murray had committed a traffic offense. Probable cause more than satisfies the particularized suspicion standard justifying the stop of "any person or vehicle" under the statute. The Court concluded that the District Court's findings that the road was of "sufficient width" under the statute--based on the evidence and the judge's independent viewing of the road--and that Murray had violated the statute by driving over the center and on the left half of the road, were not clearly erroneous.

Concurrence--No Constitutional "Seizure." Chief Justice McGrath specially concurred, joined by Justice Nelson. Despite not having been raised, briefed, or decided,

the Concurrence would hold that the “case does not concern a vehicular stop,” rather “the central issue is whether Murray was seized when Officer Cross engaged him in the parking lot.” The Concurrence would hold that Murray was never subjected to a “constitutional seizure,” and suggested a new analysis so as to clarify the Court’s “seizure jurisprudence.”

The Concurrence suggests abandonment of the federal 4th Amendment test (previously adopted in Montana) for whether a person has been “seized.” The test has evolved from Mendenhall (“in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave”) to the more recent, but derivative, statement: whether, in a totality of the circumstances, “the police conduct would ‘have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.’”

The Concurrence criticizes the federal “reasonable person” test, first, for its “problematic built-in contradiction,” inquiring whether a reasonable person would feel free to leave, while inherently recognizing that the reasonable person already feels a level of compulsion to remain--whether out of a sense of cooperation, coercion, or lack of understanding or knowledge that walking away is even an option. Second, for the “impractical and unrealistic” standard it creates, as expressed by a number of jurisdictions.

The Concurrence, therefore, suggests a “clearer standard” that “properly turns on the officer’s objective conduct”--such as the test recently adopted by the Oregon Supreme Court: “Whether an officer’s objective actions restrict, interfere with, or deprive an individual’s liberty or freedom of movement.” State v. Ashbaugh, 244 P.3d 360 (Ore. 2010). They note that Montana has already deviated in some respects from the federal rule in State v. Clayton, 2002 MT 67, 309 Mont. 215, 45 P.3d 30, holding a seizure can occur at the moment an officer displays authority, regardless of the individual’s subjective response to the authority (as would be relevant under the reasonable person test).

Thus, in this case, the Concurrence submits that the officer did not “stop” Murray’s vehicle and the proper focus was whether he seized Murray after the truck was already parked and Murray was out “wandering around” with his dogs. They would hold, under the facts, that no seizure occurred because the officer’s actions did not objectively restrict, interfere with, or deprive Murray’s liberty or freedom of movement--despite blocking Murray’s pickup from exiting the parking lot, the officer only ordered Murray to come back to the pickup, after “ignoring” him for awhile.

***State v. Rodriguez*, 2011 MT 36, ___ Mont. ___, ___ P.3d ___ (Missoula). Affirmed; Cotter, J.** Following his 8th DUI, Rodriguez appealed, challenging the particularized

suspicion for the stop and the deputy's trial testimony on HGN. Regarding HGN, the deputy testified that based on the six HGN indicators, Rodriguez was over the legal limit.

Scope of Appellate Court review in particularized suspicion cases:

Whether particularized suspicion exists is a fact question, which the Court reviews for clear error. The Court rejected Rodriguez's claim that its review was limited to "undisputed facts" and to the trial court's findings of fact. The Court reaffirmed that it examines the *entire record* when reviewing a finding of fact for clear error.

Particularized suspicion

Particularized suspicion does not depend on satisfying a "checklist of factors." The Court noted that it previously had considered relevant the time of day, whether nearby businesses were closed, the vehicle's location, and the behavior of the vehicle's occupants. Here, the deputy saw a vehicle, with its headlights off, rolling slowly through the parking lot of a closed business that contained expensive motorsports inventory. It was late and well after the business had closed. The deputy testified that, in his experience, burglaries of businesses take place at night and that vehicles did not typically park in that parking lot at night. The Court held that these "objective and articulable observations" provided particularized suspicion that Rodriguez was casing the store for a burglary.

HGN expert testimony

A witness must be an expert to testify about HGN testing. Before an officer can testify about HGN results, the State must establish that the officer was properly trained to administer the test and did so in accordance with the training. Further, a Rule 702 hearing is required to determine whether the testimony is admissible. The Court clarified that "an officer may be qualified to testify as to the HGN test administration and results, but may not be qualified to testify as to the scientific basis of the HGN test results without additional foundation laid. . . . These are two separate analyses." ¶ 21.

Rodriguez challenged only the deputy's training and administration of the test; he did not challenge whether the deputy could testify about the scientific basis and the correlation between nystagmus and intoxication. The deputy testified about his MLEA training and advanced operator training, both of which specifically addressed DUI and SFSTs. Additionally, the deputy testified that he previously had been qualified as an expert in justice court and that he investigated roughly two DUIs per week. He testified that he followed the proper procedure when he administered the HGN test. Based on the testimony and the "considerable latitude a district court has when ruling on admissibility of expert testimony," the Court held that the district court did not abuse its discretion in allowing the deputy to testify on HGN.

Nichols v. DOJ, 2011 MT 33, ___ Mont. ___, ___ P.3d ___ (Missoula). Affirmed; Morris, J. During a DUI investigation, Nichols provided a BAC sample on a PAST

device, but she refused to provide a BAC sample on the Intoxilyzer. As a result, DOJ suspended her driver's license. On appeal, Nichols challenged the constitutionality of the implied consent laws. The Court construed Nichols's appeal as seeking a declaratory judgment that the implied consent provisions of MCA §§ 61-8-402 and -409 forced an unconstitutional search or seizure by threatening her with a driver's license suspension.

(1) No unconstitutional search occurred when the officer requested the second BAC test. The Court held that there could not have been a search of Nichols's breath because she refused to provide a breath sample. Further, Nichols could not have suffered a seizure from the "threat" of a license suspension. The Court noted that the *statutory* right of refusal grants even greater protections against self-incrimination than either the United States or Montana Constitution require.

(2) No unconstitutional seizure occurred when officers seized Nichols's driver's license. The Court noted that it repeatedly has rejected constitutional challenges to the related consequence for a breath test refusal--the rebuttable inference of intoxication. The Court stated that driving is a privilege, not a right; those who wish to enjoy the benefits of the driving privilege must also accept the responsibilities, including the implied consent provisions.

(3) The Court rejected Nichols's argument that the implied consent statutes authorize multiple, invasive searches that must be justified with a warrant exception. The Court agreed with DOJ that "the implied consent provisions do not infringe on a fundamental right, that driving is not a right at all, that the statutory right of refusal actually provides greater protections than constitutionally required, and that the implied consent provisions must only pass rational basis review." The Court rejected Nichols's argument that the implied consent provisions function as warrant exceptions.

***State v. Schaff*, 2011 MT 19, ___ Mont. ___, ___ P.3d ___ (Yellowstone). Affirmed; McGrath, C.J.** Officers found Susan Schaff intoxicated and asleep in the front seat of her car, which was parked on a dirt road in West Billings. She said she had been getting some rest and thought she was in Laurel. She was arrested and taken to the police station. She refused BAC testing and invoked her Miranda right to counsel. At trial she testified that she drove to the location where she was found and drank a bottle of wine there because she was trying to escape from a man who was stalking her and was stressed. She was convicted of felony DUI.

On appeal, Schaff claimed that the prosecutor had impermissibly commented upon her post-Miranda silence, in violation of Doyle v. Ohio, 426 U.S. 610 (1976), by asking questions and arguing about the inconsistencies between her statements to the officers and her testimony at trial. The Supreme Court disagreed, finding no Doyle violation where the defendant testifies and the State uses pre-Miranda statements to try to expose

what it believes to be false testimony. The Court determined that the prosecutor's inquiries and comments, viewed in their context, referred only to Schaff's pre-Miranda statements to the officers at the scene and not to Schaff's post-Miranda silence after she was given the Miranda warnings at the police station. The prosecutor emphasized Schaff's story, not her silence after the Miranda advisory, and did not seek to take advantage of that silence to create an inference of guilt.

***State v. Flynn*, 2011 MT 48, __ Mont. __, __ P.3d __ (Gallatin). Affirmed, McGrath, C. J.** An officer stopped Flynn after the officer witnessed Flynn drive over the fog line on a highway three times within half a mile at 1:30 a.m. He was subsequently convicted of DUI.

Particularized Suspicion: Flynn argued that his driving did not establish particularized suspicion to justify the stop, relying on State v. Lafferty, 1998 MT 247, __ Mont. __, __ P.3d __ and Morris v. City of Great Falls, 2001 MT 13, __ Mont. __, __ P.3d __. The Court noted that Lafferty was distinguishable and did not stand for the rule Flynn proposed. In addition, the Court explained that it would not rely on Lafferty and Morris because both cases are flawed. In both cases, the Court relied, in part, on the justification the defendant gave for his or her driving behavior after the defendant was stopped. The Court explained that the defendant's subsequent explanation may affect the defendant's ultimate liability, but it does not affect the validity of the stop. Thus, the Court declined to rely on Lafferty and Morris as precedent.

***State v. Baze*, 2011 MT 52, __ Mont. __, __ P.3d __ (Rosebud). Reversed and remanded, Cotter, J.** Baze rolled his car and was transported to the hospital. An officer who responded suspected that Baze was under the influence. Baze refused to provide a breath sample. However, blood was drawn and tested for medical purposes.

Business Record Exception: At the trial, the State relied on a toxicology report indicating that Baze's blood alcohol content was 0.328. The report had been faxed from the Billing Clinic, which had done the testing, to the clinic in Forsyth, where Baze's blood had been drawn. The report was admitted under the business record exception, which provides that a report is admissible if it was made and kept in the regular course of business. There was no testimony from the Billings Clinic regarding the clinic's record keeping practice. However, the district court concluded that the report was admissible because some federal courts have held that a record is "made" by a business if the business takes custody of the record. The Court concluded that the federal rule does not apply in Montana. Instead, the business record exception requires the entity creating the business record, not the entity receiving it, to establish that the record was prepared in the regular course of business. Because there was no evidence regarding the preparation of the report from the Billings Clinic, the district court erred in admitting the report.

***State v. Pearson*, 2011 MT 55, ___ Mont. ___, ___ P.3d ___ (Yellowstone).**

Affirmed; Morris, J. (Nelson, dissenting.) Pearson argued that after being lawfully stopped for a broken tail light, the officers exceeded the scope of the investigatory stop. The Court disagreed, holding the facts obtained after the initial stop for the broken tail light supported the officers' suspicion that Pearson might have weapons or contraband in his car. The Court further held that the officers' suspicion served to enlarge the scope of the traffic stop and justified their additional questioning of Pearson.

The Court held that a search of Pearson's fanny pack was unlawful, but refused to suppress the drugs found in the fanny pack because the drugs would have been inevitably discovered during a later routine inventory search at the detention center. The Court emphasized that prior to the unlawful search of the fanny pack the officers had intended to arrest Pearson for violating his probation based on Pearson having pepper spray in his car.

Justice Nelson filed a dissent on inevitable discovery issue.

***City of Missoula v. Moore*, 2011 MT 61, ___ Mont. ___, ___ P.3d ___ (Missoula)**

Affirmed; Wheat, J. After pleading no contest to DUI per se in municipal court, Moore appealed to the district court, challenging the municipal court's reliance on the 911 transcripts. Moore also challenged particularized suspicion for the stop, which was based on an informant's report (Pratt test).

1) An overly-broad objection or motion in limine is insufficient to preserve issue for appeal.

In the municipal court, Moore made an all-encompassing objection to "any evidence" unknown to the officer when she made the stop. On appeal to the district court, Moore asserted that this broad objection preserved her ability to challenge the municipal court's reliance on the 911 transcripts. The Supreme Court disagreed, holding that an objection that is "very general in nature" will not preserve an objection for appeal. Further, treating the objection as a motion in limine would lead to the same result because motions in limine must be "specific and articulate the grounds for the objection." The Court also noted that Moore had stipulated to the admission of the 911 transcripts in the municipal court and relied on them herself during the hearing.

2) Court found that substantial evidence supported the district court's finding that the 3-part Pratt test had been satisfied. The Court made several observations that are useful in cases involving an informant's report:

* The Court stated that “all information that the citizen informant gives to the dispatcher is relevant” when evaluating particularized suspicion, regardless of whether it is specifically relayed to the officer in the field.

* The Court has never required evidence to be presented that 911 dispatchers are capable of making a particularized suspicion determination; rather, the courts should “look beyond the information” that the investigating officer knows and consider also the information that the dispatcher knows.

* The Court acknowledged that an informant’s report may be based, in part, on what the informant learned from a reliable third party.

* If the first 2 Pratt factors have been satisfied, an officer can corroborate the report by observing innocent behaviors, such as the vehicle’s make, model, color, and direction of travel.

***State v. Finley*, 2011 MT 89, ___Mont.___, ___P.3d___ (Lewis and Clark). Reversed (State appeal); McGrath, C.J.**

John Finley was convicted of PFMA in justice court. The district court reversed the conviction for insufficiency of the evidence. The State appealed. The Montana Supreme Court reversed the district court and held:

1. The State is authorized to appeal from a district court order where the district court, acting as an intermediate appellate court, has set aside a guilty verdict entered by a justice court of record.
2. The State’s evidence of the “reasonable apprehension of bodily injury” element of PFMA, which included the 911 recording and the officers’ observations of the victim after the incident, was sufficient to support Finley’s conviction, even though the victim recanted at trial.