AUSTIN KNUDSEN

STATE OF MONTANA

Version 1.0

Montana DUI Quick Reference Manual

CONDENSED LEGAL REFERENCE DESK BOOK

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DEPARTMENT OF JUSTICE

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Dear Prosecutor,

Montana DUI laws are unique; the innumerable idiosyncrasies may draw a prosecutor down any number of legal rabbit holes. What five "magic" documents must a prosecutor submit to the court prior to admission of a simple breath test result? Why those five? Why does admission of the most fundamental piece of DUI evidence, a breath test, require such a delicate and convoluted evidentiary process?[1]

Sometimes, for the sake of sanity, it's necessary to merely identify the rule, rather than the reason. Hence, this quick reference manual. This is not intended to replace diligent legal research. Rather, this quick reference offers fast answers for the harried line prosecutor, when their inbox is overflowing, deadlines approach, and a patrol officer is on hold awaiting their advice. Full legal analyses, prosecution strategies, and presentation techniques will be included in a future rewrite of the Montana DUI Manual. In the meantime, may this quick reference aid you in your pursuit of justice.

Sincerely,

Ed Hirsch
Montana Traffic Safety Resource Prosecutor (TSRP)
Assistant Montana Attorney General
Prosecution Services Bureau

[1] The requirements come from multiple administrative rules, including A.R.M. §§ 23.4.213-4, & 218.

Notes for Use:

- This is a "living document" and will be frequently updated on the Montana TSRP website. See the Changelog for legal updates.
- The Montana Legislature substantially re-wrote Montana's DUI laws in 2021. These changes took effect January 1, 2022.
- Many case citations reference the pre-2022 statutes. Due to the substantive similarities, it is generally assumed the pre-2022 caselaw will persist until or unless overruled. Such decisions will be noted and added if or when they occur.
- Internal citations omitted.
- Areas of unsettled law will be labeled.

Changelog:

This space left intentionally blank for documenting future legal updates.

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DUI Offenses, Elements:

Citation(s): Mont. Code Ann. §§ 61-8-1002(1)(a)(b)(c)(d) or (e).

"Driving Under the Influence" is the technical name for the five separate offenses within Mont. Code Ann. §§ 61-8-1002(1)(a) through (1)(e). Generally, statutory references to "driving under the influence" apply to all five offenses, unless otherwise stated. The five subsections are informally referred to as: DUI (1)(a), DUI Per Se (1)(b), CDL DUI (1)(c), THC Per Se (1)(d), and Minor DUI (1)(e). Below are the statutory definitions and elements.

- Driving Under the Influence (1)(a), aka DUI
    - Citation(s): Mont. Code Ann. § 61-8-1002(1)(a)
    - A person commits the offense of driving under the influence if the person drives or is in actual physical control of: (a) a vehicle or a commercial motor vehicle upon the ways of this state open to the public while under the influence of alcohol, any drug, or a combination of alcohol and any drug.
    - Elements:

        Defendant
        1. Was [driving] [in actual physical control of] a vehicle;
        2. Upon the ways of this state open to the public, and;
        3. While under the influence of [alcohol][a drug or drugs][any combination of alcohol and/or drugs].

- Driving Under the Influence (1)(b), aka DUI Per Se
    - Citation(s): Mont. Code Ann. § 61-8-1002(1)(b)
    - A person commits the offense of driving under the influence if the person drives or is in actual physical control of: (b) a noncommercial vehicle upon the ways of this state open to the public while the person's alcohol concentration, as shown by analysis of the person's blood, breath, or other bodily substance, is 0.08 or more.
    - Elements:

        Defendant

1. Was [driving] [in actual physical control of] a noncommercial vehicle;
2. Upon the ways of this state open to the public, and;
3. While the alcohol concentration in Defendant's [blood] [breath] [other bodily substance] was 0.08 or more.

- Driving Under the Influence (1)(c), aka CDL DUI
    - Citation(s): Mont. Code Ann. § 61-8-1002(1)(c)
    - A person commits the offense of driving under the influence if the person drives or is in actual physical control of: (c) a commercial motor vehicle within this state while the person's alcohol concentration, as shown by analysis of the person's blood, breath, or other bodily substance, is 0.04 or more.
    - Elements:

      Defendant
      1. Was [driving] [in actual physical control of] a noncommercial vehicle;
      2. Upon the ways of this state open to the public*, and;
      3. While the alcohol concentration in Defendant's [blood] [breath] [other bodily substance] was 0.04 or more.
      *Note – *See* "Ways of this State" vs "Within this State," pg 11.

- Driving Under the Influence (1)(d), aka THC Per Se
    - Citation(s): Mont. Code Ann. § 61-8-1002(1)(d)
    - A person commits the offense of driving under the influence if the person drives or is in actual physical control of: (d) a noncommercial vehicle or commercial motor vehicle within this state while the person's tetrahydrocannabinol level, excluding inactive metabolites, as shown by analysis of the person's blood or other bodily substance, is 5 ng/ml or more.
    - Elements:

      Defendant:
      1. Was [driving] [in actual physical control of] a noncommercial or commercial motor vehicle;

2. Upon the ways of this state open to the public*, and;
3. While the delta-9-tetrahydrocannabinol level, excluding inactive metabolites, in Defendant's [blood] [other bodily substance] was 5 ng/ml or more.
*Note – *See* "Ways of this State" vs "Within this State," pg 11.

- Driving Under the Influence (1)(e), aka Minor DUI[2]
    - Citation(s): Mont. Code Ann. § 61-8-1002(1)(e)
    - A person commits the offense of driving under the influence if the person drives or is in actual physical control of: (e) a vehicle within this state when the person is under 21 years of age at the time of the offense while the person's alcohol concentration, as shown by analysis of the person's blood, breath, or other bodily substance, is 0.02 or more.
    - Elements:

        Defendant:
        1. Was under 21 years of age at the time of the offense;
        2. Was [driving] [in actual physical control of] a vehicle;
        3. Upon the ways of this state open to the public*;
        4. While the alcohol concentration in Defendant's [blood] [breath] [other bodily substance] was 0.02 or more.
        *Note – *See* "Ways of this State" vs "Within this State," pg 11.

[2] Author's Note: It is the author's preference to avoid downplaying potentially lethal behavior by calling it a "Baby" DUI.

"Ways of this State" vs "Within this State" - Unsettled Law:

In short, treat all DUIs as only applicable upon "Ways of this state open to the public" unless you are making a deliberate choice to address the legal issue. This suggestion is given in the interests of simplicity, not because it is the only reasonable interpretation. Whether certain DUIs apply everywhere "within this state" is an unsettled question of law and subject to judicial interpretation, considering the 2021 DUI re-writes.

Per their plain language, DUI (1)(a) and DUI Per Se (1)(b) only apply to violations upon "ways of this state open to the public." Per their plain language, CDL DUI (1)(c), THC Per Se (1)(d), and Minor DUI (1)(e) would seem to apply to violations everywhere "within this state." However, Mont. Code Ann. §§ 61-8-101(2)(b) and (c) muddy the waters. The full analysis, with both sides of this legal question, will be discussed in the Montana DUI Manual. For the purposes of this quick reference, treat all DUI offenses as only applicable upon "ways of this state open to the public" unless you have conducted a thorough analysis of these statutes and are prepared to litigate this issue.

Location Applicability:

- Citation(s): Mont. Code Ann. § 61-8-101
- Full Text:
- **61-8-101. Application -- exceptions.** (1) As used in this chapter, "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.
- (2) The provisions of this chapter relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways except:
    - (a) where a different place is specifically referred to in a given section;
    - (b) the provisions of 61-8-301 and 61-8-1002(1) and (2), with regard to operating a vehicle while under the influence of drugs, apply anywhere within this state;
    - (c) the provisions of 61-8-301 and 61-8-1002, except under the influence of a dangerous drug and 61-8-1002(2), with regard to

operating a vehicle while under the influence of alcohol, apply upon all ways of this state open to the public.

- (3) The operation of motor vehicles directly across the public roads and highways of this state, especially as required in the transportation of natural resource products, including agricultural products and livestock, shall not be considered to be the operation of such vehicles on the public roads and highways of this state or on ways of this state open to the public, provided that such crossings are adequately marked with warning signs or devices. Such crossings are subject to provisions relating to stopping before entry and to restoration of any damage as may reasonably be prescribed by the state or local agency in control of safety of operation of the public highway involved.

Penalty Enhancements:

Citation(s): Mont. Code Ann. § 46-1-401.

This issue has not gone before the Montana Supreme Court, but the plain language of the 2021 statutes strongly suggests we should be treating certain DUI conditions as penalty enhancements, which must comply with Mont. Code Ann. § 46-1-401. A full analysis on penalty enhancements will be discussed in the DUI Manual.

A court may not impose a penalty enhancement unless certain procedural requirements are met:

1. The charging document must cite the underlying offense and the penalty enhancement;

And:

2. At trial, the finder of fact (either judge or jury), must make a separate finding beyond a reasonable doubt that the enhancement occurred;

Or

3. A defendant who knowingly and voluntarily pleads guilty may admit to the enhancement.

This requirement does not apply if the enhancing fact is one or more prior convictions for the same or other type of offense. Mont. Code Ann. § 46-1-401(4).

If the enhancement is related to another offense, bifurcation is likely required. *See e.g. State v. Zimmerman,* 2018 MT 94, 391 Mont. 210, 417 P.3d 289.

Specific Penalty Enhancements:

Aggravated DUI

Citation(s): Mont. Code Ann. § 61-8-1001(1).

Historically, Aggravated DUI was a standalone offense. This changed with the 2021 DUI re-write, when Aggravated DUI was moved to a "Definitions" statute. It is more accurate to describe Aggravated DUI as a penalty enhancement to violations of subsections of Mont. Code Ann. §§ 61-8-1002(1)(a), (b), (c), or (d), plus the enhancing fact or omission.

- "Aggravated driving under the influence" means a person is in violation of 61-8-1002(1)(a), (1)(b), (1)(c), or (1)(d) and:
  - (a) the person's alcohol concentration, as shown by analysis of the person's blood, breath, or other bodily substance, is 0.16 or more;
  - (b) the person is under the order of a court or the department to equip any motor vehicle the person operates with an approved ignition interlock device;
  - (c)* the person's driver's license or privilege to drive is suspended, cancelled, or revoked as a result of a prior violation of driving under the influence, including a violation of 61-8-1002(1)(a), (1)(b), (1)(c), or (1)(d), an offense that meets the definition of aggravated driving under the influence, or a similar offense under previous laws of this state or the laws of another state; or
  - (d) the person refuses to give a breath sample as required in 61-8-1016 and the person's driver's license or privilege to drive was suspended, cancelled, or revoked under the provisions of an implied consent statute.

*The enhancing fact is the suspension because of a prior conviction. It could be argued this is a fact of a prior conviction, in which case the requirements for penalty enhancements may not be required. Unsettled law.

- Suggested Charging Language:

Defendant committed the offense of Driving Under the Influence, [*Specify* – 1st, 2nd, etc.] offense, a [misdemeanor or felony], in violation of Mont. Code Ann. § 61-8-1002(1)[*Specify* - a, b, c, or d], Aggravated, Mont. Code Ann. § 61-8-1001(1)[*Specify* - a, b, c, or d].

DUI w/ Penalty Enhancement for Pending DUI or Prior Agg DUI

Citation(s): Mont. Code Ann. §§ 61-8-1007(1)(c) or (2)(c).

This statute is ambiguously written and subject to wide interpretation. Application of this statute is unsettled law. Proceed with caution.

- If the person has a prior conviction* or pending charge for a violation of driving under the influence, including 61-8-1002(1)(a), (1)(b), (1)(c), or (1)(d), or a similar offense under previous laws of this state or the laws of another state that meets the definition of aggravated driving under the influence in 61-8-1001, the person shall be punished as provided in subsection (4).

*If proceeding under the "prior conviction" fact, it may fall outside the procedural requirements for a penalty enhancement. *See* Mont. Code Ann. § 46-1-401(4).

There are multiple ways to interpret this statute. None have been settled by the Montana Supreme Court. Two are below:

  - Option 1 – If there is a prior or pending Agg DUI only (either in state or out), the penalty is enhanced.
  - Option 2 - Pending Montana DUI or Agg DUI, or prior Agg DUI or Pending Out of State Agg DUI, the penalty is enhanced.

If not stipulated, bifurcation likely required if referencing another offense. *See e.g. State v Zimmerman,* 2018 MT 94, 391 Mont. 210, 417 P.3d 289.

- Suggested Charging Language:

Defendant committed the offense of driving under the influence, [*Specify* – 1st, 2nd, etc.] offense, a [misdemeanor or felony], in violation of Mont. Code Ann. § 61-8-1002(1) [*Specify* – (a), (b), (c), or (d)], with a penalty enhancement for a pending DUI as specified by Mont. Code Ann. § 61-8-1007(1)(c) [or (2)(c), as applicable]

DUI w/ Passenger Under 16

Citation(s): Mont. Code Ann. §§ 61-8-1007(1)(a)(i),(ii), or (iii); 61-8-1007(2)(a)(i), (ii), or (iii); 61-8-1007(4)(a)(i), (ii), or (iii).

First through third offense DUIs have an enhanced penalty if a passenger is under 16 years of age. If the passenger is under 14 years of age, consider whether the facts constitute Child Criminal Endangerment, Mont. Code Ann. § 45-5-628(1)(e).

- "… if one or more passengers under 16 years of age were in the vehicle at the time of the offense, the person shall be punished by…[enhanced penalty]."

- Suggested Charging Language

Defendant committed the offense of driving under the influence, [*Specify* – 1st, 2nd, etc.] offense, a [misdemeanor or felony], in violation of Mont. Code Ann. § 61-8-1002(1) [*Specify* – (a), (b), (c), or (d)], with a penalty enhancement for having a passenger under 16 years of age, as specified by Mont. Code Ann. § 61-8-1007(1)(a)(i) [*Specify* subsection – *e.g.* (a)(i), (ii), or (iii), as applicable].

Other DUI Related Offenses:

Other DUI related offenses will be discussed briefly. These are intended to remind the prosecutor of other possible offenses when making the charging decision.

Misdemeanors:

- Child Seats Required
    - Citations(s): Mont. Code Ann. § 61-9-420
    - Each motor vehicle passenger who is under 6 years of age and weighs less than 60 pounds must be transported and properly restrained in a child safety restraint. The child safety restraint must be appropriate for the height and weight of the child as indicated by manufacturer standards.
    - May be the basis for initiating a traffic stop. Mont. Code Ann. § 61-13-103(3)(b)
    - Penalties found at Mont. Code Ann. § 61-9-423.
    - Penalties may be waived if the appropriate child safety restraint is acquired and presented to the charging peace officer's agency within 7 days of violation. Mont. Code Ann. § 61-9-423.
- Negligent Vehicular Assault *
    - *If suspect causes serious bodily injury this can become a felony. Mont. Code Ann. § 45-5-205(3).
    - Citation(s): Mont. Code Ann. § 45-5-205(1)
    - A person who negligently operates a vehicle, other than a bicycle as defined in Mont. Code Ann. § 61-8-102, while under the influence of alcohol, a dangerous drug, any other drug, or any combination of the three, as provided for in Mont. Code Ann. § 61-8-1002, and who causes bodily injury to another commits the offense of negligent vehicular assault.
    - Elements:

        Defendant

        1. Operated a vehicle other than a bicycle;

        2. While under the influence of [alcohol][a dangerous drug][any other drug][a combination of alcohol or drugs];

3. Defendant's conduct while operating the vehicle was the cause of bodily injury to [the victim], and;
4. Defendant acted negligently.

- Author's Note: If applicable, it is often strategic to charge DUI 2nd or subsequent, rather than Negligent Vehicular Assault, because the minimum and maximum penalties are greater than Negligent Vehicular Assault.
- Author's Note: This is not an absolute liability offense and requires proving the suspect was negligent.

- Operation or Assisting in Starting and Operating Circumventing Ignition Interlock
  - Citation(s): Mont. Code Ann. § 61-8-1024(2) or (3)
  - (2) A person may not knowingly assist a person who is restricted to the use of an ignition interlock device to start and operate the restricted person's vehicle.
    (3) A person may not knowingly circumvent the operation of an ignition interlock device.
  - Exceptions:
    - (5)(a) Safety or mechanical repair of the device or vehicle;
    - (5)(b) The person subject to restriction does not operate the vehicle.

Felonies:

- If serious bodily injury, see Negligent Vehicular Assault.
- Criminal Child Endangerment
    - Citation(s): Mont. Code Ann. § 45-5-628(1)(e)
    - A person commits the offense of criminal child endangerment if the person purposely, knowingly, or negligently causes substantial risk of death or serious bodily injury to a child under 14 years of age by: (e) operating a motor vehicle under the influence of alcohol or dangerous drugs in violation of Mont. Code Ann. § 61-8-1002 or committing aggravated driving under the influence as defined in Mont. Code Ann. § 61-8-1001 with a child in the vehicle.
    - Author's Note: DUI with a passenger under 14 years of age does not automatically constitute this offense. The State must prove the DUI plus the mental state plus substantial risk of death or serious bodily injury to the child. *See State v. Freiburg,* 2018 MT 145, ¶ 15, 391 Mont. 502, 419 P.3d 1234.
- Vehicular Homicide While Under Influence
    - Citation(s): Mont. Code Ann. § 45-5-106
    - A person commits the offense of vehicular homicide while under the influence if the person negligently causes the death of another human being while the person is operating a vehicle in violation of Mont. Code Ann. § 61-8-1002.
    - Author's Note: Law enforcement and prosecutors should be mindful to identify what behavior negligently caused the death. Driving under the influence, without negligent causation, does not constitute this offense. However, depending on the facts and circumstances, driving under the influence may contribute in whole or in part to negligently causing the death. *See e.g. State v Coluccio,* 2009 MT 273, 352 Mont. 122, 214 P.3d 1282 (overruled in part on other grounds).
    - Author's Note: This is not an absolute liability offense.
    - Author's Note: Consider Negligent Homicide as an alternative charge. A blood warrant can be obtained regardless of prior DUI

or refusals, when investigating Negligent Homicide, per *State v Thompson,* 207 Mont. 433, 674 P.2d 1094 (1984). *See also State v. Schauf,* 2009 MT 281, ¶ 20, 352 Mont. 186, 216 P.3d 740.

"Other" Offenses:

The following are not considered "criminal offenses" as they are neither misdemeanors nor felonies.

- Open Alcohol Container
    - Citation(s): Mont. Code Ann. § 61-8-1026(1)
    - Except as provided in subsection (2), a person commits the offense of unlawful possession of an open alcoholic beverage container in or on a motor vehicle if the person knowingly possesses an open alcoholic beverage container within the passenger area of a motor vehicle on a highway.
      (2) This section does not apply to an open alcoholic beverage container:
        (a) in a locked glove compartment or storage compartment;
        (b) in a motor vehicle trunk or luggage compartment or rack, or in a truck bed or cargo compartment;
        (c) behind the last upright seat of a motor vehicle that is not equipped with a trunk;
        (d) in a closed container in the area of a motor vehicle that is not equipped with a trunk and that is not normally occupied by the driver or a passenger; or
        (e) in the immediate possession of a passenger:
          (i) of a bus, taxi, or limousine that is used for the transportation of persons for compensation and that includes the provision of a hired driver; or
          (ii) in the living quarters of a camper, travel trailer, or motor home.
    - This is not a "criminal offense" and may not be recorded or charged against a driver's record. Surcharges may not be imposed. *See* Mont. Code Ann. § 61-8-1026(3)(b).

- Seat Belts Required
    - Citations(s): Mont. Code Ann. § 61-13-103(1)

- A driver may not operate a motor vehicle upon a highway of the state of Montana unless each occupant of a designated seating position is wearing a properly adjusted and fastened seatbelt or, if Mont. Code Ann. § 61-9-420 applies, is properly restrained in a child safety restraint.
- Many exceptions apply.
- May not be basis for stopping a vehicle. Mont. Code Ann. § 61-13-103(3)
- Not a "misdemeanor." Mont. Code Ann. § 61-13-104
- Surcharges do not apply. *Compare* Mont. Code Ann. § 61-8-104 to Mont. Code Ann. §§ 3-1-317, 3-1-318, and 46-18-236.

- Unlawful Possession of Marijuana/Marijuana Paraphernalia.
  - Citation(s): Mont. Code Ann. § 61-8-1027
  - Author's Note: For simplicity, think of this as "Open Container" for Marijuana, per the exception in subsection (2)(a).
  - Except as provided in subsection (2), a person commits the offense of unlawful possession of marijuana, marijuana products, or marijuana paraphernalia in a motor vehicle if the person knowingly possesses marijuana, marijuana products, or marijuana paraphernalia, as those terms are defined in Mont. Code Ann. § 16-12-102, within the passenger area of a motor vehicle on a highway.
    (2) This section does not apply to marijuana, marijuana products, or marijuana paraphernalia:
    (a) purchased from a dispensary and that remains in its unopened, original packaging;
    (b) in a locked glove compartment or storage compartment;
    (c) in a motor vehicle trunk or luggage compartment or in a truck bed or cargo compartment;
    (d) behind the last upright seat of a motor vehicle that is not equipped with a trunk; or
    (e) in a closed container in the area of a motor vehicle that is not equipped with a trunk and that is not normally occupied by the driver or a passenger.

- This is not a "criminal offense" and may not be recorded or charged against a driver's record. Surcharges may not be imposed. *See* Mont. Code Ann. § 61-8-1027(3)(b).

Definitions:

- Actual Physical Control
    - Jury Instruction:
        - "[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." *State v. Hudson*, 2005 MT 142, ¶ 8, 327 Mont. 286, 114 P.3d 210.
    - Totality of Circumstances Analysis:
        - Where in the vehicle the defendant was located;
        - Whether the ignition key was in the vehicle;
        - Whether the engine was running;
        - Where the vehicle was parked & how it got there;
        - Whether the vehicle was disabled;
        - How easily the Defendant could have cured vehicle's disability. *State v Sommers*, 2014 MT 315, ¶¶ 34-37, 374 Mont. 135, 321 P.3d 82.
- Bicycle
    - "Bicycle" means a vehicle propelled solely by human power on which any person may ride, irrespective of the number of wheels, except scooters, wheelchairs, and similar devices. The term includes an electrically assisted bicycle. *See* Mont. Code Ann. § 61-8-102(2)(b)
- Commercial Motor Vehicle
    - Author's Note: Some farm & military exclusions.
    - Mont. Code Ann. § 61-1-101(10):

    (a) "Commercial motor vehicle" means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the vehicle:

    (i) has a gross combination weight rating or a gross combination weight of 26,001 pounds or more, whichever is greater, inclusive of a towed unit with a gross vehicle weight rating of more than 10,000 pounds;

    (ii) has a gross vehicle weight rating or a gross vehicle weight of 26,001 pounds or more, whichever is greater;

(iii) is designed to transport at least 16 passengers, including the driver;

(iv) is a school bus; or

(v) is of any size and is used in the transportation of hazardous materials.

(b) The following vehicles are not commercial motor vehicles:

(i) an authorized emergency vehicle:

(A) equipped with audible and visual signals as required under 61-9-401 and 61-9-402; and

(B) operated when responding to or returning from an emergency call or operated in another official capacity;

(ii) a vehicle:

(A) controlled and operated by a farmer, family member of the farmer, or person employed by the farmer;

(B) used to transport farm products, farm machinery, or farm supplies to or from the farm within Montana within 150 miles of the farm or, if there is a reciprocity agreement with a state adjoining Montana, within 150 miles of the farm, including any area within that perimeter that is in the adjoining state; and

(C) not used to transport goods for compensation or for hire; or

(iii) a vehicle operated for military purposes by active duty military personnel, a member of the military reserves, a member of the national guard on active duty, including personnel on full-time national guard duty, personnel in part-time national guard training, and national guard military technicians, or active duty United States coast guard personnel.

(c) For purposes of this subsection (10):

(i) "farmer" means a person who operates a farm or who is directly involved in the cultivation of land or crops or the raising of livestock owned by or under the direct control of that person;

(ii) "gross combination weight rating" means the value specified by the manufacturer as the loaded weight of a combination or articulated vehicle;
(iii) "gross vehicle weight rating" means the value specified by the manufacturer as the loaded weight of a single vehicle; and
(iv) "school bus" has the meaning provided in 49 CFR 383.5.

- Electrically Assisted Bicycles
    - "Electrically assisted bicycle" means a vehicle on which a person may ride that has two tandem wheels and an electric motor capable of propelling the vehicle and a rider who weighs 170 pounds no faster than 20 miles an hour on a paved, level surface. Mont. Code Ann. § 61-8-102(2)(g)
    - Unsettled law re: Electric Scooters.
- Noncommercial Vehicle
    - "Noncommercial motor vehicle" or "noncommercial vehicle" means any motor vehicle or combination of motor vehicles that is not included in the definition of commercial motor vehicle in Mont. Code Ann. § 61-1-101 and includes but is not limited to the vehicles listed in Mont. Code Ann. § 61-1-101(10)(b). Mont. Code Ann. § 61-8-102(2)(o).
    - Author's Note: Exceptions are the farm/military equipment exceptions to commercial vehicles.
- "Vehicle" as contemplated in DUI
    - Author's Note: Other traffic offenses have different "vehicle" definitions. "Vehicle" is very broad in DUI offenses.
    - "Vehicle" has the meaning provided in 61-1-101, except that the term does not include a bicycle. Mont. Code Ann. § 61-8-1001(15)
        - "Vehicle" means a device in, on, or by which any person or property may be transported or drawn on a public highway, except devices moved by animal power or used exclusively on stationary rails or tracks. Mont. Code Ann. § 61-1-101(91)(a).

        - The term does not include a manually or mechanically propelled wheelchair or other low-powered, mechanically propelled vehicle that is designed specifically for use by a physically disabled person and that is used as a means of mobility for that person. Mont. Code Ann. § 61-1-101(91)(b).

- Under the Influence
    - "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. Mont. Code Ann. § 61-8-1001(14)
- Way of the State
    - As used in this chapter, "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. Mont. Code Ann. § 61-8-101
    - Totality of circumstances analysis.
    - Circumstantial evidence may be sufficient. *See e.g. State v Mooney*, 2006 MT 121, 332 Mont. 249, 137 P.3d 532 (overruled on other grounds).

Inferences and Refusals:

There are several inferences relevant to DUI prosecutions. Prosecutors should always be careful to avoid "burden shifting" or misstating the specific language of inferences.

- Inference Definition:
  - An "inference" is a deduction which the trier of fact may make from the evidence. Mont. Code Ann. § 26-1-501
- Alcohol Concentration Inferences
  - Citation(s): Mont. Code Ann. § 61-8-1002(2)
  - Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person at the time of a test, as shown by analysis of a sample of the person's blood, breath, or other bodily substance drawn or taken within a reasonable time after the alleged act, gives rise to the following inferences:
    - (a) if there was at that time an alcohol concentration of 0.04 or less, it may be inferred that the person was not under the influence of alcohol;
    - (b) if there was at that time an alcohol concentration in excess of 0.04 but less than 0.08, that fact may not give rise to any inference that the person was or was not under the influence of alcohol, but the fact may be considered with other competent evidence in determining the guilt or innocence of the person; and
    - (c) if there was at that time an alcohol concentration of 0.08 or more, it may be inferred that the person was under the influence of alcohol. The inference is rebuttable.
- Refusals:
  - The trier of fact may infer from the refusal that the person was under the influence. The inference is rebuttable. Mont. Code Ann. § 61-8-1018(2).
  - The refusal inference is admissible and does not improperly shift the burden to the Defendant. *State v. Michaud,* 2008 MT 88, ¶¶ 42-55, 342 Mont. 244, 180 P.3d 636.

    - Subsequent consent does not cure a prior refusal to submit to an alcohol test. *State v. Turner,* 2023 MT 88, ¶ 13, 412 Mont. 284, 529 P.3d 863.
    - The Montana Supreme Court has found that "uncooperative behavior" may constitute an implied refusal to submit to a blood alcohol test. For example, deficient performance in a breath test when capable of performing or continually asking for an attorney. *State v. Turner,* 2023 MT 88, ¶ 15, 412 Mont. 284, 529 P.3d 863.
    - Author's Note: A jury may still choose to ignore a refusal inference, and therefore law enforcement should be encouraged to be patient and clarify whether an uncooperative suspect is refusing. A tiny bit of patience and clarification during the investigation can avoid needless litigation.
- Inferences in Trial:
    - Author's Note: When applying inferences, always add the caveat "the inference is rebuttable." For example, best practices language may be, "If you find from the evidence the Defendant's BAC was 0.08 or more, the jury, you all, may infer Defendant was under the influence. The inference is rebuttable."

Additional Charging Considerations:

- Prior DUI Convictions, generally:
    - The number of priors increases the applicable penalty but are not "penalty enhancements" requiring a separate jury verdict. *See* Mont. Code Ann. § 46-1-401(4)
    - A Certified Driving Record is generally sufficient to establish the number of priors. *See e.g. State v Perry (1997),* 283 Mont. 34, 938 P.2d 1325.

- Lookbacks:
    - Citation(s): Mont. Code Ann. § 61-8-1011(1)(b):
        - An offender is considered to have been previously convicted for the purposes of sentencing if less than 10 years have elapsed between the commission of the present offense and a previous conviction unless the offense is the offender's third or subsequent offense, in which case all previous convictions must be used for sentencing purposes. Mont. Code Ann. § 61-8-1011(1)(b).
    - Summary:
        - For 2nd DUI: 10-year lookback.
        - For 3rd or Subsequent DUI: Lifetime lookback.
    - Author's Notes:
        - Lookback periods are not applicable to blood warrants, per plain language of Mont. Code Ann. § 61-8-1011(1)(b).
        - Some Montana DUIs from the 80s and very early 90s may not stack because, intermittently, there was an auto-expungement statute. This issue is becoming rare – but be aware of it. *See e.g. State v Weldele,* 2003 MT 117, 315 Mont. 452, 69 P.3d 1162. *See also State v. Peralta,* 2022 MT 201, 410 Mont. 316, 519 P.3d 5.

- Stacking Prior Montana Convictions
    - Citation(s): Mont. Code Ann. §§ 61-8-1011(1):

        - (c) A previous conviction for a violation of driving under the influence, including 61-8-1002(1)(a), (1)(b), (1)(c), or (1)(d), an offense that meets the definition of aggravated driving under the influence in 61-8-1001, or a similar offense under previous laws of this state or the laws of another state, or a violation of a similar statute or regulation in another state or on a federally recognized Indian reservation, and as otherwise defined in subsection (1)(a) may be counted for the purposes of determining the number of a subsequent conviction for a violation of driving under the influence under 61-8-1002.
        - (d) A previous conviction for a violation of 45-5-104 for which the offense under 45-5-104 occurred while the person was operating a vehicle in violation of driving under the influence, including 61-8-1002(1)(a), (1)(b), (1)(c), or (1)(d), an offense that meets the definition of aggravated driving under the influence in 61-8-1001, or a similar offense under previous laws of this state or the laws of another state, and a previous conviction for a violation of 45-5-205 or 45-5-628(1)(e) may also be counted for the purposes of determining the number of a subsequent conviction for a violation of driving under the influence under 61-8-1002.
    - Summary:
        - Prior convictions (not pending charges), regardless of subsection under current or prior Montana law, except Minor DUIs, stack interchangeably.
            - E.g. DUI (1)(a), (1)(b) Per Se, (1)(d) THC Per Se, Agg DUI all stack interchangeably.
        - Pending charges do not count for stacking purposes. *State v Marks,* OP 22-0623 (December, 2022)(Petition for supervisory control denied because the State failed to demonstrate the district court was proceeding under a clear error of law).

- Challenging Prior Montana Convictions

- Prior Montana convictions can be challenged if they are constitutionally infirm.
- State bears initial burden of proving the fact of the prior conviction. *See e.g. State v. Krebs*, 2016 MT 288, ¶ 12, 385 Mont. 328, 384 P.3d 98.
    - (e.g. submitting driving record (CDR))
- Once the fact of the prior is submitted, the following framework applies:
    - (1) There is a rebuttable presumption of regularity that attaches;
    - (2) Defendant has initial burden to produce direct evidence that the prior is invalid;
    - (3) Once Defendant makes this showing, burden shifts to State to produce direct evidence and prove by preponderance of evidence that prior was not entered in violation of Defendant's constitutional rights.
    - *State v. Wellknown,* 2022 MT 95, ¶¶ 33-35, 408 Mont. 411, 510 P.3d 84.
- Generally:
    - Defendant bears "heavy burden" to prove with "affirmative evidence."
    - Silent record is insufficient.
    - Self-serving statements by Defendant are insufficient.
    - *State v. Wellknown,* 2022 MT 95, ¶¶ 33-35, 408 Mont. 411, 510 P.3d 84.

- Stacking Priors from out of State or Reservation

    - Citation(s): Mont. Code Ann. § 61-8-1011(1)(c)
        - See Stacking Prior Montana Convictions, above, for statutory language.
    - Generally:
    - Convictions under "similar" statutes from other states or federally recognized Indian Reservations stack.
    - Does not include Federal DUIs, per plain language (e.g. in Yellowstone National Park).

- Burden for stacking is *similar* not *substantially* similar – confusion of different statutes. Substantially similar is from the telephonic search warrant language, not from priors stacking statute. *Compare to* Mont. Code Ann. § 61-8-1016(4).

- Challenging Priors from Out of State
  - Author's note: Researching out of state challenges is often time consuming for line prosecutors. If you need assistance researching or briefing challenges to out of state convictions, Montana's TSRP is happy to assist.
  - *McNally* analysis:
    - If another state's DUI laws allow a person to be convicted using a lesser standard of impairment than would be required in Montana for a conviction, the statutes are not similar for the purposes of Mont. Code Ann. § 61-8-734(1)(a). *State v. Pankhurst*, 2022 MT 89, ¶ 8, 509 P.3d 15 (Author's Note: Pre-2022 statute, identical language.).
    - When applying the analysis, we are to compare the out-of-state and Montana statutes at time of original conviction. *Id.*
      - E.g. – 1994 Washington conviction compared to 1994 Montana conviction
    - Since *McNally,* the Court has clarified a few components of the *McNally* analysis:
      - First, Montana's "diminished" standard means, "reduced or to a lesser degree." *State v. Polaski,* 2005 MT 13, ¶ 22, 106 P.3d 538.
      - Second, the Court has stressed that *McNally* was distinguishable from other cases, even in cases involving states with very similar language to Colorado's "slightest degree" standard, because Colorado's DWAI offense was explicitly a lesser tier of DUI, and Montana did not have a comparable statute. *State v. Young,* 2012 MT 251, ¶ 16, 289 P.3d 110. This final consideration distinguishes the vast majority of DUI stacking challenges from *McNally*.

- Applications of *McNally*:
  - Similar impairment (diminished safety) language examples:
    - "Appreciable degree" – *State v Polaski*, 2022 MT 89, ¶ 21, 408 Mont. 309, 509 P.3d 15
    - "Not have the normal use of mental or physical faculties." *State v Olson*, 2017 MT 101, ¶ 16, 387 Mont. 318, 400 P.3d 214.
    - "A level of impairment that renders the driver incapable of operating a motor vehicle with the caution characteristic of a person of ordinary prudence who is not under the influence." *State v Lund*, 2020 MT 53, ¶ 12, 399 Mont. 159, 458 P.3d 1043.
  - NOT similar impairment language:
    - "To the slightest degree" in the context of Colorado's lesser tier DWAI offense. *State v McNally*, 2002 MT 160, 310 Mont. 396, 50 P3d 1080.
    - Author's Note: Some other jurisdictions have used "to the slightest degree" but then clarified that this definition is broader than what may be initially presumed. All other jurisdictions analyzed by the Montana Supreme Court that used or referenced "to the slightest degree" language have been determined to stack. *See e.g. State v. Young,* 2012 MT 251, 366 Mont. 527, 289 P.3d 110; *State v. Lund ,* 2020 MT 53, ¶¶ 12-13, 399 Mont. 159, 458 P.3d 1043.
- Niche Defenses
  - Author's Note: Defendants are increasingly attempting to exclude prior DUI convictions as dissimilar by asserting niche defenses, unrelated to the degree of impairment.
  - The Montana Supreme Court has reviewed ten cases (including non-cites) for the issue of stacking. The Court has only found one to be dissimilar, in the case of *McNally*, for a clearly lesser offense under Colorado's three-tiered DUI offenses, compared to Montana's two-tiered DUI

offenses. *See for discussion and analysis: City of Missoula v. Williams,* 2017 MT 282, ¶¶ 12-13, 389 Mont. 303, 406 P.3d 8.

- The Court has never determined an out-of-state conviction does not stack, except when assessing the specific issue of level of impairment and the other state possessed a "lesser" tier of DUI, of which the defendant in question had been committed.
- The Court has addressed niche defenses twice and declined both times, for various reasons. For example:
  - *See e.g. State v Calvert,* 2013 MT 374, 373 Mont. 152, 316 P.3d 173 (As written, Nevada criminalizes having a BAC within 2 hours of driving a crime, although not applied in practice. Still stacks.).
  - *See e.g. State v. Pankhurst,* 2022 MT 89, 408 Mont. 309, 509 P.3d 15 (Some argument and analysis regarding the differing degrees of nexus between impairment and driving ability between Montana and North Dakota. Still stacks.).
  - *State v. Hall,* 2004 MT 106, 321 Mont. 78, 88 P.3d 1273 (Not precisely on point, but perhaps demonstrative. There was a defense available in Washington that is not available in MT. Still stacks.).

- Multiple Convictions Prohibition & Charging in the Alternative
  - Citation(s): Mont. Code Ann. § 61-8-1002(6). *See also* Same Transaction Rule, Mont. Code Ann. § 46-11-410.
  - Generally, a suspect cannot be convicted under multiple DUI subsections for the same event.
    - For example, a suspect can be convicted of DUI (1)(a) but cannot also be convicted for DUI Per Se (1)(b) for the same act, despite these two offenses having unique elements and thus would survive a traditional Double Jeopardy challenge.

- Although multiple convictions are prohibited, a prosecutor may charge "in the alternative."
- Citation(s): Mont. Code Ann. § 46-11-404.
    - For example, an officer conducts a DUI investigation and charges the suspect under DUI (1)(a). During the investigation, the suspect provides a breath sample with a BAC of 0.14. While the case is pending, negotiations fall apart. The case is set for trial. The prosecutor may move to amend the offense to DUI (1)(a) or, in the alternative, DUI Per Se (1)(b).
    - Increases likelihood of success at trial.
    - Reminder: Defense can now plead to either offense, even if one is "lesser."
- Author's note: While it is unclear whether this is necessary, it may be prudent to amend all Aggravated DUIs in the alternative if set for trial. This eliminates challenges to the charges mid-trial.
    - For example: Defendant committed the offense(s) of: **Count I:** Driving Under the influence, first offense, a misdemeanor, in violation of Mont. Code Ann. § 61-8-1002(1)(a), Aggravated, Mont. Code Ann. § 61-8-1001(1)(a), **or in the alternative**, **Count I(A):** Driving Under the influence, first offense, a misdemeanor, in violation of Mont. Code Ann. § 61-8-1002(1)(b), Aggravated, Mont. Code Ann. § 61-8-1001(1)(a).

Telephonic/Digital Blood Search Warrants

Law enforcement should be strongly encouraged to pursue a digital or telephonic blood warrant whenever applicable. Law enforcement should also be regularly reminded of the proper post-application procedure (including obtaining a countersign ASAP and providing all completed documentation to the prosecutor's office for discovery).

- Citation(s): Mont. Code Ann. §§ 61-8-1016(4); 46-5-220; 46-5-221; 46-5-222; 46-5-223; 46-5-224
    - Mont. Code Ann. § 61-8-1016(4):
        - (a) If an arrested person refuses to submit to one or more tests requested and designated by the peace officer, the refused test or tests may not be given unless the person has refused to provide a breath, blood, urine, or other bodily substance in a prior investigation in this state or under a substantially similar statute in another jurisdiction or the arrested person has a prior conviction or pending offense for a violation of 45-5-104, 45-5-106, 45-5-205, or driving under the influence, including 61-8-1002, an offense that meets the definition of aggravated driving under the influence in 61-8-1001, or a similar offense under previous laws of this state or a similar statute in another jurisdiction.
        - (b) On the person's refusal to provide the breath, blood, urine, oral fluid, or other bodily substance requested by the peace officer pursuant to subsection (1) and this subsection (4) may apply for a search warrant to be issued pursuant to 46-5-224 to collect a sample of the person's blood or oral fluid for testing.
    - Mont. Code Ann. § 46-5-224(1): Evidence, including blood samples that may yield evidence of any measured amount or detected presence of alcohol or drugs in a person's body when subjected to testing.
- Eligibility:
    - Specific Citation(s): Mont. Code Ann. §§ 61-8-1016(4)
    - Probable cause of:
        - DUI & under arrest;
        - DUI & involved in crash causing damage to property, or;

        - Crash resulting in death or serious bodily injury.
    - Suspect refused testing after being advised of implied consent, including advisement of right to an independent test, and;
    - *Suspect has (from any state):
        - A prior or pending DUI, Agg. DUI, Negligent Homicide, Neg. Vehicular Assault/Homicide, or;
        - Prior refusal.
    - *Author's Note: Unsettled Law. There is a strong legal argument that neither a prior DUI nor prior refusal is required to obtain a DUI blood warrant for a first offense DUI. However, law enforcement should discuss this legal issue and proper procedure with their prosecutor before pursuing a DUI blood warrant for a first offense without a prior or refusal.*
- Generally:
    - Jurisdiction:
        - Citation(s): Mont. Code Ann. § 46-5-220(2)
        - (2) A search warrant may be issued by: (a) a city or municipal court judge or justice of the peace within the judge's geographical jurisdiction; or (b) a district court judge within this state.
            - This statute has been interpreted to mean courts have jurisdiction to issue a blood warrant if the blood draw will take place in their jurisdiction, even if the underlying offense occurred in another jurisdiction. *See e.g. State v. Grussing,* 2022 MT 76, ¶ 9, 408 Mont. 245, 507 P.3d 1152.
    - Lookback periods do not apply for blood warrants. The lookback period derives from Mont. Code Ann. § 61-8-1011(1)(b), which specifically states that this period is for the purposes of sentencing.
    - Officer need not verify a prior out-of-state conviction is "similar" to Montana, as in sentencing provisions. Any prior DUI or Per Se from any state should satisfy the requirements. *See City of Missoula v. Williams*, 2017 MT 282, ¶ 17, 389 Mont. 303, 406 P.3d 8.
- General Search Warrant Content Requirements:

    - Citation(s): Mont. Code Ann. § 46-5-221
    - State facts sufficient to support:
        - Probable cause an offense was committed;
        - Probable cause evidence will be found;
        - Particularly describe person/area searched, and;
        - Particularly describe what to be seized.
        - Additionally, must state reasons to justify immediate issuance of the search warrant. (Per Mont. Code Ann. § 46-5-222(1).)
            - For example, a search warrant for a blood draw for immediate issuance is justified because alcohol in the blood is metabolized quickly and evidence will be forever lost if not immediately collected and preserved.
- Procedural Requirements:
    - Citation(s): Mont. Code Ann. § 46-5-222
    - Must be sworn statement;
    - Must be recorded, and;
        - Include the date and time of recording;
        - Shall, as soon as possible, provide to the Court an original copy and transcription to verify accuracy;
        - Transcription shall be verbatim, and;
        - Shall be retained by the officer and in the court records.
    - (If electronic warrant) The applicant shall transmit to the judge an electronic record that is capable of being retained by the judge when the application is made.
    - (If by telephone) The peace officer shall sign the search warrant in the officer's own name and in the judge's name. The peace officer shall initial the judge's name indicating the signature was authorized by the judge but signed by the officer.
    - (If judge signs by electronic signature) The peace officer serving the warrant shall initial the electronic signature of the judge.
    - As soon as possible after being issued, the warrant shall be signed (in person) by the judge.
- Refusal after Blood Draw Warrant Granted:

- Law enforcement may consider charging Obstructing a Peace Officer, in violation of Mont. Code Ann. § 45-7-302(1).
    - The Montana Supreme Court has not directly addressed the specific issue, but implicitly permitted the charge. *See e.g. State v Secrease,* 2021 MT 212, 405 Mont. 229, 493 P.3d 335.
- May not charge Tampering with Evidence. The Montana Supreme Court has ruled that, even after issuance of a warrant, blood in the body is not evidence as contemplated in the Tampering with Evidence statute until the blood is physically collected. *State v. Harrison,* 2017 MT 60, ¶¶ 16-17, 387 Mont. 52, 390 P.3d 945.

Implied Consent:

- Citation(s): Mont. Code Ann. § 61-8-1016
    - A person who operates or is in actual physical control of a vehicle or commercial motor vehicle upon the ways of this state open to the public is considered to have given consent to a test or tests of the person's blood or breath for the purpose of determining any measured amount or detected presence of alcohol or blood or oral fluid for the purposes of determining any measured amount or detected presence of drugs in the person's body. Mont. Code Ann. § 61-8-1016(1)(a)
- Generally:
    - A person who operates or is in actual physical control of a vehicle upon the ways of this state open to the public is considered to have given consent to test blood, breath, or oral fluid for determining alcohol or drugs.
    - Tests must be administered at the direction of a peace officer.
    - The officer may designate which test or tests will be taken. IE Officer's choice.
        - E.g. if officer requests breath, but defendant will only submit to a blood test, it's still a refusal. *See e.g. State v. Christopherson (1985)*, 217 Mont. 449, 705 P.2d 121.
    - A person who is unconscious or otherwise incapable of refusal has not withdrawn consent for a blood draw. Mont. Code Ann. § 61-8-1016(3).
        - *See also City of Billings v. Grela,* 2009 MT 172, 350 Mont. 511, 209 P.3d 222.
        - The U.S. Supreme Court has determined that law enforcement may administer a warrantless blood draw on unconscious drunk-driving suspects without violating the Fourth Amendment. *See Mitchell v. Wisconsin,* 139 S. Ct. 2525 (2019).
            - Author's Note: Montana's Constitution offers a higher degree of privacy protections than the Federal Constitution. *Mitchell* re-affirms that the Montana Supreme Court's holding on this issue would survive a federal challenge.

    - If refused, tests may not be given, except pursuant to a Judicial Warrant.
- Constitutionality:
    - "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." *Birchfield v North Dakota,* 579 U.S. 438, 136 S. Ct. 2160 (2016).
    - There is no constitutional right to consult with an attorney before deciding whether to submit to alcohol testing. *State v. Michaud,* 2008 MT 88, ¶ 60, 342 Mont. 244, 180 P.3d 636.

Penalties:

The penalties associated with driving under the influence are complex and often contain nuances or fact specific conditions. Thus, they do not lend themselves to a one-size-fits-all discussion. However, the generalities are provided below. Always double check the penalties for your specific case.

- Generally:
  - The statutes inconsistently use "consecutive" and hours/days language.
    - For example, Driving Under the Influence, (1)(a), Aggravated, (1)(a), with a Passenger Under 16 years of age, 2nd Offense, requires a minimum of 45 days in jail, while a 3rd Offense requires a minimum of 90 *consecutive* days in jail.
  - DUIs may not be deferred or resolved via a Pretrial Diversion Program. Mont. Code Ann. §§ 61-8-1011(4); 46-16-130(4)
    - This applies to all DUI subsections, including (1)(e) Minor DUIs.
  - The court may not allow the sentence to be served on house arrest unless the court finds that the imposition of the imprisonment sentence "will pose a risk to the person's physical or mental well-being"
    - Home Arrest requires a petition with a lot of checked boxes. *See* Mont. Code Ann. § 46-18-1002.
- Misdemeanor Fines, Jail, and Penalties:
  - Citation(s): Mont. Code Ann. § 61-8-1007
  - See code for specifics.
- Felony Fines, Jail, and Penalties:
  - Citation(s): Mont. Code Ann. § 61-8-1008
  - See code for specifics.
- Required Treatment:
  - Citation(s): Mont. Code Ann. § 61-8-1009
- Monitoring Conditions:
  - Citation(s): Mont. Code Ann. § 61-8-1010
  - When Required:

        - For a first (1st) offense, the court may order 24/7 or an ignition interlock if recommending a probationary driver's license.
        - For a second (2nd) or subsequent offense, the court shall order 24/7, an ignition interlock if recommending a probationary driver's license, or forfeit vehicle.
    - Ignition Interlock
        - It is a separate offense to operate without or circumvent a court ordered ignition interlock device or assist a person to circumvent the requirement. Mont. Code Ann. § 61-8-1024.
    - 24/7 Sobriety Programs or other Court-Approved Alcohol/Drug Detection Programs
        - Program specific rules can be found at Mont. Code Ann. § 44-4-1203.
    - Vehicle Forfeiture
        - Procedural specifics can be found at Mont. Code Ann. § 61-8-1033.
- Other Conditions:
    - The court may order all other "reasonable conditions." Mont. Code Ann. § 46-18-201.
        - E.g. Community service.
    - If the sentencing judge finds that a victim has sustained a pecuniary loss the sentencing judge shall require payment of full restitution. Mont. Code Ann. § 46-18-201(5).
        - See also Mont. Code Ann. §§ 46-18-241 through 46-18-244.

- Suspensions – See Mont. Code Ann. §§ 61-5-205, 208, 61-8-1010

    - Suspensions are imposed by the Motor Vehicle Division and cannot generally be waived or negotiated away by the parties.
    - The probationary driver's license is at the discretion of the court.
    - A probationary driver's license will not be issued for a second or subsequent conviction without the court's recommendation. Mont. Code Ann. § 61-5-208(2)(b)(ii) & (iii)
    - The suspension periods are:
        - Six (6) months for a first offense. Mont. Code Ann. § 61-5-208(2)(b)(i)

        - One (1) year for a second or subsequent offense. Mont. Code Ann. § 61-5-208(2)(b)(ii) & (iii)
    - Suspended drivers may not receive a probationary driver's license during the first forty-five (45) days of the suspension period for a second offense or within ninety (90) days for a third or subsequent offense.
        - Exceptions to mandatory minimum suspension periods:
            - Participation in a DUI court. Mont. Code Ann. § 61-5-231
            - Enrollment in a 24/7 program. Mont. Code Ann. § 44-4-1205
    - Felony Suspensions:
        - For a felony offense, the person may not operate a motor vehicle unless operation is authorized by the person's probation officer, or the motor vehicle is equipped with an ignition interlock device. Mont. Code Ann. § 61-5-208(5)
    - CDL Suspensions:
        - DUI convictions or Implied Consent refusals are considered "major offenses." Mont. Code Ann. § 61-8-802(2)
        - For a first major offense, suspension period is 1 year, or 3 years if transporting hazardous materials. Mont. Code Ann. § 61-8-802(1)(a)
        - For a second or subsequent major offense, suspension period is lifetime, but may be considered for reinstatement after 10 years. Mont. Code Ann. § 61-8-802(1)(b)

Penalty Chart:

Charge, MCA § 61-8-1002:	Min Jail/DOC/MSP	Max Jail/DOC/MSP	Min Fine	Max Fine	DL Susp.*	Prob. DL Restriction	Rqrd. Treatment
(1)(a) 1st	24 Cons. Hrs	6 Mos	$600	$1,000	6 Mos		Chem. Dep. Assess.; Ed. Course
(1)(a) 2nd	7 Days	1 Yr	$1,200	$2,000	1 Yr	45 Days	Chem. Dep. Ass.; Ed. Crs.; & Chem. Dep. Trtmt; 1 yr Monit.
(1)(a) 3rd	30 Days	1 Yr	$2,500	$5,000	1 Yr	90 Days	Chem. Dep. Ass.; Ed. Crs.; & Chem. Dep. Trtmt; 1 yr Monit.
(1)(a)(b)(c)or(d) 4th (Fel)	13 Mos DOC	2 Yrs DOC + 5 Yrs MSP Susp.	$5,000	$10,000	1 Yr	90 Days**	Appropriate Facility or Residential Treatment
(1)(a)(b)(c)or(d) 5th (Fel)	0 Days	10 Yrs MSP	$5,000	$10,000	1 Yr	90 Days**	Appropriate Facility or Residential Treatment
(1)(a)(b)(c)or(d) 6th (Fel)	0 Days	25 Yrs MSP	$5,000	$10,000	1 Yr	90 Days**	Appropriate Facility or Residential Treatment
(1)(a)(b)(c)or(d) 7th + (Fel)	5 Yrs	25 Yrs MSP (1st 5 Yrs Not Elig. Susp.)	$5,000	$10,000	1 Yr	90 Days**	Appropriate Facility or Residential Treatment
(1)(a)(b)(c)or(d) 1st Agg	2 Days	1 Yr	$1,000	$1,000	6 Mos		Chem. Dep. Assess.; Ed. Course
(1)(a)(b)(c)or(d) 2nd Agg	15 Days	1 Yr	$2,500	$2,500	1 Yr	45 Days	Chem. Dep. Ass.; Ed. Crs.; & Chem. Dep. Trtmt; 1 yr Monit.
(1)(a)(b)(c)or(d) 3rd Agg	40 Cons. Days	1 Yr	$5,000	$5,000	1 Yr	90 Days	Chem. Dep. Ass.; Ed. Crs.; & Chem. Dep. Trtmt; 1 yr Monit.
(1)(a) 1st Pass. <16	48 Cons. Hrs	1 Yr	$1,200	$2,000	6 Mos		Chem. Dep. Assess.; Ed. Course
(1)(a) 2nd Pass. <16	14 Days	1 Yr	$2,400	$4,000	1 Yr	45 Days	Chem. Dep. Ass.; Ed. Crs.; & Chem. Dep. Trtmt; 1 yr Monit.
(1)(a) 3rd Pass. <16	60 Days	1 Yr	$5,000	$10,000	1 Yr	90 Days	Chem. Dep. Ass.; Ed. Crs.; & Chem. Dep. Trtmt; 1 yr Monit.
(1)(a)(b)(c)or(d) 1st Agg Pass. <16	4 Cons. Days	1 Yr	$2,500	$2,500	6 Mos		Chem. Dep. Assess.; Ed. Course
(1)(a)(b)(c)or(d) 2nd Agg Pass. <16	45 Days	1 Yr	$5,000	$5,000	1 Yr	45 Days	Chem. Dep. Ass.; Ed. Crs.; & Chem. Dep. Trtmt; 1 yr Monit.
(1)(a)(b)(c)or(d) 3rd Agg Pass. <16	90 Cons. Days	1 Yr	$10,000	$10,000	1 Yr	90 Days	Chem. Dep. Ass.; Ed. Crs.; & Chem. Dep. Trtmt; 1 yr Monit.
(1)(b)(c)or(d) 1st	0 Days	6 Mos	$600	$1,000	6 Mos		Chem. Dep. Assess.; Ed. Course
(1)(b)(c)or(d) 2nd	5 Days	1 Yr	$1,200	$2,000	1 Yr	45 Days	Chem. Dep. Ass.; Ed. Crs.; & Chem. Dep. Trtmt; 1 yr Monit.
(1)(b)(c)or(d) 3rd	30 Days	1 Yr	$2,500	$5,000	1 Yr	90 Days	Chem. Dep. Ass.; Ed. Crs.; & Chem. Dep. Trtmt; 1 yr Monit.
(1)(b)(c)or(d) 1st Pass. <16	0 Days	6 Mos	$1,200	$2,000	6 Mos		Chem. Dep. Assess.; Ed. Course
(1)(b)(c)or(d) 2nd Pass. <16	10 Days	1 Yr	$2,400	$4,000	1 Yr	45 Days	Chem. Dep. Ass.; Ed. Crs.; & Chem. Dep. Trtmt; 1 yr Monit.
(1)(a)(b)(c)or(d) 3rd Pass. <16	60 Days	1 Yr	$5,000	$10,000	1 Yr	90 Days	Chem. Dep. Ass.; Ed. Crs.; & Chem. Dep. Trtmt; 1 yr Monit.
(1)(e) 1st	NA	NA	$100	$500	90 Days	If 18> 30 Days	Chem. Dep. Assess.; Ed. Course
(1)(e) 2nd	NA or 0 Days if >18yoa	NA or 10 Days if > 18yoa	$200	$500	6 Mos	If 18> 30 Days	Chem. Dep. Ass.; Ed. Crs.; & Chem. Dep. Trtmt; 1 yr Monit.
(1)(e) 3rd +	NA or 24 Cons. Hrs if >18yoa	NA or 60 Days if > 18yoa	$300	$500	1 Yr	If 18> 30 Days	Chem. Dep. Ass.; Ed. Crs.; & Chem. Dep. Trtmt; 1 yr Monit.
		*CMV DL Susp.	61-5-208				**Must be Auth. By Prob. Ofcr or Ign. Interlock
		1st: 1 Yr, 3 Yr (Hazard)	61-8-1007(3)				
		2nd: 10 Yrs or Life					

Negotiation Rules:

- Generally:
  - The "give and take" of negotiations in the pretrial context does not constitute an attempt to punish a defendant for exercising a constitutional right, so long as the defendant was free to accept or reject the offer made by the prosecution. *State v. Knowles*, 2010 MT 186, ¶ 33, 357 Mont. 272, 239 P.3d 129.
    - Benefits to State: prompt imposition of punishment after admission may be more effective rehabilitation; preserve judicial and prosecutorial resources; reduce risk. *Brady v. United States*, 397 U.S. 742, 752, 90 S. Ct. 1463 (1970).
    - Benefits to Defendant: Reduce exposure/risk, begin sentence immediately, avoid practical burdens of trial. *Brady v. United States*, 397 U.S. 742, 752, 90 S. Ct. 1463 (1970).
  - Negotiations rules after mistrial or appeal are much stricter. *See State v. Knowles,* 2010 MT 186, ¶ 35, 357 Mont. 272, 239 P.3d 129.
    - After mistrial or appeal, be very cautious of increasing penalties, recommendations, or charges.
  - Agreeing to forego adding or amending (to correct) charges supported by probable cause is acceptable during negotiations. *State v Knowles*, 2010 MT 186, 357 Mont. 272, 239 P.3d 129. *See also United States v. Goodwin*, 457 U.S. 368, 378-80, 102 S. Ct. 2485 (1982).
    - E.g. language: The state will forego amending to the correct charge of DUI (1)(a) with Aggravated penalty enhancements if Defendant pleads to DUI (1)(a), 1st Offense.
  - Ambiguities in plea agreements are construed in favor of defendant (even if plea agreement is drafted by defense). *State v. Langley*, 2016 MT 67, ¶ 22, 383 Mont. 39, 369 P.3d 1005.
    - In Montana, it is best practice for prosecutors to draft the plea agreements and waivers of rights (or complete a deep-dive review of the Court's waiver of rights form).

        - It is strongly discouraged to use waiver of rights or plea agreement forms drafted by defense unless the prosecutor has had ample opportunity to thoroughly vet the sufficiency of the advisement.
    - Deadlines:
        - Deadlines for accepting/rejecting offers have never been directly addressed, but implied acceptable in numerous cases.
            - Author's Note: There may be speedy trial implications. It is recommended the case either settle relatively quickly or be set for trial. Depending on circumstances, excessive delays for negotiations may be charged as institutional delay against State. *See e.g. State v Couture,* 2010 MT 201, 357 Mont. 398, 240 P.3d 987.

- DUI Specific Negotiation Limitations:
    - May not defer. Mont. Code Ann. § 61-8-1011(4)
    - No pretrial diversion programs (aka Deferred Prosecution Agreements (DPA)). Mont. Code Ann. § 46-16-130(4).

- Federal CDL Anti-Masking – See 49 C.F.R. § 384.226:
    - Does not explicitly prevent negotiation in good faith, but tread cautiously.
    - The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP or CDL holder's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State. 49 CFR § 384.226.
    - Montana could lose 4%, up to 8%, of federal highway funds if found in violation. 49 C.F.R. § 384.401.

Discovery:

When in doubt, err on the side of providing materials as discovery. Prosecutors should be vigilant in reminding law enforcement of their discovery obligations.

- Statutory Prosecution Discovery Obligations – Mont. Code Ann. § 46-15-322:
    - Names, addresses, statements of all persons whom the prosecutor may call as witness
        - Odds & Ends: 911 calls, RADD Report phone calls, Backup officer report & recordings (defendant, witnesses, photos, etc)
    - All written or oral statements of defendant/co-defendant
        - E.g. audio, video, jail calls
    - All written reports/statements of experts who have personally examined the defendant or evidence in case, along with results of all physical exams, scientific tests, etc.
    - All papers, documents, photos, tangible objects that may be used at trial or were obtained from defendant
    - All material or information that tends to mitigate or negate defendant's guilt or *that would tend to reduce potential sentence.*
- *Brady* Prosecution Discovery Obligations:
    - Affirmative duty to disclose all info and materials that are favorable to accused and "constitutionally material" to guilt or punishment. *United States v. Brady*, 373 U.S. 83, 87-88, 83 S.Ct. 1194, 1196-7 (1963); *United States v. Giglio*, 405 U.S. 150, 153-155, 92 S.Ct. 763, 766 (1972).
    - Scope limited to "exculpatory evidence" or tending to show that a witness is unreliable, biased, has motive to lie, untruthfulness, etc. *City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 14, 397 Mont. 134, 447 P.3d 1048.
    - Non-exculpatory only constitutionally material if disclosure would be reasonably likely to undermine confidence in fairness of trial/sentencing. Id.

- The courts recently removed the "reasonable diligence" requirement upon defendants. However, defense counsel still "cannot ignore that which is given to him or of which he is otherwise aware." *Garding v. State,* 2020 MT 163, ¶ 31, 400 Mont. 296, 466 P.3d 501.

- Defense Discovery Obligations:
  - Citation(s): Mont. Code Ann. § 46-15-323 has an exhaustive list.
  - Author's Note: It is strongly suggested prosecutor officese should have a standard form demanding reciprocal discovery sent on every case, **in writing.**
    - For cases in district court, defendant may be required upon motion to:
      - Appear in a lineup
      - Speak for identification
      - Obtain fingerprint/voiceprint
      - Pose for photographs not involving reenactment
      - Try on clothing
      - Sample blood/hair/saliva/urine/etc.
      - Obtain handwriting samples
      - Partake in physical or medical inspection.
  - Includes deadlines for notice of affirmative defenses and experts.
    - See Affirmative Defenses, below.
  - Required Defense Discovery includes:
    - (6) Within 30 days after the arraignment or at a later time as the court may for good cause permit, the defendant shall make available to the prosecutor for testing, examination, or reproduction:
      - (a) the names, addresses, and statements of all persons, other than the defendant, whom the defendant may call as witnesses in the defense case in chief, together with their statements;
      - (b) the names and addresses of experts whom the defendant may call at trial, together with the results of their physical examinations, scientific tests,

experiments, or comparisons, including all written reports and statements made by these experts in connection with the particular case; and

- (c) all papers, documents, photographs, and other tangible objects that the defendant may use at trial.

- (7) The defendant's obligation under this section extends to material and information within the possession or control of the defendant, defense counsel, and defense counsel's staff or investigators.
- Mont. Code Ann. §§ 46-15-323(6) & (7).

- Defense Investigations
    - Not Otherwise Provided For – Mont. Code Ann. § 46-15-322(5)
        - Court may order production of anything else, if:
            - Upon Motion of Defendant;
            - Showing of Substantial Need;
            - Information is not otherwise provided for, and;
            - Defendant is unable, without undue hardship, to obtain the substantial equivalent by other means.
        - Cross examination purposes, without more, is not a showing of "substantial need." *See e.g. City of Billings v. Peterson*, 2004 MT 232, ¶ 42, 322 Mont. 444, 97 P.3d 532.

- Officer HR or Personnel Records:
    - As a general rule, Defendants are likely entitled to evidence of *truthfulness/untruthfulness* from officer personnel files upon request – but they need to make a *substantial showing* for anything else. It is likely best practices to contest requests for anything beyond truthfulness/untruthfulness from officer's personnel file, in light of Montana's right to privacy and the competing interests involved.
        - *See e.g. City of Bozeman v McCarthy,* 2019 MT 209, 397 Mont. 134, 447 P.3d 1048; *City of Bozeman v. Howard,* 2021 MT 230, 405 Mont. 321, 495 P.3d 72.

- Recommended process:
    - Author's Note: This process assumes your law enforcement officer does not have a known "*Brady*" file.
    - Defense must specifically demand officer personnel file;
    - Contact law enforcement command staff, advise them of the request, and explain the process;
    - Personnel file requests should be submitted to the Court for an *in camera* review, limited to instances of truthfulness/untruthfulness.
    - LEO agency should be in charge of working with HR department to transfer file to the court for review and return of file afterwards.
        - Prosecutors should not get in the middle of this and become a witness.
    - The Court will then need to coordinate with HR/LEO to return the file after the review.
    - Get a ruling from the court whether their review has any information that must be disclosed.
- Anything beyond truthfulness/untruthfulness must be supported by substantial showing beyond "cross examination purposes" – no fishing expeditions. *See e.g. City of Bozeman v McCarthy,* 2019 MT 209, 397 Mont. 134, 447 P.3d 1048; *City of Bozeman v. Howard,* 2021 MT 230, 405 Mont. 321, 495 P.3d 72.

- Officer's Other DUI Reports
    - Officers should avoid copying and pasting their reports.
    - If an officer copy and pastes/puts wrong name or information in reports, other reports may become discovery.
        - Zimmerman maintains [officer] Lee's reports are both relevant and admissible to attack Lee's credibility under M. R. Evid. 401, 402, and 608(b) because the fact that Lee admittedly cuts and pastes his reports

and verified at least one mistake regarding another suspect who was not given a test—even though Lee reported that suspect failed that test—was relevant to Lee's credibility and truthfulness. We agree. *State v. Zimmerman*, 2018 MT 94, ¶ 25, 391 Mont. 210, 417 P.3d 289.

- Subpoenas for Production (aka Subpoena Duces Tecum)
    - Unsettled Law
    - Defense attorneys have been increasingly abusing subpoenas for the production of evidence in order to circumvent the discovery process.
        - Sometimes called a subpoena "duces tecum"
        - The Crime Lab is understaffed and swamped.
        - If a defense attorney has filed an *unreasonable* subpoena for production of evidence, contact the Crime Lab and discuss whether they can reasonably comply with the request.
        - If the request is unreasonable, consider contesting portions of Subpoena for Production of Evidence.
    - Rules:
        - A Subpoena for Production of Evidence is an *extension* of normal subpoenas. Not designed as a "discovery" tool.
            - Mont. Code Ann. § 46-15-101 sets forth subpoenas.
            - Mont. Code Ann. § 46-15-106, subpoenas for production of evidence, per its plain language, says those subpoenas may require production of items at time of trial, or earlier for inspection.
        - Per Commission Comments, Montana's Subpoena for Production copied from Federal Rule – so can apply same analysis from federal cases.
            - Favorable (limited) MT case law and very favorable federal case law.

    - *See Billings v Peterson,* 2004 MT 232, ¶¶ 42-44, 322 Mont. 444, 97 P.3d 532 (upheld D.C. who limited a 5-page request to just 4 items);
    - *See e.g. United States v. W.R. Grace,* 434 F. Supp. 2d 869 (2006).
- Defendant's Burden:
    - Requirements from Federal law (which should be our guide):
    - These requirements are imposed in recognition of the principle that "a Rule 17(c) subpoena is not intended to serve as a discovery tool or to allow a blind fishing expedition seeking unknown evidence."
    - The party seeking production of materials prior to trial pursuant to Rule 17(c) must
    - (1) show that the subpoenaed item is relevant;
    - (2) show that the item sought is admissible; and
    - (3) request the item with specificity.
    - The movant must also show that the materials sought are unavailable through any other means and that the examination and processing of the materials sought should not wait until trial.
    - *United States v. W.R. Grace,* 434 F. Supp. 2d 869 (2006) (internal citations omitted).

Prosecution Notices:

- Experts
    - Generally:
        - Almost every DUI should have notice of at least one.
        - Required per Mont. Code Ann. § 46-15-322(1)(c) (Discovery statute)
        - Notice doesn't necessarily mean you will subpoena or call them at trial.
        - Failure to call noticed witness may not be commented upon. Mont. Code Ann. § 46-15-325
        - Notice should include CV (contact crime lab for copies – local HGN expert should draft one and update it annually)
    - Specific Expert Recommendations:
        - Every Case – HGN expert, such as DRE
        - If breath:
            - Senior Operator for Intox
            - Crime Lab
            - Author's Note: You will rarely need to call or subpoena these potential witnesses. Instead, you will typically submit the foundational certification documents and breath sample through the investigating officer. Providing notice of these witnesses allows you to call them if you notice any issues while preparing for trial, or if defense provides notice of an expert.
        - If blood:
            - Crime Lab Toxicologist
            - Licensed physician, registered nurse, phlebotomist, or other "qualified person acting under the supervision and direction of a physician or registered nurse." Mont. Code Ann. § 61-8-1019
                - Qualified person acting under supervision is a very broad requirement.
                - "As the Legislature has not limited 'supervision and direction' to onsite or direct supervision, we

conclude that a physician's or RN's physical presence is not required and that a qualified person who draws blood while subject to offsite or on-call supervision can satisfy the statutory requirement that the person be 'acting under the supervision and direction of a physician or registered nurse . . . .'" Mont. Code Ann. § 61-8-405(1); *State v. Merry*, 2008 MT 288, ¶ 19, 345 Mont. 390, 191 P.3d 428.

        - Case Specific
            - Crash Investigators
            - Medical Personnel

- 803(6) Records of Regularly Conducted
    - Anything "from the Montana state crime laboratory" requires specific notice.
    - Notice requirements:
        - In writing, and;
        - Sufficient time for opposing party to obtain depositions prior to trial and to subpoena persons at trial.
    - Prosecutors should provide notice in every case involving breath test results, certification documents, blood test results, blood test evidence/property logs, etc.

Admitting Evidence:

- HGN
    - Prior to admission or reference, the State must present expert testimony:
        - (1) explaining the correlation between alcohol consumption and the presence of [horizontal gaze] nystagmus, i.e. the scientific basis of the HGN test, and;
        - (2) testify that the test was administered correctly. *See e.g. State v. Bollman*, 2012 MT 49, ¶¶ 22-28, 364 Mont. 265, 272 P.3d 650.
    - Expert Qualifications:
        - Sufficient expertise will vary by jurisdiction/judge.
        - There are no "essential requirements," need not be a "medical professional," but basic training on SFSTs is insufficient.
        - (Analysis of all training, education, experience, fact dependent)
        - DRE = Functionally yes
        - Less than DRE = Possibly yes, with enough other qualifications. *See e.g. State v Crawford,* 2003 MT 118, ¶ 28, 315 Mont. 480, 68 P.3d 848.

- Blood Results
    - Requires expert testimony.
    - Must call toxicologist (or hospital medical laboratory scientist) who tested the blood.
    - It is generally best practices to elicit the testimony of the person who conducted the blood draw.
        - Author's Note: Technically, there is no requirement for the individual who conducted the blood draw to testify at trial, so long as the foundation is otherwise met. Under ideal circumstances, eliciting the testimony of the blood drawer is the better practice to avoid subjecting the blood test result to otherwise unwarranted criticism.

        - If attempting to enter blood test results without the testimony of the blood drawer:
            - Many jurisdictions regularly admit blood test results without the testimony of the blood drawer.
            - For example, in cases where a phlebotomist can no longer be located, the Blood Test Request Form, DUI/Toxicology Submission Form, officer testimony, and body camera footage may be sufficient foundation.
            - Prosecutors should be mindful of the limitations upon who may conduct a DUI blood draw, and be prepared to address those limitations, if challenged:
            - "Only a licensed physician, registered nurse, or other qualified person acting under the supervision and direction of a physician or registered nurse may, at the request of a peace officer, withdraw blood for the purpose of determining any measured amount or detected presence of alcohol, drugs, or any combination of alcohol and drugs in the person. This limitation does not apply to the sampling of breath or oral fluid." Mont. Code Ann. § 61-8-1019(1). *See also State v. Merry*, 2008 MT 288, ¶ 19, 345 Mont. 390, 191 P.3d 428.

- Intoxilyzer (Breath test) Results:
    - Author's Note: The Montana TSRP can be contacted for a Step-by-Step Intox Admission Guide for a more detailed procedure.
    - Generally:
        - Expert testimony not required if you submit the "magic 5" certification documents.
        - Can be submitted through officer.
        - After submitting the magic 5 certification documents to the judge, then enter breath test via Rule 803(6) to the jury.
        - The Montana Supreme Court's analyses and holdings have always applied regardless of Intoxilyzer version. *Compare State v. Delaney*, 1999 MT 317, ¶ 3, 297 Mont. 263, 991

P.2d 461; *State v. Poitras*, 2015 MT 287, ¶ 1, 381 Mont. 211, 358 P.3d 200.

- Process:
  - State must provide required Notice (Pursuant to 803(6)).
  - State must provide all certification documents to defense.
  - At trial, the "magic 5" certification documents are submitted to the court.
  - The breath tests are admitted to the jury via rule 803(6).
- "Magic 5:"
  - Operator Certification.
    - Mont. Code Ann. § 61-8-1018(1)(b)(i); A.R.M. § 23.4.218; *State v Poitras,* 2015 MT 287, ¶ 14, 381 Mont. 211, 358 P.3d 200.
  - Intoxilyzer (Monthly) Field Certification.
    - *State v Incashola,* 1998 MT 184, ¶¶ 16, 19, 289 Mont. 399, 961 P.2d 745; A.R.M. §§ 23.4.213(1)(i) & (j)
  - Senior Operator Certification (Person who performed Field Cert.)
    - A.R.M. §§ 23.4.213(1); *State v Poitras*, 2015 MT 287, ¶¶ 14, 15, 381 Mont. 211, 358 P.3d 200.
  - Intoxilyzer Annual Certification.
    - A.R.M. § 23.4.214(1).
  - Gas Standard Approval.
    - A.R.M. §§ 23.4.213(1)(a) & (c).
- Evidentiary Considerations:
  - Foundational documents (magic 5) are not subject to rules of evidence. *State v Jenkins*, 2011 MT 287, ¶ 8, 362 Mont. 481, 265 P.3d 643.
  - Foundational documents (magic 5) do not implicate the right to confrontation. *State v. Delaney*, 1999 MT 317, ¶ 18, 297 Mont. 263, 991 P.2d 461.
  - The certification documents probably do not need to go to the jury because they "are not substantive evidence of DUI." *State v. Delaney*, 1999 MT 317, ¶ 18, 297 Mont. 263, 991 P.2d 461.

        - Crime Lab certification and requirements are found in the Administrative Rules of Montana (ARM), 23.4.201 through 23.4.225.
    - Procedural Considerations:
        - If you believe admission will be hotly contested or subjected to substantial litigation (for example, if this is the first time a breath test has been admitted without a crime lab witness in your jurisdiction), consider requesting a pretrial hearing on the issue.
        - Denying admission of a breath alcohol test for foundational reasons "effectively suppress[es] the breath test evidence" and may be appealed by the State pursuant to Mont. Code Ann. § 46-20-103(2)(e). *State v. Incashola*, 1998 MT 184, ¶ 6, 289 Mont. 399, 961 P.2d 745.
            - Author's Note: Pausing a trial for a writ is extremely disruptive.

Montana Specific Defenses:

Reminder: Defense is required to provide notice of affirmative defenses.

- Compulsion
    - E.G. Defendant was fleeing violence.
    - Required Showing:
        - Defendant must show: (1) he was compelled to perform the offensive conduct (2) by the threat or menace (3) of the imminent infliction (4) of death or serious bodily harm, and that (5) he believed that death or serious bodily harm would be inflicted upon him if he did not perform such conduct, and (6) his belief was reasonable. *See e.g. State v Leprowse*, 2009 MT 387, 353 Mont. 312, 221 P.3d 648.
    - Notice Requirements:
        - Within 30 days after the arraignment or at a later time as the court may for good cause permit, the defendant shall provide the prosecutor with a written notice of the defendant's intention to introduce evidence at trial of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity. Mont. Code Ann. § 46-15-323(2)
        - The notice must specify for each defense the names and addresses of the persons, other than the defendant, whom the defendant may call as witnesses in support of the defense, together with all written reports or statements made by them, including all reports and statements concerning the results of physical examinations, scientific tests, experiments, or comparisons, except that the defendant need not include a privileged report or statement unless the defendant intends to use the privileged report or statement, or the witness who made it, at trial. Mont. Code Ann. § 46-15-323(4)
- Automatism, aka Involuntary Intoxication

- E.g. Roofied. *City of Missoula v. Paffhausen,* 2012 MT 265, 367 Mont. 80, 289 P.3d 141.
- Required Showing:
  - In order to prove automatism, Defendant must prove by admissible evidence that they did not act voluntarily when they drove their vehicle. *Paffhausen,* 2012 MT 265 ¶ 37, 367 Mont. 80, 289 P.3d 141.
  - This evidence may include expert medical or pharmacological evidence, non-expert evidence, or a combination of both. *Id.*
  - To the extent that Defendant offers admissible evidence supporting the defense of automatism, it will remain the State's burden to prove the defendant acted voluntarily beyond a reasonable doubt. *Id.*
- Notice Requirements:
  - Defendant is required to give written notice to the prosecution at or before omnibus hearing and identify the witnesses to be called. *State v. Paffhausen,* 2012 MT 265, ¶ 38, 367 Mont. 80, 289 P.3d 141.
- Procedural Requirements.
  - Once notice is given, courts are expected to hold a pre-trial hearing to determine whether the accused asserting the defense is able to offer sufficient admissible evidence to make a prima facie defense. If the accused is able to make out a prima facie defense on automatism, whether this defense ultimately raises a reasonable doubt as to guilt is a question to be decided by the fact-finder. *State v. Paffhausen,* 2012 MT 265, ¶ 38, 367 Mont. 80, 289 P.3d 141.
- Jury Instruction:
  - When automatism is raised in defense of a strict liability offense, the court shall charge the jury that the defense goes only to whether the accused acted voluntarily. *State v. Paffhausen,* 2012 MT 265, ¶ 38, 367 Mont. 80, 289 P.3d 141.

Recommended Motions in Limine:

Most jury trials will warrant some limited Motions in Limine. Over time, you will learn what your court expects from these motions, and you may need to add or remove motions as they become necessary or unnecessary.

- Always:
  - Punishment
    - The State moves the Court to prohibit Defendant from discussing punishment, jail, sentencing, the effect conviction may have upon Defendant's employment prospects, or loss of privileges. The jury's role is to determine whether Defendant committed an offense. A jury's verdict should not be influenced in any way by sentencing considerations. *State v. Martin*, 2001 MT 83, ¶¶ 65-66, 305 Mont. 123, 23 P.3d 216.
- Most times:
  - Unless Defendant has provided timely notice, prohibit affirmative defenses (entrapment, compulsion, automatism, etc.). Mont. Code Ann. § 46-15-323.
- Sometimes:
  - Defense counsel testifying/justness/vouching etc.
    - E.g. The State moves the Court to prohibit the parties from alluding to any matter that will not be supported by admissible evidence, assert personal knowledge of facts in issues, or state a personal opinion as to the justness of a cause, the credibility of a witness, or the guilt or innocence of the accused, per Mont. R. Prof. Conduct 3.4(e).
    - Possible additional support:
      - The State makes this motion in light of recent prior trials where, during opening statements, defense attorneys have been stating a Defendant's mindset and reasoning, but then never calling any witnesses to testify or admit any such evidence.
  - Pretrial issues, e.g. discovery, motions to suppress, etc.

- The State moves to prohibit Defendant from arguing legal issues, discovery, or case law at trial. Questions of law are determined by the Court. Mont. Code Ann. § 26-1-201.
- *See also State v. Hudon*, 2019 MT 31, 394 Mont. 266, 434 P.3d 273, re: defense arguing discovery violations etc.

Constitutional Issues and Case Law:

There are several Montana specific constitutional law considerations. First and foremost is Montana's specific Right to Privacy. As a result of this right, Montana deviates from federal rules of criminal procedure during searches and seizures. For example, vehicles are not inherently exigent in Montana.

- Montana Specific Constitutional Provisions:
    - The Right to Privacy - Mont. Const. Art. II, § 10
        - Greater privacy interests than other states/federal system.
        - For example, there is no pure "automobile" search warrant exception in Montana (requires exigent circumstances, although mobility may be part of consideration).
            - *See e.g. State v Elison*, 2000 MT 288, 302 Mont. 228, 14 P.3d 456.
    - The Right to Jury Trial (and waiver) – Mont. Const. Art. II, § 26
    - The Right to Know – Mont. Const. Art., II, § 9
        - Comes into play during some discovery requests, e.g. Officer Personnel Files. *See e.g. City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 17, 397 Mont. 134, 447 P.3d 1048.

Seizures, Generally:

Every analysis must precisely pinpoint the exact moment of seizure, if any occurred at all. That exact moment will dictate the remainder of the analysis, including whether the officer had particularized suspicion before or after that moment.

- Montana Seizures Generally:
  - If it's a seizure, law enforcement need a warrant or warrant exception.
  - Analysis:
    - A person has been seized only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed they were not free to ignore law enforcement and go about their business (aka free to leave). *State v Dupree*, 2015 MT 103, ¶ 14, 378 Mont. 499, 346 P.3d 1114.
  - Specific seizure factors:
    - Mendenhall Factors for Consideration (Federal Standard):
      - (1) The threatening presence of multiple officers;
      - (2) A threatening display or draw of a weapon;
      - (3) Some physical touching of the citizen, or;
      - (4) The use of language or tone of voice indicating that compliance with the officer's request might be compelled. *United States v. Mendenhall*, 446 U.S. 544, 555, 100 S. Ct. 1870 (1980).
    - The Montana Supreme Court has also highlighted other factors to consider:
      - (1) Whether the encounter is in a public place, *Dupree*, 2015 MT 103, ¶ 15, 378 Mont. 499, 346 P.3d 1114;
      - (2) Whether the location was Defendant's choice, *Id.*;
      - (3) Whether officers speak in permissive terms (as opposed to commands), *Id.*, and;
      - (4) Whether officers displayed emergency lights. *State v. Graham*, 2007 MT 358, ¶ 16, 340 Mont. 366, 175 P.3d 885.

- It's a Seizure when:
  - Suspect in handcuffs. *See e.g. State v. Stevens,* 2019 MT 36, ¶¶ 8-20, 394 Mont. 278, 434 P.3d 904.
  - Red & Blue Lights/sirens (Rear facing traffic lights are OK, if for traffic safety reasons.)
  - Blocking suspect's vehicle likely arises to a seizure
  - Physically touching suspect
  - Use or threat of use of force/weapon
  - Commands
  - If officer takes a driver's license (or ID card) to run (must have P.S.) *State v Strom*, 2014 MT 234, 376 Mont. 277, 333 P.3d 218. *See also State v Carrywater,* 2022 MT 131, ¶¶ 22-24, 409 Mont. 194, 512 P.3d 1180.

Common DUI Seizure Warrant Exceptions:

Investigative Stop Seizure Warrant Exception, aka Traffic, aka Terry Stop

- Author's Note: Montana uses the term "Particularized Suspicion." This is equivalent to the federal "reasonable suspicion" standard.
    - Generally:
        - Purpose: Confirm or dispel particularized suspicion of wrongdoing.
        - Requirements: An officer may stop a vehicle if the vehicle is observed in circumstances that "create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense." Mont. Code Ann. § 46-5-401.
    - Limitation:
        - May last no longer than necessary to effectuate purpose of stop. Mont. Code Ann. § 46-5-403.

Two Types of Investigative Stop Seizure Warrant Exceptions:

- Per Se Traffic Violation (Automatically constitutes Particularized Suspicion)
    - "A statutory violation alone is sufficient to establish particularized suspicion for an officer to make a traffic stop." *State v. Schulke*, 2005 MT 77, ¶ 16, 326 Mont. 390, 109 P.3d 744.
- Particularized Suspicion of Wrongdoing (Totality)
    - Particularized suspicion exists when an officer has:
        - (1) objective data and articulable facts from which they can make certain inferences, and;
        - (2) a resulting suspicion that the vehicle's occupant is, or has been, engaged in wrongdoing." *City of Missoula v. Moore*, 2011 MT 61, ¶ 16, 360 Mont. 22, 251 P.3d 679 (internal citations omitted).
        - Whether particularized suspicion exists is evaluated under the totality of the circumstances and requires consideration of the quantity or content of the information available to

the officer and the quality or degree of reliability of that information. *Id.*

- Innocent Explanations:
    - "An officer in the field need not consider every possible innocent explanation or legal exception before concluding that particularized suspicion exists." *State v. Flynn,* 2011 MT 48, ¶ 11, 359 Mont. 376, 251 P.3d 143.
- Subjective Intent, i.e. Pretextual Stops:
    - The Montana Supreme Court "has never held that an otherwise objectively justifiable traffic stop is unlawful because an officer used the stop to investigate a hunch about other criminal acts." *State v. Kaufman*, 2002 MT 294, ¶ 22, 313 Mont. 1, 59 P.3d 1166.
- Escalation:
    - May last no longer than necessary to effectuate purpose of stop. Mont. Code Ann. § 46-5-403.
    - Author's Note: This is where officers get in trouble.
        - *For example, see e.g. State v Martinez,* 2003 MT 65, ¶¶ 25-29, 314 Mont. 434, 67 P.3d 207.
    - Asking for driver's license after LEO has dispelled suspicion of wrongdoing illegally extends the stop, unless…
        - *See e.g. State v Carrywater,* 2022 MT 131, ¶¶ 23-24, 409 Mont. 194, 512 P.3d 1180.
    - A lawful stop can escalate based upon an officer's subsequent observations. However, the investigation must still remain, "within the limits created by the facts upon which the stop is predicated and the suspicion which they arouse." *State v. Larson*, 2010 MT 236, ¶25, 358 Mont. 156, 243 P.3d 1130.
    - Law enforcement may not artificially extend a stop. Authority for a seizure ends when the tasks tied to the traffic infraction are, or reasonably should have been, completed. *State v. Noli,* 2023 MT 84, ¶ 33, 412 Mont. 170, 529 P.3d 813.

- Law enforcement cannot "detour" into unrelated and unsupported investigations that are not connected to the reason for the stop unless they have developed additional particularized suspicion of wrongdoing. *State v. Noli,* 2023 MT 84, ¶¶ 46-47, 412 Mont. 170, 529 P.3d 813.

- Community Caretaker Seizure Warrant Exception
  - *Requirements:* Objectively Reasonable Particularized Suspicion that a person may presently be in peril or otherwise in need of assistance.
    - Specific and articulable facts known to officer
    - Resulting rational inferences
    - *State v Laster,* 2021 MT 269, ¶ 17, 406 Mont. 60, 497 P.3d 224.
  - *Scope:* Briefly detain to investigate and take corresponding action to mitigate peril or otherwise assist.
  - *Restrictions:* Community Caretaker Doctrine check must "actually involve a welfare check" and may not be used as a pretext for an illegal search or seizure, although the purpose need not be *exclusively* to conduct welfare check. *State v. Laster,* 2021 MT 269, ¶ 17, 406 Mont. 60, 497 P.3d 224.
    - Stop must terminate *immediately* once the officer is assured the citizen is not in peril or is no longer in need of assistance or peril is mitigated. *State v. Laster,* 2021 MT 269, ¶ 18, 406 Mont. 60, 497 P.3d 224.
    - Author's Note: Escalation rules apply. May ripen into investigative/terry stop if additional particularized suspicion develops. However, proceed *cautiously*. Montana Supreme Court is frequently reversing CCD stops that overstay their welcome.
- Many Others (Beyond the scope of this Manual)

Arrest:

- The substance of all probable cause definitions is a reasonable belief of guilt, less than evidence which would justify convictions, but more than bare suspicion. *State v. Barnaby,* 2006 MT 203, ¶ 83, 333 Mont. 220, 142 P.3d 809.
- Only the probability, not a prima facie showing, of criminal activity is required. *Id.*
- Because the probable cause standard is a practical, nontechnical conception, the U.S. Supreme Court has reaffirmed the totality-of-the-circumstances approach when evaluating probable cause. *Id.* at ¶ 85.

Informants / RADD (Report a Drunk Driver):

Montana has a specific DUI "informant" test. "Informant" is a catchall term for any citizen reporting crimes to law enforcement and includes reports of drunk drivers.

Pratt Test:

- Montana's rules for informants are more restrictive than the federal informant rules.
- The *Pratt* Test is limited to DUIs:
    - The *Pratt* test is a narrowly drawn variant of the *Gopher* analysis and addresses the reliability of a citizen's tip in the context of a DUI investigative stop. *State v. Dupree*, 2015 MT 103, ¶ 12, 378 Mont. 499, 346 P.3d 1114, (citing *State v. Martinez*, 2003 MT 65, ¶ 37, 314 Mont. 434, 67 P.3d 207).
    - The Court has explained that *Pratt* is not necessarily limited to a DUI context, but that it should be applied only in those cases where the circumstances parallel a DUI stop. *State v. Dupree*, 2015 MT 103, ¶ 12, 378 Mont. 499, 346 P.3d 1114.
- Three Factor *Pratt* Analysis:
    - When an officer's particularized suspicion is based upon a citizen informant's report, the report must contain some indicia of reliability. *City of Missoula v. Moore,* 2011 MT 61, ¶ 17, 360 Mont. 22, 251 P.3d 679.
    - The court should assess the reliability of the informant's report under the three-part test adopted in *Pratt*. *City of Missoula v. Moore,* 2011 MT 61, ¶ 17, 360 Mont. 22, 251 P.3d 679.
    - Under *Pratt*, Montana courts consider (From *City of Missoula v. Moore,* 2011 MT 61, ¶ 17, 360 Mont. 22, 251 P.3d 679):
        - (First Factor) Whether the informant identified himself or herself to the authorities;
            - A citizen informant who is motivated by good citizenship and is willing to disclose the circumstances by which the incriminating information became known is presumed to be telling the truth. Information provided by the citizen informant, such as the citizen informant's name,

address, and telephone number, lends a "high indicia of reliability" to their report. *City of Missoula v. Moore*, 2011 MT 61, ¶ 18, 360 Mont. 22, 251 P.3d 679.

- (Second Factor) Whether the informant's report is based on personal observations, and;
  - An officer is allowed to infer that a report is based on a citizen informant's personal observations if the report contains sufficient detail that it is apparent that the informant has not been fabricating the report out of whole cloth and the report is of the sort which in common experience may be recognized as having been obtained in a reliable way. An informant's belief that a person is DUI must be based, in part, on his or her personal observations. Innocent details that were personally observed by the informant are also relevant in assessing the reliability of the report. *City of Missoula v. Moore*, 2011 MT 61, ¶ 21, 360 Mont. 22, 251 P.3d 679.
- (Third Factor) Whether the officer's observations corroborated the informant's information.
  - Corroboration is achieved by:
  - (a) observing illegal activity, <u>or</u>
  - (b) if the first and second *Pratt* factors are met, by finding the person, vehicle, and vehicle's location substantial as described by the informant. *City of Missoula v. Moore*, 2011 MT 61, ¶ 25, 360 Mont. 22, 251 P.3d 679.

- All information given to the dispatcher is imputed to the officer. *State v. Hall*, 2004 MT 106, ¶ 15, 321 Mont. 78, 88 P.3d 1273.

Searches, Generally:

- *Bullock* and its progeny generally applied the federal *Katz* test to Montana, with some slight adjustments, in consideration of Montana's greater right to privacy.
    - *See generally State v. Bullock* (1995), 272 Mont. 361, 901 P.2d 61, for full discussion of *Katz* application.
- In Montana, to determine whether a (lawful or unlawful) search has occurred, we look to:
    - (1) Whether an individual has an actual expectation of privacy;
    - (2) Whether society is willing to recognize that expectation as objectively reasonable, and;
    - (3) (Montana Specific) In consideration of the nature of the State's intrusion.
        - For example, considering the "nature" of a dog sniff. *E.g. State v Scheetz,* 286 Mont. 41, 950 P.2d 722 (1997).
    - Citation(s): *See e.g. State v. Smith,* 2021 MT 324, ¶ 17, 407 Mont. 18, 501 P.3d 398 (Discussing *State v. Bullock (1995),* 272 Mont. 361, 901 P.2d 61, and its progeny).
- Specific Examples:
    - The following are generally not a Search:
        - Law enforcement running visible license plates/registration/etc. *See e.g. State v Neil,* 2009 MT 128, 350 Mont. 268, 207 P.3d 296.
        - Observations of things in plain view are not typically a search.
            - Author's Note: "Plain View" is a *seizure* warrant exception, but its underlying logic holds for searches.
            - The officer must be in a location they are legally permitted to be (e.g., public property, on the road, etc.)
            - The plain view doctrine simply recognizes that if an article is in plain view, neither its observation nor its seizure involves any invasion of privacy; rather, a seizure of the article involves an invasion only of the owner's possessory interest. Thus, the seizure of an

object in plain view does not constitute a search. *State v. Delao*, 2006 MT 179, ¶ 21, 333 Mont. 68, 140 P.3d 1065.

- The following are searches:
  - When a person stores something in a concealed area of a vehicle and seeks to preserve their privacy, that privacy has constitutional protections.
    - Author's Note: Montana does not have a pure "vehicle" exception. *State v. Tackitt*, 2003 MT 81, ¶ 20, 315 Mont. 59, 67 P.3d 295.
  - Dog Sniff of vehicle under most circumstances is a search. *See e.g. State v. Tackitt,* 2003 MT 81, ¶¶ 20-22, 315 Mont. 59, 67 P.3d 295.
- Private Property Searches
  - Whether a search is occurring on private property always fact specific
  - Not a search: Knocking on front door when house near the road, unobstructed path to front door, no fencing nor no trespassing signs, etc. *State v. Hubbel (1997)*, 286 Mont. 200, 951 P.2d 971.
  - Was a search: Officer on private property where owner put up "no trespassing signs," fencing, shielded from view, historically required to call owner before entering property. *State v. Bullock (1995),* 272 Mont. 361, 901 P.2d 61.
  - In 2021, the Montana Supreme Court issued its ruling in *State v Smith,* 2021 MT 324, 407 Mont. 18, 501 P.3d 398. This case substantially muddied the waters, and it should be reviewed for private property cases. At this time, it is unclear how future Supreme Court cases will interpret and apply the holding in *Smith.*
    - Author's Note: the officers in *Smith* were investigating the non-arrestable offense of speeding and did not have particularized suspicion or probable cause of an arrestable offense at the time they seized the defendant. An analysis involving an arrestable

offense, such as DUI, would likely have been viewed substantially differently.

- DUIs at Home
    - Timing and Location of Arrests:
        - An arrest may be made at any time of the day or night, except that a person may not be arrested in the person's home or private dwelling place at night for a misdemeanor committed at some other time and place unless upon the direction of a judge endorsed upon an arrest warrant. Mont. Code Ann. § 46-6-105.
            - Author's Note: There is an exception for domestic violence cases.
        - This rule has been applied in numerous DUI cases, as highlighted below.
    - Do not Arrest:
        - If suspect breaks the plane of the residence's doorway threshold. *Billings v Whalen (1990),* 242 Mont. 293, 790 P.2d 471.
        - Arresting inside an individual's garage is not permitted. *United States v. Oaxaca*, 233 F.3d 1154, 1156–58 (9th Cir. 2000).
    - OK to Arrest:
        - Freely accessible carports. *City of Whitefish v. Large,* 2003 MT 322, 318 Mont. 310, 80 P.3d 427.
        - Freely accessible driveways. *State v Krause,* 2002 MT 63, 309 Mont. 174, 44 P.3d 493.
            - Author's Note: Contrary to *State v Smith,* 2021 MT 324, 407 Mont. 18, 501 P.3d 398, DUI is an arrestable offense.
    - Suggested LEO Procedure if a DUI suspect has broken the plane of a residence:
        - Knock on the front door.
        - Attempt Consent warrant exception to continue the investigation.

    - For example (Assuming a typical hit-and-run with a trail):
    - "We got a report of a vehicle crash involving your vehicle. We followed the fluid trail to your residence. Would you mind coming out and talking to me?"
    - If the suspect refuses, LEO may not force them out of the residence without a warrant or exception.
- If the suspect freely and unambiguously consents to coming outside and speaking with LEO, the officer may continue the DUI investigation like normal.
    - Run through SFSTs.
    - Read Past and administer PBT.
- For DUIs, my suggestion is to not remand to the detention center a suspect who "broke the plane" of their residence, even if they later agree to come outside and speak with LEO, in consideration of Mont. Code Ann. § 46-6-105, and the caselaw described above.
- Instead, after SFSTs, read implied consent *in the field.*
- If the suspect refuses, issue the citations, notice to appear, and release them back to their residence.
- If the suspect agrees, LEO should inform them they will drive the suspect to the Intoxilyzer instrument at the police station (or hospital for a blood draw). Let the suspect know they will be released following the test, regardless of the results, and driven back home.
- Drive the suspect to the testing location, administer the test, issue any citations, take a Mirandized statement, then return the suspect to their home.
- Author's Note: The implied consent does inform the suspect they are under arrest. Pursuant to Mont. Code Ann. § 46-6-313, law enforcement may exercise discretion in subsequently releasing the suspect to their residence following arrest.

Common Search (Or Property Seizure) Warrant Exceptions

- Consent (Search or Seizure) Warrant Exception:
    - *Requirements*
        - Must get voluntary consent from owner: Unequivocal, Specific, Uncontaminated by duress or coercion. *State v Osteen (1985),* 216 Mont. 258, 700 P.2d 188 (overruled other grounds).
        - *Must not be ambiguous conduct*
    - *Scope*
        - Whatever consent was given for.
        - E.g., car, pockets, backpack, etc.
    - *Restrictions*
        - Consent from 3rd party must have *actual* common authority over the property. *Apparent* authority is insufficient.
            - Mutual use, joint access, joint control for most purposes, so that reasonable to recognize that co-habitant has the right to permit inspection. *State v. Urziceanu,* 2015 MT 58, 378 Mont. 313, 344 P.3d 399.
        - Vehicle Specific 3rd Party Consent with actual authority OK
            - The District Court determined that the search of the vehicle Baty was driving was legal because the passenger, Miller, had common authority to grant consent for the search of the vehicle. We have repeatedly held that a warrantless search is not unlawful when the police obtain the free and voluntary consent of the defendant or a third party who possesses common authority over the private property sought to be inspected. This rule applies so long as there is no evidence that the police have removed a potentially objecting party to avoid a possible objection to the search. *State v. Baty*, 2017 MT 89, ¶ 19, 387 Mont. 252, 393 P.3d 187.
- Search Incident to Arrest (Search or Seizure) Warrant Exception:
    - *Requirements*

- When a lawful arrest is effected, a peace officer may reasonably search the person arrested and the area within such person's immediate presence (aka grab area) for the purpose of:
    - (1) protecting the officer from attack;
    - (2) preventing the person from escaping;
    - (3) discovering and seizing the fruits of the crime; or
    - (4) *discovering and seizing any persons, instruments, articles, or things which may have been used in the commission of or which may constitute evidence of the offense. Mont. Code Ann. § 46-5-102
        - Exigent Circumstances required in Montana. 1-3 are inherently exigent, *State v Hardaway,* 2001 MT 252, ¶ 57, 307 Mont. 139, 36 P.3d 900.
        - *However, need some additional showing for #4.

- *Scope*
    - Grab area *at the location of arrest,* not at the location where the suspect was initially encountered, seized, or stopped. A full body search is generally permitted.
    - (Caution) Containers usually are not within this exception unless there are articulable facts to justify searching the container for safety or escape concerns.
        - If there is a container, such as a purse, wallet, or backpack, LEO should not open the container in the field without consent of the owner.
        - Instead, LEO should wait until booking at the detention center. There, pursuant to the detention center's standard protocol, the detention center staff (or LEO if pursuant to the DC's procedures) may perform the standard Inventory Search of all containers that the suspect had at the time of the arrest. An Inventory Search at a detention center is its own Search Warrant Exception. *See e.g. State v. Demontiney,* 2014 MT 66, 374 Mont. 211, 324 P.3d 344.

- Plain View Seizure Warrant Exception
    - *Requirements*
        - The "plain view" doctrine allows for the warrantless seizure of incriminating evidence where the item is in the plain view of a lawfully present officer, its incriminating nature is immediately apparent, and the officer has a "lawful right of access" to the object itself. *State v. Tenold*, 2020 MT 263, ¶ 7, 401 Mont. 532, 474 P.3d 829.
        - Evidence in Plain View;
        - Incriminating nature is "immediately apparent," and;
        - Officer must have lawful right of access to the object
    - *Scope*
        - Only items in plain view and within reach of officer.
    - *Restrictions*
        - Does not permit "breaking the plane" into a residence.
        - If already in residence for other legally permissible reason, can seize.
        - *May* permit *very limited* "breaking the plane" into a vehicle – but not recommended.
            - *See e.g. State v Tenold,* 2020 MT 263, ¶ 11, 401 Mont. 532, 474 P.3d 829. The Court said an officer slightly reaching through an open window after meth fell from sun visor onto defendant's lap was one of the "limited instances envisioned" by Montana caselaw.
            - Author's Note: In my opinion this was not a carte blanche endorsement by the Court.

- Investigative Stop & Frisk (aka Terry Pat Down) (Search or Seizure) Warrant Exception
    - Generally:
        - During an investigative stop supported by particularized suspicion, an officer my conduct a limited protective pat-down:
    - Requirements:

        - Already have particularized suspicion justifying an investigative stop, and;
        - Particularized Suspicion that the person(s) "may be armed and presently dangerous." *State v. Laster,* 2021 MT 269, ¶ 19, 406 Mont. 60, 497 P.3d 224.
            - Author's Note: For both legal and safety reasons, it is best practices for LEO to always ask for consent prior to administering a pat-down.
    - Scope:
        - Limited protective pat-down search of the "outer clothing"
        - ***May not manipulate objects***
        - If officer "reasonably suspects" item is a weapon, may recover it.
        - If officer detects "immediately apparent" contraband, may remove it.

- Inventory (Search or Seizure) Warrant Exception
    - *Requirements*
        - The routine, administrative inventory search of the personal property on or in the possession of the arrestee <u>at the police station following a lawful arrest</u>. *State v. Demontiney*, 2014 MT 66, ¶ 23, 374 Mont. 211, 324 P.3d 344.
    - *Scope*
        - The scope is limited to the property, including closed containers, in the immediate possession of the arrestee at the time of arrest. *State v. Demontiney*, 2014 MT 66, ¶ 25, 374 Mont. 211, 324 P.3d 344.

- Exigent Circumstances (Search or Seizure) Warrant Exception
    - *Requirements*
        - State bears "heavy burden."
        - Reasonable belief prompt action necessary to prevent:
            - Physical harm to officers or other;
            - (Imminent) destruction of relevant evidence;

        - Escape of the suspect, or;
        - Some other consequence improperly frustrating legitimate law enforcement. *State v. Wakeford,* 1998 MT 16, ¶ 24, 287 Mont. 220, 953 P.2d 1065.
    - *Scope*
        - Limited scope, as necessary by exigent circumstances.
    - *Restrictions*
        - In Montana, lowering BAC does not constitute exigency. *See e.g. State v. Saale,* 2009 MT 95 ¶ 11.
        - "Hot Pursuit" does not apply to misdemeanors. *State v. Smith,* 2021 MT 324, 407 Mont. 18, 501 P.3d 398.
        - A vehicle is not inherently exigent. *See e.g. State v. Tackitt*, 2003 MT 81, ¶ 20, 315 Mont. 59, 67 P.3d 295.

Alcohol Testing Warrant Exceptions (Breath and Blood):

- Generally:
  - The US Supreme Court has drastically simplified alcohol testing analyses thanks to *Birchfield v. North Dakota,* 579 US 438, 136 S. Ct. 2160 (2016). Every DUI prosecutor should read and become familiar with this case.
  - In short, blood and breath tests are searches.
  - The US Supreme Court has permitted them as subtypes of other warrant exceptions.
    - Breath tests are permissible as searches incident to arrest (or via consent).
    - Blood tests are permissible via consent.
    - *Birchfield v North Dakota,* 579 US 438 (2016).
  - States may criminalize refusing to take a breath test but may not criminalize refusal to take a blood test. *Id.*
  - Montana, however, does not *criminalize* refusals. Rather, there are evidentiary and civil penalties for refusal. Thus, these distinctions do not conflict with Montana's current Implied Consent laws.
    - "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." *Birchfield v North Dakota,* 579 US 438 (2016).
  - Montana also has specific statutory restrictions for alcohol testing. All forbid testing upon refusal, except pursuant to a judicial warrant. Mont. Code Ann. § 61-8-1016(4).
  - Author's Note: Failure to advise a suspect of the right to an independent blood draw, such as via reading the Implied Consent Advisory, is grounds for dismissal of DUI offenses. *See e.g. State v. Neva,* 2018 MT 81, ¶ 13, 391 Mont. 149, 415 P.3d 481.

- Portable Breath Test (PBT) Search Warrant Exception

- *Requirements:* Particularized Suspicion of DUI and read PAST advisory. Mont. Code Ann. § 61-8-1016.
- *Scope:* Portable breath test.
- *Restrictions:* May not be given if refused.

- Intoxilyzer Breath Test (Intox) Search Warrant Exception
  - *Requirements:*
    - LEO must read implied consent, and
    - Probable Cause of:
      - DUI + Arrest, or;
      - DUI + Crash, or;
      - Drove/Actual Physical Control vehicle involved in SBI or Death.
      - Mont. Code Ann. § 61-8-1016.
  - *Scope:* Breath test.
  - *Restrictions:* May not be given if refused.

- Blood Test Search Warrant Exception
  - *Requirements:*
    - Consent, per Consent Search Warrant Exception, and
    - LEO must read implied consent, and
    - Probable Cause of:
      - DUI + Arrest, or
      - DUI + Crash, or
      - Drove/Actual Physical Control vehicle involved in SBI or Death.
      - Mont. Code Ann. § 61-8-1016.
  - *Scope:* Blood Draw
  - *Restrictions:* May not be given if refused.

Miranda in Montana:

- Applicability:
  - The Miranda warnings are not required to be given by law enforcement unless a person is subject to a custodial interrogation. *State v Reavley,* 2003 MT 298, ¶ 18, 318 Mont. 150, 79 P.3d 270.
  - Custody:
    - A person is 'in custody' if 'he has been deprived of his freedom of action in any significant way, or his freedom of action has been curtailed to a degree associated with a formal arrest. *Id*. (emphasis added).
  - Interrogation:
    - Interrogation under Miranda extends only to words or actions on the part of the police that the police should know are "reasonably likely to elicit an incriminating response from the suspect." *State v Morrisey,* 2009 MT 201, ¶ 43, 351 Mont. 144, 214 P.3d 708 (emphasis added).
- DUI Specifics
  - Miranda is generally not required for a roadside DUI investigation so long as officers keep the scope of inquiry reasonably related to purpose of the traffic stop (Until arrest). *State v. Larson,* 2010 MT 236, ¶ 31, 358 Mont. 156, 243 P.3d 1130.
  - SFSTs and breath tests (even after arrest) are outside Miranda's purview because "the privilege against self-incrimination does not extend to real or objective evidence." *State v. Kelm*, 2013 MT 115, ¶ 30, 370 Mont. 61, 300 P.3d 687.
  - "…Without custodial interrogation, a defendant generally does not have a Fifth Amendment or Article II, Section 25 constitutional right to consult with an attorney prior to performing field sobriety tests." *State v. Stanczak,* 2010 MT 106, ¶ 14, 356 Mont. 263, 232 P.3d 896.
- Author's Note:
  - The Montana Law Enforcement Academy trains peace officers to forego Miranda during typical roadside DUI investigations to

avoid implicating "the confusion doctrine." *See e.g. Gentry v DOJ, Motor Vehicle Div. (1997),* 282 Mont. 491, 495, 938 P.2d 693.

- Author's Note: Following this change in procedure, the confusion doctrine has not been raised as an issue. It is unclear whether the confusion doctrine would even be applicable at this point, considering the current language of the Implied Consent Advisory.

- There may be some circumstances during which Miranda may be necessary prior to conducting a DUI investigation, for example after a physical altercation with a suspect. In such cases, Miranda can and should be read to preserve the contents of any admissions during DUI processing. Even if Miranda is not read, the SFSTs and testing, including refusals, would be admissible even without Miranda. *See e.g. State v. Schlichenmayer,* 2023 MT 79, ¶¶ 25-32, 412 Mont. 119, 529 P.3d 789.
- Law enforcement should be cautioned that soliciting statements from a suspect during or after transportation to another location, such as for administration of SFSTs or to a detention center following arrest, may implicate Miranda. *See e.g. State v. Schlichenmayer,* 2023 MT 79, ¶¶ 25-32, 412 Mont. 119, 529 P.3d 789.

Montana Specific Right to Jury Trial / Absence of Defendant:

Jury Trial

- Right to Jury Trial (and waiver) – Mont. Const. Art. II, § 26
- Jury trial can be waived if defendant:
  - (1) is advised that failure to appear may result in waiving jury trial;
  - (2) the court finds Defendant knew of date/time and is voluntarily absent, and;
  - (3) the offense carries no more than 6 months maximum jail sentence. *City of Kalispell v. Salsgiver*, 2019 MT 126, 396 Mont. 57, 443 P.3d 504.
- See also Mont. Code Ann. § 46-16-122.

Sentencing

- In misdemeanors, the verdict and sentence may be imposed without defendant being present. Mont. Code Ann. § 46-16-123.
- In felonies, the defendant shall appear in person when the verdict is returned or the sentence is imposed unless, after the exercise of due diligence to procure the defendant's presence, the court finds that it is in the interest of justice that the verdict be returned and the sentence be pronounced in the defendant's absence. Mont. Code Ann. § 46-16-123.

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