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Recent Decisions Affecting the Montana Practitioner

LEGAL SHORTS

RECENT DECISIONS AFFECTING THE MONTANA PRACTITIONER

I. *STATE V. DELAO*[1]

In *State of Montana v. Delao*, the Montana Supreme Court held that a police officer arresting a defendant for driving under the influence of alcohol (DUI) has a "slight duty of care" to secure the defendant's vehicle. The Court held that an officer may attempt to roll up the windows and lock the doors of the vehicle to execute that duty.[2] The Court further held that in doing so, an officer is lawfully present in the vehicle, justifying the seizure of any visible incriminating evidence under the plain view doctrine, even when the evidence is not visible from outside the vehicle.[3]

On October 30, 2004, Montana Highway Patrol Officer Scott Largent conducted an investigative stop of Delao while responding to a citizen complaint of a drunk driver. While Largent was calling in Delao's license plate number and checking for outstanding warrants, Delao exited his vehicle. After Delao failed to comply with Largent's order to return to his vehicle, Largent placed Delao in custody and locked him in the backseat of the Highway Patrol vehicle.[4]

When Delao was detained, the doors to his vehicle were unlocked and the windows were rolled down.[5] Pursuant to Montana Highway Patrol policy, Largent attempted to secure Delao's vehicle by rolling up the windows and locking the doors.[6] Largent

1. *State v. Delao*, 140 P.3d 1065 (Mont. 2006).
2. *Id.* at 1069.
3. *Id.* at 1070.
4. *Id.* at 1066.
5. *Id.*
6. *Id.*

leaned into Delao's vehicle, but realized he needed the keys from Delao to operate the power locks and windows.[7] As Largent exited Delao's vehicle to retrieve the keys, Largent noticed a clear bottle partially covered by the center armrest.[8] From his training and experience, and based on the size and shape of the object, Largent identified the bottle as an alcohol container.[9] Largent seized what was later identified as a 375-milliliter bottle of vodka.[10]

Largent returned to his police vehicle with the bottle of vodka and asked Delao if the bottle belonged to him, which Delao denied.[11] Because Delao claimed that he did not have his car keys, Largent was unable to secure Delao's vehicle.[12]

Delao pled guilty to operating a motor vehicle without proof of liability insurance, and driving while his license was suspended or revoked, but pled not guilty to DUI.[13] Delao filed a pretrial motion to suppress the vodka bottle, claiming it was evidence obtained by an illegal search.[14] The district court denied the motion, concluding that the bottle was properly seized under the plain view exception to the warrant requirement.[15] Delao's sole issue on appeal to the Montana Supreme Court was whether the district court erred in denying his motion to suppress the vodka bottle at trial.[16]

Delao argued that under *State v. Elison*,[17] he had a reasonable expectation of privacy in items stored in his car.[18] In *Elison*, an officer stopped a driver whom the officer suspected was under the influence of marijuana. The officer subsequently found drugs behind the front seat while conducting a warrantless search of the vehicle.[19] The Court held that the officer's warrantless search was unreasonable.[20]

In his analysis of Delao's protections from unreasonable searches and seizures, Justice Nelson, writing for the Court, re-

7. *Delao*, 140 P.3d at 1066.
8. *Id.*
9. *Id.* at 1070.
10. *Id.* at 1066–67.
11. *Id.*
12. *Id.*
13. *Delao*, 140 P.3d at 1067.
14. *Id.*
15. *Id.*
16. *Id.* at 1066.
17. *State v. Elison*, 14 P.3d 456 (Mont. 2000).
18. *Delao*, 140 P.3d at 1069 (citing *Elison*, 14 P.3d at 456).
19. *Id.*
20. *Id.*

viewed the Fourth Amendment to the U.S. Constitution, as well as Article II, section 11 of the Montana Constitution.[21] Although the Court noted that warrantless searches are *per se* unreasonable,[22] the plain view doctrine is a well established exception that allows police to legitimately seize objects for evidence. Courts conduct a three-part inquiry to determine whether the plain view exception applies to the facts: (1) was the officer lawfully in the place from which the evidence was seen? (2) was the item in plain view? and (3) was the item's incriminating character "immediately apparent"?[23] The primary policy justification for the plain view doctrine is that there is no reasonable expectation of privacy when an object is in plain view.[24]

The Montana Supreme Court affirmed the district court, holding that the officer's actions satisfied the three-part test. The Court held that the first part of the test was satisfied—Largent was lawfully in Delao's car—because, as a Montana Highway Patrol officer, he had an obligation to secure Delao's property.[25] This obligation gave Largent a lawful reason to lean inside Delao's vehicle and look for the keys in the ignition.[26] Largent's attempt to secure Delao's vehicle was consistent with the "slight duty of care" an officer owes a detainee when his or her vehicle must be left on the road.[27] The duty is justified by the need to protect vehicle owners' property and to protect police from liability for detainees' lost or stolen property.[28]

The Court also held that the second part of the plain view test was met because "the item was in plain view": the vodka bottle was not concealed.[29] The third part of the test was satisfied because Largent recognized the bottle as containing alcohol; therefore the incriminating nature of the item was immediately apparent.[30]

The Montana Supreme Court distinguished *Delao* from *Elison* by noting two key factual differences. First, Largent did not enter

21. *Id.* (citing *Elison*, 14 P.3d at 456).
22. *Id.* at 1067.
23. *Id.*
24. *Delao*, 140 P.3d at 1069.
25. *Id.*
26. *Id.*
27. *Id.* at 1068.
28. *Id.* (citing *State v. Sawyer*, 571 P.2d 1131, 1134 (Mont. 1977)).
29. *Id.* at 1069.
30. *Delao*, 140 P.3d at 1069.

the vehicle to look for the bottle of vodka.[31] Second, Delao did not place the bottle out of plain view.[32] Therefore, *Elison* was inapplicable and the three-part test was satisfied. The Montana Supreme Court held that the district court did not err in admitting the vodka bottle at trial.[33]

In affirming the district court's denial of Delao's motion to suppress, the Montana Supreme Court reinforced a boundary of the plain view doctrine. Here, Largent intended to secure the vehicle, not to look for incriminating evidence, which sufficiently demonstrated that an improper warrantless search did not occur.[34] This opinion illustrates that an officer's *intention* is relevant to the application of the plain view exception to the warrant requirement, as is an officer's "common-sense judgment."[35]

—Jennifer A. Giuttari

II. *STOP OVER SPENDING MONTANA V. STATE*[36]

In *Stop Over Spending Montana*, the Montana Supreme Court upheld the Attorney General's (AG) ballot statements written to describe Constitutional Initiative 97 (CI-97). Plaintiffs included proponents of the initiative and a political ballot committee called Stop Over Spending Montana (Proponents). Proponents were "dissatisfied" with the statements and asked the district court of Lewis and Clark County to alter them. The district court rewrote the statements, and the AG appealed to the Montana Supreme Court. The Court reversed the district court's invalidation and revision of the AG's statements.[37]

After a constitutional initiative is proposed, the AG must write three statements for the initiative, which appears on both the ballot and the petitions.[38] The statement of purpose must be 100 words or less and state the initiative's purpose.[39] Two statements of implication must state what will happen if the initiative passes or fails, and each is limited to twenty-five words.[40] The

31. *Id.*
32. *Id.*
33. *Id.* at 1070.
34. *Id.*
35. *Id.*
36. *Stop Over Spending Mont. v. State*, 139 P.3d 788 (Mont. 2006).
37. *Id.* at 793.
38. Mont. Code Ann. § 13-27-312 (2005).
39. *Id.* at -312(2)(a).
40. *Id.* at -312(2)(b).

statements must be "true and impartial," in "plain, easily understood" language, and not written to "create prejudice for or against the measure."[41]

CI-97 would have constitutionally capped Montana legislative spending based on population and inflation, unless voters approved a particular spending increase in a statewide election.[42] The AG's statement said that Montana law already prevents the State from spending more than anticipated revenue, and included a list of other expenses, such as emergencies, debt payments, and pro-rata tax rebates that would not be included in the spending limit.[43]

Proponents sued the State of Montana through the offices of the AG and Secretary of State, claiming that the AG's statements were not true and accurate.[44] The district court found for Proponents and invalidated the AG's language in the initiative's statement of purpose, the statements of implication, and the statement of fiscal impact.[45]

The district court determined that the AG's statement of purpose was inaccurate because it referred to "growth rate" as opposed to "change" in population and inflation, and the statement left out "salient provisions" of the measure.[46] The court rewrote the statement to include the term "change," instead of "growth," and added certain "salient provisions."[47] The court also substituted "change" for "growth rate" when it rewrote the statements of

41. *Id.* at -312(4).

42. *Stop Over Spending Mont.*, 139 P.3d at 789. If inflation and population decreased, the legislature could spend at the level of the previous biennium. *Id.*

43. *Id.* at 790. The statement of purpose prepared by the AG reads:

> The Montana Constitution currently prohibits appropriations by the legislature that exceed anticipated revenue. This measure adds a constitutional spending limit that would prohibit increases in appropriations greater than the combined growth rate of population and inflation. It allows appropriations up to the largest spending limit for any previous biennium. Emergencies, debt payments, pro-rata tax rebates, various appropriations expressly provided by the Montana Constitution, and expenditures from funding sources including the federal government, constitutionally created trusts, and certain user fees are not included in the spending limit. The legislature may exceed the spending limit only with voter approval.

Id.

44. *Id.* at 789.

45. *Id.*

46. *Id.* at 790–91.

47. *Stop Over Spending Mont.*, 139 P.3d at 790.

implication and the fiscal note.[48] Finally, the court rewrote the fiscal note after finding that it was confusing.[49]

The Montana Supreme Court reversed the district court.[50] The Court found that the initiative meant to prevent the legislature from increasing fund appropriation more than an amount determined by considering population growth and inflation.[51] The Court found no requirement in the measure that the legislature should reduce appropriations in the event of a lack of population growth or deflation. Thus, the Court ruled, the AG's statement was "not inaccurate."[52]

The Court went on to analyze the added "salient provisions." It determined that considering the 100-word limit on statements of purpose,[53] to avoid bias and untruthfulness, there was no need for the AG to add language allowing parties to sue to enforce the measure or that the limits would apply in the next legislative session.[54] It noted there are many provisions "that could be deemed salient to voters" within the complex text of the initiative.[55] The Court clarified its holding by emphasizing it was not condemning the lower court's amendments as patently incorrect. Instead, it found the AG's statement to be "true and impartial" in "plain, easily understood language" that was not written to "create prejudice."[56]

In reviewing the district court's changes to the statements of implication, the Court referenced its earlier reasoning regarding "change" in the statement of purpose.[57] It concluded that the change was not necessary because the amendment would not have required the legislature to reduce appropriations in the event of deflation or decrease in population.[58]

The Montana Supreme Court further determined the district court "erred in re-writing" the statements of implication.[59] The district court added language that spending limits could be in-

48. *Id.* at 791–93.
49. *Id.* at 793.
50. *Id.*
51. *Id.* at 790.
52. *Id.*
53. Mont. Code Ann. § 13-27-312(2)(a) (2005).
54. *Stop Over Spending Mont.*, 139 P.3d at 791.
55. *Id.*
56. *Id.*
57. *Id.* at 792.
58. *Id.* at 790–91.
59. *Id.* at 792.

creased by a vote of the people.[60] However, to remain within the twenty-five-word limit, the district court deleted the AG's provision that appropriations could remain at the "largest spending limit for any previous biennium" if there is deflation or a decrease in population.[61] The Montana Supreme Court found neither of these provisions more important than the other.[62] Thus, the changes were unnecessary for the statement to fulfill statutory requirements of truth, impartiality, and writing that avoids prejudice.[63]

Finally, the Court assessed the district court's changes to the AG's fiscal statement.[64] The initiative required a fiscal note because it would affect state spending.[65] The AG's fifty-word fiscal statement concluded that the fiscal impact of the measure was unknown.[66]

Proponents argued that the fiscal statement was invalid because it did not estimate the dollar value of the actual impact.[67] The Court held the statement was sufficient, though "not perfect," and that the statement did not need to estimate specific amounts.[68] Furthermore, the Court interpreted Montana law as requiring an exact dollar amount on the fiscal note only when "possible."[69]

Two dissents were written. Justice Nelson argued the Court should have analyzed the legal question of whether the statements were sufficient before assessing the district court's rewritten statements for statutory compliance.[70] He went on to ask, "*why* is the trial court's conclusion incorrect as a matter of law?" and faulted the Court for a "substituted determination of the purpose of the initiative and the appropriate language that should be included in the statement."[71] Justice Nelson concluded the Court

60. *Stop Over Spending Mont.*, 139 P.3d at 792.

61. *Id.*

62. *Id.*

63. *Id.*; Mont. Code Ann. § 13-27-312(4) (2005).

64. *Stop Over Spending Mont.*, 139 P.3d at 792–93.

65. *Id.* at 792. "[I]f the proposed ballot issue has an effect on the revenue, expenditures, or the fiscal liability of the state, [the Attorney General] shall order a fiscal note incorporating an estimate of the effect . . . ." Mont. Code Ann. § 13-27-312(1).

66. *Stop Over Spending Mont.*, 139 P.3d at 793.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Stop Over Spending Mont.*, 139 P.3d at 793–94 (Nelson, J., dissenting).

71. *Id.* at 796.

did not provide adequate analysis in supporting its conclusion that the district court was wrong as a matter of law.[72]

Justice Nelson agreed with the district court's reasoning for replacing "growth rate" with "change" because it was in the text of the initiative.[73] He also agreed with the district court's reasoning for rewriting the AG's statements because the information was necessary to accurately represent the measure.[74] Justice Nelson further agreed with the district court's finding that the AG's fiscal statement was confusing and needed to be rewritten.[75]

Finally, Justice Nelson assessed whether the petition signatures should be invalidated.[76] He analyzed the text of Montana Code Annotated § 13-27-316(3)(b), which requires that "[a] statement certified by the Court must be placed on the petition for circulation and on the official ballot."[77] Justice Nelson concluded that the statute requires the language on the ballot and the petition be the same. The district court would be "elevating the sublime over the ridiculous" to conclude the AG's statements were not "true, accurate, and not misleading" for use on the ballot but were not so "untrue," "inaccurate," and "misleading" to render them unfit for signature gathering.[78]

Chief Justice Gray wrote a dissent agreeing with Justice Nelson's dissent relating to the sufficiency of the AG's statements, but diverging from Justice Nelson's final conclusion.[79] Chief Justice Gray would instead have affirmed the district court on its refusal to invalidate the signatures already gathered with the AG's original statements.[80] Chief Justice Gray reached a different conclusion, however, by analyzing the "statutory scheme" surrounding the provision requiring ballot and petition language be the same.[81] She concluded it would not make any sense for the signatures to be invalidated when they were gathered by using language that was unsatisfactory to the proponents of the initiative.[82] In analyzing the "statutory scheme," Chief Justice Gray

72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 797.
76. *Stop Over Spending Mont.*, 139 P.3d at 797 (Nelson, J., dissenting).
77. *Id.* at 798–99; Mont. Code Ann. § 13-27-316(3)(b) (2005).
78. *Stop Over Spending Mont.*, 139 P.3d at 798–79 (Nelson, J., dissenting).
79. *Id.* at 801 (Gray, C.J., dissenting).
80. *Id.*
81. *Id.* at 802.
82. *Id.* at 801–02.

discussed Montana Code Annotated § 13-27-312(5), which states that the statement of purpose, "unless altered by a court under 13-27-316," should be both the petition and ballot title.[83] She concluded that the statutory language, "unless altered," was adopted intentionally as "legislative anticipation" of a court changing a statement after signatures had been gathered, such as the situation here.[84]

—Hilary J. Oitzinger

III. *CITIZENS RIGHT TO RECALL V. MCGRATH*[85]

In *Citizens Right to Recall*, the Montana Supreme Court upheld the Attorney General's (AG) ballot statements written to describe Constitutional Initiative 98 (CI-98).[86] The plaintiff, a political ballot committee (Proponent), was dissatisfied with the statements and asked the district court to alter them. The district court declined to rewrite the statements and Proponent appealed to the Montana Supreme Court. The Court affirmed the district court's holding that the statements complied with Montana Code Annotated § 13-27-312.[87]

CI-98 would have changed the way Montana citizens recall state judges and Montana Supreme Court justices.[88] Proponent intended the initiative to "give voters a constitutional right to recall elected justices or judges if and when voters determine that appropriate cause exists."[89] The AG's statement of purpose said Montana law already allows justices and judges to be recalled and the measure would allow their recall "for any reason."[90]

At the district court, Proponent sued the State of Montana through the offices of the AG and Secretary of State, claiming that the AG's statements did not "explain the purpose of the measure," that the statements were not "true and impartial," and that the statements were written "to create prejudice against the measure."[91] The district court found for the State in an order issued July 10, 2006, almost four months before the November election,

83. *Id.* at 802 (emphasis omitted); Mont. Code Ann. § 13-27-312(5) (2005).
84. *Stop Over Spending Mont.*, 139 P.3d at 802 (Gray, C.J., dissenting).
85. *Citizens Right to Recall v. McGrath*, 142 P.3d 764 (Mont. 2006).
86. *Id.* at 769.
87. *Id.*; Mont. Code Ann. § 13-27-312 (2005).
88. *Citizens Right to Recall*, 142 P.3d at 765.
89. *Id.*
90. *Id.* at 765–66.
91. *Id.* at 766.

concluding that the AG's statements complied with the state law.[92]

The Montana Supreme Court took the "opportunity to expand upon the analysis contained in [its] recent decision in *Stop Over Spending Montana*,"[93] decided ten days earlier, perhaps to address Chief Justice Gray's and Justice Nelson's dissents.[94] The *Citizens Right to Recall* Court first assessed the AG's purpose statement for statutory compliance.[95] Proponent argued that the statement did not adequately "explain the purpose of the proposed measure" because "58% of the 100 words allowed by statute" talk about existing law.[96] The Court rejected this argument,[97] holding that, although it was true the first sentence provided "context" and did not focus on purpose, the first sentence needed to be read with the other sentences that did explain the purpose.[98]

Proponent asserted that the first sentence of the purpose statement—which noted that Montana law currently provides for the recall of judges and justices—created prejudice by implying the measure was "redundant and unnecessary."[99] The Court held the AG's first sentence accurately depicted current law.[100]

Proponent also argued the statement of purpose left out "salient provisions."[101] The Court reasoned that because the measure is 885 words long and there is a 100-word limit, the AG cannot be expected to include "details of the proposal."[102] The Court held the AG is "entrusted" with the "degree of discretion" necessary to summarize the measure, and the Court will not reverse the AG's choices unless the statute is violated.[103] The Court determined

92. *Id.*

93. *Id.* at 766.

94. *See supra* Section II., discussing *Stop Over Spending Mont. v. State* and dissents by Justice Nelson and Chief Justice Gray.

95. *Citizens Right to Recall*, 142 P.3d at 766.

96. *Id.*

97. *Id.* at 767.

98. *Id.*

99. *Id.* The first sentence of the AG's statement reads, "Montana statutes currently provide for the recall of public officials, including state court justices or judges, for physical or mental lack of fitness, incompetence, violation of the oath of office, official misconduct, or conviction of a felony offense." *Id.* at 765 (referring to Mont. Code Ann. § 2-16-603(1) (2005)).

100. *Id.* at 767.

101. *Citizens Right to Recall*, 142 P.3d at 767.

102. *Id.*

103. *Id.* (citing *Wenzel v. Murray*, 538 P.2d 633, 637–38 (Mont. 1978)).

the omission of certain provisions does not preclude voters from "an intelligent and informed ballot."[104]

The second sentence of the AG's statement of purpose reads, "[t]his measure amends the Montana Constitution to provide for recall by petition of state court justices or judges for any reason."[105] The Court compared the language "for any reason" to the "salient provisions" suggested by Proponent.[106] It determined the requested "salient provisions" were just details, but the "for any reason" language expressed the "intent of the measure."[107]

The Court stated the text of the measure included that the reason behind a petition for recall "is sufficient if it sets forth *any reason* acknowledging electoral dissatisfaction with a justice or judge . . . ."[108] It then held that the statement was "a true and impartial explanation of CI-98 that the [AG] wrote in plain language."[109]

The Court then addressed whether the AG's statement of purpose "create[d] prejudice."[110] The Court rejected Proponent's claim that the lack of explanation and the "for any reason" language created prejudice.[111] The Court held that omitting information is not grounds for a claim of anti-measure prejudice.[112] Proponent could not point to any actual language that created prejudice, thus, this argument failed.[113]

The statements of implication were also held to comply with the statute.[114] Proponent claimed that the statements of implication did not state the purpose of the measure and "omit[ted] salient provisions" important to voters.[115] Proponent specifically requested that the statements be revised to include the "salient provisions" that a petitioner could be held liable for making "false statements in petitions" or a petitioner could have to "post bond for successive petitions."[116]

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104. *Id.* at 767 (citing *Advisory Op. to the Atty. Gen. Re Term Limits Pledge*, 718 S.2d 798 (Fla. 1998)).
105. *Id.* at 766.
106. *Id.* at 768.
107. *Citizens Right to Recall*, 142 P.3d at 768.
108. *Id.* (citing text of CI-98).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* (citing *Schulte v. Long*, 687 N.W.2d 495 (S.D. 2004)).
113. *Citizens Right to Recall*, 142 P.3d at 768.
114. *Id.* at 769; Mont. Code Ann. § 13-27-312(4) (2005).
115. *Citizens Right to Recall*, 142 P.3d at 769.
116. *Id.*

The Court rejected these arguments.[117] First, it found no requirement that a statement of implication must also explain the purpose of the initiative.[118] The statute only requires that a statement explain the implications of voting yes or no on the measure.[119] Considering the twenty-five-word limit on the statement of implication, the Court held the AG would have to delete provisions Proponent wanted.[120] It concluded that the AG has broad discretion to draft the statements, which will not be disturbed absent violation of Montana Code Annotated § 13-27-312.[121]

Proponent also claimed that the statements of implication created prejudice by causing voter confusion because a voter could misinterpret the language "to provide for recall of state court justices or judges for any reason."[122] Proponent claimed that a voter may think that a state court justice or judge could initiate a recall as opposed to a "dissatisfied qualified elector."[123] The Court rejected this argument because, although the statement was "admittedly ambiguous," both interpretations were correct and thus there was no prejudice created.[124] The Court reasoned that not only qualified electors would be authorized to recall a judge or justice, but judges or justices would also be "implicitly" authorized to "recall one another."[125]

The Court held that both the statements of purpose and implication were "true and impartial reflections," not written "in a manner to create prejudice against CI-98," and therefore were in compliance with the statute.[126] The Court declined to rewrite the ballot statements.[127]

Justice Cotter concurred but did not sign on to the majority's concession that the statements of implication were "admittedly ambiguous."[128] Cotter argued that only a "strained reading" of the statements would reveal ambiguity and that in doing so the statements would be rendered "incomplete and illogical."[129]

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117. *Id.*
118. *Id.*; Mont. Code Ann. §§ 13-27-312(2)(a), -312(2)(b).
119. Mont. Code Ann. § 13-27-312(2)(b).
120. *Citizens Right to Recall*, 142 P.3d at 769.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Citizens Right to Recall*, 142 P.3d at 769; Mont. Code Ann. § 13-27-312 (2005).
127. *Citizens Right to Recall*, 142 P.3d at 769; Mont. Code Ann. § 13-27-312(4).
128. *Citizens Right to Recall*, 142 P.3d at 770 (Cotter, J., concurring).
129. *Id.*

Chief Justice Gray dissented and would have reversed and remanded to the district court for more complete analysis "if time permitted," or would have had the Court rewrite the ballot statements.[130] Gray first took issue with the district court's lack of a legal rationale for dismissing Proponent's complaint,[131] arguing that there was inadequate basis for appellate review.[132]

The Chief Justice then addressed the majority's and the district court's use of *Wenzel* to describe the AG's discretion.[133] The *Wenzel* Court found that as long as the AG's language met statutory requirements, the AG has discretion to determine the wording.[134] Although Gray agreed with *Wenzel*'s reasoning and result, she disagreed that it resembled the facts of this case.[135]

Chief Justice Gray also argued that the AG's statement of purpose was not "true and impartial" because the "for any reason" language did not accurately convey that a recall will only occur after the required number of signatures are gathered and a majority of the electors vote for the recall in an election.[136] Gray further concluded that the statement was not "impartial" because thirty-eight of the sixty-four words in the statement of purpose provided context[137]

Chief Justice Gray asserted that because the timeline did not allow for remand, the Montana Supreme Court should have rewritten the AG's statements.[138] A revised statement of purpose should have been clear that the measure makes it easier to recall judges or justices for "any stated reason" only after the required number of signatures are gathered and an election is held.[139]

Finally, Chief Justice Gray would not invalidate the signatures already gathered because that would punish the Proponents for gathering signatures under statements she believed were "biased *against* the initiative."[140]

—Hilary J. Oitzinger

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130. *Id.* at 770, 774 (Gray, C.J., dissenting).
131. *Id.* at 770.
132. *Id.*
133. *Id.* (citing *Wenzel v. Murray*, 585 P.2d 633, 635 (Mont. 1978) (Gray, C.J., dissenting)).
134. *Citizens Right to Recall*, 142 P.3d at 770 (Gray, C.J., dissenting).
135. *Id.* at 771.
136. *Id.*
137. *Id.* at 772.
138. *Id.* at 773.
139. *Id.*
140. *Citizens Right to Recall*, 142 P.3d at 774 (Gray, C.J., dissenting).

IV. *MONTANANS FOR JUSTICE V. STATE*[141]

In *Montanans for Justice*, the Montana Supreme Court invalidated signatures gathered in support of Constitutional Initiatives 97 and 98, and Initiative 154 (the Initiatives).[142] As a result of the Court's action, although the Initiatives were on election ballots in November 2006, votes for or against them had no effect.[143] Plaintiffs, three political ballot committees formed to oppose the initiatives ("Opponents"), sued the political ballot committees formed to promote the initiatives and their representatives ("Proponents") and the State of Montana, claiming that the signature-gathering process violated statutory requirements due to deceptive practices and false swearing to affidavits.[144] The district court found for Opponents and the Supreme Court unanimously affirmed, holding that "the signature-gathering process was permeated by a pervasive and general pattern and practice of fraud and procedural noncompliance."[145]

For an initiative to qualify for the ballot, proponents must gather signatures from "qualified elector[s]" totaling 5% of voters in half of Montana's counties.[146] In contrast, a constitutional amendment initiative requires signatures from 10% of voters in half of the counties in Montana.[147] Since this county distribution requirement was found unconstitutional in 2005,[148] the Court determined that the law required 22,308 signatures from thirty-four legislative districts to qualify an initiative and 44,615 signatures from forty legislative districts to qualify a constitutional initiative.[149]

Petitions must be certified by affidavit, attesting that the affiant "gathered or assisted in gathering" the signatures, that the affiant believes the signatures are genuine, and that the signers "knew the contents of the petition before signing."[150] An action

141. *Montanans for Just. v. State ex rel. McGrath*, 146 P.3d 759 (Mont. 2006).

142. *Id.* at 763.

143. *Id.* at 778 ("County administrators are instructed not to count the votes for CI-97, CI-98 and I-154 to the extent that this is technically feasible. If the votes must be counted, they will have no force or effect.").

144. *Id.* at 764–65.

145. *Id.* at 763.

146. Mont. Code Ann. §§ 13-27-102, -204 (2005).

147. *Id.* at -207.

148. *Mont. Pub. Interest Research Group v. Johnson*, 361 F. Supp. 2d 1222, 1232 (D. Mont. 2005).

149. *Montanans for Just.*, 146 P.3d at 764.

150. Mont. Code Ann. § 13-27-302.

contesting the validity of certification of an initiative must be brought within thirty days of certification.[151]

Constitutional Initiative 97 (CI-97) would have capped Montana's taxing and spending ability according to a formula accounting for inflation and population growth. Constitutional Initiative 98 (CI-98) changed the procedure for recalling state-court judges and justices from office. Initiative 154 (I-154) expanded Montana's definition of government action qualifying as a taking of private property.[152]

From March 2006 to June 23, 2006, signatures were gathered for the initiatives, most by forty-three out-of-state signature gatherers who were paid more than $633,000.[153] Although Proponents did use signature gatherers from Montana,[154] more than half the 125,609 total signatures came from five out-of-state signature gatherers,[155] each of whom attested to signatures gathered in five or more counties.[156] One affiant swore to collecting 41,761 signatures, including 15,000 during a single two-week period.[157]

At the district court, Opponents claimed that signature gatherers violated statutes by obtaining signatures "in a deceptive manner" and "falsely swearing" to affidavits.[158] After an expedited hearing, the district court agreed with Opponents, issuing a forty-six page order finding that the signature-gathering process was "permeated by a pervasive and general pattern and practice of fraud and procedural non-compliance."[159]

On appeal, Proponents claimed: (1) Opponents' suit was barred by laches; (2) the district court violated Proponents' due process rights by expediting the hearing; and (3) the district court erred in finding "fraud and procedural non-compliance."[160] The Court first found no merit in the laches argument because it was an affirmative defense and could not be raised for the first time on appeal.[161] The Court then found no merit in the due process

151. *Id.* at -302(6).
152. *Montanans for Just.*, 146 P.3d at 764.
153. *Id.* at 764, 771.
154. *Id.* at 764.
155. *Id.* at 771 n. 4.
156. *Id.* 771.
157. *Id.*
158. *Montanans for Just.*, 146 P.3d at 764–65.
159. *Id.* at 770.
160. *Id.* at 763–64.
161. *Id.* at 766.

claim, holding that Proponents were given adequate notice and the opportunity for a meaningful hearing.[162]

Third, and most significantly, the Court addressed Proponents' claim that the district court erred in finding pervasive fraud in the signature-gathering process.[163] The Court first focused on the form affidavit in the statute, which states: "I . . . swear that I gathered or assisted in gathering the signatures on the petition to which this affidavit is attached . . . ."[164] The Court asked whether "assisted in" requires that affiants be present at the signing.[165]

The Court compared the 2003 statute (defining a signature-gatherer as "an individual who collects signatures on a petition")[166] to the 2001 statute, which used the language "person who collects or *intends to* collect."[167] Similarly, the 2003 statute required that an affiant "gathered or assisted in gathering" signatures,"[168] while the 2001 statute merely required that an affiant "circulated or assisted in circulating the petition."[169] Further, the Court looked to the legislative history, which emphasized "mak[ing] the process 'more accountable.' "[170]

The Court found that "the revised language of both statutes contemplates something more than mere oversight of the process by a geographically remote affiant."[171] Also, because five gatherers collected 64,463 signatures, the "sheer numbers" made it phys-

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162. *Id.* at 769.

163. *Id.* at 770.

164. Mont. Code Ann. § 13-27-302 (2005).

165. *Montanans for Just.*, 146 P.3d at 770; Mont. Code Ann. § 13-27-302. The statute addresses the certification of signatures and provides as follows:

> An affidavit, in substantially the following form, must be attached to each sheet or section submitted to the county official:
>
> I, (name of person who is the signature gatherer), swear that I gathered or assisted in gathering the signatures on the petition to which this affidavit is attached on the stated dates, that I believe the signatures on the petition are genuine, are the signatures of the persons whose names they purport to be, and are the signatures of Montana electors who are registered at the address or have the telephone number following the person's signature, and that the signers knew the contents of the petition before signing the petition.

Id.

166. Mont. Code Ann. § 13-27-111(4).

167. *Montanans for Just.*, 146 P.3d at 770 (emphasis added).

168. *Id.* at 771.

169. *Id.* at 770.

170. *Id.* at 771.

171. *Id.* at 773.

ically impossible for those gatherers to be present at each signing.[172]

The Court then addressed Proponents' claim that the district court erred in finding that all forty-three of the out-of-state signature gatherers used false or fictitious addresses in their certification affidavits.[173] Opponents presented unrebutted evidence at trial that a witness attempted to confirm the addresses using the Internet but could not do so.[174] The witness stated that the addresses were for businesses or residences that did not list the affiant as a resident.[175] Proponents also presented a hearing transcript from a similar trial in Oklahoma. During that trial, one of Proponents' signature-gatherers testified he was encouraged to use a fake address so as to "leave no trail" and that he had used a fake address while gathering signatures in Montana.[176]

The only witness testifying for Proponents, Trevis Butcher, did not counter this evidence but stated that one signature-gatherer had used Butcher's sister's address, and that the signature gatherer could have received messages at that address.[177] However, evidence was also presented that a police officer attempted to find the signature gatherer at Butcher's sister's house, but she told him she did not know the person and he did not live there.[178]

The Court again looked to the statute, which required signature gatherers provide their addresses.[179] The Court presumed the requirement provides a mechanism for contacting the signature gatherers.[180] Also, since "address" is not defined in the statute, the Court looked to its everyday meaning as "a place where a person, organization or the like is located or may be reached."[181]

The Court found that the addresses supplied constituted false information sworn to in the affidavits.[182] It concluded that the statute's meaning of "address" requires signature gatherers to provide a location where they can be contacted during the time

172. *Id.*
173. *Montanans for Just.*, 146 P.3d at 773–74.
174. *Id.* at 773.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 773–74.
179. *Montanans for Just.*, 146 P.3d at 774.
180. *Id.*
181. *Id.* (citing Dictionary.com Unabridged v. 1.0.1 & *Random House Unabridged Dictionary* (Random House, Inc. 2006)).
182. *Id.* at 775.

period in which they are gathering signatures.[183] The Court concluded that since Proponents failed to present evidence to the contrary, the district court did not err in finding that affiants used "false or fictitious addresses."[184]

Finally, the Court addressed the district court's finding that paid out-of-state signature gatherers used "bait and switch" tactics.[185] The district court found that a "significantly large percentage" of the out-of-state signature gatherers "induce[d]" petition signers to sign all three petitions by claiming that they lacked carbon paper and thus needed two more copies of the signature on one petition.[186] Six affidavits and three depositions claimed such deception.[187] Most of the affiants also claimed they could hear other signature gatherers using the same tactic on other signers around them.[188] A witness from the Secretary of State's office and a witness working against CI-97 testified that they had received complaints about bait and switch.[189] Opponents also presented county vote lists demonstrating that more than 60% of signers in Lake, Cascade, and Flathead counties signed all three petitions.[190] At trial, Proponents' witness Butcher conceded they used the tactic for a short time and presented no evidence to refute these claims.[191]

The Court found that, since Proponents did not adequately counter the Opponents' evidence, the district court's finding of pervasive use of deceptive tactics was "based on substantial evidence and was not clearly erroneous."[192]

The final issue was whether to allow the signatures to stand as gathered.[193] The Court looked to other jurisdictions and found that false information on an affidavit is more than a technical violation of the statute because it jeopardizes a "primary procedural safeguard for ensuring the integrity of the signature-gathering process."[194] The Court also cited cases from other jurisdictions in which signatures had been invalidated due to signature gatherers'

183. *Id.*
184. *Id.*
185. *Montanans for Just.*, 146 P.3d at 775.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 776.
191. *Montanans for Just.*, 146 P.3d at 775.
192. *Id.* at 776.
193. *Id.*
194. *Id.* at 777.

failure to comply with statutory requirements.[195] The Supreme Court affirmed the district court and held that the signatures gathered by all forty-three out-of-state signature gatherers were invalid; it then ordered County administrators not to count votes on CI-97, CI-98, and I-154 to the extent possible, and, if they were counted, the votes were to "have no force or effect."[196]

—Hilary J. Oitzinger

195. *Id.*
196. *Id.* at 778.