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Recent Decisions Affecting the Montana Practitioner

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RECENT DECISIONS AFFECTING THE MONTANA PRACTITIONER

I. *STATE V. PEARSON*[1]

In *State v. Pearson*, the Montana Supreme Court held that methamphetamine discovered during an unlawful search of a defendant's fanny pack was admissible under the inevitable discovery doctrine.[2] The Court determined that the officers initiated lawful investigatory proceedings and intended to arrest the defendant prior to the unlawful search.[3] Therefore, a routine inventory search at the police station would have inevitably revealed the methamphetamine.[4]

This case arose after two Billings Police Officers, Officer LaMantia ("LaMantia") and Officer Kristjanson ("Kristjanson"), stopped Thomas Pearson ("Pearson") for driving with a broken tail light.[5] Rather than stopping on the road, Pearson pulled into a parking lot. The officers then observed Pearson making "furtive movements" as LaMantia approached his vehicle.[6] Pearson appeared to reach across the passenger seat, causing Kristjanson to fear that he was trying to grab a weapon.[7] Kristjanson also observed a "meth watch" sticker on Pearson's window. Kristjanson testified that methamphetamine users commonly display these stickers on their cars.[8]

When he reached Pearson's vehicle, LaMantia saw Pearson holding "a large wad of cash."[9] LaMantia soon learned that Pearson did not have in-

1. *State v. Pearson*, 251 P.3d 152 (Mont. 2011).
2. *Id.* at 158.
3. *Id.* at 157–158.
4. *Id.* at 158.
5. *Id.* at 154.
6. *Id.*
7. *Pearson*, 251 P.3d at 154.
8. *Id.*
9. *Id.*

surance and had allowed his registration to expire.[10] A subsequent license search revealed that Pearson was on probation and had used drugs in the past.[11]

The officers conducted a protective pat down of Pearson and removed and searched his fanny pack.[12] They did not initially discover any weapons or contraband.[13] Shortly thereafter, Kristjanson observed a can of pepper spray in plain view near the driver's seat of Pearson's vehicle.[14] Because Kristjanson was aware that probationers cannot lawfully possess pepper spray, he detained Pearson and put him in the patrol car, but he did not arrest Pearson at this time.[15] Kristjanson then made an attempt to contact Officer Pinnick ("Pinnick"), Pearson's probation officer.[16]

Following his detainment, Pearson gave the officers written consent to search his vehicle, where they found drug paraphernalia.[17] Officer Vickery ("Vickery") arrived at the scene and conducted a second search of Pearson's fanny pack. This time, the officers discovered that the fanny pack contained a bindle[18] of methamphetamine.[19] After the officers seized the methamphetamine, they were able to contact Pinnick, who authorized a probation violation hold on Pearson.[20]

The district court denied Pearson's motion to suppress the evidence obtained by the officers during the searches of Pearson's fanny pack and car.[21] The court determined that "officer safety concerns justified the first search of Pearson's fanny pack," and "Pearson's written consent justified the officers' search of his car."[22] The district court found Vickery's second search of Pearson's fanny pack to be unlawful, but declined to suppress the methamphetamine evidence because it would have inevitably been discovered during a routine inventory search or the probationary search authorized by Pinnick.[23]

On appeal, the Montana Supreme Court affirmed the district court's decision to admit the methamphetamine evidence.[24] The Court determined

10. *Id.*
11. *Id.*
12. *Id*.
13. *Pearson*, 251 P.3d at 154.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 155.
18. A bindle is a "single-purpose container used to carry illegal drugs." *Ambrose v. State*, 221 P.3d 364, 365 (Alaska App. 2009).
19. *Pearson*, 251 P.3d at 155.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 158.

that even though Vickery did not have a warrant or warrant exception justifying the second search of Pearson's fanny pack, the methamphetamine would have inevitably been discovered during a routine inventory search at the police station.[25]

Normally, the exclusionary rule prohibits evidence obtained through unlawful searches from being introduced at trial.[26] The exclusionary rule does not apply, however, if the evidence "would have been discovered despite the unlawful government intrusion."[27] The Court explained that the doctrine of inevitable discovery generally applies "when investigatory procedures already were in progress and the lawful investigation eventually would have revealed the evidence."[28] But, "it must appear 'as certainly as night follows day' that the evidence would have been discovered without reference to the violation of the defendant's rights."[29]

Relying on its reasoning in *State v. Hilgendorf*,[30] the Court concluded that the methamphetamine in Pearson's case would have inevitably been discovered during a routine inventory search.[31] The Court explained that Kristjanson handcuffed Pearson, put him in the patrol car, and attempted to contact Pinnick before Vickery searched his fanny pack.[32] Kristjanson also testified that he intended to arrest Pearson for the pepper spray violation alone.[33] This probation violation justified Pearson's immediate arrest independent of the officers' discovery of the methamphetamine.[34] Additionally, Pinnick "would have authorized Pearson's arrest based solely on the pepper spray violation or drug paraphernalia."[35] Following arrest, officers at the detention center would have inevitably discovered the methamphetamine contained in Pearson's fanny pack during a routine inventory search.[36]

The Court also addressed Justice Nelson's dissenting argument that the inevitable discovery doctrine could not excuse the unlawful search because Pinnick did not authorize Pearson's detention until after the search took

25. *Pearson*, 251 P.3d at 156–157.

26. *Id.*at 156 (citing *State v. Hilgendorf*, 208 P.3d 401, 405 (Mont. 2009) (internal citations omitted); Mont. Code Ann. § 46–13–302 (2011)).

27. *Pearson*, 251 P.3d at 156 (citing *Hilgendorf*, 208 P.3d at 406).

28. *Pearson*, 251 P.3d at 156–157 (citing *Nix v. Williams*, 467 U.S. 431, 449–450 (1984)).

29. *Pearson*, 251 P.3d at 157 (quoting *Hilgendorf*, 208 P.3d at 406 (internal citations omitted)).

30. *Pearson*, 251 P.3d at 157 (citing *Hilgendorf*, 208 P.3d at 406). In *Hilgendorf*, the Court admitted drug evidence under the inevitable discovery doctrine, reasoning that the officer was going to arrest the defendant for possession of drug paraphernalia before an allegedly unlawful search occurred. 208 P.3d at 406.

31. *Pearson*, 251 P.3d at 157.

32. *Id.*

33. *Id.*

34. *Id.* at 158.

35. *Id.* at 157.

36. *Id.*

place.[37] The Court countered that Kristjanson was in the process of arresting Pearson before Vickery discovered the methamphetamine.[38] Thus, Kristjanson had initiated lawful investigatory proceedings that would have inevitably led to the discovery of the methamphetamine prior to the unlawful search.[39]

Justice Nelson dissented from the Court's decision to admit the unlawfully obtained methamphetamine evidence.[40] He argued that Kristjanson did not actually place Pearson under arrest or read him his *Miranda* rights until after the methamphetamine had been discovered.[41] Justice Nelson also focused on Kristjanson's testimony that he would never have transported Pearson to the detention facility absent Pinnick's approval.[42] Because the unlawful search occurred before Pinnick authorized Kristjanson to transport Pearson, it was not "inevitable" that the methamphetamine would have been discovered.[43]

Montana practitioners should be aware that the Court may apply the inevitable discovery doctrine when a routine inventory search would have revealed evidence even if officers fail to arrest a defendant prior to conducting an unlawful search. So long as officers intend to arrest a defendant and initiate investigatory proceedings based upon an independent offense, evidence obtained from a subsequent unlawful search may be admissible if it would have been inevitably discovered at the police station.

—Mac Bloom

II. *STATE V. NORQUAY*[44]

In *State v. Norquay*, the Montana Supreme Court reached two noteworthy holdings, each matters of first impression in Montana.[45] First, the Court held that admitting a videotaped deposition of the State's expert DNA witness did not violate the defendant's right to confront the witness because pregnancy prevented the witness from attending trial.[46] The Court reasoned that since the State made a good faith effort to procure the witness, the district court properly allowed the videotaped testimony.[47] Second, the

37. *Pearson*, 251 P.3d at 158.
38. *Id.*
39. *Id.*
40. *Id.* (Nelson, J., concurring and dissenting).
41. *Id.* at 160.
42. *Id.* at 161.
43. *Pearson*, 251 P.3d at 161.
44. *State v. Norquay*, 248 P.3d 817 (Mont. 2011).
45. *Id.* at 821–823.
46. *Id.* at 822.
47. *Id.*

Court held that the district court's *Allen* instruction (a pattern instruction given to encourage deadlocked juries to come to a resolution) did not unduly pressure the jury to reach a unanimous verdict.[48] Nonetheless, the Court adopted significant changes to the *Allen* instruction.[49]

On the evening of November 24, 2006, Kim A. Norquay, Jr. ("Norquay") and several others gathered at a house party to drink alcohol.[50] At the party, several men verbally and physically assaulted Lloyd Kvelstad ("Kvelstad") and threatened to sexually assault him.[51] Kvelstad eventually passed out from intoxication and was taken to a bed.[52] Nathan and Georgetta Oats found Kvelstad unconscious at around 1:30 a.m.[53] His face was beaten "beyond recognition" and a black string was around his neck.[54] Soon after, paramedics arrived and pronounced Kvelstad dead.[55] At trial, one witness testified that Norquay removed the black string from his sweatshirt and another testified that Norquay told her he strangled Kvelstad using the string.[56]

The State charged Norquay with deliberate homicide, claiming he participated in an aggravated assault that resulted in Kvelstad's death.[57] It also charged Norquay with tampering with physical evidence for allegedly wiping blood from his shoe.[58]

Initially, the parties agreed to move the trial from January 2009 to November 2008, to accommodate for the maternity leave of Megan Ashton ("Ashton"), a DNA expert with the Montana Crime lab.[59] Ashton's doctor subsequently prohibited her from traveling from Missoula to Havre for the November trial, however.[60] The State attempted, but failed to replace Ashton with another expert.[61] Six days before trial, the State conducted a videotaped deposition of Ashton.[62] Counsel for both parties attended, and Norquay's counsel cross-examined Ashton.[63]

48. *Id.* at 824.
49. *Id.* at 824–825.
50. *Norquay*, 248 P.3d at 819.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Norquay*, 248 P.3d at 819.
57. *Id.*
58. *Id.*
59. *Id.* at 820.
60. *Id.*
61. *Id.*
62. *Norquay*, 248 P.3d at 817, 819–820.
63. *Id.* at 822.

The court denied Norquay's motion to continue until Ashton recovered.[64] At trial, over Norquay's objection, the court granted the State's motion to introduce the videotaped deposition.[65] Both parties eventually relied on parts of Ashton's deposition.[66] The jury found Norquay guilty on all counts.[67]

On appeal, Norquay argued that the district court's admission of the videotaped deposition violated his Sixth Amendment right to confront Ashton.[68] He asserted that the State did not make a good-faith effort to present Ashton at trial and, therefore, failed to establish her unavailability.[69]

Both the United States Constitution and the Montana Constitution grant defendants the right to confront witnesses against them.[70] While the Confrontation Clause normally requires that a witness testify in court, recorded testimony is allowed at trial under limited circumstances.[71] First, a court must "determine that the defendant has had an opportunity to cross-examine the witness in some forum."[72] Second, the court must "deem the witness unavailable for trial."[73] Since Norquay cross-examined Ashton at her deposition, the first element was not at issue; Norquay only challenged Ashton's "unavailability" for trial.[74]

A party seeking to introduce recorded testimony "bears the burden of demonstrating that it made a 'good faith effort' to secure the witness's presence at trial."[75] To make this determination, the court employs a reasonableness standard based on the totality of the circumstances.[76] Because the unavailability of a pregnant witness for Confrontation Clause purposes was an issue of first impression, the Montana Supreme Court turned to its closest precedent.[77] In *State v. Hart*, the Court affirmed the admission of a witness's videotaped testimony when he left Montana, evaded police officers, and declined to testify at trial.[78] The State deposed the reluctant witness five days before trial, and opposing counsel cross-examined him.[79] As another guide, the Court looked at *City of Helena v. Roan*, where it

64. *Id.* at 820.
65. *Id.*
66. *Id.* at 822.
67. *Id.* at 819.
68. *Norquay*, 248 P.3d at 819–820.
69. *Id.* at 820.
70. U.S. Const. amend. VI; Mont. Const. art. II, § 24.
71. *Norquay*, 248 P.3d at 820.
72. *Id.* at 821.
73. *Id.* at 820.
74. *Id.* at 821.
75. *Id.* (citing *State v. Hart*, 214 P.3d 1273 (Mont. 2009)).
76. *Norquay*, 248 P.3d at 821.
77. *Id.*
78. *Hart*, 214 P.3d at 1280.
79. *Id.*

concluded that a witness's fiancé's pregnancy, and the requisite recovery time, demonstrated good cause for delaying trial.[80]

The Court also examined the factors courts consider when determining witness unavailability due to illness.[81] A court may deem a witness unavailable if a physical illness renders the witness unable to testify.[82] Courts have considered "the nature of the illness, the expected time of recovery, the reliability of the evidence concerning the illness, the importance of the absent witness to the case, and other special circumstances."[83] In *United States v. McGuire*, the Ninth Circuit Court of Appeals applied these factors to address the unavailability of a pregnant witness, holding that the district court properly relied on a physician's statement when deeming a pregnant witness unavailable to testify at a criminal trial.[84]

Applying these principles, the *Norquay* Court held that the lower court properly relied upon the physician's statement that Ashton could not travel to testify while pregnant.[85] The Court reasoned that pregnancy "poses special risks to a woman and her unborn child."[86] The Court also noted that this was a complex trial involving approximately 50 other witnesses, and that the district court could not accurately predict when Ashton would have her baby or when it would be safe for her to travel.[87] If the district court had rescheduled, Norquay's trial could have been delayed significantly.[88] Further, the Court emphasized that the jury "had the opportunity to view the demeanor of the witness and evaluate her credibility."[89] Norquay did not contest the substance of Ashton's testimony and even suggested that her DNA evidence would be in his favor.[90] Based on the totality of the circumstances, the Court concluded that the State made a good faith effort to bring Ashton to trial and that the lower court properly allowed the videotaped deposition.[91]

The Court then addressed the second issue: whether the *Allen* instruction improperly coerced the deadlocked jury.[92] Ultimately, the Court determined that the instruction was appropriate because it "did not contain lan-

80. *City of Helena v. Roan*, 226 P.3d 601, 604 (Mont. 2010).
81. *Norquay*, 248 P.3d at 820–821.
82. Mont. R. Evid. 804(a)(4).
83. *Norquay*, 248 P.3d at 821.
84. *U.S. v. McGuire*, 307 F.3d 1192, 1205 (9th Cir. 2002).
85. *Norquay*, 248 P.3d at 822.
86. *Id.* at 821–822.
87. *Id.* at 822.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Norquay*, 248 P.3d at 822.
92. *Id.* at 822–823.

guage that instructed the minority jurors to reconsider their views" and the jurors had "ample time to deliberate."[93]

The jury deliberated for seven hours on the first day with no progress.[94] The next morning, the district court read the *Allen* instruction, Montana Pattern Jury Instruction Criminal No. 1–121 ("MPJIC 1–121").[95] Norquay objected, arguing that the instruction "violated his due process rights and unlawfully coerced the jury to render a verdict."[96] The jury returned a guilty verdict shortly after receiving the instruction.[97]

On appeal, Norquay argued that the *Allen* instruction improperly instructed the jury "to consider matters irrelevant to their deliberations, specifically the 'quality' of their service, making a 'definite contribution to the administration of justice,' and passing a 'final test' of rendering a verdict."[98] Both federal and Montana law protects defendants from a coerced verdict.[99] Courts cannot require jurors to reach a decision or otherwise pressure jurors into returning a unanimous verdict.[100] A coercive instruction "directs the minority jurors to reconsider their views in light of the majority."[101]

The Court first looked at the *Allen* instruction in *State v. Randall*.[102] While *Randall* found some language in the instruction inappropriate, the Court subsequently allowed amended *Allen* instructions as long as they did not "instruct the minority jurors to surrender their opinions in light of the majority views."[103] Montana's current pattern *Allen* instruction, MPJIC 1–121, omits the rejected language from *Randall*.[104]

Here, the Court held that the instruction comported with the applicable law in Montana.[105] The *Allen* instruction provided at Norquay's trial was nearly identical to the instruction allowed in previous cases.[106] The Court reasoned that "[t]he jury had ample time to deliberate," and that facts did not indicate "patently coercive circumstances."[107] The Court therefore af-

93. *Id.* at 823.
94. *Id.* at 822.
95. *Id.*
96. *Id.*
97. *Norquay*, 248 P.3d at 822.
98. *Id.*
99. *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988); *State v. Randall*, 353 P.2d 1054, 1058 (Mont. 1960).
100. *Norquay*, 248 P.3d at 822–823.
101. *Id.* at 822.
102. *Id.* at 823.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Norquay*, 248 P.3d at 823.
107. *Id.*

firmed the district court's use of the *Allen* instruction.[108] Nonetheless, Norquay's challenge persuaded the Court to amend MPJIC 1–121 by removing such language as "final test" and "the ultimate responsibility of the jury is to render a verdict."[109]

Ultimately, *Norquay* does not present a seismic shift to Montana law. It does, however, firmly establish that a witness's pregnancy may be proper grounds for determining unavailability for trial. Also, while the changes to MPJIC 1–121 were of no use to Norquay, they clarify the *Allen* instruction and bring it more clearly within the American Bar Association's standards.[110]

—Paul Burdett

III. *In Re The Estate of William F. Big Spring, Jr.*[111]

In the Montana Supreme Court decision, *In re Estate of William F. Big Spring, Jr.*, the Court revised its subject-matter jurisdiction analysis for regulatory and adjudicatory actions that arise within the exterior boundaries of an Indian reservation.[112] The Court reversed the Ninth Judicial District Court's denial of the appellants' motion to dismiss for lack of subject matter jurisdiction over the probate of the estate of William F. Big Spring, Jr., an enrolled member of the Blackfeet Tribe.[113] The estate was located within the exterior boundaries of the Blackfeet Indian Reservation.[114] In an attempt to reconcile clouded Montana caselaw, the Court overruled its precedent and articulated a fresh interpretation of controlling law for Montana courts to determine jurisdiction.[115] The Court held that the proper jurisdictional analysis asks whether the State's exercise of jurisdiction is preempted by federal law and, if the State's jurisdiction is not preempted, whether the State's assumption of jurisdiction would infringe on tribal self-government.[116]

An extensive legal battle followed the death of William F. Big Spring, Jr. ("Big Spring"). At the time of his death, Big Spring was an enrolled member of the Blackfeet Tribe domiciled on the Blackfeet Indian Reserva-

108. *Id.* at 817.
109. *Id.* at 824–825.
110. *See ABA Standards for Criminal Justice Discovery and Trial by Jury*, Standard 15–5.4, 255 (3d ed., ABA 1996).
111. *In re Est. of Big Spring, Jr.*, 255 P.3d 121 (Mont. 2011).
112. *Id.* at 123.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*

tion.[117] Big Spring's estate, located in the exterior boundaries of the reservation, included trust land and member Indian-owned fee land.[118] Big Spring was survived by his mother, Kathleen Big Spring ("Kathleen"), his ex-wife, Georgia Eckerson ("Georgia"), and his three children—all of whom were enrolled members of the Blackfeet Tribe[119]—Julie Big Spring ("Julie"), William F. Big Spring II ("William"), and Angela Conway ("Angela").[120]

On September 29, 2004, the district court appointed Georgia as the personal representative of Big Spring's estate.[121] Georgia represented that Big Spring's only heirs were Julie and William and that he died intestate.[122] Georgia satisfied creditor's claims, sold the member Indian-owned fee land to Doug Eckerson ("Doug"), distributed proceeds of the sale to Julie and William, filed to terminate her appointment as personal representative, and closed the estate on June 1, 2006.[123] On December 1, 2006, Angela and Kathleen filed a petition asserting:

> (1) Georgia knew Angela was the daughter of Big Spring and intentionally excluded her from the proceedings; (2) at the time of his death, Big Spring had a valid will, executed September 15, 1965, which appointed Kathleen executrix and devised the entire Estate to her; and (3) Georgia transferred the Estate's only identified non-Indian trust asset to her ex-husband, Doug, for less than adequate consideration.[124]

The probate action remained static and unsettled, sidelined with collateral legal matters until March 2009. In the interim, Kathleen filed a voluntary motion to dismiss her claims in the probate petition.[125] The district court granted the motion on November 30, 2007, leaving only Angela's petition to be resolved.[126] On March 10, 2009, "Doug filed a motion to enforce a settlement agreement or, in the alternative, to lift the *lis pendens* that had been placed on the property conveyed to him by the Estate."[127] Angela consented to Doug's motion on October 6, 2009.[128] Angela stated

117. *In re Est. of Big Spring*, 255 P.3d at 123.

118. *Id.* Individual tribal members may hold land in (1) restricted allotment, a parcel of land "owned by an Indian subject to a restriction on alienation in the United States or its officials;" (2) trust allotment, "a parcel of land owned by the United States in trust for an Indian;" or (3) fee simple absolute, member Indian-owned fee land free of restrictions and not held in trust. *Id.* at 129 (citing *Cohen's Handbook of Federal Indian Law* § 16.03 (Nell Jessup Newton, ed., LexisNexis 2005)).

119. *In re Est. of Big Spring*, 255 P.3d at 123–124.

120. *Id.* at 123.

121. *Id.* at 124.

122. *Id.*

123. *Id.*

124. *Id.*

125. *In re Est. of Big Spring*, 255 P.3d at 125.

126. *Id.*

127. *Id.*

128. *Id.*

that because the personal representative of the estate, Georgia, was unable to be found, and Julie or William could not be located, she intended to file a motion approving the closure of the estate.[129]

The motion at issue in this case materialized when Julie and William appeared before the district court for the first time since the appointment of the personal representative for Big Spring's estate. On October 23, 2009, Julie and William moved the district court to dismiss the case arguing that the court lacked subject matter jurisdiction over a probate matter surrounding an enrolled member of the Blackfeet Indian Tribe domiciled on the reservation whose property, at the time of his death, was located within the exterior boundaries of the reservation.[130] In its order denying the motion, the district court applied the test articulated in *State ex rel. Iron Bear v. District Court of Fifteenth Judicial District In and For the County of Roosevelt*[131] for determining whether concurrent jurisdiction exists between Montana and an Indian tribe:

> (1) whether federal treaties and applicable statutes have preempted state jurisdiction; (2) whether the exercise of state jurisdiction would interfere with reservation self-government; and (3) whether the tribal court is currently exercising jurisdiction or has exercised jurisdiction in such a manner as to preempt state jurisdiction.[132]

Using the test from *Iron Bear*, the district court concluded that it had jurisdiction to probate Big Spring's estate.[133] Julie and William appealed the order denying their motion to dismiss to the Montana Supreme Court.[134]

On appeal, the Court sought to clarify its own precedent concerning Montana's civil adjudicatory jurisdiction involving Indian Country. The Court began its analysis by acknowledging that federal supremacy and tribal self-government are "bedrock principles" in the field of Indian law as recognized by federal caselaw, the Commerce Clause, and the Supremacy Clause of the United States Constitution.[135] Drawing from the United States Supreme Court decision in *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*,[136] the Montana Supreme Court adopted a similar "comprehensive pre-emption inquiry in the context of Indian law" that looked to the congressional plan and the nature of any state, federal, and tribal interests at stake to determine whether the exercise of state authority would violate federal law.[137]

129. *Id.*
130. *Id.* at 126.
131. *State ex rel. Iron Bear v. Dist. Ct. of Fifteenth Jud. Dist.*, 512 P.2d 1292 (Mont. 1973).
132. *In re Est. of Big Spring*, 255 P.3d at 127 (quoting *Iron Bear*, 512 P.2d at 1299).
133. *In re Est. of Big Spring*, 255 P.3d at 126.
134. *Id.*
135. *Id.* at 127 (citing U.S. Const. art. I, § 8, cl. 3; U.S. Const. art. VI, cl. 2).
136. *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engg.*, 476 U.S. 877 (1986).
137. *In re Est. of Big Spring*, 255 P.3d at 128 (quoting *Three Affiliated Tribes*, 476 U.S. at 884).

The Court determined that federal precedent dictates that a state court must consider three factors when presented with an issue invoking Indian law principles under the determination of subject matter jurisdiction.[138] A state court must look to "the status of the parties [tribally enrolled member Indian versus nonmember Indian], the status of the property where the dispute arose or took place, and whether the regulatory or adjudicatory state action is criminal or civil in nature."[139] Applying these factors to this appeal, the Court focused its analysis on the second factor, the status of the land of the estate at issue, the member Indian-owned fee land.[140] The Court looked to United States Supreme Court cases that have consistently held that "Federal Government and tribes, not states, retain jurisdiction over territories defined as Indian Country."[141] The Montana Supreme Court also noted that when land is involved, the United States Supreme Court has held that the status of property may be jurisdictionally dispositive[142] as there is a "significant geographical component to tribal sovereignty."[143]

The Montana Supreme Court then turned its analysis to controlling federal Indian caselaw and found that its caselaw was at odds with the three-part test from *Iron Bear*. The Court found the United States Supreme Court decision *Williams v. Lee*[144] to be controlling.[145] *Williams* announced that absent a governing act of Congress, the test to determine state jurisdiction on Indian reservations inquires "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[146] Further, the Court determined that "federal policy favoring tribal self-government operates *even in areas where state control has not been affirmatively preempted by federal statute.*"[147] Based on this precedent, the Court held that the *Iron Bear* Court misinterpreted federal statutes and caselaw when it asserted that "states retain 'residual jurisdiction' over areas that federal law has not specifically preempted and areas where tribes are not exercising jurisdiction."[148] The Court concluded that the *Iron Bear* ra-

138. *In re Est. of Big Spring*, 255 P.3d at 128.

139. *Id.* (referencing generally *Cohen's Handbook* at §§ 6.01–6.03).

140. *In re Est. of Big Spring*, 255 P.3d at 129.

141. *Id.* at 128.

142. *In re Est. of Big Spring*, 255 P.3d at 129 (citing *Nev. v. Hicks*, 533 U.S. 353, 360 (2001)).

143. *In re Est. of Big Spring*, 255 P.3d at 129 (quoting *White Mt. Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980)).

144. *Williams v. Lee*, 358 U.S. 217 (1959).

145. *In re Est. of Big Spring*, 255 P.3d at 387–388.

146. *Id.* at 130 (quoting *Williams*, 358 U.S. at 220).

147. *In re Est. of Big Spring*, 255 P.3d at 132 (quoting *Iowa Mt. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (emphasis added)).

148. *In re Est. of Big Spring*, 255 P.3d at 131 (quoting *Iron Bear*, 512 P.2d at 1298).

tionale was erroneous and analytically flawed, and expressly overruled the test along with its progeny.[149]

Under the revised approach, the Court reversed the district court's assumption of subject matter jurisdiction over the probate of Big Spring's estate.[150] Subject matter jurisdiction belonged exclusively with the Blackfeet Tribal Court "because at the time of his death Big Spring was an enrolled member of the Blackfeet Tribe and all of his estate property was located within the exterior boundaries of the Blackfeet Reservation."[151] Before Montana can assume jurisdiction over actions arising on a reservation and involving a tribal member, enrolled tribal members on the reservation must consent through a majority vote of adults at a special election as mandated by Public Law 280.[152] Therefore, the district court's assumption of subject matter jurisdiction infringed on the right of tribal self-government because "Montana and the Blackfeet Tribe have not taken the necessary steps for Montana to assume civil jurisdiction over the Blackfeet Reservation."[153]

The Montana practitioner should take note of the revised test for determining subject matter jurisdiction in civil and criminal actions arising on a reservation and involving a tribal member. The proper test considers three factors: "the status of the parties, the status of the property where the dispute arose or took place, and whether the regulatory or adjudicatory action is criminal or civil in nature."[154] The Court's decision in *Big Spring* overruled its precedents that held that district courts have concurrent jurisdiction with Indian tribal courts over disputes—including probate matters—involving enrolled tribal members. The Montana Supreme Court clearly articulated in its new interpretation, however, that tribal courts have exclusive jurisdiction unless tribes have consented to state assumption of jurisdiction pursuant to the procedures outlined in Public Law 280. Additionally, the Court expressly cautioned that a court operating near Indian Country "has

149. *In re Est. of Big Spring*, 255 P.3d at 133 (overruling *In re Marriage of Skillen*, 956 P.2d 1 (Mont. 1998); *Morigeau v. Gorman*, 225 P.3d 1260 (Mont. 2010); *Confederated Salish & Kootenai Tribes v. Clinch*, 158 P.3d 377 (2007); *Gen. Constructors, Inc. v. Chewculator, Inc.*, 21 P.3d 604 (Mont. 2001); *Balyeat Law, P.C. v. Pettit*, 967 P.2d 398 (Mont. 1998); *Krause v. Neuman*, 943 P.2d 1328 (Mont. 1997); *Lambert v. Ryozik*, 886 P.2d 378 (Mont. 1994); *Emerson v. Boyd*, 805 P.2d 587 (Mont. 1991); *Geiger v. Pierce*, 758 P.2d 279 (Mont. 1988); *Milbank Mut. Ins. Co. v. Eagleman*, 705 P.2d 1117 (Mont. 1985); *In re Limpy*, 636 P.2d 266 (Mont. 1981); *Est. of Standing Bear v. Belcourt*, 631 P.2d 285 (Mont. 1981); *State ex rel. Stewart v. Dist. Ct.*, 609 P.2d 290 (Mont. 1980); *Larrivee v. Morigeau*, 602 P.2d 563 (Mont. 1979); *Bad Horse v. Bad Horse*, 517 P.2d 893 (Mont. 1974); *Sec. St. Bank v. Pierre*, 511 P.2d 325 (Mont. 1973)).

150. *In re Est. of Big Spring*, 255 P.3d at 136.

151. *Id.*

152. *In re Est of Big Spring*, 255 P.3d at 134 (citing *In re Wellman*, 852 P.2d 559, 562 (Mont. 1993); 18 U.S.C. § 1326 (2006)).

153. *In re Est. of Big Spring*, 255 P.3d at 136.

154. *Id.* at 128.

an 'independent obligation' to determine whether jurisdiction exists, even in the absence of a challenge from a party."[155] Where assumption of jurisdiction would infringe on tribal self-government, or is preempted by federal law, there is no subject matter jurisdiction and the case must be dismissed.[156] This ruling is significant in the area of tribal law because it strengthens tribal sovereignty by conferring legal matters arising from tribal members on reservation land back into the hands of tribal courts, even in areas that tribal law has not directly addressed.

—Jessica Finley

IV. *DICK ANDERSON CONSTRUCTION, INC. V. MONROE PROPERTY CO.*[157]

In *Dick Anderson Construction, Inc. v. Monroe Property Co.*, the Montana Supreme Court established who qualifies as an agent of a contracting owner in a real estate improvement contract under Montana's construction lien statute, Montana Code Annotated § 71–3–522.[158] The Court's holding makes it easier for construction companies to foreclose on liens and harder for individuals to avoid personal liability in Montana, even when the entity contracting for improvements is not the vested owner of the property. In the contract at issue, the Court concluded that Monroe Construction, the contracting entity, qualified as an actual agent of Monroe Property, the owner of the real property.[159] Thus, Dick Anderson Construction's ("DAC") construction lien was valid and foreclosable.[160]

In the spring of 2000, David Lipson ("Lipson"), the president of both Monroe Construction and Monroe Property, and the proprietor of Paws Up Ranch ("Ranch"), contracted with DAC to build improvements on the Ranch.[161] Lipson utilized Monroe Construction as the contracting entity for purposes of the construction contract.[162] Monroe Construction was a shell entity without any ongoing assets, and Monroe Property was the actual owner of the Ranch.[163] Though Lipson testified that he intended for Monroe Construction to contract with DAC and pay for the cost of the improvements with money drawn from his other businesses, he admitted that another reason for this structure was to make Monroe Property judg-

155. *Id.* at 136 (quoting *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 544 U.S. 316, 324 (2008)).
156. *In re Est. of Big Spring*, 255 P.3d at 136.
157. *Dick Anderson Constr., Inc. v. Monroe Prop. Co.*, 255 P.3d 1257 (Mont. 2011).
158. *Id.* at 1263 (citing Mont. Code Ann. § 71–3–552 (2011)).
159. *Monroe Prop.*, 225 P.3d at 1262.
160. *Id.* at 1263.
161. *Id.* at 1258.
162. *Id.*
163. *Id.*

ment proof and to protect the Ranch land from liens.[164] In effect, Lipson attempted to keep himself and the Ranch free from any civil suit in relation to the construction contract. After Monroe Construction failed to pay DAC's June and July 2001 invoices, DAC sued Monroe Construction for breach of contract, filed a construction lien on the Ranch, and sued Monroe Property to foreclose the lien in September 2001.[165]

In March 2005, the district court ordered the parties to participate in arbitration.[166] The arbitration panel awarded DAC damages, and in May 2007, the district court ordered the foreclosure of the construction lien to satisfy the claim.[167] Monroe Construction and Monroe Property appealed.[168] The Montana Supreme Court reversed and remanded the case in December 2009, after it determined that the arbitration panel did not have the authority to make findings regarding the foreclosure of the construction lien because Monroe Property was not a party in the arbitration proceedings.[169]

On remand, Monroe Property argued it was not a contracting owner under the construction lien statutes.[170] DAC argued that the lien was enforceable because Monroe Construction was an agent of Monroe Property.[171] The district court determined that Monroe Property was not a contracting owner and "that DAC failed to establish that Monroe Construction was an agent of Monroe Property."[172] The district court concluded the lien was unenforceable as to Monroe Construction because it had no interest in the real property.[173]

DAC appealed the judgment to the Montana Supreme Court, arguing that Monroe Construction was an agent of Monroe Property, and that the construction lien was enforceable.[174] Though Monroe Property argued it was a separate entity from Monroe Construction, the Court disagreed, holding that Monroe Construction was the actual agent of Monroe Property for the purposes of the contract with DAC.[175] After determining that agency existed, the Court held that the construction lien was valid and entered judgment foreclosing the lien in favor of DAC.[176]

164. *Id.* at 1258–1259.
165. *Monroe Prop.*, 225 P.3d at 1259.
166. *Id.*
167. *Id.* at 1259–1260.
168. *Id.* at 1260.
169. *Id.*; *Dick Anderson Const., Inc. v. Monroe Const. Co.*, 221 P.3d 675, 686 (Mont. 2009).
170. *Monroe Prop.*, 255 P.3d at 1260.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 1260–1261.
175. *Id.* at 1261–1262.
176. *Monroe Prop.*, 255 P.3d at 1263.

In its analysis, the Court first relied on Montana Code Annotated § 28–10–103(1), which defines agency as being either actual, when the agent is "really employed" by the principal, or ostensible, when the principal "intentionally or by want of ordinary care causes a third person to believe another to be the principal's agent when that person is not really employed by the principal."[177] The Court then relied on caselaw providing that "the existence of agency may be implied from conduct and from all the facts and circumstances of the case."[178] Based on its review of the record, the Court determined that Monroe Construction was the actual agent of Monroe Property.[179]

Central to the Court's determination that agency existed was its conclusion that Lipson controlled and managed Monroe Property and the Ranch, and Monroe Construction, and that he created Monroe Construction to facilitate the construction of improvements at the Ranch.[180] The Court found more indicia of agency in Monroe Property's approval of the improvements done for its benefit.[181] Finally, the Court reasoned that if an asset-free shell entity with no title to real property were allowed to engage a contractor to construct improvements and not be subject to a potential construction lien, the remedial purposes of the construction lien statutes would be frustrated.[182] Such remedial purposes include "providing payment security for contractors who construct improvements to real property."[183] After the Court determined Monroe Construction was an agent of the contracting owner, Monroe Property, it reinstated the Final Money Judgment and Final Judgment Foreclosing Construction Lien in favor of DAC.[184]

In sum, the Court found actual agency here for several reasons: Lipson controlled both entities; he created the asset-less entity to facilitate construction; the construction contract was for the benefit of the property owner; and the enforcement of the lien was in line with the purposes of the construction lien statutes.[185]

The Court's holding makes it easier for construction companies to foreclose construction liens on real property when the contracting entity is not the vested owner of the property on which the builder contracted to construct improvements. Also, individuals and entities with title to real

177. *Id.* at 1261.

178. *Id.* at 1261–1262 (citing *Butler Mfg. Co. v. J & L Implement Co.*, 540 P.2d 962, 965 (Mont. 1975)).

179. *Monroe Prop.*, 255 P.3d at 1262.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 1263.

185. *Monroe Prop.*, 255 P.3d at 1262.

property and other security will be harder pressed to avoid liability when the facts indicate that a contracting entity acted as their agent. Though Montana practitioners should continue to ensure that the entities they contract with have the appropriate ownership over real property or other assets to provide the necessary security, the Court's holding here will make it more difficult for individuals and entities using shell corporations to evade enforcement of such contracts.

—Peter Ivins

V. *MONTANA V. WYOMING*[186]

In *Montana v. Wyoming*, the United States Supreme Court held that under Article V(A) of the Yellowstone River Compact ("Compact") neither the doctrine of prior appropriation nor the doctrine of recapture prohibit upstream water-rights users from increasing the efficiency of their irrigation systems, even if the increased use is detrimental to downstream water-rights holders of otherwise equal seniority.[187] In doing so, the Court affirmed the findings of the Special Master and held that Montana's complaint regarding the increased efficiency of irrigation systems in Wyoming failed to state a claim under Article V(A) of the Compact.[188]

In 1951, Montana, Wyoming, and North Dakota ratified the Compact, which allocates the flow of the Yellowstone River and its various tributaries.[189] The Compact divides water into three tiers of priority: (1) beneficial water rights existing at the time the Compact was written; (2) the "water as shall be necessary to provide supplemental water supplies" for the existing rights; and (3) "the remainder of the unused and unappropriated water" of each tributary that was allocated to each state in the Compact.[190] Wyoming, as the upstream state, received specific percentages of the flow in each river basin, and Montana received the remainder.[191]

In 2008, Montana filed a complaint alleging that Wyoming breached the Compact.[192] Montana alleged that Wyoming was appropriating more water than it had in 1950 and that that water was being utilized for new uses, including "irrigating new acreage, building new storage facilities, conducting new groundwater pumping, and increasing consumption on existing

186. *Mont. v. Wyo.*, 131 S. Ct. 1765 (2011).
187. *Id.* at 1779.
188. *Id.*
189. *Id.* at 1770.
190. *Id.* (quoting Yellowstone River Compact, Act of Oct. 30, 1951, ch. 629, 65 Stat. 663, 666–667).
191. *Mont.*, 131 S. Ct. at 1770.
192. *Id.*

acreages."[193] The Court appointed a Special Master to oversee the proceedings.[194]

After briefing and oral argument, the Special Master determined that some of Montana's allegations stated a claim but recommended dismissal of the portion of Montana's allegations regarding "efficiency improvements by pre-1950 appropriators in Wyoming."[195] Montana appealed this portion of the Special Master's recommendation.[196]

Montana alleged that some of its pre-1950 appropriators had been harmed because upstream appropriators in Wyoming had switched from flood irrigation to sprinkler irrigation, which was significantly more efficient.[197] This increase in efficiency means less water returns to the river for downstream users in Montana.[198] The Court then summarized Montana's two basic arguments. First, well-established principles of prior appropriation do not permit such an increase in consumption. Second, even if they do, the terms of the Compact "amended those principles in Montana's favor."[199]

To analyze these arguments, the Court undertook an overview of the appropriation doctrine and concluded that water rights are "perfected and enforced in order of seniority"[200] and that the scope of the right is limited by "beneficial use." The Court determined that the beneficial use doctrine restricts an appropriator to the "amount of water that is necessary to irrigate his land by making a reasonable use of the water."[201] Once a senior water right is perfected, "it is senior to any later appropriators' rights and may be fulfilled entirely before those junior appropriators get any water at all."[202] The Court used this analysis to conclude that because the Compact assigned the same seniority level to all pre-1950 users in Montana and Wyoming, Montana's pre-1950 users are junior appropriators because they are located downstream.[203] Therefore, in a low-water year, upstream appropriators may lawfully consume all of the water, leaving none for the downstream users.[204] However, the Court also noted that"[j]unior appropriators are not completely without rights" and under the no-injury doctrine, senior users

193. *Id.*
194. *Id.*
195. *Id.* at 1771.
196. *Id.* at 1771.
197. *Mont.*, 131 S. Ct. at 1770.
198. *Id.*
199. *Id.* at 1772.
200. *Id.*
201. *Id.* (quoting Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights: And the Arid Region Doctrine of Appropriation of Waters* § 586, 1007–1008 (2d ed., Bender-Moss 1912)).
202. *Mont.*, 131 S. Ct. at 1772.
203. *Id.*
204. *Id.*

cannot enlarge their water rights to the detriment of the junior users.[205] The Court then summarized the overall issue of the case, and asked: "Is a switch to more efficient irrigation with less return flow within the extent of Wyoming's pre-1950 users' existing appropriative rights, or is it an improper enlargement of that right to the detriment of Montana's pre-1950 water users?"[206]

The Court subsequently undertook an analysis of the no-injury rule. First, it noted the no-injury rule is "not absolute" and is generally confined to harm resulting from changes in the specific point of diversion and nature of the use.[207] "Accordingly," the Court reasoned, "certain types of changes can occur even though they may harm downstream appropriators."[208] Well-established and acceptable changes include changing the crop to a more water-intensive variety, or even utilizing existing rights to irrigate increased acreage so long as the appropriator contemplated that increased future use when the water was originally diverted.[209] The Court reasoned that efficiency improvements to irrigation systems are the "sort of changes that fall outside the [scope of the] no-injury rule as it exists in Montana and Wyoming."[210] Next, the Court discussed the doctrine of recapture, which it determined also supported allowing improvements in irrigation efficiency within the original water right.[211] Despite Montana's argument to the contrary, the Court determined that Montana and Wyoming both apply the established doctrine that allows a user to freely recapture his water "while it remains on his property and reuse it for the same purpose on the same land."[212] It cited Montana and Wyoming Supreme Court cases to support this argument, and concluded that increases in efficiency due to sprinkler irrigation instead of flood irrigation are simply a different and more efficient method of recapture.[213]

Because it found that both the doctrine of no-injury and the doctrine of recapture support appropriators' rights to increased efficiency, the Court concluded that if Article V(A) "simply incorporates background principles of appropriation law, it allows Wyoming's pre-1950 water users to improve their irrigation efficiency, even to the detriment of Montana's pre-1950 users."[214]

205. *Id.*
206. *Id.* at 1773.
207. *Id.*
208. *Mont.*, 131 S. Ct. at 1773.
209. *Id.* at 1773–1774.
210. *Id.* at 1774.
211. *Id.*
212. *Id.* at 1775.
213. *Id.* at 1775–1776.
214. *Mont.*, 131 S. Ct. at 1777.

Next, the Court addressed Montana's second argument, which alleged that even if traditional principles of appropriation support Wyoming's position, Article V(A) defines "beneficial use" in such a way that pre-1950 water users are guaranteed the net quantity of water they received at the time the Compact was ratified.[215] Montana contended that beneficial use, as defined by the Compact, was the "amount of depletion."[216] Therefore, Montana claimed that Wyoming should be required to allow the same amount of water to flow downstream as it did at the time the Compact was ratified.[217]

Article V(A) defines beneficial use as "that use by which the water supply . . . is depleted."[218] The Court stated that this definition "is fairly clear" and decided that "use" only means "a use which depletes the water supply."[219] Nothing, according to the Court, suggests that "beneficial use" means "a measure of the *amount* of water depleted."[220] The Court thus dismissed Montana's argument that "beneficial use" should be defined in terms of net water consumption.[221] In support, it noted that irrigation was the preferred "depletive use" at the time the Compact was drafted (as opposed to power generation—a non-depletive use) and that the Preamble to the Compact recognized "the great importance of water for irrigation in the signatory States."[222] Therefore, according to the Court, if the Compact meant to redefine the existing and widely understood definition of "beneficial use," it could have easily done so in explicit terms.[223] Because the Compact did not include any terms regarding the amount of water consumed or the volume of water left in the river, the Court agreed with the Special Master that "the definition of beneficial use in the Compact is unremarkable" and, therefore, Article V(A) "does not change the scope of the pre-1950 appropriative rights that it protects in both states."[224]

Finally, the Court stated that "if article V(A) were intended to guarantee Montana a set quantity of water, it could have done so as plainly as other compacts that do just that."[225] By 1950, Wyoming had in fact already entered into at least one other compact that defined water rights in terms of depletion instead of guaranteeing other users a specific quantity of water.[226]

215. *Id.*
216. *Id.* at 1778.
217. *Id.*
218. *Id.*
219. *Id.* at 1778.
220. *Mont.*, 131 S. Ct. at 1778 (emphasis in original).
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 1779.
225. *Id.*
226. *Mont.*, 131 S. Ct. at 1779.

The Court determined Montana's assertion "that Article V(A) accomplishes essentially the same sort of depletive allocation with language that has a different and longstanding meaning" was unpersuasive.[227] Accordingly, the Court concluded that both the plain terms of the Compact and the existing appropriation doctrine allow upstream irrigators to increase the efficiency of their water use, even to the detriment of downstream appropriators.[228] Therefore, the Court upheld the Special Master's findings.[229]

This decision is only the first round in what will likely be a long process of settling Montana's complaints against Wyoming regarding the Compact. The Court found that upstream appropriators are senior to downstream appropriators even if both users had perfected their water rights at the same time. This determination was made without citation to existing authority and it is unclear from the decision that either Montana or Wyoming had ever adopted this approach. The Court then made clear and definite holdings regarding the wide-ranging rights of appropriators that the Court deemed senior merely because of their geographic location. Therefore, this decision is important precedent for future water-rights litigation in Montana, Wyoming, and other western states.

—Jesse Kodadek

VI. *WILSON V. STATE*[230]

In *Wilson v. State*, the Montana Supreme Court held that the Montana State Prison ("MSP") did not violate a defendant's constitutional rights when it denied him prescribed psychiatric medication.[231] The Court upheld the district court's denial of post-conviction relief, finding that the defendant failed to prove MSP "consciously disregarded a substantial risk of serious harm" or acted in a manner that "greatly exacerbate[d] [his] mental illness."[232] Therefore, the Court held that MSP did not violate the defendant's Eighth Amendment right against cruel and unusual punishment or his right to individual dignity under the Montana Constitution.[233]

On January 22, 2009, the district court sentenced Colton Wilson ("Wilson") to a six-year deferred sentence after he pleaded guilty to felony assault with a weapon.[234] As a condition of his deferred sentence, the court

227. *Id.*
228. *Id.*
229. *Id.*
230. *Wilson v. State*, 249 P.3d 28 (Mont. 2010).
231. *Id.* at 34.
232. *Id.*
233. *Id.*
234. *Id.* at 30.

ordered Wilson to attend the boot camp program at the Treasure State Correctional Training Center and emphasized that the sentence was "very lenient given the seriousness of the crime."[235]

Wilson had a history of mental health and behavioral issues.[236] Dr. William Stratford ("Dr. Stratford") diagnosed Wilson with severe Attention Deficit Hyperactivity Disorder ("ADHD") and rapid cycling bipolar disorder during a sentencing consultation in 2007.[237] Dr. Stratford prescribed a regimen of Abilify, Vyvanse, and Lamictal to manage Wilson's mental health issues.[238] These medications reportedly improved Wilson's behavior.[239]

In January 2009, Wilson entered the boot camp program.[240] He failed to bring his prescriptions and medications to boot camp, and consequently, the officials did not allow him to take his medication during the entirety of the program.[241] Within two weeks of his arrival, the program terminated Wilson for disruption, failing to adhere to program rules, and interfering with staff.[242]

The district court held a revocation hearing upon the recommendation of Wilson's probation officer,[243] followed by a second hearing focused on why the boot camp did not allow Wilson to take his medication.[244] At the second hearing, the parties agreed to provide Wilson another opportunity to complete boot camp in a non-MSP facility.[245] The court sent Wilson to a "pre-booter" program at the Missoula Assessment and Sanction Center ("MASC") to prepare him for boot camp.[246] After MASC terminated Wilson for inappropriate behavior, the State reinstated its motion to revoke Wilson's deferred sentence.[247]

At a subsequent revocation hearing on September 10, 2009, Wilson requested to be sent to a rehabilitation program because MSP policies did not allow inmates to take Vyvanse for security reasons.[248] Despite Dr. Stratford's testimony that Wilson could not succeed in any correctional program without Vyvanse, Abilify, and Lamictal, and in light of Wilson's prior

235. *Id.*
236. *Wilson*, 249 P.3d at 30.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Wilson*, 249 P.3d at 30.
243. *Id.*
244. *Id.*
245. *Id.* at 30–31.
246. *Id.* at 31.
247. *Id.*
248. *Wilson,* 249 P.3d at 31.

failures in rehabilitation programs, the district court committed him to MSP for twenty years with fifteen years suspended, concluding that MSP would provide him with adequate mental health care.[249]

When Wilson entered MSP on September 23, 2009, MSP's psychiatric physician, Dr. David Schaefer ("Dr. Schaefer"), diagnosed him with major depression and anxiety disorder, for which he prescribed Celexa and Wellbutrin.[250] Wilson reported to Dr. Schaefer that the medications made him feel better, and his behavior at MSP improved.[251]

On December 22, 2009, Wilson filed a petition for post-conviction relief, arguing the denial of his necessary prescription medication—Vyvanse—violated his Eighth Amendment right against cruel and unusual punishment under both the United States Constitution and the Montana Constitution and his right to individual dignity under the Montana Constitution.[252] Wilson offered no new evidence to the district court, but he claimed that the lack of proper medication exacerbated his mental health issues, causing him to behave poorly, thereby increasing his sentence.[253] He requested that the district court resentence him to a private residential setting."[254] The district court heard testimony from both Dr. Schaefer and Dr. Stratford, whose opinions varied regarding the appropriate medications for Wilson.[255] Concluding that the issues raised by Wilson were decided in previous hearings, the district court accordingly denied his petition for post-conviction relief.[256] Wilson appealed the denial to the Montana Supreme Court.[257]

On appeal, the Court noted that the district court was in the best position to gauge Dr. Stratford's and Dr. Schaefer's credibility and weigh the evidence, and thus it refused to reverse its sentence.[258] The Court then considered Wilson's central issue on appeal: whether the denial of Vyvanse violated Wilson's rights under the United States Constitution and Montana Constitution.[259]

The Court first relied on federal jurisprudence as persuasive authority on the issue of cruel and unusual punishment.[260] The Court looked to the

249. *Id.*
250. *Id.*
251. *Id.* at 31.
252. *Id.* at 32.
253. *Id.*
254. *Wilson,* 249 P.3d at 32.
255. *Id.*
256. *Id.* at 33.
257. *Id.* at 31.
258. *Id.* at 33.
259. *Id.*
260. *Wilson,* 249 P.3d at 33.

United States Supreme Court's two-part test from *Farmer v. Brennan*,[261] to determine whether an alleged deprivation of medical treatment violated the Eighth Amendment.[262] Under the *Farmer* test, an inmate must demonstrate he suffered "a serious deprivation that results in the denial of the 'minimal civilized measure of life's necessities'" and "that a prison official acted with deliberate indifference to the inmate's health and safety."[263] Turning to Montana jurisprudence, the Montana Supreme Court noted that the right of individual dignity granted by the Montana Constitution "provide[s] Montana citizens greater protections from cruel and unusual punishment than does the federal constitution."[264] The Court pointed out that *Walker v. State* set forth "the standard for determining deliberate indifference as it applies to improper psychiatric care in Montana."[265]

Under the *Walker* standard, Wilson had to demonstrate that prison officials "consciously disregarded a substantial risk of serious harm to [his] health or safety"[266] and deprived him of his "basic necessities of human existence."[267] In order to do so, Wilson had to show that the prison conditions inflicted or greatly exacerbated a mental illness or deprived him of his sanity.[268]

The Court found that MSP did not "consciously [disregard] a serious risk of substantial harm to Wilson's health."[269] Supporting this conclusion, and demonstrating the deference given to the district court's findings, the Court noted that Wilson received frequent psychiatric visits at MSP and that Dr. Schaefer "intentionally chose not to [prescribe] Vyvanse . . . because he did not believe that it was an appropriate medication."[270] Instead, Dr. Schaefer prescribed different medications—Wellbutrin and Celexa—to treat Wilson's mental illness.[271] Further, the Court noted that Wilson's behavior improved at MSP on the medications Dr. Schaefer prescribed, and that Wilson told Dr. Schaefer that the medications made him feel better.[272]

Recognizing that Wilson displayed mental and behavioral problems at MSP, the Court pointed out that he also exhibited problems in rehabilitation programs.[273] Moreover, the Court surmised that time spent in a correc-

261. *Farmer v. Brennan*, 511 U.S. 825 (1994).
262. *Wilson*, 249 P.3d at 33.
263. *Id.* (citing *Farmer*, 511 U.S. at 834).
264. *Wilson*, 249 P.3d at 33 (citing *Walker v. State*, 68 P.3d 872, 883 (Mont. 2003)).
265. *Wilson*, 249 P.3d at 33.
266. *Id.* (citing *Walker*, 68 P.3d at 880).
267. *Wilson*, 249 P.3d at 33–34 (citing *Walker*, 68 P.3d at 880).
268. *Wilson*, 249 P.3d at 33–34 (citing *Walker*, 68 P.3d at 883).
269. *Wilson*, 249 P.3d at 34.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*

tional setting "often exacerbates behavioral problems in young inmates."[274] Notwithstanding Wilson's exhibited mental and behavioral issues and the propensity of a correctional setting to aggravate them, the Court determined that he "failed to show that the conditions at MSP *greatly* . . . exacerbated his mental illness or deprived him of his sanity."[275]

In dissent, Justice Nelson opined that Wilson's case closely resembled *Walker*.[276] Justice Nelson emphasized that the three medications Dr. Stratford prescribed stabilized Wilson while those Dr. Schaefer prescribed did not.[277] Justice Nelson reasoned that because MSP denied Dr. Stratford's prescribed medications, it violated Wilson's rights of individual dignity and subjected him to cruel and unusual punishment.[278]

The Montana practitioner should take note that when an inmate seeks postconviction relief for improper psychiatric care, the Montana Supreme Court will apply a highly fact-dependent, case-by-case approach. A factual record demonstrating that an inmate was provided consistent, effective psychiatric care while incarcerated will likely bar an inmate's entitlement to post-conviction relief on Eighth Amendment or individual dignity grounds.

—Jeffrey R. Kuchel

VII. *STATE V. MAINE*[279]

In *State v. Maine*, the Montana Supreme Court modified the requirements that a defendant must meet to render a prior conviction unusable for sentence enhancement.[280] The Court declined to adopt the rigid standard used by the United States Supreme Court, which bars defendants from challenging prior convictions unless they were denied their right to counsel.[281] The Montana Supreme Court acknowledged that the State has an interest in the finality of decisions and modified the existing standard to place a higher burden on defendants to offer affirmative evidence to demonstrate the invalidity of a prior conviction.[282] To render a prior conviction constitutionally infirm—and therefore unusable for purposes of an enhanced punishment on a pending charge—a defendant must prove by a preponderance of the evidence that a previous conviction violated the Constitution.[283]

274. *Id.*
275. *Wilson*, 249 P.3d at 34 (emphasis added).
276. *Id.* at 35 (Nelson, J., dissenting).
277. *Id.*
278. *Id.*
279. *State v. Maine*, 255 P.3d 64 (Mont. 2011).
280. *Id.* at 69.
281. *Id.* (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).
282. *Maine*, 255 P.3d at 69.
283. *Id.* at 74.

On July 27, 2009, Gregory Alan Maine ("Maine") was booked in jail for driving under the influence of alcohol ("DUI").[284] Law enforcement officers arrested Maine after they discovered him sleeping in a car parked on the wrong side of the road, with alcohol on his breath, and with bloodshot and glassy eyes.[285] In addition, the results of several sobriety tests indicated that Maine was impaired.[286] After discovering that Maine had three prior DUI convictions, the Rosebud County Attorney charged Maine with a felony DUI for a fourth or subsequent offense.[287] Maine filed a motion to reduce the charge to a misdemeanor DUI, alleging that one of his prior convictions was invalid.[288]

Maine claimed that the circumstances surrounding his 1997 DUI conviction made the conviction constitutionally infirm because his attorney never raised a compulsion defense.[289] According to Maine, the 1997 conviction occurred as a result of an altercation at a rodeo in Ingomar, Montana on July 28, 1996, in which six individuals beat Maine unconscious.[290] After Maine awoke, he fled in his pickup truck because he did not feel safe in Ingomar.[291] After fleeing, Maine drove towards Forsyth, Montana.[292] Two Rosebud County deputies, responding to reports of the altercation in Ingomar, noticed Maine's truck and observed his driving.[293] Maine pulled over of his own initiative.[294] Maine admitted drinking twelve beers the previous night and two beers at the rodeo that day.[295] Based on this information in conjunction with the smell of alcohol and the results of sobriety tests, the deputies placed Maine under arrest for DUI.[296] At trial, Maine argued that he was not driving under the influence, but he never raised a compulsion defense.[297] Maine was sentenced to 60 days in jail, 53 of which were suspended, one of which was already served; Maine did not appeal his conviction.[298]

In the case at bar, the district court denied Maine's motion to reduce the felony charge to a misdemeanor.[299] The court reasoned that there is a

284. *Id.* at 66.
285. *Id.*
286. *Id.*
287. *Id.*
288. *Maine*, 255 P.3d at 66.
289. *Id.* at 67, 69.
290. *Id.* at 66.
291. *Id.* at 66–67.
292. *Id.* at 67.
293. *Id.*
294. *Maine*, 255 P.3d at 67.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*

need for finality in convictions, and it would be impossible for a court to sort out all the new claims and counterclaims about whether a compulsion defense would have made a difference ten years earlier.[300] Maine was sentenced to 13 months of incarceration followed by a three-year suspended sentence.[301] Maine appealed the district court's decision.[302]

In a majority opinion authored by Justice Nelson, the Montana Supreme Court began by outlining the framework from *State v. Oakland*,[303] which is used by courts to determine whether a prior conviction should be included for purposes of enhanced punishment on a current charge. That framework includes:

> (1) a rebuttable presumption of regularity attaches to the prior conviction, (2) the defendant has the initial burden to produce direct evidence that the prior conviction is invalid, and (3) once the defendant has made this showing, the burden shifts to the State to produce direct evidence and prove by preponderance of the evidence that the prior conviction was not entered in violation of the defendant's rights.[304]

Maine argued that in its application, this framework does not provide a bright line for when evidence is sufficient to rebut the presumption of regularity.[305] Maine pointed out that in both *State v. Jenni*[306] and *State v. Olson*,[307] the defendants' allegations of constitutional violations were sufficient to shift the burden to the State.[308]

The State requested that the Court adopt the rule developed from a trio of United States Supreme Court cases[309] which limit a defendant's ability to challenge the use of a prior conviction to when a defendant was denied assistance of appointed counsel under *Gideon v. Wainwright*.[310]

After analyzing the federal jurisprudence, the Court declined to adopt the federal rule limiting attacks on prior convictions solely to *Gideon* violations, reasoning that in Montana, defendants are awarded greater due-process protections.[311] The Court determined that administrative burdens and policy concerns did not warrant limiting the constitutional arguments that a defendant can use to attack a prior conviction.[312]

300. *Maine*, 255 P.3d at 67.
301. *Id.* at 68.
302. *Id.*
303. *State v. Oakland*, 941 P.2d 431 (Mont. 1997).
304. *Maine*, 255 P.3d at 68 (citing *Oakland*, 941 P.2d at 436 (Mont. 1997)).
305. *Maine*, 255 P.3d at 68.
306. *State v. Jenni*, 938 P.2d 1318 (Mont. 1997).
307. *State v. Olson*, 938 P.2d 1321 (Mont. 1997).
308. *Maine*, 255 P.3d at 68.
309. *Id.* at 69 (citing *Custis v. U.S.*, 511 U.S. 485 (1994); *Daniels v. U.S.*, 532 U.S. 374 (2001); *Lackawanna Co. Dist. Atty. v. Cross*, 532 U.S. 394 (2001)).
310. *Maine*, 255 P.3d at 69 (citing *Gideon*, 372 U.S. 335).
311. *Id.*
312. *Id.*

The Court retained the general framework from *Oakland*, but agreed with Maine that clarification was needed as to the type of evidence sufficient to shift the burden to the State.[313] The Court held that a defendant must provide affirmative evidence establishing that the prior conviction violated the defendant's rights under the Montana Constitution in order to transfer the burden to the State.[314] Additionally, the Court distinguished affirmative evidence from self-serving statements or a defendant's attempt to point to a silent or ambiguous record.[315] The Court emphasized that the burden falls on a defendant to prove the invalidity of a prior conviction, and the State is not required to show the validity of the conviction; the Court further noted that this is a heavy burden for the defendant to overcome.[316]

After applying the modified standard to Maine's claims of ineffective counsel, the Court held that Maine failed to meet the burden it had just enunciated.[317] The Court concluded that Maine's evidence did not establish that his counsel's performance fell below an objective standard of reasonableness because the record was silent on why his attorney did not raise a compulsion defense.[318] Additionally, the Court found that Maine's evidence failed to establish that even if his counsel's performance fell below an objective standard of reasonableness, the outcome of the trial would have been different.[319]

For the Montana practitioner, *Maine* clarifies the burden on defendants and the State when a defendant challenges the use of a defendant's prior conviction for the purposes of enhanced punishment. Prosecutors and defense attorneys should take note that the Court has clarified and modified a defendant's burden of proof when challenging the constitutionality of prior convictions and has rejected the federal approach, which would limit such challenges to *Gideon* violations. With its decision, the Court balanced Montanan's enhanced due-process rights with the State's need for finality of convictions.

—*Amy McNulty*

313. *Id.* at 73–74.
314. *Id.* at 74.
315. *Id.*
316. *Maine*, 255 P.3d at 74.
317. *Id.* at 76.
318. *Id.* at 74.
319. *Id.* at 75.

VIII. *WALTERS V. FLATHEAD CONCRETE PRODUCTS, INC.*[320]

In *Walters v. Flathead Concrete Products, Inc.*, the Montana Supreme Court affirmed the constitutionality of the Workers' Compensation Act ("WCA")—specifically, the constitutionality of the WCA's exclusive remedy provision and the provision providing a $3,000 lump sum payment to non-dependent parents of a deceased worker.[321] Carol Walters ("Walters"), the mother of a deceased employee, asserted wrongful death and survivorship claims against her son's employer, Flathead Concrete Products, Inc. ("FCP").[322] The Court affirmed the district court's grant of summary judgment for FCP, finding that the WCA's exclusive remedy provision barred Walters' claims.[323]

Walters' son, Tim, died in a work-related accident while working for FCP.[324] Tim was forty-two years old and single, and he had no children. He lived with Carol but did not provide her with sufficient support for her to qualify as a dependent.[325] FCP provided workers' compensation coverage to its employees through the WCA.[326] As a non-dependent parent of a deceased worker, Carol was entitled to receive $3,000 under the WCA, plus medical, hospital, and burial benefits.[327]

Walters conceded that she could not establish an intentional injury claim, which would allow her to circumvent the exclusive remedy provision of the WCA.[328] Instead, she argued that the exclusive remedy provision of the WCA and the provision entitling her to only $3,000 were unconstitutional because the quid pro quo on which the WCA was premised was not satisfied.[329] Based on the unconstitutionality of these provisions, she contended that her claims should proceed.[330]

Walters broadly presented the issue as: "Is $3,000 for the death of a worker constitutional?"[331] She argued that because Tim had no dependents, and thus no person was eligible to receive wage loss benefits, the quid pro

320. *Walters v. Flathead Concrete Products, Inc.*, 249 P.3d 913 (Mont. 2011).

321. *Id.* at 914.

322. *Id.*

323. *Id.*

324. *Id.* at 915.

325. *Id.*

326. *Walters*, 249 P.3d at 915.

327. *Id.* (citing Mont. Code Ann. § 39–71–721(4) (2011)).

328. *Walters*, 249 P.3d at 915.

329. *Id.*

330. *Id.*

331. *Id.*

quo was not satisfied.[332] Walters further asserted that the provisions of the WCA were fundamentally unfair and violated substantive due process.[333]

The Court looked to the Montana Constitution, Article II, § 16, which affords all persons full legal redress except in the case of an employee against his fellow employees or immediate employer when the employer provides coverage under the WCA.[334] The Court also recited the exclusive remedy rule stated in Montana Code Annotated § 39–71–411:

> An employer is not subject to any liability whatever for the death of or personal injury to an employee covered by the Workers' Compensation Act . . . . The [WCA] binds the employee himself, and in case of death binds his personal representative and all persons having any right or claim to compensation for his injury or death . . . ."[335]

Thus, the Court held that the WCA, on its face, barred all of Walters' claims.[336]

The Court reasoned that the quid pro quo of the WCA means that employers providing coverage under the WCA receive the exclusive remedy provision in exchange for providing workers with a no-fault recovery.[337] The Court emphasized that the WCA's purpose is to benefit both the employer and the employee, by immunizing the employer from lawsuits while assuring compensation for the employee.[338] Further, it described the exclusive remedy provision as "perhaps the most firmly entrenched doctrine in workers' compensation law."[339]

Walters' challenge to the quid pro quo relied primarily on the Court's holding in *Stratemeyer v. Lincoln County* (*"Stratemeyer II"*).[340] There, the plaintiff-employee suffered a mental injury defined as a "mental-mental" injury.[341] Because the *Stratemeyer II* Court determined that such mental injuries were not covered by the WCA, the Court concluded that the quid pro quo did not exist, and therefore the plaintiff was allowed to pursue a remedy via an action against his employer.[342] The Court in *Stratemeyer II* held that "[a]bsent the quid pro quo, the exclusive remedy cannot stand, and the employer is thus exposed to potential tort liability."[343]

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332. *Id.*

333. *Id.* at 915–916.

334. *Walters*, 249 P.3d at 916.

335. *Id.* (quoting Mont. Code Ann. § 39–71–411).

336. *Walters*, 249 P.3d at 916.

337. *Id.*

338. *Id.* (quoting *St. Farm Fire & Cas. v. Bush Hog, LLC*, 219 P.3d 1249, 1253 (Mont. 2009)).

339. *Walters*, 249 P.3d at 916 (quoting *Stratemeyer v. Lincoln Co. (Stratemeyer II)*, 915 P.2d 175, 179 (Mont. 1996)).

340. *Walters*, 249 P.3d at 917.

341. *Stratemeyer II*, 915 P.2d at 180.

342. *Id.*

343. *Id.*

The Court distinguished Walters' claim from *Stratemeyer II*, concluding that, unlike Stratemeyer's "mental-mental" injury, Tim's death was an injury covered by the WCA.[344] The Court highlighted *Maney v. Louisiana Pacific Corporation*'s[345] determination that "[the WCA's] language is clear and unequivocal. An employer has no liability for an employee's work-related injury or death which is compensable under the Act."[346] Accordingly, the Court held that because Tim's injury was compensable under the WCA, "the basis for the Court's conclusion in *Stratemeyer II* that the quid pro quo had failed . . . is not present in this case."[347]

Next, the Court addressed Walters' substantive due process challenge. The Court noted "the essence of substantive due process" is to protect individuals from the exercise of "unreasonable, arbitrary or capricious" State power.[348] Thus, the Court declared that substantive due process requires statutes to be reasonably related to a legitimate government objective.[349]

The district court had rejected Walters' substantive due process challenge altogether, finding that she had failed to assert a constitutionally protected property interest.[350] The Court rejected this position:

> We find it incongruent for the FCP to argue on the one hand that there was an exchange of interests sufficient to satisfy the quid pro quo bargain supporting the exclusive remedy, but to argue on the other hand that Walters lacks an interest sufficient to test whether the quid pro quo bargain satisfied substantive due process.[351]

Accordingly, the Court held that Walters demonstrated an interest sufficient to bring her substantive due process challenge.[352]

Walters argued that the Montana Constitution mandates fairness and the $3,000 afforded to her under the WCA was unfair and unreasonable.[353] She focused on the denial of wage loss benefits to support her argument that the quid pro quo was not satisfied.[354] The Court expanded the inquiry and examined all benefits available to a worker who suffers a fatal, work-related injury, including medical and hospital expenses related to the injury and death, burial expenses, wage loss benefits available to various categories of

344. *Walters*, 249 P.3d at 917.

345. *Maney v. La. Pac. Corp.*, 15 P.3d 962 (Mont. 2000).

346. *Walters*, 249 P.3d at 917 (quoting *Maney*, 15 P.3d at 967).

347. *Walters*, 249 P.3d at 917.

348. *Id.* at 918 (quoting *Town & Country Foods, Inc. v. City of Bozeman*, 203 P.3d 1283, 1286 (Mont. 2009)).

349. *Walters*, 249 P.3d at 918.

350. *Id.*

351. *Id.* at 919.

352. *Id.*

353. *Id.* at 918.

354. *Id.* at 919.

dependents, and if no dependents exist, a lump sum payment of $3,000 to the decedent's surviving parent or parents.[355]

The Court then examined whether the statutes were logically related to the WCA's purpose, which is "'to provide, without regard to fault, wage-loss and medical benefits to a worker suffering from a work-related injury or disease. . . . at a reasonable cost to the employer.'"[356] The Court held that the Legislature's efforts to prioritize the allocation of resources from the workers' compensation fund served a legitimate government objective.[357] The Court concluded that "the challenged statutes evidence a legislative intention to manage resources by paying wage-loss benefits only to those people who are dependent upon the deceased worker's wages."[358] The Court recognized that the amount awarded was "minimal";[359] however, it said that such an arrangement met the legitimate goal of preserving resources from the workers' compensation fund for those people who need them most—the dependents of injured workers.[360]

The Court emphasized that Walters' burden in this case was high—to prove the WCA's unconstitutionality beyond a reasonable doubt.[361] The Court conceded that the WCA may not be perfect, but concluded that Walters had not met her high burden.[362]

Ultimately, the Court held that the WCA is "rationally related to the recognized legitimate government objectives of the Act" in that, "[o]ut of available resources, the Legislature logically directed wage loss benefits to those persons who depended upon them, and paid a small amount to those who did not."[363] The Court concluded that the WCA is not arbitrary or unreasonable and that it satisfies both substantive due process and the quid pro quo.[364]

Justice Cotter specially concurred, asserting that the quid pro quo only extends to the workers and their beneficiaries, not to persons who are not beneficiaries of the deceased worker.[365] Justice Cotter warned that while

355. *Walters*, 249 P.3d at 919–920.

356. *Id.* at 920 (quoting Mont. Code Ann. § 39–71–105(1)).

357. *Walters*, 249 P.3d at 920.

358. *Id.*

359. *Id.*

360. *Id.* (citing *Taylor v. Southeast-Harrison W. Corp.*, 694 P.2d 1160, 1162 (Alaska 1985)).

361. *Walters*, 249 P.3d at 921 (citing *Powell v. St. Compen. Ins. Fund*, 15 P.3d 877, 881 (Mont. 2000)).

362. *Walters*, 249 P.3d at 921–922 (citing *Satterlee v. Lumberman's Mut. Cas. Co.*, 222 P.3d 566, 576 (Mont. 2009)).

363. *Walters*, 249 P.3d at 921–922.

364. *Id.* at 922.

365. *Id.* at 922 (Cotter, J., concurring).

further limitations on available benefits may create a scenario in which the quid pro quo no longer exists, that was not the situation here.[366]

Justices Wheat and Nelson dissented.[367] Justice Wheat argued that the quid pro quo was violated for two reasons: (1) the unavailability of wage loss benefits for non-dependent parents; and (2) the unreasonableness of the $3,000 payment.[368] Justice Wheat pointed out that, outside the context of the WCA, an estate is entitled to seek future wage loss damages in a survivorship action, regardless of whether any members of the estate are dependents.[369] Accordingly, Justice Wheat maintained that in order to satisfy the quid pro quo, a worker should be entitled to wage loss benefits even if no dependents exist.[370] Justice Nelson agreed with Justice Wheat's dissent.[371] But he further argued that while this case may not be the case in which the WCA may be deemed unconstitutional, "given the direction of workers' compensation reform, there will likely come a case which presents this Court with the issue of whether the whole Workers' Compensation Act, or significant parts of it, has been rendered unconstitutional . . . because . . . the quid pro quo no longer exists."[372]

In sum, *Walters* is an important case because it affirms the constitutionality of the WCA and the Legislature's power to allocate and prioritize distributions from the Workers' Compensation Fund. Further, *Walters* establishes that non-dependent family members of a deceased worker have a constitutionally protected property interest in the benefits due to the worker under the WCA. Finally, *Walters* sounds a warning to the Legislature that the Court is divided and that further limitations on compensating workers may render the WCA, or portions of it, unconstitutional.

—Mac Morris

IX. *STATE V. STIFFARM*[373]

In *State v. Stiffarm*, the Montana Supreme Court held that a district court cannot revoke a suspended sentence prior to the commencement of that sentence.[374] The Court relied upon a strict interpretation of Montana Code Annotated § 46–18–203(2), which required that a petition for revocation of a suspended sentence "be filed with the sentencing court during the

366. *Id.*
367. *Id.* at 922–923 (Wheat & Nelson, JJ., dissenting).
368. *Id*. at 922 (Wheat, J., dissenting).
369. *Walters*, 249 P.3d at 922 (Wheat, J., dissenting).
370. *Id.*
371. *Id.* at 923 (Nelson, J., dissenting).
372. *Id.*
373. *State v. Stiffarm*, 250 P.3d 300 (Mont. 2011).
374. *Id.* at 303.

period of suspension or deferral."[375] In doing so, the Court overruled a line of cases that allowed a district court to file a revocation petition before the period of suspension.[376] In addition to redefining the permissible period for a district court to revoke a suspended sentence,[377] *Stiffarm* demonstrates that *stare decisis* will not sustain a statutory interpretation that contradicts the plain language of a statute.[378]

Gerald Stiffarm ("Stiffarm") pleaded guilty to a Partner or Family Member Assault ("PFMA") charge and received a suspended sentence on December 9, 2005.[379] On February 24, 2006, Stiffarm pleaded guilty to a Failure to Register as a Violent Offender ("Failure to Register") charge, and the State moved to revoke his previous suspended sentence for the PFMA conviction.[380] As a result, the district court sentenced Stiffarm to a five-year suspended sentence for his Failure to Register conviction to run consecutive to the four-year sentence for the PFMA conviction.[381] Stiffarm was granted parole for his PFMA sentence on June 9, 2009, but that sentence continued to run until November 14, 2009.[382] On November 10, 2009, the State petitioned to revoke Stiffarm's suspended sentence for the Failure to Register conviction because he violated the terms of the sentence.[383] At that time, there were four days remaining on Stiffarm's PFMA sentence; therefore, it was four days prior to the commencement of the suspended sentence for the Failure to Register conviction.[384] Stiffarm moved to dismiss the revocation petition, arguing that Montana Code Annotated § 46–18–203(2) did not permit the district court to revoke a suspended sentence prior to the commencement of the sentence.[385] The district court rejected Stiffarm's argument and revoked his suspended sentence; Stiffarm appealed.[386]

The Montana Supreme Court based its decision on the plain language of § 46–18–203(2), ruling that it clearly and unambiguously precluded the State from revoking a suspended sentence prior to the commencement of

375. *Id.* at 301; Mont. Code Ann. § 46–18–203(2) (2009). The statute has since been amended to state: "The petition for a revocation must be filed with the sentencing court either before the period of suspension or deferral has begun or during the period of suspension or deferral but not after the period has expired." Mont. Code Ann. § 46–18–203(2) (2011).

376. *Stiffarm*, 250 P.3d at 303.

377. *Id.*

378. *Id.*

379. *Id.* at 301.

380. *Id.*

381. *Id.*

382. *Stiffarm*, 250 P.3d at 301.

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

that sentence.[387] The statute read: "The petition for a revocation must be filed with the sentencing court during the period of suspension or deferral. Expiration of the period of suspension or deferral after the petition is filed does not deprive the court of its jurisdiction to rule on the petition."[388] The key term is the word "during," which the Court defined using two different dictionaries, both of which use the language "in the course of."[389]

According to the Court, such clear language leaves no room for a contrary interpretation.[390] The Court stated that its role is to "ascertain and carry out the Legislature's intent by looking at the plain meaning of the words in the statute."[391] When the language of a statute is clear, the Court "need not—and cannot—inquire further into the legislative history."[392] Instead, it is the Legislature's duty to ensure that the language of the law reflects legislative intent.[393] Nevertheless, the Court was concerned that the statute's plain meaning was not the Legislature's intent and twice urged the Legislature to consider amending the statute.[394]

In 1983, the Montana Legislature added the time limitation for filing a petition for a revocation by creating subsection (2) to § 46–18–203.[395] The previous version of that statute required that the hearing for revocation, rather than the filing of the petition, take place during the period of suspension.[396] The Court decided *State v. Sullivan*[397] under this earlier statute and held that, "the language of section 46–18–203, MCA, does not prohibit revocation of probation before the defendant actually begins serving the suspended sentence."[398] The Court reasoned that if a defendant proves himself unworthy of leniency before it is granted, there is good reason not to grant it.[399] In *Matter of Ratzlaff*,[400] the Court also allowed a district court to revoke a suspended sentence before the suspended portion of that sentence commenced.[401] Following the adoption of subsection (2), the Court decided *Christofferson v. State*,[402] relying on *Sullivan* to hold that "a suspension of sentence may be revoked for acts of a probationer after sen-

387. *Id.* at 302.
388. Mont. Code Ann. § 46–18–203(2) (2009).
389. *Stiffarm*, 250 P.3d at 302.
390. *Id.*
391. *Id.*
392. *Id.* at 302–303.
393. *Id.* at 303.
394. *Id.* at 302, 303–304.
395. *Stiffarm*, 250 P.3d at 302.
396. *State v. Morrison*, 176 P.3d 1027, 1031 (Mont. 2008).
397. *State v. Sullivan*, 642 P.2d 1008 (Mont. 1982).
398. *Id.*
399. *Id.* at 1011.
400. *In re Ratzlaff*, 564 P.2d 1312 (Mont. 1977).
401. *Id.* at 1313–1316.
402. *Christofferson v. State*, 901 P.2d 588 (Mont. 1995).

tence is imposed but before the probationer actually begins serving the suspended sentence."[403] *Christofferson* was the first in a line of cases that relied on *Sullivan* and *Ratzlaff* despite the 1983 change in statutory language.[404]

In *Stiffarm*, the Court held that its "uncritical continuing reliance" on *Sullivan* and *Ratzlaff* was misplaced because the amended statute significantly differed from the prior version.[405] The Court determined that regardless of its reasoning in *Sullivan*, the amendment to § 46–18–203(2) required it to take a fresh look at the issue in subsequent cases.[406] According to the *Stiffarm* Court, *Christofferson* was wrongly decided due to reliance on an inapplicable precedent.[407] Rather than perpetuate an erroneous interpretation of the law, the Court overruled *Christofferson* and its progeny.[408] Because the State did not meet the statutory requirements for its petition for revocation, the Court reversed the district court's decision and remanded with an instruction to vacate the order revoking Stiffarm's suspended sentence.[409]

Justices Baker and Rice dissented.[410] They acknowledged that the majority interpretation of the plain language of § 46–18–203(2) "cannot be faulted," but argued that the Court's previous decisions on the issue had become the correct legal interpretation, regardless of their original merit.[411] Under this view, the principle of *stare decisis* should prevail in order to maintain consistency and predictability.[412] The dissenters also noted that the legislature had many opportunities after *Christofferson* to amend the law if it did not agree with the Court's interpretation.[413]

The majority agreed that *stare decisis* is an important principle but reserved the right to reconsider past cases rather than follow "a manifestly wrong decision."[414] *Stiffarm* stands for the proposition that *stare decisis* will not save a statutory interpretation that unmistakably conflicts with the plain language of the law.

Following *Stiffarm*, the Montana Legislature amended § 46–18–203(2) to allow a petition for revocation to be filed prior to the commencement of

403. *Id.* at 589.
404. *Stiffarm*, 250 P.3d at 303.
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.*
409. *Id.*
410. *Stiffarm*, 250 P.3d at 300.
411. *Id.* at 304 (Baker, J., dissenting).
412. *Id.*
413. *Id.*
414. *Stiffarm*, 250 P.3d at 303 (majority) (quoting *Allstate v. Wagner–Ellsworth*, 188 P.3d 1042, 1051 (Mont. 2008)).

the sentence.[415] Nevertheless, *Stiffarm* demonstrates a willingness to overturn longstanding precedent if it conflicts with the plain language of existing statutes. This principle of statutory interpretation is applicable to diverse fields of law. The Montana practitioner must closely examine statutory language independently of existing caselaw, particularly if the language has been modified since the original precedent. Finally, *Stiffarm* should reinforce upon legislators their duty to carefully draft statutes without relying on the courts to reconcile the letter of law with the spirit of legislative intent.

—Samuel Preta

X. *KELLER V. LIBERTY NORTHWEST, INC.*[416]

The risk of misdiagnosis presents a special difficulty to the settlement of Workers' Compensation claims. Claimants commonly request rescission of settlement contracts based upon mutual mistake regarding their injuries.[417] In *Keller v. Liberty Northwest, Inc.*, the Montana Supreme Court clarified the burden of proof required to assert mutual mistake in such cases. The Court established that a settlement may be rescinded due to mutual mistake, even if the parties knew about the theory of injury, as long as that theory existed when the parties settled and was "disregarded, forgotten, or not considered."[418]

This case arose from the misdiagnosis of the cause of Kimberly Keller's ("Keller") back pain after a work-related injury. Keller was injured when she moved a patient while filling in as an in-home care provider in early 2005.[419] During her initial medical examinations, two different physician assistants noticed a protrusion, or "winging," of her right scapula.[420] Yet none of the first seven doctors who examined Keller observed the winging or diagnosed long thoracic nerve damage.[421] In January 2007, Keller settled her indemnity benefits for $27,582.64.[422] Then, later that year after the seventh doctor noted that several of the medical personnel who treated Keller had suggested breast-reduction surgery might ease her pain, Keller settled her medical benefits for $7,500.[423] Her medical benefits

415. Mont. Code Ann. § 42–18–203(2).
416. *Keller v. Liberty N.W., Inc.*, 246 P.3d 434 (Mont. 2010).
417. *Id.* at 439.
418. *Id.* at 440.
419. *Id.* at 436.
420. *Id.*
421. *Id.* at 436–437. One doctor noted his physician's assistant had observed winging, although it was absent during his examination.
422. *Keller*, 246 P.3d at 437.
423. *Id.*

settlement included provisions regarding the parties' dispute over the necessity of Keller's breast reduction.[424] After the Department of Labor and Industry approved the surgery in September 2007, Keller underwent the operation, but it did not relieve her pain.[425] Finally, roughly three and a half years after her injury and a year after the settlement of her medical benefits, an eighth doctor, Dr. Dean Ross, treated Keller.[426] Ross performed an electrodiagnostic test on Keller that revealed "chronic right long thoracic neuropathy" as the cause of her "very prominent" scapular winging.[427]

Keller petitioned the Workers' Compensation Court to rescind both settlements and reinstate her medical benefits.[428] She argued that the settlement contracts were formed under a mutual mistake because they were premised on a misdiagnosis of the cause of her back pain.[429] Ross and another doctor—who had previously treated Keller—both testified that the newly diagnosed long thoracic nerve damage was likely the cause of the winging observed in her early examinations.[430] Keller testified that she had not known her condition included right scapular winging or long thoracic nerve injury when she settled her claim.[431] However, the Workers' Compensation Court denied her attempt to rescind the settlements, stating that Keller needed to show that both she and Liberty Northwest, Inc. ("Liberty Northwest") were unaware of her actual injuries at the time of the settlement.[432] Keller appealed to the Montana Supreme Court,[433] arguing the Workers' Compensation Court incorrectly required that neither party have any knowledge of the mistaken facts to establish mutual mistake.[434]

The Montana Supreme Court agreed, stating that both the statute governing mistakes of fact and the Court's prior decisions "confirm that mutual mistake may still exist when parties know about a theory of injury, if that theory is disregarded, forgotten, or not considered even though raised as a possibility."[435] Montana Code Annotated § 28–2–409 provides that a mistake of fact may occur due to "unconscious ignorance or forgetfulness" of the person making the mistake, unless that person caused the mistake by neglecting a legal duty.[436] The statutory language presupposes that the

424. *Id.*
425. *Id.*
426. *Id.* at 436–437.
427. *Id.* at 437.
428. *Keller*, 246 P.3d at 438.
429. *Id.*
430. *Id.* at 437–438.
431. *Id.* at 438.
432. *Id.*
433. *Id.*
434. *Keller*, 246 P.3d at 440.
435. *Id.*
436. Mont. Code Ann. § 28–2–409 (2011).

party making the mistake might have knowledge of a mistaken fact before forgetting it.[437] Further, in *Weldele v. Medley Development*, the Court recognized that a suspected diagnosis that had been dismissed could be grounds for mutual mistake.[438] In *Weldele*, the Court found that the settlement should be rescinded due to a mutual mistake of fact after the parties dismissed the correct diagnosis, even though they knew that diagnosis was a possibility when they settled.[439] The *Keller* Court concluded that both the applicable statute and caselaw allowed for rescission of a settlement for mutual mistake when a known fact was dismissed.[440]

The Court also dismissed Liberty Northwest's argument that the holding of *Kruzich v. Old Republic Insurance Company*[441] was inconsistent with other Workers' Compensation misdiagnosis cases and precluded a finding of mutual mistake.[442] The *Kruzich* Court rejected a claim of mutual mistake when a new condition developed years later because the mistaken fact did not exist at the time of the settlement.[443] The *Keller* Court distinguished *Kruzich*, noting that Keller's doctors testified the scapular winging and long thoracic nerve damage existed at the time of settlement, but was incorrectly diagnosed.[444]

Finally, the Court clarified that it was not overturning the Workers' Compensation Court's factual findings but rather correcting an incorrect legal standard.[445] Liberty Northwest argued the standard of review established in *Gamble v. Sears*[446] required the Court to uphold the Workers' Compensation Court's decision.[447] That standard limited the Court's review to examining whether the evidence supported the factual findings and prohibited it from considering whether the evidence might support findings not made by the lower court.[448] Liberty Northwest argued that Keller was merely trying to rebut the Workers' Compensation Court's factual findings.[449] But the Court called that argument "plainly inapposite," noting Keller disputed the legal standard applied by the Workers' Compensation Court, not its factual findings.[450] The Court also recognized that its stan-

437. *Keller*, 246 P.3d at 440.
438. *Weldele v. Medley Dev.*, 738 P.2d 1281, 1281–1283 (Mont. 1987); *Keller*, 246 P.3d at 440.
439. *Weldele*, 738 P.2d at 1281–1283; *Keller*, 246 P.3d at 440.
440. *Keller*, 246 P.3d at 440.
441. *Kruzich v. Old Republic Ins. Co.*, 188 P.3d 983 (Mont. 2008).
442. *Keller*, 246 P.3d at 440.
443. *Kruzich*, 188 P.3d at 991.
444. *Keller*, 246 P.3d at 440.
445. *Id.*
446. *Gamble v. Sears*, 160 P.3d 537 (Mont. 2007).
447. *Keller*, 246 P.3d at 440.
448. *Gamble*, 160 P.3d at 542; *Keller*, 446 P.3d at 440.
449. *Keller*, 446 P.3d at 440.
450. *Id.*

dard of review prohibited it from deciding whether Keller's assertions constituted a mutual mistake and instead remanded the case to the Workers' Compensation Court to determine that question.[451]

In *Keller*, the Montana Supreme Court clarified the relationship between two lines of cases involving misdiagnosis in Workers' Compensation settlements. The Court noted that a settlement may be rescinded for mutual mistake if the parties disregard, forget, or fail to consider a known fact, provided that fact existed at the time of the agreement and was not merely a failure to predict a future development. Montana practitioners should be aware of this case as a recent reaffirmation of long-standing contract law and a clear explanation of the doctrine of mutual mistake.

—Gale Price

XI. *GORDON V. KUZARA*[452]

In *Gordon v. Kuzara*, the Montana Supreme Court held that an operating agreement's ("OA") arbitration clause does not apply to judicial dissolution of a limited liability company ("LLC") when the OA contains no provision addressing judicial dissolution.[453] Policy arguments favoring arbitration were not persuasive to the Court because the OA did not implicate interstate commerce or the Federal Arbitration Act.[454] As a matter of first impression in Montana, the Court determined that because the parties never agreed to arbitrate in the event of a judicial dissolution, the general rule that arbitration agreements between two parties are valid and enforceable did not apply.[455]

Joseph Kim Kuzara was a managing member of Half Breed, LLC.[456] Half Breed's OA contained an arbitration clause that compelled arbitration when any member of Half Breed wished to challenge the agreement, any activity conducted pursuant to the agreement, or any interpretation of the terms of the agreement.[457] The Gordons filed an Application for Dissolution of Half Breed with the district court, pursuant to Montana Code Annotated § 35–8–902.[458] That statute sets forth several instances in which a district court may order dissolution of an LLC, including when: the economic purpose of the LLC is unreasonably frustrated; it is not reasonably

451. *Id.* at 441.
452. *Gordon v. Kuzara*, 245 P.3d 37 (Mont. 2010).
453. *Id.* at 41.
454. *Id.* at 39.
455. *Id.* at 39, 41.
456. *Id.* at 38.
457. *Id.*
458. *Gordon*, 245 P.3d at 38.

practicable to continue the LLC's business with one of the members remaining involved; it is not reasonably practicable to continue the LLC's business pursuant to the articles of organization and the OA; or the LLC did not purchase the petitioner's distributional interest as required by law.[459]

In their Application for Dissolution, the Gordons cited several grounds for dissolution that caused "irreparable damage to the company," including Kuzara's diversion of fees and improper accounting and tax reporting.[460] In response, Kuzara moved to compel arbitration based on the arbitration clause in the OA.[461]

The district court noted that whether an application for judicial dissolution must be arbitrated was an issue of first impression in Montana.[462] Given the absence of Montana precedent, the district court referenced a Georgia Supreme Court case that concluded an arbitration clause within an OA did not apply to a petition for judicial dissolution.[463] Here, the district court concluded that only judges, not arbitrators, were authorized to grant judicial dissolution under the statute.[464] It further determined that the arbitration clause did not apply because the requested dissolution did not challenge any activity conducted pursuant to the OA.[465] Kuzara appealed the denial of his Motion to Compel Arbitration to the Montana Supreme Court.[466]

On appeal, the Montana Supreme Court only considered the narrow issue of whether the arbitration clause in the OA applied to judicial dissolution.[467] The Court reviewed the district court's order de novo.[468]

Because the Gordons included allegations of Kuzara's misconduct in their Application for Dissolution, Kuzara argued that the Gordons sought dissolution based on an activity conducted pursuant to the OA.[469] The Court rejected this argument and determined that the Gordons merely cited examples of misconduct to show that Half Breed was "no longer economically feasible."[470] The Court concluded that although the Application for Dissolution referenced Kuzara's activities, the Gordons did not seek anything other than judicial dissolution pursuant to § 38–5–902.[471]

459. Mont. Code Ann. § 35–8–902(1)(a), (b), (e) (2011).
460. *Gordon*, 245 P.3d at 38.
461. *Id.*
462. *Id.* at 38–39.
463. *Id.* at 39 (citing *Ga. Rehab. Ctr., Inc. v. Newman Hosp.*, 658 S.E.2d 737 (Ga. 2008)).
464. *Gordon*, 245 P.3d at 39.
465. *Id.*
466. *Id.*
467. *Id.*
468. *Id.*
469. *Id.*
470. *Gordon*, 245 P.3d at 40.
471. *Id.*

The Court also rejected Kuzara's argument that the Gordons wanted to exclude him from Half Breed, not dissolve the LLC.[472] In their Application for Dissolution, the Gordons requested that the district court appoint someone besides Kuzara to wind up the LLC's affairs and hold "Kuzara responsible for any fees or penalties assessed due to his harmful actions."[473] The Court asserted that the relief requested was within the statutory boundaries of Montana Code Annotated § 35–8–903, which gives a district court the authority to wind up an LLC by settling and closing the business or disposing of and transferring the LLC's property.[474]

The Court noted that it has "consistently held that arbitration agreements between two parties are valid and enforceable."[475] Whether the parties agreed to arbitrate the dispute was the threshold inquiry.[476] Because the OA did not have a provision addressing judicial dissolution, the Court declined to conclude that the parties ever agreed to arbitrate in the event of judicial dissolution pursuant to the statute.[477]

Citing the Georgia case referenced by the district court as persuasive authority, the Court applied the Georgia Court's reasoning that the state statute on dissolution proceedings provided "an independent legal mechanism for judicial and administrative dissolution" of an LLC which did not "change the fact that dissolution proceedings are an exclusive outgrowth of that statute rather than the [OA]."[478] The Court affirmed the lower court's denial of Kuzara's Motion to Compel Arbitration for two reasons: namely, that the Gordons sought judicial dissolution pursuant to the statute and the OA made no reference to judicial dissolution.[479]

This case is significant to Montana lawyers and to anyone in Montana who operates under an OA. The Montana Supreme Court has identified a situation in which the general rule that arbitration clauses are valid and enforceable does not apply. Unless there is an express reference to judicial dissolution of an LLC, a court should exempt judicial dissolution from the arbitration clause. While this holding is limited to a narrow issue, other such situations may emerge as the Court examines future motions to compel arbitration.

—Hannah Tokerud

472. *Id.*
473. *Id.*
474. *Id.* at 40; Mont. Code Ann. § 35–8–903(2).
475. *Gordon*, 245 P.3d at 39.
476. *Id.*
477. *Id.*
478. *Id.* at 40–41 (citing *Ga. Rehab. Ctr., Inc.*, 658 S.E.2d at 738).
479. *Gordon*, 245 P.3d at 41.