Montana Law Review

Volume 79
Issue 2 *Summer 2018*

Article 3

11-16-2018

The Rule of Lenity in the State of Montana: Is There Lenity?

Angelica Gonzalez
Alexander Blewett III School of Law

\\jciprod01\productn\M\MON\79-2\MON203.txt unknown Seq: 1 19-OCT-18 13:59

COMMENTS

THE RULE OF LENITY IN THE STATE OF MONTANA: IS THERE LENITY?

Angelica Gonzalez*

I. Introduction

Is hashish oil "marijuana?"[1] To a person not trained in the law it might appear as though a statute is black and white, but to a person that has been trained to fish out and dissect even the most mundane words, a seemingly clear statute may contain many shades of gray. Just as there are various theories of statutory interpretation, from legal process and new textualism to economic and pragmatic theories, there are also various doctrines of statutory interpretation. These doctrines include ordinary meaning rules, textual canons, and substantive policy canons. These doctrines serve as guiding principles for judges and lawyers to aid in the interpretation of statutes.

When interpreting a statute, a court traditionally looks to the plain language of the statute to discern the legislative intent.[2] A court usually accomplishes this by first looking at the words in the statute and applying the usual and ordinary meaning of the words used. If, after employing the traditional rules of statutory construction and interpretation, a penal statute re-

* J.D. candidate, 2018, Alexander Blewett III School of Law at the University of Montana. I wish to extend a special thanks to Anthony Johnstone, an exemplary professor and mentor, who has had unwavering faith in my capacity, has motivated me to strive for excellence, and has been a pillar of support throughout my law school tenure. I am grateful for the opportunity to pursue an advanced degree at this institution and look forward to what the future holds.

1. The Montana Supreme Court held that hashish did not fall within the Montana Marijuana Act's "useable marijuana" exception to the Controlled Substance Act and the rule of lenity did not require that the Montana Marijuana Act be interpreted to include hashish as useable marijuana. State v. Pirello, 282 P.3d 662 (Mont. 2012).

2. 2 Am. Jur. 2d *Administrative Law* § 238 (2018).

mains unclear or ambiguous, then some courts apply the common law rule of lenity, also referred to as the rule of strict construction: ambiguous statutes should be strictly construed in favor of the defendant.[3]

This note examines how the rule of lenity is applied in the Montana Supreme Court and ultimately demonstrates that the Court's understanding of the rule's application is not always clear. The first application of the rule of lenity occurred in 1922.[4] From 1922 to 1933, the Montana Supreme Court applied the rule of lenity, despite it not being codified in Montana since 1895.[5] In 1934, the Court correctly cited to the statute that abrogated the common law rule of strict construction in Montana by looking to the Revised Codes of 1921.[6] However, only four years later, in 1938, the Court returned to the application of the rule of strict construction until 1993.[7] In 1993, in *State v. Turner*,[8] the Court notably did not apply the rule of lenity to the penal code in Montana. Defendants continued to challenge the Court's holding in *Turner* by raising the rule of lenity, but the Court continued to follow the rule of strict construction, without regard to whether that construction favors the defendant, after *Turner*.[9] Since 1993, the Court has not actually applied the rule of lenity. The Court allows the rule of lenity to cause commotion in cases but refuses to give it force. Without its application in cases where it has been raised, the rule is simply a noisemaker rather than a tool of statutory interpretation.

In most cases in which the rule of lenity has been raised, the Court has declined to consider it and failed to justify its decision to not apply the rule of lenity.[10] Currently, the Court (with the exception of *Turner*) gives the illusion that the rule of lenity exists, but does not apply the rule because it finds that the statutes are clear and unambiguous even in instances when the statute is, in fact, ambiguous.[11] The Court could end the illusion of the existence of the rule of lenity by simply adhering to and enforcing the provisions found in Montana Code Annotated § 45–1–102. The Court need only rely on the text of the statute, which requires construing the provisions in the penal code "according to the fair import of their terms with a view to its effect and to promote justice."[12] Tracing the statute back to when it was first enacted, the original meaning and legislative intent of giving the terms

3. *Id.*
4. State v. Bowker, 205 P. 961, 963 (Mont. 1922).
5. *Id.*, at 961; Shubat v. Glacier Cty., 18 P.2d 614, 615 (Mont. 1932).
6. State ex rel. Kurth v. Grinde, 32 P.2d 15, 16 (Mont. 1934).
7. State ex rel. Juhl v. Dist. Court of First Judicial Dist., 84 P.2d 979, 982 (Mont. 1938).
8. 864 P.2d 235, 235 (Mont. 1993).
9. State v. Weigle, 947 P.2d 1053, 1055 (Mont. 1997); Gollehon v. State, 986 P.2d 395, 402 (Mont. 1999).
10. *See infra* Appendix 1.
11. *Id.*
12. MONT. CODE ANN. § 45–1–102(2) (2017).

their fair import and promoting justice is still applicable today. It, unlike the rule of lenity, is law in Montana and therefore governs.

If the judicial branch in the "last best place" is truly concerned with promoting justice and protecting individual rights, then it should follow the general purposes stated in § 45–1–102 to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threaten to inflict harm to individual or public interests.[13] This note argues that safeguarding faultless conduct from condemnation as criminal should be a priority, and the first two sections of this note explore how the rule of lenity and Montana's complicated relationship with it do not always promote that goal. The final section includes four cases that demonstrate why providing defendants with fair warning of the nature of the conduct that constitutes an offense should be of utmost priority for the judicial branch. Lastly, this note emphasizes that differentiating between serious and minor offenses is a principle that cannot be underplayed. If after applying § 45–1–102(2), the decisions and judgments delivered by the Court do not promote justice, then maybe the legislature will step up to the plate and write statutes that clearly express their intent.

II. Background

A. Historical and Legal Setup of the General Law

The rule of lenity provides that ambiguous statutes should be construed narrowly in favor of the defendant. It has its founding in fourteenth-century England where it was "developed . . . in response to a legal regime that punished [the majority] of crimes by hanging."[14] At the time, capital punishment was the most common form of punishment, and the doctrine of the benefit of clergy exempted clergy from the death penalty based on a literacy test.[15] English Monarchs, in an effort to counteract the evasion of punishment, passed statutes that excluded certain felonies from the benefit of clergy.[16]

The United States inherited this concept, now known as the rule of lenity. The rule of lenity has become a principle of judicial restraint, mandating that legislatures define the crime, thereby providing notice to the defendant.[17] In courts that apply it, the "rule of lenity . . . applies only when, after consulting traditional canons of statutory construction [a court

13. Mont. Code Ann. § 45–1–102.

14. Lawrence Solan, *Law, Language, and Lenity*, 40 Wm. & Mary L. Rev. 57, 87 (1998).

15. Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 Harv. C.R.–C.L. L. Rev. 197, 199 (1994).

16. *Id.* at 200.

17. *Id.* at 201.

is] is left with an ambiguous statute."[18] If the statute is not ambiguous, then the rule of lenity cannot be used. At the federal level, it is only applicable if there is grievous ambiguity.[19]

The rule of lenity's core focus is providing fair warning to defendants. "The American rule of lenity insists that only the legislature define crime, and that the definition be clear and precise before courts may impose punishment."[20] Additionally, "[i]ts frequent use in the late 19th century led some state legislatures to pass statutes forbidding the strict construction of penal laws."[21] Not all states codified the rule; in fact, only 36 states codified it and as of 2013, 28 of those 36 states have abolished or reversed their rule.[22]

The rule has undergone periods of dormancy, but most recently Justice Scalia is credited with reviving the canon at the United States Supreme Court level. Justice Scalia, a known critic of the use of legislative history, was a strong believer that the rule of lenity should be applied before legislative history. He stated that, "in [his] view it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history."[23]

B. The Policy Behind the Rule of Lenity

One of the main policy reasons behind the rule of lenity is a concern for a defendant's due process rights. Statutes that delineate criminal conduct must be written to ensure that potential defendants receive proper notice of the crime allegedly committed and its consequences.[24] Another policy reason behind the rule of lenity is safeguarding the separation of powers, which "imply a policy of judicial restraint in effectuating the intent of the legislature."[25] From this background and history, the rule of lenity finds its obscure place in American jurisprudence, requiring a closer analysis of its application in the Montana court system. It is beneficial to all parties involved to gain an understanding of how the Montana Supreme Court has punted on the issue by failing to employ the statutory canon of construction and instead sending it to the legislature to define statutes.

18. United States v. Bustillos-Pena, 612 F.3d 863, 868 (5th Cir. 2010) (quoting United States v. Shabani, 513 U.S. 10 (1994)).

19. *See* Barber v. Thomas, 560 U.S. 474, 488 (2010).

20. Newland, *supra* note 15, at 201. **R**

21. *Id.* at 202.

22. WILLIAM ESKRIDGE ET AL., LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 695 (5th ed. 2014).

23. Newland, *supra* note 15, at 217 (citing United States v. R.L.C., 503 U.S. 291 (1992)). **R**

24. 73 AM. JUR. 2D *Statutes* § 188 (2018); *see* Dunn v. United States, 442 U.S. 100, 112 (1979) (citations omitted).

25. Newland, *supra* note 15, at 203. **R**

III. Does Montana Apply the Rule of Lenity?

A. *The Rule of Lenity is Not Codified in Montana*

In 1889, Montana was formally admitted to the union and its third proposed constitution was written, ratified, and adopted.[26] In 1972, the Montana Constitution was ratified[27] and the term length for Montana Supreme Court Justices was extended from six to eight years.[28] The judicial branch in Montana is made up of the Montana Supreme Court, state district courts, the worker's compensation court, the water court, and the courts of limited jurisdiction (justice courts, municipal courts, and city courts).[29] The Montana Supreme Court hears direct appeals from the all the state district courts because there is no intermediate appellate court in the state.[30]

To provide some background, the codification of laws in 1895 originated from the draft codes known as the Field Code, prepared by David Dudley Field for the state of New York.[31] The Field Code was divided into four separate codes: the Civil Procedure Code, the Penal Code, the Political Code, and the Civil Code.[32] To put the amount of law adopted into perspective, "the Fourth Montana Legislature adopted more than 170 pounds of laws, an estimated 784,000 words, during 42 days."[33] After such a voluminous passage of laws, it is not surprising that Montana attorneys and judges were uncertain as to what the laws actually were at that time. Montana had just become a state in 1889, and the codification of the Field Codes provided Montana the opportunity it needed to establish itself as a progressive state at the forefront of legal reform.[34] The adoption of the Field Codes was described as a reorganization of existing Montana law.[35] However, this was an inaccurate description because the Field Codes were not Montana law at all. The proponents of the codification opted for adoption of the Field Codes and then revising them in the future.[36]

The common law rule of lenity, that ambiguous statutes are to be strictly construed in favor of the defendant, was never codified in the Mon-

26. *See* G. Alan Tarr,*?The Montana Constitution: A National Perspective*, 64 Mont. L. Rev. 1, 2 (2003).

27. Tyler Stockton, *Originalism and the Montana Constitution*, 77 Mont. L. Rev. 117, 117 (2016).

28. Mont. Judicial Branch, *Brief History of the Montana Judicial Branch*, State of Mont. https://perma.cc/T5T6-XZY3 (last visited April 10, 2018).

29. *Id.*

30. *Id.*

31. Andrew P. Morriss, "*This State Will Soon Have Plenty of Laws"– Lessons from One Hundred Years of Codification in Montana*, 56 Mont. L. Rev. 359, 366 (1995).

32. *Id.* at 369

33. *Id.* at 360.

34. *Id.* at 363.

35. *Id.* at 388.

36. *Id.* at 389.

\\jciprod01\productn\M\MON\79-2\MON203.txt unknown Seq: 6 19-OCT-18 13:59

tana Code Annotated and it remains that way today. Instead, Montana codified a statute that specifically mandates that the strict construction of penal statutes is not to be applied to the Code, a position that can be traced back through the last century. The statute currently reads as follows:

> (1) The general purpose of the provisions governing the definition of offenses are:
>
> (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens harm to individual or public interests;
>
> (b) to safeguard conduct that is without fault from condemnation as criminal;
>
> (c) to give fair warning of the nature of the conduct declared to constitute an offense;
>
> (d) to differentiate on reasonable grounds between serious and minor offenses.
>
> **(2) The rule of common law that penal statutes are to be strictly construed has no application to this code. All its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice.**[37]

To understand how Montana arrived at its current definition requires some background. In 1947, the laws were codified as the Revised Codes of Montana and the statute was renumbered as § 94–1–101, but the text remained the same.[38] Then in 1973, one year after the Montana Constitution was written, the Montana Criminal Code was once again revised. In 1973, the statute was renumbered as § 94–1–102, and a substantial portion was added. The original statute became § 2, and the added portion is what is currently § 1(a)–(d).

> **(1) The general purposes of the provisions governing the definition of offenses are:**
>
> **(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens harm to individual or public interests;**
>
> **(b) to safeguard conduct that is without fault from condemnation as criminal;**
>
> **(c) to give fair warning of the nature of the conduct declared to constitute an offense;**
>
> **(d) to differentiate on reasonable grounds between serious and minor offenses.**
>
> (2) The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed

37. MONT. CODE ANN. § 45–1–102(2) (emphasis added). In the interest of providing the most complete history possible, it is also important to understand that this current version of the statute has developed from the original 1895 statute, which read as follows: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice." CODES AND STAT. OF MONT. § 4 prelim. prov. (1895).

38. Rev. Codes of Mont. 1947 § 94–1101 (1973).

according to the fair import of their terms, with a view to effect its object and to promote justice.[39]

Again taking inspiration from another state, Section (1) (a)–(d) has its origin in the Illinois Criminal Code of 1961, which reads as follows:

(1) The provisions of this Code shall be construed in accordance with the general purposes hereof, to:

(a) Forbid and prevent the commission of offenses;

(b) Define adequately the act and mental state which constitute each offense, and limit the condemnation of conduct as criminal when it is without fault;

(c) Prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders;

(d) Prevent arbitrary or oppressive treatment of persons accused or convicted of offenses.[40]

At the earliest point in the relevant history, the statute abrogating the common law rule of lenity was first codified in 1895.[41] However, as noted above, the statute originated from the Field Code prepared for New York, not for Montana. The Montana Legislature hastily adopted the Codes, perhaps without giving much thought to the fact that the statutes were written for a state that differs greatly from Montana.

In 1947, purpose provisions taken from the Illinois Criminal Code were added to the original statute. The provisions taken from Illinois emphasized the same fair-warning policy reason that the rule of lenity is concerned with. This purpose statement is almost identical to the due process concern of providing defendants with notice of what he or she is charged with and the consequences that may result.

B. Case Law in Montana

In Montana, the rule of lenity has made its appearance in 21 Montana Supreme Court cases.[42] Of those 21 cases, 19 are still good law.[43] In only

39. Rev. Codes of Mont. 1947 § 94–1101 (1973); MONT. CODE ANN. § 45–1–102 (2017) (emphasis added).

40. ILL. CRIM. CODE OF 1961, art. 1, § 1–2.

41. CODES AND STAT. OF MONT. § 4 prelim. prov. (1895).

42. *See* State v. Bowker, 205 P. 961, 962 (Mont. 1922); Shubat v. Glacier Cty., 18 P.2d 614, 615 (Mont. 1932); State ex rel. Kurth v. Grinde, 32 P.2d 15, 16 (Mont. 1934); State ex rel. Juhl v. Dist. Court of First Judicial Dist., 84 P.2d 979, 980 (Mont. 1938); Shipman v. Todd, 310 P.2d 300 (Mont. 1957); State ex rel. Penhale v. State Highway Patrol, 321 P.2d 612 (Mont. 1958); Montana Auto. Ass'n v. Greely, 632 P.2d 300 (Mont. 1981); State v. Gollehon, 864 P.2d 249 (Mont. 1993); State v. Turner, 864 P.2d 235, 236 (Mont. 1993); State v. Berger, 856 P.2d 552 (Mont. 1993); Moore v. McCormick, 858 P.2d 1254 (Mont. 1993); Gollehon v. State, 986 P.2d 395, 396 (Mont. 1999); State v. Faque, 4 P.3d 651 (Mont. 2000); State v. Liefart, 43 P.3d 329 (Mont. 2002); State v. Bailey, 87 P.3d 1032 (Mont. 2004); State v. Roundstone, 261 P.3d 1009 (Mont. 2011); State v. Stoner, 285 P.3d 402 (Mont. 2012); State v.

one of those 19 cases did the Court apply the rule of lenity, reversing the lower court's judgment, and rule in favor of the State.[44]

The first case where the rule of lenity appeared was in 1922 in *State v. Bowker*, where the defendant appealed his conviction of maintaining a common nuisance under the 1921 statute by conducting and maintaining a place where intoxicating liquors were sold.[45] It was the Prohibition era, and the Court faced the question of whether the district court had jurisdiction over the charged offense.[46] It was unclear whether sections of the 1917 Act were still in force and whether they were in conflict with or superseded by the section in the 1921 Act. The Court "recognized that penal statutes must be strictly construed" but "where the legislative intent is plain, there is no departure from the rule in consequence of the consideration and application of the provisions of more than the one existing enactment on the same subject."[47] The Court stated that "it is [its] duty to reconcile the statutes, and make them operative in accordance with the legislative intent, if at all possible."[48] This statement was significant, because by recognizing that penal statutes must be strictly construed, the Court breathed life into the rule of lenity, which had ceased being law in Montana in 1895.

In 1932, in *Shubat v. Glacier Cty*, the statute at issue was an interest provision that imposed a penalty for delinquent taxes.[49] The Court found that the statute was penal in nature and thus was to be strictly construed.[50] In reaching its decision, the Court concluded that the language used indicated the legislature's intent and that the arrangement of the different provisions in the section confirmed the Court's views as to the intent of the legislature.[51] Again, the Court followed the rule of strict construction.[52]

Two years later, in *State ex rel. Kurth v. Grinde*, the Court faced the question of whether to apply the rule of lenity as urged by the appellants.[53] The case was a proceeding to compel the Mayor and certain aldermen of the

Pirello, 282 P.3d 662, 662 (Mont. 2012); State v. Matheson, 311 P.3d 443 (Mont. 2013); State v. Madsen, 317 P.3d 806 (Mont. 2013); State v. Strong, 356 P.3d 1078 (Mont. 2015).

43. *See Bowker*, 205 P. at 962; *Shubat*, 18 P.2d at 615; *Grinde*, 32 P.2d at 16; *Juhl*, 84 P.2d at 980; *Penhale* 321 P.2d; *Mont. Auto. Ass'n,* 632 P.2d; *Gollehon*, 864 P.2d; *Turner*, 864 P.2d at 236; *Berger*, 856 P.2d; *Moore*, 858 P.2d; *Gollehon*, 986 P.2d at 396; *Liefart*, 43 P.3d; *Bailey*, 87 P.3d; *Roundstone*, 261 P.3d; *Stoner*, 285 P.3d; *Pirello*, 282 P.3d at 662; *Matheson*, 311 P.3d; *Madsen*, 317 P.3d; *Strong*, 356 P.3d.

44. *Madsen*, 317 P.3d at 808.

45. *Bowker*, 205 P. at 962.

46. *Id.*

47. *Id.* at 963.

48. *Id.*

49. 18 P.2d at 615.

50. *Id.*

51. *Id.* at 616.

52. *Id.*

53. 32 P.2d 15, 15 (Mont. 1934).

City of Great Falls to reinstate the relator as water registrar of the city.[54] The issue presented by the case was whether the appointment of the relator was unlawful under the nepotism law of 1933.[55] Appellants argued that since the statute was a penal statute then it "must be strictly construed."[56] The Court held that, "Section 10710, Revised Codes 1921, provides: 'The rule of common law, that penal statutes are to be strictly construed, has no application to this code; All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice.'"[57] The Court clarified that its duty "to ascertain the intention of the legislature . . . is to be ascertained from the terms of the statute, and [the court] may not 'insert what has been omitted, or omit what has been inserted.'"[58] Here, in contrast to *Bowker*, the Court made a correct statement of law when it held that the rule of lenity was not to be applied in Montana and clarified that it would not read beyond the words in the statute. The Court reiterated that, "[it] cannot read something into the statute which is not there."[59]

In *State ex rel. Juhl v. Dist. Court of First Judicial Dist.*, two informations had been filed against the defendant. The defendant was charged with willful and unlawful killing and failure to render aid to the injured person after running over the victim on a highway.[60] A new district judge was elected, and the defense moved for the two charges to be dismissed due to the defendant not having been taken to trial within six months.[61] The motion was granted, and the county attorney then proceeded to present two new informations with the same charges that were alleged in the original informations.[62] The defendant petitioned the Montana Supreme Court for an alternative writ of supervisory control.[63] The Court authorized the writ and fixed the return day. Counsel for the State moved to quash the writ and dismiss the proceeding.[64] The Court heard the motion to quash and arguments on the merits, then cited to the rule of lenity, stating that, "[i]t has always been the policy of the legislature . . . to provide for the strict construction of penal statutes in the interest of the accused."[65] The Court justified the strict construction of penal statutes as "seek[ing] no unfair advan-

54. *Id.*
55. *Id.* at 16.
56. *Id.* at 17.
57. *Id.*
58. *Id.* (quoting REV. CODES OF MONT. 1921 § 10519).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 982.

tage over a defendant, [the law] is watchful to see that the proceedings under which [defendant's] life or liberty is at stake shall be fairly and impartially conducted."[66] The writ was issued.[67]

It is interesting that only four years after *Kurth* the Court returned to the strict construction of penal statutes in favor of the defendant. One possible reason for this outcome is that the Montana Supreme Court was composed of two new Justices. At the time that *Kurth* was decided the Court was composed of Justice Angstman, Justice Callaway, Justice Matthews, Justice Stewart, and Justice Anderson.[68] Justice Calloway's term ended in 1935 and Justice Matthews' term ended in 1937 (he served as a Justice from 1919–1920 and subsequently as Assistant Justice from 1925–1937).[69] When *Juhl* was decided, the Court was composed of Justice Angstman, Justice Stewart, Justice Anderson, Justice Morris, and Justice Goddard.[70] The presence of Justice Morris and Justice Goddard might have had an impact on the Court reverting to employing the rule of lenity in *Juhl* since the Court changed its stance on the rule of lenity with their presence.

In 1958, the Montana Supreme Court again encountered the rule of lenity, but in a civil case. Appellants appealed a judgment granting a peremptory writ of mandamus requiring the Montana Highway Patrol to return to the relatrix-respondent the license plates to the vehicle for which she was co-owner.[71] The Court applied what it referred to as the "familiar rule" stating that "the rule, universally recognized, is that a statute of this character must be strictly construed."[72] The Court was cognizant that it is for the legislature to write the law and that with that power comes the power of punishment. The Court explained that

> Strict construction, as applied to statutes, means that they are not be so extended by implication beyond the legitimate imports of the words used in them . . . but that everything shall be excluded from the operation of statutes so construed which does not clearly come within the meaning of the language used.[73]

The Court held that "[relator's] registration, even though indivisible and inseparable from that of her husband, must be excluded from the operation of the statute."[74] Here, the Court seemed to forget that the rule of lenity ceased to be law in 1895 and that the law at the time provided that the

66. *Id.*(citing to State ex rel. Foot v. Dist. Court, 263 P. 979, 981 (Mont. 1928)).
67. *Id.* at 983.
68. State ex rel. Kurth v. Grinde, 32 P.2d 15, 15 (Mont. 1934).
69. Mont. Memory Project, *Hon. John A. Matthews*, MONT. STATE LIBRARY, https://perma.cc/WH3H-PGFB (last visited April 10, 2018).
70. *Juhl*, 84 P.2d at 979.
71. State ex rel. Penhale v. State Highway Patrol, 321 P.2d 612, 612 (Mont. 1958).
72. *Id.* at 613
73. *Id.* at 614 (internal quotations omitted) (emphasis omitted).
74. *Id.* at 614.

Code's provisions are to be construed according to the fair import of their terms, with a view to affect its object and to promote justice.

From 1958 through 1991, the application of the rule of strict construction was not raised or heard by the Montana Supreme Court. It wasn't until 1991 that the Court was once again asked whether the rule of lenity applied. In *State v. Goodwin* the defendant was convicted of sexual intercourse without consent, misdemeanor sexual assault, and felony assault.[75] The Court addressed the rule of lenity in responding to an issue raised by the State on cross-appeal. The issue raised was whether the district court erred in applying the exception in Montana Code Annotated § 46–18–222(5) to the mandatory two-year minimum.[76] The district court's sentencing suspended all but 30 days, prompting the State's appeal.[77] Montana Code Annotated § 45–5–503 establishes the mandatory two-year minimum, except as provided in Montana Code Annotated § 46–18–222.[78] The State argued that

> a reasonable construction of § 46–18–222(5), MCA, [the exception that the Court applied], requires the conclusion that the exception to the minimum sentence is applicable in only those cases where the threat of bodily injury or actual infliction of bodily injury is an essential element of the crime.[79]

The State further argued that § 45–5–503(3)(a) "increases the penalty in [ ] cases where the victim is under 16 years [old] or where bodily injury is inflicted on the victim."[80] The Court "agree[d] that in reconciling these two provisions there [was] at least an ambiguity regarding the meaning of 'where applicable' in [the] cases where the victim is under the age of 16 . . . , or where some injury less than 'serious bodily injury' [had] been inflicted on the victim."[81] The Court commented on how the legislature could have easily made its intentions clear but did not. The Court stated that, "it must interpret the criminal statute in a way most favorable to the private citizen against whom it is sought to be enforced, and against the state which authored it."[82]

The Court applied the rule of lenity without expressly stating that it was applying the rule of lenity in its reading of the statutes in *Goodwin*. The Court did, however, state that it was "compelled to follow the *classic rule* of construction of criminal statutes which is . . . [that] [p]enal statutes are

75. 813 P.2d 953, 955 (Mont. 1991), *overruled by* State v. Turner, 864 P.2d 235, 241 (Mont. 1993) (holding that "[i]nsofar as *Goodwin* is in conflict with § 45–1–102(2) MCA, it is overruled."), *overruled on other grounds by* State v. Lawrence, 948 P.2d 186 (Mont. 1997).

76. *Goodwin*, 813 P.2d at 965.

77. *Id.* at 955.

78. *Id.* at 965–66; MONT. CODE ANN. § 45–5–503; MONT. CODE ANN. § 46–18–222.

79. *Id.* at 966.

80. *Id.* (emphasis omitted).

81. *Id.*

82. *Id.*

construed with such strictness as to safeguard the rights of the defendant."[83] The Court even went on to state that it agreed with the United States Supreme Court's rule of interpretation that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[84] The Court discussed the policy reasons for applying the rule as: 1) fair warning and 2) that "legislatures and not courts should define criminal activity" because of the seriousness of criminal penalties and punishments.[85] The Court held that "any ambiguity regarding the applicability of this exception must be 'resolved in favor of lenity.' "[86]

Goodwin established that the rule of lenity was triggered by an ambiguity in the statute (*Goodwin* was overturned two years later by *Turner*). Initially, this would appear to be a positive outcome for defendants. However, now defendants faced the challenge of how to trigger application of the rule of lenity since the Court provided little guidance.

The rule of lenity in Montana is only applied when statutes are found to be ambiguous after using all other tools of statutory interpretation. The Court reached this conclusion in *Moore v. McCormick*, where the petitioner, a defendant convicted of deliberate homicide pending appeal, filed an application for writ of habeas corpus and argued that the statute was ambiguous, and therefore, the rule of lenity should apply.[87] The Court concluded that the statute was not ambiguous because the "plain intendment of the language used" was an if "X then Y" mandate, but since the district court below did not do X it was then not mandated to do Y.[88]

In the criminal cases since 1993, in which the defendants have raised the rule of lenity as a defense, judges have concluded that the statute at issue was unambiguous or they have explicitly declined to apply the rule of lenity.[89] When the Court declines to apply the rule of lenity, the Court does not explain why the rule does not apply.[90] Appendix 1 shows a list of the criminal cases since 1993 in which the rule of lenity was raised. The appendix also shows that the Court has found that ambiguous statutes were "unambiguous" and thus has held that the rule of lenity has not been triggered.

83. *Id.* (citing 73 AM. JUR. 2D *Statutes* § 188) (emphasis added).

84. *Id.* at 967 (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)) (internal quotations omitted).

85. *Id.*

86. *Id.*

87. 858 P.2d 1254, 1254, 1256 (Mont. 1993).

88. *McCormick*, 858 P.2d at 1256.

89. *See e.g.* State v. Stoner, 285 P.3d 402, 406 (Mont. 2012).

90. For more information on the subject matter of cases over the decades, *see infra* Appendix 1.

IV. What is the Court doing?

As demonstrated in Appendix 1, it is obvious that the rule of lenity is not applied in Montana. Is this simply explainable by the fact that judges and attorneys are correctly adhering to Montana Code Annotated § 45–1–102(2), or is there something more going on? One could argue that the outcome reflects the fact that Montana's penal statutes are clear and unambiguous and therefore the rule of lenity does not come into play. However, this is not the case. There are many penal statutes that remain unclear and are ambiguous. Should we sit quietly in the comfort of our spectator seats and wait patiently for the next highlight? Or should we instead be good fans cheering loudly, so that the Court can hear our support in favor of the laws that safeguard individual or public interests and protect innocent conduct from condemnation as criminal, in addition to providing fair warning, and that differentiate between serious and minor offenses?

A. Application of Montana Code Annotated § 45–1–102, General Purposes and Principles of Construction

Montana Courts have addressed § 45–1–102 in 23 cases; the first case was addressed in 1919 and the most recent in 2016 (21 of which were heard by the Montana Supreme Court).[91] The four most recent decisions will be addressed below to illustrate the Court's application of the statute. The Court in applying § 45–1–102 generally cites to one of the purpose statements found in subsection 1(a)–(d). The rule itself is found in subsection (2) and it provides that "provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice."[92] The Court should consider citing to subsection (2) and subsection (1) together rather than citing to the purpose statements standing alone. Additionally, this note contends that subsection (1) (a), (b), (c), and (d) are conjunctive, not disjunctive. The statute does not contain the conjunction "or" which would make the statements read as alternatives rather than a list of intentions expressing the legislative purpose.

91. State v. Sperry & Hutchinson Co., 179 P. 460 (Mont. 1919); Rosebud Cty v. Flinn, 98 P.2d 330 (Mont. 1940); Grady v. City of Livingston, 141 P.2d 346 (Mont. 1943); Catrino v. United States, 176 F.2d 884 (9th Cir. 1949); State v. Bush, 636 P.2d 849 (Mont. 1981); State v. Palmer, 673 P.2d 1234 (Mont. 1983); State v. Taylor, 745 P.2d 337 (Mont. 1987); *Goodwin*, 813 P.2d; State v. Gollehon, 864 P.2d 249 (Mont. 1993); State v. Turner, 864 P.2d 235 (Mont. 1993); State v. Gollehon, 864 P.2d 1257 (Mont. 1993); State v. Tower, 881 P.2d 1317 (Mont. 1994); State v. Wakeford, 953 P.2d 1065 (Mont. 1998); State v. Abe, 965 P.2d 882 (Mont. 1998); State v. Hansen, 989 P.2d 338 (Mont. 1999); State v. Haser, 20 P.3d 100 (Mont. 2001); State v. Liefert, 43 P.3d 329 (Mont. 2002); State v. Stevens, 53 P.3d 356 (Mont. 2002); State v. Sherer, 60 P.3d 1010 (Mont. 2002); State v. Smith, 138 P.3d 799 (Mont. 2006); City of Missoula v. Paffhausen, 289 P.3d 141 (Mont. 2012); Stewart v. State, 353 P.3d 506 (Mont. 2015); Stewart v. Green, 2016 WL 5107067 (2016).

92. Mont. Code Ann. § 45–1–102(2).

In *State v. Liefart*,[93] the Court found that the rule of lenity did not apply because the statute was unambiguous.[94] In its opinion, the Court cited to *Turner* where the Court applied Montana Code Annotated § 45–1–102(2), "provid[ing] that penal statutes are not strictly construed, leniency only applies when statutes create an ambiguity."[95] However, the Court in *Turner* should not have stated that lenity only applies when there is an ambiguity because in reality the rule of lenity has no application to the Code. The Court in *Liefart* ultimately held that the defendant's due process rights of fair warning were not violated.[96]

In *State v. Hansen*, the defendant was convicted of deliberate homicide and sentenced to sixty years.[97] Defendant appealed and raised the issue of "[w]hether the District Court abused its discretion when it admitted evidence of [the victim's] out-of-court statements for the purpose of establishing the *corpus deliciti*."[98] The Court found that the district court had erred in admitting the evidence of victim's out of court statements, but found it to be a harmless error.[99] Nowhere in the case is Montana Code Annotated § 45–1–102 cited. However, the Court made a very interesting statement that seemed to contradict its precedent regarding the rule of lenity:

> [T]he terms *corpus delicti* and *res gestae* are vague and imprecise and have been misinterpreted and used incorrectly in the past. Therefore, we urge that these terms not be used in future. We suggest, instead, that the practicing bar and trial courts of this State rely on the clearer and more precise statements of the law, i.e., the Montana Code Annotated and the Montana Rules of Evidence, rather than vague Latin phrases that can easily be misinterpreted and misapplied.[100]

In *State v. Sherer*, the defendant pleaded guilty to practicing medicine under a false name or impersonating a doctor, criminal endangerment, and aggravated assault.[101] Defendant appealed and argued that his conduct in instructing the victim to cut off her nipple did not constitute aggravated assault because he contended that "exposure to liability under the statute would require utilizing tort proximate cause principles."[102] Defendant further argued that "aggravated assault is designated as an offense for which Sherer must register as a 'violent offender' pursuant to § 46–23–504, MCA; therefore this Court ought to abide by Black's Law Dictionary's def-

93. *See infra* Appendix 1 for a discussion of the facts and disposition of this case.
94. 43 P.3d 329, 336 (Mont. 2002).
95. *Id.* at 336; *see Turner*, 864 P.2d at 241.
96. *Liefart*, 43 P.3d at 336.
97. State v. Hansen, 989 P.2d 338, 340 (Mont. 1999).
98. *Id.*
99. *Id.* at 346.
100. *Id.* at 356.
101. 60 P.3d 1010, 1011 (Mont. 2002).
102. *Id.* at 1012.

inition of 'violent offenses' . . . ."[103] The Court concluded that "the statute defining aggravated assault and the statutes defining cause, act, and conduct, pursuant to § 45–1–102(1)(c), MCA, give fair warning that the nature of [defendant's] conduct constituted the offense . . . ."[104]

In *City of Missoula v. Paffhausen*, the defendant was charged with driving under the influence.[105] The plaintiff successfully filed a motion to prevent the defendant from claiming involuntary intoxication.[106] The defendant then appealed to the district court and it affirmed the municipal court's ruling.[107] The defendant appealed to the Montana Supreme Court and argued the automatism defense.[108] The Court allowed "[defendant] to raise an automatism defense [to] accomplish the policies provided for in . . . Section 45–1–102(1)(b), MCA, [which] provides that one of the general purposes of the provisions governing the definition of offenses is to 'safeguard conduct that is without fault from condemnation as criminal.'"[109] The Court agreed with the point raised by the dissent that:

> because Montana's criminal code is modeled after the Illinois Criminal Code, we have repeatedly turned to Illinois for guidance in interpreting our criminal statutes; this does not mean, however, that we must blindly follow the interpretations of the criminal code provided by the courts in Illinois without taking into consideration Montana's unique character and history.[110]

In *State v. Turner*, the Court overruled *Goodwin*, and stated that "[t]he law of accountability is properly presented and understood[.] To interpret the statute as [defendant] does in his argument would frustrate the obvious legislative purpose of Montana's accountability statutes."[111] The Court declined to follow the common law rule that penal statutes are to be strictly construed and found that it had no application to the penal code.[112] Rather, the Court explained that "[a]ll its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice."[113] In doing this, the Court recognized that the Montana Legislature statutorily abrogated the common law rule of strict construction as applicable to the penal code.[114]

103. *Id.*
104. *Id.* at 1013.
105. 289 P.3d 141, 144 (Mont. 2012).
106. *Id.*
107. *Id.*
108. *Id.* at 145.
109. *Id.* at 147 (quoting MONT. CODE ANN. § 45–1–102(1)(b)).
110. *Id.* at 149.
111. 864 P.2d 235, 241 (Mont. 1993).
112. *Id.* at 241; MONT. CODE ANN. § 45–1–102(2).
113. MONT. CODE ANN. § 45–1–102(2).
114. *Turner*, 864 P.2d at 241.

In other cases where Montana Code Annotated § 45–1–102 has been applied, the Court has cited to either subsection (a), (b), or (c) of subsection (1). Subsections (1)(a)–(d) provide the general purpose statements of the statute and subsection (2) contains the rule of law. The Court should be applying and citing to subsection (1) and subsection (2) rather than solely citing to the purpose statements found in subsection (1). In the cases in which the rule of lenity was raised, the Court should have cited to Montana Code Annotated § 45–1–102 because it is the law in Montana and the common law rule of lenity was abolished in 1895.

B. The Court Should Apply Montana Code Annotated § 45–1–102

Despite the rule being that "provisions [in the Code] are to be construed according to the fair import of their terms with a view to effect its object and to promote justice,"[115] the Court fails to adhere to the rule and its purpose statements, which aim to safeguard the defendant's rights. Instead, the Court's jurisprudence regarding the rule of lenity errantly states that statutes were either to be strictly construed or found that ambiguous statutes were not unambiguous, and thus, resolved cases in a manner that was not always the most fair and just for the defendants. Montana Code Annotated § 45–1–102 has been the law since 1895, yet the Court from 1922 until 1993 applied the rule that penal statutes are to be strictly construed. After *Turner*, the Court has continued to state that penal statutes are to be strictly construed. Although, the Court usually concludes that the statutes are not ambiguous and therefore does not need to consider the rule of lenity; the Court usually does not expressly state as it did in *Turner* that the rule of lenity does not apply.

It is not for the Court to make new laws; that is for the legislature. The law in Montana is Montana Code Annotated § 45–1–102, and it should be used by defendants, prosecutors, and judges, not as a canon of statutory interpretation, but as the law. Unlike what is required for the application of the rule of lenity, the Court need not exhaust all other canons of statutory interpretation before applying this statute. Additionally, ambiguity and lack of clarity as to a statute's meaning is not a prerequisite for the application of Montana Code Annotated § 45–1–102. The following sub-sections will illustrate what might have occurred if the Court had adhered to the rule that "provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice."[116]

115. MONT. CODE ANN. § 45–1–102(2).

116. MONT. CODE ANN. § 45–1–102(2).

1. State v. Pirello

If the Court had applied the rule of reading statutes according to the ordinary meaning of their terms and to promote justice, then the outcome of *State v. Pirello* might have favored the defendant. The issue addressed by the Court was whether the rule of lenity required that the Montana Marijuana Act ("MMA") be interpreted in the defendant's favor.[117] Defendant was charged with felony possession of dangerous drugs for possession of hashish oil in violation of Montana Code Annotated § 45–9–102.[118] Defendant claimed that hashish is included as an exception under the MMA exception for "usable marijuana," which is defined in the MMA as "any mixture or preparation of marijuana."[119] Defendant claimed that the term was otherwise unconstitutionally vague and raised the rule of lenity as a defense.[120]

At the time of the defendant's arrest, the MMA provided an exception for possessing marijuana for medical use and provided that "[a] qualifying patient and that qualifying patient's caregiver may not possess more than six marijuana plants and 1 ounce of usable marijuana each."[121] The Court looked to the definition of "marijuana" as provided in the Controlled Substances Act ("CSA"), which defined it as "all plant material from the genus cannabis containing tetrahydrocannabinol ("THC") or seeds of the genus capable of germination."[122] The Court also looked to the CSA's definition of hashish as "distinguished from marijuana, [ ] means the mechanically processed or extracted plant material that contains [THC] and is composed of resin from the cannabis plant."[123]

However, the term "useable marijuana" was also defined in the MMA as "the dried leaves and flowers of marijuana and any mixture or preparation of marijuana," excluding "the seeds, stalks, and roots of the plant."[124] Defendant argued that hashish was a "mixture or preparation of marijuana" under the MMA and further argued that, "[i]t [was] only when looking to statutes in other parts of the code that the definition of 'useable marijuana' [was] called into question."[125] The Court concluded that, "the MMA was clear and unambiguous on its face and that the district court's interpretation appropriately harmonized the statutes."[126]

117. State v. Pirello, 282 P.3d 662, 665 (Mont. 2012).
118. *Id.* at 663.
119. *Id.*; MONT. CODE ANN. § 50–46–102(10) (2009) (repealed in 2011).
120. *Pirello*, 282 P.3d at 663.
121. *Id.* at 664 (quoting MONT. CODE ANN. § 50–46–201(2) (2009) (repealed in 2011)).
122. *Id.* (quoting MONT. CODE ANN. § 50–32–101(17) (2009) (repealed in 2011)).
123. *Id.* (quoting MONT. CODE ANN. § 50–46–102(1) (2009) (repealed in 2011)) (emphasis omitted).
124. *Id.* (quoting MONT. CODE ANN. § 50–46–102(10) (2009) (repealed in 2011)).
125. *Id.* (internal quotations omitted).
126. State v. Pirello, 282 P.3d 662, 665 (Mont. 2012).

Had the Court found the statute was ambiguous and applied Montana Code Annotated § 45–1–102 to the MMA, hashish would qualify as "useable marijuana" under the § 50–46–101(2) exception for medical use. The Court would only need to look to the definition of "useable marijuana" as defined in the MMA and hashish oil is clearly "any mixture or preparation of marijuana," as was provided in Montana Code Annotated § 50–46–102(10) in 2009.[127] Therefore, the Court would not need to look beyond the definitions found in the MMA because the MMA definitions adequately covered hashish oil. The Court only needed to give the words the "fair import of their terms," meaning their usual and ordinary meaning as required by Montana Code Annotated § 45–1–102(2).

But even applying the definition of hashish from the CSA as "mechanically processed or extracted plant material that contains [THC] and is composed of resin from the cannabis plant," and then giving the words their fair import, a mechanically processed or extracted plant material containing THC made up of resin from the cannabis plant is clearly also a "mixture or preparation of marijuana." If hashish was not to qualify as "any mixture or preparation," then the Montana Legislature likely would have stated that in the statute.

2. State v. Strong

A second example in which the Court should have adhered to the rule of reading statutes according to the ordinary meaning of their terms, with a view to statutory effects and to promote justice, is given by *State v. Strong*.[128] The incarcerated defendant was charged with four counts of violating a protective order in violation of Montana Code Annotated § 45–5–626 after calling his wife four times in one day.[129] "The first two counts were charged as misdemeanors, and the third and fourth were charged as felonies."[130] Defendant pleaded guilty in district court to three of the four counts, then appealed.[131] The statute provided an exception:

> [A] defendant may not be convicted of more than one offense for conduct that is part of the same transaction if the "offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that the specific periods of the conduct constitute separate offenses."[132]

127. MONT. CODE ANN. § 50–46–102(10) (2009) (repealed in 2011).

128. State v. Strong, 356 P.3d 1078 (Mont. 2015).

129. *Id.* at 1079.

130. *Id*.

131. *Id*.

132. *Id.* at 1080 (quoting MONT. CODE ANN. § 46–11–410(2)(e)).

The district court found that the four telephone calls were part of the same transaction, but the exception under Montana Code Annotated § 46–11–410(2)(e) was not applicable "because the underlying statute was not defined to prohibit a continuing course of conduct."[133]

The issue on appeal in *Strong* was whether the four telephone calls constituted the same transaction, and if so, did they then meet the exception found in Montana Code Annotated § 46–11–410(2)(e)?[134] The term "same transaction" is defined by Montana Code Annotated § 46–1–202(23) as "conduct consisting of a series of acts or omissions that are motivated by . . . a common purpose or plan that results in the repeated commission of the same offense or effect upon the same person . . . ."[135] The defendant argued that Montana Code Annotated § 45–5–626(1) was "ambiguous 'as to what exactly constituted a complete offense.' "[136] In response to the defendant's argument, the Court iterated that "[i]n interpreting a statute, [it] must construe statutory language according to its plain meaning . . ." and stated that "because the plain language of the statute dictates when an offense is complete, [it] need not consider [defendant's] argument regarding application of the rule of lenity."[137] The Court agreed with the defendant's argument that the calls met the statutory requirement of "same transaction."[138] The defendant also argued that the calls were "part of [one interrupted] conversation that was an ongoing violation . . . ."[139] Ultimately, the Court held that the calls did not meet the exception because the "plain language of § 46–11–410(2)(e), MCA, require[d] that the offense be 'defined to prohibit a continuing course of conduct[,]' " and "Section 45–5–626, MCA, is not 'defined to prohibit a continuing course of conduct.' "[140]

If the Court had applied Montana Code Annotated § 45–1–102, then the Court would have "construed [the statute] according to the fair import of its terms with a view to effect its object and to promote justice."[141] The exception for multiple charges, Montana Code Annotated § 46–11–410(2)(e), states that:

> A defendant may not, however, be convicted of more than one offense if[ ] . . . the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that the specific periods of the conduct constitute separate offenses.[142]

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* (citing Infinity Ins. Co. v. Dodson, 14 P.3d 287, 496 (Mont. 2000)).
138. *Id.* at 1081.
139. *Id.*
140. *Id.* (quoting MONT. CODE ANN. § 46–11–410(2)(e)).
141. MONT. CODE ANN. § 45–1–102(2).
142. MONT. CODE ANN. § 46–11–410(2)(e).

The Court agreed that Defendant's conduct of placing four phone calls (at 4:05 p.m., 7:01 p.m., 10:48 p.m., and 10:52 p.m.) on the same day in an effort to speak to his wife about their pending divorce and child support met the statutory definition of "same transaction."[143]

There was no dispute that defendant violated the no contact order by placing the first call.[144] However, holding that the three additional calls made on the same evening constituted "separate offenses" rather than a "continuing course of conduct" was not construing the statute in a manner of promoting justice. This is especially evident when the last two calls were made four minutes apart and those two calls were charged felony violations of the protective order.[145] The Court noted that, "[c]harging decisions are generally within prosecutor's exclusive domain, and the separation of powers [doctrine] mandates judicial respect for prosecutor's independence."[146] Nevertheless, judicial respect for prosecutorial independence should not be a justification for ignoring the rule of construing statutes in a manner that would promote justice. The justice system is an imperfect system and although it is not for the Court to make laws, it is the Court's duty to safeguard the rights of the accused and ensure that the punishment fits the crime. Holding that four phone calls made in one evening constitute four separate offenses, of which two are to be charged as felonies, does not reflect the Court's reading of the statute with a view to its effect and with the purpose of a just outcome.

V. Conclusion

The rule of lenity has not been the law in Montana since 1895. Rather, the law in Montana is that statutes are to be "construed according to the fair import of their terms with a view to effect its object and to promote justice."[147] In the majority of cases in which the Montana Supreme Court tackled the issue of whether the rule of lenity was applicable, the Court held that the statutes in question were not ambiguous and therefore the rule of lenity was not triggered. In some instances, in cases in which the statutes were ambiguous, the Court held that they were clear and unambiguous. With the exception of *Turner*, the Court failed to state that the rule of lenity was not the law in Montana. The Court could put an end to the illusion of the rule of lenity's existence by citing to Montana Code Annotated § 45–1–102, which provides that, "[t]he rule of the common law, that penal statutes are to be

143. *Strong*, 356 P.3d at 1079, 1081.

144. *Id.* at 1080–81.

145. *Id.* at 1079.

146. *Id.* at 1082 (quoting State v. Passmore, 225 P.3d 1229, 1244–45 (Mont. 2010)) (changes in original).

147. Mont. Code Ann. § 45–1–102.

strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice."[148] Safeguarding the rights of the innocent and working towards a more perfect justice system should be the goal of every player in the field of law and the game of statutory construction.

148. *Id.*

Appendix 1: Criminal Cases in Montana Beginning in 1993 Where the Rule of Lenity has been Raised

Case	Statute	Conclusion/Finding/Holding	Disposition
Moore v. McCormick, 858 P.2d 1254 (Mont. 1993).	Petitioner filed an application for a writ of habeaus corpus challenging the denial of his bail pending appeal. Petitioner argued that § 46-20-204(2) is ambiguous and that it was not clear what the legislature intended by the words "defendant is admitted to bail."	The Court concluded that the statute was not ambiguous and did not go into a discussion regarding the rule of lenity or its application.	Petition denied.
State v. Berger, 856 P.2d 552 (Mont. 1993).	Defendant was convicted for the criminal sale of dangerous drugs in violation of § 45–9–101. Defendant appealed and argued that § 46–11–503(1)(b) (the double jeopardy statute) applied. Defendant argued that the 1991 amendments to the statute eliminated the "same transaction" requirement and expanded the protection of the statute to unrelated offenses.	The Court looked to House Judiciary Committee hearings, bill sponsor comments, and the 1991 Commission Comments. The Court stated that, "[it] [is] required to avoid any statutory interpretation that renders any sections of the statute superfluous and does not give effect to all of the words used."	Affirmed.
State v. Turner, 864 P.2d 235 (Mont. 1993).	Defendant was convicted of deliberate homicide by accountability in violation of § 45–5–102(1)(A). Defendant appealed and argued that § 46–18–220 did not require the death penalty for persons convicted of accountability for deliberate homicide. He further argued that the aggravating circumstances listed in § 46-18-303 did not include accountability for deliberate homicide.	The Court clarified that "the Montana legislature has statutorily abrogated the common law rule of strict construction so far as the penal code is concerned" and cited § 45–1–102(2). The Court stated that, "[i]nsofar as *Goodwin* is in conflict with 45–1–102(2), MCA, it is overruled." The Court stated that the statutes at issue are clear and unambiguous and that the law of accountability is properly presented and understood.	Affirmed.
State v. Gollehon, 864 P.2d 249 (Mont. 1993).	Defendant was convicted of deliberate homicide by accountability in violation of § 45–5–102(1)(A). Defendant appealed and argued that the mitigating evidence he presented was substantial enough to call for leniency.	The Court held that the district court did not err by failing to rule that mitigating factors existed and that mitigating factors were substantial enough to call for leniency.	Affirmed.

Case	Statute	Conclusion/Finding/Holding	Disposition
Gollehon v. State, 986 P.2d 395 (Mont. 1999).	After affirmance of his conviction, Petitioner requested that the Court reconsider its judgment regarding issues from his direct appeal. The State claimed in federal court that defendant did not present a due process and fair notice claim under the 14th Amendment. Petitioner asked the Court to look to Justice Gray's dissent in the direct appeal where the court considered his argument under the rule of lenity.	Court declined to address Petitioner's claim for relief and stated that "postconviction relief is not available upon claims that a petitioner could have raised on direct appeal."	Petition denied.
State v. Fauque, 4 P.3d 651 (Mont. 2000), *superseded by statute*, MONT. CODE ANN. § 46–18–205(2) (2013), *as recognized in* State v. Rambold, 325 P.3d 686, 690 (Mont. 2014).	Defendant pled guilty to one count of sexual intercourse without consent in violation of § 45–5–503 and one count of sexual assault in violation of § 45–5–502. Defendant appealed and argued that a direct conflict existed between the 4-year mandatory minimum sentence under § 45–5–503 when victim is less than 16 and defendant is 3 or more years older and the 30-day minimum sentence under § 46–18–201 when victim is less than 16 years old. Defendant contended that this created ambiguity under the rule of lenity.	The Court concluded that no conflict existed and therefore the rule of lenity need not be addressed. The Court stated that "they first look to the plain meaning of the statute and if language is clear and unambiguous then no further interpretation is required." The Court found that "no conflict exist[ed], the statutes were clear and unambiguous and [the Court] need go no further than their plain meaning."	Affirmed.
State v. Liefart, 43 P.3d 329 (Mont. 2002).	Defendant pled guilty to partner assault in violation of § 45–5–206 in Justice Court. Defendant was subsequently charged with unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(9). Defendant moved to withdraw his plea and argued that he was not informed that he would be charged with the federal charge. Justice Court denied the motion. Defendant appealed to District Court, which denied his motion. Defendant appealed and argued that "his guilty plea	The Court did not agree that "federal prohibitions contingent on a state conviction or any other predicate offense requires reading those statutes together in the context of accepting guilty pleas." The Court found that the state and federal statutes each unambiguously specify the punishment that may be brought by each entity. The Court held that Defendant's due process rights of fair warning were not violated.	Affirmed.

Case	Statute	Conclusion/Finding/Holding	Disposition
	was not voluntary because he was not informed of the federal limitations on possessing a gun upon conviction for domestic violence under state law." Defendant made a "negative implication" argument that "statutes must give fair warning."		
State v. Bailey, 87 P.3d 1032 (Mont. 2004).	Defendant convicted for two counts of incest. Defendant appealed and argued that "the District Court erred in concluding that § 45–5–507(4) requires a four-year mandatory minimum which cannot be suspended." On appeal, he argued that § 46–18–205(1) authorized suspension of all but 30 days. Section 46–18–222 lists exceptions to the mandatory minimum.	The Court held that none of the exceptions in § 46–18–222 existed and Defendant had not challenged that determination. The Court cited to State v. Fauque, 4 P.3d 651 (Mont. 2000), *superseded by statute*, MONT. CODE ANN. § 46–18–205(2) (2013), *as recognized in* State v. Rambold, 325 P.3d 686, 690 (Mont. 2014), and noted that here § 46–18–205(1) as in *Faque*, the "language reflects the legislative intent."	Affirmed.
State v. Roundstone, 261 P.3d 1009 (Mont. 2011).	Defendant pled guilty to felony escape and was sentenced to ten years with five suspended. Defendant was placed in a prerelease center and conditional parole was granted. Defendant asked the Court to "conclude that furlough is pre-certificate parole. . .and after furlough is completed the prisoner is granted post-furlough parole."	The Court declined to consider Defendant's reading of the statute as it would essentially require rewriting the statute. The Court admitted that furlough and parole are forms of release but the "Legislature has not provided in statute that furlough, is in fact parole." The Court found no ambiguity in the statute.	Affirmed.
State v. Pirello, 282 P.3d 662 (Mont. 2012).	Defendant was charged with felony possession of dangerous drugs, misdemeanor criminal possession of dangerous drugs, misdemeanor possession of drug paraphernalia, and driving under the influence of drugs. Defendant entered a conditional guilty plea, then appealed. Defendant argued that hashish oil falls under "exception for useable marijuana" or "otherwise the	The Court considered MMA and CSA together and read them together to determine the meaning of the term "usable marijuana." The Court concluded that MMA was clear and unambiguous on its face.	Affirmed.

Case	Statute	Conclusion/Finding/Holding	Disposition
	term is unconstitutionally vague and rule of lenity requires MMA to be interpreted in his favor."		
State v. Madsen, 317 P.3d 806 (Mont. 2013).	Defendant was charged with mistreating a prisoner. Defendant filed a motion to dismiss claiming that a detained juvenile was not a prisoner. The district court granted the motion and the State appealed.	The Court found that the district court had incorrectly found that the statute was ambiguous. Court stated that the "State correctly argued below that a 'prisoner' commonly means a person whose liberty is restrained by law enforcement personnel, for any reason . . ." and "the fact that a term . . . may apply to individuals in several different circumstances does not make it ambiguous, it only makes the term inclusive." Court found the word "prisoner" to be "clear from the ordinary and common understanding."	Reversed and Remanded.
State v. Matheson, 311 P.3d 443 (Mont. 2013), *decided by memorandum opinion, not to be cited and does not serve as precedent*.	Defendant argued that "the Court should apply the rule of lenity [because] the circumstances do not allow him to establish the basis for his conviction." Defendant argued that the Court should interpret 61–8–722 as expunging his record.	Court reviewed the question of law de novo and decided the case pursuant to 1996 Internal Operating Rules as amended in 2006. The Court stated that, "it is clear in the face of the briefs and the record that the District Court correctly interpreted Montana law."	Affirmed.
State v. Strong, 356 P.3d 1078 (Mont. 2015).	The incarcerated Defendant was charged with four counts of violating a protective order by calling his wife four times in one day. Defendant pled guilty to three of the four counts and appealed. Defendant argued that "the calls were part of the same ongoing conversation and the plain language of 46–11–410(2)(e), MCA, requires that the offense be defined to prohibit a continuing course of conduct."	Court found the plain meaning of the statute was clear and therefore did not need to consider Defendant's argument regarding application of the rule of lenity.	Affirmed.

\\jciprod01\productn\M\MON\79-2\MON203.txt unknown Seq: 26 19-OCT-18 13:59