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THE MONTANA SUPREME COURT – THE STATISTICS

Brent Mead & Dillon Kato*

INTRODUCTION

The Montana Supreme Court sits atop the state’s judicial pyramid as its highest court and lone court of appeals. In the interest of showing how the current lineup of the Montana Supreme Court decides its cases and inspired by a project published annually by the Harvard Law Review,¹ which looks at statistical trends of the United States Supreme Court, the authors hope these tables illustrate voting patterns and trends of Montana’s highest Court. Thus, this statistical analysis² looks at Montana Supreme Court decisions from the start of 2018, coinciding with the seating of the newest member, Justice Gustafson,³ through the end of 2019.⁴

Generally, the results show a Court that is overwhelmingly likely to speak with a single voice when issuing decisions, with concurring and dissenting opinions a rarity. Even when members of the Court do break from signing onto the cases they are presiding over, there is still little disagreement overall. For example, the two justices—Justice Baker and Justice McKinnon—who were most likely to reach different outcomes on cases they both were on, still held the same positions 87.9 percent of the time. Justice Gustafson has crafted more opinions than any justice. What’s more, the Montana Supreme Court is almost as likely to issue non-cite memorandum—which cannot be cited by practitioners as precedent—as it is to issue published rulings. The statistics show it is a Court that is active and unafraid to reverse the lower courts; the district courts, upon review, emerge with everything from a perfect record to an affirmation rate of just 57 percent. Thus, while there are still many important statistical avenues that can be explored, these insights may prove useful to practitioners who find themselves presenting a case before the highest court in Montana.

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1. See *The Supreme Court – The Statistics*, 133 HARV. L. REV. 412 (2019).

2. This analysis included all direct appeal cases decided between 2018 and 2019 by the Montana Supreme Court. Original proceedings—of which there were very few—are not included.

3. Justice Gustafson was officially sworn in on January 5, 2018. Justice Gustafson joined her first opinion on February 13, 2018. In re C.G., 2018 MT 22N, 391 Mont. 537, 413 P.3d 811.

4. Only direct appeal cases (those designated with a DA case number) that ended with an opinion from the Court were included, totaling exactly 600 cases over the two-year period.

TABLE I: OPINIONS WRITTEN

		Opinions of Court ⁵	Concurrences ⁶	Dissents ⁷	Concur in part, Dissent in part ⁸
McGrath	Published ⁹	42	1	2	0
	Non-Published ¹⁰	46	0	0	0
	TOTAL	88	1	2	0
Shea	Published	30	2	3	1
	Non-Published	42	0	0	0
	TOTAL	72	2	3	1
McKinnon	Published	42	5	14	0
	Non-Published	44	1	0	0
	TOTAL	86	6	14	0
Baker	Published	60	4	6	3
	Non-Published	36	3	0	1
	TOTAL	96	7	6	4
Sandefur	Published	20	2	1	1
	Non-Published	29	0	2	0
	TOTAL	49	2	3	1
Rice	Published	54	1	14	4
	Non-Published	37	1	1	0
	TOTAL	91	2	15	4
Gustafson	Published	62	4	4	3
	Non-Published	56	0	1	0
	TOTAL	118	4	5	3
ALL JUSTICES	Published	310	19	44	12
	Non-Published	290	5	4	1
	TOTAL	600	24	48	13

Table I shows that Justice Gustafson, despite not joining in an opinion until February 2018, proved the most prodigious writer, authoring a whopping 118 majority opinions. Otherwise, the Court's workload appears bal-

5. Opinions of Court includes all such opinions so designated by the Court no matter how many justices joined the opinion..

6. A justice is considered to have concurred when the justice authored an opinion concurring in part, concurring in the judgment, or concurring in both.

7. A justice is considered to have dissented whenever the justice's opinion would have disposed of the case in any manner different from the manner specified by the majority of the Court.

8. A justice is considered to have concurred in part and dissented in part when a justice's opinion both concurred with the majority of the Court on one or more issues and dissented from the majority of the Court on one or more issues.

9. Published cases are those cases decided by opinions that are citable and serve as precedent.

10. Non-published cases are those cases decided pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules. These cases are decided by memorandum opinion and shall not be cited, nor do they serve as precedent.

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anced, both in the number of opinions authored and whether those opinions were classified as published or non-published.

TABLE II: UNANIMITY

	Unanimous	With Concurrence ¹¹	With Dissent ¹²	TOTAL
Published	244 (79%)	14 (5%)	52 (17%)	310
Non-Published	280 (96%)	5 (2%)	5 (2%)	290

Table II reveals the remarkable tendency of the Montana Supreme Court to speak through unanimity. Thus, the 96 percent rate of unanimity on non-published cases does not significantly differ from the 90 percent rate of unanimity in memorandum opinions issued by the United States Supreme Court during its 2018 term.¹³ Yet the Montana Supreme Court's 79 percent rate of unanimity for published cases far surpasses the United States Supreme Court's 32 percent rate for non-memorandum opinions during its 2018 term.¹⁴

11. This column includes only those cases where a Justice authored a separate concurrence and no Justice dissented from the Court's opinion.

12. This column includes all cases where a Justice dissented from the opinion of the Court, even in cases where a separate justice issued a concurrence, or a Justice dissented in part and concurred in part.

13. *The Supreme Court – The Statistics*, 133 HARV. L. REV. 412, 417 (2019).

14. *Id.*

TABLE III: JUSTICE VOTING ALIGNMENTS

	McGrath	Shea	McKinnon	Baker	Sandefur	Rice	Gustafson	
McGrath	M ¹⁵	—	293	269	299	286	292	270
	M/C	—	0	0	0	1	0	1
	C	—	1	0	1	0	0	0
	D	—	3	1	4	0	0	0
	D/C	—	1	0	1	0	1	1
	AGREEMENT	—	298	270	305	287	293	272
	TOTAL CASES	—	314	307	322	315	324	292
	AGREEMENT (%)	—	94.9	88	94.7	91.1	90.4	93.2
Shea	M	293	—	285	305	299	298	282
	M/C	0	—	0	0	1	1	1
	C	1	—	0	1	1	0	2
	D	3	—	4	3	2	4	2
	D/C	1	—	0	0	0	0	1
	AGREEMENT	298	—	289	309	303	303	288
	TOTAL CASES	314	—	324	338	329	337	306
	AGREEMENT (%)	94.9	—	89.2	91.4	92.1	89.9	94.1
McKinnon	M	269	285	—	299	286	286	273
	M/C	0	0	—	0	0	0	0
	C	0	0	—	1	1	0	0
	D	1	4	—	4	8	9	5
	D/C	0	0	—	0	0	0	0
	AGREEMENT	270	289	—	304	295	295	278
	TOTAL CASES	307	324	—	346	324	331	305
	AGREEMENT (%)	88	89.2	—	87.9	91.1	89.1	91.2
Baker	M	299	305	299	—	302	311	289
	M/C	0	0	0	—	0	0	0
	C	1	1	1	—	0	0	0
	D	4	3	4	—	0	7	0
	D/C	1	0	0	—	1	2	0
	AGREEMENT	305	309	304	—	303	320	289
	TOTAL CASES	322	338	346	—	343	346	320
	AGREEMENT (%)	94.7	91.4	87.9	—	88.3	92.5	90.3

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	McGrath	Shea	McKinnon	Baker	Sandefur	Rice	Gustafson	
Sandefur	M	286	299	286	302	—	307	290
	M/C	1	1	0	0	—	0	2
	C	0	1	1	0	—	0	1
	D	0	2	8	0	—	6	3
	D/C	0	0	0	1	—	0	2
	AGREEMENT	287	303	295	303	—	313	298
	TOTAL CASES	315	329	324	343	—	345	314
	AGREEMENT (%)	91.1	92.1	91.1	88.3	—	90.7	94.9
Rice	M	292	298	286	311	307	—	286
	M/C	0	1	0	0	0	—	0
	C	0	0	0	0	0	—	0
	D	0	4	9	7	6	—	0
	D/C	1	0	0	2	0	—	0
	AGREEMENT	293	303	295	320	313	—	286
	TOTAL CASES	324	337	331	346	345	—	321
	AGREEMENT (%)	90.4	89.9	89.1	92.5	90.8	—	89.1
Gustafson	M	270	282	273	289	290	286	—
	M/C	1	1	0	0	2	0	—
	C	0	2	0	0	1	0	—
	D	0	2	5	0	3	0	—
	D/C	1	1	0	0	2	0	—
	AGREEMENT	272	288	278	289	298	286	—
	TOTAL CASES	292	306	305	320	314	321	—
	AGREEMENT (%)	93.2	94.1	91.2	90.3	94.9	89.1	—

According to Table II, most Montana Supreme Court decisions are unanimous. So an examination of each justice in Table III, and how they vote concerning one another in the cases in which they appear, reinforces the fact that the Court most often finds itself in agreement, with no justice tending to find themselves alone on an island very often. For example, over the past two years, Chief Justice McGrath and Justice Shea, as well as Justices Gustafson and Sandefur, are the two pairs most likely to fully agree when both are on a case. Each pairing signed onto the same outcome as the other in 94.9 percent of the cases in which they appeared. Even at the far end, the two justices least likely to reach the same conclusions for the same reasons, there was still little disagreement overall. Mainly because of the sheer number of unanimous decisions issued by the Court, Justice McKin-

15. For each case that a justice took part in, their position was recorded as one of the following: Majority (“M”) (either authored or joined the majority opinion); Majority/Concurrence (“M/C”) (joined the majority opinion and authored or joined a concurring opinion); Concurrence (“C”) (authored or joined a concurring opinion but did not join the majority opinion); Dissent (“D”) (authored or joined a dissenting opinion); or Dissent/Concurrence (“D/C”) (authored or joined a concurring in part, dissenting in part opinion). Note that because many cases are decided with only five justices, not all justices appear on the same number of cases.

non and Justice Baker still found themselves in agreement in 87.9 percent of the 346 cases in which they were both together during the period analyzed.

TABLE IV: VOTING PATTERNS IN NONUNANIMOUS CASES

	TOTAL CASES	JOINING THE OPINION OF THE COURT ¹⁶		AGREEING IN THE DISPOSITION OF THE CASE ¹⁷	
		Number	Percentage	Number	Percentage
McGrath	66	55	83%	57	86%
Shea	63	45	71%	51	80%
McKinnon	69	38	55%	45	65%
Baker	65	40	61%	47	72%
Sandefur	73	53	72%	57	78%
Rice	71	44	61%	46	64%
Gustafson	59	44	74%	48	81%

Table IV, like Table II, highlights the degree to which justices agree with one another. Even in non-unanimous cases, every justice voted with the majority more often than not. This agreement becomes more pronounced when factoring in concurring opinions. For example, Justice Rice was the least likely to vote with the majority in the disposition of the case. Even so, Justice Rice still agreed with the disposition of non-unanimous cases 64 percent of the time. Compared to the United States Supreme Court 2018 term where only Justice Kavanaugh agreed with the majority over 80 percent of the time; Chief Justice McGrath, Justice Shea, and Justice Gustafson all vote with the majority at that rate in Montana.¹⁸ Thus, the Montana Supreme Court's propensity for agreement appears in both its high rate of unanimity and each individual justice's likelihood to side with the majority in non-unanimous cases.

16. The number of justices signing an opinion varied from four to seven. Further, because the Montana Supreme Court rotates which justices sit for a specific case, the number of non-unanimous cases an individual justice will have sat on necessarily varies.

17. This column includes both cases in which a justice joined the Opinion of the Court and those cases in which a justice authored a separate concurrence agreeing in the outcome. Those cases in which a justice concurred in part and dissented in part are excluded.

18. *The Supreme Court – The Statistics*, 133 HARV. L. REV. 412, 417 (2019).

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TABLE V: DISPOSITIONS BY COURT OF ORIGIN

COURT OF ORIGIN ¹⁹	Affirm ²⁰	Reverse	Split	TOTAL	Affirm Percentage	Reverse Percentage	Split Percentage
1st Mont. Dist. Ct.	49	12	8	69	71.0%	17.4%	11.6%
2d Mont. Dist. Ct.	21	2	1	24	87.5%	8.3%	4.2%
3d Mont. Dist. Ct.	14	4	2	20	70.0%	20.0%	10.0%
4th Mont. Dist. Ct.	56	13	10	79	70.9%	16.5%	12.7%
5th Mont. Dist. Ct.	12	1	0	13	92.3%	7.7%	0.0%
6th Mont. Dist. Ct.	17	2	2	21	81.0%	9.5%	9.5%
7th Mont. Dist. Ct.	6	1	0	7	85.7%	14.3%	0.0%
8th Mont. Dist. Ct.	40	11	7	58	69.0%	19.0%	12.1%
9th Mont. Dist. Ct.	7	2	1	10	70.0%	20.0%	10.0%
10th Mont. Dist. Ct.	5	0	0	5	100.0%	0.0%	0.0%
11th Mont. Dist. Ct.	38	3	8	49	77.6%	6.1%	16.3%
12th Mont. Dist. Ct.	4	1	2	7	57.1%	14.3%	28.6%
13th Mont. Dist. Ct.	49	10	13	72	68.1%	13.9%	18.1%
14th Mont. Dist. Ct.	4	2	0	6	66.7%	33.3%	0.0%
15th Mont. Dist. Ct.	3	1	1	5	60.0%	20.0%	20.0%
16th Mont. Dist. Ct.	11	2	1	14	78.6%	14.3%	7.1%
17th Mont. Dist. Ct.	8	3	1	12	66.7%	25.0%	8.3%
18th Mont. Dist. Ct.	34	4	1	39	87.2%	10.3%	2.6%
19th Mont. Dist. Ct.	15	3	1	19	78.9%	15.8%	5.3%
20th Mont. Dist. Ct.	13	4	1	18	72.2%	22.2%	5.6%
21st Mont. Dist. Ct.	22	3	1	26	84.6%	11.5%	3.8%
22d Mont. Dist. Ct.	7	3	2	12	58.3%	25.0%	16.7%
Mont. Workers' Comp. Ct.	2	2	1	5	40.0%	40.0%	20.0%
Mont. Water Ct.	8	1	1	10	80.0%	10.0%	10.0%

Cases originating from the Fourth Judicial District Court, encompassing Missoula and Mineral counties, had the highest number of decisions from the Montana Supreme Court in 2018 and 2019—consisting of 79 total decisions out of the 600 appeals the Court decided during the term. Further, of the 24 courts whose rulings were examined by the Court over the period, the Fourth Judicial District was ranked 14th in terms of being affirmed, with the Montana Supreme Court upholding the district's rulings in their entirety in just over 70 percent of cases.

19. Montana's district court system is split into twenty-two judicial districts, and each of those districts as well as the Montana Workers' Compensation Court and the Montana Water Court are appealed to the Montana Supreme Court.

20. All case dispositions were categorized as one of the following: Affirm, Reverse or Split (decisions where the Court affirmed in part and reversed in part the lower court's decision).

Cases originating from the Tenth Judicial District Court,²¹ the Fifteenth Judicial District Court,²² and the Montana Workers' Compensation Court represented the fewest number of cases decided during the same time, at five cases each. Interestingly, despite the small sample size, the Tenth Judicial District Court was the only lower court in Montana that always had its rulings on appeal affirmed by the Montana Supreme Court. Otherwise, the Fifth Judicial District Court²³ was the only other court to exceed a 90 percent affirmation rate, with only one of its thirteen cases not ending in a full affirmation.

At the other end of the spectrum, the Montana Workers' Compensation Court was only fully affirmed 40 percent of the time, although another 20 percent of its cases led to split outcomes that were affirmed in part and reversed in part. In addition, the Workers' Compensation Court was also the one most likely to be fully reversed, with 40 percent of its cases ending in reversal.

21. Consisting of Fergus, Judith Basin, and Petroleum counties

22. Consisting of Daniels, Roosevelt, and Sheridan counties

23. Consisting of Beaverhead, Jefferson, and Madison counties

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TABLE VI: DISPOSITIONS BY SUBJECT MATTER

	TOTAL	Published	Non-Published
CIVIL ²⁴	390	201	189
Account Due	1	0	1
Adoptions	1	1	0
Amount Due	1	1	0
Bad Faith and Unfair Dealing	2	1	1
Breach of Contract	16	11	5
Civil Rights	2	2	0
Commitment–Mental Illness	10	4	6
Condemnation	1	1	0
Damages	12	5	7
Debt	1	0	1
Declaratory Judgment	26	19	7
Defamation	1	0	1
Dependent Neglect	60	27	33
Discrimination	1	0	1
Domestic Relations	64	21	43
Eviction	1	0	1
Foreclosure	3	1	2
Foreign Judgment	1	1	0
Fraudulent Conveyance	1	0	1
Guardian/Conservator	1	0	1
Injunction	11	8	3
Judicial Review	11	9	2
Justice Court Appeal	5	2	3
Municipal Court Appeal	1	1	0
Negligence	10	8	2
Other	61	42	19
Personal Injury	5	4	1
Postconviction	37	4	33
Probate	7	2	5
Product Liability	1	1	0
Quiet Title	5	4	1
Reinstatement of Driver's License	2	1	1
Tort	2	2	0
Unfair Trade Practices	1	1	0
Wage Claim	2	2	0
Water Rights Adjudication	1	1	0

24. Subcategories were provided by the Clerk of the Montana Supreme Court pursuant to the Court's internal filing system. Montana Water Court and Montana Workers' Compensation Court cases on appeal are categorized as civil.

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Writ of Mandamus	2	2	0
Wrongful Discharge	5	1	4
Mont. Water Ct.	10	6	4
Mont. Workers' Comp. Ct.	5	5	0
	TOTAL	Published	Non-Published
CRIMINAL	210	109	101
Aggravated Kidnapping	1	1	0
Arson	1	0	1
Assault	17	7	10
Assault on a Peace Officer	2	0	2
Assault–Partner/Family Member	8	7	1
Bail Jumping	2	1	1
Burglary	4	2	2
City Court Appeal	4	1	3
Cruelty to Animals	1	1	0
Dangerous Drugs	27	14	13
DUI	2	1	1
DUI–Felony	17	10	7
Endangerment–Criminal	4	2	2
Escape	1	0	1
Exploitation of an Older Person	1	0	1
Failure to Register as a Sex Offender	3	1	2
Forgery	1	0	1
Homicide–Attempted	2	2	0
Homicide–Deliberate	14	12	2
Homicide–Negligent	2	1	1
Incest	6	4	2
Insurance Fraud	1	0	1
Justice Court Appeal	16	7	9
Municipal Court Appeal	13	7	6
Other	15	6	9
Revocation	5	0	5
Robbery	4	2	2
Sexual Abuse of Children	2	0	2
Sexual Assault	7	3	4
Sexual Intercourse without Consent	15	9	6
Stalking	1	1	0
Tampering with Evidence	1	1	0
Theft	8	5	3
Violation of Protective Order	2	1	1

Table VI shows a subject matter breakdown of the cases the Montana Supreme Court decides. Here, a couple of data points stand out. First, over half of all cases appealed to the Court from 2018 through 2019 involved the

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State of Montana as a necessarily involved party. Criminal cases composed of 210 those cases with dependent neglect and postconviction relief comprising another 101. Those categories all necessarily involve the State of Montana. Second, while the rate of published versus non-published holds even across subcategories, some specific subcategories have a high rate of non-published opinions. For example, postconviction relief cases saw only 4 of 37 cases published. Domestic relations cases had only 21 of 64 published. Finally, dependent neglect cases had just under half—27 of 60—of those cases published. Collectively, these three subcategories comprise over one-third of all non-published cases.

CONCLUSION

The *Montana Law Review* hopes to expand and build on the preceding data sets in the years to come. The foregoing statistical compilations are designed to provide the reader with various insights into the Treasure State's highest court. We hope that you enjoy our insight and the rest of the Summer Issue.

