Montana Law Review

Volume 84 | Issue 1 Article 8

4-15-2023

Significant Montana Cases

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SIGNIFICANT MONTANA CASES

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I. INTRODUCTION

Ratified in 1972, the Montana State Constitution celebrated its fiftieth birthday in 2022.[1] This year saw the United States Supreme Court overturn *Roe v. Wade,*[2] which may have far-reaching effects on privacy rights as derived from the "Jenga tower" of substantive due process.[3] At the state level, the interests of election security and voter access continue to be framed as intractably conflicting and respective partisan instrumentalities.[4] The state continued to feel the aftershocks of a legislative session fraught with conflict that brought the Montana Supreme Court itself into the fold, shaking the scope of judicial review to the core.[5]

Significant Montana Cases is a recurring legal short in the *Montana Law Review*, where staff members attempt to select the most impactful Montana Supreme Court decisions from the previous term, and then explain the expected impact and breadth of those decisions. By recounting the following four significant cases here, we hope practitioners reflect on Montana's current constitutional and statutory protections. Moreover, we write in earnest, to reiterate that the Montana Supreme Court continues to wrestle with interpreting a handful of those protections.

II. *SHEPHERD V. STATE EX REL. DEPARTMENT OF CORRECTIONS*[6]

Montana's Wrongful Discharge from Employment Act (WDEA) was passed in 1987.[7] Since then, the Montana Supreme Court has seen many

* *Montana Law Review* Staff Members 2022–23.

1. *See, e.g.*, Jonathon Ambarian, *Montana Celebrates 50th Anniversary of State Constitution*, MISSOULA CURRENT (June 16, 2022), https://perma.cc/NV3Y-8SYE.

2. 410 U.S. 113 (1973), *overruled* by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

3. Erik Larson & Emma Kinery, *Same-Sex Marriage, Contraception at Risk After Roe Ruling*, BLOOMBERG LAW (June 24, 2022), https://perma.cc/T45K-JJKT.

4. *See* Alex Sakariassen, *Judge: New Voter Laws "Unconstitutional" and Permanently Enjoined*, MONT. FREE PRESS (Sept. 30, 2022), https://perma.cc/6LDZ-LZU7.

5. *See, e.g.*, Mara Silvers, *Gianforte Signs Bill Allowing Governors to Appoint Judges to Vacant Seats*, MONT. FREE PRESS (Mar. 17, 2021), https://perma.cc/92DB-LYM4; *see also* Victoria Hill, Eric Monroe & Marti A. Liechty, *Significant Montana Cases*, 83 MONT. L. REV 422, 447–49 (2022) (discussing the interbranch conflict culminating in McLaughlin v. Montana State Legislature, 493 P.3d 980 (Mont. 2021), and its consequences).

6. 483 P.3d 518 (Mont. 2021).

7. MONT. CODE ANN. § 39-2-901 (2021).

cases arising from wrongful discharge claims.[8] In *Shepherd v. State ex rel. Department of Corrections*, the Montana Supreme Court opted for a broad interpretation of the one-year statute of limitations and held that a WDEA claim could be tolled until all grievance procedures are exhausted.[9]

Prior to 1987, Montana employee-employer relationships were "at-will,"[10] meaning employers could discharge employees with or without cause at any time. Today, Montana is the only state without "at-will" employment after a defined probationary period of employment.[11] The enactment of the WDEA reflects a legislative policy determination that employees should be protected from arbitrary discharge.[12]

However, that protection is not without restrictions. Those restrictions include the one-year statute of limitations, which is meant to encourage speedy litigation and provide employers with a safe harbor when the one year passes.[13] Both the statute of limitations and acknowledgment of internal grievance procedures are meant to inspire employer-written procedures, particularly where none had existed previously.[14] Pursuant to the WDEA, the Court has held that where those written grievance procedures exist internally, employees must first exhaust those before bringing a WDEA claim.[15] Though the claimant in *Shepherd* exhausted her employer's internal written procedures first, those procedures exceeded the one-year statute of limitations. Therefore, the issue in *Shepherd* was whether, and to what extent, a WDEA claim could be tolled beyond one year when internal procedures exceed the same.

Kila Shepherd served as Human Resources Director for the Montana Department of Corrections (DOC),[16] and had a generally positive professional rapport.[17] On July 23, 2018, DOC told Shepherd she was "being

8. *See generally, e.g.*, Blehm v. St. John's Lutheran Hosp., Inc., 246 P.3d 1024 (Mont. 2010); Buckley v. W. Mont. Cmty. Health Ctr., 485 P.3d 1211 (Mont. 2021); Meech v. Hillhaven W., Inc., 776 P.2d 488 (Mont. 1989); Whidden v. John S. Nerison, Inc., 981 P.2d 271 (Mont. 1999).

9. *Shepherd*, 483 P.3d at 522.

10. William L. Corbett, *Resolving Employee Discharge Disputes under the Montana Wrongful Discharge Act (MWDA), Discharge Claims Arising Apart from the MWDA, and Practice and Procedure Issues in the Context of Discharge Case*, 66 MONT. L. REV. 329, 331 (2005).

11. Spoon Gordon Attorneys at Law, PC, *Montana – The Only State in the Union Where At-Will Employment Laws Do Not Apply*, SPOON LAW (Feb. 25, 2019), https://perma.cc/F96R-YTFN.

12. LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins*, 51 MONT. L. REV. 94, 109 (1990).

13. MONT. CODE ANN. § 39-2-911(1) (2021).

14. Schramm, *supra* note 12, at 118.

15. *See* Hathaway v. Zoot Enters., Inc., 498 P.3d 204, 208 (Mont. 2021) (affirming lower court that complainant's failure to pursue internal grievance process precludes his wrongful discharge as matter of law).

16. Shepherd v. State ex rel. Dep't of Corr., 483 P.3d 518, 519 (Mont. 2021).

17. Opening Brief of Appellant, *Shepherd v. State ex rel. Dep't of Corr.*, 2020 WL 10540814, at *1 (Mont. Oct. 14, 2020) (No. DA 20-0376).

considered for termination."[18] Due to conflict of interest concerns, DOC handed off the matter to the Department of Administration (DOA).[19] The DOA subsequently hired an outside investigator, and after conducting a pre-termination due process meeting, the State notified Shepherd by letter on August 10, 2018, that she was discharged from her position, "effective today."[20]

The letter also informed Shepherd that she could challenge her discharge by filing an internal grievance.[21] In accordance with the Administrative Rules of the State of Montana,[22] Shepherd filed her grievance on the same day as her termination.[23] Shepherd asserted her discharge was wrongful because DOC had violated "state and department statutes and policies."[24] Her grievance was assigned and heard by an officer with the Office of Administrative Hearings of the Department of Labor and Industry on January 7, 2019.[25] Over one year later, Shepherd received notification that the Hearing Officer concluded her termination was justified and recommended her grievance be denied.[26] The DOA's Director adopted the recommendation and issued a Final Administrative Decision on February 14, 2020.[27]

Following the Final Administrative Decision, on March 11, 2020, Shepherd brought suit against DOC under the WDEA in Montana's First Judicial District Court.[28] DOC moved for summary judgment and argued that Shepherd's claim was time-barred because it exceeded the one-year statute of limitations.[29] The district court granted DOC summary judgment and dismissed Shepherd's complaint.[30]

Pursuant to Montana Code Annotated § 39-2-911,[31] the district court determined that the tolling of the one-year statute of limitations is limited to

18. *Shepherd*, 483 P.3d at 519.
19. *Id.*
20. *Id.*
21. *Id.*
22. MONT. ADMIN. R. 2.21.8010 (1988).
23. *Shepherd*, 483 P.3d at 519.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Shepherd*, 483 P.3d at 519; *see also* MONT. CODE ANN. § 39-2-911(1) (2021).
30. *Shepherd*, 483 P.3d at 519.
31. MONT. CODE ANN. § 39-2-911(1) and (2) provide:

> (1) An action under this part must be filed within 1 year after the date of discharge.
>
> (2) If an employer maintains written internal procedures, other than those specified in 39-2-912, under which an employee may appeal a discharge within the organizational structure of the employer, the employee shall first exhaust those procedures prior to filing an action under this part. The employee's failure to initiate or exhaust available internal procedures is a de-

120 days while administrative remedies are pursued.[32] Furthermore, the district court found that if administrative remedies are not concluded within 90 days, they are considered exhausted, and the employee should proceed with suit.[33] Since Shepherd neither filed a WDEA claim when administrative remedies were inconclusive after 90 days, nor within the period of one year and 120 days as prescribed by statute, the district court found Shepherd's claim was untimely.[34] Shepherd appealed to the Montana Supreme Court, which decided the appeal as follows.[35]

Justice James Jeremiah Shea, joined by three other justices, delivered the opinion of the Court, and concluded Shepherd's WDEA claim was timely and well within the WDEA's one-year statute of limitations.[36] The Court held the limitation period on Shepherd's claim was tolled from when she commenced her grievance with the DOA until grievance procedures were exhausted on February 14, 2020.[37] Ultimately, the majority found Shepherd's claim was properly tolled beyond one year.[38]

Justice Shea's analysis started with the premise that a court's statutory interpretation should be in accordance with the "plain meaning" of the statute's language.[39] Using the "plain meaning" approach, Justice Shea reasoned that, because an "employee *may* file an action" if internal procedures are not completed within 90 days,[40] those ongoing grievance procedures will only be considered exhausted if and when the employee exercises the option to file.[41] Here, Shepherd fully availed herself of the internal administrative due process procedures, and therefore, suspended the statute of limitations until the Final Administrative Decision issued on February 14, 2020.[42]

After determining the statute of limitations did not begin to run after 90 days of Shepherd pursuing her internal administrative remedies, the majority shifted its attention to the length of the tolling period. Turning to the

fense to an action brought under this part. If the employer's internal procedures are not completed within 90 days from the date the employee initiates the internal procedures, the employee may file an action under this part and for purposes of this subsection the employer's internal procedures are considered exhausted. The limitation period in subsection (1) is tolled until the procedures are exhausted. In no case may the provisions of the employer's internal procedures extend the limitation period in subsection (1) more than 120 days.

32. *Shepherd*, 483 P.3d at 519.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 522.
37. *Id.*
38. *Shepherd*, 483 P.3d at 521–22.
39. *Id.* at 521 (citing Eldorado Coop. Canal Co. v. Hoge, 373 P.3d 836, 840 (Mont. 2016)).
40. MONT. CODE ANN. § 39-2-911(2) (2021) (emphasis added).
41. *Shepherd*, 483 P.3d at 521.
42. *Id.*

statute's 120-day provision—"[i]n no case may the *provisions* of the employer's internal *procedures* extend the limitation period . . . beyond 120 days"[43]—the majority reasoned that when the Legislature chooses not to use identical language, it is appropriate for the court to assume a different meaning was intended for each word.[44] Here, both "provisions" and "procedures" were used in the statute to describe the 120-day tolling period.[45] To differentiate the terms, the majority used Black's Law Dictionary to define "provisions" as "[a] clause in a statute, contract, or other legal instrument."[46]

In contrast, the majority defined "procedures" as the "active engagement in the process of grieving a wrongful discharge in accordance with those provisions."[47] In short, if the Legislature had intended to prohibit an employer's internal *procedures*—the process itself—from extending the limitation period more than 120 days, it would have indicated that through its word choice.[48] Instead, the majority concluded the Legislature intended to limit the scope of an employer's written *provisions* that govern the timing and timeliness of those procedures—in other words, the Legislature did not intend to limit an employee's window of opportunity to bring a claim. [49] Since DOC's *provisions* were not at issue here, and because Shepherd properly waited until her grievance with the DOA came to completion, the majority found Shepherd's claim was timely.[50]

Justice Rice, joined by Justices Baker and Sandefur, wrote a dissenting opinion criticizing the majority's departure from stare decisis, misapplication of statutory interpretation principles, and lack of common sense.[51] Justice Rice emphasized that the Montana Supreme Court had been applying the one-year statute of limitations for over thirty years.[52] Additionally, he argued the majority's opinion wiped out any effect of the 120-day provision and that, under the majority's conclusion, Shepherd's "challenge to her discharge under the internal procedures tolls the one-year limitation period indefinitely."[53]

While Justice Rice contended that the majority opinion was inconsistent with precedent, he insisted that reading and interpreting a statute is a

43. MONT. CODE ANN. § 39-2-911(2) (emphasis added).

44. *Shepherd*, 483 P.3d at 521 (citing Zinvest, LLC v. Gunnersfield Enters., 405 P.3d 1270, 1276 (Mont. 2017)).

45. *Id.* at 522.

46. *Id.* at 521 (quoting *Provision*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

47. *Id.*

48. *Id.* at 522.

49. *Id.* at 521–22.

50. *Shepherd*, 483 P.3d at 521–22.

51. *Id.* at 525 (Rice, J., with Baker & Sandefur, JJ., dissenting).

52. *Id.* at 523.

53. *Id.*

"holistic endeavor," which requires a broad view of text, language, structure, and object—not merely parsing definitions of words such as "provisions" and "procedures."[54] Rather, read contextually and in its entirety, Justice Rice interpreted the statute to mean that employees must use the employer's internal procedures first.[55] Then, even if those procedures are not complete in 90 days, the employee can file a WDEA action and the employer's procedures will be considered exhausted.[56]

Finally, the limitation is tolled until internal procedures are exhausted, and "in no case may the provisions of the employer's internal procedures extend the limitation period."[57] Given this statutory language, Justice Rice asserted the one-year limitation period is tolled only until the exhaustion of the employer's procedures, an event which occurs in "one of three ways":

> (1) completion of the internal procedures in less than 90 days; (2) if the procedures are "not completed within 90 days," the employee may file an action and "the procedures are considered exhausted" as a matter of law; or (3) the internal procedures continue beyond 90 days without the employee filing an action, in which case tolling continues for up to a maximum of 120 days.[58]

Thus, Justice Rice emphasized that "the *statute* effectuates tolling, not the employer."[59] In conclusion, the dissent argued the majority erred in its interpretation and Shepherd's complaint should have been time-barred.[60]

When considering the *Shepherd* opinion, Montana practitioners should be aware of the Court's use of semantic statutory interpretive tools and their application to ambiguous text. Though the one-year statute of limitations had been recognized as the expression of legislative intent,[61] *Shepherd* highlights the Court's agency in statutory interpretation, resulting in a favorable outcome for employees. The decision in Shepherd will inevitably put pressure on employers to establish more detailed internal grievance procedures, including provisions that limit the length of those procedures. Without such employer provisions, the effect of *Shepherd* easily increases an employee's likelihood of bringing a WDEA claim. Unless the Legisla-

54. *Id.* at 524.

55. *Id.*

56. *Id.* (citing MONT. CODE ANN. § 39-2-911(2) (2021)).

57. MONT. CODE ANN. § 39-2-911(2).

58. *Shepherd*, 483 P.3d at 524 (Rice, J., with Baker & Sandefur, JJ., dissenting).

59. *Id.*

60. *Id.* at 524–25.

61. *See* Redfern v. Mont. Muffler, 896 P.2d 455, 457 (Mont. 1995) (complaint barred by one-year statute of limitations); Arnold v. Boise Cascade Corp., 856 P.2d 217, 220 (Mont. 1993) (stating "that all actions brought pursuant to WDEA must be filed one year after date of discharge"); Turner v. City of Dillon, 461 P.3d 122, 126–27 (Mont. 2020) (holding that because "there is no further dispute over the applicable statute of limitation," claimant failed to timely file complaint).

ture decides to amend and clarify the text, *Shepherd*'s new precedent stands as a hallmark of judicial empathy for Montana employees.

—Moriah Williams

III. *STATE v. PEOPLES*[62]

In *State v. Peoples*, the Montana Supreme Court reaffirmed that a warrantless entry, which results in a search for evidence of illegal drug use, is lawful under the probation search exception to the warrant requirement.[63] Further, the Court held the evidence of drugs, found in plain view, would not be suppressed despite the defendant's allegations he was unreasonably temporarily detained—in violation of the Montana Constitution—while the search took place.[64]

Under the Montana Constitution, individuals have a fundamental right to privacy, which can only be lawfully invaded upon the government's showing it had "a compelling state interest."[65] Furthermore, individuals enjoy a separate but comparable right to be free from "unreasonable searches and seizures."[66] This decision analyzes the scope of those rights, and exceptions, as applied to probationers.

The facts begin with Arthur Ray Peoples, who has been under the supervision of the State of Montana for over eighteen years.[67] In 2003, Peoples was pulled over while driving with a suspended license.[68] The officers who pulled him over found a small amount of methamphetamine and other ingredients required to cook methamphetamine in his vehicle.[69] Peoples was subsequently convicted of two felonies: operation of an unlawful clandestine laboratory and criminal possession of dangerous drugs.[70] The Eleventh Judicial District Court in Flathead County sentenced Peoples to a 20-year prison term, with five years suspended, and a multitude of conditions applicable to the probationary term of his sentence.[71] At sentencing, the district court ordered Peoples "must submit to a warrantless search of his person, vehicle, place of residence, and place of employment by his super-

62. 502 P.3d 129 (Mont. 2022).
63. *Id.* at 129.
64. *Id.*
65. MONT. CONST. art. II, § 10.
66. *Id.* art II, § 11.
67. *Peoples*, 502 P.3d at 156 (Gustafson, J., with McKinnon, J., dissenting).
68. *Id.*
69. *Id.*
70. *Id.* at 134 (majority opinion).
71. *Id.*

vising officer whenever there is reasonable cause to believe that he has violated the law or any condition of his sentence."[72]

On February 27, 2017, Peoples was discharged onto probation under the supervision of Sam Stricker, a Montana Department of Corrections (DOC) probation officer in Missoula.[73] After finding housing and employment,[74] Peoples exhibited a long-standing pattern of intermittent drug use.[75] Peoples admitted to Stricker he had used methamphetamine on several occasions.[76] After testing positive for drug use many times, DOC held an administrative intervention hearing.[77] Following the hearing, Peoples was placed in DOC's Enhanced Supervision Program (ESP), which included regular drug testing.[78] People completed ESP in January 2018, and tested positive for methamphetamine use the next month.[79]

On March 16, 2018, Peoples was at home in his Missoula apartment.[80] Peoples's wife had placed a call to Stricker the previous day,[81] wherein she reported being in Peoples's apartment, seeing a "large amount of blood," and thinking he might have overdosed.[82] In response, Stricker sought authorization for a forced entry into Peoples's apartment, if such force became necessary.[83] The day after receiving the call, Stricker—accompanied by two other DOC probation officers and a deputy United States Marshal—went to Peoples's apartment to perform a welfare check and conduct a probation search regarding the reported illegal drug use, the overdose, and the "large amount of blood."[84]

When the DOC officers and U.S. Marshal arrived at Peoples's apartment, they knocked loudly on the door, announced their presence, and heard nothing from Peoples.[85] One of the probation officers called the apartment complex manager who provided a key to the apartment, and the officers opened the door.[86] With sidearms temporarily drawn, the officers found Peoples inside, unclothed, and seated on his bed next to a small bag

72. *Id.*
73. *Peoples*, 502 P.3d at 134; *see also id.* at 156 (Gustafson, J., with McKinnon, J., dissenting).
74. *Id.* at 134 (majority opinion).
75. *Id.* at 134–35.
76. *Id.* at 135.
77. *Id.*
78. *Id.*
79. *Peoples*, 502 P.3d at 156 (Gustafson, J., with McKinnon, J., dissenting).
80. *Id.* at 136 (majority opinion).
81. *Id.* at 135.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Peoples*, 502 P.3d at 135.
86. *Id.*

containing a crystalline substance.[87] One officer immediately handcuffed Peoples to his bed while Peoples remained calm and compliant.[88]

Meanwhile, the other officers performed a protective sweep of the apartment and called the Missoula Police Department (MPD) to report the discovery of the suspected methamphetamine and blood spots.[89] Thirty minutes later, MPD officers arrived at the scene and found Peoples unclothed and handcuffed to the bed.[90] An MPD officer ordered one of the probation officers to clothe Peoples.[91] By the end of the search, Peoples's personal belongings were seized, and police had taped the apartment, blocking its entrance.[92] None of the agencies involved had a search warrant.[93]

DNA testing later revealed the blood in the apartment was Peoples's.[94] Stricker filed a report of probation violation against Peoples.[95] The report alleged Peoples violated his probation by possessing—and suspectedly using—methamphetamine, as well as refusing to open the door for the officers.[96] The State filed a petition for revocation of Peoples's suspended sentence.[97] In response, Peoples denied the allegations and filed a motion to suppress the methamphetamine evidence found in his apartment on the basis that the search and seizure were unconstitutional.[98] Peoples argued the basis for the forced entry was merely a pretext for a warrantless search of his home, which violated Article II, Sections 10 and 11 of the Montana Constitution.[99]

Montana's Eleventh Judicial District Court denied Peoples's motion to suppress the evidence and determined the search and seizure were lawful under the probation search exception to the warrant requirement.[100] The district court further determined Peoples violated the terms of his probation and resentenced him to an unsuspended term of four years and three months at the DOC correctional facility.[101] Peoples appealed to the Montana Supreme Court.[102]

87. *Id.* at 135–36.
88. *Id.* at 136.
89. *Id.*
90. *Id.*
91. *Peoples*, 502 P.3d at 136.
92. *Id.* at 157 (Gustafson, J., with McKinnon, J., dissenting).
93. *Id.*
94. *Id.* at 136 (majority opinion).
95. *Id.*
96. *Id.*
97. *Peoples*, 502 P.3d at 136.
98. *Id.*
99. *Id.* at 136–37.
100. *Id.* at 137.
101. *Id.*
102. *Peoples*, 502 P.3d at 137.

Justice Sandefur delivered the majority opinion, joined by Chief Justice McGrath, Justice Shea, and Justice Rice; Justices Baker and Shea specially concurred.[103] Given both the United States Constitution's Fourth Amendment protections and Montana's constitutional privacy provisions under Article II, Sections 10 and 11, the State needed to demonstrate the warrantless entry fell into one of the narrow exceptions to the general rule that searches must be conducted pursuant to a warrant.[104] Here, such an exception applied: A probation officer may search a probationer's residence so long as the search is authorized by a state regulatory scheme with an interest in rehabilitating the probationer and protecting the public from criminal activity.[105] However, under the totality of circumstances, the officer must have reasonable cause to suspect probation has been violated.[106] In addition, the scope of this search is limited to the initial reasonable suspicion—"except to the extent that new or additional cause may arise within the lawful scope of the initial search."[107]

The majority found Peoples's 2003 sentencing order, authorized by statute[108] and signed by Peoples, had express conditions requiring him to submit to warrantless searches of his residence.[109] This condition satisfied the first element of the probation search exception because the sentencing order qualified as an established state regulatory scheme.[110] Next, the majority found the second element was satisfied because, based on Peoples's wife's phone call, Stricker had reasonable cause to suspect that Peoples was violating probation.[111] Finally, when Stricker arrived, he found methamphetamine in plain view,[112] which satisfied the third element because suspected drug use was the reason the probation officers initially sought entry.[113] Given the State's undisputed evidence, the majority concluded the "probation search" exception to the warrant requirement applied, and the entry was not unreasonable.[114]

Peoples asserted the probation search was merely a pretext to search his apartment for blood evidence in connection to an independent law en-

103. *Id.* at 134; *id.* at 152; *id.* at 156 (Baker, J., with Shea, J., concurring).

104. *Peoples*, 502 P.3d at 140 (majority opinion). *See also* U.S. CONST. amend. IV; MONT. CONST. art. II, § 11.

105. *Peoples*, 502 P.3d at 141.

106. *Id.*

107. *Id.*

108. MONT. CODE ANN. §§ 46-18-201(4)(c), (p) and 46-18-202(1)(g) (2021).

109. *Peoples*, 502 P.3d at 143–44.

110. *Id.* at 144.

111. *Id.*

112. *Id.*

113. *Id.* at 135.

114. *Id.* at 144.

forcement investigation.[115] However, the majority rejected this theory because Peoples "failed to demonstrate how, even if evidence of a secondary purpose was actually present here, any such collaboration or cooperation would be of constitutional magnitude."[116] According to the majority, police involvement in a probation search, even if partially motivated by an independent investigation, does not render a search unlawful under Article II, Section 11 of Montana's Constitution.[117]

Nevertheless, Peoples urged the Court that the officer's entry and his 30-minute unclothed detention were unreasonable, and therefore, unconstitutional.[118] Here, the majority reasoned that both the probation officers' manner of entry and subsequent detention of Peoples were difficult to assess based on the limited evidentiary record.[119] On the one hand, there was reasonable suspicion to authorize the warrantless search, plus the fact the officers used a key—rather than force—to enter the apartment.[120] On the other hand, the State had not articulated a reasonable justification for requiring Peoples to sit unclothed and handcuffed to his bed for thirty minutes.[121] Given this factual juxtaposition, the majority addressed the dispositive question of whether the exclusionary rule would apply and require suppression of the found methamphetamine.[122]

The exclusionary rule, or the "fruit of the poisonous tree" doctrine, provides that, under certain circumstances, evidence obtained as a direct or indirect result of a constitutionally invalid search or seizure is *inadmissible* against the defendant.[123] The rule only applies when: (1) a police officer performed an illegal act or constitutional violation that is a direct or indirect cause-in-fact of the discovery of the evidence, and (2) the discovery is the result of police exploitation of that illegality.[124] The rule is not an express right rooted in the Constitution, but is a judicial remedy designed to deter government agents from violating an individual's constitutional rights in order to acquire evidence.[125]

In any event, the majority determined the exclusionary rule did not apply "because neither the officers' initial manner of entry, nor the ensuing 30-minute period during which Peoples remained handcuffed naked, was a

115. *Peoples*, 502 P.3d at 145.
116. *Id.*
117. *Id.*
118. *Id.* at 146.
119. *Id.* at 149.
120. *Id.* at 149–50.
121. *Peoples*, 502 P.3d at 150.
122. *Id.*
123. *Id.* (citations omitted).
124. *Id.*
125. *Id*. at 151.

cause-in-fact of the methamphetamine discovery."[126] Rather, the sole cause-in-fact was their reasonable suspicion that Peoples was violating his probation.[127] Further, the officers handcuffed him only *after* they entered the apartment, and *after* they found him naked on the bed.[128] For these reasons, the majority held the discovery of methamphetamine was not the result of government exploitation and Peoples could not suppress the evidence.[129]

Justice Baker, joined by Justice Shea, specially concurred, and ultimately agreed the "probation search" exception applied.[130] However, Justice Baker expressed concern about the application of the exclusionary rule considering these problematic facts.[131] Specifically, given Peoples's argument and criminal history, Justice Baker found the officers' chosen manner of unconsented entry was not justified.[132] However, she conceded to leaving the district court's ruling alone.[133]

Despite her conclusion, Justice Baker stated that Peoples was not necessarily without remedy.[134] Article II, Section 4, of the Montana Constitution provides: "the dignity of the human being is inviolable."[135] Justice Baker argued that the dignity provision provides Montana citizens greater protections than those afforded by the federal constitution.[136] Citing *Dorwart v. Caraway*,[137] Justice Baker reminded practitioners that a Montana law enforcement officer's legal obligation "extends far beyond that of his or her fellow citizens: the officer not only is required to respect the rights of other citizens, but is sworn to *protect and defend* those rights."[138] She concluded that if an officer violates the same rights they are sworn to protect, the constituent may have a viable claim against the police officer.[139] Without explicitly commenting on whether Peoples would have such a claim in this instance, Justice Baker recognized the magnitude of such a threat.[140]

126. *Id.* at 152.
127. *Peoples*, 502 P.3d at 152.
128. *Id.* at 151 (emphasis added).
129. *Id.* at 152.
130. *Id.* at 152–53, 156 (Baker, J., with Shea, J., concurring).
131. *Id.* at 154.
132. *Id.*
133. *Peoples*, 502 P.3d at 154.
134. *Id.* at 156.
135. MONT. CONST. art. II, § 4.
136. *Peoples*, 502 P.3d at 155 (Baker, J., with Shea, J., concurring).
137. 58 P.3d 128 (Mont. 2002).
138. *Peoples*, 502 P.3d at 155 (Baker, J., with Shea, J., concurring) (quoting *Dorwart*, 58 P.3d at 136).
139. *Id.* at 156.
140. *Id.*

Justice Gustafson, joined by Justice McKinnon, dissented.[141] Justice Gustafson framed her analysis using Article II, Sections 10 and 11 of the Montana Constitution.[142] Both Sections 10 and 11, Justice Gustafson urged, provide Montanans broader protection than the Fourth and Fourteenth Amendments of the United States Constitution.[143] Under Section 10, "individuals have a fundamental right to privacy, subject to government infringement only upon 'showing of a compelling state interest.'"[144] Under Section 11, individuals "have a separate but corresponding right to be free 'from unreasonable searches and seizures.'"[145] Justice Gustafson analyzed Peoples's constitutional challenge by undertaking a search and seizure analysis, similar to that used by the Court in *State v. Staker*.[146]

The first part of the analysis focuses on whether a search occurred, and, if so, whether the search "intruded upon or infringed a reasonable expectation of privacy."[147] To determine whether a search has occurred, the Court considers, first, "whether an individual has an actual, subjective expectation of privacy society is willing to accept as objectively reasonable," and second, "the nature of the State's intrusion."[148] In addition, law enforcement must have lawfully obtained a warrant, or an exception to the warrant requirement must apply.[149]

The second prong considers "whether the subject search or seizure was constitutionally permissible under the substantive and procedural safeguards respectively provided by or derived from Article II, Sections 10 and 11."[150] Pursuant to Sections 10 and 11, Justice Gustafson urged the Court to consider whether the search "was both narrowly tailored to further a compelling state interest" and "constitutionally reasonable."[151] The focus, Justice Gustafson argued, must be centered on whether law enforcement acts within the limits of the warrant or the warrant exception.[152] Absent a warrant, the State bears the burden to prove a warrantless search was narrowly tailored to serve the government's compelling interest within an applicable exception to the warrant requirement of Article II, Section 11.[153]

141. *Id.* at 166 (Gustafson, J., with McKinnon, J., dissenting).
142. *Id.* at 159.
143. *Id.*
144. *Peoples*, 502 P.3d at 159.
145. *Id.*
146. 489 P.3d 489 (Mont. 2021).
147. *Peoples*, 502 P.3d at 161 (Gustafson, J., with McKinnon, J., dissenting).
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Peoples*, 502 P.3d at 160.

Justice Gustafson agreed with the district court that a search had occurred—in other words, "not just a home visit."[154] Moreover, she agreed the officers had reasonable cause to search Peoples's apartment given his relapse after competing ESP and suspected drug use.[155] She concluded the district court erred in its analysis by neglecting to consider the limits of the warrantless search exception or whether the search had been constitutionally reasonable.[156]

Justice Gustafson then turned to analyzing Peoples's expectation of privacy.[157] She noted Peoples had a limited expectation of privacy given his probation, the conditions of which required him to make his residence available for search based on reasonable suspicion and "upon reasonable request."[158] Justice Gustafson analogized Peoples's case to the facts in *State v. Therriault*,[159] where an officer failed to make a reasonable request after knocking and calling out, prior to entering.[160] The Court found the request in *Therriault* was unreasonable, so the same reasoning and conclusion—that there was no warrant and no exception—should apply here.[161]

Further, even if the entry was lawful, Justice Gustafson argued the officers' manner during an administrative probationary search was unreasonable.[162] Gustafson argued that the officer's pre-planned forced entry, with guns drawn, far exceeded the narrow scope of the probationary search exception.[163] Though Stricker may have had reasonable cause to suspect Peoples's relapse, "Stricker cited no concerns about officer safety" and "planned and executed a forced entry search to investigate the possible probation violation of methamphetamine relapse."[164] The probation officers violated Peoples's constitutional rights, Justice Gustafson specified, "by shackling Peoples naked on his bed while they 'rummage[d] through [Peoples's] belongings' for over half an hour," during an otherwise administrative probation search.[165] In other words, even conceding that the State had a compelling interest here, the nature of the State's intrusion was not narrowly tailored to that interest. Therefore, Justice Gustafson concluded the

154. *Id.* at 161.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. 14 P.3d 444 (Mont. 2000).

160. *Peoples*, 502 P.3d at 162 (Gustafson, J., with McKinnon, J., dissenting) (citing *Therriault*, 14 P.3d at 453–54).

161. *Id.* (citing *Therriault*, 14 P.3d at 455).

162. *Id.* at 162.

163. *Id.*

164. *Id.*

165. *Id.* (alterations in original).

evidence of methamphetamine should have been suppressed.[166] Her dissent warned that the majority set a dangerous precedent which "ignores the reality of fear, intimidation, and harassment," and permits forced entry without permission or warrant.[167]

Peoples is a significant case for criminal law practitioners. The decision sheds light on both the intricacies of the "fruit of the poisonous tree doctrine" and the relationship between the Montana Constitution's Article II, Section 10 and 11 protections. The *Peoples* decision affirms the limits on individual privacy for probationers, even considering enhanced state constitutional protections. Since the "probation search" exception applied, the Court did not require the government to show a compelling interest.[168] Rather, the majority opined on the application of the exclusionary rule, and concluded it did not apply, despite the manner of Peoples's detainment. Practitioners may be left wondering whether the narrow tailoring requirement for searches—unique to the Montana Constitution—retains any teeth when it is ignored by a majority of the Court. As to the constitutionality of handcuffing a person naked to his bed for thirty minutes during a warrantless search of his home—for at least two justices, the answer is not so unclear.

—Moriah Williams

IV. *STATE v. MERCIER*[169]

In *State v. Mercier*, the Montana Supreme Court set a standard emphasizing the preference for in-person testimony in criminal prosecutions. The Court overturned a district court ruling that had allowed remote testimony to be admitted into evidence over the defendant's objection.[170] Throughout 2020 and 2021, states enacted policies designed to reduce the spread of contagion.[171] Some of these measures included restricting in-person presence at places of business,[172] which ultimately resulted in many industries conducting work remotely using two-way video conferencing.[173] Court-

166. *Peoples*, 502 P.3d at 165–66.

167. *Id.* at 162.

168. MONT. CONST. art. II, § 10.

169. 479 P.3d 967 (Mont. 2021).

170. *Id.* at 971.

171. *See State Action on Coronavirus (COVID-19)*, NAT'L CONFERENCE OF STATE LEGISLATURES, https://perma.cc/E65L-X73T (last accessed Dec. 1, 2022).

172. *See* Directive Implementing Executive Orders 2-2020 and 3-2020 providing measures to stay at home and designating certain essential functions, OFFICE OF MONT. GOVERNOR (Mar. 26, 2020), *available at* https://perma.cc/9QBZ-7LRG.

173. *See* Mansoor Iqbal, *Zoom Revenue and Usage Statistics*, BUS. OF APPS (June 30, 2020), https://perma.cc/R3PV-QPNP.

houses also adopted these methods, which subsequently renewed legal debate regarding the constitutionality of using two-way video conferencing in delivering witness testimony.[174] *Mercier* sets precedent for determining whether and to what extent a contagion crisis or similar infrastructural hiccup warrants changing procedural safeguards, and whether such an adjustment implicates a Montana criminal defendant's right of confrontation.[175]

On October 6, 2016, Lincoln County emergency responders found Sheena Devine lying dead on the floor of her home, with her cell phone submerged in a pot of greasy water.[176] The previous night, Trevor Mercier had reportedly gone to Devine's and thrown rocks at her vehicle.[177] Mercier was convicted of, among other things, deliberate homicide, for which the state needed to prove he was at the scene and inside the house; it met this burden by presenting witness testimony contradicting his account of that night's events.[178] To convict Mercier of another charge—tampering with physical evidence—the state needed to prove he actually handled Devine's phone containing the evidence; for this, it offered two photographs recovered from the phone which the state maintained implicated and contradicted Mercier.[179]

Prior to the trial, investigators delivered the phone (which was still operational) to the Department of Homeland Security in Greely, Colorado, where Special Agent Brent Johnsrud was able to access and analyze the data.[180] In addition to providing a written report, Johnsrud testified via live two-way video from Colorado to contextualize the photos and explained the retrieval and preservation process, which laid the foundation necessary to admit the evidence.[181] Mercier objected to the remote testimony, and the district court overruled his objection.[182] Mercier appealed the issue to the Montana Supreme Court, which reviewed de novo the issue of whether the trial court erroneously violated Mercier's right of confrontation in allowing the state's use of two-way video conference for a foundational witness.[183]

174. *See generally* Matthew Tokson, Comment, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581 (2007) (noting courts were split over the constitutionality of video testimony over a decade ago).

175. *See Mercier*, 479 P.3d at 973 (discussing the Court's intention to carve out exceptions).

176. *Id.* at 971.

177. *Id.*

178. *Id.* at 972.

179. *Id.*

180. *Id.* at 971.

181. *Mercier*, 479 P.3d at 971–72.

182. *Id.* at 971.

183. *Id.* at 972.

One purpose of the federal Bill of Rights is to protect the fundamental rights of criminal defendants from overzealous prosecution.[184] A purpose of the Sixth Amendment's Confrontation Clause, specifically, is to facilitate an exchange—via cross-examination—geared toward testing reliability and uncovering truth.[185] The Confrontation Clause reflects the same spirit as the general rule prohibiting hearsay evidence: It is easier to judge a witness's demeanor and credibility through firsthand reports of a presently available party, as well as prevent confusion of issues, while secondhand accounts may be more prejudicial than probative.[186]

Taking this concept a step further, the Montana Constitution provides: "In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf . . . ."[187] Unlike the federal Constitution, which says only, "the accused shall enjoy the right . . . to be *confronted* with the witnesses against him,"[188] the Montana Constitution expresses a right to meet "face to face."[189] This is an important textualist distinction strongly suggesting that confrontation of witnesses requires physical presence under Montana law.

Opponents of incorporating video conferences into court proceedings caution against expansion of the practice and call for more scholarship on the topic.[190] Statistics show technology can have a substantial impact on the outcome of a case; specifically, compared with in-person hearings, video conferences are associated with perceptions of decreased witness reliability and a higher rate of rulings unfavorable to defendants.[191] This characteristic reflects both the general nature of video conferencing to cause disconnect and the specific nature that defendants may feel they have been unable to obtain or effectively utilize counsel.[192]

Proponents of incorporating video conferences into court proceedings encourage its adaptation and integration into the judicial system.[193] Sup-

184. Marc Chase McAllister, *Two-Way Video Trial Testimony and the Confrontation Clause: Fashioning a Better* Craig *Test in Light of* Crawford, 34 Fla. St. U. L. Rev. 835, 862 (2007).

185. Maryland v. Craig, 497 U.S. 836, 846 (1990).

186. Deborah Jones Merritt & Ric Simmons, Learning Evidence: From the Federal Rules to the Courtroom 438 (Thomas Reuters, 5th ed. 2022); *see also* Fed. R. Evid. 802.

187. Mont. Const. art. II, § 24.

188. U.S. Const. amend. VI (emphasis added).

189. Mont. Const. art. II, § 24.

190. Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, Brennan Ctr. for Justice (Sept. 10, 2020), https://perma.cc/92W6-TXN4.

191. *Id.*

192. *Id.* This concern highlights the importance of giving heightened scrutiny to the second prong of *Craig*.

193. *See* Brief of Appellee, *State v. Mercier*, 2020 WL 4476185, at *6 (Mont. June 3, 2020) (No. DA 18-0006).

porters also point out that costs of transportation, the cost of guards, and the delay of mustering all involved parties could be alleviated by remote hearings, at least for arraignments and pre-trial proceedings.[194] Over time, court staff appearing remotely for trivial matters will lessen the concern with parties to the case appearing remotely.[195]

It is important to understand the background of the debate between video appearances and in-person confrontation. Previously, the United States Supreme Court in *Maryland v. Craig* declared the face-to-face standard is not absolute, and it proposed a test for whether an individual case—especially one involving video appearances—warrants an exception to the Confrontation Clause.[196] The issue in *Craig* was whether it was constitutional for a minor to provide testimony against her alleged assaulter through a one-way, closed-circuit television.[197] The Supreme Court reasoned that the defendant's right to "confrontation" is reliably satisfied by the one-way transmission since the elements of cross-examination include the witness taking an oath and the opposing parties being able to observe the witness's demeanor, and that neither of these was abrogated by lack of physical presence.[198] Furthermore, protecting children from the potential re-traumatization caused by testifying was a sufficiently important public interest, and the closed-circuit testimony was an appropriate means for furthering the interest in a way least restrictive to the defendant's right to confrontation.[199]

Six years before *Mercier*, in *City of Missoula v. Duane*,[200] the Montana Supreme Court upheld a veterinarian's permission to testify remotely in a series of three animal abuse trials.[201] In addition to using video conferencing, the testimony served multiple proceedings.[202] The Court cited elements of "impossibility" or "impracticality" (due to distance) and "expense" as a justification to resort to using video conferencing and consolidation.[203]

Justice Rice delivered the opinion of the Montana Supreme Court in *Mercier*, which invoked Montana law to interpret *Craig*.[204] The Court imported the *Craig* test as two prongs; there is an exception if (1) the denial of

194. Fredric I. Lederer, *Technology Comes to the Courtroom, and . . .*, 43 EMORY L.J. 1095, 1101–05 (1994) (part of *Symposium: Changing Litigation with Science and Technology*).

195. *Id.*

196. Maryland v. Craig, 497 U.S. 836, 850 (1990).

197. *See id.* at 843.

198. *Id.* at 857. The defendant was able to watch the screen and communicate with counsel present in the room to raise objections.

199. *Id.* at 852–53.

200. 355 P.3d 729 (Mont. 2015).

201. *Id.* at 731.

202. *Id.*

203. *Id.* at 734.

204. State v. Mercier, 479 P.3d 967, 974–75 (Mont. 2021).

face-to-face confrontation "is necessary to further an important public policy," presuming a determination that (2) "the reliability of testimony is otherwise assured."[205] The Court held that its prior holding in *Duane* did not nullify an application of the *Craig* standard here, its facts being counter-analogous to *Mercier*'s[206]—given that *Duane* involved transporting an expert witness to appear in three separate trials.[207] Justice Rice asserted the second prong of *Craig*, reliability, was not at issue in this appeal, because the hallmarks of reliability were present.[208] Ultimately, the Court concluded the video testimony here was improperly admitted.[209]

In his discussion of *Craig*, Justice Rice attended to the disagreement over whether that test applies to two-way video—as opposed to only closed-circuit—and agreed with the majority of jurisdictions that have concluded it does apply.[210] Justice Rice also discussed the United States Supreme Court's decision in *Crawford v. Washington*,[211] which set the threshold question for admissibility of testimony as the opportunity for cross-examination by the defendant, rather than the reliability of that cross-examination.[212] Since he maintained reliability was not at issue here, Justice Rice largely disregarded this nuance, and concluded that *Crawford* did not overrule *Craig*—interpreting *Crawford*'s holding as limited to out-of-court statements unrelated to face-to-face confrontation.[213]

Justice Rice interpreted the state's argument of public policy as one of "judicial economy," and opined on the consideration of travel expenses, etc.[214] Drawing on *Craig*'s emphasis on a case-specific showing of necessity to further an important public policy, Justice Rice concluded that general judicial economy cannot comprise such necessity, and the constitutional rights of the accused—Mercier—must take priority.[215] Finally, he noted the text of both the federal and Montana constitutions do not distinguish between types of testimony.[216]

Justices Gustafson, McKinnon, and Shea filed a separate opinion, specially concurring and dissenting. The concurrence agreed that *Craig* is the

205. *Id.* at 974 (citing United States v. Carter, 907 F.3d 1199, 1205–06 (9th Cir. 2018)).
206. *Id.* at 974, 979.
207. *Duane*, 355 P.3d at 731.
208. *Mercier*, 479 P.3d at 974–75.
209. *Id.* at 977.
210. *Id.* at 976.
211. 541 U.S. 36 (2004).
212. *Mercier*, 479 P.3d at 975 (citing *Crawford*, 541 U.S. at 61).
213. *Id.* at 976 (citing McAllister, *supra* note 184, at 512–13).
214. *Id.*; *see also* Brief of Appellee, *supra* note 193, at *3 (arguing that Johnsrud's testimony was insignificant because it was undisputed).
215. *Mercier*, 479 P.3d at 976; *see also* Maryland v. Craig, 497 U.S. 836, 860 (1990). Justice Rice did not provide specific examples here of what a sufficient showing of necessity would entail.
216. *Mercier*, 479 P.3d at 976–77.

governing test for the facts of *Mercier*, but dissented to argue *Duane* should be overruled, as opposed to being treated as *Craig*'s supplement.[217] Justice Rice argued that avoiding impracticability satisfied the necessity requirement;[218] Justice Gustafson disagreed with this reading and argued Justice Rice incorrectly characterized how *Duane* is influenced by *Craig*.[219] She interpreted *Duane* as not abrogating *Craig*'s standard of impossibility to impracticability—thus, prohibitive expense should not form the basis of necessity in *Mercier*'s application of *Craig*.[220] Finally, Justice Gustafson called for the Court to overrule *Duane*, suggesting that expense should not form the basis of necessity.[221]

Chief Justice McGrath and Justice Sandefur issued a special concurrence advocating for the use of two-way video conferencing in criminal proceedings, and defended its constitutionality.[222] Chief Justice McGrath argued that technological developments must be interpreted as to "purpose and effect," principles that also weigh on constitutional issues such as the reasonableness of novel surveillance technologies under the Fourth Amendment, or regulation of the internet under the First.[223] He posited that the majority "needlessly tethers technology . . . [to] one particular technology not at issue here," and suggested he does not believe two-way video conferencing is similar enough to one-way, closed-circuit television to invoke *Craig*'s application.[224]

Specifically, Chief Justice McGrath argued the purpose of a video appearance is to create a reproduction of the witness to be cross-examined, demeanor intact, and this purpose does not interfere with formality.[225] Chief Justice McGrath drew an analogy to hearing aids and eyeglasses, which "facilitate communication" and are "uncontroversial" during witness testimony.[226] He also appealed to COVID-19 as a waypoint for how video conferencing hosts a "wide range of important interactions,"[227] and called for a standard that is not "mechanical," but dynamic and suited to technology's

217. *Id.* at 979–80 (Gustafson, J., with McKinnon & Shea, JJ., specially concurring and dissenting).

218. *Id.* at 974 (majority opinion).

219. *Id.* at 979–80 (Gustafson, J., with McKinnon & Shea, JJ., specially concurring and dissenting) ("My interpretation of *Duane* is similar to that of the parties and the District Court in that 'impossibility' or 'impracticality' is *not the same as* 'necessary to further an important public policy' and thus, appears to lower the required showing of necessity under the first prong of *Craig*." (emphasis added)).

220. *Id.* at 980; *see also* City of Missoula v. Duane, 355 P.3d 729, 734 (Mont. 2015).

221. *Mercier*, 479 P.3d at 980 (Gustafson, J., with McKinnon & Shea, JJ., specially concurring and dissenting).

222. *Id.* at 979 (McGrath, C.J., concurring).

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 981.

227. *Mercier*, 479 P.3d at 982.

accessible nature.[228] Chief Justice McGrath declared that *Duane*, not *Craig,* controlled two-way video appearances in Montana.[229] His separate opinion would dispense with the "necessity" prong and shift focus to "impracticability."[230]

In discarding the reliability issue, Chief Justice McGrath disregarded concerns over the reliability of video conferencing platforms[231]—concerns that inform a defendant's objection to the court's waiver of the right to confrontation.[232] The majority concluded *Duane* should not bind the facts of *Mercier*, and Johnsrud's testimony was improperly admitted.[233] In contrast, Chief Justice McGrath's reasoning—that *Duane* should bind—would essentially dispense with physical presence as an important element of confrontation by positing that avoiding an inconvenience, such as the state incurring travel expenses, is an important public policy.[234] The Court's holding instead concludes that permitting witnesses like Johnsrud to testify via a two-way video feed does not necessarily further important public policy.[235]

As additional context for this debate, the United States has a history of defining new judicial standards in response to pandemics. In the era of smallpox, for example, the United States Supreme Court answered the question of when individual liberty interests secured under substantive due process may be abrogated.[236] The Supreme Court declared that it is "under the pressure of great dangers," and "as the safety of the general public may demand."[237] More recently, government agencies such as the National Center for State Courts have released suggestions in response to disease mitigation, such as, "Courts should implement technology that is deliber-

228. *Id.*

229. *Id.* at 981.

230. *Id.* at 982.

231. *See generally* Bannon & Adelstein, *supra* note 190; *see also* In re Adoption of Patty, 186 N.E.3d 184, 200 (Mass. 2022) (reversing and ordering retrial after the defendant missed a day of testimony due to technological issues).

232. Reply Brief of Appellant, *State v. Mercier*, 2020 WL 4476186, at *1–2 (Mont. July 30, 2020) (No. DA 18-0006) (noting that the State made no assertions that Johnsrud's remote testimony would further an important public policy—to which Justice Rice devoted much of his analysis).

233. *Mercier*, 479 P.3d at 974 ("[T]his comparison is a bit of mixing analytical apples and oranges. . . . The apparent alarm over our use of the word 'impracticable' is dispelled by consideration of the facts in *Duane*."); *id.* at 979.

234. *See* City of Missoula v. Duane, 355 P.3d 729, 734 (Mont. 2015) ("While the physical presence of a witness in the courtroom is preferred, the City made a compelling showing that requiring Sjolin to travel to Missoula from California to testify live at three separate trials would impose a prohibitive expense . . . . Allowing Skype testimony under these circumstances was not error because all of the hallmarks of confrontation addressed in *Craig* and *Stock* were fully met.").

235. *Mercier*, 479 P.3d at 976 ("Even if it were, 'case-specific' findings demonstrating the necessity of video testimony were not entered here. We can draw only the conclusion from the record that video testimony was permitted for the stake of generalized judicial economy.").

236. *See* Jacobson v. Massachusetts, 197 U.S. 11, 26–27 (1905).

237. *Id.* at 29.

ately designed to allow court staff, judicial officers, and external court users to advance court processes remotely where appropriate, while respecting the fundamental court processes."[238] Thus, a pandemic threatening public health can provide sufficient pretense to apply a lower standard of "important public policy" than that which the courts exercised before the government declared the state of emergency.[239]

Going forward, one possibility is that Montana courts treat these interests as occupying equal ground and incorporate a balancing test. For example, the legal community might consider whether it would be more inequitable to give someone a preventable risk of being sick and spreading it, or to risk a defendant suffering a false conviction by resorting to a method of communication disfavored under the *Craig* jurisprudence.[240] In *Mercier*, the Court seems biased toward convenience, as Johnsrud's travel did not create an impossibility—but would cost the state $670.[241] One can imagine political pressure from the executive branch to abrogate the confrontation right for a higher number of defendants when an "expensive" burden can be shown.[242]

Mercier involves technology directly impacting criminal procedure itself. As the judicial system continues to use two-way video conferencing platforms in its operations, this shift will likely be presumed to fill the "reliability" requirement of *Craig*. Of course, this may not always be the case for judicial districts in rural regions.[243] Also, it is not as easy to appraise invisible hiccups that could occur when the use of video technology prejudiced the defendant in such a way that led to a different outcome of the trial.[244] The burden is generally on the defendant to raise the issue on appeal that the use of video conferencing caused prejudice.[245] A novel technology that could expedite processes within the judicial process system

238. *Guiding Principles for Post-Pandemic Court Technology*, NAT'L CTR. FOR STATE COURTS, at 7 (July 16, 2020), https://perma.cc/TQX9-4MBC.

239. *See generally, e.g.*, NFIB v. OSHA, 142 S. Ct. 661 (2022) (vaccine mandate); Agudath Israel of America v. Cuomo, 983 F.3d 620 (2d Cir. 2020) (free exercise); Jones v. Cuomo, 542 F. Supp. 3d 207 (S.D.N.Y. 2021) (quarantine); Antietam Battlefield KOA v. Hogan, 461 F. Supp. 3d 214 (D. Md. 2020) (gatherings); Stewart v. Justice, 502 F. Supp. 3d 1057 (S.D. W. Va. 2020) (dress code); N.J. State Policemen's Benevolent Ass'n v. Murphy, 271 A.3d 333 (N.J. Super. Ct. App. Div. 2022) (congregate settings).

240. Maryland v. Craig, 497 U.S. 836, 849 (1990) ("In sum, our precedents establish that the Confrontation Clause reflects a preference for face-to-face confrontation at trial[.]" (internal quotation marks omitted)).

241. Brief of Appellant, *State v. Mercier*, 2019 WL 7877465, at *22 (Mont. Dec. 6, 2019) (No. DA 18-0006).

242. *See Montana Coronavirus Relief*, MONT. DEP'T OF COMMERCE, https://perma.cc/F37E-PDSS (last visited May 20, 2022) (listing state costs).

243. State v. Mercier, 479 P.3d 967, 970 (Mont. 2021) (noting the district as Lincoln County).

244. *See generally* Bannon & Adelstein, *supra* note 190.

245. *See, e.g.*, *Mercier*, 479 P.3d at 972 (Mercier appealing his charges).

must be individually evaluated for its ramifications on constitutional rights.[246] However, the Chief Justice's opinion would have *Mercier* act as a waypoint for accepting the reliability of video conferencing.[247] This could allow the normalization of technology, by itself, to constitute an important public policy.[248]

In *Mercier*, the Montana Supreme Court declined to draw on the COVID-19 pandemic in favor of more lenient criminal procedure rules. *Mercier* effectively sets Montana's judiciary apart, as one with a narrower concept of what satisfies the right to confrontation.[249] *Mercier* arguably creates a legal landscape where the defendant's rights under the Confrontation Clause are binding regardless of whether the witness's testimony is foundational.[250] To best avoid challenges under *Mercier*, Montana prosecutors should be prepared to make the best available efforts to have witnesses appear in person. Practitioners hoping to use two-way video appearances as a tool may be less likely to garner favor in the current judicial climate.

—Zachary Stauffer

V. *L.B. v. United States*[251]

Five Montana Supreme Court justices formed a narrow majority to expand how employer liability will be handled within the state, particularly when that employer is the United States Federal Government.[252] In *L.B. v. United States*, the Court held that the Bureau of Indian Affairs (BIA) Officer Dana Bullcoming was not, as a matter of law, acting outside the scope of his employment as an on-duty police officer when he impressed the authority of his position to commit sexual assault on the plaintiff.[253]

246. *See id.* at 980 (McGrath, C.J., concurring) ("[I]nterpretation of the Sixth Amendment's right of confrontation must examine the practical effect of new technology on the interests protected by the Confrontation Clause.").

247. "Rather than purposefully obscuring a fundamental aspect of live testimony, the modern two-way telecommunications technology at issue here is intended to transmit substantially the same information as that shared by individuals physically present in the same room." *Id.* at 982.

248. *See, e.g.*, *In re Qimonda*, 462 B.R. 165 (Bankr. E.D. Va. 2011) ("[T]he issue is . . . whether declining to apply [11 U.S.C] § 365(n) in the context of the semiconductor industry would nevertheless adversely threaten U.S. public policy favoring technological innovation.").

249. *See, e.g.*, *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999) (noting that "closed-circuit television testimony does not necessarily violate the Sixth Amendment"); *United States v. Johnpoll*, 739 F.2d 702, 708–09 (2d Cir. 1984) (arguing that the testimony of deposed witnesses in a stolen securities case was admissible under a standard of exceptional circumstances).

250. *Mercier*, 479 P.3d at 976–77 (addressing the argument that since Johnsrud's testimony is foundational, it warrants a higher degree of admissibility).

251. 515 P.3d 818 (Mont. 2022).

252. *Id.* at 828.

253. *Id.* at 825.

A. Background

On the evening of October 30, 2015, Officer Bullcoming went to L.B.'s residence on the Northern Cheyenne Reservation to follow up on a police report she had made.[254] Upon arriving, Officer Bullcoming asked L.B. if she was alone; she responded that her children were asleep in another room.[255] The Northern Cheyenne Reservation is "dry," meaning that intoxication within its boundaries is prohibited.[256] L.B. told Officer Bullcoming she had consumed a few drinks off the reservation, and half a beer at her residence.[257] A breathalyzer test confirmed L.B.'s blood alcohol content to be around .132.[258]

Following the breathalyzer, Officer Bullcoming threatened to call social services and arrest L.B. for child endangerment.[259] L.B. responded that she would lose her job if she were arrested.[260] Officer Bullcoming made no move to arrest L.B.[261] Instead, Officer Bullcoming told her that "something had to be done."[262] After repeating this phrase, L.B. inferred he was referring to something specific.[263] L.B. asked Bullcoming if "something" meant sexual intercourse; he confirmed her inference.[264] Officer Bullcoming then had sexual intercourse with L.B.[265] L.B. gave birth to D.B. and a paternity test was performed to support her report of Bullcoming.[266]

This action began with L.B. bringing an action under the Federal Tort Claims Act (FTCA), which permits private parties to sue the United States in federal court for most torts committed by persons deemed to be acting on behalf of the United States.[267] Relevant here, the FTCA waives sovereign

254. *Id.* at 821. In cases involving sex crimes, the names of victims, or survivors, are represented by their initials to protect privacy considerations when they outweigh the judiciary's presumption of openness. *See* Meg Garvin, Alison Wilkinson & Sarah LeClair, *Protecting Victims' Privacy Rights: The Use of Pseudonyms in Civil Law Suits*, NAT'L CRIME VICTIM LAW INST., at 1–2 (July 2011), https://perma.cc/LM6S-TV6W. This case feature will report the facts in the same method.

255. *L.B.*, 515 P.3d at 821.

256. Brief of Appellant, *L.B. v. United States*, 2020 WL 5659191, at *1 (9th Cir. Sept. 14, 2020) (No. DA 20-35514); N. CHEYENNE CRIM. CODE § 7-9-6 (1998), *available at* https://perma.cc/B66M-TKGQ.

257. *L.B.*, 515 P.3d at 821.

258. *Id.*

259. *Id.*

260. Brief of Appellee, *L.B. v. United States*, 2020 WL 6833571, at 5 (9th Cir. Nov. 13, 2020) (No. DA 20-35514).

261. *L.B.*, 515 P.3d at 821.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. Brief of Appellant, *supra* note 256, at *1 (showing the sequence where the crime came to light after the performance of a paternity test); *see also L.B.*, 515 P.3d at 824 n.4 (clarifying that D.B. refers to the son of L.B. and is not to be confused with Dana Bullcoming).

267. *See generally* 28 U.S.C. §§ 1346, 2680 (2018).

immunity when there is a claim for damage by an injured party "caused by the negligent or wrongful act or omission of *any employee of the Government* while acting within *the scope of his office or employment*."[268] Thus, the major issue of law presented under this type of claim is determining when an employee of the Government is "acting within the scope of their employment."[269] The analysis below explains how the Montana Supreme Court responded to L.B.'s attempt to hold the BIA liable for Officer Bullcoming's conduct, by and through the FTCA.[270]

B. Legal Proceedings and Decision

The federal magistrate judge determined Officer Bullcoming acted outside the scope of his BIA employment and recommended summary judgment be granted to the Federal Government.[271] The district court adopted this recommendation, and further declined L.B.'s motion to certify this question of law—"whether Officer Bullcoming's conduct was within the scope of employment"—to the Montana Supreme Court.[272] However, on appeal, the Ninth Circuit granted this request to certify the question.[273] The Montana Supreme Court accepted this certification, and rephrased the question as follows: "Under Montana law, do law-enforcement officers act outside the scope of their employment, as a matter of law, when they use their authority as on-duty officers to sexually assault a person they are investigating for a crime?"[274]

The majority characterized the question of whether a worker's wrongful act is within the scope of employment as a fact-specific one.[275] Ultimately, the Court answered the certified question in the negative and concluded that "Officer Bullcoming was not, as a matter of law, acting outside the scope of his employment when he sexually assaulted L.B."[276]

268. 28 U.S.C. § 1346(b)(1) (emphasis added).

269. *L.B.*, 515 P.3d at 822.

270. *Id.* at 821.

271. L.B. v. United States, 2019 WL 5298725, at *7 (D. Mont. July 16, 2019) (No. CV 18-74-BLG-SPW-TJC).

272. L.B. v. United States, 2019 WL 4051946, at *2 (D. Mont. Aug. 28, 2019) (No. CV-1874-BLG-SPW).

273. L.B. v. United States, 8 F.4th 868, 872 (9th Cir. 2021) ("We respectfully certify the following question to the Montana Supreme Court: Under Montana law, do law-enforcement officers act within the course and scope of their employment when they use their authority as on-duty officers to sexually assault members of the public?").

274. *L.B.*, 515 P.3d at 821. It is important to note that through its phrasing, the Court reserved the determination of liability under the FTCA for the federal district court following remand. *See* L.B. v. United States, 49 F.4th 1241, 1241 (9th Cir. 2022) (remanding to district court).

275. *L.B.*, 515 P.3d at 823.

276. *Id.* at 828.

The majority first analyzed its precedent in *Maguire v. State*,[277] which involved the sexual assault of a "severely" autistic patient by an employee of the Montana Developmental Center.[278] The *Maguire* Court ruled this act was outside the employee's scope of employment.[279] The majority next turned to the holding in *Kornec v. Mike Horse Mining & Milling Co.*,[280] which involved a mining company employee who allegedly assaulted a former employee in a property dispute.[281] The *Kornec* Court reasoned the claimant could recover from the employer since the act in the complaint "arose out of and was committed in prosecution of the task," regardless of whether the employer actually instructed the employee to act as such.[282]

Finally, the majority considered and substantially relied on *Brenden v. City of Billings*,[283] which held an act can be within the scope of employment if it is "at least partially" in furtherance of "authorized" acts.[284] The facts in *Brenden* involve a claim for misrepresentation and intentional interference with business relations, illustrating a wide range of circumstances where it is necessary to analyze whether an employee's actions are "within the scope of their employment."[285]

Justice McKinnon, writing for the majority, concluded that, although Officer Bullcoming's act of sexual assault was not authorized by the BIA, this lack of authorization does not necessarily place the act outside the scope of employment, in part since the investigation that gave rise to it was similarly authorized in *Brenden*.[286] Extending *Kornec*, the majority reasoned that "scope of employment" can involve acts that are committed for self-gratification, or even acts that violate the employer's rules, so long as there is a motive to serve the employer.[287] The majority further concluded that *Maguire* was inapplicable, since those facts presented an issue decidedly outside of the scope of employment.[288] On the other hand, Justice McKinnon wrote that Officer Bullcoming's act was not "so disconnected"

277. 835 P.2d 755 (Mont. 1992).

278. *Id.* at 757.

279. *Id.* at 759.

280. 180 P.2d 252 (Mont. 1947).

281. *Id.* at 254 (employee committed assault and battery).

282. *Id.* at 257.

283. 470 P.3d 168 (Mont. 2020).

284. *Id.* at 174. *See also* Keller v. Safeway Stores, 108 P.2d 605, 612 (Mont. 1940) (expanding this to acts that are "closely intermingled" or "incidental" with the employment when not expressly authorized—paving the way for *Kornec*).

285. *Brenden*, 470 P.3d at 171.

286. L.B. v. United States, 515 P.3d 818, 825 (Mont. 2022).

287. *Id.* at 823.

288. *Id.* at 827.

from his employment activities as to leave the trier of fact with no finding to support that the act was within the scope of employment.[289]

Justice Sandefur argued in his dissenting opinion that Montana's respondeat superior jurisprudence should have been applied.[290] The dissent proposed a two-prong test, and emphasized how the *Brendan*/*Kornec* rule outlines the act must have internally "arose out of" or been "at least partially motivated by the employer's intent or purpose" to be found to be within the scope.[291] Justice Sandefur contrasted sexual assault as a self-gratifying act for which an actor "steps outside" his employment to perform the act with "purely personal motives."[292] The dissent construed the law in such a way that if Bullcoming acted for gratification, he did not act for his employer.[293]

Notably, the majority and dissent agreed *Maguire* deals with a fundamentally different question of liability and had no bearing here.[294] Further, both agreed to settle some uncertainty by officially adopting Restatement (Second) of Agency § 229 as the standard for determining if an act falls within the scope of employment.[295] The factors there include consideration of: whether the act is characteristic of the employment, the act's purpose, the relationship between master and servants, if master reasonably expects the act, the nexus to authorized acts, its deviance or criminality, and whether the instrumentality has been furnished by the master.[296]

C. Analysis and Conclusion

This case is significant to Montana practitioners for several reasons. The Federal Government in this case argued L.B. was essentially asking the Court to create a new legal test not currently reflected in Montana law.[297]

289. *Id.* at 825.

290. *Id.* at 829 (Sandefur, J., dissenting) (promoting respondeat superior as "suitable for flexible but consistent application").

291. *Id.* at 831 (citing Kornec v. Mike Horse Mining & Milling Co., 180 P.2d 252, 256–57 (Mont. 1947)).

292. *L.B.*, 515 P.3d at 831–32 (citing W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS 503, 505–07 (5th ed. 1984)).

293. *Id.* at 832.

294. *Id*. at 829 n.2 (concurring that *Maguire* has no "dispositive bearing in this case to the extent that the specific theor[y] of employer liability at issue [there] were alleged breaches of employer non-delegable duties of care").

295. *Id.* at 824 (majority opinion); *id.* at 830–31 (Sandefur, J., dissenting).

296. RESTATEMENT (SECOND) OF AGENCY § 229(2) (1958).

297. Brief of Appellee, *supra* note 260, at *3 (stating one of the issues of the case as "[w]hether the Court should certify to the Montana Supreme Court the question of whether to create a new, special test of respondeat superior liability with respect to law enforcement officers"). *See also id.* at *26 ("While L.B. cites cases that apply law which, contrary to Montana law, contain such an exception or otherwise apply a test different from that applied in Montana, this Court is bound to follow Montana law.").

The Court had previously expressed that changes in this area are "best left to the legislature."[298]

The Montana Supreme Court is not alone in this ruling. Courts in other jurisdictions, such as the California Supreme Court in *Mary M. v. City of Los Angeles*,[299] have held that police act within the scope of their employment when committing sexual assault.[300] The holding in *Mary M.* was similarly limited to the issue of when an employer is not barred from liability for sexual assault as a matter of law, though it was framed positively—an employer "can" be held liable.[301] As a result, California courts have been more inclined to allow claims under respondeat superior, at least at the initial pleading stages.[302] A similar progression may occur in Montana as a result of *L.B.*

Montana practitioners will be able to cite *L.B.* when arguing that law enforcement officers acted within the scope of their employment in committing misconduct while on the job. This potential also extends beyond claims with a nexus of law enforcement.[303] On the other hand, employment law practitioners arguing agency law to defend against liability may still find refuge by successfully distancing the conduct at issue from "the scope of employment" test.[304]

—Zachary Stauffer

298. Brief of Appellee, *supra* note 260, at *26 (citing Maguire v. State, 835 P.2d 755, 759 (Mont. 1992)).

299. 814 P.2d 1341 (Cal. 1991).

300. *Id.* at 1342 (holding that the employing agency could be liable under respondeat superior for an officer who had misused his authority to rape an intoxicated woman in her home).

301. *Id.*

302. *See, e.g.*, Doe v. City of San Diego, 35 F. Supp. 3d 1195, 1197 (S.D. Cal. 2014) (holding City vicariously liable under respondeat superior for officer who sexually assaulted plaintiff); Perez v. City & Cty. of San Francisco, 75 Cal. App. 5th 826, 843 (Cal. Dist. Ct. App. 2022) (holding that negligently failing to secure a firearm is within an officer's scope of employment).

303. For example, a caretaker—such as that in *Maguire*—may be tasked with dressing, bathing, and toileting patients. Pursuant to the expectations of the employer, this may entail "initiating nonconsensual, and at times invasive, physical contact" with clients. *See* L.B. v. United States, 515 P.3d 818, 824 (Mont. 2022). The act in *Maguire* was originally dispensed of with little discussion as outside the scope of employment, but similar facts arising post-*L.B.* could raise the issue of the organization's liability for its caretaker's wrongful conduct.

304. *Id.* at 822.