

STANDARDS OF REVIEW IN CRIMINAL APPEALS

Affirmative Defenses.	1
Generally.	1
Fitness to Proceed to Trial.	1
Renunciation.	1
Appeals.	1
From Courts of Limited Jurisdiction.	1
Transcripts on Appeal.	1
Attorneys.	2
Appointment of Counsel.	2
Conflicts of Interest.	2
Ineffective Assistance of Counsel.	2
Waiver of Right to Counsel.	3
Bail.	3
Bail Pending Appeal.	3
Bail Pre-trial.	3
Charging.	3
Amendments to Information or Complaint.	3
Joinder or Severance of Counts.	4
Continuances.	4
Defendant's Presence.	4
Discovery.	4
Exculpatory Evidence.	4
Sanctions.	5
Motions to Dismiss.	5
Double Jeopardy.	5
Failure to State an Offense.	5
For Insufficient Evidence.	5
In the Interest of Justice.	6
Interstate Agreement on Detainers.	6
Outrageous Government Conduct.	6

Pre-charging Delay.....	7
Lack of Probable Cause.	7
Prosecutorial Misconduct.....	7
Speedy Trial.	7
Speedy Trial - Misdemeanors.	8
Speedy Trial - Delay between conviction and sentencing.....	8
Subject matter jurisdiction.	9
Vindictive Prosecution.....	9
Driver’s License Reinstatement	9
Generally.....	9
Due Process.....	9
Generally.....	9
Evidence.	10
Admissibility Generally.	10
Sixth Amendment Confrontation.....	10
Motions in Limine.	10
Other Wrongs Evidence.....	11
Rape Shield Statute.	11
Rebuttal Evidence.....	11
Witnesses.	11
Witnesses under Rule 702.....	11
Guilty Pleas.....	12
Generally.....	12
Motion to Withdraw Guilty Plea..	12
Initial Appearance.	13
Jury.	13
Challenges to the Array.....	13
Verdict.....	14
Jury Information.	14
Exhibits.....	14
Transcripts.	14

Jury Instructions.	15
Generally.	15
Lesser Included Offense.	16
Juror Misconduct.	16
Jury Selection.	17
Generally.	17
Voir dire.	17
Justice Courts.	18
Generally.	18
Mistrial.	18
Generally.	18
Municipal Courts (of Record).	19
Generally.	19
New Trial.	19
Generally.	19
Plea Agreements.	19
Generally.	19
Post-conviction Motions.	20
Remission of Restitution.	20
Post-conviction Relief.	20
Generally.	20
Actual Innocence.	21
Amendments to Petition.	21
DNA Testing.	21
Evidentiary Hearing.	22
Preliminary Hearing.	22

Probation Revocation.....	22
Generally.....	22
Due Process claims.....	23
Motion to Dismiss Petition.	23
Public Trial.	23
Sentencing.....	23
Generally.....	23
Amendments of Sentences.....	24
Misdemeanors.....	24
Oral versus Written Judgment.	25
Persistent Felony Offender.	25
Prior Convictions.	25
Restitution.....	25
Time served.....	26
Sentence Review.....	26
Sex Offender Registration.	26
Statutory Interpretation.....	27
Retroactivity.	27
Retroactivity of Supreme Court Decisions.	27
Sufficiency of the Evidence.	27
Sufficiency of the Record on Appeal.	28
Suppression of illegally seized evidence.....	28
Generally.....	28
Community Caretaker Doctrine.	28
Confessions.....	29
Exigent Circumstances.....	29
Hearing.	29
Particularized Suspicion.	29
Search Warrants.....	30
Trial Administration and Errors.....	31

Adding Witnesses.....	32
Closing Argument.....	32
Recross and Re-re-direct.....	32
Restraints.....	32
Subpoenas.....	32
Venue.....	32
Youth Court.....	33

1. **Affirmative Defenses.**

a. Generally.

The district court's determination whether an affirmative defense exists is a question of law reviewed *de novo*. If there are conflicting facts regarding the availability of an affirmative defense in a criminal trial, the issue is properly submitted to a jury. *State v. Leprowse*, 2009 MT 387, ¶ 11, 353 Mont. 312, 221 P.3d 648; *State v. Reynolds*, 2004 MT 364, ¶¶ 8, 9, 324 Mont. 495, 104 P.3d 1056.

b. Fitness to Proceed to Trial.

“This Court's standard of review is whether substantial evidence supports the district court's decision that the defendant was fit to proceed to trial.” *State v. Santos*, 273 Mont. 125, 130, 902 P.2d 510, 513 (1995).¹

c. Renunciation.

“The District Court's determination that Lynch was not entitled to assert the affirmative defense of renunciation [as a participant in solicitation] is a legal conclusion. We review conclusions of law for correctness.” *State v. Lynch*, 2005 MT 337, ¶ 7, 330 Mont. 74, 125 P.3d 1148.

2. **Appeals.**

a. From Courts of Limited Jurisdiction.

Whether an appeal from a court of limited jurisdiction was timely is a question of law reviewed *de novo*. *State v. Clark*, 2008 MT 317, ¶ 8, 346 Mont. 80, 193 P.3d 934.

b. Transcripts on Appeal.

“We review the District Court's determination to grant or deny a

motion order additional transcripts under M.R.App. P. 8(3)(b) for abuse of discretion. However, this Court retains the plenary power to determine whether the transcripts actually ordered as part of the record on appeal provide a sufficient basis for ruling on the issues raised.” *Heidt v. Argani*, 2009 MT 267, ¶ 11, 352 Mont. 86, 214 P.3d 1255 (citation omitted).

3. Attorneys.

a. Appointment of Counsel.

“We defer to a trial court’s consideration of a request to appoint new counsel ‘and the court’s determination will be sustained absent an abuse of discretion.’ ” *City of Missoula v. Fogarty*, 2013 MT 254, ¶ 10, 371 Mont. 513, 309 P.3d 10.

We review a district court’s denial of a request for substitution of counsel for an abuse of discretion. *State v. Schowengerdt*, 2015 MT 133, ¶ 13, 379 Mont. 182, 348 P.3d 664; *Halley v. State*, 2008 MT 193, ¶ 11, 344 Mont. 37, 186 P.3d 859.

b. Conflicts of Interest.

“[W]e will review the conflict of interest issue *de novo*.” *State v. St. Dennis*, 2010 MT 229, ¶ 19, 358 Mont. 88, 244 P.3d 292.

c. Ineffective Assistance of Counsel

IAC claims reviewed on direct appeal “present a mixed question of law and fact, which this Court reviews *de novo*.” *State v. Williams*, 2015 MT 247, ¶ 11; ___ Mont. ___, ___ P.3d ___; *State v. Johnston*, 2010 MT 152, ¶ 7, 357 Mont. 46, 237 P.3d 70.

“Only record-based ineffective assistance of counsel claims are considered on direct appeal.” *State v. Ugalde*, 2013 MT 308, ¶ 28, 372 Mont. 234, 311 P.3d 772 (citations omitted). “To the extent such claims are reviewable, they present mixed questions of law and fact that we review *de novo*.” *Ugalde*, ¶ 28 (citations

and internal quotation marks omitted). *State v. Chafee*, 2014 MT 226, ¶ 11, 376 Mont. 267, 332 P.3d 240.

d. Waiver of Right to Counsel.

Where there is a question of whether a defendant has waived her right to counsel, we will not disturb the district court's findings "as long as substantial credible evidence exists to support that decision." *City of Missoula v. Fogarty*, 2013 MT 254, ¶ 10, 371 Mont. 513, 309 P.3d 10; *State v. Wilson*, 2011 MT 277, ¶ 15, 362 Mont. 416, 264 P.3d 1146.

4. **Bail.**

a. Bail Pending Appeal.

"The appropriate standard of review when considering the denial of an application for bail pending appeal is whether the district court abused its discretion in denying the application." *Moore v. McCormick*, 260 Mont. 305, 306, 858 P.2d 1254, 1255 (1993).

b. Bail Pre-trial.

Bail settings pre-trial are considered *de novo* on a writ of habeas corpus. *Miller v. Eleventh Judicial Dist. Court*, 2007 MT 58, ¶ 1, 336 Mont. 207, 154 P.3d 1186.

5. **Charging.**

a. Amendments to Information or Complaint.

Whether to allow the amendment of an information is left to the discretion of the trial court. *State v. Gardipee*, 2004 MT 250, ¶ 5, 323 Mont. 59, 98 P.3d 305.

A district court's denial of a motion to amend or strike a criminal information involves legal questions which we review *de novo*,

determining only whether the court correctly interpreted the law. *State ex rel. Kuntz v. Montana Thirteenth Judicial Dist. Court*, 2000 MT 22, ¶ 12, 298 Mont. 146, 995 P.2d 951.

b. Joinder or Severance of Counts.

We review whether counts were properly joined in an information *de novo*. *State v. Freshment*, 2002 MT 61, ¶ 22, 309 Mont. 154, 43 P.3d 968.

We review denial of a motion to sever counts into separate trials for abuse of discretion. *State v. Freshment*, 2002 MT 61, ¶ 25, 309 Mont. 154, 43 P.3d 968.

We review whether counts in a charging information were properly joined under Mont. Code Ann. § 46-11-404(1) *de novo*. Conversely, the denial of a motion to sever properly joined charges based on unfair prejudice under Mont. Code Ann. § 46-13-211(1) is reviewed under an abuse of discretion standard. *State v. Kirk*, 2011 MT 314, ¶ 10, 363 Mont. 102, 266 P.3d 1262.

6. **Continuances.**

We review a district court's ruling on a motion for continuance for an abuse of discretion. *State v. Gleed*, 2014 MT 151, ¶ 10, 375 Mont. 286, 326 P.3d 1095.

7. **Defendant's Presence.**

We exercise plenary review over claimed violations of a defendant's right to be present at a critical stage in the proceedings and right to a public trial. *State v. Northcutt*, 2015 MT 267, ¶ 5, ___ Mont. ___, ___ P.3d ___; *State v. Charlie*, 2010 MT 195, ¶ 21, 357 Mont. 355, 239 P.3d 934.

8. **Discovery.**

a. Exculpatory Evidence.

“[W]hether evidence is exculpatory evidence is a mixed question of law and fact” reviewed *de novo*. *Hiebert v. Cascade County*, 2002 MT 233, ¶ 23, 311 Mont. 471, 56 P.3d 848.

b. Sanctions.

The standard of review for a court’s decision regarding imposition of sanctions in such a case is whether the court has abused its discretion. *State v. Golder*, 2000 MT 239, ¶ 7, 301 Mont. 368, 9 P.3d 635.

9. **Motions to Dismiss.**

a. Double Jeopardy.

“We review *de novo* a district court's denial of a motion to dismiss [on double jeopardy grounds].” *State v. Zink*, 2014 MT 48, ¶ 9, 374 Mont. 102, 319 P.3d 596.

A district court’s decision to grant or deny a defendant's motion to dismiss a charge on the basis of double jeopardy presents a question of law that we review for correctness. *State v. Cline*, 2013 MT 188, ¶ 6, 371 Mont. 18, 305 P.3d 55.

b. Failure to State an Offense.

“We review a district court's decision on a motion to dismiss [for failure to state an offense]” for correctness. *State v. Pinder*, 2015 MT 157, ¶ 9, 379 Mont. 357, 350 P.3d 377.

“When the dismissal is based upon the interpretation or construction of a statute, we review for whether the district court’s interpretation or construction is correct.” *State v. Nelson*, 2014 MT 135, ¶ 16, 375 Mont. 164, 334 P.3d 345; *State v. Pirello*, 2012 MT 155, ¶ 9, 365 Mont. 399, 282 P.3d 662.

c. For Insufficient Evidence.

“This court reviews *de novo* a district court’s denial of defendant’s motion to dismiss for insufficient evidence. *State v. Bowen*, 2015 MT 246, ¶ 21, ___ Mont. ___, ___ P.3d ___; *State v. Eisenzimer*, 2014 MT 208, ¶ 5, 376 Mont. 157, 330 P.3d 116 (citing *State v. Kirn*, 2012 MT 69, ¶ 8, 364 Mont. 356, 274 P.3d 746).

“Regardless of whether it was raised below, however, we review *de novo* a claim of insufficiency of the evidence.” *State v. Robertson*, 2014 MT 279, ¶ 16, 376 Mont. 471, 336 P.3d 367.

“We review *de novo* a district court's denial of a motion to dismiss for insufficient evidence. We determine whether, after viewing the evidence presented at trial in a light most favorable to the prosecution, a reasonable juror could have convicted the defendant.” *State v. Hanna*, 2014 MT 346, ¶ 14, 377 Mont. 418, 341 P.3d 629 (citation omitted).

d. In the Interest of Justice.

“Our standard of review is whether the District Court abused its discretion by dismissing the information [Under Mont. Code Ann. § 46-13-401(1)]. *State v. Pinkerton*, 270 Mont. 287, 891 P.2d 532 (1995).

e. Interstate Agreement on Detainers.

The denial of a motion to dismiss in a criminal case presents a question of law, which we review *de novo*. *State v. Nickerson*, 2014 MT 83, ¶ 6, 374 Mont. 354, 322 P.3d 421.

f. Outrageous Government Conduct.

A motion to dismiss in a criminal case “based on outrageous government conduct is a question of law reviewed *de novo*.” *State v. Fitzpatrick*, 2012 MT 300, ¶ 12, 367 Mont. 385, 291 P.3d 1106 (citation omitted).

g. Pre-charging Delay.

“The issue of preaccusation delay presents a question of constitutional law. *See State v. DuBray*, 2003 MT 255, ¶ 28, 317 Mont. 377, 77 P.3d 247; *State v. Taylor*, 1998 MT 121, ¶ 18, 289 Mont. 63, 960 P.2d 773. We review a trial court's resolution of such questions *de novo* to determine whether the court's interpretation and application of the law are correct.” *State v. Passmore*, 2010 MT 34, ¶ 23, 355 Mont. 187, 225 P.3d 1229.

h. Lack of Probable Cause.

This Court reviews a trial court's denial of a motion to dismiss a criminal charge for lack of probable cause for abuse of discretion. *State v. Fehringer*, 2013 MT 10, ¶ 22, 368 Mont. 226 293 P.3d 853.

“Holt argues that some facts in the affidavit in support of the motion to file the information must be excised and, after these facts are deleted, the affidavit no longer establishes probable cause. Holt argues that the original inclusion of these facts violated § 46–16–215, MCA. Given the alleged statutory violation, the issue of whether certain facts in the affidavit should be excised is a question of law which we review *de novo*.” *State v. Holt*, 2006 MT 151, ¶ 20, 332 Mont. 426, 139 P.3d 819.

i. Prosecutorial Misconduct.

“We review allegations of prosecutorial error *de novo*, ‘considering the prosecutor's conduct in the context of the entire proceeding.’” *State v. Labbe*, 2012 MT 76, ¶ 11, 364 Mont. 415, 276 P.3d 848 (closing argument); *State v. Rardon*, 2005 MT 129, ¶ 14, 327 Mont. 228, 115 P.3d 182 (sentencing hearing).

j. Speedy Trial.

“We apply two standards when reviewing a trial court's ruling on a speedy trial motion. First, we review the factual findings

underlying the court’s ruling to determine whether those findings are clearly erroneous. Second, whether the factual circumstances, when evaluated pursuant to the four-factor balancing test, amount to a speedy trial violation presents a question of constitutional law, which we review *de novo* to determine whether the trial court correctly interpreted and applied the law.” *State v. Zimmerman*, 2014 MT 173, ¶ 11, 375 Mont. 374, 328 P.3d 1132 (Citations omitted).²

We review a district court’s denial of a motion to dismiss [on speedy trial grounds] in a criminal case *de novo* for correctness. *State v. Maloney*, 2015 MT 227, ¶ 12, 380 Mont. 244, 354 P.3d 611.

Whether a defendant’s right to a speedy trial has been violated is a question of law, which we review to determine whether the District Court’s interpretation of law is correct. *State v. Christensen*, 2014 MT 294, ¶ 7, 377 Mont. 7, 338 P.3d 45; *State v. Bertolino*, 2003 MT 266, ¶ 10, 317 Mont. 453, 77 P.3d 543.

k. Speedy Trial - Misdemeanors.

“Whether the right to a speedy trial under § 46-13-401(2), MCA, has been violated is a question of law, which we review for correctness.” *State v. Thompson*, 2015 MT 279, ¶ 10, ___ Mont. ___, ___ P.3d ___; *State v. Luke*, 2014 MT 22, ¶ 10, 373 Mont. 398, 321 P.3d 70. We review the factual findings in support of a district court’s ruling on a speedy trial claim under the clearly erroneous standard. *State v. Charlie*, 2010 MT 195, ¶ 20, 357 Mont. 355, 239 P.3d 934; *State v. Hendershot*, 2009 MT 292, ¶ 8, 352 Mont. 271, 216 P.3d 754.

l. Speedy Trial - Delay between conviction and sentencing.

“The denial of a motion to dismiss in a criminal case [based on the delay between conviction and sentencing] presents a question of law, which this Court reviews *de novo*.” *State v. Betterman*, 2015 MT 39, ¶ 11, 378 Mont. 182, 342 P.3d 971, *pet.*

for cert. filed, No. 14-1457 (June 10, 2015).

- m. Subject matter jurisdiction.

“The grant or denial of a motion to dismiss [for lack of subject matter jurisdiction] in a criminal case presents a question of law that we review for correctness.” *State v. Montgomery*, 2015 MT 151, ¶ 6, 379 Mont. 353, 350 P.3d 77.

- n. Vindictive Prosecution.

This Court reviews *de novo* a district court's decision on a motion to dismiss in a criminal case [on grounds of vindictive prosecution].” *State v. Ridge*, 2014 MT 288, ¶ 9, 376 Mont. 534, 337 P.3d 80.³

10. **Driver’s License Reinstatement (DUI).**

- a. Generally.

“The Supreme Court reviews a ruling on a petition for reinstatement of a driver’s license to determine whether the court’s findings of fact are clearly erroneous and whether its conclusions of law are correct.” *Kummerfeldt v. State*, 2015 MT 109, ¶ 8, 378 Mont. 522, 524, 347 P.3d 1233, 1235.

“We review for clear error a district court’s denial of a petition for reinstatement of a driver’s license and driving privileges. *Weer v. State*, 2010 MT 232, ¶ 7, 358 Mont. 130, 244 P.3d 311. We look to the ruling to determine whether the court has made a correct conclusion of law. *Weer*, ¶ 7. A presumption of correctness attaches to the suspension or revocation of a driver’s license.” *Muller v. State, Dep’t of Justice*, 2012 MT 66, ¶ 8, 364 Mont. 328, 330, 274 P.3d 737, 739

11. **Due Process.**

- a. Generally.

“Alleged violations of due process also involve questions of constitutional law over which we exercise plenary review.” *State v. Finley*, 2003 MT 239, ¶ 10, 317 Mont. 268, 77 P.3d 193; *State v. Charlie*, 2010 MT 195, ¶ 21, 357 Mont. 355, 239 P.3d 934.

12. Evidence.

a. Admissibility Generally.

“We generally review evidentiary rulings for abuse of discretion.” *State v. Lotter*, 2013 MT 336, ¶ 13, 372 Mont. 445, 313 P.3d 148; *State v. Given*, 2015 MT 273, ¶ 23.

but see “Rulings regarding the admissibility of evidence are left to the sound discretion of the trial court and will not be overturned absent a showing of manifest abuse of discretion. *State v. Wilmer*, 2011 MT 78, ¶ 11, 360 Mont. 101, 103, 252 P.3d 178, 180

“[W]here the district court’s reasons for its evidentiary rulings are not apparent from the record, we will review the rulings *de novo*.” *State v. Clifford*, 2005 MT 219, ¶ 52, 328 Mont. 300, 121 P.3d 489; *State v. Pulst*, 2015 MT 184, ¶ 14, 379 Mont. 494, 351 P.3d 687.

Evidentiary rulings based on an asserted erroneous interpretation of the law or rules of evidence are reviewed *de novo*. *State v. Lotter*, 2013 MT 336, ¶ 13, 372 Mont. 445, 313 P.3d 148.

b. Sixth Amendment Confrontation Claims.

Confrontation claims are reviewed *de novo*. *State v. Mizenko*, 2006 MT 11, ¶ 8, 330 Mont. 299, 303, 127 P.3d 458.

c. Motions in Limine.

The Supreme Court reviews evidentiary rulings on motions in limine for abuse of discretion. *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811; *State v. Kebble*, 2015 MT 195, ¶ 16, 380 Mont. 69, 353 P.3d 1175.

d. Other Wrongs Evidence. (Rule 404(b), Mont. R. Evid.).

This Court reviews a district court's ruling regarding the admission of other crimes, wrongs, or acts for an abuse of discretion. *State v. Knowles*, 2010 MT 186, ¶ 22, 357 Mont. 272, 239 P.3d 129; *State v. Green*, 2009 MT 114, ¶ 14, 350 Mont. 141, 205 P.3d 798. To the extent the court's ruling on other wrongs is based on an interpretation of an evidentiary rule or statute, the review is *de novo*. *State v. Crider*, 2014 MT 139, ¶ 14, 375 Mont. 187, 328 P.3d 612.

e. Rape Shield Statute.

“The standard of review for the application of the rape shield provisions is a manifest abuse of discretion standard. *State v. Howell* (1992), 254 Mont. 438, 445, 839 P.2d 87, 91, *cert. denied* (1993), 507 U.S. 1036, 113 S.Ct. 1862, 123 L.Ed.2d 483.” *State v. Stuit*, 268 Mont. 176, 885 P.2d 1290 (1994).⁴

f. Rebuttal Evidence.

We review a district court's admission of rebuttal testimony for abuse of discretion. *State v. Redlich*, 2014 MT 55, ¶ 32, 374 Mont. 135, 321 P.3d 82.

g. Witnesses.

A district court's ruling to allow testimony of a witness is reviewed for abuse of discretion. *State v. Bowen*, 2015 MT 246, ¶ 20, ___ Mont. ___, ___ P.3d ___; *State v. Normandy*, 2008 MT 437, ¶ 12, 347 Mont. 505, 198 P.3d 834.

h. Witnesses under Rule 702, Mont. R. Evid.

“We review the district court’s determination regarding the qualification and competency of an expert witness for an abuse of discretion.” *State v. Jay*, 2013 MT 79, ¶ 15, 369 Mont. 332, 298 P.3d 396; *State v. Robins*, 2013 MT 71, ¶ 9, 369 Mont. 291, 297 P.3d 1213.

13. **Guilty Pleas.**

a. Generally

“[T]he voluntariness of a guilty plea is a mixed question of law and fact, which we review *de novo*.” *State v. Garner*, 2014 MT 312, ¶ 21, 377 Mont. 173, 339 P.3d 1; *State v. McFarlane*, 2008 MT 18, ¶ 8, 341 Mont. 166, 176 P.3d 1057.

“If there is any doubt that a plea is involuntary, the doubt should be resolved in the defendant's favor.” *State v. Wise*, 2009 MT 32, ¶ 9, 349 Mont. 187, 203 P.3d 741.

b. Motion to Withdraw Guilty Plea.

Denial of a Motion to Withdraw a Plea is reviewed *de novo*. *State v. Warclub*, 2005 MT 149, ¶ 17, 327 Mont. 352, 114 P.3d 254.

“We review the district court’s underlying factual findings to determine whether the findings are clearly erroneous. *Warclub*, ¶ 23. We review the district court’s interpretation of the law, as well as its application of the law to the facts, for correctness.” *Warclub*, ¶ 23. *State v. Swensen*, 2009 MT 42, ¶ 9, 349 Mont. 268, 203 P.3d 786.

We review a district court’s ruling on a motion to withdraw plea to determine whether the plea was voluntary. *State v. Muhammad*, 2005 MT 234, ¶ 12, 328 Mont. 397, 121 P.3d 521.

“Whether the District Court failed to comply with the provisions of § 46–14–221(2)(c), MCA (2001), constitutes a matter of statutory interpretation [reviewed *de novo*].” *State v. Yarnall*, 2004 MT 333, ¶ 17, 324 Mont. 164, 102 P.3d 34.⁵

14. **Initial Appearance.**

“Whether an initial appearance is sufficient to satisfy the requirement of §§ 46–7–101–102, MCA, is an issue of statutory construction that we review for correctness. *State v. Gatlin*, 2009 MT 348, ¶ 16, 353 Mont. 163, 219 P.3d 874.” *State v. White*, 2014 MT 335, ¶ 13, 377 Mont. 332, 339 P.3d 1243.

“A district court's decision applying § 46–7–101, MCA, is an issue of statutory construction that this Court reviews to determine whether it is correct.” *State v. Strong*, 2010 MT 163, ¶ 8, 357 Mont. 114, 236 P.3d 580.

15. **Jurisdiction.**

“When the issue presented is whether the district court had authority to take a specific action, the question is one of law and our review is *de novo*.” *State v. Graves*, 2015 MT 262, ¶ 12, ___ Mont. ___, ___ P3d ___; *State v. Stiffarm*, 2011 MT 9, ¶ 8, 359 Mont. 116, 250 P.3d 300.

16. **Jury.**

a. Challenges to the Array.

“Decisions on challenges to the composition of the jury [*Batson* or proper calling of the pool] are conclusions of law [reviewed *de novo*].” *State v. Azure*, 2005 MT 328, ¶ 7, 329 Mont. 536, 538, 125 P.3d 1116.

“We review *de novo* a district court's application of the law regarding the timeliness of a *Batson*-type challenge.” *State v. Parrish*, 2005 MT 112, ¶ 9, 327 Mont. 88, 111 P.3d 671.

A court's decision on a challenge to the composition of the jury is a conclusion of law that this Court reviews to determine whether it is correct. *State v. Fehringer*, 2013 MT 10, ¶ 12, 368 Mont. 226, 293 P.3d 853 (citing *State v. Bearchild*, 2004 MT 355, ¶ 7, 324 Mont. 435, 103 P.3d 1006).

“a challenge that a litigant has exercised its use of peremptory strikes in a discriminating manner, an appellate court will defer to the trial court's findings of fact unless clearly erroneous, and will review the trial court's application of the law *de novo*.” *State v. Ford*, 2001 MT 230, ¶ 7, 306 Mont. 517, 39 P.3d 108.

b. Verdict.

“Whether the jury verdict was unanimous constitutes a question of constitutional law. Our review of questions of constitutional law is plenary.” *State v. Pyatt*, 2000 MT 136, ¶ 3, 300 Mont. 25, 1 P.3d 953.

17. **Jury Information.**

a. Exhibits.

“We generally review a district court's decision to deliver exhibits in evidence to a jury room during deliberations for an abuse of discretion.” *State v. Parker*, 2006 MT 258, ¶ 11, 334 Mont. 129, 144 P.3d 831.

b. Transcripts.

“The decision to provide a portion of the transcript of trial testimony to a jury under Mont. Code Ann. § 46–16–503(2), is reviewed for abuse of discretion.” *State v. Greene*, 2015 MT 1, ¶ 12, 378 Mont. 1, 340 P.3d 551.

“Our standard of review of a district court's decision to allow or disallow a jury's request to replay trial testimony is whether the district court abused its discretion.” *State v. Henrich*, 268 Mont.

258, 266, 886 P.2d 402, 407 (1994)

18. **Jury Instructions.**

a. Generally.

“We review jury instructions in criminal cases ‘to determine whether the instructions as a whole fully and fairly instruct the jury on the applicable law.’ *State v. Myran*, 2012 MT 252, ¶ 16, 366 Mont. 532, 289 P.3d 118 (citation omitted). District courts are given broad discretion when instructing a jury, and ‘reversible error will occur only if the jury instructions prejudicially affect the defendant’s substantial rights.’ *Myran*, ¶ 16 (citation omitted).” *State v. Williams*, 2015 MT 247, ¶ 10, ___ Mont. ___, ___ P.3d ___.

“A district court's decision on jury instructions is presumed correct, and the appellant has the burden of showing lower court error.” *State v. Carnes*, 2015 MT 101, ¶ 6, 378 Mont. 482, 346 P.3d 1120.

“This Court reviews for correctness the legal determinations a lower court makes when giving jury instructions, including whether the instructions, as a whole, fully and fairly instruct the jury on the applicable law.” *State v. Carnes*, 2015 MT 101, ¶ 6, 378 Mont. 482, 346 P.3d 1120.

“We review preserved jury instruction challenges for an abuse of discretion coupled with a showing of prejudice to the defendant’s substantial rights.” *State v. Hanna*, 2014 MT 346, ¶ 13, 377 Mont. 418, 341 P.3d 629.

“A district court's discretion is restricted, however, by the overriding principle that the instructions, as a whole, must fully and fairly instruct the jury on the law applicable to the case.” *State v. Erickson*, 2014 MT 304, ¶ 21, 377 Mont. 84, 338 P.3d 598; *State v. Hovey*, 2011 MT 3, ¶ 10, 359 Mont. 100, 248 P.3d

303.

b. Lesser Included Offense.

Whether an offense is a lesser included offense is an issue of law that this Court reviews *de novo* to determine whether it is correct. *State v. Fehringer*, 2013 MT 10, ¶ 30, 368 Mont. 226, 293 P.3d 853 (citing *State v. Molenda*, 2010 MT 215, ¶ 3, 358 Mont. 1, 243 P.3d 387).

19. **Juror Misconduct.**

“A district court’s ruling on a motion for a new trial and its decision as to the impartiality of a jury should not be set aside unless there is an abuse of discretion. *State v. Dunfee*, 2005 MT 147, ¶ 14, 327 Mont. 335, 114 P.3d 217. The trial court is in the best position to observe the jurors and to decide the potential for prejudice when allegations of juror misconduct are raised. *State v. Rennaker*, 2007 MT 10, ¶ 29, 335 Mont. 274, 150 P.3d 960. Thus, the trial court’s determination is given considerable weight by this Court and we will defer to the trial court’s determination absent a showing of prejudice. *Rennaker*, ¶ 29.” *State v. Ring*, 2014 MT 49, ¶ 14, 374 Mont. 109, 321 P.3d 800.

“This Court reviews motions for new trial based on juror misconduct for abuse of discretion, and a district court will not be overturned unless a defendant demonstrates he was deprived of a fair and impartial trial.” *State v. MacGregor*, 2013 MT 297, ¶ 15, 372 Mont. 142, 311 P.3d 428.

Juror misconduct based on extraneous communications must be reviewed on a case-by-case basis, and in the context of the entire record. *United States v. Maree*, 934 F.2d 196, 202 (9th Cir. 1991) (*rev’d in part on other grounds, United States v. Adams*, 432 F.3d 1092, 1095 (9th Cir.2006)). The trial court is uniquely qualified to appraise whether extraneous information resulted in prejudice, and we accord substantial weight to that determination.” *State v. MacGregor*, 2013 MT 297, ¶ 19, 372

Mont. 142, 311 P.3d 428.

The decision of a district court regarding the impartiality of a jury will not be set aside unless there is a clear abuse of discretion. *State v. White*, 2008 MT 129, ¶ 8, 343 Mont. 66, 184 P.3d 1008.

20. **Jury Selection.**

a. Generally.

“We review a court's decision to deny a challenge for cause of a juror for an abuse of discretion. We will reverse the judgment and order a new trial if a court abuses its discretion by denying a defendant's challenge for cause, the defendant removes the challenged prospective juror with a peremptory challenge, and the defendant exhausts his peremptory challenges. *State v. Braunreiter*, 2008 MT 197, ¶ 7, 344 Mont. 59, 185 P.3d 1024 (citations omitted).” *State v. Kebble*, 2015 MT 195, ¶ 15, ___ Mont. ___, ___ P.3d ___.

“A district court abuses its discretion if it denies a challenge for cause when a prospective juror's statements during voir dire raise serious doubts about the juror's ability to be fair and impartial or actual bias is discovered. *Johnson*, ¶ 8 (citations omitted). If a district court abuses its discretion by denying a legitimate challenge for cause, the error is structural and automatic reversal is required. *State v. Good*, 2002 MT 59, ¶¶ 62–63, 309 Mont. 113, 43 P.3d 948.” *State v. Cudd*, 2014 MT 140, ¶ 6, 375 Mont. 215, 326 P.3d 417.

“The District Court's decision to permit the State to challenge a juror for cause prior to a voir dire examination involves a conclusion of law. We review a district court's conclusion of law to determine if it is correct.” *State v. Bearchild*, 2004 MT 355, ¶ 7, 324 Mont. 435, 103 P.3d 1006.

b. Voir dire.

“A district judge has ‘great latitude in controlling voir dire.’ *State v. LaMere*, 190 Mont. 332, 339, 621 P.2d 462, 466 (1980). We review a court's control of voir dire for abuse of discretion.” *State v. Grant*, 2011 MT 81, ¶ 8, 360 Mont. 127, 252 P.3d 193.

21. **Justice Courts.**

a. Generally.

“We review cases that originate in justice court[s of record] and are appealed to district court as if the appeal originally had been filed in this Court. Accordingly, we undertake an independent examination of the record apart from the district court's decision.” *State v. Kebble*, 2015 MT 195, ¶ 14, 380 Mont. 69, 353 P.3d 1175; *State v. Lamarr*, 2014 MT 222, ¶ 9, 376 Mont. 232, 332 P.3d 258.

22. **Mistrial.**

a. Generally.

“A district court’s decision on a motion for a mistrial must be based upon whether the party has been denied a fair and impartial trial, and the decision on the motion is reviewed to determine whether the court abused its discretion.” *State v. Zlahn*, 2014 MT 224, ¶ 16, 376 Mont. 245, 332 P.3d 247.

“A mistrial is an exceptional remedy and remedial action short of a mistrial is a preferred remedy. *State v. Flores*, 1998 MT 328, ¶ 17, 292 Mont. 255, 974 P.2d 124. A district court’s decision on a motion for mistrial is entitled to deference and will be affirmed if the trial judge acted rationally and responsibly.” *State v. Morsette*, 2013 MT 270, ¶ 28, 372 Mont. 38, 45, 309 P.3d 978.

“The standard of review for denial of a motion for a mistrial based on failure to provide discovery, is whether there is clear and convincing evidence that the district court’s ruling is

erroneous.” *State v. Romero*, 279 Mont. 58, 75, 926 P.2d 717, 728 (1996).⁶

23. **Municipal Courts (of Record).**

a. Generally.

A district court's review of a municipal court's orders and judgment is limited to review of the record and questions of law. *City of Missoula v. Duane*, 2015 MT 232, ¶ 10, 380 Mont. 290, ___ P.3d ___.

24. **New Trial.**

a. Generally.

We generally review a district court's decision to grant or deny a motion for new trial for an abuse of discretion. *State v. Clark*, 2005 MT 330, ¶ 18, 330 Mont. 8, 125 P.3d 1099 (*Clark I*). To the extent that a district court makes findings of fact, those findings must be made by a preponderance of the evidence and will be reviewed for clear error. *Clark I*, ¶ 39. Where a district court exercises its discretion, its decisions will be reviewed for an abuse of discretion. *Clark I*, ¶ 39. Whether a district court has the authority to grant a new trial pursuant to § 46-16-702, MCA, is a matter of statutory interpretation, and reviewed as a question of law.” *State v. Morse*, 2015 MT 51, ¶ 18, 378 Mont. 249, 343 P.3d 1196.

25. **Plea Agreements.**

a. Generally.

“A plea agreement is essentially a contract and the district court's interpretation is reviewed for correctness. *State v. McDowell*, 2011 MT 75, ¶ 14, 360 Mont. 83, 253 P.3d 812, and whether or not the State has breached the agreement is a question of law, reviewed *de novo*. *State v. Lewis*, 2012 MT 157,

¶ 13, 365 Mont. 431, 282 P.3d 679.⁷

“When a defendant alleges that a district court has erred in failing to require the state to abide by the plea agreement, the correct standard of review is abuse of discretion. *State v. Rardon*, 1999 MT 220, ¶ 11, 296 Mont. 19, 986 P.2d 424 (*Rardon I*). When, as here, the defendant does not point to any alleged error by the court, but rather claims that the prosecutor has breached the plea agreement, we employ a *de novo* standard of review.” *State v. Manywhitehorses*, 2010 MT 225, ¶ 10, 358 Mont. 46, 243 P.3d 412.

26. Post-conviction Motions.

a. Remission of Restitution.

The Court reviews a district court’s decision to grant or deny a post-trial motion for remission of restitution for an abuse of discretion. *State v. Passmore*, 2014 MT 249, ¶ 12, 376 Mont. 334, 334 P.3d 378.

27. Post-conviction Relief.

a. Generally.

We review a district court's denial of a petition for post-conviction relief to determine whether the court’s findings of fact are clearly erroneous and whether its conclusions of law are correct. *Wilkes v. State*, 2015 MT 243, ¶ 9, ___ Mont. ___, ___ P.3d ___; *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118.

A district court may dismiss a petition for postconviction relief as a matter of law, and we review a court’s conclusions of law for correctness. *Herman v. State*, 2006 MT 7, ¶ 13, 330 Mont. 267, 127 P.3d 422.

“We review discretionary rulings in PCR proceedings, including

rulings related to whether to hold an evidentiary hearing, for an abuse of discretion. *State v. Morgan*, 2003 MT 193, ¶ 7, 316 Mont. 509, 74 P.3d 1047.” *McGarvey v. State*, 2014 MT 189, ¶ 14, 375 Mont. 495, 329 P.3d 576.

b. Actual Innocence.

“the reviewing court must determine whether the petitioner has supported his innocence claim “with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.” To determine if the evidence is “reliable,” the reviewing court must analyze “whether the new evidence is trustworthy by considering it both on its own merits and ... in light of the pre-existing evidence in the record.” The court must then combine the new reliable evidence with the old trial evidence and determine whether a reasonable jury presented with this hybrid record would find the petitioner guilty. Because the determination as to “whether no reasonable juror would find a petitioner guilty beyond a reasonable doubt is a mixed question of law and fact, we review the district court's ultimate finding of actual innocence *de novo*.” *State v. Beach*, 2013 MT 130, ¶ 8, 370 Mont. 163, 302 P.3d 47 (citations omitted).

c. Amendments to Petition.

An order denying a motion to amend a postconviction petition is reviewed for an abuse of discretion. *Thurston v. State*, 2004 MT 142, ¶ 9, 321 Mont. 411, 91 P.3d 1259.⁸

d. DNA Testing.

“A district court’s decision regarding postconviction DNA testing under § 46–21–110, MCA, constitutes a mixed question of fact and law, which we review *de novo*. *Golden v. State*, 2014 MT 141, ¶ 14, 375 Mont. 222, 326 P.3d 430.

“[T]he District Court’s determinations under § 46–21–110(5)(b), (c), (e), MCA, which involve, respectively, the chain of custody of the evidence to be tested, whether identity was or should have been an issue at trial, and whether the DNA testing would establish whether the petitioner was the perpetrator of the crime of which he was convicted. We conclude that these determinations are mixed questions of fact and law, subject to *de novo* review.” *Haffey v. State*, 2010 MT 97, ¶ 9, 356 Mont. 198, 233 P.3d 315.

e. Evidentiary Hearing.

We review rulings related to whether to hold an evidentiary hearing, for an abuse of discretion. *Heath*, ¶ 13; *Wilkes*, ¶ 9.

28. **Preliminary Hearing.**

“We review a district court’s determination of what constitutes a reasonable time under § 46–10–105, MCA, for an abuse of discretion.” *State v. Haller*, 2013 MT 199, ¶ 5, 371 Mont. 86, 306 P.3d 338.

29. **Probation Revocation.**

a. Generally.

“This Court reviews a district court’s revocation of probation for an abuse of discretion.” *State v. Graves*, 2015 MT 262, ¶ 12, ___ Mont. ___, ___ P.3d ___; *State v. Lundquist*, 251 Mont. 329, 331, 825 P.2d 204, 205 (1992).

The revocation of a suspended sentence is reviewed to determine whether it was supported by a preponderance of the evidence and, if it was, whether the district court abused its discretion. *State v. Evans*, 2012 MT 115, ¶ 13, 365 Mont. 163, 280 P.3d 871, *as amended on denial of reh’g* (June 26, 2012); *State v. Goff*, 2011 MT 6, ¶ 13, 359 Mont. 107, 247 P.3d 715.

b. Due Process claims.

“We exercise plenary review to determine whether a court has violated a probationer's right of due process.” *State v. Macker*, 2014 MT 3, ¶ 8, 373 Mont. 199, 317 P.3d 150.

c. Motion to Dismiss Petition.

“The district court’s denial of a motion to dismiss a probation petition because conditions were improperly imposed presents a question of law, which this Court reviews *de novo*.” “*In re A.D.T.*, 2015 MT 178, ¶ 10, 379 Mont. 452, 351 P.3d 682.⁹

30. **Public Trial.**

“We exercise plenary review over claimed violations of a defendant’s right to be present at a critical stage in the proceedings and right to a public trial.” *State v. Northcutt*, 2015 MT 267, ¶ 5, ___ Mont. ___, ___ P.3d ___; *State v. Charlie*, 2010 MT 195, ¶ 21, 357 Mont. 355, 239 P.3d 934.

31. **Sentencing.**

a. Generally.

“When a defendant challenges a sentencing condition on appeal, we review the condition under a dual standard of review. We review the legality of the condition *de novo*. If the challenged condition is legal, we then review the condition for abuse of discretion. The district court has broad discretion.” *State v. Robertson*, 2015 MT 266, ¶ 21, ___ Mont. ___, ___ P.3d ___. (citations omitted).

“[W]e first review the sentence for legality to determine whether it falls within statutory parameters and, if so, we then examine whether the sentencing court abused its discretion in imposing the sentence.” *State v. Ashby*, 2008 MT 83, ¶¶ 8-9, 342 Mont. 187, 179 P.3d 1164.

“Although a District Court could have imposed less restrictive conditions, under our deferential standard of review of sentencing conditions, failure to do so is not an abuse of discretion.” *State v. Robertson*, 2015 MT 266, ¶ 21, ___ Mont. ___, ___ P.3d ___.

“This Court reviews *de novo* whether a district court adhered to the applicable sentencing provisions.” *State v. Gable*, 2015 MT 200, ¶ 6, 380 Mont. 101, 354 P.3d 566; *State v. Moore*, 2012 MT 95, ¶ 10, 365 Mont. 13, 277 P.3d 1212.

“This Court reviews *de novo* whether a district court violated a defendant’s constitutional rights at sentencing. *State v. Haldane*, 2013 MT 32, ¶ 17, 368 Mont. 396, 300 P.3d 657; *State v. Herman*, 2008 MT 187, ¶ 13, 343 Mont. 494, 188 P.3d 978.

“We may review a criminal sentence ‘if it is alleged that such sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing.’” *State v. MacDonald*, 2013 MT 105, ¶ 9, 370 Mont. 1, 299 P.3d 839.

b. Amendments of Sentences.

“The court’s original and amended sentences required the District Court to interpret and apply §§ 46–1–401 and 46–12–211, MCA. We review a district court’s conclusions of law and interpretation of statutes *de novo* for correctness. *State v. Petersen*, 2011 MT 22, ¶ 8, 359 Mont. 200, 247 P.3d 731.

c. Excessive Fines.

“The question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate. *State v. Forfeiture of 2003 Chevrolet Pickup*, 2009 MT 25, ¶ 5, 349 Mont. 106, 202 P.3d 782.

d. Misdemeanors.

“If . . . the defendant is sentenced to serve less than one year of actual incarceration, we review the sentence both for legality and for an abuse of discretion.” *State v. Kebble*, 2015 MT 195, ¶ 17, 380 Mont. 69, 353 P.3d 1175; *City of Bozeman v. Cantu*, 2013 MT 40, ¶ 11, 369 Mont. 81, 296 P.3d 461.

e. Oral versus Written Judgment.

“Whether there is a difference between the oral pronouncement of sentence and the written judgment is reviewed *de novo*.” *State v. Byrd*, 2015 MT 20, ¶ 12, 378 Mont. 94, 342 P.3d 9.

f. Persistent Felony Offender.

The question of whether a district court followed the proper procedure in designating a criminal defendant as a PFO is a question of statutory interpretation, which we review *de novo*. *State v. Brooks*, 2010 MT 226, ¶ 11, 358 Mont. 51, 243 P.3d 405.

g. Prior Convictions.

“Whether a prior conviction may be used for sentence enhancement is generally a question of law, for which our review is *de novo*.” *State v. Johnson*, 2015 MT 221, ¶ 10, 380 Mont. 198, ___ Mont. ___, ___ P.3d ___; *State v. Maine*, 2011 MT 90, ¶ 12, 360 Mont. 182, 255 P.3d 64.

“We will not disturb findings of fact used to determine whether a prior conviction is invalid unless such findings are clearly erroneous.” *State v. Johnson*, 2015 MT 221, ¶ 10, 380 Mont. 198, ___ P.3d ___.

h. Restitution.

“The ‘measure of restitution is a question of law, which we review for correctness.’ *State v. Aragon*, 2014 MT 89, ¶ 9, 374 Mont. 391, 321 P.3d 841; *State v. Passwater*, 2015 MT 159, ¶ 9,

379 Mont. 372, 350 P.3d 382. “Conclusions of law regarding the measure of restitution are reviewed for correctness.” *State v. Barrick*, 2015 MT 94, ¶ 11, 378 Mont. 441, 347 P.3d 241.

“The meaning of a restitution statute as applied to the facts of a case is a mixed question of law and fact that we review *de novo*.” *State v. Thorpe*, 2015 MT 14, ¶ 6, 378 Mont. 62, 342 P.3d 5.

“A district court's finding of fact as to the amount of restitution is reviewed under the clearly erroneous standard.” *State v. Passwater*, 2015 MT 159, ¶ 9, 379 Mont. 372, 350 P.3d 382; *State v. Barrick*, 2015 MT 94, ¶ 11, 378 Mont. 441, 347 P.3d 241.

“A district court’s determination of a defendant’s future ability to pay restitution is essentially a finding of fact that this Court will reverse only if it is clearly erroneous.” *State v. Holt*, 2006 MT 151, ¶ 23, 332 Mont. 426, 139 P.3d 819.

i. Time served.

“The District Court’s award of credit for time served in this case was based on a statutory interpretation. A statutory interpretation is a conclusion of law, which we review to determine whether the district court’s interpretation of the law is correct.” *State v. Price*, 2002 MT 150, ¶ 15, 310 Mont. 320, 50 P.3d 530.

j. Sentence Review.

“Because the Sentence Review Division functions as an arm of this Court, this Court has the supervisory authority to ensure that it complies with statutes and rules governing its operations as well as the Montana Constitution and the United States Constitution.” *Avery v. Batista*, 2014 MT 266, ¶ 12, 376 Mont. 404, 336 P.3d 924 (quoting *Ranta v. State*, 1998 MT 95, ¶ 12, 288 Mont. 391, 958 P.2d 670).

32. Sex Offender Registration.

As with designation of a sexual offender level, *see State v. Hill*, 2009 MT 134, ¶ 22, 350 Mont. 296, 207 P.3d 307, a district court must exercise considerable discretion in determining whether to grant or deny relief from registration. Accordingly, the standard of review is whether the district court abused its discretion in granting or denying the petition. *Langford v. State*, 2013 MT 265, ¶ 10, 372 Mont. 14, 309 P.3d 993.

“[W]e will review a sex offender level designation for an abuse of discretion.” *State v. Hill*, 2009 MT 134, ¶ 22, 350 Mont. 296, 207 P.3d 307.

33. **Statutory Interpretation.**

a. Retroactivity.

Retroactivity of a constitutional rule is an issue of law reviewed *de novo*. *Beach v. State*, 2015 MT 118, ¶ 4, 379 Mont. 74, 348 P.3d 629.

b. Retroactivity of Supreme Court Decisions.

Whether a decision is retroactive is a question of law reviewed *de novo*. *State v. Reichmand*, 2010 MT 228, ¶ 6, 358 Mont. 68, 243 P.3d 423.

34. **Sufficiency of the Evidence.**

When reviewing a criminal conviction for sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. R.S.A.*, 2015 MT 202, ¶ 18, ___ Mont. ___, ___ P.3d ___; *State v. Beaudet*, 2014 MT 152, ¶ 11, 375 Mont. 295, 326 P.3d 1101 (citation omitted).

We review a jury’s verdict to determine whether sufficient

evidence exists to support the verdict, not whether the evidence could have supported a different result. *State v. Himes*, 2015 MT 91, ¶ 20, 378 Mont. 419, 345 P.3d 297.

35. **Sufficiency of the Record on Appeal.**

“Whether a reconstructed record is of sufficient completeness to accord effective appellate review is a question which may be determined by this Court. We review this issue *de novo* as a matter of law.” *State v. Caswell*, 2013 MT 39, ¶ 13, 369 Mont. 70, 295 P.3d 1063.

36. **Suppression of illegally seized evidence.**

a. Generally.

“We review a denial of a motion to suppress to determine whether the lower court's findings of fact were clearly erroneous and whether it correctly applied the law to those findings.” *State v. Emerson*, 2015 MT 254, ¶ 12, ___ Mont. ___, ___ P.3d ___; *State v. Strom*, 2014 MT 234, ¶ 8, 376 Mont. 277, 333 P.3d 218 (citation omitted).

“This Court reviews a district court’s ruling on a motion to suppress evidence to determine whether the court’s findings of fact are clearly erroneous and whether the court’s interpretation and application of the law are correct.” *Muir v. Bilderback*, 2015 MT 180, ¶ 9, 379 Mont. 459, 353 P.3d 473; *State v. Minett*, 2014 MT 225, ¶ 7, 376 Mont. 260, 332 P.3d 235.¹⁰

b. Community Caretaker Doctrine.

“[W]e review a district court’s conclusions of law with respect to the application of the community caretaker doctrine to determine if they are correct.” *State v. Kenfield*, 2009 MT 242, ¶ 15, 351 Mont. 409, 213 P.3d 461; *State v. Wheeler*, 2006 MT 38, ¶ 12, 331 Mont. 179, 134 P.3d 38.

c. Confessions.

“The question of whether a defendant has given a confession voluntarily is a factual determination within the province of the district court. The district court has the opportunity to observe the demeanor of witnesses and is in the best position to determine their credibility. We will not, on appeal, reweigh the evidence or substitute our evaluation of the evidence for that of the district court.” *State v. Old-Horn*, 2014 MT 161, ¶ 14, 375 Mont. 310, 328 P.3d 638 (citations omitted).

“Whether or not a defendant’s privilege against self-incrimination is triggered is a conclusion of law. Our standard of review of a district court’s conclusions of law is plenary. We determine whether the district court’s conclusions are correct.” *State v. Hill*, 2009 MT 134, ¶ 21, 350 Mont. 296, 207 P.3d 307; *State v. Fuller*, 276 Mont. 155, 159, 915 P.2d 809, 811 (1996).¹¹

d. Exigent Circumstances.

“We also review *de novo* the issue of whether exigent circumstances exist. *Cassady v. Yellowstone Cnty. Montana Sheriff Dep’t*, 2006 MT 217, ¶ 17, 333 Mont. 371, 377, 143 P.3d 148; Whether the factual circumstances determined by the District Court constitute “exigent circumstances” is a conclusion of law that we will review for correctness. *State v. Saxton*, 2003 MT 105, ¶ 19, 315 Mont. 315, 68 P.3d 721.

e. Hearing.

“[W]e review a district court’ denial of an evidentiary hearing on the veracity of statements in the search warrant application for clear abuse of discretion.” *State v. Minez*, 2004 MT 115, ¶ 17, 321 Mont. 148, 89 P.3d 966.

f. Particularized Suspicion.

“A court’s determination that particularized suspicion exists is a question of fact reviewed for clear error.” *State v. Dupree*, 2015 MT 103, ¶ 8, 378 Mont. 499, 346 P.3d 1114; *State v. Gill*, 2012 MT 36, ¶ 10, 364 Mont. 182, 272 P.3d 60.¹²

“We review a district court’s factual findings of particularized suspicion for clear error and its application of those facts to the law for correctness.” *City of Missoula v. Sharp*, 2015 MT 289, ¶ 5, ___ Mont. ___, ___ P.3d ___.

“This Court has repeatedly stated that whether particularized or reasonable suspicion justifies an investigative stop is a question of fact that the district court determines from the totality of the circumstances confronting the officer at the time of the stop. While largely a question of fact, the evaluation may encompass legal conclusions, such as whether or not a particular act or omission violates the law. Also, the legal standard of objective reasonableness is applied to determine whether the inferences drawn from the objective facts give rise to a particularized suspicion of wrong-doing. We defer to the district courts on matters of fact-finding, and we will not disturb a finding of the trial court unless the determination is clearly erroneous. * * * When legal conclusions arise in the mix of the totality of the circumstances and when the court applies the law to its findings, our review of those matters of law is plenary. We hold that our bifurcated standard of review affords appropriate deference to the trial court’s fact-finding role and responsibility, while providing this Court with the opportunity to review legal conclusions and the application of legal standards de novo.” *State v. Kaufman*, 2002 MT 294, ¶¶ 11-12, 313 Mont. 1, 59 P.3d 1166 (citations omitted).

g. Search Warrants.

“When reviewing a district court’s denial of a motion to suppress based on its refusal to excise information from a warrant application, we review findings of fact for clear error and conclusions of law for correctness.” *State v. Urziceanu*, 2015 MT

58, ¶ 9, 378 Mont. 313, 344 P.3d 399.

“[W]hen information must be excised from the application for the search warrant, we review the warrant *de novo* for probable cause. *State v. Tackitt*, 2003 MT 81, ¶ 11, 315 Mont. 59, 67 P.3d 295.

“When an application for a warrant contains only legally obtained evidence, we review a magistrate’s issuance of a warrant to determine whether the application provided a substantial evidentiary basis for a determination of probable cause. *State v. Kuneff*, 1998 MT 287, ¶ 18, 291 Mont. 474, 970 P.2d 556. When an application for a warrant contains illegally obtained evidence, we conduct *de novo* review to determine whether probable cause existed to issue the warrant.” *State v. Urziceanu*, 2015 MT 58, ¶ 10, 378 Mont. 313, 344 P.3d 399.

“In reviewing a search warrant for probable cause, we ensure that the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant. *Hauge v. Dist. Ct.*, 2001 MT 255, ¶ 21, 307 Mont. 195, ¶ 21, 36 P.3d 947, ¶ 21. We pay great deference to a court’s determination that probable cause existed, and draw every reasonable inference possible to support that determination.” *State v. \$129,970.00 One Hundred Twenty Nine Thousand Nine Hundred Seventy Dollars in U.S. Currency*, 2007 MT 148, ¶ 23, 337 Mont. 475, 161 P.3d 816.

“We must look solely to the information given to the impartial magistrate and to the four corners of the search warrant application. *State v. Crowder* (1991), 248 Mont. 169, 173, 810 P.2d 299, 302. In so doing, we must refuse to review a search warrant application sentence by sentence; rather, we must examine the entire affidavit to determine whether the issuing magistrate had a substantial basis to conclude that probable cause existed. *State v. Gray*, 2001 MT 250, ¶ 11, 307 Mont. 124, 38 P.3d 775.

37. **Trial Administration and Errors.**

a. Adding Witnesses.

Decisions to endorse witnesses are reviewed for an abuse of discretion. *State v. Giddings*, 2009 MT 61, ¶ 42, 349 Mont. 347, 208 P.3d 363.

b. Closing Argument.

“We consider closing argument statements in the context of the entire argument and review a district court’s rulings on objections to closing argument content for abuse of discretion.” *State v. Chafee*, 2014 MT 226, ¶ 12, 376 Mont. 267, 332 P.3d 240.

c. Recross and Re-re-direct.

“We review the District Court’s action in allowing the prosecution to re-examine its witness following its previous direct, defense’s cross, the States re-direct and the defense’s re-cross for abuse of discretion.” *State v. Long*, 2005 MT 130, ¶ 12, 327 Mont. 238, 113 P.3d 290.

d. Restraints.

“We review a district court’s decision to restrain a criminal defendant during trial for an abuse of discretion.” *State v. Hartsoe*, 2011 MT 188, ¶ 19, 361 Mont. 305, 258 P.3d 428.

e. Subpoenas

“[W]e have reviewed a district court’s quashing of a subpoena as trial error, employing harmless error analysis.” *State v. Kolb*, 2009 MT 9, ¶ 10, 349 Mont. 10, 200 P.3d 504; *but compare Bryden v. Lakeside Ventures, LLC*, 2009 MT 320, ¶ 17, 352 Mont. 452, 218 P.3d 61 (issue of law).

38. **Venue.**

“We review a district court’s legal conclusion regarding venue under a de novo standard of review.” *State v. Patterson*, 2012 MT 282, ¶ 22, 367 Mont. 186, 291 P.3d 556.

39. **Youth Court.** *See* Civil.

1. The question of fitness to proceed to trial should be a mixed question of law and fact.

2. It is probably better to describe speedy trial review as plenary. Since the review involves several of record questions that are readily reviewed, clear error will appear if it exists. For example, the reviewing court will determine when the speedy trial clock started. This is a question of law. Second, it will determine who is responsible for delay. This is a question of fact but one that requires no deference to the trial court. Third, it will determine if the defendant asserted the right sufficiently. This is also a question of fact based on the record. Finally, the calculation of the length of delay is straightforward and requires no deference. The last piece of the speedy trial analysis is the question of prejudice. The facts may be disputed and subject to clear error review if there was a hearing on prejudice. If undisputed, what deference should be given to a trial court's determination of insufficient prejudice? This, too, would seem a question of law?

3. Although this was the standard articulated by the Court, the Court’s reviewed this case for abuse of discretion. *Ridge*, ¶¶ 18-20.

4. *Stuitt*’s is an anomalous statement. It imports the “manifest abuse” of discretion standard from *State v. Van Dyken*, 242 Mont. 415, 435, 791 P.2d 1350, 1362-63 (1990), *cert. denied*, 498 U.S. 920, which articulates the standard for admission of rebuttal expert testimony. The standard now is abuse of discretion. More significant, the rape shield statute is statutory and it would seem that the review would be *de novo* because the the district court interprets and applies the statute.

5. *But see State v. Knox*, 2001 MT 232, ¶ 11, 307 Mont. 1, 36 P.3d 383. (“This Court reviews denial of a motion to withdraw a guilty plea for abuse of discretion. *Bowley*, 282 Mont. at 304, 938 P.2d at 595. We consider three

factors in this review: 1. the adequacy of the court's interrogation at the time the plea was entered regarding the defendant's understanding of the consequences of the plea; 2. the promptness with which the defendant attempts to withdraw the plea; 3. the fact that the plea was the result of a plea bargain in which the guilty plea was given in exchange for dismissal of another charge.”)

6. This holding has likely been superceded.

7. *But see Maldonado v. State*, 2008 MT 253, ¶ 10, 345 Mont. 69, 190 P.3d 1043 (stating “we review a district court’s decisions on claims that the State breached a plea agreement for an abuse of discretion”) In *Maldonado* the State agreed not to participate in the defendant’s parole process as part of its plea agreeent. It did but then withdrew its letter and the Board member who spoke to the deputy county attorney recused herself.

8. This has likely been overruled by Mont. Code Ann. § 46-21-105(1)(a).

9. NOTE: This seems a poor statement of the standard, because the *de novo* standard is in fact applied to the question of the legality of the original conditions. *A.D.T.* cites *Betterman*, which was a motion to dismiss on speedy trial grounds, applied to a 14-month delay between conviction and sentencing.

10. NOTE: Under this standard the application of the law to the facts is reviewed *de novo*. Earlier cases seem to subsume the *de novo* standard into abuse of discretion. Think of it this way, a court may make an error of law but not rely on the erroneous interpretation in its decision. Relying upon the error, however, is an abuse of discretion. Applying law to facts is synonymous with a mixed question of law and fact, which is reviewed *de novo*.

11. The determination of whether the right against self-incrimination is “triggered” may also involve issues of fact, such as the defendant’s freedom to move. Those would be reviewed for clear error.

12. This is an erroneous statement. *Dupree* relies on *Gill*, which cites *Moore*, which cites *Clawson*, which cites *Farabee*, which cites *State v. Gilder*, 1999 MT 207, ¶ 7, 295 Mont. 483, 985 P.2d 147. But *Gilder* says this, “We review a district court's denial of a motion to suppress for clearly

erroneous findings of fact and to determine whether those findings were correctly applied as a matter of law.” This was the holding in *Gilder*: “the information was insufficient to support the District Court’s conclusion that Deputy Estill had a particularized suspicion to justify an investigatory stop of Gilder’s vehicle.” ¶ 16. Because determinations of reasonable suspicion are objective determinations, the correct standard is *de novo* because it requires application of law to the facts. The facts in *Gilder* were undisputed and the findings of fact were not in error. The district court erred, however, when it concluded that they were sufficient to support reasonable suspicion. In *Farabee*, the driver’s headlight was broken. Even though it was daylight, the statute required equipment. So there was no issue of fact. The determination that the equipment statute applied was a conclusion of law. In *Clawson*, the officer received a citizen complaint and observed Clawson stopped with his door open - a traffic violation. The Court concluded, “Under the totality of the circumstances of this case, we find that the stop was justified and that the District Court’s findings were not clearly erroneous.” *State v. Clawson*, 2009 MT 228, ¶ 14, 351 Mont. 354, 359, 212 P.3d 1056, 1060. Notably *Clawson* relies on *Ellison*, but *Ellison* states, “We review a district court’s denial of a motion to suppress to determine whether the court’s findings of fact are clearly erroneous, and whether those findings were correctly applied as a matter of law.” *State v. Ellison*, 2000 MT 288, ¶ 12, 302 Mont. 228, 14 P.3d 456. *Gill* was also a citizen report and officer observations.