

**Selected Montana Statutes for  
Review by the Commission on Sentencing  
August 2016**

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1 **46-18-201. Sentences that may be imposed.**

2 (1) (a) Whenever a person has been found guilty of an offense upon a verdict of  
3 guilty or a plea of guilty or nolo contendere, a sentencing judge may defer  
4 imposition of sentence, except as otherwise specifically provided by statute, for a  
5 period:

6 (i) not exceeding 1 year for a misdemeanor or for a period not exceeding 3  
7 years for a felony; or

8 (ii) not exceeding 2 years for a misdemeanor or for a period not exceeding 6  
9 years for a felony if a financial obligation is imposed as a condition of sentence for  
10 either the misdemeanor or the felony, regardless of whether any other conditions  
11 are imposed.

12 (b) Except as provided in [46-18-222](#) [below], imposition of sentence in a felony  
13 case may not be deferred in the case of an offender who has been convicted of a  
14 felony on a prior occasion, whether or not the sentence was imposed, imposition of  
15 the sentence was deferred, or execution of the sentence was suspended.

16 (2) Whenever a person has been found guilty of an offense upon a verdict of  
17 guilty or a plea of guilty or nolo contendere, a sentencing judge may suspend  
18 execution of sentence, except as otherwise specifically provided by statute, for a  
19 period up to the maximum sentence allowed or for a period of 6 months, whichever  
20 is greater, for each particular offense.

21 (3) (a) Whenever a person has been found guilty of an offense upon a verdict of  
22 guilty or a plea of guilty or nolo contendere, a sentencing judge may impose a  
23 sentence that may include:

24 (i) a fine as provided by law for the offense;

25 (ii) payment of costs, as provided in [46-18-232](#), or payment of costs of assigned  
26 counsel as provided in [46-8-113](#);

27 (iii) a term of incarceration, as provided in Title 45 for the offense, at a county  
28 detention center or at a state prison to be designated by the department of  
29 corrections;

30 (iv) commitment of:

31 (A) an offender not referred to in subsection (3)(a)(iv)(B) to the department of  
32 corrections, with a recommendation for placement in an appropriate correctional  
33 facility or program; however, all but the first 5 years of the commitment to the

1 department of corrections must be suspended, except as provided in [45-5-503\(4\)](#),  
2 [45-5-507\(5\)](#), [45-5-601\(3\)](#), [45-5-602\(3\)](#), [45-5-603\(2\)\(b\)](#), and [45-5-625\(4\)](#); or

3 (B) a youth transferred to district court under [41-5-206](#) and found guilty in the  
4 district court of an offense enumerated in [41-5-206](#) to the department of  
5 corrections for a period determined by the court for placement in an appropriate  
6 correctional facility or program;

7 (v) with the approval of the facility or program, placement of the offender in a  
8 community corrections facility or program as provided in [53-30-321](#);

9 (vi) with the approval of the prerelease center or prerelease program and  
10 confirmation by the department of corrections that space is available, placement of  
11 the offender in a prerelease center or prerelease program for a period not to exceed  
12 1 year;

13 (vii) chemical treatment of sexual offenders, as provided in [45-5-512](#), if  
14 applicable, that is paid for by and for a period of time determined by the  
15 department of corrections, but not exceeding the period of state supervision of the  
16 person; or

17 (viii) any combination of subsections (2) and (3)(a)(i) through (3)(a)(vii).

18 (b) A court may permit a part or all of a fine to be satisfied by a donation of  
19 food to a food bank program.

20 (4) When deferring imposition of sentence or suspending all or a portion of  
21 execution of sentence, the sentencing judge may impose upon the offender any  
22 reasonable restrictions or conditions during the period of the deferred imposition or  
23 suspension of sentence. Reasonable restrictions or conditions imposed under  
24 subsection (1)(a) or (2) may include but are not limited to:

25 (a) limited release during employment hours as provided in [46-18-701](#);

26 (b) incarceration in a detention center not exceeding 180 days;

27 (c) conditions for probation;

28 (d) payment of the costs of confinement;

29 (e) payment of a fine as provided in [46-18-231](#);

30 (f) payment of costs as provided in [46-18-232](#) and [46-18-233](#);

31 (g) payment of costs of assigned counsel as provided in [46-8-113](#);

32 (h) with the approval of the facility or program, an order that the offender be  
33 placed in a community corrections facility or program as provided in [53-30-321](#);

34 (i) with the approval of the prerelease center or prerelease program and  
35 confirmation by the department of corrections that space is available, an order that

Comment [CR1]: DOC Commit

Comment [CR2]: SIWOC victim <12 /  
offender >18

Comment [CR3]: Incest victim <12 /  
offender >18

Comment [CR4]: Patronizing  
prostitute victim <18 / offender  
>18

Comment [CR5]: Promoting  
prostitution victim <18 / offender  
>18

Comment [CR6]: Agg promoting  
prostitution victim <18 / offender  
>18

Comment [CR7]: Sexual abuse of  
children victim <12

Comment [CR8]: Direct referral to  
CCF/PRC.

Comment [CR9]: Mix and match.

Comment [CR10]: The only difference  
between deferred and suspended is  
length of term (and when early  
termination is possible).

Comment [CR11]: High maximum for a  
deferred sentence in particular.

1 the offender be placed in a prerelease center or prerelease program for a period not  
2 to exceed 1 year;

3 (j) community service;

4 (k) home arrest as provided in Title 46, chapter 18, part 10;

5 (l) payment of expenses for use of a judge pro tempore or special master as  
6 provided in [3-5-116](#);

7 (m) with the approval of the department of corrections and with a signed  
8 statement from an offender that the offender's participation in the boot camp  
9 incarceration program is voluntary, an order that the offender complete the boot  
10 camp incarceration program established pursuant to [53-30-403](#);

11 (n) participation in a day reporting program provided for in [53-1-203](#);

12 (o) participation in the sobriety program provided for in Title 44, chapter 4, part  
13 12, for a violation of [61-8-465](#), a second or subsequent violation of [61-8-401](#), [61-8-](#)  
14 [406](#), or [61-8-411](#), or a second or subsequent violation of any other statute that  
15 imposes a jail penalty of 6 months or more if the abuse of alcohol or dangerous  
16 drugs was a contributing factor in the commission of the crime or for a violation of  
17 any statute involving domestic abuse or the abuse or neglect of a minor if the abuse  
18 of alcohol or dangerous drugs was a contributing factor in the commission of the  
19 crime regardless of whether the charge or conviction was for a first, second, or  
20 subsequent violation of the statute;

21 (p) participation in a restorative justice program approved by court order and  
22 payment of a participation fee of up to \$150 for program expenses if the program  
23 agrees to accept the offender;

24 (q) any other reasonable restrictions or conditions considered necessary for  
25 rehabilitation or for the protection of the victim or society; or

26 (r) any combination of the restrictions or conditions listed in subsections (4)(a)  
27 through (4)(q).

28 (5) In addition to any other penalties imposed, if a person has been found guilty  
29 of an offense upon a verdict of guilty or a plea of guilty or nolo contendere and the  
30 sentencing judge finds that a victim, as defined in [46-18-243](#), has sustained a  
31 pecuniary loss, the sentencing judge shall, as part of the sentence, require payment  
32 of full restitution to the victim, as provided in [46-18-241](#) through [46-18-249](#),  
33 whether or not any part of the sentence is deferred or suspended.

34 (6) In addition to any of the penalties, restrictions, or conditions imposed  
35 pursuant to subsections (1) through (5), the sentencing judge may include the

Comment [CR12]: The third way that sentencing, or even deferred sentencing, can lead to CCF/PRC

1 suspension of the license or driving privilege of the person to be imposed upon the  
2 failure to comply with any penalty, restriction, or condition of the sentence. A  
3 suspension of the license or driving privilege of the person must be accomplished  
4 as provided in [61-5-214](#) through [61-5-217](#).

5 (7) In imposing a sentence on an offender convicted of a sexual or violent  
6 offense, as defined in [46-23-502](#), the sentencing judge may not waive the  
7 registration requirement provided in Title 46, chapter 23, part 5.

8 (8) If a felony sentence includes probation, the department of corrections shall  
9 supervise the offender unless the court specifies otherwise.

10 (9) As used in this section, "dangerous drug" has the meaning provided in [50-](#)  
11 [32-101](#).

#### 12 **46-18-202. Additional restrictions on sentence.**

13 (1) The sentencing judge may also impose any of the following restrictions or  
14 conditions on the sentence provided for in [46-18-201](#) that the judge considers  
15 necessary to obtain the objectives of rehabilitation and the protection of the victim  
16 and society:

17 (a) prohibition of the offender's holding public office;

18 (b) prohibition of the offender's owning or carrying a dangerous weapon;

19 (c) restrictions on the offender's freedom of association;

20 (d) restrictions on the offender's freedom of movement;

21 (e) a requirement that the defendant provide a biological sample for DNA  
22 testing for purposes of Title 44, chapter 6, part 1, if an agreement to do so is part of  
23 the plea bargain;

24 (f) a requirement that the offender surrender any registry identification card  
25 issued under [50-46-303](#);

26 (g) any other limitation reasonably related to the objectives of rehabilitation and  
27 the protection of the victim and society.

28 (2) Whenever the sentencing judge imposes a sentence of imprisonment in a  
29 state prison for a term exceeding 1 year, the sentencing judge may also impose the  
30 restriction that the offender is ineligible for parole and participation in the  
31 supervised release program while serving that term. If the restriction is to be  
32 imposed, the sentencing judge shall state the reasons for it in writing. If the  
33 sentencing judge finds that the restriction is necessary for the protection of society,

Comment [CR13]: If imposed by the court, automatic license suspension for any violation determined by the court and provided to DMV.

1 the judge shall impose the restriction as part of the sentence and the judgment must  
2 contain a statement of the reasons for the restriction.

Comment [CR14]: This judicial power is extraordinary.

3 (3) If a sentencing judge requires an offender to surrender a registry  
4 identification card issued under [50-46-303](#), the court shall return the card to the  
5 department of public health and human services and provide the department with  
6 information on the offender's sentence. The department shall revoke the card for  
7 the duration of the sentence and shall return the card if the offender successfully  
8 completes the terms of the sentence before the expiration date listed on the card.

9 **46-18-205. Mandatory minimum sentences -- restrictions on deferral or**  
10 **suspension.**

11 (1) If the victim was less than 16 years of age, the imposition or execution of the  
12 first 30 days of a sentence of imprisonment imposed under the following sections  
13 may not be deferred or suspended and the provisions of [46-18-222](#) [below] do not  
14 apply to the first 30 days of the imprisonment:

- 15 (a) [45-5-503](#), sexual intercourse without consent;
- 16 (b) [45-5-504](#), indecent exposure;
- 17 (c) [45-5-507](#), incest; or
- 18 (d) [45-8-218](#), deviate sexual conduct.

19 (2) Except as provided in [45-9-202](#) [below] and [46-18-222](#) [below], the  
20 imposition or execution of the first 2 years of a sentence of imprisonment imposed  
21 under the following sections may not be deferred or suspended:

- 22 (a) [45-5-103](#)(4), mitigated deliberate homicide;
  - 23 (b) [45-5-202](#), aggravated assault;
  - 24 (c) [45-5-302](#)(2), kidnapping;
  - 25 (d) [45-5-303](#)(2), aggravated kidnapping;
  - 26 (e) [45-5-401](#)(2), robbery;
  - 27 (f) [45-5-502](#)(3), sexual assault;
  - 28 (g) [45-5-503](#)(2) and (3), sexual intercourse without consent;
  - 29 (h) [45-5-603](#), aggravated promotion of prostitution;
  - 30 (i) [45-9-101](#)(2), (3), and (5)(d), criminal distribution of dangerous drugs;
  - 31 (j) [45-9-102](#)(4), criminal possession of dangerous drugs; and
  - 32 (k) [45-9-103](#)(2), criminal possession with intent to distribute dangerous drugs.
- 33 (3) Except as provided in [46-18-222](#), the imposition or execution of the first 10

1 years of a sentence of imprisonment imposed under [45-5-102](#), deliberate homicide,  
2 may not be deferred or suspended.

3 (4) The provisions of this section do not apply to sentences imposed pursuant to  
4 [45-5-310](#), [45-5-311](#), [45-5-503](#)(4), [45-5-507](#)(5), [45-5-601](#)(3), [45-5-602](#)(3), [45-5-](#)  
5 [603](#)(2)(b), or [45-5-625](#)(4).

6 **46-18-221. Additional sentence for offenses committed with dangerous**  
7 **weapon.**

8 (1) If the provisions of [46-1-401](#) have been complied with, a person who has been  
9 found guilty of any offense, other than an offense in which the use of a weapon is  
10 an element of the offense, and who, while engaged in the commission of the  
11 offense, knowingly displayed, brandished, or otherwise used a firearm, destructive  
12 device, as defined in [45-8-332](#)(1), or other dangerous weapon shall, in addition to  
13 the punishment provided for the commission of the underlying offense, be  
14 sentenced to a term of imprisonment in the state prison of not less than 2 years or  
15 more than 10 years, except as provided in [46-18-222](#).

16 (2) If the provisions of [46-1-401](#) have been complied with, a person convicted  
17 of a second or subsequent offense under this section shall, in addition to the  
18 punishment provided for the commission of the present offense, be sentenced to a  
19 term of imprisonment in the state prison of not less than 4 years or more than 20  
20 years, except as provided in [46-18-222](#). For the purposes of this subsection, the  
21 following persons must be considered to have been convicted of a previous offense  
22 under this section:

23 (a) a person who has previously been convicted of an offense, committed on a  
24 different occasion than the present offense, under 18 U.S.C. 924(c); and

25 (b) a person who has previously been convicted of an offense in this or another  
26 state, committed on a different occasion than the present offense, during the  
27 commission of which the person knowingly displayed, brandished, or otherwise  
28 used a firearm, destructive device, as defined in [45-8-332](#)(1), or other dangerous  
29 weapon.

30 (3) The imposition or execution of the minimum sentences prescribed by this  
31 section may not be deferred or suspended, except as provided in [46-18-222](#).

32 (4) An additional sentence prescribed by this section must run consecutively to  
33 the sentence provided for the offense.

Comment [CR15]: Procedural requirements for penalty enhancement.

1 **46-18-222. Exceptions to mandatory minimum sentences, restrictions on**  
2 **deferred imposition and suspended execution of sentence, and restrictions on**  
3 **parole eligibility.**

4 Mandatory minimum sentences prescribed by the laws of this state, mandatory life  
5 sentences prescribed by [46-18-219](#), the restrictions on deferred imposition and  
6 suspended execution of sentence prescribed by [46-18-201](#)(1)(b), [46-18-205](#), [46-18-](#)  
7 [221](#)(3), [46-18-224](#), and [46-18-502](#)(3), and restrictions on parole eligibility  
8 prescribed by [45-5-503](#)(4), [45-5-507](#)(5), [45-5-601](#)(3), [45-5-602](#)(3), [45-5-603](#)(2)(b),  
9 and [45-5-625](#)(4) do not apply if:

10 (1) the offender was less than 18 years of age at the time of the commission of  
11 the offense for which the offender is to be sentenced;

12 (2) the offender's mental capacity, at the time of the commission of the offense  
13 for which the offender is to be sentenced, was significantly impaired, although not  
14 so impaired as to constitute a defense to the prosecution. However, a voluntarily  
15 induced intoxicated or drugged condition may not be considered an impairment for  
16 the purposes of this subsection.

17 (3) the offender, at the time of the commission of the offense for which the  
18 offender is to be sentenced, was acting under unusual and substantial duress,  
19 although not such duress as would constitute a defense to the prosecution;

20 (4) the offender was an accomplice, the conduct constituting the offense was  
21 principally the conduct of another, and the offender's participation was relatively  
22 minor;

23 (5) in a case in which the threat of bodily injury or actual infliction of bodily  
24 injury is an actual element of the crime, no serious bodily injury was inflicted on  
25 the victim unless a weapon was used in the commission of the offense; or

26 (6) the offense was committed under [45-5-310](#), [45-5-311](#), [45-5-502](#)(3), [45-5-](#)  
27 [503](#)(4), [45-5-507](#)(5), [45-5-601](#)(3), [45-5-602](#)(3), [45-5-603](#)(2)(b), or [45-5-625](#)(4) and  
28 the judge determines, based on the findings contained in a sexual offender  
29 evaluation report prepared by a qualified sexual offender evaluator pursuant to the  
30 provisions of [46-23-509](#), that treatment of the offender while incarcerated, while in  
31 a residential treatment facility, or while in a local community affords a better  
32 opportunity for rehabilitation of the offender and for the ultimate protection of the  
33 victim and society, in which case the judge shall include in its judgment a  
34 statement of the reasons for its determination.



1 **46-18-225. Sentencing of nonviolent felony offenders -- criteria -- alternatives**  
2 **to be considered -- court to state reasons for imprisonment.**

3 (1) In sentencing a nonviolent felony offender, the sentencing judge shall first  
4 consider alternatives to imprisonment of the offender in a state prison, including  
5 placement of the offender in a community corrections facility or program, a  
6 prerelease center, a prerelease program, or a day reporting program provided for in  
7 [53-1-203](#). In considering alternatives to imprisonment, the sentencing judge shall  
8 examine the sentencing criteria contained in subsection (2).

9 (2) Prior to sentencing a nonviolent felony offender to whom [46-18-219](#) does  
10 not apply to a term of imprisonment in a state prison, the sentencing judge shall  
11 take into account whether:

12 (a) the interests of justice and the needs of public safety truly require the level  
13 of security provided by imprisonment of the offender in a state prison;

14 (b) the needs of the offender can be better served in the community or in a  
15 facility or program other than a state prison;

16 (c) there are substantial grounds tending to excuse or justify the offense, though  
17 failing to establish a defense;

18 (d) the offender acted under strong provocation;

19 (e) the offender has made restitution or will make restitution to the victim of the  
20 offender's criminal conduct;

21 (f) the offender has no prior history of conviction for a criminal act or, if the  
22 offender has a prior history of conviction for a criminal act, the offender has led a  
23 law-abiding life for a substantial period of time before the commission of the  
24 present crime;

25 (g) the offender's criminal conduct was the result of circumstances that are  
26 unlikely to recur;

27 (h) the character and attitude of the offender indicate that the offender is likely  
28 to commit another crime;

29 (i) the offender is likely to respond quickly to correctional or rehabilitative  
30 treatment; and

31 (j) imprisonment of the offender would create an excessive hardship on the  
32 offender or the offender's family.

33 (3) If the judge sentences the offender to a state prison, the judge shall state the  
34 reasons why the judge did not select an alternative to imprisonment, based on the  
35 criteria contained in subsection (2).

**Comment [CR16]:** May want to discuss whether this section is effective at guiding judicial discretion.

Although a district court must examine the criteria in considering an alternative to imprisonment, the statute neither provides a formula by which a district court can determine whether an alternative to imprisonment is appropriate, nor does it indicate that greater consideration should be given to any one of the statutory criteria than to the others. [State v. Alden, 282 Mont. 45, 934 P.2d 210, 54 Mont. St. Rep. 234, 1997 Mont. LEXIS 44 \(Mont. 1997\).](#)

1 **46-18-401. Consecutive sentences.**

2 (1) Unless the judge otherwise orders:

3 (a) whenever a person serving a term of commitment imposed by a court in this  
4 state is committed for another offense, the shorter term or shorter remaining term  
5 may not be merged in the other term; and

6 (b) whenever a person under suspended sentence or on probation for an offense  
7 committed in this state is sentenced for another offense, the period still to be served  
8 on suspended sentence or probation may not be merged in any new sentence of  
9 commitment or probation.

10 (2) The court, whether or not it merges the sentences, shall immediately furnish  
11 each of the other courts and the penal institutions in which the defendant is  
12 confined under sentence with authenticated copies of its sentence, which must cite  
13 any sentence that is merged.

14 (3) If an unexpired sentence is merged pursuant to subsection (1), the court that  
15 imposed the sentence shall modify it in accordance with the effect of the merger.

16 (4) Separate sentences for two or more offenses must run consecutively unless  
17 the court otherwise orders.

Comment [CR17]: Default to consecutive sentencing.

18 **46-18-501. Definition of persistent felony offender.**

19 A "persistent felony offender" is an offender who has previously been convicted of  
20 a felony and who is presently being sentenced for a second felony committed on a  
21 different occasion than the first. An offender is considered to have been previously  
22 convicted of a felony if:

23 (1) the previous felony conviction was for an offense committed in this state or  
24 any other jurisdiction for which a sentence to a term of imprisonment in excess of  
25 1 year could have been imposed;

26 (2) less than 5 years have elapsed between the commission of the present  
27 offense and either:

28 (a) the previous felony conviction; or

29 (b) the offender's release on parole or otherwise from prison or other  
30 commitment imposed as a result of the previous felony conviction; and

31 (3) the offender has not been pardoned on the ground of innocence and the  
32 conviction has not been set aside in a postconviction hearing.

Comment [CR18]: "That intent, as demonstrated by the other event which initiates the five year period in this subsection; release from prison, is to have the time start to run when the habitual offender is once again free, if he or she chooses, to victimize society."  
State v. Smith, 755 P.2d 569 (1988)

1 **46-18-502. Sentencing of persistent felony offender.**

2 (1) Except as provided in [46-18-219](#) and subsection (2) of this section, a persistent  
3 felony offender shall be imprisoned in the state prison for a term of not less than 5  
4 years or more than 100 years or shall be fined an amount not to exceed \$50,000, or  
5 both, if the offender was 21 years of age or older at the time of the commission of  
6 the present offense.

7 (2) Except as provided in [46-18-219](#), an offender shall be imprisoned in a state  
8 prison for a term of not less than 10 years or more than 100 years or shall be fined  
9 an amount not to exceed \$50,000, or both, if:

10 (a) the offender was a persistent felony offender, as defined in [46-18-501](#), at the  
11 time of the offender's previous felony conviction;

12 (b) less than 5 years have elapsed between the commission of the present  
13 offense and:

14 (i) the previous felony conviction; or

15 (ii) the offender's release on parole, from prison, or from other commitment  
16 imposed as a result of the previous felony conviction; and

17 (c) the offender was 21 years of age or older at the time of the commission of  
18 the present offense.

19 (3) Except as provided in [46-18-222](#), the imposition or execution of the first 5  
20 years of a sentence imposed under subsection (1) of this section or the first 10  
21 years of a sentence imposed under subsection (2) of this section may not be  
22 deferred or suspended.

23 (4) Any sentence imposed under subsection (2) must run consecutively to any  
24 other sentence imposed.

25 **45-5-206. Partner or family member assault -- penalty.**

26 (1) A person commits the offense of partner or family member assault if the  
27 person:

28 (a) purposely or knowingly causes bodily injury to a partner or family member;

29 (b) negligently causes bodily injury to a partner or family member with a  
30 weapon; or

31 (c) purposely or knowingly causes reasonable apprehension of bodily injury in a  
32 partner or family member.

1 (2) For the purposes of Title 40, chapter 15, [45-5-231](#) through [45-5-234](#), [46-6-](#)  
2 [311](#), and this section, the following definitions apply:

3 (a) "Family member" means mothers, fathers, children, brothers, sisters, and  
4 other past or present family members of a household. These relationships include  
5 relationships created by adoption and remarriage, including stepchildren,  
6 stepparents, in-laws, and adoptive children and parents. These relationships  
7 continue regardless of the ages of the parties and whether the parties reside in the  
8 same household.

9 (b) "Partners" means spouses, former spouses, persons who have a child in  
10 common, and persons who have been or are currently in a dating or ongoing  
11 intimate relationship.

12 (3) (a) (i) An offender convicted of partner or family member assault shall be  
13 fined an amount not less than \$100 or more than \$1,000 and be imprisoned in the  
14 county jail for a term not to exceed 1 year or not less than 24 hours for a first  
15 offense.

16 (ii) An offender convicted of a second offense under this section shall be fined  
17 not less than \$300 or more than \$1,000 and be imprisoned in the county jail not  
18 less than 72 hours or more than 1 year.

19 (iii) Upon a first or second conviction, the offender may be ordered into  
20 misdemeanor probation as provided in [46-23-1005](#).

21 (iv) On a third or subsequent conviction for partner or family member assault,  
22 the offender shall be fined not less than \$500 and not more than \$50,000 and be  
23 imprisoned for a term not less than 30 days and not more than 5 years. If the term  
24 of imprisonment does not exceed 1 year, the person shall be imprisoned in the  
25 county jail. If the term of imprisonment exceeds 1 year, the person shall be  
26 imprisoned in the state prison.

27 (v) If the offense was committed within the vision or hearing of a minor, the  
28 judge shall consider the minor's presence as a factor at the time of sentencing.

29 (b) For the purpose of determining the number of convictions under this section,  
30 a conviction means:

31 (i) a conviction, as defined in [45-2-101](#), under this section;

32 (ii) a conviction for domestic abuse under this section;

33 (iii) a conviction for a violation of a statute similar to this section in another  
34 state;

1 (iv) if the offender was a partner or family member of the victim, a conviction  
2 for aggravated assault under [45-5-202](#) or assault with a weapon under [45-5-213](#);

3 (v) a conviction in another state for an offense related to domestic violence  
4 between partners or family members, as those terms are defined in this section,  
5 regardless of what the offense is named or whether it is misdemeanor or felony, if  
6 the offense involves conduct similar to conduct that is prohibited under [45-5-202](#),  
7 [45-5-213](#), or this section; or

8 (vi) a forfeiture of bail or collateral deposited to secure the defendant's  
9 appearance in court in this state or in another state for a violation of a statute  
10 similar to this section, which forfeiture has not been vacated.

11 (4) (a) An offender convicted of partner or family member assault is required to  
12 pay for and complete a counseling assessment with a focus on violence, controlling  
13 behavior, dangerousness, and chemical dependency. An investigative criminal  
14 justice report, as defined in [45-5-231](#), must be copied and sent to the offender  
15 intervention program, as defined in [45-5-231](#), to assist the counseling provider in  
16 properly assessing the offender's need for counseling and treatment. Counseling  
17 providers shall take all required precautions to ensure the confidentiality of the  
18 report. If the report contains confidential information relating to the victim's  
19 location or not related to the charged offense, that information must be deleted  
20 from the report prior to being sent to the offender intervention program.

21 (b) The offender shall complete all recommendations for counseling, referrals,  
22 attendance at psychoeducational groups, or treatment, including any indicated  
23 chemical dependency treatment, made by the counseling provider. The counseling  
24 provider must be approved by the court. The counseling must include a preliminary  
25 assessment for counseling, as defined in [45-5-231](#). The offender shall complete a  
26 minimum of 40 hours of counseling. The counseling may include attendance at  
27 psychoeducational groups, as defined in [45-5-231](#), in addition to the assessment.  
28 The preliminary assessment and counseling that holds the offender accountable for  
29 the offender's violent or controlling behavior must be:

30 (i) with a person licensed under Title 37, chapter 17, 22, or 23;

31 (ii) with a professional person as defined in [53-21-102](#); or

32 (iii) in a specialized domestic violence intervention program.

33 (c) The minimum counseling and attendance at psychoeducational groups  
34 provided in subsection (4)(b) must be directed to the violent or controlling conduct  
35 of the offender. Other issues indicated by the assessment may be addressed in

1 additional counseling beyond the minimum 40 hours. Subsection (4)(b) does not  
2 prohibit the placement of the offender in other appropriate treatment if the court  
3 determines that there is no available treatment program directed to the violent or  
4 controlling conduct of the offender.

5 (5) In addition to any sentence imposed under subsections (3) and (4), after  
6 determining the financial resources and future ability of the offender to pay  
7 restitution as provided for in [46-18-242](#), the court shall require the offender, if  
8 able, to pay the victim's reasonable actual medical, housing, wage loss, and  
9 counseling costs.

10 (6) In addition to the requirements of subsection (5), if financially able, the  
11 offender must be ordered to pay for the costs of the offender's probation, if  
12 probation is ordered by the court.

13 (7) The court may prohibit an offender convicted under this section from  
14 possession or use of the firearm used in the assault. The court may enforce [45-8-](#)  
15 [323](#) if a firearm was used in the assault.

16 (8) The court shall provide an offender with a written copy of the offender's  
17 sentence at the time of sentencing or within 2 weeks of sentencing if the copy is  
18 sent electronically or by mail.

19 **45-5-401. Robbery.**

20 (1) A person commits the offense of robbery if in the course of committing a theft,  
21 the person:

22 (a) inflicts bodily injury upon another;

23 (b) threatens to inflict bodily injury upon any person or purposely or knowingly  
24 puts any person in fear of immediate bodily injury; or

25 (c) commits or threatens immediately to commit any felony other than theft.

26 (2) A person convicted of the offense of robbery shall be imprisoned in the state  
27 prison for a term of not less than 2 years or more than 40 years and may be fined  
28 not more than \$50,000, except as provided in [46-18-219](#) and [46-18-222](#).

29 (3) "In the course of committing a theft", as used in this section, includes acts  
30 that occur in an attempt to commit or in the commission of theft or in flight after  
31 the attempt or commission.

32  
33 **45-9-102. Criminal possession of dangerous drugs.**

**Comment [CR19]:** Robbery tends to occur as two different case types, one much more serious than the other, and some states reflect this distinction with two degrees of offense.

1 (1) Except as provided in Title 50, chapter 46, a person commits the offense of  
2 criminal possession of dangerous drugs if the person possesses any dangerous  
3 drug, as defined in [50-32-101](#).

4 (2) A person convicted of criminal possession of marijuana or its derivatives in  
5 an amount the aggregate weight of which does not exceed 60 grams of marijuana  
6 or 1 gram of hashish is, for the first offense, guilty of a misdemeanor and shall be  
7 punished by a fine of not less than \$100 or more than \$500 and by imprisonment in  
8 the county jail for not more than 6 months. The minimum fine must be imposed as  
9 a condition of a suspended or deferred sentence. A person convicted of a second or  
10 subsequent offense under this subsection is punishable by a fine not to exceed  
11 \$1,000 or by imprisonment in the county jail for a term not to exceed 1 year or in  
12 the state prison for a term not to exceed 3 years or by both. This subsection does  
13 not apply to the possession of synthetic cannabinoids listed as dangerous drugs in  
14 [50-32-222](#).

15 (3) A person convicted of criminal possession of an anabolic steroid as listed in  
16 [50-32-226](#) is, for the first offense, guilty of a misdemeanor and shall be punished  
17 by a fine of not less than \$100 or more than \$500 or by imprisonment in the county  
18 jail for not more than 6 months, or both.

19 (4) A person convicted of criminal possession of an opiate, as defined in [50-32-](#)  
20 [101](#), shall be imprisoned in the state prison for a term of not less than 2 years or  
21 more than 5 years and may be fined not more than \$50,000, except as provided in  
22 [46-18-222](#).

23 (5) (a) A person convicted of a second or subsequent offense of criminal  
24 possession of methamphetamine shall be punished by:

25 (i) imprisonment for a term not to exceed 5 years or by a fine not to exceed  
26 \$50,000, or both; or

27 (ii) commitment to the department of corrections for placement in an  
28 appropriate correctional facility or program for a term of not less than 3 years or  
29 more than 5 years. If the person successfully completes a residential  
30 methamphetamine treatment program operated or approved by the department of  
31 corrections during the first 3 years of a term, the remainder of the term must be  
32 suspended. The court may also impose a fine not to exceed \$50,000.

33 (b) During the first 3 years of a term under subsection (5)(a)(ii), the department  
34 of corrections may place the person in a residential methamphetamine treatment  
35 program operated or approved by the department of corrections or in a correctional

1 facility or program. The residential methamphetamine treatment program must  
2 consist of time spent in a residential methamphetamine treatment facility and time  
3 spent in a community-based prerelease center.

4 (c) The court shall, as conditions of probation pursuant to subsection (5)(a),  
5 order:

6 (i) the person to abide by the standard conditions of probation established by the  
7 department of corrections;

8 (ii) payment of the costs of imprisonment, probation, and any  
9 methamphetamine treatment by the person if the person is financially able to pay  
10 those costs;

11 (iii) that the person may not enter an establishment where alcoholic beverages  
12 are sold for consumption on the premises or where gambling takes place;

13 (iv) that the person may not consume alcoholic beverages;

14 (v) the person to enter and remain in an aftercare program as directed by the  
15 person's probation officer; and

16 (vi) the person to submit to random or routine drug and alcohol testing.

17 (6) A person convicted of criminal possession of dangerous drugs not otherwise  
18 provided for in subsections (2) through (5) shall be imprisoned in the state prison  
19 for a term not to exceed 5 years or be fined an amount not to exceed \$50,000, or  
20 both.

21 (7) A person convicted of a first violation under this section is presumed to be  
22 entitled to a deferred imposition of sentence of imprisonment.

23 (8) Ultimate users and practitioners, as defined in [50-32-101](#), and agents under  
24 their supervision acting in the course of a professional practice are exempt from  
25 this section.

26 **45-9-102. Criminal possession of dangerous drugs.**

27 (1) Except as provided in Title 50, chapter 46, a person commits the offense of  
28 criminal possession of dangerous drugs if the person possesses any dangerous  
29 drug, as defined in [50-32-101](#).

30 (2) A person convicted of criminal possession of marijuana or its derivatives in  
31 an amount the aggregate weight of which does not exceed 60 grams of marijuana  
32 or 1 gram of hashish is, for the first offense, guilty of a misdemeanor and shall be  
33 punished by a fine of not less than \$100 or more than \$500 and by imprisonment in



1 the county jail for not more than 6 months. The minimum fine must be imposed as  
2 a condition of a suspended or deferred sentence. A person convicted of a second or  
3 subsequent offense under this subsection is punishable by a fine not to exceed  
4 \$1,000 or by imprisonment in the county jail for a term not to exceed 1 year or in  
5 the state prison for a term not to exceed 3 years or by both. This subsection does  
6 not apply to the possession of synthetic cannabinoids listed as dangerous drugs in  
7 [50-32-222](#).

8 (3) A person convicted of criminal possession of an anabolic steroid as listed in  
9 [50-32-226](#) is, for the first offense, guilty of a misdemeanor and shall be punished  
10 by a fine of not less than \$100 or more than \$500 or by imprisonment in the county  
11 jail for not more than 6 months, or both.

12 (4) A person convicted of criminal possession of an opiate, as defined in [50-32-](#)  
13 [101](#), shall be imprisoned in the state prison for a term of not less than 2 years or  
14 more than 5 years and may be fined not more than \$50,000, except as provided in  
15 [46-18-222](#).

16 (5) (a) A person convicted of a second or subsequent offense of criminal  
17 possession of methamphetamine shall be punished by:

18 (i) imprisonment for a term not to exceed 5 years or by a fine not to exceed  
19 \$50,000, or both; or

20 (ii) commitment to the department of corrections for placement in an  
21 appropriate correctional facility or program for a term of not less than 3 years or  
22 more than 5 years. If the person successfully completes a residential  
23 methamphetamine treatment program operated or approved by the department of  
24 corrections during the first 3 years of a term, the remainder of the term must be  
25 suspended. The court may also impose a fine not to exceed \$50,000.

26 (b) During the first 3 years of a term under subsection (5)(a)(ii), the department  
27 of corrections may place the person in a residential methamphetamine treatment  
28 program operated or approved by the department of corrections or in a correctional  
29 facility or program. The residential methamphetamine treatment program must  
30 consist of time spent in a residential methamphetamine treatment facility and time  
31 spent in a community-based prerelease center.

32 (c) The court shall, as conditions of probation pursuant to subsection (5)(a),  
33 order:

34 (i) the person to abide by the standard conditions of probation established by the  
35 department of corrections;

- 1 (ii) payment of the costs of imprisonment, probation, and any  
2 methamphetamine treatment by the person if the person is financially able to pay  
3 those costs;
- 4 (iii) that the person may not enter an establishment where alcoholic beverages  
5 are sold for consumption on the premises or where gambling takes place;
- 6 (iv) that the person may not consume alcoholic beverages;
- 7 (v) the person to enter and remain in an aftercare program as directed by the  
8 person's probation officer; and
- 9 (vi) the person to submit to random or routine drug and alcohol testing.
- 10 (6) A person convicted of criminal possession of dangerous drugs not otherwise  
11 provided for in subsections (2) through (5) shall be imprisoned in the state prison  
12 for a term not to exceed 5 years or be fined an amount not to exceed \$50,000, or  
13 both.
- 14 (7) A person convicted of a first violation under this section is presumed to be  
15 entitled to a deferred imposition of sentence of imprisonment.
- 16 (8) Ultimate users and practitioners, as defined in [50-32-101](#), and agents under  
17 their supervision acting in the course of a professional practice are exempt from  
18 this section.

19 **45-9-202. Alternative sentencing authority.**

- 20 (1) A person convicted of a dangerous drug felony offense under this chapter may,  
21 in lieu of imprisonment, be sentenced according to the alternatives provided in  
22 subsection (2).
- 23 (2) If the court determines, either from the face of the record or from a presentence  
24 investigation and report, that incarceration of the defendant is not appropriate, the  
25 court may, as a condition of a suspended or deferred sentence, impose one or more  
26 of the following alternatives:
- 27 (a) imposition of a fine not to exceed the maximum amount provided by statute  
28 for those offenses that specify a fine as part of the penalty or \$1,000 for those  
29 offenses that do not specify a fine;
- 30 (b) commitment to a residential drug treatment facility licensed and approved  
31 by the state for rehabilitative treatment for not less than the minimum  
32 recommended time determined necessary by the facility and not more than 1 year;

1 (c) mandatory service of not more than 2,000 hours in a community-based drug  
2 treatment or drug education program with compliance to be monitored by the  
3 probation and parole bureau of the department of corrections based upon  
4 information provided by the treatment or education program;

5 (d) if recommended by the probation and parole bureau, placement in a program  
6 of intensive probation that requires, at a minimum, that the defendant comply with  
7 all of the following conditions:

8 (i) maintain employment or full-time student status at an approved school,  
9 making progress satisfactory to the probation officer, or be involved in supervised  
10 job searches and community service work designated by the probation officer;

11 (ii) pay probation supervision fees through the department of corrections of not  
12 less than \$50 a month to be deposited in the account established in [46-23-1031](#);

13 (iii) find a place to reside approved by the probation officer that may not be  
14 changed without the officer's approval;

15 (iv) remain at the residence at all times except to go to work, to attend school,  
16 or to perform community service or as otherwise specifically allowed by the  
17 probation officer;

18 (v) remain drug free and submit to drug and alcohol tests administered  
19 randomly not less than once each month by or under supervision of the probation  
20 officer;

21 (vi) perform not less than 10 hours of community service each month as  
22 approved by the probation officer, except that full-time students may be exempted  
23 or required to perform fewer hours of community service;

24 (vii) enroll or make satisfactory effort to seek enrollment in an approved drug  
25 rehabilitation program; and

26 (viii) comply with any other conditions imposed by the court to meet the needs  
27 of the community and the defendant;

28 (e) suspension or revocation of the defendant's driver's license issued under  
29 Title 61, chapter 5, subject to the following terms and conditions:

30 (i) upon the first conviction of an offense under this chapter, the driver's license  
31 must be suspended for 6 months;

32 (ii) upon the second conviction, the driver's license must be revoked for 1 year;

33 (iii) upon a third or subsequent conviction, the driver's license must be revoked  
34 for 3 years.

Comment [CR20]: Odd combination of permission to impose DL condition, but mandatory terms and conditions.

Comment [CR21]: The Commission requested analysis of this section.

1 **45-5-207 Criminal Endangerment**

2 The Montana offense of criminal endangerment was enacted in 1987, amended in  
3 1989 to add the second sentence of subsection (a), and currently reads:

4 45-5-207. Criminal endangerment -- penalty. (1) A person who knowingly engages in  
5 conduct that creates a substantial risk of death or serious bodily injury to another  
6 commits the offense of criminal endangerment. This conduct includes but is not limited  
7 to knowingly placing in a tree, log, or any other wood any steel, iron, ceramic, or other  
8 substance for the purpose of damaging a saw or other wood harvesting, processing, or  
9 manufacturing equipment.

10 (2) A person convicted of the offense of criminal endangerment shall be fined an  
11 amount not to exceed \$50,000 or imprisoned in the state prison for a term not to exceed  
12 10 years, or both.

13 It is the third most frequent felony conviction as reported by the MDOC, with  
14 1,684 cases out of 14,308 total cases over five years, about 12% of the total.<sup>i</sup>

**Type of Sentence Received by Adult Conviction Offense, FY-2010 to FY-2014**

Offense	Total	Type of Sentence Received											
		Deferred Sentence		Suspended Sentence		Prison Sentence with Partial Suspended		Prison Sentence with No Suspended		DOC Commit with Partial Suspended		DOC Commit with No Suspended	
		N	%	N	%	N	%	N	%	N	%	N	%
AGGRAVATED ASSAULT	251	56	22%	62	25%	35	14%	26	10%	61	24%	11	4%
AGGRAVATED KIDNAPPING	15	1	7%	0	0%	6	40%	6	40%	2	13%	0	0%
ARSON	44	9	20%	8	18%	5	11%	8	18%	14	32%	0	0%
ASSAULT	135	53	39%	46	34%	1	1%	5	4%	16	12%	14	10%
ASSAULT ON PEACE OFFICER	203	72	35%	43	21%	18	9%	16	8%	39	19%	15	7%
ASSAULT WITH A WEAPON	472	153	32%	152	32%	36	8%	23	5%	84	18%	24	5%
BAIL JUMPING	165	15	9%	83	50%	3	2%	7	4%	24	15%	33	20%
BURGLARY	1,115	476	43%	267	24%	73	7%	49	4%	180	16%	70	6%
CRIMINAL ENDANGERMENT	1,684	829	49%	501	30%	33	2%	46	3%	189	11%	86	5%
CRIMINAL MISCHIEF	318	163	51%	105	33%	4	1%	5	2%	29	9%	12	4%
DECEPTIVE PRACTICES	169	67	40%	65	38%	5	3%	4	2%	16	9%	12	7%
DELIBERATE HOMICIDE	45	0	0%	0	0%	5	11%	36	80%	2	4%	2	4%
DISTRIBUTION OF DRUGS	1,411	617	44%	399	28%	58	4%	20	1%	228	16%	89	6%
ESCAPE	119	0	0%	34	29%	8	7%	50	42%	7	6%	20	17%
FELONY DUI	1,911	1	0%	43	2%	54	3%	28	1%	1,638	86%	147	8%
FORGERY	309	140	45%	107	35%	7	2%	7	2%	32	10%	16	5%
INCEST	66	1	2%	14	21%	38	58%	11	17%	2	3%	0	0%
INTIMIDATION	66	24	36%	23	35%	2	3%	4	6%	10	15%	3	5%
ISSUING BAD CHECKS	441	233	53%	168	38%	4	1%	1	0%	19	4%	16	4%
KIDNAPPING	13	1	8%	3	23%	1	8%	7	54%	1	8%	0	0%
MITIGATED DELIBERATE HOMICIDE	16	0	0%	0	0%	6	38%	10	63%	0	0%	0	0%
NEGLIGENT HOMICIDE	46	5	11%	8	17%	15	33%	4	9%	14	30%	0	0%
PARTNER/FAMILY MEMBER ASSAULT	426	89	21%	198	46%	14	3%	19	4%	54	13%	52	12%
POSSESSION OF DEADLY WEAPON BY PRISONER	15	0	0%	0	0%	4	27%	5	33%	2	13%	4	27%
POSSESSION OF DRUGS	2,374	1,155	49%	672	28%	23	1%	55	2%	166	7%	303	13%
ROBBERY	217	36	17%	27	12%	48	22%	30	14%	64	29%	12	6%
SEXUAL ABUSE OF CHILDREN	67	8	12%	23	34%	19	28%	10	15%	7	10%	0	0%
SEXUAL ASSAULT	250	26	10%	64	26%	87	35%	23	9%	44	18%	6	2%
SEXUAL INTERCOURSE WITHOUT CONSENT	209	27	13%	38	18%	75	36%	20	10%	43	21%	6	3%
STALKING	49	22	45%	16	33%	1	2%	1	2%	6	12%	3	6%
THEFT	1,687	795	47%	481	29%	42	2%	56	3%	204	12%	109	6%
<b>Total</b>	<b>14,308</b>	<b>5,074</b>	<b>35%</b>	<b>3,650</b>	<b>26%</b>	<b>730</b>	<b>5%</b>	<b>592</b>	<b>4%</b>	<b>3,197</b>	<b>22%</b>	<b>1,065</b>	<b>7%</b>

Totals do not include 35 offenders that received life sentences or 82 offenders that received a DPHHS Commit.

15  
16 In addition to this extraordinary volume,<sup>ii</sup> two intersecting features of the Montana  
17 version of this offense are notable, in contrast to the approach in other states and in  
18 the Model Penal Code<sup>iii</sup>: in Montana the penalty is much higher--a felony

1 punishable up to 10 years versus a misdemeanor punishable up to 1 year elsewhere  
2 (18 months in Arizona, for a subset); and in Montana, the culpable mental state is  
3 *ostensibly* higher--“knowing” conduct versus “reckless” conduct elsewhere.

4 Montana did not adopt and does not use the concept of “recklessness” in its penal  
5 law, unlike the Model Penal Code and most states. It was thought that juries would  
6 struggle to discern the difference between negligence and recklessness,<sup>iv</sup> and the  
7 Montana definition of “negligently” merges the Model Penal Code concept of  
8 recklessness -- conscious disregard of a risk, with negligence -- disregard of a risk  
9 that should have been known. MCA 45-2-101(43)(emphasis added):

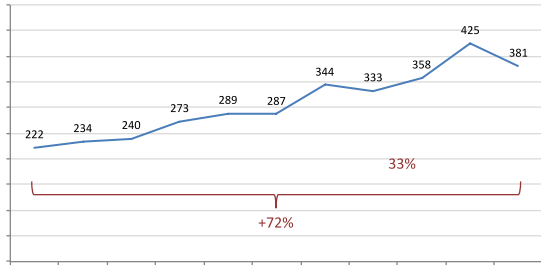
10 "Negligently"--a person acts negligently with respect to a result or to a circumstance  
11 described by a statute defining an offense *when the person consciously disregards a risk*  
12 *that the result will occur or that the circumstance exists or when the person disregards a*  
13 *risk of which the person should be aware that the result will occur or that the*  
14 *circumstance exists. The risk must be of a nature and degree that to disregard it involves*  
15 *a gross deviation from the standard of conduct that a reasonable person would observe*  
16 *in the actor's situation. "Gross deviation" means a deviation that is considerably greater*  
17 *than lack of ordinary care. Relevant terms, such as "negligent" and "with negligence",*  
18 *have the same meaning.*

19 From the enactment of MCA 45-5-207 forward, there has been confusion and  
20 blurring of the requisite culpability for criminal endangerment, discussed as further  
21 background below.

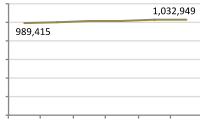
22 The net effect appears to be an extraordinary tool for prosecution, enabling both  
23 the threat and the reality of a 10-year felony conviction for essentially reckless  
24 conduct that in other states carries much lower exposure, in terms of punishment  
25 and criminal record, as a gross/high severity misdemeanor. This unusual felony  
26 also has a place in the defense’s toolbox, as it allows for pleading downward, but  
27 remaining in felony territory, from assaultive and sexually assaultive offenses that  
28 hold more dire consequences.

29 Additional data acquired from the Department of Corrections (results shown  
30 below) indicate that:

- 31 • Convictions have increased steadily over the known time period (2005-  
32 2015) and the conviction rate has increased relative to the population.
- 33 • Rates of conviction differ noticeably by county, and have increased in most  
34 of the larger counties.

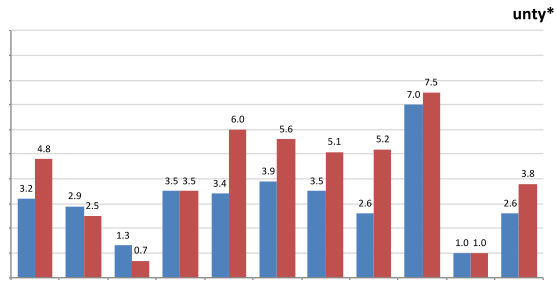


Source: Montana Department of Corrections conviction reports



Source: Montana Department of Corrections conviction reports

on rate information was only available for 2010 – 2015.



Source: Montana Department of Corrections conviction reports

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1 Further Background

2 In the House Judiciary Committee in 1987, proponents of H.B. 301 provided  
3 statutory examples from Alaska, Arizona, Colorado, Oregon, and Washington.<sup>v</sup>  
4 All of those states use “recklessness” and attach top-level misdemeanor  
5 punishment of 1 year (except Arizona, see fn. v), while the approach in Montana  
6 was to create a “knowing” version of the offense as a 10-year felony (MCA 45-5-  
7 207), as well as a “negligent” version as a 1-year misdemeanor (MCA 45-5-208),  
8 along with amendments described as making it easier to prosecute “negligent  
9 vehicular assault,” a 1-year misdemeanor (MCA 45-5-205).

10 Proponents provided two cases to illustrate the use of criminal endangerment. The  
11 case from Washington did not actually discuss the offense but involved convictions  
12 for a sustained incident of gun shooting, which were upheld on appeal both as  
13 felony assault (for shooting at someone) and reckless endangerment (for shooting  
14 toward a neighbor’s house).<sup>vi</sup> The other case, from Arizona, involved a shooting  
15 into a house, but after the target had stepped out of view, and thus presented the  
16 question whether reckless endangerment is a lesser included offense of felony  
17 assault.<sup>vii</sup> The court observed (emphasis added):

18 "A person commits endangerment by *recklessly* endangering another person with the  
19 substantial risk of imminent death or physical injury." A.R.S. S 13 120(A). The  
20 comments of the Criminal Code Commission indicate that the offense supplements the  
21 law of criminal attempt by adding a provision for reckless actions. *Arizona Revised*  
22 *Criminal Code Commission Report* at 134 (1975). The statute is designed to cover  
23 "situations where the actor's recklessness endangers another's well being without the  
24 actor technically intending or knowing he is doing so." R. Cerber. *Criminal Law of*  
25 *Arizona* at 163 (1978). According to the Commission, conduct punishable under the  
26 statute would include such actions as "recklessly discharging firearms in public,  
27 pointing firearms at others, obstructing public highways or abandoning life-threatening  
28 containers which are attractive to children," *Arizona Revised Criminal Code*  
29 *Commission Report* at 134 (1975). It is thus clear, both from a reading of the statute and  
30 from the Commission's comments, that one of the required elements of endangerment is  
31 that the victim must be placed in actual substantial risk of imminent death or physical  
32 injury. There is no requirement that the victim be aware of the conduct of the actor.

33 Although questions about the broad applicability and high punishment were raised in  
34 committee,<sup>viii</sup> H.B. 301 passed as proposed.

35 The Montana Supreme Court first interpreted the new statute in *State v. Clawson*, 239 Mont.  
36 413, 421, 781 P.2d 267, 272 (1989), and diluted the culpable mental state requirement with this  
37 passage [emphasis added]:

1 Defendant argues that the intent of the 1987 Montana Legislature in enacting the  
2 criminal endangerment statute § 45-5-207, MCA, was to impliedly repeal the offense of  
3 attempted deliberate homicide. . . . The legislative history does not indicate that the  
4 creation of the offense of criminal endangerment impliedly repealed the offense of  
5 attempted deliberate homicide. *The offense entails a wide variety of offenses, resulting*  
6 *from gross negligence and reckless behavior.* Judiciary Committee Notes, February 5,  
7 1987, page 4. The legislature considered endangerment statutes of Colorado,  
8 Washington, Oregon, Alaska and Arizona in drafting the criminal endangerment statute.  
9 Those states all consider endangerment as an assault-type offense and have classified it  
10 as a misdemeanor, gross misdemeanor, and a felony. . . . Washington law defines  
11 "reckless endangerment" as follows:

12 (1) A person is guilty of reckless endangerment when he recklessly engages in  
13 conduct which creates a substantial risk of death or serious physical injury to another  
14 person.

15 (2) Reckless endangerment is a gross misdemeanor. Wash. Rev. Code § 9A.36.050  
16 (1975).

17 *The only significant difference between the Washington statute and the Montana statute*  
18 *is the use of the term "reckless" in the Washington statute rather than "knowingly" as*  
19 *defined in Montana. Either way it is clear that the statute is created to punish reckless*  
20 *or negligent behavior which has the inherent potential of resulting in death or serious*  
21 *bodily injury to another person.*

22 Two years later the court tersely corrected itself, in *State v. Crisp*, 249 Mont. 199, 203, 814 P.2d  
23 981, 983 (1991):

24 Defendant argues that the statute is vague on its face because it does not require a  
25 specific intent to cause the risk. In *Clawson*, we indicated that a defendant may commit  
26 the offense of felony criminal endangerment by engaging in negligent or reckless  
27 conduct. A plain reading of the felony criminal endangerment statute, however,  
28 establishes that the State must prove that the defendant acted knowingly. If the State can  
29 establish only that the defendant acted negligently, the defendant may be convicted of  
30 violating § 45-5-208, MCA, misdemeanor negligent endangerment; he may not be  
31 convicted of violating § 45-5-207, MCA, felony criminal endangerment. [A] defendant  
32 commits the crime of criminal endangerment when he is aware that there is a high  
33 probability that his conduct may cause a substantial risk of death or serious bodily  
34 injury to another."

35 Perhaps the best illustration of confusion was *State v. Lambert*, 280 Mont. 231, 929 P.2d 846  
36 (1996), in which the trial court provided such flawed instructions to the jury on the definition of  
37 "knowing," that the Supreme Court was compelled to reverse, amid great debate with concurring  
38 opinions and a vigorous dissent. The trial court instructed: "A person acts knowingly: (1) when  
39 he is aware of his conduct or (2) when he is aware under the circumstances that his conduct  
40 constitutes a crime or (3) when he is aware there exists the high probability that his conduct will  
41 cause a specific result." The Supreme Court concluded that criminal endangerment is an offense  
42 defined by "the result of conduct" rather than specific conduct itself. In other words, "a person  
43 may engage in a wide variety of conduct and still commit the offense of criminal endangerment,  
44 provided that the conduct creates a substantial risk of death or serious bodily harm."



1 The Supreme Court has also concluded that reckless driving is not a lesser included offense of  
2 criminal endangerment, *State v. Beavers*, 296 Mont. 340, 987 P.2d 381 (1999), and in 2014 that  
3 that “negligent endangerment” is a lesser-included offense of criminal endangerment and that the  
4 evidence in that case (*Martinosky*) required a remand. Cf. *State v. Shegrud*, 374 Mont. 192, 320  
5 P.3d 455 (2014) and *State v. Martinosky*, 294 Mont. 426, 982 P.2d 440 (1999).  
6 Additional cases of interest are summarized in the Legislature’s annotations for MCA 45-5-207  
7 (attached).

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<sup>i</sup> Montana Department of Corrections 2015 Biennial Report, p. A-12.

<sup>ii</sup> In states where the Justice Center has current conviction data such as North Dakota and Massachusetts, the comparable offense (reckless conduct) is a misdemeanor and represents less than 1 percent of the total conviction volume. Reckless conduct is not a UCR-reported crime because it is low volume in most states, so arrest comparisons are not available.

<sup>iii</sup> “A person commits a misdemeanor if he recklessly engages in conduct which places or may place another in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.”

<sup>iv</sup> Jeff Essman, *A Primer on the Element of Mental State in the Montana Criminal Code of 1973*, 37 Mont. L. Rev. (1976), fn. 31, citing MONT. CRIM. CODE ANN. § 94-2-101(32) comment at 52.

<sup>v</sup> Legislative Library bill file on Chapter 196, 1987 Session Laws.

Current versions of reckless endangerment in the cited states:

Alaska

Sec. 11.41.250. Reckless endangerment.

(a) A person commits the crime of reckless endangerment if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

(b) Reckless endangerment is a class A misdemeanor [1 year].

Arizona

13-1201. Endangerment; classification

A. A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury.

B. Endangerment involving a substantial risk of imminent death is a class 6 felony [18 months].

In all other cases, it is a class 1 misdemeanor [6 months].

Colorado

18-3-208. Reckless endangerment

A person who recklessly engages in conduct which creates a substantial risk of serious bodily injury to another person commits reckless endangerment, which is a class 3 misdemeanor [6 months].

Oregon

163.195 Recklessly endangering another person

(1) A person commits the crime of recklessly endangering another person if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

(2) Recklessly endangering another person is a Class A misdemeanor [1 year].

Washington

RCW 9A.36.050

Reckless endangerment.

(1) A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person.

(2) Reckless endangerment is a gross misdemeanor [1 year].

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<sup>vi</sup> *State v. Turner*, Wash. App. 627 P.2<sup>nd</sup> 1324 (1981).

<sup>vii</sup> *State v. Morgan*, Ariz.App. 625 P.2d 951 (1981).

<sup>viii</sup> “Does conduct such as a doctor operating on a patient constitute ‘criminal endangerment’? There are no qualifications, such as “unreasonably” creates a substantial risk. The penalty of \$50,000 or 10 years seems rather high, especially compared to the penalty for negligent vehicular assault which involves driving under the influence and is only \$1,000 or county jail for 1 year, or both. Could conduct fall under both negligent vehicular assault and negligent endangerment? Which would apply?” [Summary of comments by members on H.B. 301, prepared by Senate Judiciary staff.]