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# CRIMINAL PROCEDURE: THE LEGAL MECHANICS AFTER ARREST AND INVESTIGATION

Ralph B. Kirscher

## I.

The subject of criminal procedure contains numerous categories often assumed or dismissed without discussion; yet, one or more such categories may affect the outcome of every suspected criminal violation processed by law enforcement personnel. Thus, in order to encourage the effective and efficient administration of criminal justice and to inform the practitioner of recent developments in post-investigative aspects of criminal procedure, this article examines selected cases of such categories considered by the Montana Supreme Court during the survey period.

## II.

### A. *Speedy Trial*

*Barker v. Wingo*<sup>1</sup> is “[t]he touchstone in any analysis of the speedy trial issue.”<sup>2</sup> It suggests a balancing test which considers four factors:<sup>3</sup> (1) length of delay; (2) reason for delay; (3) assertion of the right by the defendant; and (4) prejudice to the defendant. The fourth factor consists of three interests of the defendant “which the [fundamental] speedy trial right was designed to protect: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.”<sup>4</sup>

Although the Montana Supreme Court has adopted the *Barker* test in numerous cases,<sup>5</sup> it has not established a precise length of delay creating presumptive prejudice. In *Fitzpatrick v. Crist*,<sup>6</sup> the court held that a seven-month delay shifted to the state the burden of explaining the reasons for delay and any absence of prejudice to

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1. 407 U.S. 514 (1972).

2. *State ex rel. Briceno v. District Court*, \_\_\_ Mont. \_\_\_, \_\_\_, 568 P.2d 162, 164 (1977).

3. 407 U.S. at 530-32.

4. *Id.* at 532.

5. *See, e.g.*, *State v. Collins*, \_\_\_ Mont. \_\_\_, 582 P.2d 1179 (1978); *State v. Cassidy*, \_\_\_ Mont. \_\_\_, 578 P.2d 735 (1978); *State ex rel. Briceno v. District court*, \_\_\_ Mont. \_\_\_, 568 P.2d 162 (1977); *State v. Carden*, \_\_\_ Mont. \_\_\_, 566 P.2d 780 (1977); *State v. Keller*, 170 Mont. 372, 553 P.2d 1013 (1976); *State ex rel. Sanford v. District Court*, 170 Mont. 196, 551 P.2d 1005 (1976); *State v. Steward*, 168 Mont. 385, 543 P.2d 178 (1975); *Fitzpatrick v. Crist*, 165 Mont. 382, 528 P.2d 1322 (1974); and *State ex rel. Thomas v. District Court*, 151 Mont. 1, 438 P.2d 554 (1968).

6. 165 Mont. 382, 528 P.2d 1322 (1974).

the defendant. That delay did not, however, create a violation of defendant's right to a speedy trial.<sup>7</sup> The court required additional inquiry into the other three factors to determine if a denial of the right to a speedy trial occurred.<sup>8</sup> Subsequent Montana cases have followed *Fitzpatrick*.<sup>9</sup>

The court in *State v. Cassidy*<sup>10</sup> dismissed a criminal mischief action delayed over a period of eight months. The state argued the delay resulted from scheduling practices of the district court, located in Missoula County. The supreme court concluded that the state could not justify such a delay when "no progression towards final disposition of the case occurred."<sup>11</sup> The delay consisted "primarily of 'dead time.'"<sup>12</sup>

The court has distinguished time delays attributable to the prosecution from those attributable to the defendant. In *State v. Collins*,<sup>13</sup> the court affirmed a lower court conviction and held that when a defendant delays his trial for purposes of investigation and for personal reasons, such time will be charged against the defendant and not the state.<sup>14</sup> After subtracting the time charged against the defendant from the total delay time, only a two-month delay occurred. Two months "would hardly qualify as a prejudicial deterrent to defendant's fair and speedy trial, especially when in that period defendant was planning to leave the state, and no prejudice [was] shown to the defendant's rights."<sup>15</sup>

Moreover, as the court said in *State v. Steward*,<sup>16</sup> "an accused must take some affirmative action to obtain a trial to be entitled to a discharge for delay."<sup>17</sup> This affirmative action may be presented by "objecting to adjournments of the trial, demanding a trial, or

7. *Id.* at 388, 528 P.2d at 1326.

8. *Id.*

9. See, e.g., *State v. Collins*, \_\_\_ Mont. \_\_\_, 582 P.2d 1179 (1978); *State v. Cassidy*, \_\_\_ Mont. \_\_\_, 578 P.2d 735 (1978); *State ex rel. Briceno v. District Court*, \_\_\_ Mont. \_\_\_, 568 P.2d 162 (1977); *State v. Keller*, 170 Mont. 372, 553 P.2d 1013 (1976); and *State v. Steward*, 168 Mont. 385, 543 P.2d 178 (1975).

10. \_\_\_ Mont. \_\_\_, 578 P.2d 735 (1978).

11. *Id.* at \_\_\_, 578 P.2d at 738.

12. *Id.* at \_\_\_, 578 P.2d at 738 (citing *State ex rel. Briceno v. District Court*, \_\_\_ Mont. \_\_\_, 568 P.2d 162, 164 (1977)).

13. \_\_\_ Mont. \_\_\_, 582 P.2d 1179 (1978).

14. *Id.* at \_\_\_, 582 P.2d at 1186.

15. *Id.* See also, *State v. Carden*, \_\_\_ Mont. \_\_\_, \_\_\_, 566 P.2d 780, 785 (1977). The court, in *State v. McKenzie*, \_\_\_ Mont. \_\_\_, 581 P.2d 1205 (1978), affirmed its earlier holding in *State v. McKenzie*, \_\_\_ Mont. \_\_\_, 557 P.2d 1023 (1976), that although a delay of 305 days created a presumptive prejudice, the reasons for delay (defendant's several appearances, defendant's refusal to plead, complexity of the case, and the newness of applicable law) removed any prejudicial effect.

16. 168 Mont. 385, 543 P.2d 178 (1975).

17. *Id.* at 390, 543 P.2d at 182.

making an appropriate motion.”<sup>18</sup> The court in *Steward* specified that “[t]he ‘appropriate motion’ is a motion to dismiss for denial of a speedy trial.”<sup>19</sup> This motion should be asserted “prior to the actual commencement of the trial, usually at the time the trial date is set, or at the time the case is called to trial.”<sup>20</sup>

When considering the fourth factor, prejudice, the court may presume the requisite anxiety and concern of the defendant. In *Cassidy*, “[t]wo felony counts of criminal mischief carrying a maximum penalty of twenty years” with corresponding prosecutorial “dead time” created the presumption of anxiety and concern.<sup>21</sup> If the defendant creates the delay, the court is unlikely to create the presumption. In *Collins*, delays occurred when the prosecution accommodated the defendant’s requests for personal business trips, personal surgery and pretrial investigation. Because anxiety and concern “were as much the result of the needs of the defendant, as of any delay in the speedy trial process,” the court refused to recognize a presumption of anxiety and concern.<sup>22</sup>

The remaining two interests, oppressive incarceration and defense impairment, contained in the factor of prejudice may be difficult to assert. If the defendant is released on bail immediately or a short time after arrest or arraignment, the possibility of prejudice for oppressive incarceration is very slight.<sup>23</sup> The third interest, defense impairment, may be established if the delay contributed to the possibility of memory lapses. The court in *Steward* stated:

It is difficult to determine whether defendant would be prejudiced due to impairment of his defense [if] there has been no trial or witness testimony which might indicate a loss of memory regarding events of the distant past. The prosecution might also have its case impaired due to the loss of memory of its witnesses, but the greater danger of prejudice exists for an innocent defendant who might, through lapse of time, be unable to accurately recall events in a certain day when there was no remarkable or memorable occurrences to etch the memory of the day in his mind.<sup>24</sup>

Certainly the type and degree of crime will influence a court in determining how remarkable or memorable the event is and how well-etched the event should be in the defendant’s mind.

The supreme court refused to consider the speedy trial issue in

18. *Id.* (citing *United States v. Research Foundation*, 155 F. Supp. 650, 654 (S.D.N.Y. 1957)).

19. *Id.* at 390-91, 543 P.2d at 182.

20. *Id.*

21. \_\_\_ Mont. at \_\_\_, 578 P.2d at 740.

22. \_\_\_ Mont. at \_\_\_, 582 P.2d at 1187.

23. *State v. Steward*, 168 Mont. 385, 393, 543 P.2d 178, 183 (1975).

24. *Id.* at 393-94, 543 P.2d at 183.

two recent cases: *Bretz v. Crist*<sup>25</sup> and *In re Hart*.<sup>26</sup> In *Bretz*, the court held a defendant could not use a writ of habeas corpus to argue a speedy trial claim when another pending appeal included that claim. "[A]ny error in a criminal trial, which is reviewable on appeal from the conviction, will not be considered in a habeas corpus proceeding."<sup>27</sup> In *Hart*, the defendant contested extradition proceedings by raising a speedy trial claim in a habeas corpus petition. The court said, however, that a habeas corpus petition is appropriate only to consider issues related to the legality or illegality of defendant's imprisonment, confinement or restraint, rather than the deprivation of other constitutional rights.<sup>28</sup> In extradition proceedings, the issue of violation of a constitutional right, such as the right to speedy trial, "is properly cognizable only in the demanding state and not in the state of asylum. Petitioner's remedy is to raise this question in [the demanding state]."<sup>29</sup>

Regarding misdemeanors, the court considered the speedy trial issue in *State v. Nelson*.<sup>30</sup> Even though a trial is delayed beyond the statutory limit of six months, valid reasons may satisfy the "good cause" requirement of Montana Code Annotated [hereinafter cited as MCA], § 46-13-201(2) (1978),<sup>31</sup> and preclude dismissal of the case. The court in *Nelson* concluded that the following reasons constituted "good cause": (1) defendant's motions to dismiss the action and suppress the evidence; (2) defendant's motions for substitution of the judge; and (3) the judge's illness.<sup>32</sup> Most, if not all, of the delay could be attributed to defendant's action. Again, as in felony cases, the court closely scrutinized the reasons for delay and precluded dismissal where defendant's actions caused a substantial portion of the delay.

### B. Bail

A law enforcement officer may set bail (bond) without referring to a bond schedule established by a judicial officer. In *State v.*

25. No. 14209 (Mont. July 13, 1978) (35 St. Rep. 990 (1978)).

26. \_\_\_ Mont. \_\_\_, 583 P.2d 411 (1978).

27. 35 St. Rep. at 991.

28. \_\_\_ Mont. at \_\_\_, 583 P.2d at 418-19.

29. *Id.* at \_\_\_, 583 P.2d at 421.

30. \_\_\_ Mont. \_\_\_, 583 P.2d 435 (1978).

31. MONTANA CODE ANNOTATED [hereinafter cited as MCA], § 46-13-201(2) (1978) (formerly codified at REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], § 95-1703(2) (Supp. 1977)) provides:

(2) The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed if a defendant whose trial has not been postponed upon his application is not brought to trial within 6 months after entry of plea upon a complaint, information, or indictment charging a misdemeanor.

32. \_\_\_ Mont. at \_\_\_, 583 P.2d at 438.

*Sawyer*,<sup>33</sup> an undersheriff arrested the defendant for reckless driving and improper vehicle registration and set the defendant's bonds at \$100 and \$25, respectively, without referring to a bond schedule. The supreme court overruled the district court decision and held "that a peace officer may . . . rely on his everyday experience and memory in accepting bond in behalf of a magistrate."<sup>34</sup> The court, however, qualified its decision: "[t]here was no evidence that bond accepted by the officer in the instant case was any different from that listed in the bond schedule."<sup>35</sup> Therefore, if a law enforcement officer sets bail in an amount contrary to the established schedule, a possible illegal detainer action could occur. Before the court would allow such an action, the differences between the amount set by the officer and that determined by the schedule probably would have to be so extreme as to hinder the efficient administration of justice.

### C. Competency of the Accused

The Montana Supreme Court has adopted two standards for considering the affirmative defense of mental disease or defect excluding responsibility.<sup>36</sup> These standards are (1) at trial, a preponderance of the evidence, and (2) at pretrial hearing, a "plain and obvious" defect leaving no room for a difference of opinion among reasonable minds.

In *State v. Hagerud*,<sup>37</sup> the court stated: "The standard of proof required [in a pretrial proceeding in the defense of mental defect

33. \_\_\_ Mont. \_\_\_, 571 P.2d 1131 (1977).

34. *Id.* at \_\_\_, 571 P.2d at 1132.

35. *Id.*

36. MCA § 46-14-201(1) (1978) (formerly codified at R.C.M. 1947, § 95-503(a)) provides:

(1) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish by a preponderance of the evidence.

MCA § 46-14-211 (1978) (formerly codified at R.C.M. 1947, § 95-507(1) (Supp. 1977)) provides:

If the report filed under 46-14-203 finds that the defendant at the time of the criminal conduct charged suffered from a mental disease or defect which rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law and the court, after a hearing if a hearing is requested by the attorney prosecuting or the defendant, is satisfied that the mental disease or defect was sufficient to exclude responsibility the court on motion of the defendant shall enter judgment of acquittal on the ground of mental disease or defect excluding responsibility.

The Revised Commission Comment to MCA § 46-14-211 (1978) (formerly codified at R.C.M. 1947, § 95-507) states:

Under [MCA § 46-14-211 (1978) (formerly codified at R.C.M. 1947, § 95-507(1) (Supp. 1977))] in cases of extreme mental disease or defect where the exclusion of responsibility is clear trial can be avoided and the defendant immediately committed as irresponsible.

See notes 37 through 44, *infra* and accompanying textual discussion.

37. \_\_\_ Mont. \_\_\_, 570 P.2d 1131 (1978).

excluding responsibility] is proof such as to leave no room for a difference of opinion among reasonable minds."<sup>38</sup> This standard precludes a judge from basing his belief "upon a mere preponderance of the evidence."<sup>39</sup> The *Hagerud* standard clarifies the prior standard adopted in *State ex rel. Krutzfeldt v. District Court*:<sup>40</sup>

[I]f, in the judge's opinion and after a hearing if requested by either attorney, a defendant was *clearly* suffering from mental disease at the time of the crime then the judge can acquit the defendant and have him committed to a state institution forthwith. The purpose is plain—to avoid a costly trial where the mental defect is plain and obvious.<sup>41</sup>

The "plain and obvious" standard, as interpreted in *Hagerud*, requires "proof such as to leave no room for a difference of opinion among reasonable minds."<sup>42</sup> Such a standard, therefore, is synonymous with "beyond a reasonable doubt." The court reached this conclusion in *State ex rel. Nelson v. District Court*,<sup>43</sup> when it considered whether the preponderance of evidence standard should control both at the pretrial hearing and at the trial. The court stated:

At this stage of the process, [the pretrial hearing], . . . , the question is not one of the preponderance of the evidence, but whether the exclusion of criminal responsibility due to mental disease or defect is "plain and obvious". If it is not plain and obvious, a trial should be conducted and the trier of fact can determine the preponderance of the evidence. The summary procedure outlined by section [46-14-211] was never designed to replace the trial where the issue of criminal responsibility is disputable. In *Krutzfeldt* this Court held this procedure does not preclude a defendant from raising the defense of mental disease or defect at trial. Such a holding would be unnecessary if the standard of proof at the hearing was equivalent to the standard at trial.<sup>44</sup>

The effect of these two standards is to create a legal tension between a "preponderance of the evidence" and "beyond a reasonable doubt." The burden mandated in MCA § 46-14-201(1) (1978)<sup>45</sup> specifically requires the defendant to establish an affirmative defense by a preponderance of the evidence. On the other hand, MCA § 46-14-211 (1978)<sup>46</sup> is construed to require a defendant to establish

38. *Id.* at \_\_\_\_, 570 P.2d at 1136.

39. *Id.*

40. 163 Mont. 164, 515 P.2d 1312 (1973).

41. *Id.* at 170, 515 P.2d at 1315.

42. \_\_\_\_, Mont. at \_\_\_\_, 570 P.2d at 1136.

43. \_\_\_\_, Mont. \_\_\_\_, 566 P.2d 1382 (1977).

44. *Id.* at \_\_\_\_, 566 P.2d at 1384-85.

45. Formerly codified at R.C.M. 1947, § 95-503(a).

46. Formerly codified at R.C.M. 1947, § 95-507(1) (Supp. 1977).

the same defense beyond a reasonable doubt.

The Model Penal Code, §§ 4.01(1) and 4.07, is the source document for MCA § 46-14-201(1) (1978)<sup>47</sup> and MCA § 46-14-211 (1978)<sup>48</sup> respectively. In section 4.03 of the code, no reference is made to the required burden of proof. The Montana legislature, however, in adopting the Montana code of criminal procedure, amended section 4.03 to include the preponderance of evidence standard.<sup>49</sup> The legislature adopted section 4.07 without amendment. It provides:

If the report filed . . . finds the defendant at the time of the criminal conduct charged suffered from a mental disease or defect [excluding responsibility] . . . , and the court . . . is *satisfied*, the court shall enter judgment of acquittal . . . .<sup>50</sup>

In construing section 46-14-211, the court has relied upon the following Revised Commission Comment:<sup>51</sup>

Under [section 46-14-211] in cases of extreme mental disease or defect where the exclusion of responsibility is *clear*, trial can be avoided and the defendant committed as irresponsible.<sup>52</sup>

The words "clear" and "clearly" are associated with the "beyond a reasonable doubt" standard.<sup>53</sup> The Commission Comment, by using the word "clear," suggests a standard inconsistent with the amount of evidence required to "satisfy" a court under section 46-14-211 when section 46-14-201(1) specifically mandates a "preponderance of evidence" standard.

#### D. Counsel

Joint representation of codefendants is not a per se violation of the constitutional guarantee of effective assistance of counsel, according to the United States Supreme Court case of *Holloway v. Arkansas*.<sup>54</sup> That case held, however, that a constitutional violation does occur when defense counsel repeatedly requests separate counsel on the grounds of codefendant's conflicting interests and the trial

47. Formerly codified at R.C.M. 1947, § 95-503(a).

48. Formerly codified at R.C.M. 1947, § 95-507(1) (Supp. 1977).

49. Section 4.03(1) of the Model Penal Code states:

Mental disease or defect excluding responsibility is an affirmative defense.

MCA § 46-14-201(1) (1978) provides:

Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish by a preponderance of the evidence.

50. See note 1, *supra* for full text (emphasis added).

51. This comment accompanies R.C.M. 1947, § 95-507.

52. Emphasis added.

53. See H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 222-26 (1954).

54. 98 S.Ct. 1173, 1178 (1978).



court fails "either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote."<sup>55</sup> If "a trial court improperly requires joint representation over timely objection, reversal is automatic"<sup>56</sup> for two reasons:

- (1) joint representation of conflicting interests is suspect . . . [because of] what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process; and
- (2) an inquiry of harmless error . . . would require . . . unguided speculation.<sup>57</sup>

If the defense counsel requests separate counsel for codefendants, deference should be given to such a request.<sup>58</sup>

What happens if the defense counsel does nothing to advise the trial court of actual or possible conflicting interests between the codefendants? The Court, in dicta, identifies two issues relevant to such an inquiry:

- (1) How strong a showing of conflict must be made, or how certain the reviewing court must be that the asserted conflict existed; and
- (2) the scope and nature of the affirmative duty by the trial judge to assure that the defendants are not deprived of their right to counsel.<sup>59</sup>

If codefendants are represented by the same counsel, "the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel."<sup>60</sup>

The Montana Supreme Court considered the impact joint representation has on a codefendant's right to effective assistance of counsel in *State v. Henry*.<sup>61</sup> *Henry* involved two defendants charged with the criminal possession of drugs for which one defendant received a heavier sentence than the other. The defendant receiving

55. *Id.*

56. *Id.* at 1181.

57. *Id.* at 1182.

58. *Id.* at 1179. The court identified three considerations which should be acknowledged:

- (1) an attorney representing two defendants is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in a trial;
- (2) defense attorneys have the obligation, upon discovery of a conflict of interest, to advise the court at once of the problem; and
- (3) attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court their declarations are virtually made under oath.

*Id.* at 1179-80.

59. *Id.* at 1178.

60. *Id.*, n.6.

61. \_\_\_\_ Mont. \_\_\_\_, 582 P.2d 321 (1978).

the heavier sentence claimed in a post conviction relief petition that her sentence resulted because counsel could not effectively represent both defendants. The record in the case disclosed no challenge to joint representation; in fact, the same counsel represented the defendant on appeal. The court held where one codefendant voluntarily exculpated the other and both intelligently acquiesced in joint representation, "the strategies . . . for both . . . [during plea bargaining and sentencing] were not in conflict."<sup>62</sup>

Another aspect of right to counsel cases is the selection of court-appointed counsel. In this regard, the leading United States Supreme Court case, *Faretta v. California*,<sup>63</sup> held that a criminal defendant has a constitutional right to have court-appointed counsel dismissed and to proceed without counsel if he voluntarily and intelligently decides to do so.<sup>64</sup> The Montana Supreme Court has refused to extend the *Faretta* rule. The court in *State v. Pepperling*<sup>65</sup> held that a defendant could not choose the court-appointed attorney he wanted. "No case so far concedes that right . . . His right to counsel does not include the right to select an attorney of his own choosing . . . or require that the particular attorney must be approved by the defendant."<sup>66</sup> If his court-appointed counsel is rendering effective assistance of counsel, the defendant has two choices: "(1) [continue] with the counsel so appointed, or (2) [have] his counsel dismissed and [proceed] on [his] own, *pro se*."<sup>67</sup>

The defendant's general statement that "me and [my attorney] don't see eye to eye"<sup>68</sup> is insufficient to establish ineffective assistance of counsel. Implicit in the court's holding is the concern for the efficient and economic administration of justice while preserving a defendant's constitutional rights. To allow a defendant to dismiss qualified, appointed counsel at will would burden the judicial system with unnecessary delay and expense.

Three recent cases considered conduct of an attorney during the trial: *State v. Bain*,<sup>69</sup> *State v. Thompson*,<sup>70</sup> and *Murphy v. Crist*.<sup>71</sup> In *Murphy*, the defendant argued that the defense counsel was improperly prepared to refute the prosecution's instructions on aiding and abetting. The court, however, summarily dismissed his argu-

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62. *Id.* at \_\_\_\_, 582 P.2d at 324.

63. 422 U.S. 806 (1974).

64. *Id.* at 835.

65. \_\_ Mont. \_\_\_\_, 582 P.2d 341 (1978).

66. *Id.* at \_\_\_\_, 582 P.2d at 36.

67. *Id.*

68. *Id.* at \_\_\_\_, 582 P.2d at 342.

69. \_\_ Mont. \_\_\_\_, 575 P.2d 919 (1978).

70. \_\_ Mont. \_\_\_\_, 576 P.2d 1105 (1978).

71. No. 14252 (Mont. July 21, 1978) (35 St. Rep. 1054 (1978)).

ment by stating: "[W]hile it is true that counsel did not object to the instructions with any degree of specificity, we note that all omissions of counsel do not arise to the dignity of a denial of due process . . . ."72 The court based its conclusion on the fact "that defense counsel and defendant were well aware that the prosecution was proceeding on an aiding and abetting theory"73 even though the information did not specifically charge defendant under the accountability statute. Consequently, the failure by defense counsel to object specifically to the instructions did not render the trial a "farce or mockery," nor did such action fail to meet the customary standard: performance of a lawyer "with ordinary training and skill in the criminal law."74

Moreover, the court admonished the prosecution in dicta for not charging the defendant under the accountability statute:

While the record is clear that no surprise existed, this Court does not condone the method used by the state in charging the defendant. If the state planned to charge the defendant with aiding and abetting, in proper practice it should have done so from the onset.75

As notice and avoidance of surprise are the key considerations in such cases, the court carefully scrutinized the facts to determine whether sufficient notice had been given.

In *State v. Thompson*,76 the court considered the propriety of a prosecutor's closing remarks. May a prosecutor comment on the disastrous effects the defendant's perjured remarks might have on an innocent man? If the remarks made during closing argument constitute "a comment on the gravity of the crime charged . . .," they are admissible:77

Generally, the gravity of the crime charged, the volume of the evidence, credibility of the witnesses, inferences to be drawn from various phases of evidence, and legal principles involved, to be presented in instructions to the jury, are all matters within the proper scope of argument.78

The court concluded that the marks did not constitute a personal commentary on the defendant's perjured statements but did explain to the jury the testimony and transcript of a prior criminal proceeding.

72. *Id.* at 1054.

73. *Id.* See also *State v. Murphy*, \_\_\_ Mont. \_\_\_, 570 P.2d 1103 (1977).

74. See *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974).

75. *State v. Murphy*, \_\_\_ Mont. \_\_\_, \_\_\_, 570 P.2d 1103, 1105 (1977), as referred to in *Murphy v. Crist*, No. 14209 (Mont. July 13, 1978) (35 St. Rep. 1054 (1978)).

76. \_\_\_ Mont. \_\_\_, 576 P.2d 1105 (1978).

77. *Id.* at \_\_\_, 576 P.2d at 1109.

78. *Id.*

The third case, *State v. Bain*,<sup>79</sup> involved repeated attempts by the prosecutor to introduce inadmissible evidence regarding defendant's prior criminal status. The court stated:

Willful attempts by counsel to place excluded evidence before the jury may result not only in a mistrial, but reversal.

. . . .  
 . . . In determining whether such questions are so prejudicial [as] to . . . require reversal, this Court must look (1) to the reasonable inference to be drawn from the questions, and (2) whether such repeated attempts to offer excluded evidence might have contributed to the conviction.<sup>80</sup>

To determine the prejudicial effect of the prosecutor's repeated attempts to introduce excluded evidence, the court considered: (1) the length of jury deliberation; (2) the fact defendant's character had never been opened by the defense; and (3) the fact defendant was convicted of theft rather than the lesser included offense of unauthorized use of a motor vehicle.<sup>81</sup>

### E. Double Jeopardy

When does jeopardy attach in a jury trial? Prior to *Crist v. Bretz*,<sup>82</sup> two rules affected the judicial system in Montana: (1) in the federal court system, jeopardy attached when the jury was empaneled and sworn; and (2) in the Montana court system, jeopardy attached after the first witness was sworn.<sup>83</sup> The United States Supreme Court in *Bretz* resolved the question of time and attachment by holding that jeopardy attaches when the jury is empaneled and sworn.<sup>84</sup>

In adopting the federal rule, the Court raised "the defendant's 'valued right to have his trial completed by a particular tribunal'" to a constitutionally guaranteed right.<sup>85</sup> The Court dismissed Montana's argument that the federal rule merely represented a rule of convenience.

[The federal rule] is a rule that both reflects and protects the defendant's interest in retaining a chosen jury. We cannot hold that this rule . . . is only at the periphery of double jeopardy

79. \_\_\_ Mont. \_\_\_, 575 P.2d 919 (1978).

80. *Id.* at \_\_\_, 575 P.2d at 923.

81. *Id.*

82. 437 U.S. 28 (1978), *rev'g* *Bretz v. Crist*, 546 F.2d 1136 (9th Cir. 1976).

83. *Id.* at 29. See MCA § 46-11-503(4) (1978) (formerly codified at R.C.M. 1947, § 95-1711(3)(d) (Supp. 1977)). The court held that § 46-11-503(4) cannot constitutionally be applied to a jury trial.

84. 437 U.S. at 38.

85. *Id.* at 36.

concerns. These concerns — the finality of judgments, the minimization of harassing exposure to the harrowing experience of a criminal trial, and the value right to continue with the chosen jury — have combined to produce the federal law that in a jury trial jeopardy attached when the jury is empaneled and sworn.<sup>86</sup>

The leading case cited as authority for the federal rule is *Downum v. United States*.<sup>87</sup> *Downum*, however, did not expressly discuss when jeopardy should attach; counsel for the parties conceded that jeopardy attached when the jury was empaneled and sworn.<sup>88</sup>

The Court's reliance on the defendant's "valued right to have his trial completed by a particular tribunal" ignores the meaning of the entire sentence from which this standard was excerpted. The complete sentence written by Justice Black in *Wade v. Hunter*<sup>89</sup> reads:

What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.<sup>90</sup>

This sentence suggests the defendant's valued right is not absolute, but conditional. Therefore, concern for federalism and state experimentation could subordinate this right, especially when the time distinction between when a jury is empaneled and sworn and when the first witness is sworn is minimal.<sup>91</sup> Justice Powell in his dissent admonished the majority for constitutionally fixing the exact time jeopardy should attach. In his opinion, the federal rule should only be a federal supervisory rule because the rule is not based on any doctrinal reasoning reaching constitutional dimensions.<sup>92</sup> Nevertheless, the Court in *Crist* overlooked these concerns and explicitly held that jeopardy in jury proceedings attaches when the jury is empaneled and sworn.<sup>93</sup> In non-jury proceedings, jeopardy attaches after the first witness is sworn.<sup>94</sup>

Will review of a pretrial acquittal place a defendant in double jeopardy? In *State v. Hagerud*,<sup>95</sup> the supreme court allowed review and stated: "[In an action regarding mental disease excluding re-

86. *Id.* at 38.

87. 372 U.S. 734 (1963).

88. *Crist v. Bretz*, 437 U.S. at 48, n. 14 (Powell, J., dissenting).

89. 336 U.S. 684 (1949).

90. *Id.* at 689.

91. *Crist v. Bretz*, 437 U.S. at 40-53 (Powell, J., dissenting). This argument is implicit in Justice Powell's dissenting opinion.

92. *Id.* at 49.

93. *Id.* at 38.

94. *Srfass v. United States*, 420 U.S. 377, 388 (1975).

95. \_\_\_ Mont. \_\_\_, 570 P.2d 1131 (1978).

sponsibility the] defendant was never once placed in jeopardy because he was never subjected to the possibility of conviction of the crime charged."<sup>96</sup> The court followed the reasoning of *Serfass v. United States*.<sup>97</sup>

Although an accused may raise defenses or objections before trial which are "capable of determination without the trial of the general issue," and although he must raise certain other defenses or objections before trial, in neither case he is "subjected to the hazards of trial and possible conviction."<sup>98</sup>

A defendant must be "put to trial before the trier of facts, whether the trier be a jury or a judge" before jeopardy attaches.<sup>99</sup>

Yet in another aspect of double jeopardy, the court in *State v. Zimmerman*<sup>100</sup> corrected an earlier decision in the same case which had allowed a second prosecution in state court after the defendant had been tried, convicted and sentenced on virtually the same facts and for the same criminal episode in federal court.<sup>101</sup> After referring extensively to a critical analysis of the earlier decision in a law review article, the court held the facts and offenses of the state prosecution arose out the same transaction as that considered in the federal prosecution: "Section [46-11-504] fits this case like a glove and bars the subsequent state prosecution after the initial federal conviction."<sup>102</sup> *Zimmerman* and MCA § 46-11-504 (1978)<sup>103</sup> abrogate the "separate sovereignties" doctrine in Montana, which allows

96. *Id.* at \_\_\_\_, 570 P.2d at 1137.

97. 420 U.S. 377 (1975).

98. *Id.* at 391.

99. *Id.* at 388. (citing *United States v. Jorn*, 400 U.S. 470, 479 (1971)).

100. \_\_\_\_, Mont. \_\_\_\_, 573 P.2d 174 (1977).

101. See *Elison, Criminal Procedure*, 38 MONT. L. REV. 27, 57 (1977) for a critical review of the first decision, *State ex rel. Zimmerman v. District Court*, 168 Mont. 289, 541 P.2d 1215 (1975).

102. *State v. Zimmerman*, \_\_\_\_, Mont. at \_\_\_\_, 573 P.2d at 179. MCA § 46-11-502 (1978) (formerly codified at R.C.M. 1947, § 95-1711(4) (Supp. 1977)) states:

When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state or of two courts of separate, overlapping, or concurrent jurisdiction in this state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:

(1) The first prosecution resulted in an acquittal or in a conviction as defined in [§ 46-11-503] and the subsequent prosecution is based on an offense arising out of the same transaction.

(2) The former prosecution was terminated, after the complaint had been filed on a misdemeanor charge or after the information had been filed or the indictment found on a felony charge, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated; and the acquittal, final order, or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense for which the defendant is subsequently prosecuted.

103. Formerly codified at R.C.M. 1947, § 95-171(4) (Supp. 1977).

both the state and federal governments to prosecute an offender for the same offense.<sup>104</sup>

A defendant, however, may be charged, convicted and sentenced for two distinct criminal offenses arising out of the same transaction. In *State v. Davis*,<sup>105</sup> the supreme court allowed the district court to charge, convict, and consecutively sentence two defendants for attempted escape and criminal mischief. The court relied on a prior precedent:

A single act may be an offense against two statutes and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.<sup>106</sup>

The court never referred to MCA § 46-11-502 (1978),<sup>107</sup> which expressly states:

When the same transaction may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

- (1) one offense is included in the other;
- (2) one offense consists only of a conspiracy or other form of preparation to commit the other;
- (3) inconsistent findings of fact are required to establish the commission of the offenses;
- (4) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

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104. The United States Supreme Court first formulated the doctrine in *United States v. Lanza*, 260 U.S. 377, 382 (1922):

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory . . . . Each government is determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punishable by both.

The Court reaffirmed this doctrine in *Abbate v. United States*, 359 U.S. 187 (1959) and *Bartkus v. Illinois*, 359 U.S. 121 (1959), even though the Fifth Amendment of the United States Constitution provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The basic rationale for the doctrine is that the defendant is "a citizen of two governments, each of which has separate interests to protect and is independently responsible for the enforcement of its laws. To outlaw successive prosecutions . . . would enable one sovereign to interfere with the administration of the other's criminal law." Comment, *Double Prosecution By State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538, 1540 (1967).

105. — Mont. —, 577 P.2d 375 (1978).

106. *Id.* at —, 577 P.2d at 377.

107. Formerly codified at R.C.M. 1947, § 95-1711(2) (Supp. 1977).

(5) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that the specific periods of such conduct constitute separate offenses.

Although the court reached the proper conclusion by relying on the prior precedent, it missed an opportunity to apply specific statutory law to a procedural question.

#### F. *Guilty Pleas*

Before a court will accept a guilty plea, the plea must be made (1) voluntarily and (2) understandingly and intelligently by the defendant.<sup>108</sup> To assure that the plea meets these essential requirements a court should consider the totality of the circumstances.<sup>109</sup> In *State v. Azure*,<sup>110</sup> the Montana Supreme Court held that a district judge must ask the defendant whether he understands the charges filed against him, the elements of the crime, the possible alternative charges and the maximum sentences for all charges.<sup>111</sup> This colloquy must occur prior to the judge accepting the defendant's plea, because once he pleads guilty he waives several constitutional rights: (1) the right to counsel; (2) the privilege against self-incrimination; (3) the right to a jury trial; and (4) the right to confront one's accusers.<sup>112</sup> If the district judge fails to conduct such a colloquy, the supreme court will vacate the earlier judgment and sentence and allow the defendant to withdraw his guilty plea if he has properly submitted a motion to the district court.<sup>113</sup>

MCA § 46-12-204(2) (1978)<sup>114</sup> provides in pertinent part:

The court may refuse to accept a plea of guilty and should not accept the plea of guilty without first determining that the plea is voluntary with an understanding of the charge.

When considering the voluntariness of the plea, the court must examine the possibility of threats, misrepresentations or bribes by either the court, the prosecutor or the defense counsel before accepting the defendant's guilty plea.<sup>115</sup>

108. See *Brady v. United States*, 397 U.S. 742 (1970).

109. See *Boykin v. Alabama*, 395 U.S. 238 (1969).

110. \_\_\_ Mont. \_\_\_, 573 P.2d 179 (1977).

111. *Id.* at \_\_\_, 573 P.2d at 183.

112. *Boyking v. Alabama*, 395 U.S. 238, 243 (1969), specifically considered the rights enumerated in (2) through (4). *Gideon v. Wainwright*, 372 U.S. 335 (1963), requires the right enumerated in (1).

113. See e.g., *State v. Azur*, \_\_\_ Mont. \_\_\_, 573 P.2d 179 (1977).

114. Formerly codified at R.C.M. 1947, § 95-1606(e).

115. *Brady v. United States*, 397 U.S. 742, 755 (1970).



A defendant may withdraw a guilty plea.<sup>116</sup> In *State ex rel. Gladue v. District Court*,<sup>117</sup> the court reversed as an abuse of discretion a district court order refusing to allow a withdrawal of a guilty plea. The defendant had maintained his innocence up to the time of his initial plea and then changed it because of his counsel's influence. The court stated:

A plea of guilty will be deemed involuntary where it appears that the defendant was laboring under such a strong inducement, fundamental mistake or serious mental condition that the possibility exists he may have plead [sic] guilty to a crime of which he is innocent.<sup>118</sup>

If the guilty plea creates any doubt as to its voluntariness, the court said, such doubt should be resolved in favor of the defendant.<sup>119</sup>

In a subsequent case, *State v. Lewis*,<sup>120</sup> which involved a defendant who wished to withdraw his guilty plea, the court held, *inter alia*, that if the district judge conducts a detailed colloquy on the record, the request for withdrawal will not "be given any degree of credence" if the defendant's motion is an attempt "to, [in effect], receive a lighter sentence."<sup>121</sup> The colloquy in *Lewis* addressed: (1) the charge; (2) the conviction; (3) the sentence; (4) the defendant's state of mind; (5) the competency of counsel; and (6) submission of a plea in open court.<sup>122</sup> The Court in *Lewis* implicitly affirmed the general practice which liberally allows the withdrawal of guilty pleas prior to sentencing, but which rarely allows the withdrawal after sentencing if the judge conducts the proper colloquy.

In *State v. Coleman*,<sup>123</sup> the defendant claimed reversible error because the state refused to plea bargain and refused to accept his offered guilty plea. The court summarily dismissed defendant's argument regarding the court's failure to accept his guilty plea: "The acceptance of a guilty plea to a charged offense is within the discretion of the trial court."<sup>124</sup> MCA § 46-12-204(2) (1978)<sup>125</sup> mandates

116. MCA § 46-16-105(2) (1978) (formerly codified at R.C.M. 1947, § 95-1902) provides in pertinent part:

At any time before or after judgment the court may, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.

117. \_\_\_ Mont. \_\_\_, 575 P.2d 65 (1978).

118. *Id.* at \_\_\_, 575 P.2d at 66.

119. *Id.* at \_\_\_, 575 P.2d at 67 (citing *State v. Casaras*, 104 Mont. 404, 413, 66 P.2d 774, 778 (1937)).

120. \_\_\_ Mont. \_\_\_, 582 P.2d 346 (1978).

121. *Id.* at \_\_\_, 582 P.2d at 352.

122. *Id.* at \_\_\_, 582 P.2d at 349. See Judge Allen's detailed colloquy, \_\_\_ Mont. at \_\_\_, 582 P.2d at 439.

123. \_\_\_ Mont. \_\_\_, 579 P.2d 732 (1978).

124. *Id.* at \_\_\_, 579 P.2d at 745.

125. MCA § 46-12-204(2) (1978) (formerly codified at R.C.M. 1947, § 95-1606(e)) pro-

such discretion. The court also dismissed the defendant's argument that the prosecutor failed to plea bargain with him. Constitutional guarantees do not require plea bargaining; they merely allow it within certain standards.<sup>126</sup> Consequently, a defendant may be denied the opportunity to plea bargain with the prosecution as well as have his guilty plea refused by the court. Moreover, if a formal plea is not completed during the arraignment, such irregularity will not affect subsequent legal action if the defendant fails to object before proceeding to trial and his substantial rights are not prejudiced by such irregularity.<sup>127</sup>

If the plea bargaining occurs in an open give-and-take process which allows the defendant to accept or reject the prosecutor's offer, the defendant probably will not be able to claim prosecutorial vindictiveness.<sup>128</sup> The United States Supreme Court held in *Bordenkircher v. Hayes*<sup>129</sup> that where a prosecutor "openly presented the defendant with the unpleasant alternatives of foregoing trial and facing charges on which he was plainly subject to prosecution" the defendant could not claim deprivation of any constitutional guarantee.<sup>130</sup> In *Hayes*, the prosecutor had recommended during post-arraignment conferences a sentence of five years if the defendant would plead guilty; the prosecution informed the defendant that if a plea of not guilty was entered, he would seek a new indictment under the Kentucky Habitual Criminal Act. The Court reasoned that "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecutor's offer."<sup>131</sup> The give-and-take process precludes the unilateral imposition of a criminal penalty through prosecutorial vindictiveness.<sup>132</sup>

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vides in pertinent part: "The court may refuse to accept a plea of guilty . . . ."

126. See *Brady v. United States*, 397 U.S. 742 (1970).

127. *State v. Petko*, \_\_\_ Mont. \_\_\_, \_\_\_, 581 P.2d 425, 429 (1978). See MCA § 46-12-206 (1978) (formerly codified at R.C.M. 1947, § 95-1608):

No irregularity which does not affect the substantial rights of the defendant shall affect the validity of any proceeding in the cause if the defendant pleads to the charge or proceeds to trial without objecting to such irregularity.

The Revised Commission Comment to § 46-12-206 states:

The real question in all criminal cases on appeal is whether the substantial rights of the defendant have been adversely affected. The purpose of the section is to prevent reversal where the court has strayed from the procedure set forth, but the failure has not hindered the defense.

The burden is upon the defendant to object if any irregularity in connection with the arraignment is going to affect his defense. This does not override any of the defendant's substantial constitutional rights even though not objected to.

128. See *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

129. 434 U.S. 357 (1978).

130. *Id.* at 365.

131. *Id.* at 363.

132. *Id.* at 362.

Justice Blackmun, in his dissenting opinion, argued that little difference can exist between vindictiveness which prevents the defendant from exercising a legal right to attack his original conviction and which occurs during the give-and-take process of plea bargaining.<sup>133</sup> Vindictiveness occurs in either situation regardless of the label attached to the process.

*Hayes* expressly overruled a Sixth Circuit case, *Hayes v. Cowan*,<sup>134</sup> in which the court considered the prosecutor's action during plea bargaining to be per se violative of defendant's due process rights. This reversal is significant in Montana as the Montana Supreme Court relied in part upon the Sixth Circuit case in deciding *State v. Sather*.<sup>135</sup> *Sather* remains technically sound, however, as the court considered both federal and state grounds in reaching its result. In *Sather*, the court held that a prosecutor could not wait until plea bargaining failed and then, twenty-four hours before trial, threaten to impose the persistent felony offender statute if the defendant refused to plea guilty. This action was characterized by the court as vindictive and a deprivation of the defendant's due process.<sup>136</sup>

In a subsequent case, *State v. Gallaher*<sup>137</sup> the court considered the *Bordenkircher* case, but did not find it applicable to the facts in *Gallaher*. The court also distinguished the facts in *Gallaher* from *Sather* on the following three grounds: (1) no agreed proceeding statement existed as in *Sather*; (2) no certified docket entries existed as in *Sather*; and (3) no documentation existed showing the prosecutor's evaluation of the case and his proposed increased sentence as in *Sather*.<sup>138</sup> Furthermore, the disparity between the bargained sentence and the actual sentence did not seem so unfair as to require a finding that a due process violation has occurred.<sup>139</sup>

### G. Probation and Parole

In *Lopez v. Crist*,<sup>140</sup> a case of first impression, the court considered the issue of "whether a parolee who, after a full revocation hearing, has been found by the Board of Pardons not to have violated his parole may nevertheless be confined pending submission of an acceptable new parole plan."<sup>141</sup> The court in *Lopez* recognized

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133. *Id.* at 367-68 (Blackmun, J., dissenting).

134. 547 F.2d 42 (6th Cir. 1976).

135. \_\_\_ Mont. \_\_\_, 564 P.2d 1306 (1978).

136. *Id.* at \_\_\_, 564 P.2d at 1311.

137. \_\_\_ Mont. \_\_\_, 580 P.2d 930 (1978).

138. *Id.* at \_\_\_, 580 P.2d at 934.

139. *Id.*

140. \_\_\_ Mont. \_\_\_, 578 P.2d 312 (1978).

141. *Id.* at \_\_\_, 578 P.2d at 314.

“the importance of parole status” and the liberty associated with that status and held that if insufficient evidence existed to justify revocation of parole, the parolee’s “indeterminate liberty” must be restored.<sup>142</sup> The court observed that if the parolee is returned to prison after a parole revocation based on insufficient evidence, “[t]he parole authorities have . . . an affirmative duty to actively aid [the parolee] in developing a realistic, acceptable plan.”<sup>143</sup> In *Lopez*, the parolee in good faith had submitted two parole plans which the board rejected without recommending changes.<sup>144</sup> The court, however, did not specify how the parole board should affirmatively aid the parolee except to require the board’s “total cooperation and active efforts . . . in finding an acceptable parole plan.”<sup>145</sup>

In a related matter, the court held that for revocation of a deferred or suspended sentence, “the trial judge must have, and the record must reflect that he has, substantially correct information concerning the defendant before he can affect a defendant’s substantial rights by entering an order of revocation.”<sup>146</sup> In *State v. Knapp*,<sup>147</sup> the district court revoked the defendant’s deferred imposition of sentence when he failed to regularly report to his probation officer. Although the judge has discretion to revoke a deferred sentence on the grounds of failure to report, such discretion should be sparingly used.<sup>148</sup>

In order to exercise his discretion, the judge must know “who the defendant is and the charges upon which the state is seeking to have a sentence imposed.”<sup>149</sup> In *Knapp*, the judge revoked the deferred sentence and then sentenced the defendant on charges for which he had not been convicted. Only after prolonged discussion did the judge correct the error. The court observed: “[A] defendant can be prejudiced as much by mistaken assumptions concerning his criminal background when a deferred sentence is revoked, as he can when he is sentenced.”<sup>150</sup> The judge, therefore, must have “substantially correct information” regarding the defendant, as verified by the record, before an order of revocation can be entered affecting the defendant’s substantial rights.<sup>151</sup>

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142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *State v. Knapp*, \_\_\_ Mont. \_\_\_, \_\_\_, 570 P.2d 1138, 1140 (1977).

147. \_\_\_ Mont. \_\_\_, 570 P.2d 1138 (1977).

148. *Id.* at \_\_\_, 570 P.2d at 1140.

149. *Id.*

150. *Id.* at \_\_\_, 570 P.2d at 1141.

151. *Id.*

### H. Sentence and Review

"A sentencing judge may not conduct his own presentence investigation by privately interviewing persons he believes to know more than they have told; . . . he must delegate that responsibility to other officials."<sup>152</sup> In *State v. Stewart*,<sup>153</sup> the court observed that where the judge personally interviewed witnesses who had testified during the trial, the judge overstepped "his legitimate role as a fact finder [and became] a private fact gatherer."<sup>154</sup> "The judge, by this process, . . . unwittingly [became] intimately connected with the accusatory process," diminishing any semblance of impartiality.<sup>155</sup> Although the judge in selecting the appropriate sentence must learn all he can about the defendant, he must not abuse his discretionary information-gathering power by privately and informally retrying the case.<sup>156</sup>

In three recent cases the court considered whether a district court could impose a fine as a reasonable condition of probation when the applicable statute did not authorize such a fine or when no reasonable relationship existed between the fine and the crime. In *State v. Babbit*,<sup>157</sup> the court recognized the discretionary power of the judge, but disallowed the imposition of any fine:

Imposition of fine is the passing of a sentence and not the suspension of sentence. The fact that the court terms it a condition of probation does not render it any the less a sentence.<sup>158</sup>

The court added: "We fail to find a reasonable association between the fine imposed . . . and the crime committed. Neither do we find it to be a reasonable or necessary condition of probation or for protection of the public."<sup>159</sup> Therefore, the imposition of a fine in this instance was "a nullity and of no force or effect."<sup>160</sup>

In *State v. Petko*,<sup>161</sup> a case factually similar to *Babbit* except that *Petko* was sentenced after a jury trial rather than after a guilty plea, the court also held the fine a nullity. In *State v. Gripps*,<sup>162</sup> the court applied the *Babbit* rule to a fine imposed as a condition for a

152. *State v. Stewart*, \_\_\_ Mont. \_\_\_, \_\_\_, 573 P.2d 1138, 1148 (1977).

153. \_\_\_ Mont. \_\_\_, 573 P.2d 1138 (1977).

154. *Id.* at \_\_\_, 573 P.2d at 1148.

155. *Id.*

156. *Id.* at \_\_\_, 573 P.2d at 1148-49.

157. \_\_\_ Mont. \_\_\_, 574 P.2d 998 (1978).

158. *Id.* at \_\_\_, 574 P.2d at 1001 (citing *State v. Pitts*, 26 Ariz. App. 390, 391, 548 P.2d 1202, 1203 (1976)).

159. *Id.* at \_\_\_, 574 P.2d at 1002.

160. *Id.*

161. \_\_\_ Mont. \_\_\_, 581 P.2d 425 (1978).

162. \_\_\_ Mont. \_\_\_, 582 P.2d 312 (1978).

suspended sentence and also held the fine to be a nullity. The defendants in *Cripps* were charged for offenses which allowed a statutory fine. The court stated:

At sentencing the court could, among other things, suspend execution of sentence upon the [condition of MCA § 46-18-201(1)(b) (1978)], impose a fine as provided by law, or impose a combination of both. We do not think, however, that [section 46-18-201(1)(b)] in itself, allows the sentencing court to make payment of a fine a condition to suspend execution of the sentence.<sup>163</sup>

Therefore, in these three cases, the court specifically expressed its willingness to invalidate the imposition of a fine as a condition of probation.

In a post-conviction relief hearing, the defendant must prove by a preponderance of the evidence that he is entitled to relief, according to *In the Matter of Jones*.<sup>164</sup> That case involved a petition for post-conviction relief wherein the defendant requested that a district judge be prohibited from imposing a heavier sentence for possible perjury in another person's trial. The court adopted the general rule that in rendering a sentence, a judge may consider the defendant's perjured statements in another trial without such consideration representing a conviction for another crime without normal procedural safeguards.<sup>165</sup> Therefore,

[w]hile the sentencing judge may take into account his belief that the defendant was not candid with the court this is to be distinguished from the rule that a sentence may not be augmented because a defendant refuses to confess or invokes his privilege against self-incrimination.<sup>166</sup>

Before imposing a heavier sentence for possible perjury or lack of

163. *Id.* at \_\_\_\_, 582 P.2d at 320. MCA § 46-18-201(1)(b) (1978) (formerly codified at R.C.M. 1947, § 95-2206(1)(b) (Supp. 1977)) provides in pertinent part:

(1) Whenever a person has been found guilty of an offense upon a verdict or a plea of guilty, the court may:

(b) suspend execution of sentence up to the maximum sentence allowed for the particular offense. The sentencing judge may impose on the defendant any reasonable restrictions during the period of suspended sentence. Such reasonable restrictions may included:

(i) jail base release;  
(ii) jail time not exceeding 90 days;  
(iii) conditions for probation;  
(iv) restitution;  
(v) any other reasonable conditions considered necessary for rehabilitation or for the protection of society;  
(vi) any combination of the above.

164. \_\_\_\_, Mont. \_\_\_\_, \_\_\_\_, 578 P.2d 1150, 1152 (1978).

165. *Id.* at \_\_\_\_, 578 P.2d at 1153.

166. *Id.* at \_\_\_\_, 578 P.2d at 1154.

candor, the district judge may wish to consider several questions:

- (1) Is possible perjury the only factor for imposing a heavier sentence?
- (2) Could a separate criminal proceeding for perjury be initiated?
- (3) Did defendant's possible perjury obstruct the administration of justice?
- (4) Will defendant's procedural rights suffer?
- (5) Is perjury a valid indicator of the defendant's capacity for reformation or repentance?
- (6) Is it possible defendant did not commit perjury but his demeanor suggests it?
- (7) Is the basis for the court's belief of possible perjury based on defendant's refusal to confess or invocation of his self-incrimination privilege?
- (8) Is the court's belief of perjury based on logical or personal biases?

Justice Shea, in his dissenting opinion, stated that questions similar to the above may be the minimum requisite questions that should be considered by a district judge.<sup>167</sup>

How much identification is required before the state may impose the persistent felony offender statutes?<sup>168</sup> In *State v. Radi*,<sup>169</sup> the court stated that mere certified records of a prior judgment and of prison records showing dates of incarceration were insufficient to identify the defendant.<sup>170</sup> Assertions that the defendant has appeared before the same judge in an unrelated case also were deemed insufficient.<sup>171</sup> The prosecutor must prove by competent evidence, the court said, that the defendant is the person who committed the prior felony.<sup>172</sup> The court also said that a presentence investigation is required regardless of the evidence that indicates the defendant is a persistent felony offender.<sup>173</sup>

The court in *Radi* also adopted the minority rule that a prior

167. *Id.* at \_\_\_\_, 578 P.2d at 1155-61 (Shea, J., dissenting). See also Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 211-17 (1956).

168. See MCA §§ 46-18-501 through 46-18-503 (1978) (formerly codified at R.C.M. 1947, §§ 95-1506 through 1507 (Supp. 1977)). These statutes allow the state to present evidence of a prior felony conviction before an offender's guilty plea or trial on a subsequent felony charge. If the offender is convicted on the subsequent felony charge and the court finds that any of the allegations regarding the prior conviction are true, then the court may not defer or suspend the first 5 years of the sentence except under certain circumstances.

169. \_\_\_\_, Mont. \_\_\_\_, 578 P.2d 1169 (1978).

170. *Id.* at \_\_\_\_, 578 P.2d at 1180.

171. *Id.*

172. *Id.* at \_\_\_\_, 578 P.2d at 1180-81.

173. *Id.* at \_\_\_\_, 578 P.2d at 1182.

conviction may be considered in applying the persistent felony offender statute even though that conviction is pending on appeal at the time of sentencing for the subsequent crime.<sup>174</sup> If the pending conviction is reversed, MCA §§ 46-18-501 and 46-18-502 (1978)<sup>175</sup> become applicable: "[A] reversal [on appeal] granting a new trial would erase the previous conviction and eliminate the bases to sentence [the] defendant as a persistent felony offender."<sup>176</sup> Consequently, the court reaches the same result as the majority if the prior conviction is reversed; if the prior conviction is affirmed, the judicial system is spared time and expense while preserving the defendant's rights.

In *State v. Nelson*,<sup>177</sup> the court considered whether evidence of two prior convictions for driving while under the influence of intoxicating liquors must be presented at trial for the third offense rather than at sentencing. "The State, upon trial, only has to prove the present offense. If they succeed, then the matter of the prior convictions is considered in setting the sentence."<sup>178</sup> The procedure used in a case involving the third offense of driving while under the

174. *Id.* at \_\_\_\_, 578 P.2d at 1181.

175. Formerly codified at R.C.M. 1947, § 95-1507(1) (Supp. 1977).

176. \_\_\_\_ Mont. at \_\_\_\_, 578 P.2d at 1181. MCA § 46-18-501 (1978) (formerly codified at R.C.M. 1947, § 95-1507(1) (Supp. 1977)) provides:

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

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

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

(a) the previous felony conviction; or

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

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

MCA § 46-18-502 (1978) (formerly codified at R.C.M. 1947, § 95-1507(2), (3) (Supp. 1977)) provides:

(1) A persistent felony offender shall be imprisoned in the state prison for a term of not less than 5 years or more than 100 years if he was 21 years of age or older at the time of the commission of the present offense.

(2) Except as provided in section 46-18-222, the imposition or execution of the first 5 years of a sentence imposed under subsection (1) may not be deferred or suspended.

These sections have been amended and recodified since the *Radi* discussion; they are not identical to the section and subsections used in *Radi*.

177. \_\_\_\_ Mont. \_\_\_\_, 583 P.2d 435 (1978).

178. *Id.* at \_\_\_\_, 583 P.2d at 437.



influence of intoxicating liquor is analogous to the process used in sentencing repeat felony offenders.<sup>179</sup>

### I. Discovery

*State v. Booke*<sup>180</sup> reaffirmed prior case law which allows additions to a witness list upon a showing of good cause any time after the arraignment and up to the time of the verdict.<sup>181</sup> If either party is allowed to add to the witness list on the day of the trial, the other party should immediately request a continuance rather than object to the addition on grounds of surprise.<sup>182</sup> An allegation of surprise may be very difficult to support, particularly when the additional witnesses are the victims of the crime who have been recuperating under medical care, as was the case in *Booke*.<sup>183</sup>

If discovery motions are used by either party, the requests should be very specific. In *State v. Cripps*,<sup>184</sup> the defendant submitted the following request:

[F]or any written or recorded statements of any person whom the prosecutor intended to call as witnesses at the trial; for any written or recorded statements and the substance of any oral statements made by the defendants; and for any relevant or material information which had been provided by an informant.<sup>185</sup>

This request lacked sufficient specificity to require a prosecutor to disclose a witness's oral statement.<sup>186</sup> Any objection to testimony which could have been obtained through discovery must be made in a timely manner; otherwise the objecting party has waived the right.<sup>187</sup> After objectionable testimony is introduced, the objecting

179. *Id.* (citing *State v. Loudermilk*, 221 Kan. 157, 161, 557 P.2d 1228, 1233 (1976)).

180. \_\_\_ Mont. \_\_\_, 583 P.2d 405 (1978).

181. *Id.* at \_\_\_, 583 P.2d at 409 (citing *State v. Campbell*, 160 Mont. 111, 500 P.2d 801 (1972)). MCA § 46-15-301 (1978) (formerly codified at R.C.M. 1947, § 95-1803 (Supp. 1977)) provides in pertinent part:

In all criminal cases originally triable in district court the following rules apply:

(1) For the purpose of notice only and to prevent surprise, the prosecution shall furnish to the defendant and file with the clerk of the court at the time of arraignment a list of the witnesses the prosecution intends to call. The prosecution may, any time after arraignment, add to the list the names of any additional witnesses upon a showing of good cause. The list shall include the names and addresses of the witnesses. This subsection does not apply to rebuttal witnesses.

182. *Id.* at \_\_\_, 583 P.2d at 410.

183. *Id.* at \_\_\_, 583 P.2d at 409-10.

184. \_\_\_ Mont. \_\_\_, 582 P.2d 312 (1978).

185. *Id.* at \_\_\_, 582 P.2d at 316.

186. *Id.* at \_\_\_, 582 P.2d at 317.

187. *Id.*

party should immediately move to strike such evidence; the failure to make such a motion will constitute a waiver.<sup>188</sup>

### J. Appeal Procedure

When a defendant is committed for psychiatric treatment following a pretrial hearing in the defense of mental defect excluding responsibility, the substantive effect of the court's action is acquittal, not dismissal.<sup>189</sup> The state under MCA § 46-20-103 (1978) has no "right of direct appeal."<sup>190</sup> The state alternatively argued in *State v. Hagerud*<sup>191</sup> that if direct appeal is not permissible, a writ of supervisory control should be granted.<sup>192</sup> A writ of supervisory control is appropriate when: (1) the district court is acting within its jurisdiction, (2) but by a mistake of law or willfull disregard of it causing a gross injustice and (3) no appeal exists or a remedy of appeal is inadequate.<sup>193</sup> The court, in allowing the writ, considered the district court's action improper because the parties contested the mental defect. Therefore, the district court should have held more than a summary pretrial proceeding to resolve the conflict.<sup>194</sup>

In *State v. Mortenson*,<sup>195</sup> the court considered "whether the time for appeal from a justice court conviction runs from the date of verbal pronouncement of judgment in open court, or from the date the judgment is executed by the court and received by the defendant."<sup>196</sup> The statutory time limit controlling appeals "runs

188. *Id.* See WHARTON, CRIMINAL PROCEDURE §§ 380-90 (12th ed. 1975) for a discussion of the general rules regarding discovery. Montana appears to be in the majority.

189. See *State v. Hagerud*, \_\_\_ Mont. \_\_\_, \_\_\_, 570 P.2d 1131, 1135 (1977).

190. MCA § 46-20-103 (1978) (formerly codified at R.C.M. 1947, § 95-2403 (Supp. 1977)) provides:

(1) Except as otherwise specifically authorized, the state may not appeal in a criminal case.

(2) The state may appeal from any court order of judgment the substantive effect of which results in:

(a) dismissing a case;  
 (b) modifying or changing the verdict as provided iin 46-16-702(3)(c);  
 (c) granting a new trial;  
 (d) quashing an arrest or search warrant;  
 (e) suppressing evidence;  
 (f) suppressing a confession or admission; or  
 (g) granting or denying change of venue.

191. \_\_\_ Mont. \_\_\_, 570 P.2d 1131 (1977).

192. *Id.* at \_\_\_, 570 P.2d at 1135.

193. *Id.* See MONT. CONST. art. VII, § 2; MONT. R. APP. CIV. P. 17.

194. *Id.* at \_\_\_, 570 P.2d at 1137.

195. \_\_\_ Mont. \_\_\_, 574 P.2d 581 (1978).

196. *Id.* at \_\_\_, 574 P.2d at 581. MCA § 46-17-311 (1978) (formerly codified at R.C.M. 1947, ] 95-2009(2) (Supp. 1977)) provides in pertinent part:

(2) The defendant may appeal to the district court by giving written notice of his intention to appeal within 10 days after judgment.

from the date of oral pronouncement."<sup>197</sup> To meet this deadline, the appeal papers must be "actually received" by the proper official "within the time fixed for filing."<sup>198</sup>

In *State ex rel. Graveley v. District Court*,<sup>199</sup> the court strictly construed the time requirement for criminal appeals. To appeal a criminal case to the supreme court, notice must be submitted to the court within sixty days after the judgment's rendition.<sup>200</sup> If this requirement is not met, the court lacks "jurisdiction to hear the appeal."<sup>201</sup>

Three cases specifically considered the writ of habeas corpus and its applicability to appeals: *Bretz v. Crist*,<sup>202</sup> *State ex rel. Graveley v. District Court*,<sup>203</sup> and *In re Hart*.<sup>204</sup> In *Bretz*, the court reaffirmed an earlier rule that "any error in a criminal trial, which is reviewable on appeal from the conviction, will not be considered in a habeas corpus proceeding."<sup>205</sup> A writ of habeas corpus and a writ of appeal cannot be pursued simultaneously on the same issue.

*Hart* provides a lengthy historical discussion of the writ of habeas corpus. The court concluded: "The only way to protect persons charged with a crime and preserve the speedy nature of the writ is to recognize that it is dual in nature, viz.—civil as well as criminal."<sup>206</sup> As the writ is an original writ, both the district court and the supreme court may issue it.<sup>207</sup> If the writ is denied in district court, such denial does not divest the supreme court of jurisdiction to issue a writ upon a second application.<sup>208</sup>

In *Hart* the court applied this rule to criminal extradition proceedings; *Graveley* applied it to a criminal proceeding, "where the issue to be determined [was] the freedom of [the] petitioner, or the legality of petitioner's detention."<sup>209</sup> In child custody cases, however, an appeal does lie from from a district court's denial of the writ

197. \_\_\_ Mont. at \_\_\_, 574 P.2d at 582.

198. *Id.* at \_\_\_, 574 P.2d at 582 [citing what is now MCA § 46-20-203 (1978) (formerly codified at R.C.M. 1947, § 95-2413(a))].

199. \_\_\_ Mont. \_\_\_, 582 P.2d 775 (1978).

200. MCA § 46-20-203 (1978) (formerly codified at R.C.M. 1947, § 95-2405(e)) provides: "An appeal from a judgment may be taken within 60 days after its rendition."

201. \_\_\_ Mont. at \_\_\_, 582 P.2d at 777.

202. No. 14209 (Mont. July 13, 1978) (35 St. Rep. 990 (1978)).

203. \_\_\_ Mont. \_\_\_, 582 P.2d 775 (1978).

204. \_\_\_ Mont. \_\_\_, 583 P.2d 411 (1978).

205. No. 14209 (Mont. July 13, 1978) (35 St. Rep. at 991) (citing *Bubnash v. State*, 139 Mont. 645, 367 P.2d 319 (1961)).

206. \_\_\_ Mont. at \_\_\_, 583 P.2d at 416.

207. *Id.* at \_\_\_, 583 P.2d at 414 (citing *State v. Booth*, 134 Mont. 235, 328 P.2d 1104 (1958)).

208. *Id.*

209. \_\_\_ Mont. at \_\_\_, 582 P.2d at 777 (1978).

**because the matter is considered a civil equitable suit and any order by a district court denying such a writ amounts to a judgment upon the merits of the case.<sup>210</sup>**

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210. *In re Hart*, \_\_\_ Mont. \_\_\_, 583 P.2d 411, 414-15 (1978).