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Criminal Procedure--Montana Law and the Federal Impact

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CRIMINAL PROCEDURE—MONTANA LAW AND THE FEDERAL IMPACT

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I. INTRODUCTION

The most reliable aspect of criminal procedure for the past decade is constant change. The 1968 Supreme Court of Warren, Fortas, Black, Brennan, Douglas, Marshall, White, Harlan, and Stewart represented the most liberal, pro-civil rights position in history, but the waning years of the sixties proved to be the end of the liberal Warren Court. In direct response to the Warren Court decisions in *Miranda v. Arizona*,[1] *McNabb v. United States*,[2]

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1. 384 U.S. 436 (1966).

Mallory v. United States,[3] *Berger v. New York,*[4] and *Katz v. United States,*[5] Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968,[6] which represented Nixon's law and order. Eight years later the "Safe Streets Act" is still largely untested.

In Montana, a new code of criminal procedure, designed to codify and generally revise state criminal procedures, became effective December 1, 1968;[7] and in 1973, a new code of substantive criminal law was enacted.[8] In 1972, the people of Montana ratified a new state constitution. Simultaneously, the United States Supreme Court, now the Burger Court, supported by Blackmun, Powell, and Rehnquist, was revising Warren Court doctrine. The Burger Court, with an effective majority, continues to make significant changes in the law of criminal procedure. The Miranda rule is being chipped away[9] and capital punishment has been approved.[10] The authority for warrantless auto and border searches has been expanded,[11] probable cause theories are shifting[12] and the exclusionary rule is under attack by Chief Justice Burger directly and by others indirectly.[13]

Commencing in 1977 Montana will have a new supreme court, one quite surely to be different. New Chief Justice Hatfield promises to be cautiously liberal, while new Associate Justice Shea is generally conceded to be a maverick. His legal experience shows a general commitment to criminal defendants, injured plaintiffs, and unpopular causes. It is impossible to predict the direction of the new court; but faced with a constitution virtually untouched by judicial interpretation, a plethora of new criminal laws, and a new package of evidentiary rules, the door to change is open wide.

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2. 318 U.S. 332 (1943).
3. 354 U.S. 441 (1957).
4. 388 U.S. 41 (1967).
5. 389 U.S. 347 (1967).
6. 18 U.S.C. §§ 2510-2520 (1969 & Supp. 1976).
7. Laws of Montana (1967), ch. 196 (codified at REVISED CODES OF MONTANA (1947) [hereinafter referred to as R.C.M. 1947], title 95).
8. Laws of Montana (1973), ch. 513 (codified at R.C.M. 1947, title 94).
9. *E.g.*, Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971).
10. The United States Supreme Court approved the capital punishment laws of several states. *E.g.*, Gregg v. Georgia, 96 S.Ct. 2909 (1976); Jurek v. Texas, 96 S.Ct. 2950 (1976); Profitt v. Florida, 96 S.Ct. 2960 (1976).
11. *See* pp. 35, 42 *infra*.
12. *See* p. 35 *infra*.
13. *See* pp. 29-30 *infra*.

II. New Directions in Criminal Procedure

A. *Exclusionary Rule: A Balancing Approach*

The United States Supreme Court has perceptibly altered its conception of the constitutional status of the exclusionary rule since it first enunciated the rule in *Weeks v. United States.*[14] Although not specifically so stating, the Court in *Weeks* strongly suggested that the rule had constitutional status. The Court recognized the "praiseworthy" efforts of courts and their officials to bring the guilty to punishment, but, nevertheless, overturned a conviction based upon competent, but illegally seized evidence. The Court said that if such evidence could be used, then the fourth amendment "might as well be stricken from the Constitution."[15] In *Mapp v. Ohio,*[16] the Court emphasized that the rule was an "essential part of the right to privacy;"[17] that it was part and parcel of the fourth amendment's limitation upon governmental encroachment on individual privacy.[18] The Court reviewed its prior decisions and found that those decisions made it clear that the rule was of "constitutional origin".[19] The Court justified its holding on four separate grounds: (1) that the rule served to deter governmental violation of the fourth amendment;[20] (2) that it prevented the use of evidence which would otherwise be tantamount to a "coerced confession";[21] (3) that it served to promote judicial integrity;[22] and (4) that it was an essential ingredient of individual privacy.[23]

Since the decision in *Mapp* mandated the application of the rule to States, the rule has been the subject of substantial debate.[24] Soon after his appointment to the Court, Chief Justice Burger began the drive to overthrow, or at least minimize the impact of, the exclusionary rule. In a strongly worded dissent in 1971, he said that the rule was anomalous and that its efficacy was "hardly more than a wistful dream."[25] According to him it was unchallengeable that

14. 232 U.S. 383 (1914).
15. *Id.* at 393.
16. 367 U.S. 643 (1961).
17. *Id.* at 656.
18. *Id.* at 651.
19. *Id.* at 649 (*citing* Weeks v. United States, 232 U.S. 383 (1914)).
20. Mapp v. Ohio, 367 U.S. 643, 658 (1961).
21. *Id.* at 656.
22. *Id.* at 659.
23. *Id.* at 656.
24. *See* United States v. Janis, 96 S.Ct. 3021, 3030 nn.21, 22 (1976) (listing scholarly commentary and criticism of the rule).
25. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 415 (1971) (Burger, C. J., dissenting). *See also* Stone v. Powell, 96 S.Ct. 3037, 3053 (1976) (Burger, C. J., concurring).

the rule "has set guilty criminals free, but demonstrably has neither deterred deliberate violations of the fourth amendment nor decreased those errors in judgment that will inevitably occur given the pressure inherent in police work having to do with serious crimes."[26]

Although his pleas to Congress to adopt alternative remedies have as yet fallen on deaf ears, his philosophy has been reinforced by recent appointments to the court. A series of recent decisions has substantially weakened the fourfold justification of the exclusionary rule enumerated by the court in *Mapp*. What remains is speculative. *Harris v. New York*[27] and *Oregon v. Hass*[28] allowed the use of illegally seized verbal evidence for impeachment purposes. In *Calandra v. United States,*[29] the Court refused to apply the exclusionary rule to a grand jury proceeding, expressly rejecting the fourth and most critical justification for the exclusionary rule enunciated in *Mapp,* holding instead that the rule was not a "personal constitutional right of the party aggrieved."[30] The *Calandra* decision refuted the constitutional origin of the rule which prior cases had at least suggested.[31] According to Justice Powell:

> Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.[32]

In so holding he ignored the teachings of the Court following the adoption of the exclusionary rule in *Weeks*. Justice Holmes, in a 1920 case, rejected the government's attempts to utilize knowledge gained illegally as the basis for a later subpoena. He said then that if the government were allowed to avail itself in any way of knowledge illegally obtained, the fourth amendment would be reduced to a mere "form of words."[33] He continued: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.*"[34] (Emphasis added).

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26. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 418 (1971) (Burger, C. J. dissenting).

27. 401 U.S. 222 (1971).

28. 420 U.S. 714 (1975).

29. 414 U.S. 338 (1974). *See also* Monaghan, *The Supreme Court 1974 Term*, 89 HARV. L. REV. 1, 4 (1975).

30. Calandra v. United States, 414 U.S. 338, 347 (1974).

31. *E.g.,* Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961).

32. Calandra v. United States, 414 U.S. 338, 348 (1974).

33. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

34. *Id.*

The Burger Court has demoted the rule from "constitutional significance" to a mere "remedial device."[35] To determine when the exclusionary rule should apply, the Court in *Calandra* employed a balancing test to weigh the potential injury to the grand jury fact-finding process against the potential deterrent benefits of the rule.[36] But any doubt whether the *Calandra* holding would be limited to the facts, involving an injury to the "historic role and functions of the grand jury,"[37] has been removed by three subsequent decisions. In each decision, the Court refused to apply the rule to exclude evidence illegally obtained: in a civil tax proceeding;[38] to overturn a prior conviction on collateral habeas corpus review;[39] and to overturn a conviction based on a search which was ostensibly valid when made, but which was subsequently held invalid by the court.[40]

In *United States v. Peltier,*[41] the Court said that evidence should be suppressed only if law enforcement officers knew or should have known that the search was constitutionally invalid.[42] Then, in two cases decided the last day of the 1975 term, the Court held that if the connection between the court proceeding and the original search is too "attenuated" and the likelihood that the exclusion of illegal evidence in that particular proceeding will have a deterrent effect is low, there is no reason to apply the rule.[43]

In *Stone v. Powell,*[44] Justice Powell, again writing for the Court, rejected the third *Mapp* justification for the exclusionary rule, the imperative of judicial integrity, saying that it had "limited force as a justification for the exclusion of highly probative evidence."[45] The exclusionary rule's vitality now flows solely from its deterrent effect.[46] If there is no deterrent effect, the evidence will not be excluded. Further, if the cost to society of excluding apparently proba-

35. In dissent, Justice Brennan pointed out that Linkletter v. Walker, 381 U.S. 618 (1965), relied upon by the Court for holding that the rule did not purport to redress injury to the privacy of the victim, was a case in which the retroactivity of *Mapp* was in question, not the holding of *Mapp* itself that privacy was a protective purpose of the rule. He emphasized the language in *Mapp* that the rule was part and parcel of the fourth amendment. Calandra v. United States, 414 U.S. 338, 361 (1974).

36. Calandra v. United States, 414 U.S. 338, 349 (1974).

37. *Id.*

38. United States v. Janis, 96 S.Ct. 3021 (1976).

39. Stone v. Powell, 96 S.Ct. 3037 (1976).

40. United States v. Peltier, 422 U.S. 531 (1975).

41. *Id.*

42. *Id.* at 543.

43. Stone v. Powell, 96 S.Ct. 3037, 3051-52 (1976); United States v. Janis, 96 S.Ct. 3021, 3032 (1976).

44. 96 S.Ct. 3037 (1976).

45. *Id.* at 3047.

46. *But c.f.* United States v. Peltier, 422 U.S. 531, 537-41 (1975), in which Justice Rehnquist carefully analyzed how the purpose of deterrence and the goal of judicial integrity were *both* necessarily satisfied under Court's holding.

tive evidence outweighs the deterrent effect of exclusion, then the evidence will be admitted. Thus, an individual's fourth amendment right to be free from unreasonable governmental intrusion is now less significant than either the officer's good faith or pragmatic considerations of the temporal and procedural distance from the time of the original illegal search.

These cases do not decide whether a State may exercise its "laboratory" function[47] and design civil and administrative remedies to replace the nonconstitutional exclusionary rule. In Montana, the 1975 legislature debated a bill to abolish the rule and substitute civil, criminal, and administrative sanctions to enforce the protections afforded by the exclusionary rule.[48] The bill was defeated. There is as yet no indication, however, that a majority of the Court, as presently constituted, believes that the exclusionary rule may be displaced entirely. To the contrary, there are some suggestions that the rule may be essential. In *Stone v. Powell,* Justice Powell recognized that the judiciary properly uses the rule to:

> encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.
>
> . . . .
>
> We adhere to the view that these considerations support implementation of the exclusionary rule at trial and its enforcement on direct appeal of state court convictions.[49]

Even Justice White, who normally stands with the more conservative wing of the Burger Court, said, in his dissent from *Stone v. Powell,* that although he agreed with the majority that the reach of the exclusionary rule should be substantially limited, he would not overrule either *Weeks* or *Mapp.*[50] Although significantly narrowed in applicability, the rule still appears vital.[51]

B. Balancing in Other Areas

The pragmatic balancing of the exclusionary rule cases is indicative of the larger role of balancing in other fourth amendment determinations. The fourth amendment comprises two conjunctive phrases protecting the individual from "unreasonable searches and

47. *See* New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932).

48. S. 314, 44th Legislative Sess. (1975). This action was taken notwithstanding the traditional adherence to the *Weeks* rule in Montana. *See, e.g.,* State *ex rel.* King v. District Court, 70 Mont. 191, 224 P. 862 (1924); State *ex rel.* Stang v. District Court, 71 Mont. 125, 227 P. 576 (1924); State v. Fuller, 34 Mont. 12, 85 P. 369 (1906).

49. Stone v. Powell, 96 S.Ct. 3037, 3051 (1976).

50. *Id.* at 3072 (White, J., dissenting).

51. *Cf.* Monaghan, *The Supreme Court 1974 Term, supra* note 29.

seizures" and guaranteeing that "no warrants shall issue but upon probable cause."[52] The amendment implicitly acknowledges that in some cases warrants will not be necessary. However, the often repeated general rule is that individual privacy should not yield to police intrusion unless an independent judicial officer has determined that probable cause justifies the intrusion.[53]

The Court frequently has said that a search or seizure conducted without a warrant issued upon probable cause is "per se unreasonable", subject only to a few specifically established and well delineated exceptions.[54] Even if the police officer possesses enough evidence to convince a judge of probable cause for a warrant, he may not justify a search without such a warrant, except in those exceptional circumstances. Otherwise the fourth amendment would be in the hands of the police who are engaged in the highly competitive enterprise of ferreting out crime and not in the hands of the neutral detached magistrate.[55] The freedom from arbitrary police or governmental intrusions, which is the core of the fourth amendment, would be reduced to a nullity if the propriety of such intrusions depended upon the subjective good faith of the governmental official.[56] The warrant serves: "to insure that the deliberate impartial judgment of a judicial officer will be interposed between the citizen and the police. . . ."[57]

Simultaneously, the clause in the fourth amendment permitting intrusions without a warrant, if not "unreasonable," has been construed by the Court as mandating at least as much evidence of probable cause as that expressly required in the warrant clause. If the circumstances make a warrant impossible or impractical, the official still acts unlawfully if he cannot show probable cause.[58] Any relaxation of that fundamental requirement would again make citizen privacy subject to official "whim or caprice".[59] If the reasonableness of warrantless intrusions on individual privacy were dependent upon something less stringent than probable cause, then the "principal incentive" for the procurement of warrants would be de-

52. U.S. CONST., amend. XIV.

53. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 14 (1948); United States v. Lefkowitz, 285 U.S. 452, 464 (1931).

54. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Chambers v. Maroney, 399 U.S. 42, 51 (1970); Katz v. United States, 389 U.S. 347, 357 (1967).

55. *E.g.*, Johnson v. United States, 333 U.S. 10, 14 (1948).

56. Beck v. Ohio, 379 U.S. 89, 97 (1964); Johnson v. United States 333 U.S. 10, 14 (1948).

57. Wong Sun v. United States, 371 U.S. 471, 481-82 (1963).

58. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 156 (1925).

59. Brinegar v. United States, 338 U.S. 160, 176 (1949); *accord*, Wong Sun v. United States, 371 U.S. 471, 479 (1963).

stroyed.[60] Thus, the threshold question in each case must be whether there was sufficient evidence to justify a neutral judicial officer in issuing a warrant.[61]

The language most often quoted by the Court when measuring the existence of probable cause derives from *Carroll v. United States.*[62] Police have probable cause to believe that a person has committed a crime or that evidence of crime may be found in a particular location if "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information would be sufficient in themselves to warrant a man of reasonable caution in [that] belief. . . ."[63] Although the Court in later cases emphasized that this rule of probable cause is a "practical, non-technical conception",[64] it has also been extremely quick to point out that the standard is an objective one, and that justifiable police officer mistakes must be those of "reasonable men".[65] To justify an intrusion upon individual privacy the police officer must show "specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant that intrusion."[66] Chief Justice Warren stated in a footnote that the demand for specificity of information was the "central teaching" of the Court's fourth amendment jurisprudence.[67] It is the traditional responsibility of the courts "to guard against police conduct which . . . trenches upon personal security without the objective evidentiary justification which the constitution requires. . . ."[68]

Where the probable cause for a search warrant depends upon information supplied by an informer, the official seeking to justify the intrusion must meet the two-pronged test of *Aguilar v. Texas,*[69] by showing with relative specificity the underlying circumstances from which: (1) the informant concluded that the evidence of crime or contraband was where he claimed it to be; and (2) the officer had reason to believe the informant was credible or reliable.[70] In that way the magistrate may judge independently the validity of the officer's conclusion that probable cause existed. Any other rule would permit the officer and not the neutral magistrate to draw the inferences.

60. Wong Sun v. United States, 371 U.S. 471, 479 (1963).
61. *Id.*
62. 267 U.S. 132 (1925).
63. *Id.* at 162.
64. *E.g.*, Brinegar v. United States, 338 U.S. 160, 176 (1949).
65. *Id.*
66. Terry v. Ohio, 392 U.S. 1, 21 (1967); *accord,* Beck v. Ohio, 379 U.S. 89, 97 (1964).
67. *Id.* at n. 18.
68. *Id.* at 15.
69. 378 U.S. 108 (1964); *accord,* Spinelli v. United States, 393 U.S. 410 (1969).
70. Aguilar v. Texas, 378 U.S. 108, 114-15 (1964).

Recent decisions have eroded the need for specific articulable information to satisfy the objective requirements of probable cause and thereby permit governmental intrusion into constitutionally protected areas. The Court has used a balancing process to revise prior probable cause jurisprudence. Ironically, the Burger Court has relied on Warren Court opinions to uphold this balancing.

The Court catalogued several areas in which the Warren Court had balanced individual citizen's interests against the purposes and needs of a governmental entity.[71] As early as 1954, the Court found that the need to prevent perjury at trial outweighed the individual's interest in excluding certain illegally obtained evidence.[72] Likewise, with standing questions, the additional benefits of extending the exclusionary rule to persons other than the victim of the illegal search or seizure do not counterbalance the "public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."[73] The language of earlier decisions which emphasized the governmental interest in criminal prosecution now plays a crucial and often conclusive role in the Burger Court's determinations.

In *United States v. Martinez-Fuerte,*[74] the Court sustained government stops for questioning persons in cars passing through fixed location checkpoints, absent any individualized suspicion of the persons stopped. The Court relied on two Warren Court decisions to justify a balancing approach which, in this case, resulted in the elimination of the minimal requirements of probable cause.[75] Justice Powell pointed to *Terry v. Ohio,*[76] for the proposition that where there is a substantial government interest at stake and the individual intrusion is limited, there is no fourth amendment violation, even though the intrusion is based upon less than probable cause. In *Terry,* the Court found that the police need for an "escalating set of flexible responses, graduated in relation to the amount of information they possess"[77] justified the police stopping and frisking the persons suspected both of criminal activity and of carrying weapons. In sustaining this limited police activity, Chief Justice Warren balanced the interests of the government in preventing crime and protecting the investigating officer against the individual's interest in personal privacy.[78]

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71. Stone v. Powell, 96 S.Ct. 3037, 3049 (1976).

72. Walder v. United States, 347 U.S. 62 (1954).

73. Alderman v. United States, 394 U.S. 165, 175 (1969); *accord,* Wong Sun v. United States, 371 U.S. 471, 491-92 (1963); Jones v. United States, 362 U.S. 257, 261 (1960).

74. 96 S.Ct. 3074 (1976).

75. *Id.* at 3081.

76. 392 U.S. 1 (1968).

77. *Id.* at 10.

78. *Id.* at 10-11.

Using a similar approach in *Martinez-Fuerte,* Justice Powell argued that the substantial governmental interest in preventing the immigration of illegal aliens and the minuteness of the intrusion warranted upholding the checkpoint procedure.[79] At that point his reasoning was still within the parameters of *Terry* and the cases which followed *Terry,*[80] but he went further to argue that the stops for questioning were justified without any individualized suspicion of the persons stopped. In *Terry,* Chief Justice Warren took great pains to emphasize that the police officer must still be able to point to "specific and articulable facts" which justify the intrusion even though they amount to something less than probable cause.[81] Justice Powell acknowledged that "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure."[82] He denied, however, that the fourth amendment imposed an "irreducible requirement of such suspicion."[83]

To support that conclusion he relied on a second Warren Court decision, *Camara v. Municipal Court.*[84] He reasoned that *Camara* held that in some instances a search was allowable without specific knowledge of facts to support the search.[85] In *Camara,* the Court allowed building inspections within a particular geographic area for code violation absent any specific knowledge of the conditions of the particular building to be inspected.[86] Justice Powell found that the same conclusion was appropriate on the facts in *Martinez-Fuerte* because of the limited expectation of privacy in automobiles and the minimal nature of the intrusion: "[T]he reasonableness of the procedures followed in making these checkpoints stops makes the resulting intrusion on the interests of motorists minimal."[87]

The prescience of Justice Douglas is manifest. In his dissent in *Terry,* he warned against the "powerful hydraulic pressures . . . to water down constitutional guarantees," and the consequences which might flow from that decision to allow police intrusions with less than probable cause.[88] The decision in *Martinez-Fuerte* evidences the resultant watering down of prior fourth amendment jurisprudence. In determining constitutionality the Court places the

79. United States v. Martinez-Fuerte, 96 S.Ct. 3074, 3082 (1976).

80. Cases following *Terry* include Almeida-Sanchez v. United States, 413 U.S. 266 (1973), and United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

81. Terry v. Ohio, 392 U.S. 1, 21 (1967).

82. United States v. Martinez-Fuerte, 96 S.Ct. 3074, 3084 (1976).

83. *Id.*

84. 387 U.S. 523 (1967).

85. United States v. Martinez-Fuerte, 96 S.Ct. 3074, 3084 (1976).

86. The Court emphasized that the "ultimate standard" of the fourth amendment is "reasonableness." Camara v. Municipal Court, 387 U.S. 523, 539 (1967).

87. United States v. Martinez-Fuerte, 96 S.Ct. 3074, 3084 (1976).

88. Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).

degree of intrusion on one side of the scales and the amount of individualized suspicion on the other. Upon finding that some of the intrusiveness of the police activity has been removed, the Court allows the police to search with less objective, individualized suspicion. The logical end of that process is reached in *Martinez-Fuerte,* which is no balance at all. On one side of the scales there remains some significant government intrusion into constitutionally protected areas; on the other side there is nothing more than an unarticulated hunch justifying unlimited discretion in the police officer.

The Court's reliance in *Martinez-Fuerte* on *Camara* is as misplaced as its use of *Terry*. *Camara* required that the decision to search be placed in the hands of a neutral magistrate who would issue a warrant prior to the search.[89] No such warrant was required in *Martinez-Fuerte.*[90] Further, the Court in *Camara* required that the non-criminal building inspections proceed according to reasonable standards which were satisfied with respect to each building searched.[91] As Justice Brennan pointed out in his dissent in *Martinez-Fuerte, Camara* did not permit the searches of any building in the sole discretion of the administrative personnel.[92] The prevention of total discretion in the police has always been the "central concern" of the fourth amendment.[93] Finally, the search in *Camara* did not focus upon individual criminal activity as did the searches upheld in *Martinez-Fuerte.* In fact, in *Camara,* the Court specifically distinguished searches there from searches related to criminal investigations. The building inspections were a limited invasion and not "personal in nature or aimed at the discovery of evidence of crime."[94]

The most disturbing aspect of the *Martinez-Fuerte* decision is that it may point the way to further erosion of the minimum requirements of probable cause and individualized objective suspicion. With the public concern about increasing criminal activity, new intrusions into constitutionally protected areas are likely to be justified without requiring proof of objective individualized suspicion. The balancing calculus now popular with the Court has tended to relax fourth amendment protections in border searches,[95] airplane searches to prevent hijackings,[96] and automobile searches.[97] In up-

89. Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

90. United States v. Martinez-Fuerte, 96 S.Ct. 3074, 3086 (1976).

91. Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967).

92. United States v. Martinez-Fuerte, 96 S.Ct. 3074, 3092 n.6 (1976) (Brennan, J., dissenting).

93. United States v. Ortiz, 422 U.S. 891, 895 (1975).

94. Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

95. United States v. Martinez-Fuerte, 96 S.Ct. 3074 (1976).

96. *See generally* Brodsky, *Terry and the Pirates: Constitutionality of Airport Searches and Seizures,* 62 KY. L. J. 623 (1973-74); McGinley & Downs, *Airport Searches and Seizures*

holding police activities which would be objectionable in other contexts, federal courts have emphasized the exigencies of the situation and the overwhelming governmental and societal interest to be protected.

In other areas, the balancing calculus has not guaranteed that the prosecution position would be consistently sustained. In *Doyle v. Ohio*,[98] the Court rejected the prosecutor's arguments that the importance of witness cross-examination at trial and the need to present all relevant information to the trier of fact justified the introduction, on cross-examination, of the defendant's failure to respond to police questioning at the time of his arrest. The Court refused to strike the balance sought by the prosecution. It said that every post-arrest silence was "insolubly ambiguous";[99] that the *Miranda* warning given to the defendant carried with it the implicit assurance that the defendant's silence would not be used against him.[100] The Court said: "In such circumstances it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[101]

Similarly, in *Brown v. Illinois*,[102] the Court considered whether *Miranda* warnings, alone and per se, make a subsequent confession sufficiently an act of free will to break the causal connection between an admittedly illegal arrest and the confession. Although it did not expressly employ a balancing process, the Court made it clear that it weighed a variety of factual elements before determining that the confession was inadmissible.[103]

The various legal changes wrought by the Burger Court may have a unique dimension in Montana. Nearly all of the search and seizure cases before the United States Supreme Court during the 1975 term came on petitions from the prosecution to overturn lower court decisions favorable to the defendant. Ten years ago, during the Warren Court, more than ninety percent of the criminal petitions for certiorari on the Supreme Court docket came from defendants.[104] As Justice Marshall pointed out in a dissent, under the

— *A Reasonable Approach*, 41 FORD. L. REV. 293 (1972); Note, *The Constitutionality of Airport Searches*, 72 MICH. L. REV. 128 (1973).

97. *See, e.g.*, South Dakota v. Opperman, 96 S.Ct. 3092 (1976).

98. 96 S.Ct. 2240 (1976).

99. *Id.* at 2244.

100. *Id.*

101. *Id.* at 2245. *See also* State v. Armstrong, 33 St. Rptr. 688, 689 (1976) (holding that a prosecutor's comments regarding the absence of controverting evidence did not violate defendant's right to remain silent).

102. 95 S.Ct. 2254 (1975).

103. *Id.* at 2260-62.

104. Lewis, *Avoiding the Supreme Court*, N.Y. TIMES, Oct. 17, 1976, § 6 (Magazine) at 31.

principles of *Oregon v. Hass*,[105] state courts may properly reach results offering greater protections to individual civil rights than those provided under the federal constitution.[106] Under traditional principles of constitutional jurisprudence, the United States Supreme Court will refrain from deciding cases if adequate state grounds exist for the decision reached below. Ultimately the Burger Court philosophy, coupled with the untested philosophy of the new Montana Supreme Court and the strong protective language of the new Montana Constitution, may result in Montana courts being more protective of individual civil rights than the United States Supreme Court.

III. Search, Seizure, and the Probable Cause Dilemma

A. *Probable Cause*

"Probable cause" is the touchstone of constitutionality which guides the legitimate process of obtaining physical evidence.[107] The existence of probable cause is "a factual matter that calls for the determination of a factual question."[108] It requires some unknown quantity of evidence to justify an arrest or to support a search warrant. Innumerable facts may bear on this determination. The courts complicate the problem by discussing and relying upon probable cause determinations for search warrants while discussing probable cause for arrests and vice versa, notwithstanding that each requires a different factual conclusion. Further, as previously discussed,[109] some searches and seizures may be constitutionally permitted with less probable cause because they involve a more limited intrusion.

Perhaps more significant than abstract statements of probable cause are the principal evidentiary sources upon which probable cause is predicated. First is the personal observation by police officers. Courts rely upon the senses, experience and evaluative judgment of trained police. Second is the informant, whose "tips" must be detailed and reliable. The third evidentiary source is the accounts of victims and witnesses to criminal activity. Less is required of the victim or casual witness than of the typical informant, but still there must be adequate information to ascertain the criminal activity and identify either the things or the persons to be seized.

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105. 420 U.S. 714 (1975).

106. Texas v. White, 96 S.Ct. 304, 307 (1975) (Marshall, J., dissenting).

107. Three constitutionally acceptable exceptions to probable cause seizures, including waiver or consent, inspection, and plain view have been discussed recently by the Montana Supreme Court. *See* pp. 43-45 *infra*.

108. Spinelli v. United States, 393 U.S. 410, 422 (Black, J., dissenting).

109. *See* pp. 35-36 *supra*.

State v. Miner[110] provides a point of departure to evaluate Montana's probable cause requirements. The case states: "*Probable* cause means that there is a probability that a crime has been committed by the person named in the warrant."[111] Guidelines for *probability* are "common sense" and not mathematical percentages; it does not require a prima facie showing of guilt, nor must it be based upon evidence that is legally admissible. Photo identification may suffice to establish probable cause and witness disagreement as to identification will not necessarily destroy the existence of probable cause.

State v. Thorsness,[112] reemphasizing the *Aguilar* test for measuring the validity of warrants based upon "tips" from informants,[113] notes that the facts in the affidavit in question did not identify underlying circumstances upon which the informant based his conclusion. The affidavit failed to specify how the informant obtained his information, although the informant was of known reliability.[114] However, the entire analysis of the *Aguilar* test is dictum because the evidence in *Thorsness* was admitted, not in a criminal trial, but at a deferred sentence revocation hearing. The court cited *Calandra* for the proposition that suppressing the evidence at that hearing would be of no additional deterrent value.[115]

Other recent Montana cases dealing with probable cause also have relied upon the tests articulated in *Aguilar* and *Spinelli v. United States*.[116] They are not generally noteworthy other than to relate specific facts to the general rules, and the factual analyses are neither restrictive nor expansive. *State ex rel. Townsend v. District Court*[117] did, however, emphasize the importance of connecting the underlying facts relied upon by an informant to the criminal activity of the defendant-relator.[118] Failure to connect reliable criminal facts to the defendant destroys probable cause. Although this connection is indispensable, another Montana case did permit the use of double hearsay to establish probable cause, at least when derived from an exchange of information between agencies of government on an official level.[119]

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110. ___ Mont. ___, 546 P.2d 252 (1976).
111. *Id.* at ___, 546 P.2d at 254.
112. 165 Mont. 321, 528 P.2d 692 (1974).
113. Aguilar v. Texas, 378 U.S. 108 (1964). *See* p. 34 *supra*.
114. State v. Thorsness, 165 Mont. 321, 324, 528 P.2d 692, 694 (1974).
115. *Id.* at 326, 528 P.2d at 695 (citing United States v. Calandra, 414 U.S. 338 (1974)). The *Calandra* concept of suppression only upon proof of deterrent value may so erode the exclusionary rule that civil, criminal, and administrative remedies might be more effective. *See* pp. 31-32 *supra*.
116. *See, e.g.*, State v. Paschke, 165 Mont. 231, 527 P.2d 569 (1974).
117. ___ Mont. ___, 543 P.2d 193 (1975).
118. *Id.* at ___, 543 P.2d at 195.
119. Longworth v. District Court, 165 Mont. 539, 540, 530 P.2d 462, 463 (1974).

Development of the critical facts at the trial court level becomes increasingly important to defense counsel as the United States Supeme Court limits the reach of the Constitution both by increasing reliance on abstention in criminal cases and reordering concepts of constitutional arrest, and search and seizure. Locally, the Montana Supreme Court has cautioned that it will not substitute its judgment for a fair determination reached by a lower court.[120] The lower court's ruling on a suppression motion must be presumed correct unless there is a clear preponderance of evidence to the contrary.

Although the Montana Supreme Court has been very active in the area of criminal procedure, it has not yet interpreted or evaluated two new, unique constitutional provisions potentially applicable to criminal procedures. These provisions are Art. II, Sections 3 and 10, which provide in part that "the dignity of the human being is inviolable" and "the right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Perhaps the new court will be more experimental, or will be directly challenged to explain the meaning and scope of these provisions.

A decrease in federal influence, direction, and control over state criminal processes is probably the most significant shift of the Burger Court.[121] The federal hands-off attitude will place increased emphasis on less fully developed state definitions of probable cause. Prosecutors will have more admissible evidence, and earlier termination of cases is assured. Finally what attorneys do at pre-trial hearings becomes increasingly important because the factual conclusions are less likely to be reviewed, particularly by a federal judge.

B. Physical Evidence

1. *Search Incident to Arrest*

The probable cause requirement for arrest is based upon indications of the arrestee's guilt. Fragments of information from informants, victims, casual witnesses and experienced law enforcement personnel are the basis of a probable cause determination. The validity of an arrest is ordinarily tested, not by habeas corpus or a civil false imprisonment suit, but in a suppression hearing directed toward evidence seized incident to the arrest. The scope of search incident to arrest is predicated on the officer's need to protect himself, to prevent the arrestee's escape, and to safeguard evi-

120. State v. Smith, 164 Mont. 334, 523 P.2d 1395 (1974).

121. *See, e.g.*, Stone v. Powell, 96 S.Ct. 3037 (1976).

dence.[122] If the arrest is valid, the evidence seized is constitutionally admissible at a subsequent trial.

The principal developments in this area involve automobile stops followed by custodial arrests, full body searches, and automobile searches. In the companion cases, *United States v. Robinson*[123] and *Gustafson v. Florida,*[124] the United States Supreme Court set the ground rules for these searches. In both cases the defendants were arrested for traffic violations. In the *Robinson* case the arresting officer had reason to believe the defendant was operating a motor vehicle after revocation of his operator's permit, and in *Gustafson,* the arresting officer saw the defendant weaving across the center line and after stopping the defendant, arrested him for failure to have an operator's license. In both cases, there was probable cause for the stop and the arrests were constitutionally valid. Robinson was subjected to a full body search resulting in discovery of capsules of heroin; the Gustafson search revealed marijuana cigarettes. The court in both cases concluded that a full body search after custodial arrest is permissible even though the arrest is for a minor traffic violation.[125] As Justice Powell succinctly noted in his concurring opinion to *Robinson*: "[A]n individual lawfully subjected to a custodial arrest retains no significant fourth amendment interest in the privacy of his person."[126]

The Court also clarified the scope of search incident to arrest. Originally, the Court had suggested that the permissible scope was tied both to the crime for which the arrest was made and to the reason for allowing search without a warrant. Thus, the search was permitted to protect the officer, to prevent escape, and to preserve evidence that might be quickly destroyed by the arrestee.[127] These rules restricted permissible searches incident to arrests to the area under the "immediate control" of the arrestee,[128] and they implied that the Constitution would not permit a full body search after arrest for a minor traffic violation. Yet, in both cases, the Court permitted such searches. Justice Stewart, concurring, noted the defendant Gustafson could have contested the constitutionality of

122. Chimel v. California, 395 U.S. 752, 762-63 (1969).

123. 414 U.S. 218 (1973).

124. 414 U.S. 260 (1973).

125. United States v. Robinson, 414 U.S. 218, 236 (1973); Gustafson v. Florida, 414 U.S. 260, 266 (1973).

126. United States v. Robinson, 414 U.S. 218, 237 (1973) (Powell, J., concurring).

127. *See* Chimel v. California, 395U.S. 752, 763 (1969). *Cf.* Warden v. Hayden, 387 U.S. 294 (1967) (Fortas, J., concurring). ("[U]ntil today, . . . , we have refused to permit the use of articles, the seizure of which could not be strictly tied to and justified by the exigencies which excused the warrantless search").

128. Chimel v. California, 395 U.S. 752, 763 (1969).

the custodial arrest for a traffic violation, but since he had not done so the search would be accepted as incidental to the arrest.

In two recent cases, the Montana Supreme Court further extended the scope of searches incident to arrests for traffic violations. In *State v. Turner,*[129] the defendant was subjected to a full custodial arrest for driving while under the influence of an intoxicating substance.[130] His car was impounded. While retrieving a beer bottle for evidentiary purposes from the floor of the vehicle, the officer discovered some marijuana. The court permitted the introduction of the marijuana at trial, thereby approving the vehicle search following arrest and impoundment.[131] There was probable cause to believe that the defendant had violated the traffic laws, however, in contrast to the searches in *Gustafson* and *Robinson,* the evidence was found in the car, not on the person. The plain view exception provided some theoretical justification for holding the search constitutional, and the United States Supreme Court recently resolved any remaining constitutional questions by approving a similar post-impoundment search.[132]

In some respects, *State ex rel. Kotwicki v. District Court,*[133] stretches the allowable scope of search even further. An officer arrested the defendant for speeding and transported him to the police station because he had an out-of-state driver's license and did not have money for bond. A considerable time after the arrest, the police searched the defendant incidental to placing him in jail. This search, which revealed marijuana in the defendant's shoe, was upheld by the court.[134] The court concluded that because each step leading to the search was reasonable, the search itself was not unreasonable and the evidence was admissible. When measuring the scope of a search incident to arrest, courts have struggled with both the space and time limitations.[135] Here, the police located the marijuana in Kotwicki's shoe long after the initial arrest for speeding. Perhaps the decision can be explained by the many extenuating circumstances. The defendant was an unemployed, indigent, transient unable to raise a fifteen dollar bond, and he was arrested for a minor traffic offense. He was ultimately searched as a necessary incident of being placed in a cell. Nonetheless, both the process and the end result violate a sense of fairness.[136]

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129. 164 Mont. 371, 523 P.2d 1386 (1974).
130. R.C.M. 1947, § 32-2142.
131. State v. Turner, 164 Mont. 371, 374, 523 P.2d 1386, 1387 (1974).
132. South Dakota v. Opperman, 96 S.Ct. 3092 (1976).
133. 166 Mont. 335, 523 P.2d 694 (1975).
134. *Id.* at 343.
135. *See, e.g.,* United States v. Edwards, 415 U.S. 800 (1974).
136. Laws not respected by large numbers of the general population tend to challenge

2. *Consent Searches*

Consent searches are easy to execute but difficult to sustain. It is essential for the State to show affirmative action by the consenting party, indicating his state of mind. A second determination in the *Kotwicki* case was that the defendant consented to the search of his car. He first gave his consent, then withdrew it. After the officers threatened to obtain a warrant, he again consented. The defendant contended that his "consent" was coerced by the circumstances of his custody, by a night in jail, and by the threat of a warrant. The court disagreed, emphasizing that in the "totality of circumstances", the consent was voluntary.[137] The court pointed to a statement signed by the defendant after he had time to reflect, and noted the defendant's prior contact with the law and knowledge of his rights.[138]

In contrast, the court in *State v. LaFlamme*[139] concluded that there was no valid consent where words of permission were inconsistent with action of avoidance. The court specifically noted that "there is a heavy burden of proof required to show that there was consent."[140] One might question whether the State met this burden in *Kotwicki.*

From the standpoint of law enforcement, a consent search is generally unwise unless no alternative means to obtain evidence is available and the evidence may be lost or destroyed unless seized immediately. It is difficult to argue that a defendant's consent to search was entirely voluntary when the defendant apparently knew the search would reveal incriminating evidence. A signed consent is obviously preferable, and probably was the critical fact in the *Kotwicki* case. Consent searches are very difficult to prove and a signed, written statement is compelling evidence to the trier of fact, as well as to an appellate court.

3. *Plain View Searches*

If each step toward the ultimate seizure of evidence stays within constitutionally proscribed bounds, anything within the "plain view" of the officer is fair game.[141] Two recent Montana cases

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constitutional parameters and lead to unexpected evidentary findings. Note the large number of marijuana decisions that stretch constitutional concepts.

137. *But cf.* Bumper v. North Carolina, 391 U.S. 543, 548 (1968) (the Court denied that a search could be justified as a consent search "when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant").

138. State *ex rel.* Kotwicki v. District Court, 166 Mont. 335, 344, 532 P.2d 694, 699 (1975).

139. ___ Mont.___, 551 P.2d 1011 (1976).

140. *Id.* at___, 551 P.2d at 1012.

141. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971); State v. Gallagher,

have restated that rule. In *State v. Peters,*[142] the court admitted into evidence stolen property which was in plain view when officers made a valid arrest.[143]

A more difficult case relying on the plain view doctrine was *State v. Emerson.*[144] There the owner of a trailer house admitted the police into the house. The police only intended to question the defendant. Before they asked any questions, the defendant made incriminating statements, and the police saw items of evidence the defendant identified as related to a robbery. The court held that no Miranda warning was required because the sequence of events was: (1) police entry with owner's permission, (2) intent to question suspect but no questions, (3) incriminating statements by suspect, which (4) described evidence in plain view.[145] Hence, the evidence in plain view was properly seized. Up to the point of seizure, there had been no overreaching or any constitutional violations.

Plain view searches are a relatively effective law enforcement technique for the seizure of evidence. Unlike consent searches, plain view seizures are regularly sustained. The problem of proof is much easier and the court is able to rely on objective facts rather than subjective mental states.

4. *Search and Seizure of Blood*

Obtaining various kinds of physical evidence directly from the person, such as hair, blood, bullets and fingerprints, presents additional fourth amendment problems. A court must first measure the degree of intrusion posed by the attempt to obtain the evidence. For example, surgery to remove a bullet might not be reasonable under any circumstance, whereas taking fingerprints might be reasonable even without a full custodial arrest. The court must then look to the special circumstances presented by the case. Is the evidence to be obtained by consent, without making an arrest and without an arrest warrant? Is it incidental to an arrest? Is it based upon a search warrant?

In *State v. Mangels,*[146] a hospital nurse administered a blood test without a warrant, without consent, and without arrest. Although the defendant was told the blood test would be taken, he neither consented nor was asked to consent. The officer requesting the blood test had decided the defendant was incapable of giving his

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162 Mont. 155, 509 P.2d 582 (1973).

142. 165 Mont. 142, 526 P.2d 353 (1974).

143. *Id.* at 144, 526 P.2d at 453.

144. ___ Mont.___, 546 P.2d 509 (1976).

145. *Id.* at___, 546 P.2d at 511.

146. 166 Mont. 190, 531 P.2d 1313 (1975).

consent. The prosecution argued that the officer's actions were proper under the circumstances. The court affirmed suppression of the test results because the requirements of Montana's implied consent law were not met:[147] the defendant had not been arrested; he was not unconscious; and the facts did not show he was incapable of refusal.[148] The officer, having detected alcohol on the defendant's breath, undoubtedly had probable cause to arrest. As an incident of an arrest, he could have ordered the blood test with or without the defendant's consent. But having failed to meet the statutory prerequisites, he could not properly order the test.

Is the Montana court's interpretation of the implied consent law compatible with the demands of the United States Constitution? The statute gives the officer almost unbridled discretion to determine the suspect's capability to consent. It would be preferable if the statute required specific, objective evidence before permitting the officer to avoid the requirement of either consent or valid arrest. As the Supreme Court stated in *Schmerber v. California*: "[S]earch warrants are ordinarily required for searches of dwellings and, absent an emergency, no less could be required where intrusions into the human body are concerned.[149] Because the alcohol content in the blood will dissipate in a very short time, it could be argued that these cases fall into the class of exigent circumstances which would justify action without a warrant. But, it is no justification for action without an arrest based on probable cause.

5. *Searches by Private Persons*

In theory, the exclusionary rule guarantees the observance of individual constitutional rights by the State and its duly authorized representatives. Its primary thrust is to deter police illegality.[150] To extend the rule to illegal searches and seizures by private persons is absurd. The suppression of evidence illegally seized by a private person does not deter illegal police activity, does not guarantee the purity of the justice system, and could result in private persons permanently tainting evidence. Because the Montana Supreme Court forgot the reasons behind the exclusionary rule, it recently extended the rule beyond any logical purpose. In *State v. Brecht,*[151] the court took a position which was unique among the fifty States by applying the exclusionary rule to illegal activity by private persons. That case appeared as a momentary aberration undoubtedly

147. R.C.M. 1947, § 32-2142.1 (Supp. 1975).
148. State v. Mangels, 166 Mont. 190, 193, 531 P.2d 1313, 1314-15 (1975).
149. 384 U.S. 757, 770 (1966).
150. *See* pp. 31-32 *infra*.
151. 157 Mont. 264, 485 P.2d 47 (1971).

to be rectified at the first opportunity. But, in *State v. Coburn,*[152] the court repeated the error, adding a bit of exceptional logic to justify an absurd result. The court relied on *Katz v. United States,*[153] holding that fourth amendment protections were not necessarily limited to intrusions by the sovereign.[154] The court pointed to *Katz* holding that the fourth amendment protects people, not places, and that the trespass doctrine no longer is valid.[155] This is undeniably true; no one could doubt that someone's constitutional rights were infringed. The question, however, is the remedy and the reason for the remedy. The court considered neither.

C. *Verbal Evidence*

1. *Miranda Warnings*

The judicially imposed requirements of *Miranda v. Arizona*[156] are being systematically, if cautiously, retracted by legislative and judicial action. *Miranda,* at least in part, was a judicial response to legislative inaction. After *Miranda,* Congress responded. The Omnibus Crime Control Act of 1968[157] requires the trial court judge to consider all circumstances surrounding a confession. It also provided that the presence or absence of Miranda-type warnings need not be conclusive on the issue of voluntariness of a confession. The Act only applies to criminal prosecutions by the United States or by the District of Columbia, whereas *Miranda* is based on the fifth and fourteenth amendments and, therefore, is applicable to state and federal prosecutions. There has been no attempt in Montana to pass legislation comparable to the Federal Omnibus Crime Control and Safe Streets Act. Consequently, the *Miranda* rule is still applicable in full force in Montana.[158] The only recent Montana case does little more than analyze the peculiar facts, concluding that there was no custodial interrogation, and hence no need to give a *Miranda* warning before the incriminating statements were made.[159]

The Montana court has at least partially followed the United States Supreme Court holding that *Miranda* defects do not render statements inadmissible when introduced for purposes of impeach-

152. 165 Mont. 488, 530 P.2d 442 (1974).

153. 389 U.S. 347 (1967).

154. State v. Coburn, 165 Mont. 488, 497, 530 P.2d 442, 448 (1974).

155. *Id.*

156. 384 U.S. 436 (1966).

157. 18 U.S.C. § 3501 (1968). Some commentators question the constitutionality of the provision which abrogates *Miranda. See, e.g.,* WRIGHT, FEDERAL PRACTICE § 76 at 120-22 (1969); Note, 42 FORD. L. REV. 425 (1973).

158. "Full force" means as interpreted by Oregon v. Hass, 420 U.S. 714 (1975), and Harris v. New York, 401 U.S. 222 (1971).

159. State v. Emerson,___ Mont.___, 546 P.2d 509 (1976).

ment rather than in the case in chief.[160] The court specifically held that the State need not meet the same burden of proof in establishing the voluntariness of a statement if the statement is introduced only for impeachment.[161] Presumptively, a statement extracted from a defendant by physical coercion would be inadmissible even for purposes of impeachment.

2. *Depositions*

A Montana statute provides for the use at trial of a deposition of an absent witness if it appears:

> That the witness is dead; or that the witness is out of the State of Montana, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena.[162]

The Montana court has given a properly narrow reading to the provision, denying the introduction of testimony by deposition of a witness transferred out of the State by the Army.[163] The court held that the prosecution must exercise "due diligence" to obtain the presence of witnesses in criminal cases.[164] The constitutional right of confrontation should not be taken lightly. Our adversarial scheme of justice is founded on the belief that truth is most likely to emerge from a complete exchange of evidence, usually testimonial, subjected to rigorous cross examination in front of the jury. The system charges the jury with the responsibility of deciding the facts—which often means judging the veracity of the witnesses. Testimony by deposition of an unavailable, but known witness because he has been transferred out of State by his employer, will only be allowed if the prosecution has diligently tried to obtain the presence of the witness and has been unsuccessful. Here, where the prosecution had not attempted to subpoena the absent witness, the introduction of the depositions was reversible error.

3. *Immunity Statutes*

The fifth amendment purports to protect witnesses, suspects and defendants from coercive state action. It *does not* protect against prosecution for the criminal offense discussed or revealed by

160. Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971).
161. State v. Smith,___ Mont.___, 541 P.2d 351 (1975).
162. R.C.M. 1947, § 95-1802.
163. State v. LaCario, 163 Mont. 511, 518 P.2d 982 (1974).
164. *Id.* at 516, 518 P.2d at 985.

the coerced testimony. It *does* provide for immunity from use and derivative use of the information obtained. If the prosecution intends to convict the person of the crime revealed, it must have an independent source for any information used in the prosecution. In this context, coerced testimony refers to testimony obtained by physical coercion, by failure to give the *Miranda* warning, or by the compulsion of an immunity statute.

The Montana statute on immunity provides:

> Before or during trial in any judicial proceeding a justice of the supreme court or judge of the district court, upon request by the attorney prosecuting or counsel for the defense, may require a person to answer any question or produce any evidence that may incriminate him. If a person is required to give testimony or produce evidence, in accordance with this section, in any investigation or proceeding he cannot be prosecuted or subjected to any penalty or forfeiture, other than a prosecution or action for perjury or contempt, for or on account of any transaction, matter or thing concerning which he testified or produced evidence.[164.1]

Unlike the federal rule,[165] Montana's statute provides a complete grant of immunity from prosecution for any crime revealed. Hence, surreptitious, derivative use of evidence derived from testimony after a grant of immunity cannot lead to criminal conviction of the person testifying. Testimony under immunity can, however, result in other collateral penalties such as loss of job, professional license, social position, political standing or domestic tranquility. Also, testifying may be such a risk to personal safety that the defendant-witness would prefer to face contempt of court and indefinite imprisonment.

In contrast, the federal rule provides only minimal protection, challenging the critical significance of fifth amendment concepts of self-incrimination. Paradoxically, information from one suspect obtained without a careful explanation of constitutional rights will be suppressed, whereas another suspect can be forced to testify or else risk incarceration for contempt. Even in Montana, a witness who fears for his personal safety can sit in jail for over eighteen months while refusing to testify.[166] Any sentence relative to the offense would almost surely have been less than eighteen months. Thus, an innocent witness can be forced to testify under threat of contempt or sit forever in jail, regardless of the risk involved in testifying.

164.1. R.C.M. 1947, § 95-1807 (Supp. 1975).

165. 18 U.S.C. § 6002 (1970) (Sustained against constitutional attack in Kastigar v. United States, 406 U.S. 441 (1972)).

166. State v. Lambert,____ Mont.____, 538 P.2d 1351 (1975).

In *State v. Lambert,*[167] the trial court dismissed charges against the defendant after the State moved to order his testimony under the Montana immunity provision. Defendant then refused to testify because the proceeding was "investigatory" and not "judicial". In rejecting the distinction, the court quoted from an Arizona case: "[T]he term 'judicial proceeding' encompasses every proceeding before a competent court in the due course of law of administration of justice resulting in any determination or action on the part of the court."[168] As a result of this decision the witness remained incarcerated for approximately eighteen months. The District Judge finally released him, concluding that the confinement had lost its coercive effect and that further confinement would be punitive and serve no legitimate purpose.

D. Non-Substantive Defects in Warrants

Several cases in the past two years have dealt with search warrant defects other than those related to fourth amendment probable cause requirements. Although there is ample federal precedent in the area of substantive defects, the Montana Supreme Court must rely upon statutory language, its own prior cases, and certain vague notions of fairness and due process. In the Montana Code of Criminal Procedure the essential requirements of an effective warrant are:

1) a writing,
2) signed by a judge,
3) particularly describing the place to be searched and the articles to be seized,
4) directed to a peace officer, and
5) commanding him to search for the property and bring it before the judge.[169]

State v. Meidinger[170] held that under the Code, a warrant directed to "any peace officer of this state" and not to a specifically named officer was not so defective and not so prejudicial, at least on the facts of that case, as to warrant a new trial.[171] Nonetheless, the court recommended that the practice be discontinued. In *State v. Snider,*[172] the court again faced a warrant directed "to any peace officer." Again, the court disapproved the practice, but, relying on *Meidinger,* found that the warrant was not fatally defective because

167. ___ Mont.___, 538 P.2d 1351 (1975).
168. *Id.* at___, 538 P.2d at 1352 (citing Smith v. Superior Court, 17 Ariz. App. 79, 495 P.2d 519, 522 (1972)).
169. R.C.M. 1947, § 95-704.
170. 160 Mont. 310, 502 P.2d 58 (1972).
171. *Id.* at 319, 502 P.2d at 58 (1972).
172. ___ Mont.___, 541 P.2d 1204 (1975).

the officer applying for the warrant had in fact executed it.[173]

After several years of only criticizing this practice, the court finally prohibited it in *State ex rel. Sanford v. District Court.*[174] The court terminated the questionable practice, saying: "We simply will not tolerate further violation of section 95-703, R.C.M. 1947, to permit incursions by law enforcement officers into a constitutionally protected area."[175]

When reviewing warrants with other non-substantive defects, the court has been even less willing to tolerate a prosecutor's arguments that the defects were only technical and not prejudicial to the defendant. In *State v. Tropf,*[176] a police judge signed the warrant, which was titled as if it came from the district court. The supreme court relied upon the state statute limiting the jurisdiction of police judges,[177] and held that even though the warrant may have been based upon probable cause, it was improper for a police judge to issue it. As to the error in titling the warrant, the court sternly reprimanded the prosecution, pointing to the language of the search warrant statute. The court said that when an instrument authorizes search of a constitutionally protected area, the person whose property is searched must have notice of the origin of the instrument so that he may know where to address his grievances and secure an inventory of items seized. Defective titles are "matters of due process and not technical irregularities."[178] Referring to the prosecution's reliance on *Meidinger,* the court stated that case was not "a license to erode the process, but an admonition to recognize that the procedures in this area are to be strictly applied, very simply because they deal with an exception that permits the sovereign to enter upon a constitutionally protected area."[179]

Following its decision in *Tropf,* the court in *State ex rel. Steif v. Sande*[180] overturned a conviction based upon evidence seized with a warrant issued to a judge rather than a peace officer. The court reasoned that the Code expressly distinguishes between peace officer[181] and judge.[182] Therefore, the warrant was doubly defective because it was neither issued to a peace officer nor served and executed by the person to whom it was issued.[183] The Code section which

173. *Id.* at____, 541 P.2d at 1208.
174. ____ Mont.____, 551 P.2d 1005 (1976).
175. *Id.* at____, 551 P.2d at 1006.
176. 166 Mont. 79, 530 P.2d 1158 (1975).
177. R.C.M. 1947, § 11-1602 (Supp. 1975).
178. State v. Tropf, 166 Mont. 79, 86, 530 P.2d 1158, 1162 (1975).
179. *Id.* at 87, 530 P.2d at 1162.
180. ____ Mont.____, 540 P.2d 968 (1975).
181. R.C.M. 1947, § 95-210.
182. R.C.M. 1947, § 95-206.
183. State *ex rel.* Stief v. Sande,____ Mont.____, 540 P.2d 968, 971 (1975).

permits certain technical irregularities did not apply because the defects were again matters of due process in failing to give the person searched proper notice of the origin of the process and to whom he might address his grievances.

It is clear that the Montana Supreme Court will have little patience with prosecution arguments that certain types of defects are mere technical irregularities. Because of the constitutional significance of warrant-based intrusions upon personal privacy, the court will strictly construe the statutory language and carefully scrutinize any defects in the details of search warrants. If the defects result in unfairness to the defendant, the court is likely to find a denial of due process.

Nonetheless, the court appears quite reluctant to extend its sanctions against irregularities in police activity to finding tort liability for officers executing irregular or defective warrants. In *Strung v. Anderson,*[184] the court relied on federal case law for the proposition that an officer acting in good faith upon the reasonable belief that a warrant was properly issued should not be liable for false arrest or false imprisonment in a civil case even if the warrant is later found defective. The court reasoned that it would unduly burden law officers to make them subject to damages "every time they miscalculated what a court of last resort would determine constituted an invasion of constitutional rights."[185] The court thereby underscored the great difficulty with alternatives to the exclusionary rule. No jury or court will normally award damages to a person suffering an invasion of constitutional rights unless the police conduct was especially egregious and was accompanied by proof of officer malevolence.

IV. Post-Investigative Concerns

Although a great percentage of the cases reaching the Montana Supreme Court in the past two years dealt with law enforcement investigation, there was no dearth of cases arising out of the post-investigative, prosecutorial and judicial aspects of criminal procedure.

A. Jurisdiction and Venue

The threshold question in any criminal case is whether jurisdiction and venue are proper. The Code places jurisdiction for all offenses in state district courts, unless otherwise provided.[186] If the poten-

184. ___ Mont.___, 529 P.2d 1380 (1975). *See also* Pierson v. Ray, 386 U.S. 547 (1967).
185. Strung v. Anderson,___ Mont.___, 529 P.2d 1380, 1381 (1975).
186. R.C.M. 1947, § 95-301.

tial punishment is below certain levels, the Code places jurisdiction in justice courts,[187] or police courts.[188] In a recent case, the court faced the jurisdictional problem created by an information originally brought in district court charging a felony, which was later amended to reduce the charge to a misdemeanor.[189] The court adopted the Texas rule, holding that district court jurisdiction is not divested by amendment of the information to charge a lesser, but similar offense. The court analogized to cases in which the evidence presented is insufficient to convict of the felony charged, but is enough to convict of a lesser included misdemeanor. It concluded: "If the rule were otherwise, the court of original jurisdiction would lose its ability to conclude the case with a just result."[190]

Whereas jurisdiction affects the court's power to act and is therefore non-waivable, venue, though also constitutionally based,[191] is waivable, and may be changed on a showing of prejudice.[192] The Montana Code of Criminal Procedure provides that venue for a crime in which certain elements are committed in different counties may be in any county in which an element occurred.[193] In a recent case,[194] the court utilized that statutory provision to uphold venue in Powell County of a case involving the offense of witness tampering, even though the defendants were in the Missoula County jail at all times when they did the acts which constituted the crime charged. The majority said that because the trial which the defendants were trying to influence was to have taken place in Powell County, venue was proper there.[195] The dissent correctly pointed out that all elements of the offense were completed in Missoula County before the trial in Powell County began.[196]

B. Bail and Amendment of Charging Document

Once a proper arrest has been made and the charges brought in the appropriate court, the next question for the judiciary is bail. The Montana Code of Criminal Procedure places a great deal of discretion in the trial court judge to determine appropriate bail. In the few bail cases that have reached the supreme court, the court has generally upheld the lower court's exercise of discretion.[197]

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187. R.C.M. 1947, § 95-302.
188. R.C.M. 1947, § 95-303.
189. State v. Shults,____ Mont.____, 544 P.2d 817 (1976).
190. *Id.* at____, 544 P.2d at 819.
191. MONT. CONST., art. II, § 24.
192. R.C.M. 1947, § 95-1710.
193. R.C.M. 1947, § 95-402.
194. State v. Bretz,____ Mont.____, 548 P.2d 949 (1976).
195. *Id.* at____, 548 P.2d at 951.
196. *Id.* at ____, 548 P.2d at 951.
197. *E.g.*, French v. Crist, 163 Mont. 544, 518 P.2d 35 (1974).

District court discretion is not, however, entirely unfettered. The Code gives the trial court discretion to allow amendment of the charging document after the defendant has entered his plea. Yet, in two recent decisions, the supreme court has demonstrated a laudable tendency to scrutinize the exercise of that discretion when the rights of the defendant may be jeopardized by such amendment. In one case, *State v. Tropf*,[198] the defendant pleaded the defense of alibi and listed his witnesses, as required by the Code, before the State moved to amend. The State wanted to change one count against the defendant from sale or intent to sell marijuana on a named date to sale of hashish on a different date. The supreme court held that allowing the amendment would destroy the defendant's defense and would in substance charge an entirely new offense.[199]

In *State v. Brown*,[200] the State changed the information, charging the defendant under a different subsection of the aggravated assault statute.[201] The court interpreted the language of the Code to allow amendments after the defendant's entry of a plea *only* if: (1) they were merely formalistic, and (2) there was no prejudice to the rights of the defendant.[202] But, where the amendment altered the elements of the offense charged, the change is substantive. "[O]nce it is determined that an amendment subsequent to pleading is as to matters of substance, the court need go no further, as that determination is controlling."[203]

C. *Speedy Trial*

In *Barker v. Wingo*,[204] Justice Powell, writing for the majority, stated:

> The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.
>
> . . . .
>
> A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic.
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> . . . .

198. 166 Mont. 79, 530 P.2d 1158 (1975).
199. *Id.* at 88, 530 P.2d at 1163.
200. State v. Brown, 33 St.Rptr. 820 (1976).
201. R.C.M. 1947, § 95-1505.
202. State v. Brown, 33 St.Rptr. 820, 824 (1976).
203. *Id.*
204. 407 U.S. 514 (1971).

> Finally, and perhaps most importantly, the right to speedy trial is a more vague concept than other procedural rights. . . . We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.[205]

Ultimately, *Barker* suggests four major factors to be considered in making speedy trial determinations: first, the length of delay; second, the reasons assigned to justify the delay; third, the defendant's responsibility to assert his right; and fourth, the prejudice to the defendant. This last factor in turn comprises three goals: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense will be impaired. These factors are to be balanced, weighing the conduct of both the prosecution and the defendant.

The Montana Supreme Court has forced prosecutors to justify lengthy delays. The court found that delays of ten months in one case,[206] and one year in a second case[207] were prima facie denial of speedy trial. If the prosecutor does not justify the delay, the case will be dismissed with prejudice. In the two Montana cases, the prosecutors could not justify the delay, and the delay was not chargeable to the defendant.

If a defendant fails to demand a speedy trial, he does not thereby waive that right. Nonetheless, the court suggested in one case that the defendant "must take some affirmative action to obtain a trial to be entitled to a discharge for delay."[208] In *State v. Steward,*[209] a pretrial motion to dismiss was adequate affirmative action taken in proper time to justify the court's ultimate dismissal with prejudice.[210] In *State ex rel. Sanford v. District Court,*[211] there were motions to suppress and subsequent requests for hearings on the motions. This satisfied the minimum requirement for affirmative action by the defendant to justify a dismissal with prejudice after ten months' delay.

In *State v. Keller,*[212] the court dismissed with prejudice a conviction of mitigated deliberate homicide because there was a delay of 326 days between arrest and trial. The court carefully evaluated the reasons given for delay, including a crowded court docket and legitimate defense motions, concluding that the State's attempted justification for the delay was inadequate. Further, it noted that

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205. *Id.* at 519-21.
206. State *ex rel.* Sanford v. District Court,___ Mont.___, 551 P.2d 1005 (1976).
207. State v. Steward,___ Mont.___, 543 P.2d 178 (1975).
208. *Id.* at___, 543 P.2d at 182.
209. ___ Mont.___, 543 P.2d 178 (1975).
210. *Id.* at___, 543 P.2d at 182.
211. ___ Mont.___, 551 P.2d 1005 (1976).
212. ___ Mont.___, 553 P.2d 1013 (1976).

"some prejudice [did result] by reason of the delay," and the defendant did continuously demand a speedy trial.[213] The court also emphasized that dismissal is the only possible remedy for denial of speedy trial.[214] Although the case involved a very serious crime, the evidence was wholly circumstantial and the appellate court leaves the impression that it was not convinced beyond a reasonable doubt that the defendant was guilty.[215]

In *State v. McKenzie,*[216] the court denied a motion to dismiss for lack of speedy trial. Approximately 350 days had elapsed between the filing of the charges and beginning of trial. The court imprecisely and superficially discussed the State's explanation for the delay, concluding that the delays resulting from the defendant's several court appearances and his refusal to plead, coupled with the complexity of the case and the newness of the applicable law, justified the delay.[217] The court noted that "much of the time [delay] can in fairness be charged to neither party. . . ."[218] The percentage of delay chargeable to the defendant was not specified, but it was stated that the delay "aided both parties to better prepare for the trial. . . ."[219]

The factor which distinguishes *McKenzie* from both *Sanford* and *Steward* is the offense charged — homicide — viewed in conjunction with the only available remedy — dismissal with prejudice. A retrial is hardly an advantage to the defendant, nor is it any answer to denial of speedy trial. The *McKenzie* case dealt with a particularly violent deliberate homicide, whereas *Steward* involved "drugs" and *Sanford* theft. Although each may be considered a serious criminal charge, the court will be very reluctant to release a convicted murderer simply because the trial was delayed.[219.1]

D. Double Jeopardy

Double jeopardy concepts pose many complicated problems. Unfortunately, the real justification for the concept is too often lost

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213. *Id.* at____, 553 P.2d at 1019.

214. *Id.* at____, 553 P.2d at 1019-21.

215. The court also cited the National Advisory Commission Report on Criminal Justice Standards and Goals which states: "[t]he period from arrest to the beginning of trial of a felony prosecution generally should not be longer than 60 days." This standard was adopted by the Montana Study on Criminal Justice Standards and Goals which concluded that, "[t]he trial date shall be set by the judge within 60 days of the plea unless good cause is shown by the prosecution or the defendant why he should not be brought to trial within that period. . ."

216. 33 St.Rptr. 1043 (1976).

217. *Id.* at 1070-71.

218. *Id.* at 1071.

219. *Id.*

219.1. *But see Keller supra* note 212, in which the court seemed unconvinced of defendant's guilt.

in the application of dryly technical rules. In *State ex rel. Zimmerman v. District Court,*[220] the court 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. The applicable statute provides:

> 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 and/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:
>
> (a) The first prosecution resulted in an acquittal or in a conviction as defined in subsection (3) and the subsequent prosecution is based on an offense arising out of the same transaction.[221]

It is difficult to imagine a case fitting more completely within both the language and purpose of the statute. As noted by the dissent, there was a single research project, a single fund, a single purpose or plan, and a series of the same acts.[222] Any factual differences were at most technical, legal distinctions. Nonetheless, the majority restated the position taken in an earlier case: "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."[223]

This statement is not applicable, however, to Montana's double jeopardy statute.[224] It misconstrues the express statutory language. It renders the phrase "same transaction" meaningless. First, the court struggled to find that the offenses involved were *different transactions,* by deciding that the money taken belonged to two different funds — Nutrition Fund, Inc. and HEW grant money — even though the money was co-mingled. The court found there was a different offense because proof of a different fact was required. Then, it moved gracelessly from "different offense" to "different transaction". This narrow, technical misapplication of Montana's double jeopardy statute is unfortunate, and in the long run is injurious to the criminal justice system. Further, its effect on this defendant is distressing. The defendant was again tried, again convicted, and given a severe sentence in state court for the crime. Society's interest had been vindicated by the earlier trial and the defendant

220. ___ Mont.___, 541 P.2d 1215 (1975).

221. R.C.M. 1947, § 95-1711(4) (Supp. 1975).

222. State *ex rel.* Zimmerman v. District Court,___ Mont.___, 541 P.2d 1215, 1218-19 (1975) (Haswell and Daly, J. J., dissenting).

223. *Id.* at___, 541 P.2d at 1217 (citing State v. McDonald, 158 Mont. 307, 310, 491 P.2d 711, 712 (1971)).

224. R.C.M. 1947, § 95-1711 (Supp. 1975).

was on a course which would assure early reentry into a productive, socially valuable life. This course was interrupted by the lengthy, expensive state court process to the value and credit of no one.

A more technically defensible result was reached in the *State v. Cunningham*[225] case in which the defendant challenged the State's authority to specify a different point in the trial when jeopardy attaches than is specified in the federal system. Montana's statute provides that jeopardy attaches after the first witness is sworn, whereas the federal rule holds that jeopardy attaches after the jury is sworn.[226] In *Cunningham*, the charges were dismissed after the jury was sworn but before the first witness was sworn. In analyzing the case, the court "perceive[d] no inherent merit in the federal rule over Montana's state law."[227] This policy determination may lend weight to the court's argument, but it does not address the only relevant issue - whether the federal rule is of constitutional dimension which the state court must follow regardless of the relative merit of the two rules.

Two distinct philosophies regarding the application of federal rules to state proceedings have emerged from Supreme Court decisions. The crux of the distinction was enunciated frequently in dissents by the late Justice Harlan.[228] He insisted that fourteenth amendment due process is distinct from the first ten amendments to the Constitution. According to Justice Fortas, there is no clear reason for using the fourteenth amendment to incorporate into state proceedings every federal guarantee "bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings."[229]

The issue is whether the exact point at which jeopardy attaches is, or should be, a fundamental part of fourteenth amendment due process, or even so fundamental that it is a necessary ingredient of the fifth amendment concept of double jeopardy. Is it merely an historical appendage accepted by federal common law and not of constitutional significance?

The answer is not easy. Obviously, if jeopardy does not attach until after verdict, the entire double jeopardy concept is eviscerated.

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225. 166 Mont. 530, 535 P.2d 186 (1975).

226. R.C.M. 1947, § 95-1711(3)(d) (Supp. 1975) provides: "Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the final witness is sworn but before verdict." Downum v. United States, 372 U.S. 734 (1963) (federal rule); *But see* Illinois v. Sommerville, 410 U.S. 458 (1973).

227. State v. Cunningham, 166 Mont. 530, 534, 535 P.2d 186, 188 (1975).

228. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 147, 171-93 (1968) (Harlan, J., dissenting); Malloy v. Hogan, 378 U.S. 1, 14-33 (1964) (Harlan, J., dissenting).

229. Bloom v. Illinois, 391 U.S. 194, 213 (1968) (Fortas, J., concurring).

Likewise, distinction between the time the jury is sworn and the time the first witness is sworn may be constitutionally insignificant and not subject to attack by those most vehemently opposed to the constitutional theory of selective incorporation.

The Montana court seemed vaguely aware of the problem, acknowledging that: "[A]lthough there is language in these opinions [Duncan, etc.] that supports this conclusion [that Montana's special rule violates the Constitution] the facts and issues in these cases do not in our opinion set up a rigid, immutable constitutional rule to be applied mechanically in determining whether state laws conform."[230]

The double deopardy clause of the fifth amendment was made applicable to the States via the fourteenth amendment in *Benton v. Maryland.*[231] The Supreme Court decided that the "double jeopardy prohibition of the fifth amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the State through the fourteenth amendment."[232] The Court also held that the same constitutional standards apply against both the state and federal governments.[233] Yet, the Court did not decide whether the point in the proceedings when jeopardy attaches is mandated by the Constitution.

In *Bretz v. Crist,*[234] which arose in Montana, the United States Court of Appeals for the Ninth Circuit considered that issue. After the jury was empaneled and sworn, the trial court granted the prosecution motion to dismiss all of the remaining counts in order for the State to file a different information. Judge Tuttle, writing for the Ninth Circuit, phrased the threshold question as "whether the federal attachment of jeopardy rule is a product of constitutional exegesis or simply a nonconstitutional consequence of the Supreme Court's supervisory power over lower federal courts and federal officials."[235] He answered the question almost harshly.

> We reject at the outset the notion that while the double jeopardy clause constrains reprosecutions by the states it countenances different constitutional applications in state and federal courts.
>
> Benton's declaration that 'the same constitutional [double jeopardy] standards apply against both the State and Federal governments,' [*Benton v. Maryland* 395 U.S. 784 (1969)] and its determination that 'the validity of [state] conviction[s] must be judged . . . under this court's interpretation of the fifth

230. State v. Cunningham, 166 Mont. 530, 533, 535 P.2d 186, 188 (1975).
231. 395 U.S. 784 (1969).
232. *Id.* at 794.
233. *Id.* at 795.
234. No. 76-1572 (2d Cir. Nov. 18, 1976).
235. *Id.*

amendment double jeopardy provision' 395 U.S. at 796, compel the conclusion that if the federal attachment of jeopardy rule is constitutionally mandated in federal courts, no different rule may be followed by state courts.[236]

The court discussed the cases interpreting the rule, the history of the rule, and Montana's own case law and decided that on all grounds the defective information could have been handled without a dismissal after the jury had been empaneled and sworn. Waiting until that point in time prevented dismissal without the risk of being barred from further prosecution by the fifth amendment to the United States Constitution.

In *Bretz,* Judge Tuttle compared the double jeopardy rule to the exclusionary rule and distinguished the two, noting that the Court's holding in *Stone v. Powell,* "confirms that the exclusionary rule, while constitutionally inspired is not constitutionally required."[237] The exclusionary rule forms a part of a substructure of substantive, procedural, and remedial rules based on notions of constitutional common law. According to Judge Tuttle, this constitutional substructure is subject to change or reversal in any number of ways without violating constitutional concepts. When jeopardy attaches is not subject to any such change, reversal, or variation according to the whims of a state legislature.

Yet another aspect of double jeopardy was discussed in *United States v. Sanford.*[238] The United States Supreme Court held that since the dismissal "was prior to a trial that the government had a right to prosecute . . . [and] the defendant was required to defend."[239] Sanford's trial had resulted in a hung jury; and jeopardy had attached. Prior to retrial, the district court dismissed the indictment finding the government had consented to the illegal game hunting in Yellowstone National Park. The Supreme Court reversed without oral argument, deciding that the case was governed by *United States v. Serfass,*[240] in which a pretrial dismissal of an indictment by a federal district court judge, followed by an appellate reversal did not preclude defendant going to trial on the merits.[241] Jeopardy does not attach until a defendant is put to trial before the trier of facts. *Serfass* apparently was based on the conclusion that jeopardy cannot attach until a defendant is put to trial whereas *Sanford* allows retrial after a full trial, a hung jury, and a court-

236. *Id.*____ . (citing Pointer v. Texas, 389 U.S. 400 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Ker v. California, 374 U.S. 23 (1963)).

237. Bretz v. Crist, No. 76-1572 (2d Cir. Nov. 18, 1976).

238. 97 S.Ct. 20 (1976).

239. *Id.* at 22.

240. 420 U.S. 377 (1975).

241. *Id.* at 392.

ordered dismissal based on a legal determination. Jeopardy had attached in the *Sanford* case although the Court simply notes without any substantial discussion that *Serfass* applied because the dismissal was prior to a trial the government had a right to prosecute.[242] Whether the rule should be different in a case where jeopardy had attached was not discussed.

V. Conclusion

The delicate balance between individual needs and social needs can never be long maintained. The very concept of balance is often used to change directions and destroy an existing equilibrium. Because the concept of balance can be used to justify any conclusion simply by giving greater weight to one of two competing policy considerations, the concept is extraordinarily dangerous. Notwithstanding the danger, it has become the foundation of many new constitutional decisions in criminal procedure. Baseline constitutional minimums must be maintained. Any such minimums that did exist under Warren Court philosophy — for example, the specific limits of *Miranda* and the specific demands of *Mapp* — are now in jeopardy.

In Montana, the complexity of adhering to changing federal demands in criminal cases could be substantially simplified if the new Montana Supreme Court under Chief Justice Hatfield is more protective of individual rights than the United States Supreme Court under the aegis of Chief Justice Burger, and if future Montana decisions on criminal procedure rely on Montana's Constitution and not on the Federal Constitution. The obvious advantages for both prosecution and defense include speedier final determination of criminal matters, front-line protection of individual rights, and reduced procedural confusion as a result of limiting federal constitutional imposition on state criminal law procedures. From the lawyer's point of view, two significant concerns surface: first, the need to build better factual foundations at the trial court level for all potential constitutional issues; and second, the need to provide state supreme court justices with state constitutional authority for each position forwarded. Rarely does legal change justify our grandest expectations or our worst fears.

242. United States v. Sanford, 97 S.Ct. 20, 21-22 (1976).