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## A History and Explanation of Montana Disciplinary Practices

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## RECENT DECISIONS

A HISTORY AND EXPLANATION OF MONTANA DISCIPLINARY PRACTICES.—The Supreme Court of Montana possesses authority to suspend, disbar, or otherwise regulate and discipline Montana attorneys. The disbarment statute, Revised Codes of Montana, 1947, section 93-2026<sup>1</sup> provides: "The supreme court of the state shall have exclusive jurisdiction to remove or suspend attorneys and counselors at law. . . ." This statute contains five subdivisions, any violation of which may be grounds for suspension or disbarment.<sup>2</sup> The court has also recognized its inherent power, over and above any statutory provisions, to control its own officers.<sup>3</sup> Thus, the court has ample power and authority "to adopt, promulgate, and enforce all necessary and proper rules for . . . regulation of attorneys in the state of Montana."<sup>4</sup>

In January, 1962, for the first time in more than twenty years, the Supreme Court of Montana took disciplinary action against a Montana attorney.<sup>5</sup> Since that time the court has considered five additional

<sup>1</sup>Hereinafter REVISED CODES OF MONTANA are cited as R.C.M.

<sup>2</sup>R.C.M., 1947 § 93-2026 provides for suspension or disbarment of an attorney for any of the following causes:

1. His conviction for a felony or misdemeanor involving moral turpitude, in which case the record of conviction is conclusive evidence.
2. Wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with, or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney and counselor.
3. Corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding.
4. Lending his name to be used as attorney and counselor by another who is not an attorney and counselor.
5. Being guilty of deceit, malpractice, crime, or misdemeanor, involving moral turpitude; provided, however, that the provisions of this section shall not abate any proceedings now pending, but the same may be proceeded with until the final determination in the court wherein such action is pending.

There have apparently been no cases arising under the prohibitions of subdivisions 3. and 4., but the court has, in several cases, outlined the scope of the other subdivisions.

In *In re McCue*, 80 Mont. 537, 261 Pac. 341 (1927), subdivision 2. of R.C.M. 1947, § 93-2026 was directly interpreted by the court. There it was held that the whole of the subdivision was modified by the term "wilful".

Subdivision 5. has been interpreted as being broad and comprehensive. It includes within its scope sufficient grounds for suspension or disbarment of any attorney who displays a "course of conduct . . . disclosing the moral obliquity and dishonesty rendering him unworthy of the privilege of practicing law." *In re O'Keefe*, 55 Mont. 200, 204, 175 Pac. 593 (1918). It is broad enough to include all kinds of felonies and misdemeanors involving moral turpitude, whether committed within the jurisdiction (Montana), and whether within or without the sphere of official duty. *In re Thresher*, 33 Mont. 441, 84 Pac. 876 (1906).

NOTE: The scope of subdivision 1. of R.C.M., 1947, § 93-2026 will be considered in the main body of the note in connection with cases of *disbarment following conviction for a felony or misdemeanor involving moral turpitude*.

<sup>3</sup>In *In re Hansen*, 101 Mont. 490, 501, 54 P.2d 882 (1936), the court, in refusing to be limited to the statutes as authority to discipline attorneys, stated: "Attorneys are officers of the court; they may be admitted to practice only by authority of the court; and it is universally held that courts have inherent powers over members of the Bar over and above statutory provisions."

<sup>4</sup>*In re Unification of the Montana Bar*, 107 Mont. 559, 562, 87 P.2d 172 (1939).

<sup>5</sup>In the *Matter of Hirst*, 140 Mont. 91, 368 P.2d 157 (1962). Prior to the *Hirst* case the last disciplinary action considered by the Montana Supreme Court had been *In re McDonald*, 112 Mont. 129, 113 P.2d 790 (1941).

disciplinary cases.<sup>6</sup> Three of the cases resulted in disbarment of the attorney involved,<sup>7</sup> while in the remaining three the attorneys were suspended for either definite or indefinite periods.<sup>8</sup> These cases reflect the increased concern of the Montana Supreme Court, as well as Montana lawyers and the lay public of the state, with the ethical standards of the legal profession in Montana. In considering a recent proposal to adopt the Intergrated Bar in Montana the Supreme Court of Montana spoke of a need for improvement of the Bar: ". . . we believe it is timely to look forward to improvement of the Bar itself. There is need for improvement in our court, in the district and justice courts, and in the Bar of which we are members." (Emphasis added.)<sup>9</sup>

The objective of a disbarment proceeding is to insure protection of the public<sup>10</sup> and to "meet and clear away the alleged reprehensible acts charged as having been committed by a member of [the] bar."<sup>11</sup> From the earliest cases of disciplinary action against Montana lawyers<sup>12</sup> the Montana Supreme Court has emphasized that all attorneys must, as individuals and in their professional lives, be fair and upright in dealings with their clients and with the public.<sup>13</sup> The attorney is an officer of the court and owes a duty to it to assist in the administration of justice. If he fails in that duty he forfeits the privilege of practicing law.<sup>14</sup> Whenever an attorney exhibits personal attributes deemed detrimental to the practice of his profession, the court has readily declared that such an individual should not be allowed to continue to practice,<sup>15</sup> but should be expelled "from the profession whose honor he has stained and whose reputation for fidelity his malpractice tends to impair."<sup>16</sup> However, the court has not been unmindful of the consequences of disbarment.<sup>17</sup> It has always insisted that the procedures followed and the evidence in support of the charges be sufficient to satisfy the court to a reasonable certainty that the charges are true.<sup>18</sup>

<sup>6</sup>In the Matter of Meyer, 141 Mont. 167, 377 P.2d 364 (1962); In the Matter of Crawford, 141 Mont. 185, 380 P.2d 664 (1962); In the Matter of Harper, 141 Mont. 483, 380 P.2d 663 (1963); In the Matter of O'Donnell, 387 P.2d 303 (Mont. 1963); In the Matter of Coyle, 390 P.2d 209 (Mont. 1964).

<sup>7</sup>In the Matter of Crawford, *supra* note 6; In the Matter of Harper, *supra* note 6; In the Matter of O'Donnell, *supra* note 6.

<sup>8</sup>In the Matter of Hirst, *supra* note 6 (suspension for ninety days); In the Matter of Meyer, *supra* note 6 (suspension for indefinite period); In the Matter of Coyle, *supra* note 6 (suspension for indefinite period).

<sup>9</sup>Application of the Montana Bar Ass'n. for the Unification and Integration of the Bar of the State of Montana, 140 Mont. 101, 109, 368 P.2d 158 (1962).

<sup>10</sup>In re Thresher, *supra* note 2; In re McDonald, *supra* note 5.

<sup>11</sup>In re Hansen, *supra* note 3 at 498-499.

<sup>12</sup>In re Bloor, 10 Mont. 222, 25 Pac. 101 (1891); State *ex rel.* Hartman v. Cadwell, 16 Mont. 119, 40 Pac. 176 (1895).

<sup>13</sup>In re O'Keefe, *supra* note 2.

<sup>14</sup>*Id.* at 205.

<sup>15</sup>In re Weed, 26 Mont. 241, 245, 67 Pac. 308 (1902).

<sup>16</sup>In re Burke, 55 Mont. 303, 305, 176 Pac. 421 (1918).

<sup>17</sup>"The effect of the disbarment of attorneys practically means their complete ruin." State *ex rel.* Stapleton v. Wines and Booth, 21 Mont. 464, 465, 54 Pac. 562 (1898). "[An attorney's] disbarment deprives him, not only of his chosen means of making a livelihood for himself and family, but of the confidence and respect of his fellows . . ." In re Peters, 73 Mont. 284, 288, 235 Pac. 772 (1925).

<sup>18</sup>R.C.M., 1947, §§ 93-2016 to -2018, and §§ 93-2028 to -2038 outline the procedural steps followed in any disbarment action other than one arising under subdivision 1.

The disciplinary actions taken against attorneys of this state have been the result of charges arising from a variety of conduct, both in the practice of law and in personal activity apart from the practice of law. Although the cases do not lend themselves to well ordered classification, they do tend to fall within one of three broad categories.

1. *Disbarment following conviction for a felony or misdemeanor involving moral turpitude.*
2. *Disciplinary actions arising from conduct or condition of the attorney apart from his professional responsibilities.*
3. *Disciplinary actions arising from conduct of the attorney in performance of his professional duties.*<sup>19</sup>

#### 1. INITIATION OF THE ACTION—FILING OF COMPLAINT

Proceedings for suspension or removal of an attorney may be undertaken on the basis of matters within the knowledge of the court or upon the information of a complaining witness or witnesses. (R.C.M., 1947, § 93-2028). If the proceedings are upon the information of an individual, the accusation must be in writing, and must be verified by affidavit that the charges are true. (R.C.M., 1947, §§ 93-2029, 2030). There is no requirement that the complainant be authorized by law to inform the court of the charges. *In re Wellcome*, 23 Mont. 140, 58 Pac. 45 (1899). No other limitations are imposed upon whom may bring a disciplinary action against an attorney except that the person making the affidavit must have knowledge of the facts upon which the affidavit is based. Accusations based on rumor or hearsay will not be considered. *In re Weed*, 26 Mont. 241, 67 Pac. 308 (1902). Additionally, accusations which are vague, indefinite or uncertain will not be considered. *In re Wellcome, supra*.

#### 2. INVESTIGATION OF THE CHARGES

After the initial complaint is filed an investigation is made of the charges. (R.C.M., 1947, § 93-2016). This investigation is made by either the attorney general or a special investigator appointed by the attorney general or the supreme court. (R.C.M., 1947, § 93-2018). If a special investigator is appointed, it is the practice to name an attorney of known ability and integrity to make the investigation. It is also customary to choose an attorney who resides at some distance from the scene of the alleged improper activity. *In re McCue, supra* note 2.

#### 3. SUMMONS AND ANSWER

Upon completion of the investigation, if, in the opinion of the attorney general or the justices of the supreme court, there should be a trial, a formal complaint is filed by the attorney general and a summons is issued in the manner provided in a civil action. (R.C.M., 1947, § 93-2017); *In the Matter of O'Donnell, supra* note 6. The accusation can be answered by objecting to its sufficiency or by denying it. (R.C.M., 1947, § 93-2033). The objection to sufficiency of the accusation need be in no particular form, provided it sufficiently sets forth the grounds. A denial can be oral and without oath. (R.C.M., 1947, § 93-2034). If the accused does not appear and answer the charges against him the court may proceed and determine the charges in his absence. (R.C.M., 1947, § 93-2032); *In the Matter of Crawford, supra* note 6.

#### 4. TRIAL AND JUDGMENT

If the accused answers and denies the accusation, there must be a trial of the issues before any judgment can be entered. (R.C.M., 1947, § 93-2036). In the proceedings the attorney "is presumed innocent and presumed to have properly performed [his] duties as [an] officer of the court . . ." *In re Parsons*, 35 Mont. 478, 482, 90 Pac. 163 (1907). However, since a disbarment action is not a criminal proceeding, the accused is not absolutely entitled to be confronted with witnesses against him under the MONT. CONST. art. III, § 16. *In re Wellcome*, 23 Mont. 259, 58 Pac. 711 (1899). If the accused pleads guilty or refuses to answer, the court *must* proceed to a judgment of removal or suspension. (R.C.M., 1947, § 93-2036) (Emphasis added). If a trial of the charges is held, the court may, upon conviction, impose judgment according to the gravity of the offense. (R.C.M., 1947, § 93-2038).

<sup>19</sup>Cases in this category have resulted in two types of sanction: (1) suspension, and

## 1.

*Disbarment following conviction for a felony or misdemeanor involving moral turpitude* is completely controlled by statute. In such cases the court is not faced with any particular problems. A certified copy of the record of conviction is conclusive evidence of such conviction,<sup>20</sup> and the court will not look beyond the fact of conviction to determine whether the accused is actually guilty.<sup>21</sup> It is not necessary to issue any citation to the attorney of the proceedings to disbar him, nor is he entitled to have a complaint or accusation served upon him.<sup>22</sup> The court acts on its own motion in ordering the disbarment.<sup>23</sup> The court has no discretion, but must order the attorney stricken from the rolls.<sup>24</sup> The only instance in which the accused attorney might be entitled to a hearing before disbarment under subsection 1 of R.C.M. 1947, sec. 93-2026 for conviction for a felony or misdemeanor involving moral turpitude would be when some question arose as to whether the offense involved moral turpitude.<sup>25</sup>

## 2.

In only limited instances has *disciplinary action* been instituted for *conduct or condition of the attorney apart from his professional responsibilities*. Such conduct has almost always involved criminal or quasi-criminal acts, and in dealing with the problem the court has relied largely on subdivision 5 of R.C.M. 1947, sec. 93-2026 which embraces acts of deceit, malpractice, crime or misdemeanor involving moral turpitude.<sup>26</sup> In *In re Wellcome*,<sup>27</sup> the first Montana case within this category, the court recognized that subdivision 5. was broad enough to include felonies or misdemeanors committed by the attorney outside his official capacity.<sup>28</sup>

In the early cases, if the questioned conduct involved the commission of a crime, the court often refused to consider the accusations

<sup>20</sup>R.C.M., 1947, § 93-2026, subd. 1., *supra* note 2. Upon conviction of an attorney for a crime involving moral turpitude the clerk of the court in which the conviction was had, must, within thirty days of the conviction, transmit to the supreme court a certified copy of the record of the conviction. (R.C.M., 1947, § 93-2027).

<sup>21</sup>The conviction may be in either state or federal court. *In re Peters*, *supra* note 17. Additionally, the crime upon which conviction is based could have been committed either before or after admission to practice. *In re Wellcome*, 23 Mont. 140, 58 Pac. 45 (1899).

<sup>22</sup>*In re Bloor*, 21 Mont. 49, 52 Pac. 779 (1898).

<sup>23</sup>*In re Peters*, *supra* note 17.

<sup>24</sup>*In re Bloor*, *supra* note 22.

<sup>25</sup>*Moral turpitude*, within the meaning of 93-2026, has been defined as "everything done contrary to justice, honesty, or good morals." *In re Peters*, *supra* note 17 at 289.

<sup>26</sup>As originally enacted, subdivision 5. did not contain the clause "involving moral turpitude." Montana Code of Civil Procedure, 1895, § 402. This subdivision was amended to its present form in 1903. Laws of Montana 1903, ch. 36, § 1. Prior to this amendment the Montana Supreme Court had held no moral turpitude was required for disbarment under this section. *In re Wellcome*, *supra* note 21.

<sup>27</sup>*Supra* note 21.

<sup>28</sup>Crimes committed outside the state also fall within the scope of this subdivision. *In re Wellcome*, *supra* note 21.

in the disbarment action until after the attorney had been prosecuted for the crime.<sup>29</sup> However, such a procedure has always been within the discretion of the court and seems to have been abandoned in more recent cases.<sup>30</sup>

In other cases involving unofficial conduct where the attorney has been found guilty of wilful perjury,<sup>31</sup> or where he knowingly and wilfully aided a litigant in establishing a false claim by acting as a witness in the action,<sup>32</sup> the court has held disbarment was justified. Disbarment has also been ordered in a case where the attorney had defrauded a bank by securing additional credit through the use of a forged deposit slip.<sup>33</sup>

Prior to the two recent cases that ordered suspension of the attorneys because of their disordered state of mind,<sup>34</sup> the court had shown an extreme reluctance to pass judgment on any extra-official conduct of a lawyer which reflected on other than his personal or professional integrity.<sup>35</sup> However, these recent cases seem to indicate an increased readiness on the part of the court to deal with such extra-official conduct. Although the per curiam opinions do not completely clarify the court's position on "moral deficiency"<sup>36</sup> as a basis for disciplinary action, they do show that the court has the power and the responsibility to suspend an attorney who is unable to properly carry on his duties as an officer of the court and a representative of clients' interests.

### 3.

The most serious, and unfortunately the most frequent, causes for disciplinary action have stemmed from conduct of the attorney in per-

<sup>29</sup>*In re Wellcome*, *supra* note 21; *In re Weed*, 26 Mont. 507, 68 Pac. 1115 (1902). In the first *Wellcome* case, the court refused to consider the disbarment charges because no criminal action had been taken. A grand jury in Lewis and Clark County subsequently failed to return an indictment against Wellcome on the bribery charges, (*In re Wellcome*, 23 Mont. 213, 58 Pac. 47 (1899)); even so, in a later action Wellcome was disbarred. *In re Wellcome*, 23 Mont. 450, 59 Pac. 445 (1899).

<sup>30</sup>*In re Young*, 77 Mont. 332, 250 Pac. 957 (1926).

<sup>31</sup>*In re McCue*, 77 Mont. 47, 248 Pac. 187 (1926). Upon petition for re-admission, McCue was able to explain all charges against him and was readmitted to practice. *In re McCue*, *supra* note 2.

<sup>32</sup>*In re O'Keefe*, *supra* note 2.

<sup>33</sup>*In re Young*, *supra* note 30.

<sup>34</sup>*In the Matter of Meyer*, *supra* note 6; *In the Matter of Coyle*, *supra* note 6. In each of these cases the order of suspension made reference to charges which had been filed against the attorney. However, neither of the orders explained the nature of the charges which initiated the action.

<sup>35</sup>*In re McCue*, *supra* note 2, the court expressly refused to take the position that, if the moral deficiencies of the attorney had been properly argued as a basis for disbarment, it would have considered such as being a sufficient basis for such action. The court quoted favorably from the dissent of Justice Field in *Ex parte Wall*, 107 U.S. 265 at 306 (1882) wherein he stated: "Indulgence in vices affecting to some extent the moral character, but not the personal or professional integrity is not a sufficient ground for disbarment." Adoption of this position by the court is especially significant when considered in light of the conduct attributed to McCue. Conduct involving moral deficiency was described by Justice Meyers who dissented in *McCue*: "As to the specifications of the issuance of worthless checks, the attempted explanation of the accused makes the offense worse . . . . The circumstances under which the accused did it, as explained by him (doing it while under the influence of bootleg whiskey, in a gambling joint, with intent, apparently, to fleece somebody and get some dishonest money in a crooked card game) only aggravates the offense in my opinion." *Supra* at 572.

<sup>36</sup>See *supra* note 35 for examples of "morally deficient" conduct.

formance of his professional duties. These cases cover a wide range of unprofessional conduct,<sup>37</sup> and in many instances the attorney was charged with multiple acts of malpractice. However, almost all these cases have one feature in common—the action taken against the attorney was at least partially due to misuse of a client's funds.

### Suspension Cases

Not all the cases within the category of professional misconduct have resulted in disbarment of the attorney. In several instances the presence of mitigating circumstances influenced the court to suspend an attorney rather than disbar him. An attorney who had collected money for a client but had not paid it over was suspended because of his lack of "evil intent" to permanently appropriate the funds to his own use.<sup>38</sup> In another case an attorney, who had promised to pay a substantial sum to two witnesses in order to secure their presence at the trial and their favorable testimony, was only suspended for his actions. His plea of having acted only in his client's interests was a sufficient mitigating circumstance to prevent imposition of disbarment.<sup>39</sup>

In other cases involving the mishandling of clients' funds, factors such as the continued employment of the attorney by the client,<sup>40</sup> the hardship to other clients resulting from a long period of suspension,<sup>41</sup> and even the economic pressures under which attorneys worked during the depression<sup>42</sup> have been taken into consideration by the court in determining the sanction to be imposed. It should be noted that in each of these cases there was either a repayment of the money involved or an offer to repay. The court has never allowed suspension if repayment has not been made.<sup>43</sup>

### Disbarment Cases

Misappropriation of funds held by an attorney in a fiduciary capacity does not, as seen from the suspension cases, always result in disbarment. In addition to recognition of various mitigating factors the court has, in the past, imposed other limitations upon disbarment proceedings. It

<sup>37</sup>Some examples of the professional misconduct which have been the subject of disciplinary action are: acting as counsel for both parties in a law suit. (*In re Carleton*, 33 Mont. 431, 84 Pac. 288 (1906)); failing to follow the client's instructions in the settlement of its claim, (*In re Waddell*, 54 Mont. 597, 172 Pac. 1036 (1918)); and failure to pay over money collected for the client, (*In re Hansen*, *supra* note 3.)

<sup>38</sup>*In re Burke*, *supra* note 16.

<sup>39</sup>*In re O'Keefe*, 49 Mont. 369, 142 Pac. 638 (1914). The suspension imposed in this action apparently made no lasting impression on Mr. O'Keefe. He was subsequently disbarred for giving false testimony in a divorce action with the intent to deceive the court. *In re O'Keefe*, *supra* note 2.

<sup>40</sup>*In re Jewell*, 60 Mont. 602, 201 Pac. 266 (1921).

<sup>41</sup>*In re Lunke*, 56 Mont. 226, 182 Pac. 126 (1919).

<sup>42</sup>*State ex rel. Foot v. Hughes*, 92 Mont. 53, 10 P.2d 584 (1932).

<sup>43</sup>On only one occasion has disciplinary action been taken against an attorney acting as an officer of the state for misuse of his official capacity. In that case, *In re Bunston*, 52 Mont. 83, 155 Pac. 1109 (1916), a county attorney had used his office as a means of securing settlement of various civil claims that he handled in his private practice. The evidence indicated that the attorney had resorted to threats of prosecution, filing of complaints, and even arrest and commitment in forcing settlement of the claims. He was suspended for one year for his actions.

has held that the withholding of a client's funds must not only be wilful, but must also be accompanied by a dishonorable intent before disbarment action will be taken.<sup>44</sup>

Prior to the recent disbarment actions, the cases which have resulted in actual disbarment have involved either a refusal by the attorney to pay over money owing to the client,<sup>45</sup> or a lack of effort to settle with the client until after some official complaint against his conduct was made or actual disciplinary proceedings were instituted.<sup>46</sup> In one of the recent cases the attorney apparently did not attempt to make any restitution of the clients' funds,<sup>47</sup> but in the other two there was either a repayment<sup>48</sup> or an offer to make the deficiencies good.<sup>49</sup> Although such repayment has, in the past, been at least a partial basis for imposing suspension rather than disbarment, the court in the recent cases gave no weight to it. In fact, in one case the court expressly stated that although an offer to repay was to the attorney's credit, disbarment was nevertheless merited in view of his actions amounting to deceit and malpractice involving moral turpitude.<sup>50</sup>

The Montana Supreme Court until recently has been reluctant to take action against unethical conduct. The recent cases mark the first action in the entire field in twenty years, and as yet the court has not acted except in those cases where the attorney has engaged in some sort of gross misconduct or criminal act involving moral turpitude. The recent cases do not mark a radical departure from earlier precedent, but they do indicate that the court has resumed its responsibility to deal with this difficult problem, and that it is now taking a more comprehensive view of the entire problem of unethical conduct. In two of the suspension cases the court based its decision on grounds which, prior thereto, had not been the basis for such action; and in the disbarment cases the court emphasized not only its own responsibility to the public, but also the position which an attorney of this state holds as an officer of the court.

It is submitted that the language of the past decisions and of the statutes does, in fact, offer ample precedent for a comprehensive treatment of any disciplinary problems which will face the court in the future:

1. The comprehensive nature of subdivision 5. of R.C.M. 1947, sec. 93-2026 has been recognized as applicable to acts falling both within and without the scope of the attorney's professional duties.

<sup>44</sup>*In re McCue*, *supra* note 2.

<sup>45</sup>*In re Stevens*, 92 Mont. 549, 16 P.2d 410 (1932). In this case the client had agreed to accept a settlement of five hundred dollars for a total of over one thousand dollars which Stevens owed. Stevens, however, paid no more on this settlement agreement than he had paid on the original amount due and owing.

<sup>46</sup>See, e.g., *In re Waddell*, 54 Mont. 597, 172 Pac. 1036 (1918); *In re McCue*, *supra* note 31; *In re Hansen*, *supra* note 3.

<sup>47</sup>*In the Matter of Crawford*, *supra* note 6.

<sup>48</sup>*In the Matter of O'Donnell*, *supra* note 6.

<sup>49</sup>*In the Matter of Harper*, *supra* note 6.

<sup>50</sup>In ordering the disbarment the court also cited its public trust and the fact that the lawyer had breached his duties as an attorney as reasons for taking such severe



2. The definition of moral turpitude adopted by the court is broad enough to include any unjust, immoral, or dishonest act by the attorney.

3. Subdivision 2. of R.C.M. 1947, sec. 93-2026 provides for disciplinary action for any wilful violation of the attorney's oath of office.

4. The court has the inherent power to regulate its officers and to promulgate and enforce all necessary and appropriate rules for such regulation.

SAM E. HADDON

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INFORMING JURY OF DEFENDANTS' PRIOR CONVICTIONS AT COMMENCEMENT OF TRIAL PURSUANT TO HABITUAL CRIMINAL STATUTE VIOLATED DUE PROCESS.—Defendant was charged in three separate indictments for state narcotics violations. As defendant had previously been convicted for narcotics violations, the state sought to increase punishment under Maryland's habitual criminal statute.<sup>1</sup> Each of the three indictments alleged the facts of the principal offense and also the details of the prior convictions. At the beginning of the trial the complete indictments were read to the jury, and during the trial the prior convictions were proven. The jury convicted the defendant of the principal crimes, and found the prior convictions to exist as an historical fact. Pursuant to these findings, the trial court sentenced defendant as a third offender. Appealing these convictions to the Maryland Court of Appeals, defendant contended that it was improper to acquaint the jury with his criminal record at the outset of the trial. This contention was rejected,<sup>2</sup> and the United States Supreme Court denied certiorari.<sup>3</sup> Defendant then petitioned the federal district for a writ of habeas corpus, alleging that he had been deprived of a fair and impartial trial as required by the due process clause of the Fourteenth Amendment. The petition was denied on the basis of Maryland decisions upholding the procedure of informing the jury of previous convictions during the trial of the principal offense.<sup>4</sup> On appeal to the Fourth Circuit Court of Appeals, *held*, reversed. Informing the jury of defendant's prior criminal record at the outset of the trial destroyed the jury's impartiality. Such procedure is prejudicial to the defendant and renders the conviction invalid. *Lane v. Warden, Maryland Penitentiary*, 320 F.2d 179 (4th Cir. 1963).

Nearly all states have enacted habitual criminal statutes which provide that prior convictions can be used to increase punishment for a subsequent offense.<sup>5</sup> In Montana, for example, if a person has a previous conviction for an offense punishable by five years imprisonment, his sentence for a subsequent conviction is increased to a minimum of ten

<sup>1</sup>MD. ANN. CODE art. 27, § 300 (1957) provides that a sentence is to be increased on a subsequent conviction for narcotics, where defendant has prior narcotics convictions.

<sup>2</sup>This was one of ten assignments of error presented on appeal. The convictions were affirmed in *Lane v. State*, 226 Md. 81, 172 A.2d 400 (1961).

<sup>3</sup>368 U.S. 993 (1962).

<sup>4</sup>*Lane v. Warden Md. Penitentiary*, 207 F. Supp. 780 (D.C. Md. 1962).

<sup>5</sup>For a list of these jurisdictions see 2 WHARTON, CRIMINAL EVIDENCE § 645 (12th ed.