Gopher to Martinez: A Journey across the Shifting Sands of Particularized Suspicion in Montana

J. Wayne Capp
Student, University of Montana School of Law

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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.  

I. INTRODUCTION

The Constitution's Framers could never have envisioned a single sentence produced by their endeavors and designed to
protect American citizens from unreasonable intrusions by the government would today have so great an impact on our modern mobile culture. Literally every citizen who is licensed to drive a motor vehicle is likely to encounter a time when his Fourth Amendment rights will be tested in an encounter with a police officer stopping them as they go about their daily lives. The vast majority of these encounters will end with a short detention, a traffic ticket, or a warning to drive more carefully. But others will result in searches of the vehicle, searches of the persons within, physical arrests of the occupants, trials, and prison sentences. Whatever the reason or result of these brief (and sometimes not so brief) encounters between citizens and the police, the Fourth Amendment protections against unreasonable search and seizure are implicated. And perhaps no other police-initiated stop of a citizen has received more scrutiny by the courts than those that have been based, not on the direct observations and knowledge of the officer, but instead upon information received from third parties who might collectively be termed "citizen informants." One scholar succinctly characterized the Fourth Amendment tensions inherent in this

3. Although the Fourth Amendment "may appear clear and concise, [this] single sentence has generated countless volumes of text." Elizabeth Ahern Wells, Warrantless Traffic Stops: A Suspension of Constitutional Guarantees in Post September 11th America, 34 U. Tol. L. Rev. 899, 900 (2003). One scholar has even observed that, "[t]he fourth amendment is the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck." Craig M. Bradley, Two Models of the Fourth Amendment, 83 Mich. L. Rev. 1468, 1468 (1985).


5. See Terry v. Ohio, 392 U.S. 1 (1968). "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime . . . . It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Id. at 16.

6. The term "citizen informant" as used here is intended to be the broadest possible characterization and would include citizens who report suspicious or criminal activities via telephone reports to police dispatch facilities (911 callers, both identified and anonymous); citizens who directly report their observations to police (identified and unidentified citizen walk-up reports); and the more nefarious "confidential informants" (often members of the criminal underworld who provide information to police in exchange for money, criminal charge reductions, or even revenge) who wish to protect their identities as informants for reasons of personal safety or embarrassment.
aspect of police practices when he wrote:

> Police are often faced with conflicting priorities. On one hand, police are forced to rely on incomplete, inaccurate, unverified, or contradictory information. On the other hand, police feel a good faith sense of urgency to act... [t]his uncertainty in the validity of information presents the difficult situation for police of knowing how to proceed without running afoul of individual Fourth Amendment rights. The difficult issue for the courts to decide in assessing police action in this area is how to balance the legitimate needs of law enforcement in protecting the public, while effectively protecting individual Fourth Amendment rights.7

On April 1, 2003 the Montana Supreme Court decided State v. Martinez,8 which significantly constricted the ability of Montana law enforcement officers to use information obtained from citizen informants to support investigative traffic stops of criminal suspects. The Montana court denied that it had changed previously articulated standards of particularized suspicion necessary for an officer to conduct a constitutionally acceptable investigative stop.9 But the dissenting opinion of Justice Jim Rice sternly warns that the Martinez decision confused the standards of particularized suspicion with those of probable cause and, in doing so, may have impacted broader public safety concerns.10

This comment will use State v. Martinez as a backdrop to trace the history of particularized suspicion in Montana and examine the Montana Supreme Court’s recent and controversial departure from established precedent regarding the necessary prerequisites for law enforcement investigative stops in Montana. Part II will trace the development of Montana’s particularized suspicion standards for law enforcement investigative stops by discussing prominent federal cases influencing Montana jurisprudence, as well as Montana cases

9. Id. ¶ 70.
10. Justice Rice wrote:

> It cannot be overemphasized that this is a case involving particularized suspicion, and not probable cause... . The Court has abandoned the totality of the circumstances test for a narrow and rigid application of standards which bears no resemblance to practical reality... this decision will eventually penalize all citizens by diminishing the [peace] officers' ability to protect their public safety.

_id. ¶¶ 77, 94 (Rice, J., dissenting). A separate dissenting opinion was written by Justice Patricia O. Cotter. _Id. ¶¶ 96-97 (Cotter, J., dissenting).
leading up to *Martinez*. Part III will describe the relevant facts of *Martinez*, the court's holdings, and the dissenting opinions in the case. Part IV will critically analyze *Martinez* in the context of previous Montana Supreme Court decisions and suggest a trend within the court, which has resulted in an inconsistent treatment of particularized suspicion standards that conflicts with earlier precedents. Indeed, the court now seems to have adopted, at least in some cases, a standard for investigative stops more akin to probable cause than particularized suspicion. The analysis will further assert that the Montana Supreme Court has created confusion and a nebulous standard for Montana law enforcement officers to follow when determining whether an investigative stop of a criminal suspect will meet Montana constitutional standards, especially when particularized suspicion has origins in information received from a confidential informant. Part V will conclude by summarizing the impact of *Martinez* and suggest that the court should return to the more predictable particularized suspicion standard originally adopted by the court and codified by the Montana Legislature.

II. THE ORIGINS OF PARTICULARIZED SUSPICION

A. Federal Jurisprudence

1. The Terry Stop.

A discussion of investigative stops by law enforcement officers must always begin with the fundamental protections against unreasonable search and seizure as specified in the U.S. Constitution. Because Fourth Amendment issues are always prevalent in such stops, the law of Montana relating to investigative stops has often been affected by federal court decisions.

The U.S. Supreme Court has long held that Fourth Amendment protections against unreasonable search and seizure extend to citizens wherever an individual may harbor a reasonable expectation of privacy. In *Terry v. Ohio*, the Supreme Court specifically held that the citizen on the street enjoys the same Fourth Amendment protections afforded a

11. U.S. CONST. amend. IV.
citizen in his home. The Court held that whenever a police officer approaches an individual and restrains his freedom to leave, a Fourth Amendment seizure occurs.

But the Court in *Terry* also recognized the need to balance the inherent tensions between Fourth Amendment protections of the citizen on the street and the power of the police to stop and question "suspicious persons" who might be engaged in criminal behaviors. In balancing the citizen's right to be free from unreasonable seizures against the police power to intrude upon the constitutionally protected interest when dealing with suspicious circumstances, the Court held that a police officer must justify the intrusion by pointing to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.

### 2. The Police Informant.

*Terry* provided a standard for when a police officer's direct observations might provide a basis for a reasonable intrusion upon a citizen's Fourth Amendment protections. But the issue of when third party information might provide a similar basis was not addressed until 1972 when the Supreme Court considered *Adams v. Williams*.

In *Adams*, a police officer approached a man sitting in a parked car in a high-crime neighborhood after receiving information from an informant who reported the man possessed illegal narcotics and was armed with a handgun. When the officer approached the man and tapped on the window the man rolled down the widow and the officer reached into the car and retrieved a handgun from the suspect's waistband. Although the gun had not been visible from the officer's perspective, it was located exactly where the informant had said it would be. The man was arrested for unlawful possession of the pistol and a subsequent search yielded substantial quantities of heroin, both

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14. Id. at 16.
15. Id. at 10.
16. Id. at 21.
17. Id.
19. Id. at 144-45.
20. Id. at 145.
21. Id.
on the suspect's person and within his vehicle.22

The Supreme Court affirmed the defendant's convictions based on the evidence seized during the encounter and placed significance on the fact that the informant was previously known to the officer and had provided reliable information to the officer in the past.23 Noteworthy in the Court's analysis was the fact that the informant could have been subjected to arrest and prosecution under State law if the information had not been correct.24 In deciding Adams the Court extended Terry to circumstances where information was received from third parties and rejected the argument that reasonable cause for a stop by a police officer can only be based on the officer's personal observations.25

The issue of tips from anonymous sources was taken up by the Supreme Court in 1990 in Alabama v. White.26 White involved a detailed call to police that indicated a person would be leaving a specific apartment at a particular time, driving a particular vehicle, and traveling to a particular motel while possessing a brown attache containing cocaine.27 Police went to the apartment building and observed White leaving at the indicated time in the described vehicle.28 Police followed the vehicle to the motel described by the anonymous informant, where officers initiated an investigative stop.29 Officers then advised White that she was under investigation for possession of narcotics and asked for consent to search the vehicle.30 White consented and officers located a brown attache case, which White agreed to open.31 The attache case contained marijuana and the officers arrested White, subsequently finding cocaine in her purse.32 White appealed her conviction on drug charges, asserting that police had no reasonable suspicion prior to stopping her vehicle.33

22. Id.
23. Id. at 146.
25. Id. at 147-48.
27. Id. at 327.
28. Id.
29. Id.
30. Id.
31. Id.
32. White, 496 U.S. at 327
33. Id. at 328.
The Supreme Court disagreed and held that the anonymous tip had been sufficiently detailed so as to allow the officers to adequately corroborate the informant's information through observation of White's activities. Therefore, the officers' investigative stop of White's vehicle was within the reasonable suspicion standards of Terry and consistent with the Fourth Amendment.

In deciding White, the Court articulated that reasonable suspicion is a less demanding standard than probable cause, so the standard of reasonable suspicion can be established with information of a different quantity or content than that required for probable cause. Furthermore, the White Court opined that reasonable suspicion may arise from information "less reliable than that required to show probable cause."

3. Particularized Suspicion and the Totality of the Circumstances.

In 1981 the Supreme Court established the principle of "particularized suspicion" of criminal activity in United States v. Cortez. In Cortez, U.S. Border Patrol agents had discovered a well-used trail leading from the Mexican border to a nearby highway. The investigating agents had deduced a likely suspect vehicle profile based on the evidence presented by the frequent use of the trail, the general direction of travel toward the highway, the number of persons using the trail, and the days and times the trail was used. On a night when the agents believed it likely that a smuggling operation would occur, the officers stationed themselves along the highway with the intention of stopping any vehicle that exhibited the profile their deductions had revealed. When the agents observed a vehicle matching the profile, an investigative stop was initiated. The vehicle carried six illegal aliens, as well as the smuggler, who was charged and convicted.

34. Id. at 331.
35. Id. at 332.
36. Id. at 330.
37. Id.
39. Id. at 413.
40. Id. at 413-14.
41. Id. at 414-15.
42. Id. at 415.
43. Id. at 416.
that the agents lacked a sufficient basis to stop the vehicle.\textsuperscript{44}

In upholding the investigative stop as lawful, the \textit{Cortez} Court articulated a two-pronged test for the development of particularized suspicion necessary to justify an investigative stop.\textsuperscript{45} First, the process must be based upon all surrounding circumstances and, second, the process must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.\textsuperscript{46}

4. Pretext Investigative Stops.

The tension between the competing interests of Fourth Amendment protections and law enforcement stops discussed in \textit{Terry} was refined in 1996 when the Supreme Court took up \textit{Whren v. United States}.\textsuperscript{47} The case addressed the issue of so-called "pretext" vehicle stops for minor traffic infractions affording police the opportunity to uncover other criminal activities.\textsuperscript{48}

In \textit{Whren}, plainclothes police officers in an unmarked car observed a vehicle that, in their view, remained parked at an intersection for an unusually long period of time.\textsuperscript{49} The vehicle abruptly turned right without signaling and accelerated away at what the officers characterized as an "unreasonable" speed.\textsuperscript{50} The officers followed the vehicle to another red light where it again stopped.\textsuperscript{51} One of the officers then approached the vehicle and identified himself as a police officer.\textsuperscript{52} When the officer drew up to the driver's window, he observed two large plastic bags in Whren's hands, which he believed contained crack cocaine.\textsuperscript{53} Whren was arrested and convicted on various federal drug offenses.\textsuperscript{54}

Whren appealed his criminal convictions arguing that the highly regulated use of automobiles through traffic and safety rules allows police the ability to stop any given motorist for a

\begin{thebibliography}{99}
\bibitem{Cortez} Cortez, 449 U.S. at 416.
\bibitem{Id} Id. at 418.
\bibitem{Id} Id.
\bibitem{517} 517 U.S. 806 (1996).
\bibitem{Id} Id. at 809.
\bibitem{Id} Id. at 808.
\bibitem{Id} Id.
\bibitem{Id} Id.
\bibitem{Id} Id.
\bibitem{Id} Id.
\bibitem{Wren} Wren, 517 U.S. at 808-09.
\bibitem{Id} Id. at 809.
\end{thebibliography}
technical violation at any given time. Whren further argued that this creates the temptation for police to use minor violations as a means to stop motorists based on factors unrelated to either particularized suspicion or probable cause.

The Court affirmed Whren's convictions and held that the constitutional reasonableness of traffic stops does not depend on the subjective motivations of the individual officer making the stop. Indeed, the Court stated: "[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent." The Court concluded:

[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, what particular provisions are sufficiently important to merit enforcement.

On the basis of Terry, Cortez, and Whren, the U.S. Supreme Court clearly established that law enforcement investigative stops comply with Fourth Amendment protections if police can articulate objective circumstances that demonstrate a reasonable particularized suspicion of wrongdoing by a particular individual. Furthermore, the holdings of Adams and White established that investigative stops comply with constitutional protections even when particularized suspicion originated via information provided by informants. These cases set the stage for the Montana Supreme Court to apply the principle of particularized suspicion to Montana cases.

B. Montana Jurisprudence

1. Terry Stops, Particularized Suspicion, and the Totality of the Circumstances.

The Montana Constitution provides protections against unreasonable searches and seizures with language very similar

55. Id. at 810.
56. Id.
57. Id. at 813.
58. Id. at 814.
to the U.S. Constitution. Prior to 1981 the standard for an investigative stop in Montana was predicated on probable cause rather than particularized suspicion. But in 1981 the Montana Supreme Court decided *State v. Gopher*, which specifically adopted the particularized suspicion standards for investigative stops outlined by the U.S. Supreme Court in *Cortez*. In *Gopher*, a police officer had responded to an early morning silent alarm at a pawn shop where he found a broken window. During his investigation at the scene, the officer observed a vehicle drive past the business at a slow rate of speed while the occupants exhibited an unusual interest in the crime scene. Based on his experience, the officer knew that burglars commonly break into structures and then retreat to see if a police response is triggered. The officer alerted other officers in the area and advised that the vehicle should be stopped. Upon stopping the vehicle, officers located merchandise stolen from the pawn shop, and the occupants were arrested and Gopher was convicted.

Gopher appealed his conviction arguing that the police had lacked probable cause in stopping the vehicle. The Montana Supreme Court agreed that the responding officers lacked sufficient facts to demonstrate probable cause before making the investigative stop. But the court then cited the *Terry* ruling establishing the constitutionality of an investigative stop in the absence of probable cause, as well as the decision in *Cortez* a few

60. MONT. CONST. art. II, § 11 provides:
The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

Although this language is similar to the U.S. Constitution, the Montana Constitution also contains an express right to privacy, which is often cited by the Montana Supreme Court when extending to Montana citizens a greater level of individual protection than would be afforded to similar circumstances in federal courts. See MONT. CONST. art. II, § 10.


63. Id., 193 Mont. at 190, 631 P.2d at 294.

64. Id., 193 Mont. at 190, 631 P.2d at 294.

65. Id., 193 Mont. at 190, 631 P.2d at 294.

66. Id., 193 Mont. at 190, 631 P.2d at 294.

67. Id., 193 Mont. at 190-91, 631 P.2d at 294.

68. Gopher, 193 Mont. at 191, 631 P.2d at 294.

69. Id., 193 Mont. at 191, 631 P.2d at 294-95.
months earlier.\textsuperscript{70} The Montana court then adopted the \textit{Cortez} rules and held that an investigative stop of a vehicle was justified when a police officer could articulate two conditions: First, objective data from which an experienced officer can make certain inferences; and, second, a resulting suspicion that the occupant of a certain vehicle is or has been engaged in wrongdoing or was a witness to criminal activity.\textsuperscript{71} The court further held that when a trained police officer has a particularized suspicion that the occupant of a vehicle is or has been engaged in criminal activity, or witness thereto, a limited and reasonable investigatory stop and search is justified.\textsuperscript{72} The \textit{Gopher} holding was significant in yet another respect—it provided the basis for a 1991 amendment to Montana’s investigative stop statute.\textsuperscript{73}

The Montana Supreme Court further extended the concept of particularized suspicion in 1982 when the court decided \textit{State v. Morsette}.\textsuperscript{74} In \textit{Morsette}, the court held that particularized suspicion need not require an officer’s certainty that a particular vehicle was involved in a criminal activity, but instead requires only a reasonable suspicion based on his training and experience, coupled with the factual circumstances of the situation.\textsuperscript{75}

A divergence between Montana and federal jurisprudence came nearly a year before the \textit{Whren} decision, when the Montana Supreme Court decided \textit{State v. Reynolds}.\textsuperscript{76} On facts very similar to those in \textit{Whren}, the Montana court reached the opposite conclusion of the U.S. Supreme Court when it determined that an officer’s observation of a vehicle traveling at an unreasonable speed and then stopping at a stop sign for an extended period of time was insufficient to create a particularized suspicion to justify an investigative stop.\textsuperscript{77}

\begin{itemize}
\item \textsuperscript{70} \textit{Id.}, 193 Mont. at 192, 631 P.2d at 295.
\item \textsuperscript{71} \textit{Id.}, 193 Mont. at 194, 631 P.2d at 296.
\item \textsuperscript{72} \textit{Id.}, 193 Mont. at 194, 631 P.2d at 296.
\item \textsuperscript{73} MONT. CODE ANN. § 46-5-401 (1991) stated:
\begin{quote}
In order to obtain or verify an account of the person’s presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense.
\end{quote}
\textsuperscript{74} 201 Mont. 233, 654 P.2d 503 (1982).
\item \textsuperscript{75} \textit{Id.}, 201 Mont. at 241, 654 P.2d at 507.
\item \textsuperscript{76} 272 Mont. 46, 899 P.2d 540 (1995).
\item \textsuperscript{77} \textit{Id.}, 272 Mont. at 51, 899 P.2d at 543.
\end{itemize}
In 1998, the Montana Supreme Court decided *State v. Henderson.* In *Henderson* the court examined a traffic stop initiated by an officer after he noticed a vehicle that exhibited no front or rear license plate and, due to darkly tinted rear windows on the vehicle, he was unable to see if a temporary registration was displayed. After stopping the vehicle, the officer approached the driver to identify himself and inform the driver of the nature of the stop. During contact with the driver, the officer noticed the odor of alcoholic beverages and other signs indicating the driver might be intoxicated. After several field sobriety tests indicated the driver was indeed intoxicated, the officer placed him under arrest. A search incidental to the arrest also revealed the driver to be in possession of illegal narcotics. After completing the arrest, the officer inspected a temporary registration sticker that had been obscured by the dark rear window of the vehicle and found that there was actually no registration violation. The district court granted a defense motion to suppress all evidence obtained during the stop, reasoning that the officer lacked sufficient particularized suspicion to stop Henderson and the State appealed.

In reversing the trial court decision, the Montana Supreme Court mirrored the standards of *Whren* and held that the officer’s inability to plainly view the temporary sticker was sufficient to give rise to a particularized suspicion that the vehicle was operating in violation of a state statute requiring proper registration. Most importantly for this discussion, the court relied on its prior decisions in *Gopher* (particularized suspicion standards) and *Morsette* (an officer need not be certain an offense has been committed) to support its decision.

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78. 1998 MT 233, 291 Mont. 77, 966 P.2d 137.
79. *Id.* ¶ 4.
80. *Id.* ¶ 7.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Henderson,* ¶ 8.
85. *Id.* ¶ 1.
86. *Id.* ¶ 14. "A person may not operate a motor vehicle upon the public highways of Montana unless the vehicle is properly registered and has the proper number plates conspicuously displayed, one on the front and one on the rear of the vehicle, each securely fastened to prevent it from swinging and unobstructed from plain view." MONT. CODE ANN. § 61-3-301(1) (2003).
87. *Henderson,* ¶ 12.
2. The Police Informant.

Although Gopher and Morsette merged Montana investigative stop criteria with the federal criteria outlined in Cortez, the Montana Supreme Court soon began to exercise its propensity to "refuse to 'march lock-step' with the United States Supreme Court where Constitutional issues are concerned."88 One point of controversy in the Montana jurisprudence of particularized suspicion was highlighted by State v. Anderson.89 Anderson presented the Montana court with the issue of whether sufficient particularized suspicion could exist when a motor vehicle stop was based solely on an informant’s tip and police had not corroborated the tip through independent investigation.90

In Anderson, a narcotics detective had received an informant’s tip indicating Anderson would be traveling from Washington to Montana in a specifically described vehicle that would contain a large quantity of marijuana.91 Acting on the informant’s tip, officers were positioned along the indicated route of travel and observed Anderson’s vehicle crossing the Montana border from Idaho.92 Although Anderson had committed no traffic infractions or other observable violations of law, the officers stopped the vehicle and conducted a search of the vehicle and the occupants.93 A quantity of marijuana was found within the vehicle and Anderson was arrested and convicted.94

In reversing Anderson’s conviction, the Montana Supreme Court noted that the officers involved in the investigation had not corroborated the informant’s tip with independent

88. See State v. Johnson, 221 Mont. 503, 719 P.2d 1248 (1986) (Fifth Amendment protections); State v. Bullock, 272 Mont. 361, 901 P.2d 61 (1995) (Fourth Amendment protections); see also State v. Lamere, 226 Mont. 323, 735 P.2d 511 (1987) (Fourth Amendment protections in inventory searches prior to incarceration). Refusing to "march lock-step" with pronouncements of the U.S. Supreme Court has become a mantra whenever the Montana court has extended individual protections to Montana citizens beyond those provided by the U.S. Constitution. The Montana court has used this language no less than 26 times since 1983. Ironically, the phrase made its first appearance in a dissent from the majority, which had upheld federal interpretation of the Fifth Amendment in a state criminal prosecution. See State v. Jackson, 206 Mont. 338, 355, 672 P.2d 255, 263 (1983) (Stevens, J. dissenting).
90. Id., 258 Mont. at 513, 853 P.2d at 1247.
91. Id., 258 Mont. at 511, 853 P.2d at 1246.
92. Id., 258 Mont. at 511-12, 853 P.2d at 1246.
93. Id., 258 Mont. at 512-13, 853 P.2d at 1246-47.
94. Id., 258 Mont. at 512-13, 853 P.2d at 1247.
investigation or observations that suggested illegal activity. In dicta that would later become crucial to the *Martinez* decision, the Montana court stated:

A tip that has not been shown to be reliable or trustworthy for purposes of establishing probable cause to procure a search warrant is also unreliable for purposes of providing an officer with a particularized suspicion. An uncorroborated, unreliable tip is not objective data as contemplated by *Cortez* and *Gopher*.

In 1997, the Montana Supreme Court's decision in *State v. Pratt* refined the issue of informant tips as a basis for particularized suspicion as it considered whether police could stop a vehicle solely on information relayed from a citizen via an emergency 911 dispatcher. In *Pratt*, a convenience store attendant had called police to report a possible drunk driver he had observed leaving the store. The citizen provided his name, location, and a detailed description of the vehicle and driver, including the vehicle license plate and direction of travel. Based only on this information an officer on patrol spotted defendant's vehicle and stopped him.

In deciding whether sufficient particularized suspicion warranted the stop of Pratt's vehicle, the Montana court adopted a three-factor test to assess the reliability of an informant providing information to the police: First, whether the citizen informant identifies himself to law enforcement and thus exposes himself to criminal and civil liability if the report is false; second, whether the information is based on the personal knowledge of the informant, and; third, whether the officer's own observations corroborate the informant's information. The court determined that the first two factors were readily apparent from the facts of the case: The citizen had identified himself to the 911 dispatcher, told police where he could be contacted for additional information, and the reported circumstances were based on the informant's first-hand observations at the convenience store. As to the third factor, the court reasoned that the informant's report was sufficiently

95. *Anderson*, 258 Mont. at 515-16, 853 P.2d at 1249.
96. *Id.*, 258 Mont. at 515-16, 853 P.2d at 1249.
98. *Id.*, 286 Mont. at 161-62, 951 P.2d at 40-41.
99. *Id.*, 286 Mont. at 159, 951 P.2d at 39.
100. *Id.*, 286 Mont. at 159, 951 P.2d at 39.
101. *Id.*, 286 Mont. at 165, 951 P.2d at 42-43.
corroborated by the officer's observation of defendant's vehicle bearing the described license plate "within a short period of time, traveling in the direction and on the same street indicated by [the informant]." The court further stated:

[The issue of whether or not a particularized suspicion exists is factually driven and depends on the totality of the circumstances. Information from a tip provided by a citizen informant, whether identified or anonymous, may provide the basis for an investigatory stop. The tip must be analyzed under the three factors that we adopt . . . to determine its reliability. Generally, tips that are less reliable, such as those provided by anonymous informants, necessarily require more corroborations on the part of the investigating officer in order to establish a particularized suspicion.]

The Pratt test was again applied in the context of the citizen informant providing information to sustain particularized suspicion in State v. Elison. In this case, the informant was a citizen participating in a citizen ride-along program with a police officer when he observed the driver of a vehicle smoking from a brass-colored pipe. The citizen observed that the driver, Elison, appeared startled when he noticed the police vehicle nearby and he lowered the pipe out of view. The citizen informed the officer of what he had seen and the officer maneuvered his squad car to allow the other vehicle to pass by, but Elison refused to pass until the officer came to a complete stop. The officer then stopped Elison's vehicle and ultimately discovered the defendant to be in possession of narcotics.

In applying the Pratt tests to Elison, the Montana court found the first factor of identity of the informant was established by the simple fact that the informant was seated next to the officer in the police vehicle. The court also found the second factor satisfied when the informant conveyed his first

104. Id., 286 Mont. at 166, 951 P.2d at 43.
105. Id., 286 Mont. at 168, 951 P.2d at 44.
106. 2000 MT 288, 302 Mont. 228, 14 P.3d 456. Elison was not the first case following Pratt to enunciate the informant reliability factors outlined by Pratt. See, e.g., State v. Roberts, 1999 MT 59, ¶ 17, 293 Mont. 476, ¶ 17, 977 P.2d 974, ¶ 17. Perhaps more noteworthy is the observation that the court does not always turn to the Pratt tests when informant information is the initial basis for law enforcement action when initiating investigative stops of motor vehicles. See infra text accompanying discussion of Grindeland v. State, notes 124, 136.
108. Id.
109. Id. ¶ 7.
110. Id. ¶¶ 8-10.
111. Id. ¶ 17.
hand observations to the officer, even though the officer had no basis for determining whether the informant's basis for believing the brass-colored pipe was evidence of marijuana possession.\textsuperscript{112} As to the final \textit{Pratt} factor, the court stated that it had never "required that an officer personally observe illegal activity in order to have a particularized suspicion justifying a traffic stop."\textsuperscript{113} The court upheld particularized suspicion for Elison's stop and further stated:

[W]here an informant's tip is anonymous and lacks any indication of the basis for the informant's opinion, the officer must corroborate the tip by observing suspicious behavior that alerts the officer to the existence of a possible violation . . . . However, a particularized suspicion does not require certainty on the part of the law enforcement officer. Where a tip is more reliable, such as those circumstances where the informant's identity is known and the informant reports his or her personal observations which led the informant to believe that criminal conduct had occurred, corroboration of innocent behavior by law enforcement may be sufficient to raise a particularized suspicion.\textsuperscript{114}

3. \textit{Pretext Investigative Stops.}

In 2000, the Montana Supreme Court specifically cited \textit{Whren} when it decided the issue of so-called "pretext" investigative stops in \textit{State v. Farabee}.\textsuperscript{115} In \textit{Farabee}, narcotics agents were conducting daytime surveillance of a residence believed to be a location for drug trafficking.\textsuperscript{116} The agents observed Farabee leaving the residence after they believed it likely that an illegal drug transaction had occurred.\textsuperscript{117} As Farabee drove away from the residence, the agents noticed that one headlight of the vehicle had sustained damage and might not be operable.\textsuperscript{118} The agents requested the assistance of a uniformed officer to stop Farabee for a potential headlight violation.\textsuperscript{119} The vehicle was stopped and the narcotics agents approached Farabee to question him about his activities at the residence he'd recently visited.\textsuperscript{120} Ultimately, the agents

\begin{itemize}
\item \textsuperscript{112} \textit{Id.} ¶ 19.
\item \textsuperscript{113} \textit{Elison}, ¶ 20.
\item \textsuperscript{114} \textit{Id.} (citations omitted).
\item \textsuperscript{115} 2000 MT 265, ¶ 31, 302 Mont. 29, ¶ 31, 22 P.3d 175, ¶ 31 (citation omitted).
\item \textsuperscript{116} \textit{Id.} ¶ 5.
\item \textsuperscript{117} \textit{Id.} ¶ 6.
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Id.} ¶ 7.
\item \textsuperscript{120} \textit{Id.} ¶ 8.
\end{itemize}
obtained consent to search the vehicle and discovered illegal drugs and drug paraphernalia, for which Farabee was arrested and convicted.\cite{Farabee, 138}

Farabee moved to suppress the evidence seized during the investigative stop and argued that the officers' observations in broad daylight could not have allowed them to form the requisite particularized suspicion of a headlight violation.\cite{Farabee, 139} The Montana Supreme Court rejected Farabee's argument and, citing Gopher, held that the lawfulness of a traffic stop under the Montana Constitution depends only on whether the officer had a particularized suspicion that an occupant of the vehicle has committed or is committing an offense.\cite{Gopher, 140}

4. A Return to Probable Cause?

Less than a year after deciding Farabee, the Montana court offered the first hint that the particularized suspicion standards of Gopher might be crumbling when the court took up Grindeland v. State.\cite{Grindeland, 141} The case involved an appeal related to a petition for reinstatement of Grindeland's driver's license, which was suspended after he refused to submit to a breath test when arrested for driving under the influence of alcohol.\cite{Grindeland, 142} The district court ruled that the initial investigative stop was not supported by particularized suspicion and granted Grindeland's petition for reinstatement of his driver's license, which the State appealed.\cite{Grindeland, 143}

In Grindeland, a deputy sheriff had responded to an anonymous citizen complaint regarding a careless driver.\cite{Grindeland, 144} Upon arrival in the vicinity specified by the complaint, the deputy located a vehicle matching the description given by the anonymous citizen and observed the vehicle leaving a restaurant parking lot.\cite{Grindeland, 145} After following the vehicle, the deputy observed the driver make a right-hand turn without signaling.\cite{Grindeland, 146} Based on the observed traffic violation, the deputy initiated an investigative stop, which culminated in Grindeland's arrest.

\begin{itemize}
  \item \cite{Farabee, 147}
  \item \cite{Farabee, 148}
  \item \cite{Farabee, 149}
  \item \cite{Farabee, 150}
  \item \cite{Grindeland, 151}
  \item \cite{Grindeland, 152}
  \item \cite{Grindeland, 153}
  \item \cite{Grindeland, 154}
\end{itemize}
when the deputy determined he was driving under the influence of alcohol.\textsuperscript{130}

The trial court concluded the deputy lacked sufficient particularized suspicion of the traffic violation because a signal was required only when other traffic might be affected by the turn.\textsuperscript{131} The language of the statute requiring a turn signal stated: "No person shall so turn any vehicle without giving an appropriate signal . . . in the event any other traffic may be affected by such movement."\textsuperscript{132}

The Montana Supreme Court agreed with the trial court's interpretation of the statute.\textsuperscript{133} Although the court acknowledged the deputy's testimony that other vehicles were in the vicinity of Grindeland's car when the un-signaled turn was made, the court noted the deputy could not recall the exact location of the other vehicles in relation to Grindeland.\textsuperscript{134} The court held that the deputy, absent knowledge of the location of other vehicles in the vicinity, could not have reasonably determined that a violation of the traffic statute had occurred.\textsuperscript{135} Therefore, the court concluded, the deputy did not have sufficient particularized suspicion to justify the investigative stop and the district court decision was affirmed.\textsuperscript{136}

\textit{Grindeland} is significant in Montana's particularized suspicion jurisprudence because the Montana court seemed to be saying

\begin{itemize}
\item \textsuperscript{130} \textit{Grindeland}, ¶ 4.
\item \textsuperscript{131} \textit{Id.} ¶ 9.
\item \textsuperscript{132} \textit{Id.} ¶ 11.
\item No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided in the event any other traffic may be affected by such movement. . . . A signal of intention to turn right or left, other than when passing, when required shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning in any business, residence, or urban district . . . .
\item MONT. CODE ANN. § 61-8-336(1)-(2) (2001).
\item \textsuperscript{133} \textit{Grindeland}, ¶ 11.
\item \textsuperscript{134} \textit{Id.} ¶ 13.
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.} ¶ 14. It is illuminating to consider whether the result of \textit{Grindeland} would have been the same if the court had applied the \textit{Pratt} test in its analysis. In other words, applying the \textit{Pratt} test might have instead focused the court on whether the officer's observations of a careless driving maneuver by Grindeland sufficiently verified the anonymous citizen's information so as to support the officer's particularized suspicion that Grindeland was indeed "driving carelessly", thus validating the investigative stop. The key question, however, remains unanswered: Why wasn't \textit{Pratt} applied to the circumstances of \textit{Grindeland} when the issue of an anonymous citizen informant was critical to the officer's initial observations prior to making the investigative stop?
\end{itemize}
through *Grindeland* that a law enforcement officer must be able to *reasonably prove* an underlying offense before initiating an investigative stop.137

If a new standard for particularized suspicion in Montana was indeed being established in *Grindeland*, the Montana Supreme Court decision in *Kleinsasser v. State*138 seemed to articulate the new standard even more forcefully.

*Kleinsasser* involved an officer on patrol at night who observed a man urinating alongside a vehicle parked adjacent to a public highway.139 The officer passed by the vehicle, but then returned to warn the man to find a more discrete location to relieve himself so as to avoid a potential disorderly conduct violation.140 After returning to the parked vehicle the officer spoke with Kleinsasser, who was behind the wheel of the car.141 The officer smelled the odor of alcoholic beverages and, after subjecting Kleinsasser to several sobriety tests, placed him under arrest for driving under the influence of alcoholic beverages.142 Kleinsasser refused to provide a breath sample and his driver's license was seized and suspended.143 Kleinsasser appealed the suspension of his driver's license, arguing that the officer lacked sufficient particularized suspicion when he returned to investigate the circumstances of a man urinating along a public highway at night.144 The State argued that the officer's stop was justified since the officer had developed particularized suspicion that an individual in the car had committed the crime of disorderly conduct.145

137. For another example of this line of reasoning see State v. Lacasella, 2002 MT 326, 313 Mont. 185, 60 P.3d 975 (no particularized suspicion in the stop of a motor vehicle when an officer, at night, failed to see a front license plate on a vehicle as it passed him and the license plate was taped to the front passenger window of the vehicle). *But see* State v. Henderson, 1998 MT 233, 291 Mont. 77, 966 P.2d 137 (officer's inability to see temporary registration in tinted window sufficient to support particularized suspicion for investigative stop).

138. 2002 MT 36, 308 Mont. 325, 42 P.3d 801.

139. *Id.* ¶ 3.

140. *Id.* ¶¶ 4, 15. "A person commits the offense of disorderly conduct if he knowingly disturbs the peace by: . . . creating a hazardous or physically offensive condition by any act that serves no legitimate purpose; . . . ." MONT. CODE ANN. § 45-8-101(1)(i) (2001).


142. *Id.* ¶ 6.

143. *Id.*

144. *Id.* ¶ 14.

145. *Id.* ¶ 15.
In reversing the suspension of Kleinsasser's driver's license, the Montana Supreme Court held that, although the act of urinating on the roadway might be physically offensive to many, the location of such an act would play a large part in determining whether the act was illegal. Under the circumstances of the case (a dark and isolated stretch of roadway), the court reasoned that a violation of the disorderly conduct statute could not have been sustained. Therefore, the court concluded that the investigative stop was not justified by a particularized suspicion of criminal conduct and the subsequent seizure of Kleinsasser's driver's license was invalid. The court's decision in Kleinsasser appeared to signal a return to a previously rejected standard of probable cause that must be articulated before a law enforcement officer can initiate an investigative stop.

Although Kleinsasser certainly did not implicate the particularized suspicion standard arising from information obtained by police from citizen informants, the holding of the case does illustrate a marked departure from the two-part particularized suspicion standard of Gopher. This divergence is best illustrated by the strong dissent of Chief Justice Karla Gray who wrote:

Particularized suspicion does not turn on whether a charge is subsequently filed or on whether the State could prove beyond a reasonable doubt in a criminal trial that, given the time, place and circumstances, the offense had been committed. Thus, the questions on which the court focuses—whether an occupant of the Kleinsasser vehicle actually created a physically offensive condition that served no legitimate purpose—have no place in our consideration of the present case.

If a law enforcement officer must be able to prove that an offense has been committed before making an investigative stop, the applicable statute [Montana Code Annotated section 46-5-401] has been judicially repealed and Gopher has been effectively overruled.

146. Id. ¶¶ 18-19.
148. Id. ¶ 22
149. Id. ¶ 29 (Gray, C.J., dissenting). Chief Justice Gray further remarked that the majority had turned particularized suspicion "on its head by requiring law enforcement officers to know, both in fact and under the law, that an offense has been committed prior to making an investigative stop." Id. ¶ 24 (Gray, C.J. dissenting) (emphasis on original).
150. Id. ¶ 31 (Gray, C.J. dissenting).
151. Id. ¶ 32 (Gray, C.J. dissenting).
The tension within the Montana Supreme Court evidenced in *Kleinsasser* arises again in *Martinez*, although expressed by different justices. A close examination of *Martinez* lends credence to Chief Justice Gray's warnings in *Kleinsasser* (and echoed by Justice Rice's dissent in *Martinez*) and indeed leads one to the inescapable conclusion that particularized suspicion standards in Montana are far from settled.

III. *STATE v. MARTINEZ*

A. Summary of Facts

On October 20, 1999, Detective Richard Hirschi of the Yellowstone County Sheriff's Department received a telephone call from a woman who wanted to report that fifty pounds of marijuana was being brought into the Billings area from Oregon. The woman was later identified as the girlfriend of Dennis Olson, one of the defendants ultimately arrested and convicted in the case. The woman told Detective Hirschi that a man she knew as "Ricky" was transporting the marijuana in a tan Ford Thunderbird bearing a license number WFY768 and that "Ricky" would be staying at the Townhouse Inn in Billings. The woman agreed to identify herself to Detective Hirschi and he met with her later the same day to obtain additional information. Although the woman was known to Detective Hirschi, she was treated as a confidential informant for the purposes of the police investigation. The woman told Detective Hirschi that she had been in trouble with the law in the past; that she had been sent to prison; that Olson was aware of numerous illegal activities; and that she was motivated by a desire to do what she thought was right.

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152. I ask the reader's forgiveness for a detailed recitation of the facts of *Martinez*. As is often the case when courts decide issues of particularized suspicion, interpretation of the facts leading up to the defendant's investigative detention become extremely important to the opinion. Therefore, it seems necessary to provide the reader with sufficient details to understand the court's rationale, as well as evaluate the merits of my forthcoming analysis.

153. Br. of Resp't at 1-2, State v. Martinez, 2003 MT 65, 314 Mont. 434, 67 P.3d 207 (Nos. 00-781 & 00-802).

154. Br. of Resp't at 1, *Martinez* (Nos. 00-781 & 00-802).

155. *Id.* at 2.

156. *Id.*


158. *Id.*, ¶ 35.
Detectives investigated the informant's tips and visited the motel indicated to be the location where "Ricky" would be staying. Detectives learned that a person had registered at the motel two weeks earlier driving a tan Ford Thunderbird with license plate WFY768 and that motel receipts indicated the man's name was Jesus Martinez. The confidential informant did not know anyone by the name of Jesus Martinez. Motel employees questioned by the police indicated no suspicious activity had been noted during Martinez's stay, but agreed to notify police if the Martinez returned in the future.

On November 2, 1999, motel employees notified police that Martinez had again checked into the motel, this time driving a different vehicle. Later the same day, the confidential informant notified police that the man she knew as "Ricky" had again checked into the motel. Additionally, the confidential informant provided information regarding a vehicle that Daniel Olson had stolen in Great Falls, which had then been driven to Billings where it had been abandoned. Police subsequently located the vehicle, verified it was stolen, and found it in the location described by the confidential informant. Police then initiated a surveillance of Martinez and his activities over the next two days, culminating in a traffic stop of Martinez's vehicle when it was observed that he had made an allegedly illegal lane change.

During the traffic stop, police questioned Martinez and obtained his consent to search the vehicle. Assisted in the search by a trained police canine, the officers located a small quantity of marijuana (.4 grams), consisting of a single bud from a plant. Believing that they could not establish the marijuana belonged to Martinez, police did not arrest Martinez or issue a citation for the traffic violation.

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159. Br. of Resp't at 2, Martinez (Nos. 00-781 & 00-802).
160. Appellant's Consolidated Br. at 3, State v. Martinez, 2003 MT 65, 314 Mont. 434, 67 P.3d 207 (Nos. 00-781 & 00-802).
161. Id.
162. Id. at 3-4.
163. Id. at 4.
164. Id.
165. Id.
166. Martinez, ¶ 5.
167. Id. ¶¶ 6-7.
168. Id. ¶ 7.
169. Id.
170. Id.
On November 4, 1999, the confidential informant again called police and advised that Martinez and Olson were leaving Billings to travel to Bozeman where they intended to sell the marijuana remaining in their possession.\(^\text{171}\) The confidential informant further advised that the men had been prompted to change vehicles by the traffic stop of the previous day and she described the vehicle the men would be driving to Bozeman.\(^\text{172}\) An employee of the motel corroborated the confidential informant's information by confirming the switch in vehicles and providing a similar description of the vehicle to investigating officers.\(^\text{173}\) The motel employee further indicated that the vehicle displayed a temporary registration sticker in the rear window.\(^\text{174}\)

Investigators acted on the information provided by the confidential informant and the motel employee by establishing surveillance along Interstate 90 between Billings and Bozeman.\(^\text{175}\) Investigators determined that observation of the described vehicle traveling beyond the City of Laurel would sufficiently corroborate the information provided by the confidential informant and the motel employee to provide a basis to stop the vehicle and detain the occupants.\(^\text{176}\) When officers observed the described vehicle pass their surveillance they stopped the vehicle for two reasons: First, the continuation of the on-going narcotics investigation, and second, investigation of the validity of the temporary registration displayed in the rear window of the vehicle.\(^\text{177}\)

The investigating officers acknowledged that they were able to identify the temporary registration soon after the vehicle had been stopped, but only after the occupants had been asked to exit the vehicle.\(^\text{178}\) After asking Martinez and Olson to exit their vehicle, investigators separated them, placed them in handcuffs, advised them of their constitutional rights,\(^\text{179}\) and questioned them as to whether they were transporting narcotics.\(^\text{180}\) Police
used the same canine to sniff the vehicle and it again showed signs positive for the presence of narcotics.\textsuperscript{181} Martinez refused to consent to a search of the vehicle, but later confessed to investigators that the vehicle contained a suitcase containing "mota," which the officers interpreted to be marijuana.\textsuperscript{182} Martinez further advised the officers that he had traveled to Billings on four previous occasions in which he had transported between fifteen and twenty pounds of marijuana each time.\textsuperscript{183} Based on this information, the vehicle was impounded, a search warrant was obtained, and investigators seized approximately fifteen pounds of marijuana from the vehicle.\textsuperscript{184}

At trial, Martinez and Olson filed separate motions to suppress the evidence seized, arguing that the police lacked sufficient particularized suspicion of wrongdoing to justify the traffic stop yielding the narcotics.\textsuperscript{185} Subsequently, the district court denied the petitions and both Martinez and Olson later pled guilty to felony narcotics charges,\textsuperscript{186} while reserving their right to appeal, which was then timely filed.\textsuperscript{187}

\textbf{B. Reasoning and Holding}

\textit{1. The Court Questions the Authority of State v. Pratt for Particularized Suspicion.}

The sole issue on appeal was "whether the stop of the vehicle driven by Martinez and Olson on November 4, 1999, was supported by particularized suspicion."\textsuperscript{188} Appellate briefs by the State and the defendants relied on \textit{Pratt} for legal arguments pertaining to whether officers had sufficient particularized suspicion to support the vehicle stop on Interstate 90 west of

\begin{itemize}
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} \textit{Id.} ¶¶ 10-11.
\item \textsuperscript{183} Br. of Resp't at 5, \textit{Martinez}, (Nos. 00-781 & 00-802).
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} \textit{Martinez}, ¶ 12.
\item \textsuperscript{186} \textit{Id.} ¶ 13. Martinez pled guilty to Criminal Possession of Dangerous Drugs With Intent to Sell under \textit{Montana Code Annotate} section 45-9-303 (1999) and received a five-year suspended sentence and deferred fine. \textit{Martinez}, ¶ 13. Olson pled guilty to Criminal Possession of Dangerous Drugs under \textit{Montana Code Annotate} section 45-9-302 (1999) and received a four-year suspended sentence and deferred fine. \textit{Martinez}, ¶ 13.
\item \textsuperscript{187} \textit{Martinez}, ¶¶ 12-13.
\item \textsuperscript{188} \textit{Id.} ¶ 40.
\end{itemize}
Billings.\[189\] Clearly, both parties felt that *Pratt* would be a crucial factor in deciding *Martinez*. This would not be surprising since *Pratt* involved similar circumstances regarding informant information providing a basis for particularized suspicion to support a police stop and subsequent narcotics seizures.\[190\] But the Montana Supreme Court appeared to have been unsatisfied with *Pratt* providing a foundation for the particularized suspicion issues presented by the case. Before considering the case further, the court ordered the parties to provide supplemental briefs assuming "arguendo, that *Pratt* and its progeny [were] not appropriate authority for the vehicle stop on the facts presented and . . . whether the stop [was] or [was] not supportable based on other legal authority and argument."\[191\]


After the parties responded with supplemental briefs as ordered, the court proceeded with its majority opinion, authored by Justice Jim Nelson. Although the court had expressed apparent reservations as to the controlling authority of *Pratt*, a considerable portion of the *Martinez* opinion was devoted to *Pratt*.\[192\] In fact, the court recalled the *Pratt* factors with specificity,\[193\] but then stated that the *Pratt* test was "a narrowly drawn variant of the *Gopher* analysis [addressing] the reliability of a citizen's tip in the context of a DUI investigative stop."\[194\] The court acknowledged that it had indeed applied the *Pratt* test in the narcotics possession case of *State v. Elison*,\[195\] but then attempted to contrast *Pratt* as applying only to circumstances where the investigative stop yields information that will quickly

\[189\] See Appellant's Consolidated Br. at 13-14, 18, *Martinez*, (Nos. 00-781 & 00-802); Br. of Resp't at 5, 10-15, 18-19, *Martinez*, (Nos. 00-781 & 00-802); Appellant's Reply Br. at 4, *State v. Martinez*, 2003 MT 65, 314 Mont. 434, 67 P.3d 207, (Nos. 00-781 & 00-802).

\[190\] See *Pratt*, 286 Mont. 156, 951 P.2d 37.

\[191\] *Martinez*, ¶ 14.

\[192\] *Id.* ¶¶ 23, 30-33, 37-38.

\[193\] *Id.* ¶ 32. "1) Whether the citizen informant identifies himself to law enforcement and thus exposes himself to criminal and civil liability if the report is false. 2) Whether the report is based on the personal observations of the informant. 3) Whether the officer's own observations corroborated the informant's information." *Id.*

\[194\] *Id.* ¶ 37.

\[195\] *Elison*, ¶¶ 16-23. The court applied the *Pratt* tests to an officer's stop of the defendant's vehicle based on the tip of a citizen informant and concluded that the officer's stop satisfied particularized suspicion standards. *Id.* ¶ 23.
affirm or refute the informant information forming the basis for the stop. The court then turned from any further consideration as to the applicability of Pratt and cited the holding of State v. Anderson: "An uncorroborated tip does not constitute objective data from which a trained officer can infer a particular individual is or has been engaged in wrongdoing." 197

3. No Basis for Detention Based on Temporary Registration.

The court acknowledged that the inability of an officer to see a temporary motor vehicle registration sticker provided sufficient particularized suspicion to stop a motorist. 198 The court further agreed that the officers involved testified that the temporary registration was not fully visible to verify a proper registration as the vehicle passed by them, which would justify the stop of the vehicle. 199 But the court refused to hold that the officers were justified in detaining Martinez and Olson any longer than was necessary to determine the temporary registration was valid. 200 On this point the court stated: "Although the officer's inability to read the temporary sticker justified a stop to check the sticker's validity, once that limited purpose of the stop had been accomplished, no further police intrusion was warranted, and the investigative stop related to drug possession was not justified thereby." 201


The court's reliance on Anderson did not stop with it's holding in that case. Although recognizing it as dicta, the court stated: "A tip that has not been shown to be reliable or trustworthy for purposes of establishing probable cause to procure a search warrant is also unreliable for purposes of providing an officer with a particularized suspicion." 202

Although the State had argued that Alabama v. White should govern the consideration of particularized suspicion in Martinez, the Montana court rejected this argument and once

197. Id. ¶ 42 (citing Anderson, 258 Mont. at 516, 853 P.2d at 1249).
199. Id.
200. Id. ¶ 29.
201. Id.

https://scholarship.law.umt.edu/mlr/vol66/iss1/7
again refused to "march lock-step with pronouncements of the United States Supreme Court."\textsuperscript{203} Citing the express privacy provisions of the Montana Constitution\textsuperscript{204} the court stated:

The heightened protection of individual privacy in Montana demands our divergence from federal jurisprudence regarding the use of tips as the basis for particularized suspicion justifying the temporary seizure of a person for questioning. We hold that an allegation of criminality from an unreliable informant that has no known basis in fact does not constitute objective data from which an officer may legitimately infer particularized suspicion . . . if an unreliable tip provides the only grounds for the detention, the stop constitutes an unconstitutional infringement of an individual's right to privacy.\textsuperscript{205}

Having rejected the particularized suspicion standards of \textit{Pratt} and \textit{White}, and linking the legal requirements of probable cause and particularized suspicion to the same standard by citing the \textit{Anderson} dicta, the majority then turned to \textit{State v. Reesman}\textsuperscript{206} to incorporate tests for informant-based \textit{particularized suspicion} that had previously been applied only to the issue of informant-based \textit{probable cause} for a search warrant.\textsuperscript{207} More specifically, the court stated:

As we discussed at length in \textit{Reesman} . . . [a] tip cannot be considered reliable without independent corroboration of the criminality alleged. In the context of particularized suspicion, because the quantum of suspicion is less, an unreliable tip requires corroboration that supports an inference that criminality is afoot by direct police observation of suspicious activity and consideration of the modes of patterns of operation of certain kinds of lawbreakers.\textsuperscript{208}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{203} \textit{Id.} ¶ 51. It should be noted that \textit{Alabama v. White} was cited contemporaneously with \textit{State v. Pratt} when the Montana court applied the \textit{Pratt} factors to narcotics-related particularized suspicion standards in \textit{State v. Elison}. \textit{Elison, ¶ 16}.
\item \textsuperscript{204} MONT. CONST. art. II, § 10 provides: "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."
\item \textsuperscript{205} \textit{Martinez, ¶ 52}.
\item \textsuperscript{206} 2000 MT 243, 301 Mont. 408, 10 P.3d 83.
\item \textsuperscript{207} \textit{Id.} ¶¶ 50, 55. In \textit{State v. Reesman}, the Montana Supreme Court analyzed probable cause standards for search warrants based on police informants. The court distinguished three types of informants: (1) concerned citizens; (2) confidential informants, and; (3) anonymous tipsters. The court then established independent police corroboration criteria necessary to support probable cause for search warrants dependent on the status of the informant. \textit{Reesman, ¶¶ 28-35}. For a critical analysis of \textit{Reesman}, see James D. Johnson, Note, \textit{Totality of the Circumstances or a Recipe for Mulligan Stew?}, 65 MONT. L. REV. 159 (2004).
\item \textsuperscript{208} \textit{Martinez, ¶ 50} (citations omitted).
\end{enumerate}
\end{footnotesize}
In applying the Reesman standards to the issue of particularized suspicion in Martinez, the court reasoned that the Reesman tests could not be satisfied because the confidential informant had no established track record to support a finding of reliability and had not enunciated a basis in personal knowledge of the criminal behaviors she reported to police. Furthermore, as to the confidential informant, although identified to police and expressing a desire to "do what she thought was right," the majority concluded that a status of "concerned citizen" was not warranted. The majority reasoned that the confidential informant's apparent past history of trouble with the law, her confidential identity status, and unclear motivations prevented any status as a "concerned citizen." The court concluded that the district court had erred in finding the confidential informant's tips to be reliable, thereby vitiating any independent particularized suspicion basis for police to stop Martinez and Olson on November 4, 1999.

5. Independent Police Corroboration.

The court next turned to another factor of a Reesman probable cause analysis and applied it to consideration of the particularized suspicion issue in the case: Whether the police investigation had sufficiently corroborated the confidential informant's information to justify the November 4, 1999 stop of Martinez and Olson. In analyzing this Reesman factor, the court considered the information corroborated by police up to the time of the traffic stop to be "otherwise innocent information" that would require "indicia of suspicion . . . reveal[ing] a pattern of human behavior associated with the alleged criminal activity, or activities, which, when viewed as a whole, are consistent with the alleged criminal activity." The court concluded that police had merely corroborated innocent information in their investigation that revealed no

209. Id. ¶¶ 56-57.
210. Id. ¶ 64.
211. Id.
212. Id. ¶ 57.
213. Id. ¶ 58.
214. Martinez, ¶ 58 (citing State v. Griggs, 2001 MT 211, 306 Mont. 366, 34 P.3d 101). The Griggs standards were applied to determine whether probable cause for a search warrant had been sufficiently established through police corroboration of otherwise innocent behavior by the defendant, not whether particularized suspicion had been established. Griggs, ¶¶ 50-53.
"pattern of criminal behavior." In reaching this conclusion, the court discounted any significance in the earlier stop of Martinez's vehicle and the small amount of marijuana police had discovered and seized. The court also found it insignificant that the confidential informant had led police to the location of the stolen vehicle from Great Falls and reasoned that no association between the stolen vehicle and the defendants had ever been established by independent investigation.

Using this reasoning, the court concluded that the November 4, 1999 stop of Martinez and Olson was not legal beyond the limited purpose of inspecting the temporary registration. The court held that once this limited purpose had been accomplished, the police had no further justification to support an investigative detention and the district court had erred in failing to suppress all evidence gathered as a result stop. The decision in Martinez was handed down without any disturbance to prior case precedents.

C. Dissenting Opinions

Justice Jim Rice and Justice Patricia O. Cotter wrote separate dissenting opinions in Martinez. Justice Rice asserted that the Pratt factors for informant reliability standards to support particularized suspicion were appropriate to the case. Justice Rice's disagreement with the majority was based on his belief that: (1) the confidential informant in the case should have been deemed reliable, and; (2) police corroboration of the information was sufficient to support particularized suspicion.

As to the informant's reliability, Justice Rice would have given greater weight to the confidential informant as a person who was motivated by "good citizenship" since she had disclosed her identity to police and indicated her motivations to "do what she thought was right." Furthermore, Justice Rice felt the

216. Id. ¶ 62.
217. Id.
218. Id. ¶ 74.
219. Id.
220. Id. ¶¶ 75-95 (Rice, J., dissenting); Id. ¶¶ 96-97 (Cotter, J., dissenting).
221. Martinez, ¶ 76 (Rice, J., dissenting).
222. Id. (Rice, J., dissenting).
223. Id. ¶ 79 (Rice, J., dissenting).
investigators had established the informant’s reliability by verifying the information she had provided during the weeks prior to the November 4, 1999 stop.\textsuperscript{224}

Justice Rice wrote that the corroboration of the information regarding the stolen vehicle and its location in Billings was sufficient to verify the reliability of the informant and amounted to much more than corroboration of "perfectly innocent" information.\textsuperscript{225} Indeed, Justice Rice stated, "[b]y the time the informant informed police about the defendants' trip to transport drugs to Bozeman, the informant was far beyond a 'first experience,' and should have been considered reliable [by the majority]."\textsuperscript{226} According to Justice Rice, the circumstances of the case make it clear "that the informant was not fabricating her reports from 'whole cloth,' but rather, that she was in strategic proximity to the planning of criminal activity."\textsuperscript{227}

Justice Rice also took issue with the majority in discounting the fact that police had discovered a small amount of marijuana during their earlier traffic stop of Martinez.\textsuperscript{228} Although the officers did not arrest Martinez for the small amount of marijuana discovered in his vehicle, Justice Rice believed a totality of circumstances analysis that included this factor would give rise to sufficient particularized suspicion to warrant the November 4, 1999 stop.\textsuperscript{229}

Interestingly, Justice Rice's closing remarks seemed to echo a similar warning as was penned by Chief Justice Karla Gray in Kleinsasser.\textsuperscript{230} Justice Rice concluded his dissent with the assertion that "[t]he Court has abandoned the totality of circumstances test for a narrow and rigid application of standards which bears no resemblance to practical reality . . . . [T]his decision will eventually penalize all citizens by diminishing the officers' ability to protect their public safety."\textsuperscript{231}

Justice Cotter's dissent was more succinct. She agreed that the informant reliability standards of \textit{Pratt} should be applied to informant-based particularized suspicion questions, but

\begin{footnotes}
\footnote{224. Id. ¶ 82 (Rice, J., dissenting).}
\footnote{225. Id. ¶¶ 82-83 (Rice, J., dissenting).}
\footnote{226. Id. ¶ 82 (Rice, J., dissenting).}
\footnote{227. Martinez, ¶ 86 (Rice, J., dissenting).}
\footnote{228. Id. ¶¶ 89-92 (Rice, J. dissenting).}
\footnote{229. Id. ¶¶ 90-92 (Rice, J., dissenting).}
\footnote{230. State v. Kleinsasser, 2002 MT 36, ¶ 32, 308 Mont. 325 ¶ 32, 42 P.3d 801, ¶ 32 (Gray, C.J., dissenting).}
\footnote{231. Martinez, ¶ 94 (Rice, J., dissenting).}
\end{footnotes}
disagreed that these standards had not been met in *Martinez*.\(^{232}\) She believed that the confidential informant’s reliability was easily established by application of *Pratt* tests to the circumstances of the case.\(^{233}\) She noted that the informant’s willingness to identify herself to investigators placed her at risk for liability associated with false reporting, thus lending reliability to her informant status and giving the officers sufficient particularized suspicion for the November 4, 1999 stop under *Pratt*.\(^{234}\)

**IV. ANALYSIS**

This analysis will proceed with the assertion that *Martinez* was wrongly decided by the Montana Supreme Court when it applied the *Reesman* tests for probable cause to the issue of particularized suspicion presented by the case. In illustrating this error, the analysis will include discussion of *State v. Olson*,\(^{235}\) decided only four days before *Martinez* on similar facts, but with an opposite conclusion.

Furthermore, the court’s use of probable cause standards in reviewing whether the police had adequately corroborated the informant’s information was not the appropriate standard if *Gopher* and its progeny have not been overturned. Even assuming the *Reesman* probable cause tests were appropriately applied to *Martinez*, the court should have determined that the confidential informant’s tip to police was adequately verified by police investigation so as to justify the November 4, 1999 traffic stop.

Additionally, under Montana particularized suspicion jurisprudence, the investigative stop and subsequent questioning of *Martinez* and Olson should have been upheld absent a showing that the time of the investigative detention exceeded the purpose of the stop.\(^{236}\) Since the court’s holding in *Farabee* remains undisturbed, it is inconsistent for the *Martinez* stop to be treated any differently.

\(^{232}\) *Id.* ¶ 96 (Cotter, J., dissenting).

\(^{233}\) *Id.* (Cotter, J., dissenting).

\(^{234}\) *Id.* (Cotter, J., dissenting).

\(^{235}\) 2003 MT 61, 314 Mont. 402, 66 P.3d 297. Note that the defendant in *State v. Olson* was unrelated to the defendant in *State v. Martinez*.

\(^{236}\) See MONT. CODE ANN. § 46-5-403 (1999) (stating that a “stop authorized by § 46-5-401 or § 46-6-411 may not last longer than is necessary to effectuate the purpose of the stop.”).
Finally, the court’s decision in *Martinez* illustrates the beginning of a disturbing precedent of unique judicial creation in Montana—a double standard for particularized suspicion dependent on the type of crime suspected. A duality of particularized suspicion based on the crime suspected is not contemplated by Montana’s particularized suspicion statute or jurisprudence and should not be a basis for the court’s decision in *Martinez*.

**A. Probable Cause vs. Particularized Suspicion**

1. *Martinez* and *Olson*: Similar Facts—Different Results.

The Montana Supreme Court has “repeatedly held that particularized suspicion is a less stringent standard than probable cause.” Only four days before the *Martinez* decision, the court repeated this holding in *State v. Olson*. A close analysis of *Olson* reveals that the facts of the case and the issues presented were very similar to those in *Martinez*, but the opposite decisions in the cases, as well as previous precedents of the court as previously discussed, lends credence to the assertion that *Martinez* was wrongly decided.

Like *Martinez*, the circumstances of *Olson* began when police received information from an informant regarding a potential methamphetamine laboratory. The informant identified himself to police as the ex-husband of the owner of the property where the illegal narcotics laboratory was located. The informant stated he had been at the garage on the property to retrieve personal items and had seen “tubing, mason jars, and coffee filters connected together, and had smelled the odor of anhydrous ammonia.” The informant also advised that he had encountered a man at the property who had asked whether he was “going to keep [his observations] cool.”

Like *Martinez*, police officers in *Olson* initiated a surveillance of the property and soon thereafter observed

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238. Id.

239. Id. ¶ 6.

240. Id.

241. Id.

242. Id.
individuals removing garbage bags from the garage and placing them into a vehicle, which then left the property. And like the officers in Martinez, police in Olson stopped the vehicle and found it to be driven by the defendant. Unlike Martinez, no independent justification to stop the vehicle was asserted as a basis for the stop of Olson's vehicle.

After stopping Olson and her companions, police removed Olson from the vehicle and questioned her about materials from a methamphetamine lab they believed were located in the trunk. Like the defendants in Martinez, the occupants of the vehicle were placed in handcuffs during police questioning. However, unlike the officers in Martinez, the officers who stopped and interrogated Olson did not advise her of her Fifth Amendment rights prior to asking her questions. As in Martinez, police initially received only denials to allegation of criminal wrongdoing by the Olson defendants. And like Martinez, Olson eventually admitted that contraband was present in the vehicle. Just as police had done in Martinez, a search warrant was then obtained for the vehicle and evidence related to illegal narcotics possession was seized. Olson was arrested and charged with several felonies.

Like the defendants in Martinez, Olson filed a motion to suppress evidence seized under the search warrant, arguing that the seizure was not based on sufficient probable cause, was based on information from an unreliable informant, and no particularized suspicion existed to justify the officers' initial traffic stop. The district court denied Olson's motions to suppress evidence seized from her vehicle and she ultimately pled guilty, reserving her right to appeal to the Montana Supreme Court.

In affirming Olson's conviction, the Montana court considered issues very similar to those presented in Martinez.

243. Olson, ¶ 7, 28.
244. Id. ¶ 7.
245. Id. ¶ 8.
246. Id. ¶ 16.
247. Id. ¶ 18.
248. Id. ¶ 8.
249. Olson, ¶ 8.
250. Id.
252. Olson, ¶ 9.
253. Id. ¶ 10.
Having concluded that the interrogation of Olson was conducted in violation of Olson's constitutional rights and should have been suppressed by the district court, the court excised from the search warrant the admissions made by Olson in order to determine whether sufficient probable cause remained.\textsuperscript{254} Without Olson's admissions, the primary basis for probable cause for the search warrant was reduced to the informant's information and police surveillance of the property.\textsuperscript{255}

To assess the informant's information to police as a basis for probable cause, the Olson court turned to the \textit{Reesman} tests for informant reliability.\textsuperscript{256} The court concluded that the first factor of \textit{Reesman} was satisfied when the informant identified himself to the investigators.\textsuperscript{257} The court reasoned that the second prong of \textit{Reesman} was satisfied by the fact that he had personally seen the suspect materials in his ex-wife's garage prior to reporting the circumstances to police.\textsuperscript{258} As to the reliability of the Olson informant, the court concluded that he had the status of a "concerned citizen motivated by good citizenship" so as to afford him presumed reliability.\textsuperscript{259} The court discounted the fact that the informant and his ex-wife had a strained relationship that might have created a mixed motivation for his report to the police.\textsuperscript{260} The court also found that the police observations of removal of garbage bags from the garage to the vehicle was sufficient corroboration to bolster the informant's reliability to establish probable cause for the search warrant.\textsuperscript{261} Therefore, the court concluded the circumstances in Olson provided police with probable cause to stop the Olson vehicle based solely on the informants statements and the police observations of garbage bags being removed from the property.\textsuperscript{262}

Having concluded that probable cause for issuance of a search warrant existed under the \textit{Reesman} tests, the issue of particularized suspicion was axiomatic, but nonetheless
addressed by the court.\textsuperscript{263} Like \textit{Martinez}, the court began by citing Montana's investigative stop statute and the standard of particularized suspicion enunciated by the statute.\textsuperscript{264} However, unlike \textit{Martinez}, the court did not look to \textit{Reesman} to determine whether particularized suspicion thresholds had been met by the officers who stopped Olson's vehicle. Furthermore, although the basis for the investigative stop was at least partially based on information from an informant, the court ignored \textit{Pratt}, too. Instead, the court turned to the particularized suspicion tests adopted under \textit{Gopher}\textsuperscript{265} and codified by statute.\textsuperscript{266}

The court agreed that the conduct observed by the officers conducting the surveillance of the \textit{Olson} defendants was arguably innocent in nature (loading garbage bags from the garage into the vehicle).\textsuperscript{267} But the court further reasoned that the same behavior took on new meaning when viewed in light of information from the informant, which would give rise to a particularized suspicion of criminal wrongdoing under a totality of the circumstances.\textsuperscript{268}

2. \textit{Martinez} Under a Particularized Suspicion Analysis.

The rationale applied by the Montana Supreme Court in \textit{Olson} clearly delineates a difference between standards of probable cause and standards of particularized suspicion. As the \textit{Olson} opinion noted, "particularized suspicion is a less stringent standard than probable cause."\textsuperscript{269} Had the court adhered to this distinction in \textit{Martinez}, it would have analyzed the November 4, 1999 stop to reach a different conclusion.

First, the court would not have applied \textit{Reesman} to the issue of particularized suspicion for the \textit{Martinez} stop. In \textit{Olson}, the \textit{Reesman} tests were applied solely for the purpose of determining whether probable cause for the issuance of the search warrant existed after police had unlawfully obtained admissions from the defendant.\textsuperscript{270} No such redaction was necessary in \textit{Martinez} since police immediately informed the

\begin{footnotes}
\item[263.] \textit{Id.} ¶¶ 30-36.
\item[264.] \textit{Olson}, ¶ 31 (citing \textsc{Mont. Code Ann.} § 45-6-401 (1999)).
\item[265.] \textit{Id.} ¶ 32 (citing Grindeland v. State, 2001 MT 196, ¶ 10, 306 Mont. 262, ¶ 10, 32 P.3d 767, ¶ 10).
\item[266.] \textsc{Mont. Code Ann.} § 46-5-401 (2001).
\item[267.] \textit{Olson}, ¶ 35.
\item[268.] \textit{Id.}
\item[269.] \textit{Id.} ¶ 36.
\item[270.] \textit{Id.} ¶¶ 25-29.
\end{footnotes}
defendants of their *Miranda* rights after stopping them.\(^{271}\) Therefore, there was no reason for an application of *Reesman* to determine whether particularized suspicion existed in the *Martinez* stop.

Instead, as it did in *Olson*, the court should have applied the *Gopher* test to the *Martinez* stop.\(^{272}\) Applying the *Gopher* tests, the Montana court would have concluded that there was sufficient objective data from which an experienced officer could make inferences to show that the occupants of the *Martinez* vehicle were engaged in wrongdoing. The information from the informant had been verified through police surveillance; interviews with other witnesses (motel employees who corroborated the informant's statements); police contact with the suspects (finding a small amount of marijuana in the process); verification of criminal behavior (location and recovery of a stolen vehicle); and verification of innocent but important details (travel to Bozeman in a different vehicle after police contact with the previous vehicle). The Montana court simply cannot affirm a holding that "particularized suspicion is a less stringent legal standard than probable cause"\(^{273}\) on one day and then analyze a particularized suspicion stop by probable cause tests only four days later!

Second, the court admitted that the *Olson* surveillance revealed only innocent behavior by the defendants when they were observed loading garbage bags into their vehicle.\(^{274}\) But the court gave credence to the experience of the officers who saw the behavior as suspicious when viewed from their perspective and in light of the information provided by the informant, even to the point that probable cause was established.\(^{275}\) Four days later, the court gave no credence to the professional experience of officers who had similarly observed otherwise innocent behavior that they viewed as suspicious in light of information received from an informant.\(^{276}\) In *Olson*, the court gave a presumption of reliability to an identified informant who had never provided any previously verified information to the police.\(^{277}\) In *Martinez*, the court deemed information provided by

\(^{271}\) *Martinez*, ¶ 10.

\(^{272}\) *Olson*, ¶ 32.

\(^{273}\) *Olson*, 27.

\(^{274}\) Id. ¶ 35.

\(^{275}\) Id. ¶¶ 29, 35.

\(^{276}\) *Martinez*, ¶ 62.

\(^{277}\) *Olson*, ¶ 27.
an identified informant to be unreliable even though the informant's information had led to the location and recovery of a stolen vehicle and was verified by contacts with other witnesses and repeated over several weeks.\textsuperscript{278} If the Montana Supreme Court can find standards for probable cause were satisfied prior to the \textit{Olson} vehicle stop, then four days later the same court should have found the \textit{Martinez} vehicle stop had satisfied the \textit{lesser} standard of particularized suspicion.

A final circumstance supporting the inapplicability of \textit{Reesman} to the circumstances of \textit{Martinez} is found in a careful review of the appellate briefs submitted by the parties. \textit{Reesman} wasn't even mentioned, let alone argued, in the original briefs submitted by the parties. After the court ordered supplemental briefing with a jaundiced eye toward \textit{Pratt},\textsuperscript{279} the appellants failed to make any reference to \textit{Reesman} as a controlling case for \textit{Martinez}. The State mentioned \textit{Reesman} in its Supplemental Brief in two sentences separated from one another by three pages of argument; not for any argument related to probable cause, but rather for the "amorphous nature" of the totality of the circumstance test\textsuperscript{280} and the assertion that "further independent corroboration . . . by law enforcement personnel is the panacea" for information from police informants.\textsuperscript{281}

The appellants in their Supplemental Reply Brief cited both \textit{Pratt} and \textit{Reesman} in a single sentence for the proposition that a state supreme court may provide specific factors for analysis of informant information.\textsuperscript{282} But these minor references by the parties in no way asserted that \textit{Reesman} was applicable to assessment of particularized suspicion for a police stop. In plucking \textit{Reesman} from its proper probable cause roots and grafting it onto the branches of particularized suspicion jurisprudence, the Montana court took another step toward "judicially repeal[ing]" Montana Code Annotated Section 45-6-401 and "effectively overrul[ing]" \textit{Gopher}.\textsuperscript{283}

\begin{footnotesize}
\begin{enumerate}
\item[278.] \textit{Martinez}, ¶ 64.
\item[279.] \textit{Id.} ¶ 14.
\item[280.] Supplemental Br. of Resp't at 5-6, State v. Martinez, 2003 MT 65, 314 Mont. 434, 67 P.3d 207 (Nos. 00-781 & 00-802).
\item[281.] \textit{Id.}
\item[282.] Appellant's Supplemental Reply Br. at 5, State v. Martinez, 2003 MT 65, 314 Mont. 434, 67 P.3d 207 (Nos. 00-781 & 00-802).
\end{enumerate}
\end{footnotesize}
B. Independent Grounds for the Martinez Stop.

In deciding Martinez, the Montana Supreme Court discounted any basis in the stop of the Martinez vehicle associated with the fact the vehicle displayed a temporary registration sticker that was not immediately visible to the officers. But the court seems to have forgotten the circumstances of a pretext investigative stop it favorably affirmed in Farabee.

In Farabee officers used the pretext of a broken headlamp to stop the defendant when they really wanted to question him about narcotics trafficking, and the Montana court deemed this appropriate and well within the boundaries of particularized suspicion law. There the court stated, "We have never held . . . that an otherwise objectively justifiable traffic stop is nonetheless unlawful because a law enforcement officer used the stop to investigate a hunch about other criminal activity." The court took no exception to the fact that the headlamp violation occurred in broad daylight or that a subsequent interrogation of Farabee by the narcotics officers ensued and resulted in his arrest and conviction on narcotics charges.

But in Martinez the court took exception to a similar circumstance and held that the officers should have released Martinez and Olson without questioning as soon as the registration violation was handled. It now seems that the court has taken a different view, but Farabee remains good law. If the court had properly applied its holding in Farabee to the circumstances of Martinez, the necessary particularized suspicion for the stop of Martinez's vehicle would have been supported and evidence subsequently obtained would not have been suppressed.

C. A Double Standard for Particularized Suspicion.

In deciding Martinez in the manner that it did, the Montana Supreme Court seems to have wanted to preserve particularized suspicion standards in one type of case, but create higher standards in other types of cases. More specifically, the court's

284. Martinez, ¶ 29.
286. Id. ¶ 29.
287. Id.
288. Martinez, ¶ 29.
decision in *Martinez* arguably created a double standard for particularized suspicion based on the type of crime suspected when police make an investigative stop. The court contrasted the *Pratt* line of cases from those like *Martinez* when it stated:

An investigative stop is a particularly effective tool for DUI investigations and to prevent highway tragedies. A brief face-to-face exchange between the driver and a trained officer often will affirm or refute an informant’s allegation of drunkenness . . . . In most cases, within minutes and with minimal intrusion, a trained officer will be able to discern whether probable cause exists for a DUI arrest or whether inferences drawn from [an informant’s tip] were incorrect.289

But the court then distinguished the investigative stop for other crimes, such as those associated with narcotics by stating:

By contrast, a vehicular stop in a drug interdiction case is less likely to yield decisive evidence of either innocence or criminality . . . . The brief detainment and questioning permitted during an investigative stop might not materially advance an investigation for drug possession if no incriminating evidence is visible and no one consents to a search or confesses.290

The court’s speculation on the investigative stop dependent on whether the suspected crime is a DUI offense or a drug offense is entirely dicta, but it does seem to provide an insight into where the majority was coming from as it went on to apply a probable cause standard to what should have been a simple particularized suspicion review. By using these distinctions, the court was able to avoid the use of *Pratt* and gravitate toward *Reesman* probable cause standards when the sole issue was one of particularized suspicion. It seems that this may actually have been the rationale behind the court’s reticence to apply *Pratt* to the facts of *Martinez*, which most certainly would have resulted in a different holding under *Pratt*’s particularized suspicion standards. If so, the use of a double standard for particularized suspicion within the reasoning of the court is wholly inappropriate. Montana law has specified one statutory standard for particularized suspicion regardless of the type of crime involved.291 Moreover, this statutory hallmark was modeled after the Montana Supreme Court’s decision in *Gopher*, even using some of the court’s own decisive language in creating the statutory particularized suspicion standard.292 Given the

289. *Id.* ¶ 38.
290. *Id.* ¶ 39.
292. *See* MONT. CODE ANN. § 46-5-401 (1999) and discussion of statutory language
fact that the court has no qualms about snatching dicta from one case and making it law in another, it will come as no surprise if the court gives this double-standard for particularized suspicion the force of law in a future case.

V. CONCLUSION

The issue of particularized suspicion in Montana has seen many changes between Gopher and Martinez. From its federal roots in Terry and Cortez to its adaptations in the Montana Supreme Court, particularized suspicion has been an effective tool of law enforcement as it protects the public from the criminal element. The Montana court's recent decisions in the area of particularized suspicion seem to signal significant changes and a return to probable cause standards when certain crimes are implicated, or when police informants are the basis for investigative stops.

Certainly it is the responsibility of law enforcement to see that the lesser standard of particularized suspicion to support investigative detention is not squandered by haphazard applications and creative report writing. And nearly all the time, law enforcement officers uphold their responsibilities to the United States Constitution and the Montana Constitution with vigor, respect, and honor.

But law enforcement cannot operate effectively in protecting the public when the legal ground on which they stand is shifting under the philosophical whims of the Montana Supreme Court. The standards for particularized suspicion were succinctly stated in Gopher and appropriately applied to informant-based information under Pratt. The Montana court's decision in Martinez reaches too far and paints the court and law enforcement into a proverbial corner; particularized suspicion is still the law, but probable cause seems to be the standard for investigative stops when informants provide narcotics-related information to police. When it pleases, the Montana court takes liberty with particularized suspicion standards and employs a higher standard of probable cause, as it did in Kleinsasser and now Martinez. The court should return itself to the particularized suspicion standards enunciated in Gopher and

 origins in supra text accompanying note 73.

293. Martinez, ¶ 48 (quoting dicta from State v. Anderson, 258 Mont. at 516, 853 P.2d at 1249, to provide reasoning for application of Reesman to particularized suspicion.).
codified by the Montana Legislature. To do less does not serve the public or the men and women of law enforcement who are charged with the public's protection.
