Criminal Procedure

Carol Everly  
*University of Montana School of Law*

Greg S. Mullowney  
*University of Montana School of Law*

Follow this and additional works at: [https://scholarship.law.umt.edu/mlr](https://scholarship.law.umt.edu/mlr)  
Part of the [Law Commons](https://scholarship.law.umt.edu/mlr)

Recommended Citation  
Available at: [https://scholarship.law.umt.edu/mlr/vol42/iss2/8](https://scholarship.law.umt.edu/mlr/vol42/iss2/8)
INTRODUCTION

The purpose of this survey is to report current case law developments affecting Montana criminal procedure. Montana Supreme Court decisions from 1980 have been analyzed and briefly discussed where they reflect matters of concern to practicing attorneys. This survey presents only an overview of current developments, and does not include criminal procedures applicable under...
the Montana Youth Court Act.

I. SCOPE OF THE FOURTH AMENDMENT

A. Legitimate Expectation of Privacy

The Fourth Amendment protects a person against unreasonable searches and seizures of his person or property by the government. It has been construed to protect people rather than places, and therefore, the scope of its protection encompasses any interest in which the person has a legitimate expectation of privacy.

Whether a person has a legitimate expectation of privacy depends upon the particular facts of each situation. In State v. Allen the Montana Supreme Court recognized that a person has a legitimate expectation of privacy when he is a co-tenant in an apartment and is present when the apartment is searched. The defendant in Allen alleged that he shared an apartment with his girlfriend. After receiving a complaint about a loud party in the apartment, officers proceeded to the scene and smelled burning marijuana. The officers were also aware that the defendant and his girlfriend were drug users. According to the officers, the apartment door swung open at the force of their knock, and they then viewed marijuana lying on a coffee table. No search warrant had been issued.

The defendant argued that the officers’ entry was unlawful, asserting that he had a legitimate expectation of privacy in the apartment because it was his residence. The state contended that the defendant lacked standing to object because certain facts indicated that he should not be considered a permanent, principal resident of the apartment. Under these circumstances, the state argued that the defendant could have no legitimate expectation of privacy.

5. Defendant alleged that although he was permanently residing in the apartment with his girlfriend, he had no contractual relationship with the landlord.
Relying upon Jones v. United States\(^6\) and Rakas v. Illinois\(^7\), the court determined that the defendant had standing to object. In Jones, the defendant was present at the time a friend's apartment was searched. The apartment’s owner was out of town and had let the defendant stay there in his absence. The United States Supreme Court held that “anyone legitimately on the premises where a search occurs may challenge its legality.”\(^8\) Subsequently, in Rakas, the Court limited the Jones holding by recognizing that the phrase “legitimately on the premises” was too broad a gauge for measuring Fourth Amendment rights.\(^9\) Instead, the Court realized that “a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place.”\(^10\)

Relying heavily on the facts presented in Allen, the Montana Supreme Court concluded that the defendant had complete dominion and control over the apartment, and, with the exception of his roommate, could exclude all others from it. Therefore, he had a legitimate expectation of privacy and had standing to object to the officers’ actions.\(^11\)

**B. Degree of Intrusion**

The Fourth Amendment prohibits only unreasonable searches. The reasonableness of a search is determined by balancing the degree of intrusion against the benefit derived.\(^12\) A search carried out pursuant to a valid search warrant is per se reasonable; warrantless searches are per se unreasonable.\(^13\) One way a warrantless search may be reasonable, however, is if it is incident to a lawful arrest.\(^14\)

In State v. Ulrich\(^15\) the Montana Supreme Court considered

---

8. Jones, 362 U.S. at 267. Prior to Jones, a defendant moving to suppress evidence had to first admit to the element of possession. Thus, if his defense was that he was never in possession of the contraband, he could not ask that illegally seized evidence be suppressed unless first admitted that it had been in his possession.
10. Id. at 142.
11. The defendant also asserted that Montana’s constitutional right to privacy protects against this kind of warrantless entry, but this contention was never specifically addressed by the court.
the scope of a warrantless search incident to a lawful arrest. The defendant had appeared at the stationhouse after officers discovered that the woman he was living with had died of gunshot wounds. The defendant was immediately arrested at the stationhouse, and, despite his request for an attorney, officers administered a neutron activation test. The neutron activation test consisted of wiping cotton swabs across the defendant’s hands to retain evidence of any gunpowder residues. It was established in district court that no force was used in obtaining this evidence. While the defendant did not resist this test, neither did he specifically consent to it. The district court ordered that the test results be suppressed because the defendant had not consented to it and because he had been denied his right to counsel. On appeal the state argued that this was a search incident to a lawful arrest and was reasonable under Schmerber v. California.16

The defendant, however, argued that under Cupp v. Murphy17 the state was required to show a likelihood that the evidence would have been lost or destroyed had the officers attempted to obtain a search warrant. The supreme court rejected this rationale, concluding that a search incident to a lawful arrest needs no additional justification so long as it is conducted within the permissible scope of searches incident to arrest.18 The court reasoned that because the intrusion in this case was minimal and because the search and manner in which it was conducted were reasonable, the state was not required to show that the evidence was destructible.19 Although such an affirmative showing had been made in Schmerber, the Montana Supreme Court found nothing to indicate that it was required in order to justify a warrantless search.20

II. ARRESTS

A. Probable Cause

The Fourth Amendment’s prohibition against unreasonable seizures requires that all arrests be based on probable cause. Mon-

16. 384 U.S. 757 (1966). In Schmerber, the warrantless extraction of blood from the defendant was found to be reasonable.
17. 412 U.S. 291 (1973). In Cupp, the warrantless taking of scrapings from the defendant’s fingernails was constitutionally permissible.
19. Id.
20. Id. at —, 609 P.2d at 1221. In a dissenting opinion, however, Justice Sheehy reasoned that the protections of the Fourth and Fifth Amendments would be lost unless the state was required to justify its warrantless search by presenting evidence that the gunpowder residues would have been lost or destroyed in the time a warrant could have been obtained. Id. at —, 609 P.2d at 1222.
tana law provides that an officer may make the warrantless arrest of a person if he has reasonable grounds to believe that the person is committing an offense, or that the person has committed an offense and the existing circumstances require his immediate arrest. The Montana Supreme Court has recently expanded the means by which an arresting officer may obtain probable cause.

In *State v. Hamilton*, a warrantless arrest was made by an officer who had overheard the commission of a homicide during a telephone call received at the stationhouse. The defendant was arrested minutes later at the scene, but argued that by the time the officers arrived, the crime had already been committed. He contended that his mere presence at the scene did not justify the arrest, and that there was sufficient opportunity for obtaining a warrant since there were no existing circumstances requiring his immediate arrest.

The supreme court rejected this argument, holding instead that "[w]hat the officer heard on the telephone led him to reasonably believe that the defendant was presently committing an offense. The warrantless arrest pursuant to that belief minutes later was proper regardless of whether or not the existing circumstances required his immediate arrest." Additionally, the court recognized that the right to make warrantless arrests is broader in felony cases than in misdemeanor cases.

This decision expands the means by which an officer may be

24. The defendant was arrested in the home he shared with his mother after officers arrived and discovered his mother's body. The defendant appeared bruised and scratched and had a small trickle of blood on his head. *Id.* at __, 605 P.2d at 1124.
25. The court found that this was a correct statement of the law. See *Hamilton*, __ Mont. __, 605 P.2d at 1125. *But cf. State v. Fetters*, 165 Mont. 117, 124, 526 P.2d 122, 126 (1974) (mere presence of defendant's car in area near scene of crime plus the personal inferences of officers did not constitute probable cause for arrest); *State v. Hull*, 158 Mont. 6, 16-17, 487 P.2d 1314, 1320 (1971) (where defendant was arrested at a "pot party" there was a greater degree of connection with illegal activities); *State ex rel. Glantz v. District Court*, 154 Mont. 132, 139, 461 P.2d 193, 197 (1969) (mere fact that a person is on premises where officers have reason to believe there are drugs will not justify arrest).
27. *Hamilton*, __ Mont. __, 605 P.2d at 1126 (emphasis added).
28. *Id.* "The usual rule is that a police officer may arrest without a warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor committed in his presence." *Carroll v. United States*, 267 U.S. 132, 156-57 (1924). In Montana, however, MCA § 46-6-401(4) (1979) provides that an officer may make a warrantless arrest if there are reasonable grounds to believe that the person is committing an offense.
considered to have gained knowledge of an offense by specifically including knowledge derived over the telephone. The court stated that "knowledge of the commission of an offense in the officer's presence may be gained by him through a mechanical apparatus, and an offense is deemed committed in . . . his presence . . . when he hears the disturbance and proceeds at once to the scene." 29

In State v. Davis 30 the court upheld a warrantless arrest where the arresting officers admitted that they did not have sufficient personal knowledge to establish probable cause to arrest the defendant. The arresting officers were part of a special team watching an informant purchase drugs from the defendant. The officers who were watching this transaction from a distance testified that they were personally unable to observe any of the defendant's actions and that they had not personally observed the defendant commit any offense. The officers did, however, observe special hand signals from the informant and were in contact with other officers by radio.

Recognizing that these facts were not unusual for undercover operations, the court found that there were enough facts and circumstances within the officers' knowledge that they could reasonably believe that the defendant was presently committing an offense. 31 The court found that although "no one officer may have had sufficient personal knowledge to establish probable cause, . . . if the information is considered collectively and is evaluated on the basis of the information available to the law enforcement officers as a group, it was sufficient to establish probable cause." 32

Both the Davis and Hamilton decisions are consonant with the supreme court's prior recognitions that although an officer may make a warrantless arrest on the basis of perceptions derived from sight, he is not limited to information derived solely through that sense. 33 The Davis decision, however, is the court's first express recognition that the collective perceptions of two or more officers may constitute probable cause.

31. Id. at _, 620 P.2d at 1212-13.
32. Id. at _, 620 P.2d at 1212 (emphasis added).
33. Accord, State v. Means, 177 Mont. 193, 581 P.2d 406 (1978) (odor of burning marijuana and other facts were sufficient to establish probable cause); State v. Schoendaller, 176 Mont. 376, 578 P.2d 730 (1978) (perception of the odor of burning or burnt marijuana by itself falls closer to realm of suspicion than probable cause); State v. Bennett, 158 Mont. 496, 493 P.2d 1077 (1972) (officer's perception of the odor of burning marijuana tends to establish probable cause of the present commission of the offense); State v. Hull, 158 Mont. 6, 487 P.2d 1314 (1971) (information from informant plus smell of burning marijuana is sufficient to establish probable cause).
B. Merchant Detentions

An arrest\textsuperscript{34} may be made by either a peace officer or a private person, although the authority of a private person to make a warrantless arrest is generally more limited.\textsuperscript{35} The situations in which a private person may make a warrantless arrest are authorized by statute.\textsuperscript{36} For example, in Montana a merchant with probable cause to believe that a person is shoplifting in his store has been authorized by statute to stop and temporarily detain that person to ascertain whether a theft has actually been committed.\textsuperscript{37} Recently, however, in \textit{Duran v. Buttrey Food, Inc.},\textsuperscript{38} the Montana Supreme Court determined that the portion of the Montana merchant detention statute which allows a merchant to detain a suspected shoplifter for up to thirty minutes \textit{without making an arrest} violates both the right of privacy\textsuperscript{39} and the right of freedom against unreasonable searches and seizures\textsuperscript{40} guaranteed by Montana's Constitution.

Although the defendant in \textit{Duran} was accused of shoplifting, she was permitted to return to her friend's car in the store parking lot after an employee's search of her purse revealed no stolen items. While waiting in the car, the defendant was approached by a store employee who grabbed her purse and searched it again, but found nothing. The defendant was then "guarded"\textsuperscript{41} by another store employee until the police arrived. Only after the police arrived twenty minutes later was the defendant actually placed under arrest and taken back into the store. The defendant was cleared of theft charges in a district court trial and subsequently brought an action against the store for false arrest and malicious
prosecution.

In deciding that merchants and other private citizens are not given the same powers as are peace officers in the stop-and-frisk situation,\(^4\) the supreme court emphasized that, in this case, there had been a very serious invasion of the defendant's right to privacy:

We fail to discern a compelling state interest which would justify the very serious invasion of a person's privacy which occurs when she is publicly stopped and detained for up to 30 minutes by private individuals who search her purse and cause her great indignity and embarrassment, all under the immunity ostensibly granted by [the merchant detention statute]. While it is true that merchants and their employees as private individuals have a right to defend their property, that right does not amount to a compelling state interest which would justify allowing the merchant or his employee to invade the privacy of another individual to the extent permitted under [the merchant detention statute].\(^4\)

III. ELECTRONIC SURVEILLANCE

With the advent of modern electronic devices, it has become possible for one person to monitor and record the conversations of another, to monitor the location and movements of another, and to trace the origin of telephone calls. While the use of these devices certainly aids in crime prevention and detection, their uncontrolled use may be perceived as a threat to individual privacy.

Recent decisions have reflected this concern and courts and legislatures generally have begun to control the use of eavesdrop-

\(^{42}\) Id. at \(\ldots\), 616 P.2d at 334. See also MCA § 46-5-401 (1979).

\(^{43}\) Duran, - Mont. \(\ldots\), 616 P.2d at 332. By not purporting to decide any issue other than the unconstitutionality of the thirty-minute detainment, the court has left open the argument that a merchant's detainment might in fact be an arrest. One California court explained that

\[\text{[a]lthough the line at times might be a fine one, there is a well-settled distinction in law between an arrest and a detention. A detention is a lesser intrusion upon a person's liberty requiring less cause and consisting of briefly stopping a person for questioning or other limited investigation.}

Cervantez v. J. C. Penney Co., Inc., 24 Cal. 3d 579, 591 n.5, 595 P.2d 975, 982 n.5, 156 Cal. Rptr. 198, 204 n.5 (1979). This distinction may prove to be critical where the suspect who has been detained or arrested seeks to sue the merchant for false arrest or malicious prosecution. It has been held that a merchant may assert a probable cause defense where he has merely detained the suspect, but not where he has arrested the suspect. See Cervantez, 24 Cal. 3d at 591, 595 P.2d at 981-82, 156 Cal. Rptr. at 205. Thus, it is arguable, in cases where the merchant does not affirmatively arrest the suspected shoplifter, that nevertheless, an arrest has been made if the purpose of a brief stop for questioning or other limited investigation has been greatly surpassed. This distinction is probably inconsequential under Montana law since MCA § 46-6-503(3) (1979) expressly provides that the probable cause defense applies to both detention and arrest.

https://scholarship.law.umt.edu/mlr/vol42/iss2/8
ping techniques. Montana is no exception. In 1978 the Montana Supreme Court endorsed the practice of obtaining judicial authorization prior to electronic interception of the activities of criminal suspects and held that the recordings and transcripts obtained through the use of unauthorized monitoring devices were properly suppressed on constitutional grounds.\(^44\) It was subsequently held, in \textit{State v. Jackson},\(^45\) that prior judicial authorization is not required where the state does not introduce or attempt to introduce the evidence obtained through the use of electronic recordings.

One facet of the legality of intercepting phone calls or the recording of conversations was settled in \textit{State v. Hanley}.\(^46\) In that case, the supreme court ruled that peace officers may intercept, transmit, or record private conversations if one of the parties to the conversation freely consents,\(^47\) and that the unauthorized monitoring of a telephone conversation does not defeat the legality of a subsequently authorized monitoring of a drug transaction to which the conversation led. In \textit{Hanley} an informant recorded a telephone call placed to him by several individuals, one of whom was the defendant. There was no prior judicial authorization for this recording. The conversation detailed a later meeting at which a drug sale would take place. The meeting was then monitored with judicial authorization. Although it was never introduced into evidence at trial, the tape of the initial telephone conversation was referred to during direct examination of a detective, and was handed to him while he was on the stand. Defense counsel previously had moved to suppress this tape and all evidence derived from it under the "fruit of the poisonous tree" doctrine since it had been recorded without a court order and later served as a basis for authorization to monitor the subsequent meeting and sale. The court found \textit{State v. Jackson}\(^48\) to be controlling and ruled that the tape did not affect the admissibility of the evidence presented. The court stated:

Since the authorities here obtained the consent of the District Court to the monitor [sic] of the sale . . . on the basis of the par-


\(^{46}\) - Mont. _, 608 P.2d 104 (1980).

\(^{47}\) The will of the consenting party must not have been subjected to overbearing pressure from the authorities. United States v. Baynes, 400 F. Supp. 285 (E.D. Pa.), aff'd 517 F.2d 1399 (3d Cir. 1975).

\(^{48}\) - Mont. _, 589 P.2d 1009 (1979). The \textit{Hanley} opinion did not consider whether the references to the tape at trial constituted an attempt to introduce it into evidence, or whether this reference might have prejudiced the jury.
participant's consent, and since appellant could have no reasonable expectation that the person he was dealing with . . . was not in fact an informer, no interest legitimately protected by the Fourth Amendment is involved . . . and the monitoring and recording of the conversation was permissible even under state law.49

In State v. Bassett50 the supreme court faced an argument similar to that presented in Hanley. An informant wore a body monitor during three meetings with the defendant, a suspected drug dealer. There had been no judicial authorization for this monitor. The authorities then obtained a court order for the monitor and set up three more meetings between the defendant and the informant. Although the first three recordings were not used at trial, the defendant argued that the information derived from them was used to support the applications for the authorization to monitor the subsequent meetings and therefore should be suppressed under the "fruit of the poisonous tree" doctrine. Yet, the court determined that there was no more taint in this case than there was in Hanley.

Finally, in State v. Case,51 the court held that the application for judicial authorization need not particularly describe the place involved, since it is usually impossible to pinpoint the actual location where a conversation will occur. Instead, the court literally interpreted Montana's search warrant provision which requires only that the "thing, place, or person to be searched" need be described with particularity,52 emphasizing the conjunctive language.

IV. IDENTIFICATION

Identification of a suspect by a witness is one method used to verify that the suspect actually committed a crime. It may also provide evidence to be used against the suspect at trial. While danger of misidentification is always present,53 it is increased where an unnecessarily suggestive identification procedure is used.54 To curb the use of unnecessarily suggestive procedures, the United States Supreme Court has announced two constitutional safeguards.

49. Hanley, _ Mont. _, 608 P.2d at 110.
52. MCA § 46-5-201 (1979).
54. The unreliability of eyewitness identification under suggestive circumstances has been widely recognized. See, e.g., Comment, Protection of the Accused at Police Lineups, 6 COLUM. J. L. SOC. PROB. 345, 360-73 (1973) (citing many sources); ALI CODE OF PRE-ARRAIGNMENT PROCEDURE, § 160.2 (1975).
One safeguard entitles the defendant to counsel at any corporeal identification involving the defendant after an adversary criminal proceeding has been initiated against him.\(^5\) The presence of defense counsel is expected to deter the use of unnecessarily suggestive police practices and to facilitate the reconstruction at trial of any impropriety.\(^6\) The other safeguard establishes that evidence of a pretrial identification must be excluded if, under the totality of the circumstances surrounding it, the identification procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification that it violates the minimal requirements of due process.\(^7\)

In Montana, as in many other states, suspect lineups are not often used. Instead, police officers may simulate the lineup situation by showing the witness several photographs of suspects. This method is advantageous because it is easily used and spares innocent suspects the embarrassment of arrest and lineup.\(^8\) It has been recognized generally that "identification from a still photograph is substantially less reliable than identification of an individual seen in person."\(^9\) Nevertheless, it is not necessary that defense counsel be present when the photographs are shown to the witness, regardless of whether the defendant has been arrested or formally charged.\(^10\)

Recently, in *State v. Strain*,\(^11\) the Montana Supreme Court heard arguments proposing that Montana adopt the rule whereby once a defendant is in custody, the right to counsel must attach to any photograph identification session (even for the investigation of a crime unrelated to the one for which the defendant was taken into custody). It was also argued that Montana adopt the rule entitling defendants to a physical lineup rather than a photographic lineup. These arguments were based upon Michigan case law.\(^12\)

---

55. Kirby v. Illinois, 406 U.S. 682 (1972); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967). It must be noted that these cases do not limit the claim for a right to counsel if there exist independent and adequate state grounds for requiring the presence of counsel prior to the initiation of the adversary proceeding.


59. California Supreme Court Justice Traynor noted this as early as 1960 in People v. Gould, 54 Cal. 2d 621, 354 P.2d 865, 870, 7 Cal. Rptr. 273, 278 (1960).


which has recognized that "eyewitness identification through photographs is at least as hazardous as corporeal identification and probably is more hazardous to the securing of the correct identifications." The Michigan Supreme Court decided that not only does the right to counsel attach to any photograph identification sessions, but that identification by photograph should normally not be used when the suspect is in custody and available for personal identification procedures.

The Montana court, without comment, refused to adopt these rules and adhered to the position that photographic identifications are allowed, but will be scrutinized for reliability. The United States Supreme Court, in Simmons v. United States, considered pretrial identification by photograph and determined that even though an identification procedure may fall short of due process, a reversal is not required if the witness' ability to identify the defendant on other occasions was plainly independent of the suggestiveness of the challenged procedure. In subsequent cases, the Court began to focus on the reliability of the identification rather than the propriety of the initial procedure, and concluded that due process is satisfied if a court can find that the proffered identification "possesses certain features of reliability." Montana has adopted these same "features of reliability."

The Montana Supreme Court's refusal to provide the right to counsel at photograph identification sessions means that the defendant must rely on principles of due process for protection against unfair procedures. In Strain, a female defendant contended that the photographs used by a witness to identify her were unnecessarily suggestive because she wore glasses and only one of the four photographs displayed a woman in glasses. The court found that although this procedure connoted suggestiveness, it did not

64. Id. at 186-87, 205 N.W.2d at 476.
65. Strain, Mont. 618 P.2d at 331.
67. Id. at 385. See also State v. Dahl, Mont. 620 P.2d 361, 364 (1980).
69. Manson v. Brathwaite, 432 U.S. 98, 114-16 (1977). The Court in Manson judged reliability according to five factors enumerated in Neil v. Biggers, 409 U.S. 188, 199-200 (1972): (1) the identifying witness' opportunity to view the suspect at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of any earlier description of the suspect; (4) the level of certainty demonstrated at the confrontation; and (5) the lapse of time between the crime and the confrontation.
71. __ Mont. 618 P.2d 331 (1980).
amount to a very substantial likelihood of irreparable misidentifi-
cation since each woman in the photographs resembled the others
and all matched the general description provided by the witness.\textsuperscript{72}

Any identification procedure may be attacked on the basis
that it was unnecessarily suggestive. This includes corporeal identi-
fications. The Montana Supreme Court recently held that the
identification of the defendant in a police vehicle shortly after the
commission of the crime was not unnecessarily suggestive.\textsuperscript{73} It has
also been held that identification by the use of only one picture is
permissible when it appears the identification is highly reliable.\textsuperscript{74}

\section*{V. Admissions and Confessions}

The policy of the Fifth Amendment, as illustrated through its
application in \textit{Miranda v. Arizona},\textsuperscript{75} operates to mitigate the coer-
cive influences inherent in custodial interrogations and may limit
the admissibility of a suspect's confessions. Any statements ob-
tained in violation of \textit{Miranda} are inadmissible in the prosecutor's
case-in-chief,\textsuperscript{76} but may be admissible for the limited purpose of
impeaching the defendant, provided the statements are shown to
be voluntary.\textsuperscript{77} Involuntary statements may not be admitted for
any purpose.\textsuperscript{78} In the most recent Montana cases the Montana Su-
preme Court has done little more than analyze facts, seeking to
determine from the totality of the circumstances whether there
was sufficient evidence in each case to support the district courts' findings that the statements were voluntary.\textsuperscript{79}

The court, in \textit{State v. Allies},\textsuperscript{80} however, had its first occasion
to consider what has become known as the "cat-out-of-the-bag"
doctrine relating to consecutive confessions. This doctrine may be
applicable when the defendant makes an otherwise admissible con-

\begin{itemize}
  \item \textsuperscript{72} Id. at \_\_, 618 P.2d at 335.
  \item \textsuperscript{73} Spurlock v. Crist, _ Mont. _, 614 P.2d 498, 501 (1980).
  \item \textsuperscript{74} State v. Higley, _ Mont. _, 621 P.2d 1043, 1049-50 (1980).
  \item \textsuperscript{75} 384 U.S. 436 (1966). \textit{Miranda} requires that prior to interrogation, law enforcement
          officials advise suspects that they have the right to remain silent, that any statements made
          may be used against them, that they have the right to an attorney, and that an attorney will
          be appointed for them if they are unable to afford one. The suspect may knowingly, intelli-
          gently, and voluntarily waive these rights.
  \item \textsuperscript{76} Id. at 479.
  \item \textsuperscript{77} Oregon v. Hass, 421 U.S. 714, 723-24 (1975); Harris v. New York, 401 U.S. 222, 225
          (1971). For a discussion of factors used in Montana to determine voluntariness, see Survey,
  \item \textsuperscript{78} Payne v. Arkansas, 356 U.S. 560, 568 (1968).
  \item \textsuperscript{79} See State v. Allies, _ Mont. _, 621 P.2d 1080 (1980); State v. Davison, _ Mont. _
  \item \textsuperscript{80} _ Mont. _, 621 P.2d 1080 (1980).
\end{itemize}
profession after a prior inadmissible one.81 Under this doctrine the subsequent confession may be held inadmissible if it is so closely related to the prior one that it can be said that "the facts of one control the character of the other."82 Where the subsequent confession is made to a friend or relative not acting for the police, the courts consider whether there was a sufficient break in the stream of events between the two confessions which will justify admitting the subsequent confession into evidence.83

In Allies, the police obtained an inadmissible confession while the defendant was in custody in a hospital psychiatric ward. He was later transferred to another institution where he made inculpatory statements to his girlfriend. The district court concluded that the second set of inculpatory statements was a fruit of the prior inadmissible confession and, therefore, was also inadmissible.84 On appeal the state alleged several factors which indicated there had been a break in the stream of events between the two confessions: (1) Passage of time—the original confession occurred on December 12, 1976, and the subsequent one occurred in late January or early February, 1977; (2) Change in location—each confession occurred in a different place; (3) Manner of interrogation—the first confession was obtained by police officers and a psychiatrist while the second confession was induced by the defendant’s girlfriend; (4) Representation by counsel—the first confession occurred while the defendant was not represented by counsel while the second confession occurred after the defendant had consulted with his appointed counsel.85

The supreme court upheld the district court’s finding of inadmissibility despite these arguments by the state, noting that the determination of whether the causative link between the two confessions has been broken is a factual determination.86

VI. The Plea

A. Guilty Pleas

Before a guilty plea will be accepted, a court must be con-
vinced that the defendant made the plea voluntarily, understandingly, and intelligently.87 These requirements are essential because a defendant who pleads guilty waives important constitutional rights: (1) the right to counsel;88 (2) the privilege against self-incrimination;89 (3) the right to a jury trial;90 and (4) the right to cross-examination and to confront witnesses and evidence against him.91

The Montana Supreme Court now requires district court judges to conduct a thorough guilty plea colloquy prior to acceptance of the plea to assure that these requirements are met.92 Montana law provides that the court should refuse to accept a guilty plea without first determining that the plea is voluntary with an understanding of the charge.93 The supreme court has further enumerated required elements of a colloquy checklist: (1) defendant’s understanding of the charge filed against him, the elements of the crime, the possible alternative charges and the maximum sentence;94 (2) the possibility of threats, misrepresentations or bribes by either the court, the prosecutor, or defense counsel;95 (3) defendant’s state of mind;96 (4) competency of counsel;97 and (5) the totality of the circumstances.98

A defendant may withdraw a guilty plea. MCA § 46-16-105(2) (1979) provides in pertinent part: “at any time before or after judgment the court may, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.” (Emphasis added.) In In re Brown,99 the defendant contended that, because his guilty plea was accompanied by a declaration of innocence, the district court erred in accepting his guilty plea before it established a factual basis in the record to support the plea. The supreme court held, however, that there is no constitutional prohi-

89. U.S. Const. amend. V.
90. Id. amend. VI.
93. MCA § 46-12-204(2) (1979).
97. Id.
bition against accepting the guilty plea of a defendant who denies his actual guilt.\textsuperscript{100}

There is no set standard to be applied by a court in handling motions to withdraw a guilty plea.\textsuperscript{101} The trial court's decision concerning a motion to withdraw is subject to review only upon a showing of an abuse of discretion.\textsuperscript{102} In Brown, no abuse of discretion was found. The record (state's affidavit and transcript of the arraignment) established a substantial factual basis for the plea, and further showed the defendant's almost obstinate insistence that he be allowed to plead guilty to charges of felony-theft, deliberate homicide, sexual intercourse without consent, robbery, and aggravated assault.\textsuperscript{103} The Brown court also held that the defendant's dislike of the security quarters was not per se a factor in determining voluntariness of a guilty plea, because the record clearly showed that defendant was under no compulsion to enter his plea.\textsuperscript{104}

State v. Haynie\textsuperscript{,105} sets forth three important considerations involved in a defendant's attempt to withdraw a guilty plea. These are: (1) adequacy of the district court's colloquy concerning defendant's understanding of the plea; (2) promptness of the motion to withdraw; and (3) the fact that the plea resulted from plea bargaining.

Although an indigent criminal defendant has a right to counsel at sentencing, this right to counsel may be lost by a knowing and understanding waiver.\textsuperscript{106} In Haynie, the defendant, who was accused of 11 sex crimes, knowingly and understandingly waived his right to more extensive counsel at sentencing where he rejected an offer to consult with his stand-in counsel, and where he entered his plea of guilty of sexual intercourse without consent with knowledge of the maximum possible penalty for the crime charged.\textsuperscript{107} A change of plea will be permitted only if it appears the defendant was ignorant of his rights and the consequences of his act, he was unduly and improperly influenced by hope or fear, or the plea was

\textsuperscript{103} Brown, - Mont. -, 605 P.2d at 187.
\textsuperscript{104} Id. at 188.
\textsuperscript{105} - Mont. -, 607 P.2d 1128, 1131 (1980).
\textsuperscript{106} Id. at 1128, 1129, citing In re Brittingham, 155 Mont. 525, 529, 473 P.2d 830, 832 (1970).
\textsuperscript{107} Haynie, - Mont. -, 607 P.2d at 1130.
entered under mistake or misapprehension.\textsuperscript{108}

In \textit{In re Hardy},\textsuperscript{109} the supreme court ruled that the trial court's refusal to grant a motion to withdraw was not an abuse of discretion. The court relied upon the standards in \textit{Haynie} and \textit{Brown} to hold that the defendant was provided every chance to consider his action, and was cognizant of his rights and the consequences of his plea. Further, the court found that the defendant was assisted by legal counsel at every point in the criminal procedure, yet continued to insist on his guilty plea.\textsuperscript{110}

\textbf{B. Plea Bargaining}

In \textit{Santabello v. New York},\textsuperscript{111} the United States Supreme Court held that when a defendant enters a plea of guilty in exchange for an agreement by the prosecutor to make a sentencing recommendation, the prosecutor's promise must be enforced or the defendant allowed to withdraw his guilty plea. In \textit{State v. McKenzie} (McKenzie III),\textsuperscript{112} however, the Montana Supreme Court, reviewing the record of the trial court, determined that there was not an enforceable plea bargain agreement. Although defense counsel and prosecutors engaged in some plea negotiations, an enforceable agreement was never reached.\textsuperscript{113}

The supreme court also found that the defendant neither contended nor proved bad faith by the state in its discussions with defense counsel on the plea bargain, or in the state's effort to secure approval of the sheriff or the victim's parents. Therefore, the trial court's actions in accepting the state's version and refusing to enforce the alleged agreement were correct.\textsuperscript{114}

In \textit{State v. Haynie},\textsuperscript{115} the supreme court considered the fact that a guilty plea resulted from plea bargaining in its determina-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{108} \textit{Id.}, citing \textit{State v. McAllister}, 96 Mont. 348, 353, 30 P.2d 821, 823 (1934). The supreme court held that the district court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea although the district court's colloquy was inadequate, where defendant, without explanation, waited almost five and a half years after entering a plea in accordance with extended plea negotiation. Haynie, \textit{Mont.}, 607 P.2d at 1130.
\item \textsuperscript{109} \textit{Id.}, 614 P.2d 528, 530 (1980).
\item \textsuperscript{110} \textit{Id.} at \textit{Mont.}, 614 P.2d at 531.
\item \textsuperscript{111} 404 U.S. 257 (1971).
\item \textsuperscript{112} \textit{Mont.}, 608 P.2d 428, 439 (1980).
\item \textsuperscript{113} \textit{Id.} The McKenzie III court held that any disclosures or statements of defense counsel concerning weaknesses in the state's case or defense positions were gratuitous and premature. As the supreme court asserted, a trial is not a sporting contest in which the verdict turned on such matters. \textit{Id.}
\item \textsuperscript{114} \textit{Id.} at \textit{Mont.}, 608 P.2d at 439.
\item \textsuperscript{115} \textit{Mont.}, 607 P.2d 1128, 1130 (1980).
\end{enumerate}
\end{footnotesize}
tion that the district court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea. The court would not aid an accused to escape obligations of the plea bargain agreement after knowingly and voluntarily accepting its benefits. 118

VII. SPEEDY TRIAL

In Barker v. Wingo, 117 the United States Supreme Court suggested four major factors to be considered in making speedy trial determinations: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's responsibility to assert his right; and (4) the prejudice to the defendant. The fourth factor entails three goals: to prevent oppressive pretrial incarceration, to minimize anxiety of the accused, and to limit the chance of impairing the defense. These factors are to be balanced, weighing conduct of both the prosecution and the defendant.

The Montana Supreme Court has forced prosecutors to justify lengthy delays. In McKenzie III, the court denied a motion to dismiss for lack of speed when approximately 350 days had elapsed between arrest and trial. 118 The court held that although the delay was not a per se violation, the length does shift the burden of explaining the reasons for the delay to the prosecution. 119 The state's delay was found justified because of the defendant's several court appearances, his refusal to plead, and the difficulty in preparing the first case under Montana's new criminal code and punishment scheme. The court also found neither side chargeable for the delay. 120

The Barker balancing test was also applied in State v. Shurtleff, 121 where a 382-day lapse between arrest and trial of defendant on charges of deliberate homicide, robbery, and theft did not deny defendant's right to a speedy trial. The delay required the state to give reasons, and the court balanced defense delays against state delays. The defense made a motion for substitution of the trial judge; defense counsel was reassigned twice, requiring time to prepare a new defense. The state was granted a continuance for 48 days when its most important witness left the United States; although the state filed an amended information, the record revealed

116. Id. at __, 607 P.2d at 1132.
119. Id.
120. Id.
121. — Mont. __, 609 P.2d 303 (1980).
no action to stall for time to prepare.\textsuperscript{123}

The \textit{Shurtleff} court held that although defendant was in jail for eleven months, the long delay was to his benefit: psychiatric examinations were obtained, and new information and witnesses were gathered.\textsuperscript{123} No facts suggested his case was weakened, and the defense was actively prepared during this period.\textsuperscript{124}

Another lengthy delay of 319 days from filing of an information to trial on a charge of robbery was justified in \textit{State v. Worden}.\textsuperscript{126} Although the supreme court found that most of the delay was due to the state’s conduct and that inherent delays caused the rest of the delay,\textsuperscript{126} the court held that the ten-month incarceration prior to trial was mostly due to unrelated offenses. The defendant showed no proof of impairment of ability to prepare a defense. The supreme court therefore found no error, because no prejudice resulted from the delay, even though the cause did not proceed in an orderly step-by-step progression to trial.\textsuperscript{127} For purposes of determining a violation of defendant’s speedy trial right, intentional delay will weigh more heavily against the state than those delays which are inherent in the system.\textsuperscript{128}

Essentially the same issue was presented in \textit{State v. Case},\textsuperscript{129} where 340 days elapsed between the filing of the information and trial. The supreme court reasoned that the only material distinction between \textit{Case} and \textit{Worden} was a delay of an additional 19 days before commencement of this trial. The defendant was therefore not denied the right to a speedy trial because the additional delay under the same facts as \textit{Worden} was not substantial.\textsuperscript{130}

A 108-day delay from filing of the information to trial was not long enough to be presumptively prejudicial in \textit{State v. Armstrong},\textsuperscript{131} precluding the need to examine other factors. The defendant also contended that the delay of three and one-half years between the first and second conviction denied his right to a speedy trial.\textsuperscript{132} The court held, however, that the Montana district court

\begin{itemize}
  \item 122. \textit{Id. at} \textit{\ldots} 609 P.2d at 305.
  \item 123. \textit{Id.}
  \item 124. \textit{Id.}
  \item 125. \textit{Id. at} \textit{\ldots} 611 P.2d 185 (1980).
  \item 126. \textit{Id. at} \textit{\ldots} 611 P.2d at 187. The defendant was transferred to Malta instead of Warm Springs, and the state failed to have defendant appear at two pre-trial hearings.
  \item 127. \textit{Id. at} \textit{\ldots} 611 P.2d at 187.
  \item 128. \textit{Id.}
  \item 129. \textit{Id. at} \textit{\ldots} 621 P.2d 1066 (1980).
  \item 130. \textit{Id. at} \textit{\ldots} 621 P.2d at 1068.
  \item 131. \textit{Id. at} \textit{\ldots} 616 P.2d 341 (1980).
  \item 132. \textit{Id. at} \textit{\ldots} 616 P.2d at 351, \textit{citing State v. Harvey}, \textit{Id. at} \textit{\ldots} 603 P.2d 661, 667 (1979).
\end{itemize}
lacks jurisdiction to retry during the appellate process, and appeal
time is not included in the computation of a speedy trial delay.\footnote{133}

In another case, the Montana Supreme Court received a peti-
tion for writ of supervisory control\footnote{134} to direct a presiding judge in
the Fourth Judicial District to set within two weeks the criminal
trial of Larry D. White because of a speedy trial risk. The Mon-
tana Attorney General presented adverse factors in the handling of
criminal prosecutions in the Fourth, Eighth, and Thirteenth Judicial
Districts, affecting speedy trial:\footnote{135} (1) indiscriminate use of the
disqualification rule; (2) not scheduling jury trials during summer
months; (3) independent calendaring of district judges in multi-
judge districts; (4) granting of continuances ex parte; and (5) rural
counties aligned with metropolitan counties. The supreme court
concluded, after reviewing these practices in several judicial dis-
tricts in Montana,\footnote{136} that: (1) widespread and indiscriminate dis-
qualification has been diminished, so the previous order permitting
disqualification would be continued; (2) the court retains jurisdic-
tion for purposes of review; (3) alignment of counties and equaliza-
tion of case loads is a matter of legislative action; (4) independent
calendarizing was not a substantial factor; and (5) a chief judge
should be appointed in all multi-judge districts.\footnote{137}

VIII. PRE-TRIAL ISSUES

A. Disqualification of Judges

The Montana Supreme Court addressed the issue of substitu-
tion of judges in McKenzie III. The defendant tried to disqualify
the trial judge for cause on grounds that the judge was a member
of the Criminal Law Revision Commission that drafted Montana's
present criminal code, that the judge had acquired information
during the plea-bargaining process which would make it impossible
to be impartial, and that the judge gave his own preliminary in-

\footnote{133. Armstrong, ___ Mont. __, 616 P.2d at 351.}
\footnote{134. Final Order on Disqualification Rule and Retention on Jurisdiction on petition
for writ of supervisory control, 37 St. Rptr. 254 (1980).}
\footnote{135. \textit{Id}.}
\footnote{136. In the Thirteenth Judicial District, the problem was ameliorated by (1) changes
in personnel and appointment of a fourth judge; (2) appointment of a chief justice; and (3)
change in local court rules for a "random-but-equal" case transfer system upon disqualifica-
tion. The court found no significant problem in the Fourth and Eighth Judicial Districts. In
the Sixteenth and Second Judicial Districts, routine disqualification of one judge by the
county attorney was to be discontinued without consultation of the Attorney General. \textit{Id}. at
255.}
\footnote{137. 37 St. Rptr. at 256.
struction to the jury. The court held that membership on the Criminal Law Revision Commission did not per se constitute grounds for disqualification because the Code of Judicial Conduct permits a judge to "engage in activities to improve the law, the legal system and the administration of justice." The court also found no facts or proof that the judge had assumed an adversary position, and found that disclosure of information during plea-bargaining was not sufficient grounds for disqualification.

B. Appeal from Justice Court

In State v. Sanchez, the Montana Supreme Court determined the scope of two sections of the Montana Criminal Procedure Code concerning an appeal by the state from a dismissal order of a justice court. The defendant had been tried on misdemeanor charges of reckless driving and obstructing a peace officer. The justice of the peace granted a motion to dismiss the obstruction charge; the state sought to appeal the justice court's dismissal by a trial de novo in district court.

MCA § 46-17-311 (1979) allows a defendant to appeal a justice court order. The supreme court determined, however, that the statute is applicable only to appealing defendants and not to the state. Under MCA § 46-20-103 (1979), the state can only ap-

139. ABA CODE OF JUDICIAL CONDUCT, Canon 4 (1979).
140. McKenzie III, Mont. 608 P.2d at 440.
142. Id. An attempt to retry in justice court was dismissed on double jeopardy grounds.
143. MCA § 46-17-311 (1979) provides:
   (1) All cases on appeal from justices' or city courts must be tried anew in the district court and may be tried before a jury of six selected in the same manner as a trial jury in a civil action, except that the total number of jurors drawn shall be at least six plus the total number of peremptory challenges.
   (2) The defendant may appeal to the district court by giving written notice of his intention to appeal within 10 days after judgment.
   (3) Within 30 days, the entire record of the justice's or city court proceedings must be transferred to the district court or the appeal must be dismissed. It is the duty of the defendant to perfect the appeal.
144. Sanchez, Mont. 610 P.2d at 163.
145. MCA § 46-20-103 (1979) provides:
   (1) Except as otherwise specifically authorized, the state may not appeal in a criminal case.
   (2) The state may appeal from any court order or judgment the substantive effect of which results in:
      (a) dismissing a case;
      (b) modifying or changing the verdict as provided in 46-16-702(3)(c);
      (c) granting a new trial;
      (d) quashing an arrest or search warrant;
peal dismissals from district court, and has no right to appeal the final decision of a justice court in a criminal case.\textsuperscript{146}

C. Continuance

Some useful guidelines for granting of continuances are set forth in \textit{State v. Fife}.\textsuperscript{147} MCA § 46-13-202 (1979)\textsuperscript{148} defines the rule for continuances, and requires a movant to show diligence prior to asking for a continuance.

In \textit{Fife}, the supreme court held that the district court had acted arbitrarily in denying a motion for a continuance requested to allow the defense to locate a crucial witness who had failed to respond to a subpoena.\textsuperscript{149} The court applied the following guidelines: (1) is the testimony material? (2) can it be elicited from another source? (3) is it cumulative? (4) is it possible to get the witness within a reasonable time? (5) was the requesting party diligent and acting in good faith? (6) is there inconvenience to the court or parties? (7) what is the likelihood the testimony would have affected the jury?\textsuperscript{150}

D. Amendment of the Information

The Montana statute\textsuperscript{151} allowing amendment of an information once as to substance without leave of court up to five days prior to trial was held unconstitutional in \textit{State v. Cardwell}.\textsuperscript{152} The defendant contended that allowing substantive changes in an information without judicial examination violates Article II, Section

\begin{itemize}
\item[(e)] suppressing evidence;
\item[(f)] suppressing a confession or admission; or
\item[(g)] granting or denying change of venue.
\end{itemize}

\textsuperscript{146} Sanchez, _ Mont. _, 610 P.2d at 163.
\textsuperscript{147} _ Mont. _, 608 P.2d 1069 (1980).
\textsuperscript{148} MCA § 46-13-202 (1979) provides:

(1) The defendant or the state may move for a continuance. If the motion is made more than 30 days after arraignment or at any time after trial has begun, the court may require that it be supported by affidavit.

(2) The court may upon the motion of either party or upon the court's own motion order a continuance if the interests of justice so require.

(3) All motions for continuance are addressed to the discretion of the trial court and shall be considered in the light of the diligence shown on the part of the movant. This section shall be construed to the end that criminal cases are tried with due diligence consonant with the rights of the defendant and the state to a speedy trial.

\textsuperscript{149} Fife, _ Mont. _, 608 P.2d at 1071-72.
\textsuperscript{150} \textit{Id.}, citing \textit{State v. Salazar}, 559 P.2d 66 (Alaska 1976).
\textsuperscript{151} MCA § 46-11-403(1) (1979) provides: "A charge may be amended once in matters of substance at any time not less than 5 days before trial without leave of court."

\textsuperscript{152} _ Mont. _, 609 P.2d 1230 (1980).
20, of the Montana Constitution,\textsuperscript{153} which provides: "All criminal actions in district court, except those on appeal, shall be prosecuted, either by information, after examination and commitment by a magistrate or after leave granted by the court, or by indictment without such examination, commitment, or leave."

The Montana Supreme Court found that the clear and unambiguous meaning of this constitutional section required that all criminal actions "prosecuted" by information\textsuperscript{154} must be examined by a magistrate or carried forward after leave granted by the court. Thus, all stages of proceeding by information, including amendments to the information, must be reviewed by the courts.\textsuperscript{155} Any statute that allows amendment without leave of court conflicts with this constitutional provision. Since MCA § 46-11-403(1) (1979) allows amendment of criminal information without judicial supervision, it conflicts with the constitution and is invalid. The court, however, saw no bar to substantive amendment of criminal informations as long as proper procedures for judicial supervision are followed.\textsuperscript{156}

The Cardwell procedural safeguards governing substantive amendments of criminal information were applied in State v. Sorenson.\textsuperscript{157} The three procedural safeguards, all of which were complied with in Sorenson are: (1) the amended information must be approved by the district court; (2) the defendant must have adequate notice of the charge and an opportunity to prepare for trial; and (3) the defendant "should" be rearraigned on the new charge.\textsuperscript{158} The court held that the defendant was not prejudiced by the existence of a procedural statute which was later ruled unconstitutional. Therefore, the defendant had no standing to argue for the retroactive application of the Cardwell rule.\textsuperscript{159}

In State v. Olson,\textsuperscript{160} the supreme court held that because both

\begin{flushleft}
153. \textit{Id.} at \textsuperscript{1}, 609 P.2d at 1231.
154. \textit{Id.} at \textsuperscript{2}, 609 P.2d at 1232, \textit{citing} Cohen v. Virginia, 19 U.S. 264, 408 (1821) and Sigmon v. Commonwealth, 200 Va. 258, 105 S.E.2d 171, 178 (1958). The court construed this use of the word "prosecuted" by use of a broad general definition. The word "prosecution" means the institution and carrying on of a suit or proceeding to obtain or enforce charges against an offender before a legal tribunal. Montana has not yet interpreted an explicit definition of the term, but the supreme court has held the term too narrow to encompass investigation before filing a complaint or information. \textit{See} Rosebud County v. Flinn, 109 Mont. 537, 541-42, 98 P.2d 330, 333-34 (1940).
155. Cardwell, \textit{Mont.}, 609 P.2d at 1233.
156. \textit{Id.}
\end{flushleft}
crimes charged in the informations might lead to the same punishment and both theories were placed before the jury, there existed no substantial departure from the original information that would materially prejudice the defendant's case.\textsuperscript{161} Any error which does not affect the substantial rights of the defendant constitutes "harmless error" and will not constitute grounds for reversal on appeal.\textsuperscript{162}

IX. FIFTH AND SIXTH AMENDMENT ISSUES AT TRIAL

A. Double Jeopardy

The complicated issue of double jeopardy was addressed in \textit{State v. Bad Horse}\textsuperscript{163} when the defendant contended that his conviction of robbery in the first trial, with an acquittal of the charge of deliberate homicide, was legally inconsistent and unsupportable. The defendant also contended that the law of the case on this point was established in his first appeal of his conviction, and that the state was collaterally estopped from retrying the robbery conviction.\textsuperscript{164} The defendant was originally tried jointly with three other defendants on charges of deliberate homicide, aggravated kidnapping and robbery. In the first trial, defendant was found not guilty of deliberate homicide and not guilty of aggravated kidnapping, but guilty of robbery. On appeal in \textit{State v. Fitzpatrick},\textsuperscript{165} the supreme court reversed and remanded his conviction for robbery because of error in the instructions.

In \textit{Bad Horse} the court compared the issues in \textit{Bad Horse} with the problem addressed in \textit{Fitzpatrick}, where two jury instructions were legally inconsistent.\textsuperscript{166} Instruction No. 28 told the jury that if a conspiracy to commit a crime existed and a death happened in furtherance of the conspiracy, all the conspirators were guilty of the homicide. Instruction No. 36 told the jury that it might find any one of four verdicts.\textsuperscript{167} Fortunately for the defendant in \textit{Bad Horse} the jury in the first trial acquitted him on the charge of deliberate homicide, preventing retrial on that charge under the double jeopardy rule.\textsuperscript{168}

\textsuperscript{161.} \textit{Id.} at \textemdash, 614 P.2d at 1062.
\textsuperscript{163.} \textit{Id.} at \textemdash, 605 P.2d 1113 (1980).
\textsuperscript{164.} \textit{Id.} at \textemdash, 605 P.2d at 1115.
\textsuperscript{166.} \textit{Id.}
\textsuperscript{167.} \textit{Bad Horse,} \textit{Id.} at \textemdash, 605 P.2d at 1116.
\textsuperscript{168.} \textit{Id.}
The *Bad Horse* court refused to find that the verdicts were so inconsistent that defendant could never again be tried for robbery. The remand for retrial on the underlying charge of robbery was founded on the right of a defendant to receive a trial with a properly instructed jury. Therefore, a defendant is not subjected to double jeopardy by virtue of his retrial after reversal of his judgment of conviction.

The court also rejected the collateral estoppel argument, because the court had remanded for retrial on the charge of robbery so that the defendant could receive a trial with a properly instructed jury. Collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties. In *Benton v. Maryland*, the United States Supreme Court held that collateral estoppel is a part of the Fifth Amendment's guarantee against double jeopardy. In *Bad Horse*, however, the conviction of robbery was not a final judgment, because verdicts may be inconsistent and yet legally supportable and defendant secured a reversal and remand from the supreme court.

In *State v. Davison*, the sentence for five additional years under an enhancement statute, which mandated an increased prison sentence for an underlying crime if defendant used a dangerous weapon, was held not to subject the defendant to multiple punishments in violation of double jeopardy. In *North Carolina v. Pearce*, the United States Supreme Court said that the double jeopardy clause protects against multiple punishments for the same offense. The issue in *Pearce*, however, was whether the prohibition against double jeopardy was violated when punishment for an offense was not fully credited in imposing sentence upon a new conviction for the same offense. The court in *Davison* held that the statute involved merely enhances the penalty based on an additional factor—the use of a firearm—and does not create or pe-

---

171. Bad Horse, - Mont. _, 605 P.2d at 1117.
174. Id.
nalize the defendant for a separate offense.¹⁷⁹

Federal District Court Judge Russell E. Smith issued an order denying a petition for writ of habeas corpus in Campbell v. Crist,¹⁸⁰ rejecting defendant's double jeopardy arguments that he had received three convictions for one offense of robbery. The court held that one judgment of conviction was ordered following a plea of guilty.¹⁸¹ A second order merely placed the defendant on probation and imposed conditions. The third order, a revocation of probation enforcing conditions of the initial judgment, did not offend the double jeopardy clause.¹⁸²

B. Jury Selection

Voir dire affords the defendant an opportunity to probe attitudes of potential jurors concerning issues at trial. In McKenzie III,¹⁸³ the defendant claimed prejudice because he was not allowed to voir dire the jury on the subject of mental disease or defect. The Montana Supreme Court had previously held that where notice of a defense of mental disease or defect is given, a refusal to allow voir dire on this defense constitutes prejudicial error.¹⁸⁴ The McKenzie III court held that the defendant was properly not allowed to voir dire on this defense because he did not give any notice of the defense.¹⁸⁵

The defendant in State v. Sunday¹⁸⁶ claimed prejudice from denial of his motion for individual voir dire. The court held, however, that the defendant never demonstrated the extent of any pretrial publicity, its inflammatory nature or whether it had any effect on prospective jurors.¹⁸⁷ Moreover, the defense passed the jury panel without challenging any potential juror for cause due to bias or prejudice.¹⁸⁸

The Montana Supreme Court requires a high level of juror prejudice to mandate the disqualification of a juror. "It is only where they form fixed opinions on the guilt or innocence of the defendant which they would not be able to lay aside and render a verdict based solely on the evidence presented in court that they

¹⁷⁹. Davison, _ Mont. _, 614 P.2d at 498.
¹⁸⁰. 37 St. Rptr. 1328 (1980).
¹⁸¹. _Id_. at 1330.
¹⁸². _Id_., citing United States v. Clayton, 588 F.2d 1288 (9th Cir. 1979).
¹⁸⁷. _Id_. at _, 609 P.2d at 1193.
¹⁸⁸. _Id_.

https://scholarship.law.umt.edu/mlr/vol42/iss2/8
become disqualified as jurors." This standard was applied in *State v. Bashor* to uphold the trial court's refusal to allow a challenge for cause against the dancing instructor of a homicide victim's daughter. Although the prospective juror told defense counsel she was not sure she could be fair and impartial, she later assured the court that she could put emotions aside and judge the defendant solely on evidence presented at trial.

Another aspect of the jury selection process is the right to observe deliberations of public bodies. This right is expressly granted under Article II, section 9 of the Montana Constitution, which provides:

> Right to know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. (Emphasis added).

After a district court ordered individual voir dire examination of prospective jurors in a criminal case closed to the press and the public, a newspaper sought a writ of supervisory control from the supreme court directing the district court to: (1) permit a newspaper reporter to attend and observe the voir dire; and (2) hold a hearing to determine whether defendant's right to a fair trial was jeopardized. The supreme court in *Great Falls Tribune v. District Court* directed the district court to hold the hearing. Upon finding no prejudice to the defendant, the supreme court entered an order vacating the closure and directed that the press and public be allowed to observe the voir dire.

The supreme court found nothing in news articles, scripts of radio and television broadcasts, or in subjecting prospective jurors to an open and public voir dire examination that would deny or impair defendant's right to a speedy trial by an impartial jury under federal and state constitutional guarantees. The publicity in this case was neither massive nor pervasive enough to influence jurors and insure a conviction as in *Sheppard v. Maxwell* or *Estes v. Texas*.

191. _ Id. _ at _, 614 P.2d at 478.
193. _ Id. _ at _, 608 P.2d at 121.
194. _ Id. _ at _, 608 P.2d at 120.
The purpose of voir dire in a criminal proceeding is to determine the existence of prejudice and bias of prospective jurors and to enable counsel to exercise peremptory challenges. The court in *Great Falls Tribune* was unable to see how closing the examination to the public was necessary to guarantee a fair trial. In upholding the Montana constitutional provision as a stricter standard than that imposed by the United States Constitution, the Montana Supreme Court stated: "Closing any part of the trial is simply the first step down the primrose path that leads to destruction of those societal values that open, public trials promote. Nothing short of strict and irreparable necessity to ensure defendant's right to a fair trial should suffice."

C. Opening Statement and Closing Argument

In *State v. West*, the prosecutor recited in the opening statement hearsay evidence which connected the defendant with the charge of theft. The hearsay evidence was subsequently ruled inadmissible, and was held highly prejudicial, requiring reversal of the conviction.

MCA § 46-16-501(6) (1979) allows an attorney to comment on the evidence of the case in closing argument. An attorney may argue and draw reasonable inferences from evidence so long as there are facts to support the statements. The state, in *State v. Bashor*, made statements contrary to results of a polygraph examination which had been given to a prosecution witness and which had been excluded from evidence by the court. The Montana Supreme Court held that because the state presented evidence to support the prosecution's version of the homicide, the closing remarks did not exceed the bounds of comment and reasonable argument which may be made.

198. Id. at 190, 608 P.2d at 120.
199. *Id.* at 190, 608 P.2d at 121.
200. *Id.* at 190, 617 P.2d 1298, 1300 (1980).
201. MCA § 46-16-401(6) (1979) provides:

> When the jury has been charged, unless the case is submitted to the jury on either side or on both sides without argument, the county attorney must commence and may conclude the argument. If several defendants having several defenses appear by different counsel, the court must determine their relative order in evidence and argument. Counsel, in arguing the case to the judge or jury, may argue and comment upon the law of the case as given in the instructions of the court, as well as upon the evidence of the case.

203. *Id.* at 277, 614 P.2d 470, 480 (1980).
204. *Id.* at 277, 614 P.2d at 482.
D. The Right to Confront Witnesses

The Sixth Amendment of the United States Constitution guarantees a defendant the right to confront and cross-examine witnesses. In *State v. Sheriff*,[205] the district court did not allow a defendant being tried for robbery to cross-examine the police officer as to defendant's willingness to take a polygraph test.[206] On review, the supreme court held that the omission of the inquiry did not so prejudice the defendant that a different verdict would have been reached.[207] The prosecution did not contend that the defendant failed to cooperate with the police. The defendant was able to take the stand and testify in his own defense as to his full cooperation with the police.[208] The fact that he was also willing to take a polygraph test would not be determinative in the case, especially when such tests generally are not allowed as evidence in a criminal trial.[209]

The Sixth Amendment also guarantees a criminal the right to testimony of witnesses in his favor.[210] The Montana Supreme Court held in *State v. Higley*[211] that it does not, however, guarantee the right to any and all witnesses, regardless of their competency and knowledge.

The supreme court also found that the Montana rules limiting inquiry into sexual conduct of the victim[212] are essential to preserve the integrity of the trial and to prevent it from becoming a trial of the victim, whose character is not in issue.[213] The court found no denial of the defendant's rights in this limitation. The Montana Rules of Evidence[214] allow the judge to inquire into spe-

---

206.  Id. at _, 619 P.2d at 184.
207.  Id.
208.  Id.
211.  — Mont. _, 621 P.2d 1043 (1980).
212.  MCA § 45-5-503(5) (1979) prevents introduction of evidence of the victim's sexual conduct and provides in part: "No evidence concerning the sexual conduct of the victim is admissible in prosecutions under this section . . . ." MONT. R. EVID. 608(b) provides in pertinent part:

Specific instances of conduct of a witness for the purpose of attacking or supporting his credibility, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness . . . .
213.  Higley, — Mont. _, 621 P.2d at 1050.
214.  MONTR. R. EVID. 405(b), Commission Comments set out the justification for keeping out evidence of specific acts of conduct:

This method of proof is the most persuasive of the three contained in the
cific acts on cross-examination, if such acts are probative of truthfulness of a witness. It is doubtful, however, that testimony concerning the victim’s sexual views comes within this rule at all. The court held that it is clearly within the judge’s discretion to exclude this evidence if it is irrelevant or too prejudicial. The court also held that this kind of evidence has little if any probative value.

X. POST-TRIAL CONSIDERATIONS

A. Sentencing

1. Substantive Issues

The Montana Supreme Court in State v. Sunday applied several important sentencing considerations. Sentences of one hundred years each for two deliberate homicides, ten years for burglary, and ten years for theft, the term to be served consecutively with defendant ineligible for parole or the work furlough program were held not excessive under the circumstances. The court justified the sentences with such factors as the need to protect society because of defendant’s extensive criminal record, his uncaring attitude, and the malevolent way in which he committed the crimes. The district court, however, did not have the authority to sentence defendant to twenty years for burglary because the maximum possible sentence was ten years imprisonment under Montana statute.

Even though the defendant in State v. Stumpf was sentenced well within statutory limits after conviction of tampering with witnesses, the trial court abused its discretion when it failed to specify reasons for the sentence. The supreme court held that the statute proscribing tampering with witnesses was not required to contain sentencing guidelines, and recognized the trial court’s rule, and is also the most likely “to arouse undue prejudice, to confuse and distract, to engender time-consuming side issues and to create risk of unfair surprise.” McCormick, Handbook of the Law of Evidence 443 (2d ed. 1972). As a result of the effect of this method of proof, it is generally restricted to situations where character is in issue, when such proof is central to the outcome of the case.

216. See Mont. R. Evid. 608(b), Commission Comments.
217. Higley, _ Mont. _, 621 P.2d at 1050.
219. Id. at __, 609 P.2d at 1198.
220. Id. See also MCA § 46-18-202 (1979).
221. Sunday, _ Mont. _, 609 P.2d at 1198.
223. Id. at __, 609 P.2d at 299.
right to exercise discretion in sentencing within statutory limits.\textsuperscript{224} The court noted that the requirement that the sentencing document state specific reasons for imposing a particular sentence\textsuperscript{225} is consistent with the Montana Canons of Judicial Ethics.\textsuperscript{226}

In a different context, the supreme court determined in \textit{Matter of McFadden}\textsuperscript{227} that a sentencing court must state its reasons underlying a determination that an offender was to be designated as a dangerous offender. Under MCA § 46-18-404(1)(b) (1979), an individual may be designated a dangerous offender, if, in the discretion of the sentencing court, he is determined to represent a substantial danger to other persons or society. The \textit{McFadden} record revealed that the district court never made a finding of substantial danger, but rather concluded that petitioner was not rehabilitatable because he had not been truthful with the court.\textsuperscript{228} The designation as dangerous offender therefore was not supported by substantial credible evidence.\textsuperscript{229}

The refusal of the sentencing judge to designate the defendant in \textit{State v. Higley} as either "dangerous" or "non-dangerous" without a psychological examination of defendant did not prejudice the defendant.\textsuperscript{230} MCA § 46-18-102 (1979) requires a sentence to be rendered within a "reasonable time." Delays will be upheld if they are found to be in the interest of justice.\textsuperscript{231} The delay in \textit{Higley} appeared to have been in the best interests of the defendant and was held reasonable under the circumstances.\textsuperscript{232} Additionally, the lack of designation requires that the defendant be considered non-dangerous for purposes of parole under Montana statute.\textsuperscript{233}

\begin{itemize}
\item \textsuperscript{224} \textit{Id.}, citing MCA § 45-7-206 (1979).
\item \textsuperscript{225} Ballantyne v. Anaconda Co., 175 Mont. 406, 574 P.2d 582 (1978) (sets forth why the trial court should record reasons underlying its decisions).
\item \textsuperscript{226} Montana Canons of Judicial Ethics, Canon 19, 144 Mont. at xxvi-xxvii provides in pertinent part:
\begin{quote}
In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.
\end{quote}
\item \textsuperscript{227} \textit{Id.} at \textit{Mont.} at \textit{Mont.} at 608 P.2d 191 (1980).
\item \textsuperscript{228} \textit{Id.} at \textit{Mont.} at 608 P.2d at 192.
\item \textsuperscript{229} Id.
\item \textsuperscript{230} Higley, \textit{Mont.} at \textit{Mont.} at 621 P.2d at 1056.
\item \textsuperscript{231} Balduc v. United States, 363 F.2d 832, 833-34 (5th Cir. 1966); Treakle v. United States, 326 F.2d 82, 83 (9th Cir. 1964).
\item \textsuperscript{232} Higley, \textit{Mont.} at \textit{Mont.} at 621 P.2d at 1056.
\item \textsuperscript{233} \textit{Id.}, citing MCA § 46-18-404(3) (1979).
\end{itemize}
2. Procedural Issues

Irregularities in presentence report procedures were the bases of several petitions to the Montana Supreme Court. The petitioner in *Spurlock v. Crist*\textsuperscript{234} claimed that he was prejudiced because he did not have an opportunity to examine the presentence report prior to sentencing nor to cross-examine witnesses with respect to the report. The supreme court held, however, that although a convicted defendant has a due process guarantee against a sentence predicated on misinformation,\textsuperscript{235} he will not be granted a resentencing where there are no errors or ambiguities in the presentence report.\textsuperscript{236}

The defendant in *State v. Lopez*\textsuperscript{237} was also not entitled to relief on the basis that his presentence report did not consider needs and potentialities of defendant or any aspects of rehabilitation, because defendant was given copies of the presentence and psychological reports and was able to cross-examine the author of his presentence report, and because many witnesses testified for defendant at the dispositional hearing.\textsuperscript{238}

In *State v. Higley*,\textsuperscript{239} the defendant’s right to be sentenced under circumstances free from misinformation was violated by an in-chambers interview conducted by the district judge with the victim to determine her feelings as to an appropriate sentence; defendant was not present.\textsuperscript{240} Even though the United States Supreme Court has found no violation of due process in denying confrontation of witnesses in a sentencing hearing,\textsuperscript{241} and the Montana Supreme Court has noted that the right of cross-examination in a presentencing hearing is a discretionary matter with the trial court,\textsuperscript{242} the lack of cross-examination or chance to refute the information in this case was held to violate defendant’s due process right to be sentenced free from misinformation.\textsuperscript{243}

While there is no right to a jury trial on sentencing or compelled attendance of persons supplying hearsay information, *Cava-
naugh v. Crist\textsuperscript{244} again required certain protections in ordinary sentencing. A defendant has the right to counsel at sentencing,\textsuperscript{245} to have his sentence based on accurate information,\textsuperscript{246} and to be free of abuse of the judge's sentencing discretion.\textsuperscript{247} In addition, a district judge must now state reasons for the sentence he imposed in the record in every case.\textsuperscript{248}

*State v. Haynie*\textsuperscript{249} affirms an indigent criminal defendant's right to counsel at sentencing, but recognizes that this right to counsel may be lost by understanding and knowing waiver by the defendant.\textsuperscript{250} The *Haynie* defendant, no novice to the criminal justice system, rejected the offer to consult with his stand-in counsel at the sentencing hearing.\textsuperscript{251} The court held that the background, experience, and conduct of the accused, and the circumstances of the case indicated an understanding and knowing waiver of the right to counsel.\textsuperscript{252}

B. Parole and Probation

1. Limiting Parole Eligibility

The defendant in *State v. Beachman*\textsuperscript{253} claimed that the trial court erred in sentencing him under a statute not in effect when the offense was committed. The offense in this case occurred in late June, 1975; defendant was apprehended, tried, and convicted in 1979.\textsuperscript{254} The trial court's declaration that the defendant was a dangerous offender and ineligible for parole under statutes enacted by the 1977 legislature\textsuperscript{255} was held ex post facto as applied to defendant and unconstitutional, and was ordered stricken from the judgment and sentence.\textsuperscript{256}

\begin{itemize}
\item 244. _Mont._ __, 615 P.2d 890 (1980).
\item 249. _Mont._ __, 607 P.2d 1128 (1980).
\item 251. Haynie, _Mont._ __, 607 P.2d at 1131.
\item 252. _Id._
\item 253. _Mont._ __, 616 P.2d 337 (1980).
\item 254. _Id._ at __, 616 P.2d at 440.
\item 256. Beachman, _Mont._ __, 616 P.2d at 441.
\end{itemize}
Although the statute, which provides that a designation as a nondangerous offender enables a prisoner to be eligible for parole after he had served one quarter of his sentence, was amended by the 1979 legislature, the petition for postconviction relief in *State v. McFadden* had to be considered in accordance with statutory provisions in effect at the time of sentencing in 1978.

The constitutionality of the Montana statute permitting a judge to sentence convicted persons to imprisonment with no possibility of parole or participation in a furlough program was upheld in *Cavanaugh v. Crist*. Due process standards are required where a sentence is to be enhanced on the basis of a psychiatric evaluation, past behavior, and pursuant to a separate act. These requirements, however, do not apply to MCA § 46-18-202(2) (1979), which is not a sentence enhancement statute, because the statute does not permit district judges to add any time beyond the statutory maximum for the underlying offense. The restriction on parole and furlough eligibility has no existence beyond the term of the sentence imposed for the underlying offense.

The *Cavanaugh* court held that the statute does not deprive defendants of equal protection by providing different punishment for different persons for the same act, because every sentencing provision allows the sentencer to consider past life and habits of the offender.

Parole and participation in the furlough program are privileges, not rights. The statute in question merely allows a district judge to restrict conditional release and determine that a defendant should serve his full sentence for the protection of society. The supreme court also found the contention that the statute unlawfully delegates legislative authority to the judicial branch by permitting excessive judicial discretion was without merit. A district judge was found to be particularly well-positioned to predict

262. Cavanaugh, _ Mont. _, 615 P.2d at 893.
263. _Id._
264. U.S. Const. amends. V and XIV.
267. _Id._
268. _Id._
whether the restriction is necessary for the protection of society in light of the offender's personal and criminal history, apparent willingness to conform to society's rules, and other factors.269

2. Conditions of Parole or Probation

MCA § 46-18-201(b) (1979) permits a trial court, when placing a person on probation, to impose any reasonable restrictions on the defendant during the period of probation, as long as the conditions are reasonably related to rehabilitation or the protection of society. MCA § 56-18-202 (1979) is a broad grant of authority permitting a trial court to impose additional restrictions which may be considered necessary to carry out these two objectives. Article II, section 28 of the Montana Constitution sets guidelines for imposition of conditions by providing that "[l]aws for the punishment of crime shall be founded on the principles of prevention and reformation . . . ."

Conditions imposed on defendant's probation that (1) he submit to search of his person, premises, or vehicles at any time by lawful authorities, without a search warrant and (2) he submit to a polygraph examination at any time, the results of which may be used in any proceeding in court in which defendant is involved were constitutionally attacked in State v. Fogarty.270 While dicta in the majority opinion in State v. Means271 seemed to indicate that a search provision is not constitutionally offensive, the supreme court in Fogarty noted that the opinion turned on the conclusion that probable cause to search existed independent of the provision. The court therefore expressly overruled Means to the extent that it could be interpreted as permitting an unlimited search provision as a condition of parole.272

The court also held that defendant could not be required to submit to a polygraph examination at any time because the condition was overly broad under the Fourteenth Amendment of the United States Constitution.273 The court further held that the unlimited search provision was patently unconstitutional because a

269. Id.
270. — Mont. __, 610 P.2d 140 (1980).
272. Fogarty, — Mont. __, 610 P.2d at 144. The circumstances underlying the imposition of the questioned provisions shed little light on why the conditions were imposed. The search and polygraph provisions were inserted in the judgment as part of a ten-year suspended sentence given to defendant after he entered a guilty plea for selling a lid of marijuana to an acquaintance. The court also found the record silent as to why the trial court imposed either condition. Id.
273. Fogarty, — Mont. __, 610 P.2d at 144.
search warrant based on probable cause must be obtained before a probationer's residence can be searched and because a search must be reasonable as to time, place, and manner.274

The Fogarty court held that the state has a right to require a probationer to submit to warrantless searches or polygraphs only to the extent that he can legitimately be denied his full constitutional protections as a result of his status.275 A defendant who accepts conditions of probation does not thereby waive the right to attack the constitutionality of the conditions, because the waiver cannot be termed voluntary when the alternative is prison.276 A probationer must expect that his constitutional rights may be justifiably limited during probation, but the limitations must be reasonable.277 A probationer's protection against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution would not prevent requiring him to answer all reasonable inquiries of his probation officer.278

The Fogarty court reasoned that a probationary status can and should carry a reduced expectation of privacy.279 Prosecuting attorneys and law enforcement officers are not involved in the probation process, however, and therefore a sentencing court may not permit them to search the probationer without a warrant as a condition to probation.280

The Montana Supreme Court in Fogarty recommended that if, upon consideration of the circumstances of the case, the sentencing court determines that the conditions of parole should include a reasonable search or polygraph provision, the court should state the reasons on the record.281

Another question underlying the use of a polygraph clause is the use to which the test results are put. The Fogarty court held that test results adverse to the probationer are not sufficiently trustworthy in and of themselves to cause revocation of probation.282

274. Id. See U.S. CONST. amend. IV; MONT. CONST. art. II, §§ 10 and 11.
275. Id.
276. Id.
277. Fogarty, __ Mont. __, 610 P.2d at 146.
278. Id. at ___, 610 P.2d at 150.
279. Id. at ___, 610 P.2d at 151. See also U.S. CONST. amend. IV; MONT. CONST. art. II, §§ 10 and 11.
280. Fogarty, __ Mont. __, 610 P.2d at 151.
281. Id. at ___, 610 P.2d at 154.
282. Id.
C. Post-Conviction Relief

The district judge in *State v. Higley* denied the defendant’s request to be present at a post-conviction hearing held to determine whether defendant was eligible for bail pending appeal.\(^{283}\) The Montana Supreme Court held that defendant is not required to be present at proceedings occurring after the verdict, because these proceedings are not part of the trial.\(^{284}\)

MCA § 46-21-102 (1979) provides that “[a] petition for . . . relief may be filed at any time after conviction.” *In re McNair*\(^{285}\) raised the issue of whether the doctrine of laches would apply to prevent a defendant from challenging the validity of his sentence eight and one-half years after imposition of sentence. The Montana Supreme Court found that the Montana legislature did not intend to impose an absolute time constraint on the filing of an application for post-conviction relief.\(^{286}\)

The finding that petitioner was entitled to file his petition at any time did not, however, necessitate a finding that he was entitled to the relief sought. Numerous federal courts have considered the problem of delay in 28 U.S.C. § 2255 motions for post-conviction relief, with many courts finding that delay can have a negative effect on the good faith and credibility of the moving party.\(^{287}\)

In addition to the problem of good faith, the *McNair* court noted that long delay may prove to be highly prejudicial if the state is forced to try a case eight and one-half years later. The practical problems of dying witnesses, fading memories, and changing government officials demand that the applications for relief be made promptly.\(^{288}\) Therefore, the *McNair* court was entitled to

\(^{283}.\) - Mont. —, 621 P.2d 1043, 1057 (1980).

\(^{284}.\) Id., citing *State v. Peters*, 146 Mont. 188, 197, 405 P.2d 642, 647 (1965) (not error for defendant not to be present at a motion for new trial).

\(^{285}.\) — Mont. —, 615 P.2d 916, 917 (1980).

\(^{286}.\) Id., citing *Heflin v. United States*, 358 U.S. 415, 420 (1959) (Stewart, J., concurring), in which the court noted that a federal statute, 28 U.S.C. § 2255 (1976), which is similar to MCA § 46-21-102 (1979), “means that, as in habeas corpus, there is no statute of limitations, no res judicata, and that the doctrine of laches is inapplicable.”


\(^{288}.\) See *Desmond v. United States*, 333 F.2d 378, 381 (1st Cir. 1964). In *Pacelli v. United States*, 588 F.2d 360, 365 (2d Cir. 1978), cert. denied, 441 U.S. 908 (1979), the court cited Rule 9(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts:

A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.
take the delay into account on the question of defendant’s good faith and on the question of possible prejudice to the state. 289

D. Ineffective Assistance of Counsel

A defense attorney’s failure to render adequate assistance results in a denial of the defendant’s constitutional right to counsel and therefore requires reversal of his conviction. 290 In Montana the right to counsel is guaranteed by the Montana Constitution as well as by the Sixth Amendment. 291 Both these provisions guarantee that the right to counsel includes the right to effective assistance of counsel. 292 The United States Supreme Court has largely left the determination of what constitutes ineffective assistance of counsel to the “good sense and discretion of the trial court.” 293 The federal circuit courts use various standards for judging ineffectiveness. The Third 294 and Eighth Circuits 295 use an effectiveness standard requiring that defense attorneys act with the prevailing customary skill and knowledge. The Fourth Circuit 296 requires that defense counsel act within a “range of incompetence” 297 to be found ineffective. The Tenth Circuit 298 has adopted a reasonableness test by which an attorney is to represent his client in the manner expected of a “reasonable, competent, and skillful defense attorney.” 299 The First, 300 Fifth, 301 Sixth, 302 and Ninth Circuits 303 require that coun-

289. McNair, - Mont. - , 615 P.2d at 918.
294. See, e.g., United States v. Williams, 615 F.2d 585, 593-94 (3d Cir. 1980) (counsel’s failure to raise defense may have resulted in representation below standard of customary skill and knowledge).
295. See, e.g., Dupree v. United States, 606 F.2d 829, 830-31 (8th Cir. 1979), cert. denied, 445 U.S. 919 (1980) (defendant must show that counsel failed to perform an essential duty and that this failure was prejudicial).
296. See, e.g., Marzullo v. Maryland, 561 F.2d 540, 546-47 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978) (failure by defense counsel found to be outside the range of competence).
297. Id. at 543.
298. See, e.g., Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980) (lack of “vigor” by counsel did not fall below that expected of a reasonable, competent and skillful attorney).
299. Id. at 278.
300. See, e.g., United States v. Thomann, 609 F.2d 560, 566-67 (1st Cir. 1979) (overall defense found to be reasonably competent despite counsel’s failure to object to a questionable charge).
301. See, e.g., Lucas v. Wainwright, 604 F.2d 373, 374-75 (5th Cir. 1979) (per curiam) (failure to object held not ineffective assistance).
302. See, e.g., United States v. Renfro, 600 F.2d 55, 58-59 (6th Cir.), cert. denied, 444
sel's assistance be reasonably effective. The United States Supreme Court has also utilized this standard of reasonably effective assistance in determining whether counsel's misevaluation of a constitutional claim provides a basis for challenging a subsequent guilty plea.304

The Second Circuit305 is the only circuit which still uses the traditional "sham and mockery test."306 Since the Supreme Court employed the reasonably effective assistance test, the constitutionality of the "sham and mockery test" has been questioned.307 This has led to its widespread abandonment.

In State v. Rose308 the Montana Supreme Court also abandoned the "sham and mockery test." To prevail on a claim of constitutionally inadequate representation under that test, a defendant had "the burden of proving his counsel's performance was so woefully inadequate as to shock the conscience of the court and make the resultant proceeding a farce and mockery of justice."309 To determine the adequacy of the representation, the court would examine the services rendered by defense counsel, including specific alleged mistakes committed at trial. Yet, the court was careful not to test the services rendered by defense counsel against the "greater sophistication of appellate counsel" nor by appellate counsel's "opportunity to study the record at leisure and cite different tactics of perhaps doubtful efficacy."310

In Rose, the Montana Supreme Court adopted the "reasonably effective assistance test" stating that "persons accused of crime are entitled to the effective assistance of counsel acting within the range of competence demanded of attorneys in criminal cases."311

U.S. 876 (1979) (overall defense found to be reasonably effective assistance).

303. See, e.g., United States v. Campbell, 616 F.2d 1151 (9th Cir. 1980) (good faith error by counsel not ineffective assistance); United States v. Currie, 589 F.2d 993, 995-96 (9th Cir. 1979) (several specific alleged errors found not to have prejudiced the defendant).


305. See, e.g., Brinkley v. Lefevre, 621 F.2d 45, 47-48 (2d Cir. 1980) (per curiam) (refusal to abandon sham and mockery test despite dissenting opinion urging that it should be unconstitutional).

306. The sham and mockery test was derived from the outmoded belief that the Sixth Amendment guarantees only the assistance of counsel, rather than effective assistance. See Diggs v. Welch, 148 F.2d 667, 668 (D.C. Cir. 1945). Under the sham and mockery standard the defendant was required to show that his counsel's incompetence rendered the proceeding a farce and mockery of justice. Id. at 669.


310. Id.

311. Rose, _ Mont. _, 608 P.2d at 1081.
Among the reasons the court cited for adopting this test was that it provides a more objective standard for determining ineffectiveness.\textsuperscript{312}

Under this new test the court still considers the alleged specific failures committed by the defense attorney. The court will determine whether these are "errors a reasonably competent attorney acting as a diligent conscientious advocate would not have made."\textsuperscript{313} Where the claim of ineffective assistance of counsel rests upon specific alleged errors committed at trial, the court will not grant relief unless it appears that the defendant was prejudiced by counsel's conduct.\textsuperscript{314}

For the most part courts have generally not established specific criteria which show when the standard of reasonably effective assistance has been breached. Certain acts and omissions, however, appear to be especially likely to establish a breach of this standard. Courts have often criticized an attorney's neglect to properly prepare the case,\textsuperscript{315} his failure to investigate or develop evidence favorable to his client's case,\textsuperscript{316} or his failure to appeal a conviction or request a mistrial.\textsuperscript{317} Failure to provide an indigent client with a necessary expert witness may also constitute ineffective assistance.\textsuperscript{318} Yet, minimal pretrial client contact may not by itself constitute evidence of ineffective assistance.\textsuperscript{319}

The Montana Supreme Court, in \textit{State v. Poncelet},\textsuperscript{320} ruled that a defendant who elects to proceed pro se, and is given every effort of assistance by the court in submitting his case to the jury,
cannot complain on appeal that the quality of his own defense acted to his detriment by not amounting to effective counsel.\footnote{321}

Carol Everly and Greg S. Mullowney

\footnote{321. \textit{Id.} at \textemdash, 610 P.2d at 709.}