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## Civil Procedure

Paul J. Luwe  
*University of Montana School of Law*

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# MONTANA SUPREME COURT SURVEY

## SURVEY EDITOR'S NOTE

This issue of Volume 43 contains the annual Montana Supreme Court Survey. The primary purpose of the survey is to present research and analysis of Montana Supreme Court decisions that have significant impact on specific areas of the law. The areas surveyed were decided upon by the Montana Law Review Editorial Board in conjunction with the faculty of the University of Montana School of Law. Case selection within each area was left to the discretion of the individual authors. Except for the survey of estates, wills and trusts, which covers 1980 and 1981, all surveys consider only 1981 supreme court decisions.

**Robert C. Reichert**

## CRIMINAL PROCEDURE

**Paul J. Luwe**

### INTRODUCTION

This survey examines selected cases in the area of criminal procedure decided by the Montana Supreme Court in 1981. It does not include criminal procedures applicable under the Montana Youth Court Act. The practitioner should consult other resources, such as the Montana Criminal Law Information Research Center,<sup>1</sup> for more information.

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1. Montana Criminal Law Information Research Center (Montclair), University of Montana School of Law, Missoula, Montana, provides a case synopsis of all recent criminal law, procedure and evidentiary cases, past memoranda of law and original research to public defenders, court appointed lawyers, county and city attorneys, judges and any other publicly paid members of the criminal justice system.

## I. FOURTH AMENDMENT

### A. *Private Searches*

The fourth amendment has been interpreted to protect an individual's justifiable expectation of privacy.<sup>2</sup> Unlike the federal constitution, the Montana Constitution expressly provides for an individual's right to privacy.<sup>3</sup> Therefore, a search and seizure in Montana evokes two separate constitutional protections: freedom from unreasonable search and seizure, and a right to privacy.<sup>4</sup> These two constitutional protections utilize two different constitutional standards for judging a search.<sup>5</sup> One standard requires that the search and seizure must be reasonable,<sup>6</sup> and the other mandates that there be a compelling state interest to justify the invasion of an individual's right to privacy. A violation of either one of these constitutional provisions will result in the exclusion of evidence.

In *State v. Hyem*,<sup>7</sup> the Montana Supreme Court continued to apply the search and seizure and privacy provisions to the actions of private individuals.<sup>8</sup> In *Hyem* two individuals posing as potential purchasers of defendant's home entered the defendant's house, accompanied by a realtor, to search for a stolen pair of Rossignol skis.<sup>9</sup> During the showing of the house, one of the furtive searchers purposely dropped his sunglasses beside a bed and then looked under it, spotting the skis. He then removed them halfway from under the bed to ascertain the serial number. A search warrant was

2. See *Katz v. United States*, 389 U.S. 347, 351 (1967).

3. MONT. CONST. art. II, § 10 provides: "The right of individual privacy is essential to the well being of a free society and shall not be infringed without the showing of a compelling state interest."

4. MONT. CONST. art. II, § 11 and § 10, respectively. The search and seizure provision, MONT. CONST. art. II, § 11, which mirrors the fourth amendment provides:

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

5. *Id.* See also Survey, *Criminal Procedure: The Exclusionary Rule*, 40 MONT. L. REV. 132, 132-39 (1979).

6. Under the search and seizure provision there are actually two standards depending upon which part of the provision is applicable. The other part of the search and seizure provision requires that search warrants be based upon probable cause.

7. — Mont. —, 630 P.2d 202 (1981).

8. See *State v. Helfrich*, — Mont. —, 600 P.2d 816 (1979); *State v. Brecht*, 157 Mont. 264, 485 P.2d 47 (1971) (decided under the 1889 Montana Constitution).

9. The defendants were absent from the house during the search. The defendants were aware that the realtor had keys and had shown the house to other prospective purchasers in their absence.

then issued based upon the individual's discovery. The district court suppressed the evidence and the state appealed.<sup>10</sup>

The Montana Supreme Court determined that the search by these private citizens had violated both the search and seizure provision and the privacy provision of the Montana Constitution. The court held, under the first constitutional standard, that the search was per se unreasonable because it did not fall within any of the exceptions to the warrant requirement. The court reasoned that, before the warrantless search by the private individuals, neither one of the searchers "could have obtained a valid search warrant because they were not possessed of their own knowledge, or through demonstrably reliable informants, of facts sufficient to establish probable cause, an essential ground for the issuance of a warrant. Section 46-5-202(1)(b), MCA."<sup>11</sup> The court's reasoning leaves open the possibility that the court might reach a different conclusion if before the warrantless search, the searchers have sufficient grounds to obtain a valid search warrant.<sup>12</sup>

Under the privacy provision, the court held that the defendants' constitutional right to privacy was infringed upon without a showing of a compelling state interest. The Montana Supreme Court reasoned that searchers acting in their individual capacities and not for the state could never establish a compelling state interest.<sup>13</sup> The court also rejected the state's argument that the defendants waived their right of privacy by consenting to allow the house to be shown to prospective purchasers.<sup>14</sup>

### B. *Exclusionary Rule*

The exclusionary rule has been the subject of considerable

10. Hyem, \_\_\_ Mont. \_\_\_, 630 P.2d at 204-05.

11. *Id.* at \_\_\_, 630 P.2d at 205. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 46-5-202(1)(b) (1981) provides in pertinent part: "Any judge may issue a search warrant upon the written or telephonic application of any person, made under oath or affirmation before the judge, which: . . . (b) states facts sufficient to show probable cause for issuance of the warrant."

12. Under such hypothetical facts the result would be the same. The searchers would have still infringed upon the defendants' privacy without a compelling state interest. See *infra* text accompanying note 13.

13. Hyem, \_\_\_ Mont. \_\_\_, 630 P.2d at 205-06. In order for private citizens to establish a compelling state interest, they must act "in concert or collusion with police officers." *Id.* at \_\_\_, 630 P.2d at 209.

14. *Id.* at \_\_\_, 630 P.2d at 209. The court reasoned that "even though the bedroom was accessible to the public, by placing the skis under the bed, out of the public's view, defendants sought to preserve the skis as private . . ." Thus, the defendants had a reasonable expectation of privacy and did not consent to a search and seizure of the personal property in their possession. *Id.*

criticism and legislative attempts to modify or abolish the rule.<sup>15</sup> The major function of the rule is to deter constitutional violations by eliminating the prosecutorial benefits of such violations.<sup>16</sup> The majority of jurisdictions will not exclude evidence unless the exclusion will have a deterrent effect. Thus, the nearly universal rule with regard to private searches is that evidence secured by private illegal searches, conducted without concerted governmental action, will not be excluded from a criminal trial, because private persons are generally not deterred by exclusion.<sup>17</sup> In Montana, however, the exclusionary rule has been applied consistently to evidence seized by private illegal searches.<sup>18</sup>

Despite contrary holdings in every other jurisdiction,<sup>19</sup> the Montana Supreme Court, in *Hyem*, did not waiver from its conviction that the exclusionary rule is applicable to private illegal searches. The court in reaffirming its application of the rule stated:

Montana law applies equally to agents of the state and to private individuals. *We have no duality of rights, one set of laws operating when state action is involved, and another set of laws applying when private action is involved; we avoid such anomalies as may occur when private individuals act for, but not in concert or collusion with police officers. We have not adopted a course of legal schizophrenia. An across-the-board application of the exclusionary rule results in a clear equality of result, and does not depend upon the fortuitous circumstances which might excuse in one situation a violation of constitutional rights, and discountenance such violations in another situation.*<sup>20</sup>

### C. Stop and Frisk

Montana's "stop and frisk" statutes<sup>21</sup> were enacted to codify

15. See H.B. 626, 47th Mont. Legis. (1981). The proposed statute to repeal the exclusionary rule was vetoed by the governor. House Journal, 47th Mont. Legis., at 2151 (1981).

16. See *Terry v. Ohio*, 392 U.S. 1 (1968). See also *United States v. Janis*, 428 U.S. 433, 446 (1976).

17. See *Burdeau v. McDowell*, 256 U.S. 465 (1921). See also W. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT*, § 1.6 at 110-45 (1978).

18. See *State v. Helfrich*, \_\_\_ Mont. \_\_\_, 600 P.2d 816 (1979); see also *State v. Brecht*, 157 Mont. 264, 485 P.2d 47 (1971).

19. Justice Morrison, dissenting in *Hyem*, states that Montana is the "only court which has applied the exclusionary rule to private action." *Id.* at \_\_\_, 630 P.2d at 210. See also Note, *Intrusion, Exclusion, and Confusion; State v. Helfrich: The Exclusionary Rule and Acts of Private Persons*, 41 MONT. L. REV. 281, 284-85 (1980). Even the states with an express provision for privacy in their constitution have limited the application of the exclusionary rule to state action.

20. *Hyem*, \_\_\_ Mont. \_\_\_, 630 P.2d at 208-09 (emphasis added).

21. MCA §§ 46-5-401 through -402 (1981).

the landmark result in *Terry v. Ohio*.<sup>22</sup> In *Terry*, the United States Supreme Court established that a police officer, who has a reasonable suspicion of illegal activity, is constitutionally privileged to stop a person, question him as to his identity and activities at the time, and frisk him for dangerous weapons, even in the absence of probable cause.<sup>23</sup> In the most recent post-*Terry* decision, *United States v. Cortez*,<sup>24</sup> the Supreme Court held that objective facts and circumstantial evidence suggesting that a particular vehicle is involved in criminal activity provides sufficient basis to justify a limited investigatory stop.<sup>25</sup> In light of this decision, the Montana Supreme Court, in *State v. Gopher*,<sup>26</sup> extended Montana's stop and frisk statutes to vehicle stops.

Prior to *Gopher*, stop and frisk principles did not apply to an individual in a vehicle.<sup>27</sup> The court, in dictum, stated that it was "inconceivable how stop and frisk [could] be applied to the stop of a defendant in a moving vehicle."<sup>28</sup> Probable cause was thus needed to initiate an investigatory stop.<sup>29</sup> In *Gopher* the court expressly set aside its previous dictum and adopted the particularized suspicion test of *Cortez*. The Montana Supreme Court held that "when a trained police officer has a particularized suspicion that the occupant of a vehicle is or has been engaged in criminal activity, or witness thereto, a limited and reasonable investigatory stop and search is justified."<sup>30</sup>

The state has a dual burden in showing that sufficient particularized suspicion existed to justify a limited investigatorial stop. The state must first demonstrate "objective data from which an experienced officer can make certain inferences."<sup>31</sup> A significant factor in the analysis of the officer's assessment is his experience and training. Experienced law enforcement officers are permitted

22. 392 U.S. 1 (1968).

23. *Id. Cf. Brown v. Texas*, 442 U.S. 47 (1980) (reasonable suspicion of illegal activity is necessary to justify an investigatory stop, even in a high crime area).

24. 449 U.S. 411 (1981).

25. *Id.* at 417-18.

26. — Mont. —, 631 P.2d 293 (1981).

27. *See generally State v. Radar*, 177 Mont. 252, 581 P.2d 437 (1978); *State v. Marshall*, 174 Mont. 278, 570 P.2d 909 (1977); *State v. Lahr*, 172 Mont. 32, 560 P.2d 527 (1977).

28. *State v. Radar*, 177 Mont. 252, 257, 581 P.2d 437, 440 (1978).

29. *See, e.g., State v. Marshall*, 174 Mont. 278, 570 P.2d 909 (1977) (holding probable cause did not exist to justify a stop of a vehicle, where officer acted on mere suspicion and on game warden's report that he observed the occupants of the vehicle smoking something); *State v. Radar*, 177 Mont. 252, 581 P.2d 437 (1978) (game warden's suspicion that defendants had stolen furniture in back of their pickup truck did not provide probable cause to stop and arrest defendants).

30. *Gopher*, — Mont. —, 631 P.2d at 296.

31. *Id.*

to draw certain inferences, deductions and conclusions which may well elude a layperson.<sup>32</sup> The second element of the state's burden is "a resulting suspicion that the occupant of a certain vehicle is or has been engaged in wrongdoing or was a witness to criminal activity."<sup>33</sup> This resulting suspicion must be judged from the viewpoint of those experienced in the law enforcement field.<sup>34</sup>

In *State v. Schatz*,<sup>35</sup> the Montana Supreme Court held that a police officer had a sufficient particularized suspicion to execute a lawful arrest and to seize items in plain view from the defendant's vehicle. Unlike the factual situation in *Gopher*, where the officer had stopped the vehicle, the vehicle in *Schatz* was already stopped. The defendant had turned suddenly, parked, turned off his lights, and ducked down in the front seat of his car.<sup>36</sup> The court applied the test adopted in *Gopher* and determined that the veteran officer with nine years of experience had a particularized suspicion sufficient "to effectuate a lawful arrest."<sup>37</sup> The court did not distinguish clearly whether it was applying the particularized suspicion test to the arrest or to the stop. The court's use of the word "lawful" to modify "arrest," however, indicates that the particularized suspicion test could have only been applied to the stop, since a "lawful" arrest requires probable cause.<sup>38</sup>

In *State v. Graves*,<sup>39</sup> however, the Montana Supreme Court created some uncertainty as to when Montana's stop and frisk statutes will be applied. The defendant was stopped by police officers who were responding to a call from an airport security guard. The airport security guard told the police that a stabbing had occurred and that he was following a black suspect. Upon arriving, a police officer parked his vehicle in front of the defendant and another police officer, while security guards parked their vehicles behind the defendant. One of the police officers approached the defendant and asked if he had been involved in an altercation. The defendant responded in the affirmative. When asked if a knife had been involved, defendant replied "yes" and turned the knife over to the officers, at which time the officers noticed blood on the de-

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32. *Id.* at \_\_\_, 631 P.2d at 295 (citing *Cortez*, 449 U.S. at 418).

33. *Id.* at 296.

34. *Cortez*, 449 U.S. at 418.

35. \_\_\_ Mont. \_\_\_, 634 P.2d 1193 (1981).

36. *Id.* at \_\_\_, 634 P.2d at 1194-95.

37. *Id.*

38. MCA § 46-6-401 (1981) requires that a peace officer have reasonable grounds before he makes an arrest. The "reasonable grounds" test and the "probable cause" requirement of the fourth amendment are substantial equivalents. *Draper v. United States*, 358 U.S. 307 (1959).

39. \_\_\_ Mont. \_\_\_, 622 P.2d 203 (1981).

defendant's hands. The defendant was then placed under arrest.<sup>40</sup> The defendant contended that the officers did not comply with the mandatory police procedures contained in Montana's stop and frisk statutes.<sup>41</sup> The Montana Supreme Court, however, held that there had been no stop and frisk,<sup>42</sup> and that the mandatory procedures were thus inapplicable. The court stated that "the defendant was merely stopped by the police and *asked investigatory questions designed to identify him as a witness or a suspect in the reported crime*. The defendant was not frisked, nor were the police officers searching for a dangerous weapon."<sup>43</sup>

The court's holding in *Graves*, that the stop and frisk statutes apply only where the defendant is frisked or where police officers are searching for dangerous weapons, is contrary to the plain language of the stop and frisk statutes. Montana Code Annotated [hereinafter cited as MCA] § 46-5-401(1) (1981) provides that "[a] peace officer may stop any person . . . if the stop is reasonably necessary to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person." MCA § 46-5-401(2)(b) (1981) provides that a peace officer may stop any person if "the stop is reasonably necessary to obtain or verify the person's identity or an account of the offense." Investigatorial stops for the purpose of asking questions "designed to identify a [person] as a witness or a suspect in the reported crime"<sup>44</sup> are precisely what the legislature intended MCA § 46-5-401 to cover.

## II. IDENTIFICATION

A conviction may be attacked on the ground that the defendant's identification constituted a denial of due process.<sup>45</sup> An iden-

40. *Id.* at \_\_\_, 622 P.2d at 205-06.

41. MCA § 46-5-401 through -402 (1981). The mandatory police procedures become applicable after a peace officer makes an authorized stop pursuant to MCA § 46-5-401 (1981). These procedures are provided for in MCA § 46-5-402 (1981), which states in pertinent part:

(3) A peace officer who has lawfully stopped a person under this part shall inform the person, as promptly as possible under the circumstances and in any case before questioning the person, that he is a police officer, that the stop is not an arrest but rather a temporary detention for an investigation, and that upon completion of the investigation the person will be released unless he is arrested.

(4) After the authorized purpose of the stop has been accomplished or 30 minutes have elapsed, whichever occurs first, the peace officer shall allow the person to go unless he has arrested the person.

42. *Graves*, \_\_\_ Mont. \_\_\_, 622 P.2d at 207.

43. *Id.* (emphasis added). See also *State v. Jenkins*, \_\_\_ Mont. \_\_\_, 629 P.2d 761 (1981) (where defendant frisked for dangerous weapons).

44. *Graves*, \_\_\_ Mont. \_\_\_, 622 P.2d at 207.

45. See *Stoval v. Denno*, 388 U.S. 293 (1967).

tification issue usually involves two separate identifications: the initial identification—via lineup, showup<sup>46</sup> or use of photographs<sup>47</sup>—and a subsequent in-court identification. The United States Supreme Court has developed a two-pronged test for resolving identification issues.<sup>48</sup> First, was the identification procedure impermissibly suggestive; and, second, if so, did it tend to give rise to a substantial likelihood of irreparable misidentification so that to allow the witness to make an in-court identification would violate due process?<sup>49</sup> For the second prong a totality of the circumstances test is employed.<sup>50</sup> The factors to be considered in evaluating the likelihood of misidentification are: (1) the opportunity of the witness to view the crime, (2) the witness' degree of attention, (3) the accuracy of his prior description, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and confrontation.<sup>51</sup>

In *State v. Jenkins*,<sup>52</sup> the Montana Supreme Court applied the two-pronged test to a showup and the subsequent in-court identification of the defendant at trial. The defendant was taken to a parking lot, two days after the crime, where he was identified.<sup>53</sup> Under the first prong of the test, the identification was summarily held to be unnecessarily suggestive.<sup>54</sup> In applying the factors used in evaluating the likelihood of misidentification under the second prong, the court determined that (1) the witness viewed the defendant face-to-face, in good light, during the time of the crime, (2)

46. Showups have been condemned by the United States Supreme Court as impermissibly suggestive absent exigent circumstances. See *Stoval v. Denno*, 388 U.S. 293 (1967). Exigent circumstances include an immediate hospital confrontation when the sole witness is in danger of dying. *Id.* Exigent circumstances also encompass an on-the-scene showup immediately after the crime in order for the police to determine if they are on the right track. *Bates v. United States*, 405 F.2d 1104 (D.C. Cir. 1968).

47. For identification via photographs, see Survey, *Montana Supreme Court Survey of 1981 Criminal Procedure*, 42 MONT. L. REV. 371, 380-83 (1981) [hereinafter cited as Survey]. See, e.g., *State v. Schatz*, \_\_\_ Mont. \_\_\_, 634 P.2d 1193, 1195-96 (1981).

48. See *Neil v. Biggers*, 409 U.S. 188, 196-201 (1972).

49. *Id.* See also *United States ex rel. John v. Cassles*, 489 F.2d 20, 23-24 (2d Cir. 1973).

50. *Manson v. Brathwaite*, 432 U.S. 98 (1977).

51. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

52. \_\_\_ Mont. \_\_\_, 629 P.2d 761 (1981).

53. *Id.* at \_\_\_, 629 P.2d at 762-63.

54. *Id.* at \_\_\_, 629 P.2d at 765. The Montana Supreme Court on two previous occasions examined whether a showup was unnecessarily suggestive. See, e.g., *State v. Lara*, 179 Mont. 201, 587 P.2d 930 (1978) (identification suggestive where defendant viewed immediately after crime sitting handcuffed next to uniformed patrolman in patrol car, where there were other police vehicles and officers). But see *Spurlock v. Crist*, \_\_\_ Mont. \_\_\_, 614 P.2d 498 (1980) (identification not suggestive where defendant viewed, immediately after the crime, in patrol wagon). See generally Annot., 39 A.L.R. 3d 791 (1971).

she was the only person in the restaurant, so her attention level was high, (3) her description was accurate, except for the height, (4) she was positive when she made the identification that the defendant was the person who had tried to rob her, and (5) only two days had passed between the crime and the identification. Thus, the suggestive identification procedure did not create a situation in which there was a substantial likelihood of misidentification, and therefore the identification was held to be valid.<sup>55</sup>

### III. CONFESSIONS—THE CAT IS OUT OF THE BAG

The "cat out of the bag" doctrine applies in cases where an inadmissible confession is obtained and subsequently the defendant makes another confession. This doctrine was first formulated by Justice Jackson in *United States v. Bayer*.<sup>56</sup> According to the doctrine, a second confession may be excluded if it is so closely related to the first confession, as to allow the first confession to control the character of the second confession.<sup>57</sup> The later confession may be rendered admissible, however, if there has been a "break in the stream of events . . . sufficient to insulate the final events from the effect of all that went before."<sup>58</sup>

Montana first considered this doctrine in 1980 in *State v. Allies*.<sup>59</sup> The court in *Allies* cited five factors to consider in determining whether there exists a significant break in the chain of events which would purge the taint from the second confession.<sup>60</sup> In other words, was the cat put back into the bag? The factors to consider are: (1) the passage of time, (2) the change in location, (3) the manner of interrogation, (4) the presence of counsel, and (5) the defendant's mental condition.<sup>61</sup>

The Montana Supreme Court again examined the cat out of the bag doctrine in the 1981 case of *In the Matter of R.P.S.*<sup>62</sup> The court expanded the list of factors from five to eight by adopting

55. *Jenkins*, \_\_\_ Mont. \_\_\_, 629 P.2d at 765. See also *State v. Lara*, 179 Mont. 201, 205, 587 P.2d 930, 932-33 (1978).

56. 331 U.S. 532 (1947).

57. See *Survey*, *supra* note 47 at 383-84.

58. *Darwin v. Connecticut*, 391 U.S. 346, 349 (1968). See also *Beecher v. Alabama*, 389 U.S. 35, 38 (1967); *State v. Allies*, \_\_\_ Mont. \_\_\_, 621 P.2d 1080 (1980). See generally *J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: TRIAL RIGHTS*, § 97 at 362 (1974).

59. \_\_\_ Mont. \_\_\_, 621 P.2d 1080 (1980). The court held that the second confession was a fruit of the prior inadmissible confession since there was not a sufficient break in the stream to render the subsequent statement admissible.

60. *Id.* at \_\_\_, 621 P.2d at 1088.

61. *Id.* These factors are applied on a case-by-case basis.

62. \_\_\_ Mont. \_\_\_, 623 P.2d 964 (1981).

some other factors used in other jurisdictions.<sup>63</sup> Specifically, these factors are: (1) police conduct, (2) opportunity to talk with family and friends, and (3) defendant's first confession has led him into believing that his present position is hopeless.<sup>64</sup> In *R.P.S.* the court held that there was a sufficient break in the stream to render the second confession admissible. The second confession was not the result of persistent questioning as in *Allies*.<sup>65</sup>

#### IV. EFFECT OF AN INVALID AMENDED INFORMATION ON THE ORIGINAL INFORMATION

In 1980 the Montana Supreme Court declared unconstitutional the provision in the Montana Code which allowed an information to be amended once as to substance without leave of court, up to five days before trial.<sup>66</sup> In 1981 the court, in *State v. Cardwell*,<sup>67</sup> explained what effect an invalid amended information had on the original information.<sup>68</sup> The defendant argued that the original information was no longer in effect, since it had become *functus officio*<sup>69</sup> upon the filing of the amended information. Because the amended information was dismissed, there existed no information upon which to prosecute the defendant and thus he was illegally detained.<sup>70</sup>

The court determined that the defendant misinterpreted the operation of the doctrine. In the court's opinion, the original information would become *functus officio* only if the amended information were valid. Therefore, the invalid information did not render

63. *Id.* at \_\_\_, 623 P.2d at 968 (citing *Comm. v. Meehan*, \_\_\_ Mass. \_\_\_, 387 N.E.2d 527, 537 (1979), *cert. dismissed*, 445 U.S. 39); *Knott v. Howard*, 511 F.2d 1060, 1061 (1st Cir. 1975).

64. *R.P.S.*, \_\_\_ Mont. \_\_\_, 623 P.2d at 968. The defendant was incarcerated throughout the period, but that factor alone does not require suppression.

65. *Id.* at \_\_\_, 623 P.2d at 969. The defendant also argued that the second confession was "fruit of the poisonous tree," and therefore, inadmissible under *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) and its progeny. The Court held the earlier confession was not the product of any exploitation or of a prior illegality since information leading to the discovery of the second confession was discovered independently. *Id.* at \_\_\_, 623 P.2d at 966-67.

66. *State v. Cardwell*, \_\_\_ Mont. \_\_\_, 609 P.2d 1230 (1980) (MCA § 46-11-403(1) (1979) held unconstitutional).

67. \_\_\_ Mont. \_\_\_, 625 P.2d 553 (1981) (the second *Cardwell* case).

68. This question was one of first impression for the Montana court.

69. BLACK'S LAW DICTIONARY 606 (5th ed. 1979) defines *functus officio* as: "Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority."

70. *Cardwell*, \_\_\_ Mont. \_\_\_, 625 P.2d at 556. The defendant alleged that he was denied due process of law as provided for in the fifth and fourteenth amendments to the United States Constitution and article II, section 7, of the 1972 Montana Constitution.

the original information *functus officio*.<sup>71</sup> The court's position was adopted from the Missouri case of *State v. Thompson*.<sup>72</sup> The Missouri court held that where an unauthorized or otherwise improper amended information is quashed or dismissed, further proceedings may be had on the original information.<sup>73</sup> It should be noted, however, that the Missouri court's ruling was based upon a Missouri statute<sup>74</sup> of which Montana has no equivalent.

## V. CHANGE OF VENUE

Most often a motion for change of trial will occur when there has been pretrial publicity.<sup>75</sup> Montana's change of venue statute<sup>76</sup> establishes a standard that makes the granting of a motion for change of trial unlikely except in the most extreme circumstances. A change of venue is authorized only if there *actually exists* such prejudice as to render a fair trial impossible in that county.<sup>77</sup>

An allegation of prejudice arising from pretrial publicity is insufficient to establish actual existing prejudice.<sup>78</sup> The court must determine that the publicity has in fact aroused undue prejudice in the community, and that the prejudice has so affected the community as to render a fair trial impossible.<sup>79</sup> This determination is left to the discretion of the judge, whose ruling will not be disturbed unless he has abused his discretion.<sup>80</sup>

71. *Id.* at \_\_\_, 625 P.2d at 556.

72. 392 S.W.2d 617 (Mo. 1965).

73. Cardwell, \_\_\_ Mont. \_\_\_, 625 P.2d at 556 (citing *Thompson*, 392 S.W.2d at 622). *But cf.* *State ex rel. Wentworth v. Coleman*, 121 Fla. 13, 163 So. 316 (1935) (unauthorized act of alteration operates to arrest power of trial court to proceed on information).

74. Mo. Rev. STAT. § 545.110 (1953) provides: "If there be at any time pending against the same defendant two indictments for the same offense, or two indictments for the same matter, although charged as different offenses, the indictment first found shall be deemed to be suspended by such second indictment, and shall be quashed."

75. See generally Survey, *Montana Supreme Court Survey of 1980 Criminal Procedure*, 41 MONT. L. REV. 330, 355-63 (1980).

76. MCA § 46-13-203 (1981) provides in pertinent part: "(1) The defendant or the prosecution may move for a change of place of trial on the ground that there exists in the county in which the charge is pending such prejudice that a fair trial cannot be had in such county . . . ."

77. See *State v. Link*, \_\_\_ Mont. \_\_\_, 640 P.2d 366 (1981). *Cf.* *Rideau v. Louisiana*, 373 U.S. 723 (1963) (if it appears that local prejudice is so intense that impartial panel of jurors cannot be had, then denial of change of venue may be violation of constitutional due process).

78. *State v. Link*, \_\_\_ Mont. \_\_\_, 640 P.2d 366, 367 (1981). See *State v. Williams*, \_\_\_ Mont. \_\_\_, 604 P.2d 1224 (1979); *State v. Kirkland*, \_\_\_ Mont. \_\_\_, 602 P.2d 586 (1979).

79. *State v. Link*, \_\_\_ Mont. \_\_\_, 640 P.2d 366, 367 (1981) (citing *State ex rel. Hanrahan v. District Court*, 145 Mont. 501, 508, 401 P.2d 770, 774 (1965)).

80. *State v. Bashor*, \_\_\_ Mont. \_\_\_, 614 P.2d 470, 476 (1980). Indicia of a denial of a fair trial resulting from prejudicial publicity are: arousal of feelings of the community, threat to personal safety of the defendant, established opinion of members of the commu-

In *State v. Link*,<sup>81</sup> the Montana Supreme Court found that the district court had abused its discretion in granting a motion for change of trial on the basis of prejudice arising only from pretrial publication. The significance of this case, however, is that the supreme court adopted a slightly lower standard than that contained in the "impossible to have a fair trial" standard.<sup>82</sup> The defendant argued that the present standard was too stringent<sup>83</sup> and urged the court to adopt the American Bar Association (ABA) standard, which requires only a showing of a "reasonable likelihood" that a fair trial cannot be had in that particular county. The Montana Supreme Court agreed that the present standard was unworkable, but instead of adopting the ABA standard, the court selected the standard used in Illinois.<sup>84</sup>

The Illinois standard is derived from Illinois Supreme Court decisions interpreting their change of venue statute,<sup>85</sup> the parent of Montana's statute.<sup>86</sup> The Illinois court has ruled that a change of venue will be granted when, in the trial court's discretion, "there are reasonable grounds to believe that the prejudice alleged actually exists and that by reason of the prejudice there is a reasonable apprehension that the accused cannot receive a fair and impartial trial."<sup>87</sup> The Montana Supreme Court, however, expressly held that under the newly adopted Illinois standard, mere allegations of prejudice will continue to be insufficient grounds for change of venue.<sup>88</sup>

In a subsequent decision, the Montana Supreme Court applied this new standard. In *State v. Hansen*,<sup>89</sup> the court did not expressly indicate that it was employing the new standard, but the court's language suggests that it did. The court stated that the defendants failed "to establish any *possibility* of jury prejudice due

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nity as to the accused's guilt, unobjective news articles and their dissemination, and difficulty or failure of securing a fair and impartial trial from the community in which the news articles appeared. *Id.*

81. — Mont. —, 640 P.2d 366 (1981).

82. *Id.* at —, 640 P.2d at 368.

83. Only two Montana Supreme Court cases have overturned a trial court's denial of a defendant's motion for change of venue: *State v. Dryman*, 127 Mont. 579, 269 P.2d 796 (1954); *State v. Spotted Hawk*, 22 Mont. 33, 55 P. 1026 (1899).

84. *Link*, — Mont. —, 640 P.2d at 368.

85. ILL. ANN. STAT. ch. 38, § 114-6 (Supp. Smith-Hurd 1980).

86. See Commission Comments, 4 MONTANA CODE ANNOTATIONS [hereinafter cited as MC ANNOT.] § 46-13-203 (1981).

87. *Link*, — Mont. —, 640 P.2d at 368 (quoting *People v. Berry*, 37 Ill. App. 2d 329, 226 N.E.2d 591, 592-93 (1967)). See also *People v. Campbell*, 28 Ill. App. 3d 480, 328 N.E.2d 608 (1975). Accord *People v. Knippenberg*, 70 Ill. App. 3d 496, 388 N.E.2d 806 (1979).

88. *Link*, — Mont. —, 640 P.2d at 368.

89. — Mont. —, 633 P.2d 1202 (1981).

to pretrial publicity.”<sup>90</sup>

## VI. DOUBLE JEOPARDY—THE LESSER INCLUDED OFFENSE

A defendant can be charged, convicted and sentenced for two criminal offenses arising out of the same transaction. However, there are limitations. If one of the two offenses is a “lesser included offense” of the other, then the offenses will be considered the “same offense” for purposes of punishment and conviction.<sup>91</sup> Thus, the fifth amendment to the United States Constitution and article II, section 25 of Montana’s Constitution<sup>92</sup> may protect an offender from multiple punishments for the same offense.<sup>93</sup> A further limitation is MCA § 46-11-502 (1981),<sup>94</sup> which prohibits the conviction of a defendant for more than one offense if one offense is included in the other offense.

The test for determining whether an offense is a lesser included offense of another was formulated by the United States Supreme Court in *Blockburger v. United States*:<sup>95</sup>

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is *whether each provision requires proof of an additional fact which the other does not*.<sup>96</sup>

In three recent Montana decisions, the court addressed the is-

90. *Id.* at \_\_\_, 633 P.2d at 1209-10 (emphasis added).

91. *See* MCA § 46-11-502(1) (1981).

92. U.S. CONST. amend. V provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” MONT. CONST. art. II, § 25 provides: “No person shall be again put in jeopardy for the same offense previously tried in any jurisdiction.” *See* *En parte Lange*, 85 U.S. (18 Wall.) 163 (1873); *Matter of Ratzlaff*, 172 Mont. 439, 445, 564 P.2d 1312, 1316 (1977); *State v. Coleman*, \_\_\_ Mont. \_\_\_, 605 P.2d 1000, 1008 (1979).

93. Several Supreme Court opinions suggest, in dictum, that the double jeopardy clause bars not only multiple prosecutions but also multiple punishments for the same offense. *See, e.g.*, *Simpson v. United States*, 435 U.S. 6, 11-13 (1978); *Jeffers v. United States*, 432 U.S. 137, 155 (1977); *Brown v. Ohio*, 432 U.S. 161, 165 (1977). *But cf.* *Whalen v. United States*, 445 U.S. 684, 689, 697 (1980) (four-justice majority held double jeopardy clause “at the very least” prevents federal court from imposing consecutive sentences unless authorized by Congress to do so).

94. MCA § 46-11-502 (1981), which in pertinent part provides: “When the *same transaction* may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense. *He may not, however, be convicted of more than one offense if: (1) one offense is included in the other . . .*” (emphasis added). MCA § 46-11-501(1) (1981) defines the term “same transaction” and MCA § 46-11-501(2) (1981) describes when an offense is an “included offense.”

95. 284 U.S. 299 (1932).

96. *Id.* at 304 (emphasis added).

sue of whether a conviction of two statutory offenses was in essence a conviction of the same offense resulting in prohibited multiple punishment.<sup>97</sup> In *State v. Close*,<sup>98</sup> the Montana Supreme Court held that the defendant's conviction for the underlying felonies of aggravated kidnapping and robbery did not merge, for the purposes of punishment, with his conviction for felony murder.<sup>99</sup> In interpreting MCA §§ 45-5-102(1)(b), -303(1)(b), -401(1)(a) and -303(1)(b) (1981), the court found that the Montana legislature intended to allow the defendant to be punished for both the felony murder offense, based on the underlying felonies, and the underlying felonies.<sup>100</sup>

The court in *Close* relied on three reasons for ruling that the legislature had not intended to preclude punishment for the felony homicide and the underlying felonies of kidnapping and robbery, in enacting the felony murder statute.<sup>101</sup> First, in applying the *Blockburger* test, the court noted that the underlying offenses were not the "same offense" as felony homicide, and held that the *Blockburger* analysis "must fall or stand on the working of the statutes alone, not on the indictment."<sup>102</sup> MCA § 46-11-502 (1981) was held to be merely a codification of the *Blockburger* test.<sup>103</sup> The second reason cited by the court was that the history and purpose

97. *State v. Close*, \_\_\_ Mont. \_\_\_, 623 P.2d 940 (1981); *State v. Ritchson*, \_\_\_ Mont. \_\_\_, 630 P.2d 234 (1981); *State v. Buckman*, \_\_\_ Mont. \_\_\_, 630 P.2d 743 (1981).

98. \_\_\_ Mont. \_\_\_, 623 P.2d 940 (1981).

99. *Id.* at \_\_\_, 633 P.2d at 949.

100. *Id.* (following *Whalen v. United States*, 445 U.S. 684 (1980)). In determining that the legislature did not intend to preclude cumulative punishment in this situation, the Montana court rejected the holding in *Whalen* as not applicable and followed the dissenting opinion. *Id.* at \_\_\_, 623 P.2d at 949. In *Whalen*, the Supreme Court held that Congress did not authorize consecutive sentences for the underlying felony of rape and the felony of murder. *Whalen v. United States*, 445 U.S. 684, 693-94 (1980).

101. *Close*, \_\_\_ Mont. \_\_\_, 623 P.2d at 950-51.

102. *Id.* (citing Justice Rehnquist dissent in *Whalen v. United States*, 445 U.S. 684, 699 (1980)). Contrary to what the Montana court wanted to believe, the majority in *Whalen* did not apply the *Blockburger* rule to the facts of the case. The majority opinion states that: "[c]ontrary to the view of the dissenting opinion, we do not in this case apply the *Blockburger* rule to the facts alleged in a particular indictment." *Id.* at 694 n.8. See *supra* note 100. The majority had simply concluded that for purposes of imposing cumulative sentences under the D.C. Code, Congress intended rape to be considered a lesser included offense of the felony homicide. "[T]here would be no question in this regard if Congress, instead of listing the six lesser included offenses in the alternative, had separately proscribed the six different species of felony murder under six statutory provisions." *Whalen v. United States*, 445 U.S. 684, 694 (1980).

The Montana Supreme Court's adoption of this new approach is contrary to the court's prior analysis in *State v. Coleman*, \_\_\_ Mont. \_\_\_, 605 P.2d 1000 (1979). In *Coleman*, the court applied the *Blockburger* test to the facts of the information. *Id.* at \_\_\_, 605 P.2d at 1008-09.

103. *Close*, \_\_\_ Mont. \_\_\_, 623 P.2d at 950.

of the felony homicide provision was designed to protect a wholly different societal interest from that which the underlying felony provisions were intended to protect.<sup>104</sup> The court's third reason was that "the legislature found that the homicidal risk is greater when there is a commission of a felony and that the protection of the person from this increased risk warranted additional sentences."<sup>105</sup>

The *Close* decision provides two significant lessons. First, the *Blockburger* analysis, or MCA § 46-11-502 (1981), must be applied to the statutes defining each offense and not with reference to the individual facts of each case.<sup>106</sup> Second, the Montana court is unlikely to find a double jeopardy violation where multiple punishments are imposed at a single prosecution for both felony homicide and the underlying felony.<sup>107</sup>

In *State v. Ritchson*,<sup>108</sup> the court held that aggravated assault is not a lesser offense of the crime of robbery. The court applied the *Blockburger* test to the elements of the offenses.<sup>109</sup> In addition, the language in MCA § 46-11-501(2)(a) (1981) was determined to be a reference to the statutory elements of the crime rather than to the individual facts of each case.<sup>110</sup> The court reasoned that a person could commit robbery without inflicting *serious* bodily injury and without using a weapon.<sup>111</sup> The court then stated that because "the aggravated assault statute requires proof of at least one element that is not needed to establish robbery, it is

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104. *Id.* (quoting *United States v. Greene*, 489 F.2d 1145, 1168-69 (D.C. Cir. 1973)). *But cf.* majority opinion in *Whalen*, 445 U.S. at 686-87 (a similar finding by the Court of Appeals was rejected by the majority as mistaken).

105. *Close*, \_\_\_ Mont. \_\_\_, 623 P.2d at 950-51 (citing the Criminal Law Commission Comment, 3 MC ANNOT. § 45-5-102 (1981)). The additional sentences warranted by this increased risk were an attempt to eliminate the disparity between first-degree murder (death or a life sentence, REVISED CODES OF MONTANA [hereinafter cited as R.C.M. 1947] § 94-2505 (1947)) and second-degree murder (incarceration of a term not less than 10 years, R.C.M. 1947 § 94-2505); there was no intent to have cumulative sentencing. *See generally* Compiler's Comments, 3 MC ANNOT. § 45-5-102 (1981).

106. *See supra* notes 102 and 103 and accompanying text.

107. *Close*, \_\_\_ Mont. \_\_\_, 623 P.2d at 951. The court states: "If a defendant wants to commit a felony, he must pay a price. If a defendant wants to commit murder in addition to the felony or in the course of committing another felony, he must pay a higher price." *Id.*

108. \_\_\_ Mont. \_\_\_, 630 P.2d 234 (1981).

109. *Id.* at \_\_\_, 630 P.2d at 237-38.

110. *Id.* MCA § 46-11-501(2)(a) (1981) provides: "An offense is an 'included offense' when: (a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." *See also* *Close*, \_\_\_ Mont. \_\_\_, 623 P.2d at 949-50. *But see supra* notes 102, 103 & 106 and accompanying text.

111. *Ritchson*, \_\_\_ Mont. \_\_\_, 630 P.2d at 238 (citing MONTANA CRIMINAL LAW INFORMATION RESEARCH CENTER, MONTANA CRIMINAL CODE ANNOTATED 182-84 (rev. ed. 1980)). Robbery can be committed with a toy gun; a toy gun, however, does not qualify as a "weapon" under MCA §§ 45-2-101(65), -5-202 (1981) for aggravated assault.

not a lesser included offense in the crime of robbery."<sup>112</sup>

The test, however, should have been "whether *each* provision requires proof of additional fact which the other does not," and not whether *one* provision requires proof of an element which the other provision does not.<sup>113</sup> This distinction is important because the relationship of a "lesser included offense" is not symmetric. That is, although aggravated assault may not be a lesser included offense of the crime of robbery, robbery could be a lesser included offense of aggravated assault.<sup>114</sup>

In *State v. Buckman*,<sup>115</sup> the defendant contended that aggravated assault was an included offense of aggravated kidnapping.<sup>116</sup> The court ruled that under these statutes, aggravated assault may be proved without a showing of restraint or the intent to hold another as a hostage or shield. Aggravated kidnapping does not entail the victim's apprehension of serious bodily injury or use of a weapon. Thus, each charge requires proof of facts which the other does not. Therefore, the court held that the trial court did not err in imposing sentences against the defendant for both offenses of which he was convicted, since neither offense merged or was included in the other under *Blockburger* and MCA § 46-11-502 (1981).<sup>117</sup>

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112. *Ritchson*, \_\_\_ Mont. \_\_\_, 630 P.2d at 238.

113. *Blockburger*, 284 U.S. at 304. *See also* *Close*, \_\_\_ Mont. \_\_\_, 623 P.2d at 950.

114. *Compare* MCA § 45-5-202 (1981) *with* MCA § 45-5-401 (1981).

115. \_\_\_ Mont. \_\_\_, 630 P.2d 743 (1981).

116. *Compare* MCA § 45-5-202 (1981) *with* MCA § 45-5-303 (1981). The defendant also contended that MCA § 46-11-502(4) prohibited his conviction of both offenses. Defendant argued that since the aggravated assault charge prohibits a general behavior, the use of force generally, and that the aggravated kidnapping charge prohibits the behavior specifically, the use of force specifically to restrain a person for purposes of a hostage or shield, then only one charge could be sustained. The court rejected this contention and held that aggravated kidnapping is not just a specific form of aggravated assault, but an entirely separate crime with its own specific elements. *Buckman*, \_\_\_ Mont. \_\_\_, 630 P.2d at 745-46.

117. *Id.* at \_\_\_, 630 P.2d at 745.