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THE SCOPE OF APPELLATE REVIEW IN CRIMINAL CASES: WHO HAS THE FINAL WORD?

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I. INTRODUCTION

In 1983, the Montana Legislature drastically limited a criminal defendant's right to have alleged constitutional errors reviewed for the first time on appeal where defense counsel failed to raise a proper objection at the trial court level.[1] Until recently, the impact of these changes, both on the defendant's right of appeal and on the Montana Supreme Court's scope of appellate review, went relatively unnoticed. In *State v. Huebner*,[2] the court ordered the parties *sua sponte* to brief and argue the constitutionality of the 1983 law, suggesting that it somehow limited the judiciary's inherent authority to correct "plain errors" on appeal.[3]

The *Huebner* majority did not ultimately address the constitutionality of the statute in question, rather the court found that the errors, though not properly objected to, were not prejudicial and therefore did not warrant reversal.[4] In contrast, the dissenting justice indicated a strong willingness not only to reverse the defendant's conviction, but to declare the 1983 law an unconstitutional infringement upon the court's exclusive rulemaking authority. If the dissenting opinion indicates the disposition of a future majority of the court, the question of the statute's constitutional

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1. MONT. CODE ANN. § 46-20-701(2) (1991).

2. ___ Mont. ___, 827 P.2d 1260 (1992).

3. Specifically, the court ordered the parties to address whether "the factors listed in MONT. CODE ANN. § 46-20-701(2), which limit this Court's power to apply the 'plain error' doctrine to constitutional violations (are) unconstitutional." *See* Montana Supreme Court Order of June 4, 1991. The author participated in the *Huebner* appeal as Assistant Attorney General for the State of Montana.

4. *Id.* at ___, 827 P.2d at 1264. The errors at issue in *Huebner* were twofold: (1) the district court failed to give an instruction on the presumption of innocence, and (2) the district court gave inconsistent instructions on the state's burden of proof in a criminal prosecution. The majority determined that none of the errors were prejudicial because the defendant, by his own testimony, established "all of the elements of the offense with which he was charged[.]" *Id.* In affirming defendant's conviction for illegally wasting a game animal in violation of MONT. CODE ANN. § 87-3-102 (1989), the court relied upon MONT. CODE ANN. § 46-20-701(1), which states, "No cause shall be reversed by reason of any error committed by the trial court against the appellant unless the record shows that the error was prejudicial."

validity is bound to resurface.[5] This article is intended as background for those practitioners of criminal law in Montana who will be fighting in the forefront when the issue presents itself once again.

II. The Rise and Fall of Plain Error in Montana

Montana adheres to the universal rule that an error not brought to the attention of the trial court is waived on appeal.[6] The purpose of this rule is to ensure that trials, especially criminal trials, will be as free of error as possible by giving the trial judge the opportunity to correct errors at the time they occur.[7] In this way, a solid record is preserved for appeal and society's resources are utilized most efficiently. The general rule does not exist without exceptions, however, and Montana's exceptions are found in both the statutory and common law.[8] Prior to 1983, the statutory exception applicable to criminal cases provided that "[d]efects affecting jurisdictional or constitutional rights may be noticed [on appeal] although they were not brought to the attention of the trial court."[9] This statute has been referred to as the rule of "plain error."[10] A similar provision also existed in the rules of evidence.[11]

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5. The majority in *Huebner* indicated that, had the facts of the case been different, the alleged errors regarding jury instructions might have presented a constitutional due process violation. *Huebner*, at ___, 827 P.2d at 1264. Accordingly, given the right factual situation the court will be forced to address the requirements of Mont. Code Ann. § 46-20-701(2), and the constitutional validity of that statute.

6. Mont. Code Ann. § 46-20-104 (1991). *See* 3 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure, § 26.5, at 251-54 (1984).

7. 3 LaFave, *supra* note 6, at 251; Wainwright v. Sykes, 433 U.S. 72, 90 (1977) *reh'g denied*, 434 U.S. 880 (1977); Henry v. Mississippi, 379 U.S. 443, 448 (1965) *reh'g denied*, 380 U.S. 926 (1965); Michel v. Louisiana, 350 U.S. 91, 101-02 (1955) *reh'g denied*, 350 U.S. 955 (1955); United States v. Griffin, 699 F.2d 1102, 1109 (11th Cir. 1983).

8. See Halldorson v. Halldorson, 175 Mont. 170, 573 P.2d 169 (1977), wherein the court announced the following rule:

> Ordinarily errors not raised below will not be considered on appeal, however this rule is subject to the exception that when the question is raised for the first time on appeal it relates to the fundamental rights of the parties. . . .
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> . . . .
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> In adopting the "plain error" doctrine we believe that appellate courts have a duty to determine whether the parties before them have been denied substantial justice by the trial court, and when that has occurred we can, within our sound discretion, consider whether the trial court has deprived a litigant of a fair and impartial trial, even though no objection was made to the conduct during the trial.

Id. at 173-74, 573 P.2d at 171-72.

9. Mont. Code. Ann. § 46-20-702 (1981).

10. *See* State v. Smith, 208 Mont. 66, 71, 676 P.2d 185, 188 (1984), wherein the court stated:

> Defendant failed to object to this exchange at the time of trial, but wishes to raise it now on appeal. Section 46-20-104, MCA, provides that failure to make a timely

In 1983, however, the legislature effectively abolished the statutory rule of plain error contained in section 46-20-702.[12] The law now provides:

> No claim alleging an error affecting jurisdictional or constitutional rights may be noticed on appeal, if the alleged error was not objected to as provided in 46-20-104, unless the defendant establishes that the error was prejudicial as to his guilt or punishment and that: (a) the right asserted in the claim did not exist at the time of the trial and has been determined to be retroactive in its application; (b) the prosecutor, the judge, or a law enforcement agency suppressed evidence from the defendant or his attorney that prevented the claim from being raised and disposed of; or (c) material and controlling facts upon which the claim is predicated were not known to the defendant or his attorney and could not have been ascertained by the exercise of reasonable diligence.[13]

This article is concerned with only that portion of the above statute which addresses errors affecting constitutional rights.[14]

As of 1983, Montana has been one of the few jurisdictions

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objection at the time of trial constitutes a waiver of the objection and it may not be raised on appeal. Although counsel on appeal (who was not trial counsel) recognizes this waiver, he nonetheless argues that we should consider the issue and reverse by application of the "plain error rule" contained in section 46-20-702, MCA. Under the "plain error rule," jurisdictional and constitutional errors at trial may be reviewed even though the injured party did not object at the time of trial. The rule is therefore an exception to the waiver rule of section 46-20-104, MCA.

11. Rule 103(d) of the Montana Rules of Evidence states: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

12. This occurred with the passage of Senate Bill 2, entitled: "An Act Prohibiting, Except Under Certain Circumstances, Appellate Review of Alleged Errors Not Objected to During a Criminal Trial; Amending Sections 46-20-104 and 46-20-702, MCA."

13. MONT. CODE. ANN § 46-20-701(2) (1991). The rule of plain error in Montana Rule of Evidence 103(d) was not altered by Senate Bill 2 and remains in effect today. The rule contained therein is arguably inapplicable beyond evidentiary matters which can be decided upon the record, although the scope of the rule's application has not been formally addressed by the court. However, to construe Rule 103(d) beyond that application renders the limitations in MONT. CODE. ANN § 46-20-701(2) without effect or meaning.

14. To the extent that MONT. CODE. ANN. § 46-20-701(2) purports to waive jurisdictional defects in a criminal prosecution, its validity is suspect. Case law uniformly establishes that jurisdiction cannot be waived and that appellate courts have a duty, *sua sponte*, to inquire not only into their own jurisdiction, but the jurisdiction of the trial court as well. *See* Wendling v. Southwest Sav. and Loan, 694 P.2d 1213 (Ariz. 1984); People v. Lockhart, 699 P.2d 1332 (Colo. 1985); Simpson v. Department of Land and Natural Resources, 791 P.2d 1267 (Haw. 1990); H & V Eng'r, Inc. v. Idaho St. Bd. of Prof. Eng'rs and Land Surveyors, 747 P.2d 55 (Idaho 1987); Long v. Riggs, 617 P.2d 1270 (Kan. 1980); State v. Wisniewski, 708 P.2d 1031 (N.M. 1985); Federal Deposit Ins. Corp. v. Duerksen, 810 P.2d 1308 (Okla. 1991); Blundell v. Holm, 698 P.2d 981 (Or. 1985); Robbins v. South Cheyenne Water and Sewage Dist., 792 P.2d 1380 (Wyo. 1990). *See also* 3 LAFAVE, *supra* note 6, at 253-54.

which does not recognize a rule of plain error either at common law or by statute.[15] There were several reasons for the 1983 change. Supporters of the change believed that by limiting the exceptions to the general rule of waiver, defense attorneys would be discouraged from planting error in the record to later serve as a basis for appeal. According to those testifying before the House and Senate Judiciary Committees, this occurred primarily in capital cases,[16] undoubtedly as a tactic to delay an execution date as long as possible.

Although not explicitly discussed in committee, the limited exceptions to the contemporaneous objection requirement proposed in Senate Bill 2 also serve to immunize state court rulings from collateral attack in federal court. State court review is not the final avenue of relief for an increasing number of criminal defendants. Many defendants pursue federal habeas corpus relief, alleging that they are "in custody in violation of the Constitution or laws or treaties of the United States."[17] Federal courts will decline to entertain a habeas petition, however, if the state court expressly relied upon a rule of procedural default in refusing to address the merits of the claim.[18] A federal habeas petitioner must demonstrate the cause for his default and resulting prejudice to obtain review of his federal claims, unless it can be shown that the petitioner is "actually innocent."[19]

To warrant federal abstention, the state court must regularly and consistently apply its procedural rules, including the rule of

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15. *See, e.g.*, State v. Bird, 708 P.2d 946 (Kan. 1985); Commonwealth v. Clair, 326 A.2d 272 (Pa. 1974). *See* 3 LAFAVE *supra* note 6, at 255.

16. Senate Judiciary Committee Minutes of January 19, 1983 at 2.

17. 28 U.S.C. § 2254 (1988).

18. Ylst v. Nunnemaker, 111 S. Ct. 2590 (1991); Harris v. Reed, 489 U.S. 255, 262 (1989). In *Ylst*, the Court explained:

> When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court. [Citations omitted]. . . .
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> State procedural bars are not immortal however; they may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available.

Id. at 2593.

19. Wainwright v. Sykes, 433 U.S. at 87; Henry v. Mississippi, 379 U.S. at 448; Coleman v. Thompson, 111 S. Ct. 2546 (1991) *reh'g denied*, 112 S. Ct. 27 (1991); Amadeo v. Zant, 486 U.S. 214, 222-23 (1988); Murray v. Carrier, 477 U.S. 478, 485-92 (1986); Reed v. Ross, 468 U.S. 1, 11 (1983); Engle v. Isaac, 456 U.S. 107, 129 (1982); Francis v. Henderson, 425 U.S. 536, 541-42 (1976); Davis v. United States, 411 U.S. 233, 242-43 (1973); Anselmo v. Sumner, 882 F.2d 431, 433 (9th Cir. 1989); Roberts v. Arave, 847 F.2d 528, 530 (9th Cir. 1988).

waiver and its exceptions.[20] If procedural rules are applied on an ad hoc basis, federal courts will not respect the state's "adequate and independent" state procedural ground, since "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' "[21] The strict exceptions to the waiver rule outlined in section 46-20-701(2) more effectively ensure consistent application of Montana's procedural rules than a rule of plain error. As the Pennsylvania Supreme Court boldly asserted when it abolished the common law rule of plain error because of its haphazard application:

> [T]he theory [of plain error] has never developed into a principled test, but has remained essentially a vehicle for reversal when the predilections of a majority of an appellate court are offended.
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> The theory has been formulated in terms of what a particular majority of an appellate court considers basic or fundamental. Such a test is unworkable when neither the test itself nor the case law applying it develop a predictable, neutrally-applied standard.
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> We conclude that basic and fundamental error has no place in our modern system of jurisprudence. This doctrine, which may in the past have been acceptable, has become an impediment to the efficient administration of our judicial system. Basic and fundamental error will therefore no longer be recognized as a ground for consideration on appeal of allegedly erroneous jury instructions; a specific exception must be taken.[22]

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20. State courts must consistently and regularly apply state procedural bars in order to successfully avoid subsequent collateral attack by federal courts. *See* Johnson v. Mississippi, 486 U.S. 578, 587-88 (1988) (rejecting the state's argument that the state court's ruling should be respected because a state's procedural ground is not "adequate" unless it is "strictly or regularly followed"). In addition, the state court must clearly articulate the procedural basis for its ruling. *See* Ylst v. Nunnemaker, 111 S. Ct. at 2594-96.

21. Johnson v. Mississippi, 486 U.S. 578, 587 (quoting Barr v. City of Columbia, 378 U.S. 146, 149 (1964)) In *Johnson*, the Supreme Court rejected the state's procedural bar argument because of inconsistent application of the state's procedural rules, stating, "We find no evidence that the procedural bar relied on by the Mississippi Supreme Court here has been consistently or regularly applied. Rather, the weight of Mississippi law is to the contrary." *Johnson*, 486 U.S. at 587.

22. Dilliplaine v. Lehigh Valley Trust Co., 322 A.2d 114 (Pa. 1974). Quoting this passage from *Dilliplaine*, one commentator observed that:

> [t]his statement, remarkable in its candor, acknowledges that appellate courts ignore a basic requirement of the appellate process when they make exceptions to procedural rules for reasons they describe as "plain," "basic," "fundamental error," or "in the interests of justice." Appellate judges must recognize that they cannot render decisions that apply only to the facts of one case. Precedent and stare decisis are essential features of a common-law system. Appellate courts undercut the entire system when they ignore the precedential value of cases.

Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1033 (1987).

III. Inconsistent Application of the Rules Signals Unrest

Unfortunately, the Montana Supreme Court has not been consistent in its application of the procedural rules. In a number of cases since the passage of Senate Bill 2, the court has acknowledged that the statutory rule of plain error no longer exists and that criminal defendants are no longer entitled to assert errors on appeal unless the statutory factors of section 46-20-701(2) are met.[23] In other cases, however, the court has disregarded the statute altogether, and has relied upon its "inherent authority" to review and, if necessary, reverse a conviction under the rule of plain error.[24] In these cases, the court has mistakenly assumed that the doctrine of plain error and the statutory rule strictly limiting appellate review of errors not objected to at trial compatibly coexist, and that either may be applied depending upon the facts of the case. However, the court's desire to intervene on behalf of criminal defendants in any one case, despite the defendant's noncompliance with procedural rules, jeopardizes the adequacy of those rules in all other cases and subjects the state court's decisions to federal review whether or not the court considered the merits of the claims. These considerations alone should be sufficient to command the supreme court's attention when applying the legislature's rules of default in future cases.

The legislature's rules designed to limit the scope of appellate review may be in jeopardy, however, if the court pursues the path outlined by the dissenting justice in *Huebner*. Justice McDonough, a delegate to the 1972 Constitutional Convention, sharply criticized the legislature's act of initiating what he considered to be a rule of appellate procedure, a task which, he posited, belongs solely to the judicial branch of government.[25] Relying upon the scope of supreme court jurisdiction granted in the 1972 Constitution, Justice McDonough proposes that the legislature has no authority to initiate rules of procedure, but rather can only veto rules promul-

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23. State v. Staat, No. 91-119 (Mont. filed March 27, 1991); State v. Kills on Top, 243 Mont. 56, 793 P.2d 1273 (1990) *cert. denied*, 111 S. Ct. 2910 (1990) (a death penalty case); State v. Larson, 240 Mont. 203, 783 P.2d 416 (1989); State v. Blalock, 232 Mont. 223, 756 P.2d 454 (1988); State v. Smith, 228 Mont. 258, 742 P.2d 451 (1987); State v. St. Goddard, 226 Mont. 158, 734 P.2d 680 (1987); State v. Cain, 220 Mont. 509, 717 P.2d 15 (1986).

24. State v. Wilkins, 229 Mont. 78, 746 P.2d 588 (1988); State v. Flamm, 215 Mont. 466, 746 P.2d 588 (1986); State v. Harris, 209 Mont. 511, 682 P.2d 159 (1984); State v. Smith, 208 Mont. 66, 676 P.2d 185 (1984).

25. *Huebner*, at ___, 827 P.2d at 1269. Justice McDonough was apparently unpersuaded by the other arguments of defense counsel and amicus curiae that the legislature's limitations on the right of appeal violated a criminal defendant's due process rights, and unconstitutionally interfered with the appellate court's grant of supervisory power over all courts in Mont. Const. art. VII, § 2(2) (1972).

gated by the judiciary. By enacting section 46-20-701(2) Justice McDonough suggests that the legislature has violated the separation of powers clause of our Constitution.[26]

It is very possible that a future majority will accept the dissent's reasoning and invalidate the restrictions in section 46-20-701(2) in favor of a rule of "plain error." The court's haphazard rulings indicate that it is not comfortable with a rule which, strictly applied, substantially limits its opportunity to correct errors of constitutional import simply because a proper objection was not registered. The court is obviously grasping for some degree of autonomy to decide which errors deserve the court's attention and which do not, without legislative intervention. Justice McDonough proposes that this can be accomplished by invalidating the legislative rule and relying upon the common law rule of plain error pronounced in 1977 in *Halldorson*.[27] He reasons that, since the legislature did not exercise its veto power in either of the two sessions following that decision, the rule of plain error pronounced therein is still intact.[28] Justice McDonough's proposed solution, however, presents problems of its own with respect to the separation of powers issue.

IV. The Supreme Court Should Not Invalidate the Legislature's Restrictions on the Scope of Appeal in Favor of a Judicially Created Rule of Plain Error

The judiciary's constitutional grant of rulemaking authority is not absolute. The constitutional delegates provided that judicial rules be subject to legislative veto in either of the two sessions following promulgation in order to preserve the system of checks and balances inherent in our tripartite system of government.[29] The delegates' primary concern was that the judiciary would extend its rulemaking authority into substantive areas of the law.[30]

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26. *Huebner*, at ___, 827 P.2d at 1269. Mont. Const. art. VII, § 2(3) (1972) provides that the supreme court "may make rules governing appellate procedure, practice and procedure for all courts, admission to the bar and the conduct of its members. Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation." Mont. Const. art. III, § 1 provides that "[t]he power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."

27. *See supra* note 8 and accompanying text.

28. *Huebner*, at ___, 827 P.2d at 1269.

29. Mont. Const. art. VII, § 2 (3); Mont. Const. art. III § 1 (1972); *see* Constitutional Convention Verbatim Transcript of February 26, 1972 at 1021-22, 1037, 1072.

30. Constitutional Convention Verbatim Transcript of February 26, 1972 at 1021-22,

Whether a rule limiting the right and scope of appeal is substantive or procedural, the delicate balance between judicial and legislative functioning is threatened by a suggestion that the legislature's opportunity to veto the judicially created rule of plain error in *Halldorson* has come and gone. By insisting that the rule of plain error in *Halldorson* is controlling, the dissent implies that procedural rules may be announced in supreme court opinions rather than through the usual rulemaking process, which entails the issuance of a formal order signed by all members of the court and publication of the new rule by the code commissioner as required by law.[31] A supreme court rule announced in opinion is presumably less conspicuous, and consequently less prone to legislative scrutiny, than a rule which is formally designated in the code book.

If a future majority falls back on the rule of plain error announced in *Halldorson*, it will effectively circumvent the system of checks and balances which is specifically built into the constitutional grant of judicial rulemaking authority. The only way to avoid this result is for the court to replace section 46-20-701(2) with a rule of plain error adopted by supreme court order and subject to legislative veto in the two sessions following promulgation. This alternative will most likely not appeal to the judiciary, since it is entirely possible that a judicially created rule of "plain error" would be vetoed on the ground that the rule invades the legislature's authority to make substantive law.[32] Despite this potential for deadlock, however, the court cannot and should not circumvent the normal rulemaking process in order to gain the upper hand over a rule of plain error.

One solution not considered by the dissent in *Huebner* would

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1037, 1072. Judicial overreaching is a primary concern of states adopting a constitutional provision which grants judicial rulemaking authority, not because courts set out to make rules governing substantive law as such, but because substance and procedure are "so inextricably interwoven." A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 4-5 (1958). The fact that the judiciary enjoys a constitutional grant of rulemaking authority, whether or not that authority is subject to legislative veto, does not divest the legislature of its power to make substantive law. A. Leo Levin & Anthony G. Amsterdam, at 14, 17; Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 634 (1957); Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 446, 466 (1946); Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., 263 U.S. 629, 635 (1924).

31. MONT. CODE. ANN. § 1-11-204(2)(k) requires that the code commissioner prepare for publication in the Montana Code Annotated the "rules of civil, criminal, and appellate procedure and other rules of procedure the Montana supreme court may adopt. . . ."

32. *See* Daou v. Harris, 678 P.2d 934 (Ariz. 1984); State v. Slatter, 423 N.E.2d 100 (Ohio 1981); State v. Birmingham, 392 P.2d 775 (Ariz. 1964).

be to leave the legislature's rule intact as a reasonable restriction on the right of appeal, recognizing that the court's authority to correct error in a particularly egregious case is not limited thereby. The court must understand that it need not invalidate section 46-20-701(2) in favor of a rule of "plain error" in order to maintain judicial integrity and its rulemaking function. Whether judicially or legislatively created, a rule of plain error is not a prerequisite to appellate jurisdiction.[33] In cases where a defect in the trial process so fundamentally affects its fairness as to call the jury's verdict into question, the appellate court not only has the inherent power, but a duty to step in to protect the constitutional rights of criminal defendants.[34] Surely all parties, including the people of Montana, have a vital interest in seeing that trials serve their truthseeking function and that innocent persons are not convicted.

The court has previously exhibited a willingness to honor legislative enactments which aid in the administration of the judiciary's rulemaking function.[35] Given the problems inherent in a rule of plain error, our court should be willing to acknowledge and consistently apply the narrow exceptions to the waiver rule which the legislature has set forth. The unpredictable nature of its prior opinions demands this result.

V. CONCLUSION

The *Huebner* case is significant because it is the first time the court has examined its historical unwillingness to consistently apply the rules of procedural default and the effect of this practice on

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33. Engle v. Isaac, 456 U.S. 107, 135 (1982) ("a plain error standard is unnecessary to correct miscarriages of justice"); Murray v. Carrier, 477 U.S. 478, 496 (1986); Hormel v. Helvering, 312 U.S. 552 (1941).

34. *See* Wilson v. State, 51 N.E.2d 848, 856 (Ind. 1943), wherein the court described the interplay between rules of procedure and inherent authority:

> Ordinarily, procedural rules must be observed by litigants and may not be ignored by reviewing courts. To hold otherwise would invite appeals and violate precedents that have given necessary order and stability to our appellate practice. But when it is made to appear by a record before us that a so-called trial did not meet the requirements of due process of law, it is within the power of this court to take cognizance of the errors that resulted in depriving the appellant of his constitutional rights.

Id. Accord People v. Dorrikas, 92 N.W.2d 305, 307 (Mich. 1958) ("[t]he inherent power of this Court to prevent fundamental injustice is not limited by what appellant is entitled to as a matter of right"); Hormel v. Helvering, 312 U.S. at 557.

35. This was done in Kradolfer v. Smith, 246 Mont. 210, 213-15, 805 P.2d 1266, 1268-69 (1990), where the court refused to invalidate an attorney license tax imposed by the legislature on the ground that the tax invaded the court's exclusive authority to regulate the practice of law. By so doing, the court noted that it was aiding judicial power rather than surrendering its constitutional grant of authority.

the finality of its decisions in federal court. From now on, the court's failure to adhere to the waiver rule and its limited exceptions cannot be excused as oversight. Future invocation of a rule of "plain error" must be viewed as an intentional disregard of the legislature's rules defining the right and scope of appeal in criminal cases.

To declare section 46-20-701(2) invalid only compounds the confusion between the role of the legislature and the inherent authority of the appellate court. In the final analysis, the supreme court retains the inherent authority to correct errors which are so fundamentally egregious as to deprive the defendant of a fair trial, regardless of whether a rule of plain error is in place or not. In those cases where the jury's verdict is suspect, the supreme court can and *should* review errors affecting constitutional rights despite the lack of a proper objection without reference to a statutory or common law rule of plain error. In all other cases, however, the court should be unequivocal in its reliance upon the strict requirements of Montana Code Annotated section 46-20-701(2). Only then will our court's rulings gain the respect they are due in the federal system. It is the integrity of the court's decisions, not its inherent authority, which is at stake.