SENATE BILL 347

Introduced by Van Valkenburg, et al.

2/04	Introduced
2/04	Referred to Judiciary
2/07	Hearing
2/13	Committee Report--Bill Passed
2/15	2nd Reading Passed
2/17	3rd Reading Passed

Transmitted to House

2/21	Referred to Judiciary
3/07	Hearing
3/20	Tabled in Committee

BILL NO. 347

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE LAW RELATING TO CRIMINAL PROCEDURE; IMPLEMENTING THE RECOMMENDATIONS OF THE COMMISSION ON RULES OF CRIMINAL PROCEDURE; AMENDING SECTIONS 1-1-202, 1-1-207, 7-4-2902, 7-4-2912, 7-16-2322, 7-32-201, 7-32-233, 7-32-4303, 16-11-147, 37-60-406, 44-11-303, 45-5-206, 45-8-209, 46-8-114, 46-16-103, 46-18-201, 46-18-247, 46-18-502, AND 46-20-103, MCA; AND REPEALING SECTIONS 46-1-101, 46-1-102, 46-1-201, 46-3-101 THROUGH 46-3-106, 46-3-201 THROUGH 46-3-206, 46-4-201 THROUGH 46-4-207, 46-4-301 THROUGH 46-4-306, 46-5-101 THROUGH 46-5-104, 46-5-201 THROUGH 46-5-209, 46-5-301 THROUGH 46-5-305, 46-5-401, 46-5-402, 46-5-501 THROUGH 46-5-505, 46-6-101, 46-6-104 THROUGH 46-6-106, 46-6-201 THROUGH 46-6-204, 46-6-301 THROUGH 46-6-304, 46-6-401 THROUGH 46-6-404, 46-6-411, 46-6-412, 46-6-421, 46-6-422, 46-6-501 THROUGH 46-6-503, 46-7-101 THROUGH 46-7-103, 46-8-101 THROUGH 46-8-104, 46-8-111 THROUGH 46-8-115, 46-8-201, 46-8-202, 46-9-101 THROUGH 46-9-104, 46-9-111, 46-9-201 THROUGH 46-9-205, 46-9-301 THROUGH 46-9-303, 46-9-311, 46-9-401 THROUGH 46-9-404, 46-9-411 THROUGH 46-9-414, 46-9-501 THROUGH 46-9-505, 46-10-101, 46-10-102, 46-10-201 THROUGH 46-10-204, 46-11-101, 46-11-102, 46-11-201 THROUGH 46-11-204, 46-11-301 THROUGH 46-11-303, 46-11-311 THROUGH 46-11-319, 46-11-331 THROUGH 46-11-333, 46-11-401 THROUGH 46-11-405, 46-11-501 THROUGH 46-11-505, 46-11-601, 46-12-101 THROUGH 46-12-105, 46-12-201 THROUGH 46-12-206, 46-13-101 THROUGH 46-13-106, 46-13-201 THROUGH 46-13-204, 46-13-301, 46-13-302, 46-14-101 THROUGH 46-14-103, 46-14-201 THROUGH 46-14-203, 46-14-212, 46-14-213, 46-14-221, 46-14-222, 46-14-301 THROUGH 46-14-304, 46-14-311 THROUGH 46-14-313, 46-14-401, 46-15-101 THROUGH 46-15-105, 46-15-111 THROUGH 46-15-114, 46-15-201 THROUGH 46-15-204, 46-15-321 THROUGH 46-15-329, 46-15-331, 46-15-332, 46-15-401 THROUGH 46-15-403, 46-16-102, 46-16-108, 46-16-201, 46-16-202, 46-16-211 THROUGH 46-16-213, 46-16-301 THROUGH 46-16-307, 46-16-401 THROUGH 46-16-403, 46-16-501 THROUGH 46-16-505, 46-16-601 THROUGH 46-16-605, 46-16-701, 46-16-702, 46-17-101 THROUGH 46-17-103, 46-17-201 THROUGH 46-17-205, 46-17-211, 46-17-301 THROUGH 46-17-303, 46-17-311, 46-17-401 THROUGH 46-17-404, 46-18-102, 46-18-111 THROUGH 46-18-113, 46-18-203, 46-18-501, 46-18-503, 46-21-101 THROUGH 46-21-105, AND 46-21-201 THROUGH 46-21-203, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1.** Scope -- purpose -- construction. (1) [This act] governs the practice and

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procedure in all criminal proceedings in the courts of Montana except where provision for a different procedure is specifically provided by law.

(2) [This act] is intended to provide for the just determination of every criminal proceeding. [This act] shall be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay.

NEW SECTION. **Section 2.** Definitions. As used in [this act], unless the context requires otherwise, the following definitions apply:

(1) "Arraignment" means the formal act of calling the defendant into open court to enter a plea answering a charge.

(2) "Arrest" means the taking of a person into custody in the manner authorized by law.

(3) "Arrest warrant" means the written order from a court directed to a peace officer or to some other person specifically named commanding that person to arrest another. This term includes the original warrant of arrest and a copy certified by the issuing court.

(4) "Bail" means the security given for the primary purpose of insuring the presence of the defendant in a pending criminal proceeding.

(5) "Charge" means a written statement presented to a

court accusing a person of the commission of the offense and is contained in a complaint, information, and indictment.

(6) "Concealment" means any act or deception done purposely or knowingly upon or outside the premises of a wholesale or retail store or other mercantile establishment with the intent to deprive the merchant of all or part of the value of the merchandise.

(7) "Conviction", unless otherwise provided by law, means a judgment or sentence entered upon a guilty plea or upon a verdict or finding of guilty of an offense rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

(8) "Court" means a place were justice is judicially administered and includes the judge thereof.

(9) "Judge" means a person who is invested by law with the power to perform judicial functions.

(10) "Judgment" means an adjudication by a court that the defendant is guilty and includes the sentence pronounced by the court.

(11) "Make available for examination and reproduction" means to make material and information subject to disclosure available upon request at a designated place during specified reasonable times and provide suitable facilities or arrangements for reproducing it. The term does not mean that the disclosing party is required to make copies at its

expense, to deliver the materials or information to the other party, or to supply the facilities or materials required to carry out tests on disclosed items. The parties may by mutual consent make any other or additional arrangements.

(12) "New trial" means a re-examination of the issue in the same court before another jury after a verdict or finding has been rendered.

(13) "Offense" means a violation of any penal statute of this state or any ordinance of its political subdivisions.

(14) "Included offense" means an offense that:

(a) is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

(b) consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(c) differs from the offense charged only in the respect that a less serious injury or risk to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

(15) "Parole" means the release to the community of a prisoner by a decision of the board of pardons prior to the expiration of a prisoner's term, subject to conditions imposed by the board of pardons and the supervision of the

department of institutions.

(16) "Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order and make arrests for offenses while acting within the scope of his authority.

(17) "Persistent felony offender" means an offender who has previously been convicted of a felony and who is presently being sentenced for a second felony committed on a different occasion than the first. An offender is considered to have been previously convicted of a felony if:

(a) the previous felony conviction was for an offense committed in this state or any other jurisdiction for which a sentence of imprisonment in excess of 1 year could have been imposed;

(b) less than 5 years have elapsed between the commission of the present offense and either:

(i) the previous felony conviction; or

(ii) the offender's release on parole or otherwise from prison or other commitment imposed as a result of a previous felony conviction; and

(c) the offender has not been pardoned on the ground of innocence and the conviction has not been set aside at the postconviction hearing.

(18) "Place of trial" means the geographical location and political subdivision within which is situated the court

that will hear the cause.

(19) "Preliminary examination" means a hearing before a justice of the peace for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant.

(20) "Probation" means release by the court without imprisonment, except as otherwise provided by law, of a defendant found guilty of a crime. The release is subject to the supervision of the department of institutions upon directions of the court.

(21) "Prosecutor" means an elected or appointed attorney who is vested by law with the power to initiate and carry out criminal proceedings on behalf of the state or a political subdivision.

(22) "Same transaction" means conduct consisting of a series of acts or omissions which are motivated by:

(a) a purpose to accomplish a criminal objective and which are necessary or incidental to the accomplishment of that objective; or

(b) a common purpose or plan which result in the repeated commission of the same offense or effect upon the same person or persons or the property thereof.

(23) "Search warrant" means a written order made in the name of the state and signed by a judge that particularly describes the thing, place, or person to be searched and the

instruments, articles, or things to be seized; and that is directed to a peace officer commanding him to search for personal property and bring it before the judge.

(24) "Sentence" means the judicial disposition of a criminal proceeding upon a plea or finding of guilty.

(25) "Statement" means:

(a) a writing signed or otherwise adopted or approved by a person;

(b) a video, audio, or other recording of a person's communications or a transcript of the communications; and

(c) a writing containing a summary of a person's oral communications or admissions.

(26) "Summons" means a written order issued by the court that commands a person to appear before a court at a stated time and place to answer the offense set forth therein.

(27) "Superseded notes" means handwritten notes, including field notes, that have been substantially incorporated into a statement. The notes may not be considered a statement and are not subject to disclosure except as provided in [section 139].

(28) "Temporary road block" means any structure, device, or means used by a peace officer for the purpose of controlling all traffic through a point on the highway where all vehicles may be slowed or stopped.

(29) "Witness" means any person whose testimony is

desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution, or proceeding.

(30) "Work product" means legal research, records, correspondence, reports, and memoranda, written and oral, to the extent that they contain the opinions, theories, and conclusions of the prosecutor, defense counsel, or their staff or investigators.

NEW SECTION. **Section 3. Filing the charge.** In all criminal prosecutions, the charge shall be filed in the county where the offense was committed unless otherwise provided by law.

NEW SECTION. **Section 4. Place of trial.** (1) The place of trial shall be the county where the charge is filed unless otherwise provided by law.

(2) All objections that a charge is filed in the improper county are waived by the defendant unless made before trial as provided for in [sections 175 through 177]. If an objection is made, a hearing shall be held and the proper county in which to file the charge shall be established before further proceedings.

NEW SECTION. **Section 5. Requisite act in multiple counties.** (1) When two or more acts are requisite to the commission of any offense, or two or more acts are committed in furtherance of a common scheme, the charge may be filed in any county in which any of the acts or offenses occur.

(2) When an act requisite to the commission of an offense occurs or continues in more than one county, the charge may be filed in any county in which the act occurred or continued.

NEW SECTION. **Section 6. Assisting or committing an offense.** When a person in one county commits or aids, abets, or procures the commission of an offense in another county, the charge may be filed in either county.

NEW SECTION. **Section 7. County of offense unknown.** (1) If it cannot be readily determined in which county the offense was committed, the offender may be charged in any county in which it readily appears that an element of the offense occurred.

(2) When an offense is committed in or against a public or private conveyance, and it is doubtful in which county the offense occurred, the charge may be filed in any county in or through which the conveyance has traveled.

NEW SECTION. **Section 8. Offense consummated within state.** If an offense is commenced outside the state but is consummated within the state, the offense shall be charged in the county where an act requisite to the commission of the offense is committed or continued.

NEW SECTION. **Section 9. Inquest -- when held -- how conducted.** (1) The coroner shall hold an inquest only if requested to do so by the county attorney of the county in

which the acts or events causing death occurred. However, when the death of any person occurs in a jail or a penal institution or from the use of a firearm by a peace officer, except where criminal charges have been or will be filed, the county attorney shall direct the coroner to hold an inquest.

(2) If an inquest is held, the proceedings shall be public. The coroner shall conduct the inquest with the aid and assistance of the county attorney. The inquest must be held in accordance with this section.

NEW SECTION. **Section 10. Disqualifying a coroner.** (1) A coroner who also serves as a peace officer may not conduct an inquest into the death of a person who:

(a) died in a jail or penal institution;

(b) died while in custody of a peace officer; or

(c) was killed by a peace officer.

(2) If a coroner is disqualified under subsection (1), the county attorney shall request a qualified coroner of another county to conduct the inquest. The expenses of a coroner fulfilling the request must be paid by the requesting county.

NEW SECTION. **Section 11. Summoning and swearing in of jurors -- instructions.** (1) For holding an inquest, the coroner must summon a jury of not more than nine persons qualified by law to serve as jurors.

(2) The jurors chosen to serve must be sworn by the coroner to inquire who the person was and when, where, and by what means he came to his death, and into the circumstances attending his death and to render a true verdict thereon, according to the evidence offered.

(3) The jurors may be required to inspect the body of the decedent, whether or not an autopsy has been performed, at the discretion of the county attorney.

(4) The coroner must instruct the jurors as to their duties.

NEW SECTION. **Section 12. Coroner's subpoena.** Upon the request of the county attorney, a coroner must issue subpoenas for witnesses returnable immediately or at a time and place as he may designate, which may be served by any competent person.

NEW SECTION. **Section 13. Witness compelled to attend -- examination.** (1) A witness served with a subpoena may be compelled to attend and testify or be punished as upon a subpoena issued by a justice of the peace.

(2) The county attorney shall examine each witness, after which the witness may be examined by the coroner and the jurors.

NEW SECTION. **Section 14. Form of verdict.** After inspecting the body, if required, and hearing the testimony, the jury must render its verdict, which shall be by majority

vote, and certify the same in writing signed by them and setting forth who the deceased person was and the location, time, circumstances, and means of the death.

NEW SECTION. **Section 15. Recording and filing the testimony and proceedings.** The testimony of the witness examined before the coroner's jury must be recorded and transcribed, the transcript of which shall be filed with the clerk of the district court of the county. The recording and transcribing expenses shall be paid by the county upon claims duly rendered and certified to by the coroner in the same manner as other claims against the county are paid.

NEW SECTION. **Section 16. Issuing subpoenas.** (1) Whenever the attorney general or county attorney has a duty to investigate alleged unlawful activity, any justice of the supreme court or district court judge of this state may cause subpoenas to be issued commanding the persons to whom they are directed to appear before the attorney general or the county attorney and give testimony.

(2) Subpoenas duces tecum may also issue commanding persons to whom they are directed to produce such books, records, papers, documents, and other objects as may be necessary and proper to the investigation.

(3) A subpoena may issue only when it appears upon the affidavit of the attorney general or the county attorney that the administration of justice requires it to be issued.

NEW SECTION. **Section 17. Failure to appear or obey.** (1) A person who, without just cause, fails to obey an investigative subpoena issued pursuant to this section may be cited for contempt of court.

(2) A person who, after being granted immunity under [section 20], refuses to give testimony or to produce evidence must be brought before the judge issuing the subpoena or, in that judge's absence or inability to act, before the nearest and most accessible judge who shall inform the person:

(a) of the contents and requirements of the subpoena;

(b) that because immunity has been granted, the person cannot be excused from testifying or producing evidence on the grounds that the testimony or evidence may be personally incriminating; and

(c) that the refusal to testify or to produce evidence as commanded in the subpoena is punishable as a contempt of court under Title 3, chapter 1, part 5.

(3) In the presence of the judge, the person must be examined by the county attorney or produce evidence as commanded in the subpoena.

NEW SECTION. **Section 18. Relief from improper subpoena.** A person aggrieved by a subpoena issued pursuant to this section may, within a reasonable time, file a motion to dismiss the subpoena. If a subpoena duces tecum has

issued, a person aggrieved may petition to limit its scope.

NEW SECTION. **Section 19. Conduct of investigative inquiry.** (1) The person requesting a subpoena may examine under oath all witnesses subpoenaed pursuant to [sections 16 through 21]. Testimony shall be recorded. The witness has the right to have counsel present at all times. If the witness does not have resources to obtain counsel, the issuing judge shall appoint counsel, when requested.

(2) The secrecy and disclosure provisions relating to grand jury proceedings shall apply to proceedings conducted under [sections 16 through 21]. A person who divulges the contents of the application or the proceedings without legal privilege to do so may be punished for contempt of court.

(3) All penalties for perjury or preparing, submitting, or offering false evidence apply to proceedings conducted under [sections 16 through 21].

NEW SECTION. **Section 20. Self-incrimination -- immunity.** (1) No person subpoenaed to give testimony pursuant to [sections 16 through 21] may be required to make any statement or to produce any evidence which may be personally incriminating.

(2) The attorney general or the county attorney may, with the approval of the judge who authorized the issuance of the subpoena on behalf of the state, grant any person subpoenaed immunity from the use of any compelled testimony

or evidence or any information directly or indirectly derived from such testimony or evidence against that person in any criminal prosecution.

(3) Nothing in [sections 16 through 20] prohibits a prosecutor from granting immunity from prosecution for or on account of any transaction, matter, or thing concerning which a witness is compelled to testify if the prosecutor determines, in his sole discretion, that the ends of justice would be served thereby.

(4) After being granted immunity, no person may be excused from testifying on the grounds that such testimony may be personally incriminating. Immunity may not extend to prosecution or punishment for false statements given pursuant to the subpoena.

(5) Nothing in [sections 16 through 21] requires a witness to divulge the contents of a privileged communication unless the privilege is waived as provided by law.

NEW SECTION. **Section 21. Fees -- costs.** (1) The fees and mileage of witnesses subpoenaed pursuant to [sections 16 through 20] shall be the same as required in criminal actions.

(2) When the application for the subpoena is made by the attorney general, the state shall bear all costs, including the cost of service. The appropriate county shall

bear all costs, including the cost of service, when the application for the subpoena is made by the county attorney.

(3) All provisions relating to subpoenas in criminal actions apply, including [sections 182 through 190], to subpoenas issued pursuant to [sections 16 through 20].

NEW SECTION. **Section 22. Method of arrest.** (1) An arrest is made by an actual restraint of the person to be arrested or by his submission to custody of the person making the arrest.

(2) All necessary and reasonable force may be used in making an arrest, but the person arrested may not be subject to any greater restraint than is necessary to hold or detain him.

(3) All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to make an authorized arrest.

NEW SECTION. **Section 23. Time of making arrest.** An arrest may be made on any day and at any time of the day or night, except that a person cannot be arrested in his home or private dwelling place at night for a misdemeanor committed some other time and place unless upon the direction of a judge endorsed upon a warrant for arrest. However, a person may be arrested in his home or private dwelling in cases involving domestic abuse.

NEW SECTION. **Section 24. Written report when no arrest made in domestic violence situation.** When a peace officer is called to the scene of a reported incident of domestic violence but does not make an arrest, he shall file a written report with the officer commanding the law enforcement agency employing him, setting forth the reason or reasons for his decision.

NEW SECTION. **Section 25. Notice of rights to victim upon arrest in domestic violence situation.** Whenever a peace officer arrests a person for domestic abuse, as defined in 45-5-206, if the victim is present, the officer shall advise the victim of the availability of a shelter or other services in the community and give the victim immediate notice of any legal rights and remedies available. The notice must include furnishing the victim with a copy of the following statement:

"IF YOU ARE THE VICTIM OF DOMESTIC ABUSE, the county attorney's office can file criminal charges against your abuser. You have the right to go to court and file a petition requesting any of the following orders for relief:

(1) an order restraining your abuser from abusing you;

(2) an order directing your abuser to leave your household;

(3) an order preventing your abuser from transferring any property except in the usual course of business;

(4) an order awarding you or the other parent custody

of or visitation with a minor child or children;

(5) an order restraining your abuser from molesting or interfering with minor children in your custody; or

(6) an order directing the party not granted custody to pay support of minor children or to pay support of the other party if there is a legal obligation to do so".

NEW SECTION. **Section 26. Basis for arrest without warrant.** (1) A peace officer may arrest a person when no warrant has issued if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest.

(2) A summons of a peace officer to a place of residence by a family or household member constitutes an exigent circumstance for making an arrest. Arrest is the preferred response in domestic abuse cases involving injury to the victim, use or threatened use of a weapon, violation of a restraining order, or other imminent danger to the victim.

NEW SECTION. **Section 27. Manner of arrest without warrant.** A peace officer making an arrest when no warrant has issued must inform the person to be arrested of the officer's authority, of the intention to arrest that person, and of the cause of the arrest, except when the person to be arrested is actually engaged in the commission of or in an

attempt to commit an offense, or is pursued immediately after its commission or after an escape, or when the giving of the information will imperil the arrest.

NEW SECTION. **Section 28. Notice to appear.** (1) Whenever a peace officer is authorized to arrest a person when no warrant has issued, the officer may instead issue the person a notice to appear.

(2) The notice to appear shall:

(a) be in writing;

(b) state the person's name and address, if known;

(c) set forth the nature of the offense;

(d) be signed by the issuing officer; and

(e) direct the person to appear before a court at a certain time and place.

(3) Upon failure of the person to appear, a summons or warrant of arrest may issue.

NEW SECTION. **Section 29. Release.** When no warrant has issued, a peace officer having custody of a person arrested may release the arrested person without requiring that person to appear before a court when the officer is satisfied that there are insufficient grounds to commence prosecution.

NEW SECTION. **Section 30. Arrest warrant and summons.** A peace officer may arrest a person when the officer has a warrant commanding that the person be arrested or when the

officer believes on reasonable grounds:

(1) that a felony warrant for the person's arrest has been issued in another jurisdiction; or

(2) that a warrant for the person's arrest has been issued in this state.

NEW SECTION. **Section 31. Issuing warrant or summons.** (1) Upon the filing of a charge, the court may issue a summons or a warrant of arrest as provided in [sections 91 and 93]. A summons may issue to a corporation upon the filing of a charge against it. More than one warrant or summons may issue on the same charge.

(2) A summons may be served personally or by first-class mail.

NEW SECTION. **Section 32. Failure to appear following summons.** (1) If, after the issuance of a summons or notice to appear, the judge becomes satisfied that the person has not appeared or will not appear as commanded, the judge may at once issue a warrant of arrest.

(2) If, after being summoned, the corporation does not appear, a plea shall be entered in accordance with [section 130] and the matter shall proceed to trial and judgment without further process.

NEW SECTION. **Section 33. Form and content of a summons.** (1) The form of a summons shall:

(a) be in writing in the name of the state of Montana

or in the name of the municipality if the violation of a municipal ordinance is charged;

(b) state the name of the person summoned and that person's address, if known;

(c) set forth the nature of the offense;

(d) state the date when issued and the municipality or county where issued;

(e) be signed by a judge of the court with the title of office also noted; and

(f) command the person to appear before a court at a certain time and place.

(2) The summons shall plainly state that, upon failure to appear following service of summons, an arrest warrant shall issue forthwith; or, if the service is made to a corporation, that a plea of not guilty will be entered.

NEW SECTION. **Section 34. Form and content of an arrest warrant.** (1) The form of an arrest warrant shall:

(a) be in writing in the name of the state of Montana or in the name of a municipality if a violation of a municipal ordinance is charged;

(b) set forth the nature of the charge;

(c) command that the person against whom the complaint was made be arrested and brought before the nearest or most accessible court for an initial appearance;

(d) specify the name of the person to be arrested or,

if that person's name is unknown, designate the person by any name or description by which the person to be arrested can be identified with certainty;

(e) state the date when issued and the municipality or county where issued; and

(f) be signed by the judge of the court with the title of office noted.

(2) The warrant of arrest may specify the amount of bail.

(3) No warrant of arrest shall be dismissed nor shall any person in custody for an offense be discharged from custody because of technical irregularities not affecting the substantial rights of the accused.

NEW SECTION. **Section 35. Execution of a warrant.** (1) A warrant of arrest may be directed to all peace officers in the state. It shall be executed by a peace officer and may be executed in any county of the state.

(2) Warrants issued for the violation of city ordinances cannot be executed outside the city limits, except as otherwise provided by law.

NEW SECTION. **Section 36. Manner of arrest with warrant.** (1) When making an arrest pursuant to a warrant, a peace officer shall inform the person to be arrested of the officer's authority, the intention to arrest that person, the cause of the arrest, and the fact that a warrant has

been issued for that person's arrest, except:

(a) when the person forcibly resists or flees before the peace officer has an opportunity to inform the person; or

(b) when the giving of the information will imperil arrest.

(2) The peace officer need not have possession of the warrant at the time of arrest, but after the arrest the warrant must be shown to the person arrested as soon as practicable if the person requests.

NEW SECTION. **Section 37. Assisting a peace officer.** (1) A peace officer making a lawful arrest may command the aid of persons 18 years of age or older.

(2) A person commanded to aid a peace officer in making an arrest:

(a) has the same authority to arrest as that officer; and

(b) is not civilly liable for any reasonable conduct in aid of the officer.

NEW SECTION. **Section 38. Assisting officer of another state.** (1) Any peace officer of another state, of the United States, or of the District of Columbia who enters this state in close pursuit of a person in order to arrest him has the same authority to arrest and hold the person in custody as peace officers of this state have to arrest and hold in

custody a person on the ground that he had committed a crime in this state.

(2) If an arrest is made in this state by an officer of another state or of the District of Columbia, the officer shall without unnecessary delay take the arrested person before the judge of a court of record, who shall conduct a hearing for the sole purpose of determining if the arrest was in accordance with subsection (1) and not of determining guilt or innocence of the arrestee.

(3) If the judge determines that the arrest was in accordance with subsection (1), the judge shall commit the arrestee to the custody of the officer making the arrest, who shall, without unnecessary delay, take the arrestee to the state from which he fled. If the judge determines that the arrest was unlawful, the judge shall discharge the person arrested.

(4) This section may not be construed to make unlawful an arrest in this state which would otherwise be lawful.

NEW SECTION. **Section 39.** **When authorized -- custody.** (1) A private person may arrest another when there is probable cause to believe that the person is committing or has committed an offense and the existing circumstances require the person's immediate arrest.

(2) A private person making an arrest shall immediately notify the nearest available law enforcement agency or peace

officer and give custody of the person arrested to the officer or agency.

NEW SECTION. **Section 40.** **Peace officer's custody.** A peace officer who, pursuant to law, takes custody of a person arrested by a private citizen shall proceed in accordance with [sections 27 and 36], and as otherwise provided by law.

NEW SECTION. **Section 41.** **Investigative stop.** A peace officer may stop any person or vehicle which is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense, to obtain or verify an account of the person's presence or conduct, or to determine whether to arrest the person.

NEW SECTION. **Section 42.** **Stop and frisk.** A peace officer who has made a lawful stop under [sections 41 through 43]:

(1) may frisk the person and take other reasonably necessary steps for protection if the officer has reasonable cause to suspect that the person is armed and presently dangerous to him or another person present;

(2) may take possession of any object that is discovered during the course of the frisk if the officer has probable cause to believe the object is a weapon;

(3) may demand of the person or persons stopped his or

her name and present address; and

(4) shall inform the person or persons stopped as promptly as possible under the circumstances and in any case before questioning the person, that he is a peace officer, that the stop is not an arrest but rather a temporary detention for an investigation, and that upon the completion of the investigation the person will be released if not arrested.

NEW SECTION. **Section 43. Duration of stop.** A stop authorized by [section 41 or 42] may not last longer than is necessary to effectuate the purpose to the stop.

NEW SECTION. **Section 44. Authority to establish roadblock.** Any law enforcement agency of this state is authorized to establish, within its jurisdiction, temporary roadblocks on the highways of this state for the purpose of identifying drivers, checking for driver's licenses, vehicle registration, and insurance.

NEW SECTION. **Section 45. Establishing a roadblock.** A written plan for establishing a roadblock shall be designed by supervisory officers within the law enforcement agency to ensure motorist safety, minimize motorist inconvenience, and prevent the arbitrary selection of vehicles to be stopped by providing a schedule for the selection of vehicles to be stopped.

NEW SECTION. **Section 46. Search and seizure -- when**

authorized. A search of a person, object, or place may be made and instruments, articles, or things may be seized in accordance with [this act] when a search is made:

(1) by the authority of a search warrant; or

(2) in accordance with recognized exceptions to the warrant requirement.

NEW SECTION. **Section 47. Authority to issue search warrant.** A search warrant authorized by this section may be issued:

(1) upon the request of a peace officer, the city or county attorney or the attorney general; and

(2) by any city or municipal court judge or justice of the peace within his respective jurisdiction wherein the property or person sought is located; or

(3) by any district court judge within this state.

NEW SECTION. **Section 48. What may be seized with search warrant.** A warrant may issue under this section to search for and seize any:

(1) property that constitutes evidence of the commission of an offense;

(2) contraband, fruits of the crime, or things otherwise criminally possessed;

(3) property designed or intended for use or which is or has been used as a means of committing a criminal offense; or

(4) person for whose arrest there is probable cause, or for whom there has been a warrant of arrest issued, or who is unlawfully restrained.

NEW SECTION. **Section 49. Search warrant upon affidavit.** (1) A search warrant, other than a search warrant upon oral testimony under [section 50], shall issue only upon an affidavit or affidavits sworn to before the judge which establishes grounds for issuing a warrant. The judge shall issue a search warrant if the judge is satisfied that there is probable cause to believe an offense has been or will be committed and that there is probable cause for issuance of the warrant.

(2) The warrant shall particularly describe the thing, place, or person to be searched and instruments, articles, or person to be seized.

(3) The warrant shall be directed to a specific peace officer commanding the officer to search for and seize the designated person or items.

NEW SECTION. **Section 50. Search warrant upon oral testimony.** (1) If the circumstances make it reasonable to dispense with a written affidavit, a judge may issue a warrant based on sworn oral testimony communicated by telephone or other appropriate means.

(2) The person who is requesting the warrant shall prepare a document to be known as a duplicate original

warrant and shall read the duplicate original warrant, verbatim, to the judge. The judge shall then enter, verbatim, what is read to him on a document to be known as the original warrant.

(3) If the judge is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist, or that there is probable cause to believe that they exist, the judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the judge's name on the duplicate original warrant and enter on the face of the original warrant the exact time when the warrant was issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(4) When a caller informs the judge that the purpose of the case is to request a warrant, the judge shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. An applicant's telephonic oath or affirmation is considered to have been made before the judge. If a voice recording device is available, the judge shall record all of the call after the caller informs the judge that the purpose of the call is to request a warrant. Otherwise, a stenographic or longhand verbatim record shall

be made. If a voice recording is used or a stenographic record is made, the judge shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the judge shall file a signed copy with the court.

(5) A search warrant issued upon any telephonic request is invalid unless it is subsequently signed by the issuing judge or his successor.

(6) The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(7) Evidence obtained pursuant to a warrant issued under this section is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

NEW SECTION. **Section 51.** **Service of a search warrant.** A search warrant must in all cases be served by the peace officer specifically named and by no other person except in aid of the officer, the officer being present and acting in its execution.

NEW SECTION. **Section 52.** **Procedures assisting execution of search warrant.** (1) All necessary and reasonable force may be used to execute a search warrant or to effect an entry into any building or property or part thereof to execute a search warrant.

(2) The person executing the warrant may reasonably detain and search any person in the place being searched at the time:

(a) to protect himself from attack; or

(b) to prevent disposal or concealment of any instruments, articles, or things particularly described in the warrant.

NEW SECTION. **Section 53.** **Execution and return.** (1) Service of a search warrant is made by exhibiting the original warrant, or a duplicate original warrant, at the place or to the person to be searched. The officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the search warrant and receipt for property taken or shall leave the copy and receipt at the place from which the items were taken. Failure to leave a copy and receipt may not render the property seized inadmissible at trial.

(2) The return shall be made promptly and shall be accompanied by a written inventory of any property taken, verified by the person executing the warrant. The return shall be made before the judge who issued the warrant or, if he is absent or unavailable, before the nearest available judge.

(3) The judge shall, upon request, deliver a copy of the inventory and the order of custody or disposition to the

person from whom or from whose premises the property was taken and to the applicant for the warrant.

(4) The warrant may be executed at any time of the day or night. The warrant shall be executed within 10 days from the time of issuance. Any warrant not executed within 10 days is void and shall be returned to the court or judge issuing the same as "not executed".

(5) The judge shall enter an order providing for the custody or appropriate disposition of the instruments, articles, or things seized pending further proceedings.

NEW SECTION. **Section 54. Filing of return.** (1) The application on which the warrant is issued shall be retained by the judge but may not be filed with the clerk of court, or with the court if there is no clerk, until the warrant has been executed or has been returned "not executed".

(2) The judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory, and all other papers in connection with the warrant and shall file them with the issuing court.

NEW SECTION. **Section 55. Custody and disposition -- seizure without search warrant.** (1) Instruments, articles, or things lawfully seized without a warrant may be retained in the custody of the officer making the seizure for a time sufficient to complete an investigation.

(2) Notice of the seizure and a receipt for the

property seized shall be given to the person from whose possession the property is taken and to the owner of the property if the owner is reasonably ascertainable. The failure to give a receipt may not render the evidence seized inadmissible upon trial.

NEW SECTION. **Section 56. Return of property seized -- right to possess.** (1) Any person claiming the right to possession of property seized as evidence may apply to the judge for its return. The judge shall give written notice as the judge considers adequate to the prosecuting attorney and all persons who have or may have an interest in the property and shall hold a hearing to determine the right to possession.

(2) If the right to possession is established, the judge shall order the property other than contraband returned if:

(a) the property is not needed as evidence; or

(b) all proceedings in which it might be required have been completed.

NEW SECTION. **Section 57. Disposition of unclaimed property.** If property seized as evidence is not claimed within 6 months of the completion of the case for which it was seized, the officer having custody of it shall apply to the court for its disposition. If the judge, after proper inquiry, cannot ascertain or locate any person entitled to

its possession, the judge must order the property to be sold or, if contraband, destroyed, by the sheriff. The proceeds from the sale, after deduction of the costs of storage, preservation of property, and the sale, must be paid into the county general fund.

NEW SECTION. **Section 58.** Right to counsel. (1) During the initial appearance before the court, every defendant must be informed of the right to have counsel, and must be asked if the aid of counsel is desired.

(2) If the defendant desires counsel, is financially unable to employ counsel, and is entitled to have counsel assigned, the court must assign counsel to the defendant without unnecessary delay.

(3) The defendant, if unable to employ counsel, is entitled to have counsel assigned if:

(a) the offense charged is a felony;

(b) the offense charged is a misdemeanor and the court desires to retain imprisonment as a sentencing option; or

(c) the interests of justice would be served by assignment.

NEW SECTION. **Section 59.** Waiver of counsel. A defendant may waive the right to counsel when the court ascertains that the waiver is made knowingly, voluntarily, and intelligently.

NEW SECTION. **Section 60.** Duration of appointment. (1)

Where counsel has been assigned, the assignment shall be effective until final judgment, including any proceeding upon direct appeal to the Montana supreme court, unless relieved by order of the court.

(2) If counsel finds the defendant's case on appeal to be wholly frivolous, counsel must advise the court of that fact and request permission to withdraw. The request to withdraw must be accompanied by a memorandum referring to anything in the record that might arguably support the appeal. The defendant is entitled to receive a copy of counsel's memorandum, and to file a reply with the court.

NEW SECTION. **Section 61.** Determination of indigence. (1) The court shall make a determination of indigence.

(2) In applying for a court-appointed counsel, a defendant shall submit a sworn financial statement demonstrating a financial inability to obtain legal representation without substantial hardship in providing for personal or family necessities. The statement is not admissible in any civil or criminal action except where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false swearing.

NEW SECTION. **Section 62.** Payment for court-appointed counsel by defendant. (1) The court may require a convicted defendant to pay the costs of court-appointed counsel as a part of or a condition under the sentence imposed as

provided in [this act].

(2) Costs must be limited to reasonable compensation and costs incurred by the court-appointed counsel in the criminal proceeding.

(3) The court may not sentence a defendant to pay the costs of court-appointed counsel unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced him for remission of the payment of costs or of any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

NEW SECTION. **Section 63. Time and method of payment.** When a defendant is sentenced to pay the costs of court-appointed counsel, the court may order payment to be made within a specified period of time or in specified installments. Payments shall be made to the clerk of the district court. The clerk of the district court shall

distribute the payments to the government agency responsible for the expense of court-appointed counsel as provided in [section 65].

NEW SECTION. **Section 64. Effect of nonpayment.** (1) When a defendant who is sentenced to pay the costs of court-appointed counsel defaults in payment of the costs or of any installment, the court on motion of the county attorney or on its own motion may require the defendant to show cause why the default should not be treated as a contempt of court and may issue a show cause citation or a warrant of arrest for the defendant's appearance.

(2) Unless the defendant shows that the default was not attributable to an intentional refusal to obey the order of the court or to a failure on the defendant's part to make a good faith effort to make the payment, the court may find that the default constitutes civil contempt.

(3) The term of imprisonment for contempt for nonpayment of the costs of court-appointed counsel shall be set forth in the judgment and may not exceed 1 day for each $25 of the payment, 30 days if the order for payment was imposed upon conviction of a misdemeanor, or 1 year in any other case, whichever is the shorter period. A person committed for nonpayment of costs must be given credit toward payment for each day of imprisonment at the rate specified in the judgment.

(4) If it appears to the satisfaction of the court that the default in the payment of costs is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount of the payment or of each installment, or revoking the order for payment of the unpaid portion of the costs in whole or in part.

(5) A default in the payment of costs or any installment may be collected by any means authorized by law for the enforcement of a judgment. The writ of execution for the collection of costs may not discharge a defendant committed to imprisonment for contempt until the amount of the payment for costs has actually been collected.

NEW SECTION. **Section 65. Remuneration of appointed counsel.** (1) Whenever in a criminal proceeding an attorney represents or defends any person by order of the court on the ground that the person is financially unable to employ counsel, the attorney shall be paid for his services a sum as a district court or justice of the state supreme court certifies to be reasonable compensation and shall be reimbursed for reasonable costs incurred in the criminal proceeding.

(2) The expense of implementing this rule is chargeable as provided in 3-5-901 to the county in which the proceeding arose, the department of commerce, or both, except that:

(a) in proceedings solely involving the violation of a

city ordinance or state statute prosecuted in a city or municipal court, the expense is chargeable to the city or town in which the proceeding arose; or

(b) when there has been an arrest by agents of the department of fish, wildlife, and parks or agents of the department of justice and the charge is prosecuted by personnel of the state agency that made the charge, the expense must be borne by the prosecuting state agency.

NEW SECTION. **Section 66. General authority for release and detention.** (1) An arrested person shall be released or detained pending judicial proceedings pursuant to [sections 66 through 81].

(2) If a person is released, he shall appear to answer, as ordered, in the court having jurisdiction.

NEW SECTION. **Section 67. Release or detention of a defendant pending trial.** Before a verdict has been rendered, the court shall:

(1) authorize the release of the defendant upon reasonable conditions that assure the appearance of the defendant and protect the safety of the community or of any other person; or

(2) detain the defendant where there is probable cause to believe that the defendant committed an offense for which death is a possible punishment and adequate safeguards are not available to ensure the defendant's appearance and

safety of the community.

NEW SECTION. **Section 68. Release or detention pending appeal -- revocation -- sentencing hearing.** The court shall order that a defendant found guilty of an offense who is awaiting imposition or execution of sentence, revocation hearing, or who has filed an appeal, be detained, unless the court finds that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released.

NEW SECTION. **Section 69. Conditions upon the defendant's release.** (1) The court may impose any condition which will reasonably assure the appearance of the defendant as required, or assure the safety of any person and the community, including but not limited to, the following:

(a) the defendant not commit an offense during the period of release;

(b) the defendant remain in the custody of a designated person who agrees to supervise the defendant and report any violation of a release condition to the court, if the designated person is reasonably able to assure the court that the defendant will appear as required and will not pose a danger to the safety of any person or the community;

(c) the defendant maintain employment, or if unemployed, actively seek employment;

(d) the defendant abide by specified restrictions on

the defendant's personal associations, place of abode, and travel;

(e) the defendant avoid all contact with the alleged victim of the offense and any potential witness who may testify concerning the offense;

(f) the defendant report on a regular basis to a designated agency or individual, pretrial services agency, or other appropriate individual;

(g) the defendant comply with a specified curfew;

(h) the defendant may not possess a firearm, destructive device, or other dangerous weapon;

(i) the defendant may not use or possess alcohol, or any dangerous drug or other controlled substance without a legal prescription;

(j) furnish bail in accordance with [section 75]; or

(k) the defendant return to custody for specified hours following release for employment, schooling, or other limited purposes.

(2) The court may not impose an unreasonable condition that results in the pretrial detention of the defendant and shall subject the defendant to the least restrictive condition, or combination of conditions, that will assure the defendant's appearance and provide for the protection of the community. The court may, upon a reasonable basis, amend the order to impose additional or different conditions of

release, at any time, upon its own motion or upon the motion of either party.

NEW SECTION. **Section 70.** **Release or detention hearing.** (1) The release or detention of the defendant shall be determined immediately upon the defendant's first appearance.

(2) In determining whether the defendant shall be released or detained, the court shall take into account the available information concerning:

(a) the nature and circumstances of the offense charged, including whether the offense involved the use of force or violence;

(b) the weight of the evidence against the defendant;

(c) the history and characteristics of the defendant, including:

(i) the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to alcohol or drug abuse, criminal history, and record concerning the appearance at court proceedings; and

(ii) whether at the time of the current arrest or offense, the defendant was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentencing for an offense;

(d) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release; and

(e) the property available as collateral for the defendant's release to determine if it will reasonably assure the appearance of the defendant as required.

(3) Upon the motion of any party or the court, a hearing shall be held to determine whether bail is established in the appropriate amount, or whether any other condition or restriction upon the defendant's release will reasonably assure the appearance of the defendant and the safety of any other person or the community.

NEW SECTION. **Section 71.** **Release order.** A release order issued by the court shall include a written statement setting forth any restrictions or conditions upon the defendant's release.

NEW SECTION. **Section 72.** **Release ordered by court where charge not pending.** If release is ordered or bail is accepted by a court other than the court in which the charge is pending, any bonds, instrument of ownership, money posted, and a written statement of other conditions of release shall be delivered without delay to the court in which the charge is pending.

NEW SECTION. **Section 73.** **Bail schedule.** A judge may establish and post a schedule of bail for offenses over

which the judge has original jurisdiction. A person may not be released on bail without first appearing before the judge when the offense is domestic abuse or any assault against a family member or a household member.

NEW SECTION. **Section 74.** **Peace officer accepting bail.** (1) A peace officer may accept bail on behalf of a judge:

(a) in accordance with the bail schedule established under [section 73]; or

(b) on behalf of a judge whenever the warrant of arrest specifies the amount of bail.

(2) Whenever a peace officer accepts bail, the officer shall give a signed receipt to the offender setting forth the bail received. The peace officer shall then deliver the bail to the judge before whom the offender is to appear, and the judge shall give a receipt to the peace officer for the bail received.

NEW SECTION. **Section 75.** **Forms of bail.** (1) Bail may be furnished in the following ways:

(a) by a deposit with the court of an amount equal to the required bail of cash, stocks, bonds, certificates of deposit, or other personal property approved by the court;

(b) by real estate situated within the state with an unencumbered equity, not exempt, owned by the defendant or sureties at a value double the amount of the required bail;

(c) by written undertaking executed by the defendant

and by two sufficient sureties; or

(d) by a commercial surety bond executed by the defendant and a qualified agent for and on behalf of the surety company.

(2) The bond shall insure the appearance of the defendant at all times required through all stages of the proceeding including trial de novo, if any, and unless the bond is denied by the court pursuant to [section 68], shall remain in effect until final sentence is pronounced in open court.

(3) Nothing in [sections 66 through 81] prohibits a surety who considers himself insecure to surrender the defendant pursuant to [section 79].

NEW SECTION. **Section 76.** **Qualifying property as bail.** (1) If property posted as a condition of release is personal property, the defendant or sureties shall file a sworn schedule which must contain a list of the personal property including a description of each item, its location and market value, and the total market value of all items listed.

(2) If the property is real estate:

(a) the defendant or sureties shall file a sworn schedule which must contain a legal description of the property, a description of any and all encumbrances on the property, including the amount of each and the holder of the

encumbrance, and the market value of the unencumbered equity owned by the affiant; and

(b) a certified copy of the schedule of the property must be filed immediately by the court in the office of the clerk and recorder of the county in which the property is situated. The state has a lien on the property from the time the copy is filed. The clerk and recorder shall enter, index, and record the schedule without requiring any fee.

(3) If the property posted as a condition of release is a written undertaking with sureties, each surety must be a resident or freeholder within the state. Each surety must be worth the amount specified in the undertaking, exclusive of property exempt from execution, but the court or judge on taking the property may allow more than two sureties to justify severally and in amounts less than that expressed in the undertaking if the whole justification is equivalent to that amount required.

(4) If the property posted as a condition of release is a commercial bond, it may be executed by any domestic or foreign surety company which is qualified to transact surety business in this state. The undertaking shall be in a form to be prescribed by the commissioner of insurance and shall state the following:

(a) the name and address of the commercial surety company which issued the bond;

(b) the amount of the bond and the unqualified obligation of the surety company to pay the court should the defendant fail to appear as guaranteed; and

(c) a provision that the surety company may not revoke the undertaking without good cause.

(5) The court may examine the sufficiency of any undertaking and take any action it considers proper to insure that a sufficient undertaking is posted.

NEW SECTION. **Section 77.** Guaranteed arrest bond certificates. (1) A domestic or foreign surety company which has qualified to transact surety business in this state may, in any year, become surety in an amount not exceeding $500 with respect to any guaranteed arrest bond certificates issued in the year by an automobile club or association or by an insurance company authorized to write automobile liability insurance within this state by filing with the commissioner of insurance an undertaking to become surety.

(2) The form of the undertaking shall be prescribed by the commissioner of insurance but must include those matters as required by [section 75].

(3) A guaranteed arrest bond certificate shall, when posted by the person whose signature appears on the certificate, be accepted in lieu of any cash bail in an amount not exceeding $500 as a bail bond to guarantee the appearance of the person in any court, including municipal

courts, in this state at the time as may be required by the court when the person was arrested for violation of a motor vehicle law of this state or ordinance of a municipality of this state (except for the offense of driving while intoxicated or for any felony) committed prior to the date of expiration shown on the guaranteed arrest bond certificate.

(4) A guaranteed arrest bond certificate is subject to the same enforcement and forfeiture provisions established by [sections 66 through 81] unless otherwise provided by law.

NEW SECTION. **Section 78. Violation of a release condition -- forfeiture.** (1) If a defendant violates a condition of release, including failure to appear, the prosecuting attorney may move the court in writing for revocation of the order of release. A judge may issue a warrant for the arrest of a defendant charged with violating a condition of release. Upon arrest the defendant shall be brought before a judge for proceeding in accordance with [section 82].

(2) If a defendant fails to appear before a court as required, and bail has been posted, the judge may declare the bail forfeited. Notice of the order of forfeiture shall be mailed to the defendant and the defendant's sureties at their last known address.

(3) If at any time within 30 days after the forfeiture the defendant or the defendant's sureties appear and satisfactorily excuse the defendant's failure to appear, the judge may direct the forfeiture to be discharged upon terms as may be just.

NEW SECTION. **Section 79. Surrender of defendant.** (1) At any time before the forfeiture of bail:

(a) the defendant may surrender to the court or any peace officer of this state; or

(b) the surety may arrest the defendant and surrender the defendant to the court or any peace officer of this state.

(2) The peace officer must detain the defendant in the officer's custody as upon commitment and shall file a certificate, acknowledging the surrender, in the court having jurisdiction of the defendant. The court may then order the bail exonerated.

NEW SECTION. **Section 80. Forfeiture procedure.** When the order of forfeiture is not discharged, the court having jurisdiction shall proceed with the forfeiture of the bail posted as follows:

(1) if any money has been posted as bail, the court must pay over the money to the treasury of the city or county where the money was posted; or

(2) if other property is posted as a condition of

release, the property shall be sold in the same manner as execution of sales in civil actions. The proceeds of the sale shall be used to satisfy all court costs and prior encumbrances, if any, and from the balance, a sufficient sum to satisfy the judgment or forfeiture shall be paid into the treasury of the city or county where the case is pending.

(3) If a surety bond has been posted as bail, execution may be issued against the sureties or the surety company in the same manner as executions in civil actions.

NEW SECTION. **Section 81.** **Use of forfeited bail as restitution.** (1) If the court enters a judgment declaring bail to be forfeited or if the order of forfeiture is not discharged, the court having jurisdiction may order the bail forfeited to be paid as restitution to any victim of the offense for which the court has received bail. Whenever the court believes restitution may be proper, the court shall order a hearing for the purpose of considering the nature and extent of the victim's pecuniary loss as defined by law.

(2) If the court finds that restitution is appropriate, the court shall order restitution in an amount not exceeding the amount of the victim's complaint or the amount of the victim's pecuniary loss.

(3) An order to require restitution is a judgment against the defendant and the defendant's sureties, and the court may order the restitution to be made by payment of

money deposited as bail. Any balance of the bail money must be disposed of in the manner prescribed in [section 80].

(4) A determination or decision under this section is not admissible as evidence in any other civil action and is not res judicata in any civil action.

NEW SECTION. **Section 82.** **Appearance of the arrested person.** Any person arrested, whether with or without a warrant, shall be taken without unnecessary delay before the nearest and most accessible judge for an initial appearance.

NEW SECTION. **Section 83.** **Duty of the court.** (1) The judge shall inform the defendant:

(a) of the charge or charges against the defendant;

(b) of the defendant's right to counsel;

(c) of the defendant's right to have counsel assigned by a court of record in accordance with [section 58];

(d) of the general circumstances under which the defendant may obtain pretrial release;

(e) of the defendant's right to refuse to make a statement and that any statement made by the defendant may be offered in evidence at the defendant's trial; and

(f) of the defendant's right to a judicial determination of whether probable cause exists if the charge is by complaint alleging the commission of a felony.

(2) The judge shall admit the defendant to bail as provided by law.

NEW SECTION. **Section 84. Preliminary examination -- when held.** (1) After the initial appearance, in all cases where the charge is triable in district court, the justice court shall, within a reasonable time, hold a preliminary examination unless:

(a) the defendant waives a preliminary examination;

(b) the district court has granted leave to file an information;

(c) an indictment has been returned; or

(d) the case is triable in a justice court.

NEW SECTION. **Section 85. Waiver.** If the defendant waives the preliminary examination, the justice shall hold the defendant to answer to the court having jurisdiction of the offense.

NEW SECTION. **Section 86. Presentation of evidence.** (1) The defendant may not enter a plea. The judge shall hear the evidence without unnecessary delay. All witnesses must be examined in the presence of the defendant. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf.

(2) During the examination of any witness or when the defendant is making a statement or testifying, the judge may, and on the request of the defendant or state shall, exclude all other witnesses. The judge may also cause the witnesses to be kept separate and to be prevented from

communicating with each other until all are examined.

(3) Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in [section 173].

NEW SECTION. **Section 87. Disposition of the defendant.** (1) If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the judge shall hold the defendant to answer to the court having jurisdiction of the offense.

(2) If from the evidence it appears that there is insufficient probable cause to believe that an offense has been committed and that the defendant committed it, the judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant may not preclude the state from instituting a subsequent prosecution for the same offense.

NEW SECTION. **Section 88. Record of preliminary examination.** (1) The testimony of each witness must be taken by a court-appointed stenographer upon demand by the county attorney, the defendant, or the defendant's counsel.

(2) After concluding the proceeding, if the justice holds the defendant to answer, the justice shall transmit immediately to the clerk of the court having jurisdiction of

the offense all papers in the proceeding and any bail taken by the justice.

NEW SECTION. **Section 89. Methods of commencing prosecution.** A prosecution may be commenced by:

(1) a complaint;

(2) an information following a preliminary examination or waiver of a preliminary examination;

(3) an information after leave of court has been granted; or

(4) an indictment.

NEW SECTION. **Section 90. Required methods.** (1) All prosecutions of offenses charged in the district courts shall be by indictment or information.

(2) All other prosecutions of offenses shall be by complaint.

NEW SECTION. **Section 91. Filing a complaint.** (1) When a complaint is presented to a court charging a person with the commission of an offense, the court may examine the complainant and any affidavits, if filed, to determine whether a charge may be filed.

(2) If it appears from any affidavit filed with the charge, or from testimony of the complainant that there is probable cause to believe that an offense has been committed and that the person against whom the charge is made has committed it, the court may issue a warrant of arrest.

NEW SECTION. **Section 92. Amending a complaint.** A complaint may be amended, with leave of court, under the same circumstances and in the same manner as an information.

NEW SECTION. **Section 93. Leave to file.** (1) The county attorney may apply directly to the district court for permission to file an information against a named defendant. If the defendant named is a district court judge, the county attorney shall apply directly to the supreme court for leave to file the information.

(2) An application must be by affidavit supported by such evidence as the judge or chief justice may require. If it appears that there is probable cause to believe that an offense has been committed by the defendant, the judge or chief justice shall grant leave to file the information; otherwise the application shall be denied.

(3) When leave to file an information has been granted, a warrant or summons may issue for the defendant's arrest or appearance.

(4) When leave is granted to file an information against a district court judge, the chief justice shall designate and direct a judge of the district court of another district to preside at the trial of the information and hear and determine all pleas and motions affecting the defendant under the information before and after judgment. All necessary records shall be transferred to the clerk of

the district court of the district in which the action arose.

NEW SECTION. **Section 94. Amending an information as to substance.** (1) The court shall grant leave to amend an information as to matters of substance at any time, but not less than 5 days before trial, provided that a motion is timely filed, states the nature of the proposed amendment, and is accompanied by an affidavit stating facts which show the existence of probable cause to support the charge as amended. A copy of the proposed amended information shall be included with the motion to amend an information.

(2) If the court grants leave to amend the information, the defendant shall be arraigned on the amended information without unreasonable delay and shall be given a reasonable period of time to prepare for trial on the amended information.

NEW SECTION. **Section 95. Amending an information as to form.** The court may permit an information to be amended as to form at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

NEW SECTION. **Section 96. Time for filing information.** (1) After a finding of probable cause following a preliminary examination or waiver of a preliminary examination, or after leave of court has been granted, the

county attorney shall file within 30 days in the proper district court an information charging the defendant with the offense or any other offense supported by probable cause.

(2) The court, unless good cause to the contrary is shown, shall dismiss the prosecution if an information is not filed within 30 days as required in subsection (1).

NEW SECTION. **Section 97. Summoning grand jury.** (1) A grand jury may only be drawn or summoned when the district judge, in his discretion, considers a grand jury to be in the public interest and orders the grand jury to be drawn or summoned. The composition and drawing of a grand jury shall be in accordance with Title 3, chapter 15, part 6.

(2) The district judge may direct the selection of one or more alternate jurors who shall sit as regular jurors before an indictment is found or a grand jury investigation is concluded. If a member of the jury becomes unable to perform his duty, the juror may be replaced by an alternate.

NEW SECTION. **Section 98. Challenges to grand jury or grand jurors.** (1) The attorney general or county attorney may challenge the panel of a grand jury on the ground that the grand jury was not selected, drawn, or summoned according to law and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the

oath of the jurors, may be oral or in writing, and shall be tried and decided by the court.

(2) A motion to dismiss the indictment may be based on the grounds that a grand jury was not selected, drawn, or summoned according to law or that the individual juror was not legally qualified. An indictment may not be dismissed on grounds that one or more members are not legally qualified if it appears from the record kept pursuant to [sections 97 through 112] that eight or more jurors, after deducting those not legally qualified, concurred in finding the indictment.

NEW SECTION. **Section 99. Excuse or discharge of grand jurors.** Any time for cause shown, the court may excuse or discharge a juror or jurors either temporarily or permanently and, in the latter event, the court may impanel another person or persons in place of the juror or jurors discharged.

NEW SECTION. **Section 100. Foreman.** The court shall appoint one of the jurors to be a foreman. The foreman shall have the power to administer oaths or affirmations and shall sign all indictments. The foreman or another juror designated by the foreman shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of court, but the record may not be made public except on order of the court.

NEW SECTION. **Section 101. Appointing special prosecutor.** When the county attorney or attorney general is the subject of the grand jury investigation, the court shall appoint a special prosecutor. If a special prosecutor is appointed, the county attorney's or attorney general's office may not participate in an official capacity, but only as witnesses.

NEW SECTION. **Section 102. Charge to the grand jury.** When a grand jury is impaneled and sworn, it shall be charged by the judge who summoned it. In making the charge, the court shall instruct the jury as to its duties and the matters which jurors may consider. The prosecutor may bring additional matters before the grand jury which are consistent with the original charge or are developed during the proceedings.

NEW SECTION. **Section 103. Closed hearing.** Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed. This rule may not affect a defendant's discovery rights after the filing of the indictment.

NEW SECTION. **Section 104. Power and duties of grand jurors.** The grand jury shall inquire into those matters as directed by the court summoning the jury and other matters as presented by the prosecutor.

NEW SECTION. **Section 105.** **Subpoena of witnesses.** (1) A subpoena requiring the attendance of a witness before the grand jury may be signed and issued by the county attorney, by the foreman of the grand jury, or by the judge of the district court.

(2) The fees and mileage of witnesses subpoenaed pursuant to this section shall be the same as required in criminal actions.

(3) All provisions relating to subpoenas in criminal actions apply to subpoenas issued pursuant to this section, including provisions of [sections 182 through 190].

NEW SECTION. **Section 106.** **Reception of evidence.** In the investigation of a charge, the grand jury shall receive no other evidence than that given by witnesses produced and sworn before it, furnished by legal evidence, or the deposition of a witness.

NEW SECTION. **Section 107.** **Advice and assistance to grand jury.** (1) The grand jury may at all times ask the advice of the judge. Unless his advice is asked, the judge may not be present during sessions of the grand jury.

(2) The prosecutor may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by the grand jury and may interrogate witnesses before the grand jury whenever he thinks it necessary.

(3) Subject to the approval of the court, the county attorney may employ a special prosecutor, investigators, interpreters, and experts at an agreed compensation to be first approved by the court.

NEW SECTION. **Section 108.** **Who may be present.** The prosecutor, witnesses under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session. No person other than the jurors may be present while the grand jury is deliberating or voting.

NEW SECTION. **Section 109.** **Recorded proceedings.** (1) The grand jury shall appoint a stenographer to take in shorthand the testimony of witnesses, or the testimony may be taken by a recording device, but the record shall include the testimony of all witnesses on that particular investigation.

(2) The stenographic reporter or operator of a recording device shall, within 30 days after an indictment has been found, certify and file with the clerk of the district court the shorthand notes or the recordings made and an original transcript of the notes or recordings.

(3) An unintentional failure of any recording to reproduce all or any portion of a proceeding may not affect the validity of the prosecution.

NEW SECTION. **Section 110. Secrecy of proceedings.** (1) A grand juror, an interpreter, a stenographer, an operator of a recording device, any typist who transcribes recorded testimony, or the prosecutor may not disclose matters occurring before the grand jury except as otherwise provided for in [this act]. No obligation of secrecy may be imposed on any person except in accordance with this section. A knowing violation of this section may be punishable as contempt of court.

(2) Disclosure of matters occurring before the grand jury, other than its deliberations and the vote of any juror, may be made to any prosecutor or investigator of this state, and prosecutors or investigators from any other state, or the federal government for use in the performance of their duty.

(3) Disclosure otherwise prohibited by this section of matters occurring before the grand jury may also be made:

(a) if directed by the court preliminary to or in connection with a judicial proceeding;

(b) when permitted by the court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or

(c) when permitted by the court, to a defendant pursuant to a proper discovery motion.

NEW SECTION. **Section 111. Discharge of jury.** When the grand jury certifies completion of business before it and the court concurs, it shall be discharged by the court.

NEW SECTION. **Section 112. Expenses of grand jury.** (1) Except as provided in subsection (2), all expenses of the grand jury, including special prosecutors, experts, investigators, and interpreters, if any, must be paid by the treasurer of the county out of the general fund of the county, upon warrants drawn by the county auditor or the clerk of the district court upon a written order of the judge of the district court of the county.

(2) If the county has a district court fund, all expenses of a grand jury must be paid out of that fund.

(3) Subject to the procedures established by law, the state shall reimburse the court for juror and witness fees and witness expenses. The county shall deposit the amount reimbursed in the general fund unless the county has a district court fund. If the county has a district court fund, the amount reimbursed must be deposited in that fund.

NEW SECTION. **Section 113. Finding an indictment.** (1) The grand jury shall find an indictment when all the evidence before it taken together would in its judgment warrant a conviction by a trial jury. An indictment may be found only upon the concurrence of at least eight grand jurors.

(2) If a complaint or information is pending against the defendant and eight jurors do not concur in finding an indictment, the foreman shall report the decision to the district judge.

NEW SECTION. **Section 114. Presenting an indictment.** (1) An indictment, when found by the grand jury, must be signed by the foreman and presented by the foreman in the presence of the grand jury to the court and must be filed with the clerk. The court shall then issue a warrant or summons for the defendant.

(2) The court may direct that an indictment shall be kept secret until the defendant is in custody or has appeared to answer the charge and a person may not disclose the execution of a warrant or summons.

NEW SECTION. **Section 115. Form of charge.** (1) The charge shall be in writing in the name of the state or appropriate municipality and specify the court in which the charge is filed. The charge shall be a plain, concise, and definite statement of the essential facts constituting the offense charged, including the name of the offense, whether the offense is a misdemeanor or felony, the name of the person charged, and the time and place of its occurrence as definitely as can be determined. The charge shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law which

the defendant is alleged to have violated.

(2) If the charge is by information or indictment, it shall include endorsed on the information or indictment the names of the witnesses for the state, if known.

(3) If the charge is by complaint, it shall be signed on oath by a person having knowledge of the facts or by the prosecuting attorney.

(4) If the charge is by information, it shall be signed by the prosecuting attorney. If the charge is by indictment, it shall be signed by a foreman of the grand jury.

(5) The court, on motion of the defendant, may strike surplusage from the indictment or information.

(6) A charge may not be dismissed because of a formal defect which does not tend to prejudice a substantial right of the defendant.

NEW SECTION. **Section 116. Joinder of offenses.** (1) Two or more offenses, or different statements of the same offense, may be charged in the same charging document in a separate court, or alternatively, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Allegations made in one count may be incorporated by reference in another count.

(2) If two or more charging documents are filed in the case, the court may order them to be consolidated.

(3) The prosecution is not required to elect between the different offenses set forth in the charging document and the defendant may be convicted of any number of offenses charged except as provided in [section 118]. Each offense of which the defendant is convicted must be stated in the verdict or the finding of the court.

NEW SECTION. **Section 117. Joinder of defendants.** Two or more defendants may be charged in the same indictment, information, or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

NEW SECTION. **Section 118. Multiple charges.** (1) When the same transaction may establish the commission of more than one offense, a person charged with the conduct may be prosecuted for each offense.

(2) A defendant may not, however, be convicted of more than one offense if:

(a) one offense is included in the other;

(b) one offense consists only of a conspiracy or other form of preparation to commit the other;

(c) inconsistent findings of fact are required to establish the commission of the offenses;

(d) offenses differ only in that one is defined to prohibit a specific instance of the conduct; or

(e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that the specific periods of the conduct constitute separate offenses.

NEW SECTION. **Section 119. Prosecution based on same transaction barred by former prosecution.** (1) When two or more offenses are known to the prosecuting attorney, are supported by probable cause, are consummated before the original charge, and jurisdiction and venue of the offenses lie in a single court, a prosecution based upon the same transaction as a former prosecution is barred under the following circumstances:

(a) the former prosecution resulted in an acquittal. There is an acquittal whenever the prosecution results in a finding of not guilty by the trier of fact or in a determination that there is insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense that is subsequently set aside is an acquittal of the greater offense that was charged.

(b) the former prosecution resulted in a conviction that has not been set aside, reversed, or vacated;

(c) after a charge had been filed the prosecution was terminated by a final order or judgment for the defendant which has not been set aside, reversed, or vacated;

(d) the former prosecution was terminated for reasons not amounting to an acquittal and takes place:

(i) in a jury trial, after the jury was sworn but before verdict; or

(ii) in a nonjury trial, after the first witness is sworn but before the verdict.

(2) A prosecution based upon the same transaction as a former prosecution is not barred under subsection (1)(d) when:

(a) the defendant consents to the termination or waives his right to object to the termination; or

(b) the trial court finds the termination is necessary because:

(i) it is physically impossible to proceed with the trial in conformity with law;

(ii) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law;

(iii) prejudicial conduct makes it impossible to proceed with the trial without manifest injustice to either the defendant or the state;

(iv) the jury is unable to agree upon a verdict; or

(v) false statements of a juror during voir dire prevent a fair trial.

NEW SECTION. **Section 120.** **Former prosecution in another jurisdiction.** When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States, or another state, or of two courts of separate, overlapping, or concurrent jurisdictions in this state, a prosecution in any other jurisdiction is a bar to a subsequent prosecution in this state under the same circumstances barring further prosecution in this state if:

(1) the first prosecution resulted in an acquittal or in a conviction and the subsequent prosecution is based on an offense arising out of the same transaction; or

(2) the former prosecution was terminated, after the charge had been filed, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated; and the acquittal, final order, or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense for which the defendant is subsequently prosecuted.

NEW SECTION. **Section 121.** **Former prosecution not a bar.** A prosecution is not a bar if:

(1) the former prosecution was before a court which lacked jurisdiction over the defendant or the offense; or

(2) the former prosecution resulted in a judgment of

conviction which was held invalid in a postconviction hearing.

NEW SECTION. **Section 122. Pretrial proceedings -- exclusion of public and sealing of records.** (1) Except as provided in this section, pretrial proceedings and their record shall be open to the public. If, at the pretrial proceedings, testimony or evidence is advanced that is likely to threaten the fairness of a trial, the presiding officer shall advise those present of the danger and shall seek the voluntary cooperation of the news media in delaying dissemination of potentially prejudicial information by means of public communication until the impaneling of the jury or until an earlier time consistent with the fair administration of justice.

(2) The defendant may move that all or part of the proceeding be closed to the public or, with the consent of the defendant, the judge may take action on his own motion.

(3) The judge may close a preliminary hearing, bail hearing, or any other pretrial proceedings, including a motion to suppress, and may seal the record only if:

(a) the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial; and

(b) the prejudicial effect of the information on trial fairness cannot be avoided by any reasonable alternative

means.

(4) Whenever under this section all or part of any pretrial proceeding is held in chambers or otherwise closed to the public, a complete record shall be kept and made available to the public following the completion of trial or earlier if consistent with trial fairness.

(5) When the judge determines that a document filed in support of a charge or warrant would present a clear and present danger to the defendant's right to a fair trial, all or part of the document shall be sealed until the trial is completed or earlier if consistent with trial fairness.

NEW SECTION. **Section 123. Misdemeanor offenses.** In all cases in which the defendant is charged with a misdemeanor offense, he may appear by counsel only, although the court may require the personal attendance of the defendant at any time.

NEW SECTION. **Section 124. Felony offenses.** (1) Except as otherwise provided in [this act], the defendant in all cases in which a felony is charged must be present at the initial appearance, arraignment, entry of plea, preliminary examination, trial, at the time of imposition of sentence, and when otherwise required by the court.

(2) The defendant may be present at all other proceedings.

(3) Presence of the defendant is not required before

the supreme court.

NEW SECTION. **Section 125.** **Absence of defendant from trial.** (1) In a misdemeanor case, if the defendant fails to appear in person, either at the time set for trial or at any time during the course of the trial, and:

(a) if the defendant's counsel is authorized to act on the defendant's behalf, the court shall proceed with the trial unless good cause for continuance exists; or

(b) if the defendant's counsel is not authorized to act on the defendant's behalf or if the defendant is not represented by counsel, the court, in its discretion, may do one or more of the following:

(i) order a continuance;

(ii) order bail forfeited;

(iii) issue a bench warrant; or

(iv) proceed with the trial after finding that the defendant had knowledge of the trial date and is voluntarily absent.

(2) The absence of the defendant during the trial of a felony offense, after the trial has commenced in the defendant's presence, may not prevent the trial from continuing, up to and including the return of a verdict, if:

(a) the defendant has been removed from the courtroom for disruptive behavior after receiving a warning that removal will result if the defendant persists in conduct

that is so disruptive that the trial cannot be carried on with the defendant in the courtroom; or

(b) the defendant is voluntarily absent and the offense is not one which is punishable by death.

(3) Nothing in this section limits the right of the court to order the defendant to be personally present at the trial for purposes of identification unless counsel stipulates to the issue of identity.

NEW SECTION. **Section 126.** **Absence of defendant on receiving verdict or at sentencing.** (1) In all misdemeanor cases, the verdict may be returned and the sentence imposed without the defendant being present.

(2) In all felony cases, the defendant must appear in person when the verdict is returned or sentence is imposed unless, after the exercise of due diligence to procure the defendant's presence, the court finds that it is in the interest of justice that the verdict be received and sentence be pronounced in the defendant's absence.

NEW SECTION. **Section 127.** **Pretrial diversion.** (1) The prosecutor and defendant, who has counsel or who has voluntarily waived counsel, may agree that a prosecution will be deferred for a specified period of time based on any or all of the following conditions:

(a) that the defendant not commit any offense;

(b) that the defendant not engage in specified

activities, conduct, and associations bearing a relationship to the conduct upon which the charge against him is based;

(c) that the defendant participate in a supervised rehabilitation program that may include treatment, counseling, training, or eduction;

(d) that the defendant make restitution in a specified manner for harm or loss caused by the offense; or

(e) any other reasonable conditions.

(2) The agreement may include stipulations concerning the admissibility of evidence, specified testimony, or dispositions if the deferral of the prosecution is terminated and there is a trial on the charge. The agreement shall be in writing signed by the parties and state that the defendant waives his right to speedy trial for the period of deferral.

(3) The prosecution shall be deferred for the period specified in the agreement unless there has been a violation of its terms.

(4) The agreement shall be terminated and the prosecution automatically dismissed with prejudice upon expiration and compliance with the terms of the agreement.

NEW SECTION. **Section 128.** **Place of arraignment.** The defendant shall be arraigned in the court that has trial jurisdiction of the charge.

NEW SECTION. **Section 129.** **Manner of conducting**

arraignment. (1) Arraignment shall be conducted in open court and shall consist of reading the charge to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead to the charge. The defendant shall be given a copy of the charging document before being called upon to plead.

(2) The court shall inquire of the defendant, or the defendant's counsel, the defendant's true name, and if the defendant's true name is given as any other than that used in the charge, the court must order the defendant's name to be substituted for the name under which the defendant is charged.

(3) The court shall determine whether the defendant is under any disability which would prevent the court in its discretion from proceeding with the arraignment. The arraignment may be continued until the court determines the defendant is able to proceed.

NEW SECTION. **Section 130.** **Plea alternatives.** (1) A defendant may plead not guilty or guilty. If a defendant refuses to plead, or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a plea of guilty reserving the right, on appeal from the judgment, to review the adverse determination of any specified pretrial

motion. If the defendant prevails on appeal, the defendant shall be allowed to withdraw the plea.

NEW SECTION. **Section 131. Advice to defendant.** Before accepting a plea of guilty, the court shall determine that the defendant understands the following:

(1) the nature of the charge for which the plea is offered, the mandatory minimum penalty provided by law, if any, the maximum penalty provided by law, including the effect of any penalty enhancement provision or special parole restriction and, when applicable, that the court may also order the defendant to make restitution of the costs and assessments provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has a right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at the trial has a right to the assistance of counsel, the right to confront and cross-examine witnesses against the defendant, and the right not to be compelled to reveal personally incriminating information; and

(4) that if the defendant pleads guilty in fulfillment of a plea agreement, the court is not required to accept the

terms of an agreement, and that the defendant may not be entitled to withdraw the plea if the agreement is not accepted pursuant to [section 133]; and

(5) that if the defendant's plea of guilty is accepted by the courts there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.

NEW SECTION. **Section 132. Insuring plea is voluntary.** The court may not accept a plea of guilty without first determining that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty results from prior discussions between the prosecuting attorney and the defendant or the defendant's attorney.

NEW SECTION. **Section 133. Plea agreement procedure.** (1) The prosecuting attorney and the attorney for the defendant, or the defendant when acting pro se, may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty to a charged offense or to a lesser or related offense, the prosecuting attorney will do any of the following:

(a) move for dismissal of other charges;

(b) agree that a specific sentence is the appropriate disposition of the case; or

(c) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that the recommendation or request may not be binding upon the court.

(2) If a plea agreement has been reached by the parties, the court shall, on the record, require a disclosure of the agreement in open court or, on a showing of good cause in camera, at the time the plea is offered. If the agreement is of the type specified in subsections (1)(a) and (1)(c), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in section (1)(c), the court shall advise the defendant that, if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea.

(3) If the court accepts a plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact and advise the defendant that the court is not bound by the plea agreement, afford the defendant an opportunity to withdraw

the plea, and advise the defendant that if he persists in the guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

NEW SECTION. **Section 134. Determining the accuracy of plea.** (1) The court may not accept a guilty plea without determining that there is a factual basis for the plea in felonies or misdemeanors resulting in incarceration.

(2) A defendant who is unwilling to admit to any element of the offense which would provide a factual basis for a plea of guilty may, with the consent of the court, enter a plea of guilty to the offense if the defendant considers the plea to be in his best interest and a factual basis exists for the plea.

NEW SECTION. **Section 135. Harmless error.** Any variance from the procedure required by this section which does not affect substantial rights of the defendant shall be disregarded.

NEW SECTION. **Section 136. Disclosure by the prosecution.** (1) Upon request, the prosecutor shall make available to the defendant for examination and reproduction or testing the following material and information within the prosecutor's possession or control:

(a) the names, addresses, and statements of all persons whom the prosecutor may call as witnesses in the

case-in-chief;

(b) all written or oral statements of the defendant and of any other person who will be tried with the defendant;

(c) all written reports or statements of experts who have personally examined the accused or any evidence in the particular case, together with the results of physical examinations, scientific tests, experiments, or comparisons;

(d) all papers, documents, photographs, or tangible objects that the prosecutor may use at trial or that were obtained from or purportedly belong to the defendant; and

(e) all material or information that tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce the defendant's potential sentence.

(2) The prosecutor may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under section (1)(d).

(3) At the same time, the prosecutor shall inform the defendant of, and make available to the defendant for examination and reproduction, any written or recorded material or information within the prosecutor's control regarding:

(a) whether there has been any electronic surveillance of any conversations to which the defendant was a party;

(b) whether an investigative subpoena has been executed in connection with the case; and

(c) whether the case has involved an informant, and, if so, the informant's identity if the defendant is entitled to know either or both of these facts under Rule 502 of the Montana Rules of Evidence.

(3) The prosecutor's obligation of disclosure extends to material and information in the possession or control of members of the prosecutor's staff and of any other persons who have participated in the investigation or evaluation of the case.

(4) Upon motion showing that the defendant has substantial need in the preparation of the case for additional material or information not otherwise provided for and that the defendant is unable, without undue hardship, to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available to the defendant. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive. The prosecutor may not be required to disclose or prepare summaries of witnesses' testimony.

(5) The prosecutor shall furnish to the defendant no later than 5 days before trial or at a later time as the court may for good cause permit, together with their

statements, a list of the names and addresses of all persons whom the prosecutor intends to call as rebuttal witnesses to the defenses of alibi, compulsion, entrapment, justifiable use of force, mistaken identity, or good character or the defense that the defendant did not have a particular state of mind that is an element of the offense charged.

NEW SECTION. **Section 137. Disclosure by the defendant.** (1) At any time after the filing in district court of an indictment or information, the defendant, in connection with the particular crime charged, shall upon written request of the prosecutor and approval of the court:

(a) appear in a line-up;

(b) speak for identification by witnesses;

(c) be fingerprinted, palmprinted, footprinted, or voiceprinted;

(d) pose for photographs not involving reenactment of an event;

(e) try on clothing;

(f) permit the taking of samples of hair, blood, saliva, urine, or other specified materials that involve no unreasonable bodily intrusions;

(g) provide handwriting samples; or

(h) submit to reasonable physical or medical inspection. However, such inspection does not include psychiatric or psychological examination.

(2) Within 10 days after the omnibus hearing in district court or at a later time as the court may for good cause permit, the defendant shall make available to the prosecutor for testing, examination, or reproduction:

(a) the names, addresses, and statements of all persons, other than the accused, whom the defendant may call as witnesses in the defense case-in-chief, together with their statements;

(b) the names and addresses of experts whom the defendant may call at trial, together with the results of their physical examinations, scientific tests, experiments, or comparisons, including all written reports and statements made by these experts in connection with the particular case; and

(c) all papers, documents, photographs, or other tangible objects that the defendant may use at trial.

(3) The defendant's obligation under this section extends to material and information within the possession or control of the defendant, defendant's counsel and defense counsel's staff or investigators.

(4) Upon motion of the prosecutor showing that the prosecutor has substantial need in the preparation of the case for additional material or information not otherwise provided for, that the prosecutor is unable without undue hardship to obtain the substantial equivalent by other

means, and that disclosure will not violate the defendant's constitutional rights, the court in its discretion may order any person to make material or information available to the prosecutor. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive. Defense counsel may not be required to prepare or disclose summaries of witness testimony.

NEW SECTION. **Section 138. Notice of defenses and disclosure of witnesses and their statements.** (1) Within 10 days after the omnibus hearing in district court or at a later time as the court may for good cause permit, the defendant shall provide the prosecutor with a written notice of the defendant's intention to introduce evidence at trial of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity.

(2) Within 10 days after receiving a report of examination pursuant to [section 151] or at a later time as the court may for good cause permit, the defendant shall provide the prosecutor with a written notice of the intention to introduce evidence at trial of the defense that due to a mental disease or defect the defendant did not have a particular state of mind that is an essential element of the offense charged.

(3) The notice must specify for each defense the names

and addresses of the persons, other than the defendant, whom defense counsel may call as witnesses at trial in support of the defense together with all written reports or statements made by them concerning the results of physical examination, scientific tests, experiments, or comparisons.

(4) Prior to trial the defendant may, upon motion and showing of good cause, add to the list of witnesses the names of any additional witnesses and disclose their statements or report as required by this section. After trial commences, no witnesses may be called by the defendant in support of these defenses unless the name of the witness is included on the list and the witness's statement or report has been disclosed as required by this section except for good cause shown.

NEW SECTION. **Section 139. Materials not subject to disclosure.** (1) Except as provided in this section, disclosure is not required for the superseded notes or work product of the prosecuting or defense attorney.

(2) If exculpatory information is contained in the superseded notes or work product of the prosecution, that information must be disclosed.

NEW SECTION. **Section 140. Failure to call a witness or raise a defense.** The fact that a witness whose name is on a list furnished pursuant to [sections 136 through 146] does not testify or that a matter contained in a pretrial notice

is not raised may not be commented upon at trial unless the court, on motion of a party, allows comment after finding that the inclusion of the witness's name or the pretrial notice constituted an abuse of the applicable disclosure requirement or that other good cause is shown.

NEW SECTION. **Section 141.** **Continuing duty to disclose.** If at any time after a disclosure has been made any party discovers additional information or material that would be subject to disclosure had it been known at the time of disclosure, the party shall promptly notify all other parties of the existence of the additional information or material and make an appropriate disclosure.

NEW SECTION. **Section 142.** **Investigation not to be impeded.** Except as to matters to which discovery is restricted and except as to the defendant's counsel advising the defendant, a party or agent of a party may not discourage or obstruct communication between any person and any party or otherwise obstruct a party's investigation of the case.

NEW SECTION. **Section 143.** **Excision and protective orders.** (1) Upon a motion of any party showing good cause, the court may at any time order that any disclosure be deferred or regulated when it finds:

(a) that the disclosure would result in a risk or harm outweighing any usefulness of the unrestricted disclosure to

any party; and

(b) that the risk cannot be eliminated by a less substantial restriction of discovery rights.

(2) Whenever the court finds, upon motion of any party, that only a portion of a document or other material is discoverable, it may authorize the party disclosing it to excise that portion of the material which is nondiscoverable and disclose the remainder.

(3) On motion of the party seeking a protective or excision order or in submitting for the court's determination the discoverability of any material or information, the court may permit that party to present the material or information for the inspection of the judge alone. Counsel for all other parties may, in the discretion of the court, be present when the presentation is made.

(4) If the court enters an order that any material or any portion thereof is not discoverable, the entire text of the material must be sealed and preserved in the record in the event of an appeal.

NEW SECTION. **Section 144.** **Sanctions.** If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any of the provisions of [sections 136 through 146] or any order issued pursuant to [sections 136 through 146], the court may impose any sanction that it finds just under the

circumstances, including but not limited to:

(1) ordering disclosure of the information not previously disclosed;

(2) granting a continuance;

(3) holding a witness, party, or counsel in contempt for an intentional violation;

(4) precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; or

(5) declaring a mistrial when necessary to prevent a miscarriage of justice.

NEW SECTION. **Section 145. Compelling testimony or production of evidence -- immunity.** (1) Before or during trial in any judicial proceeding, a judge of the district court, upon request by the prosecutor or defense counsel, may require a person to answer any question or produce any evidence, even though personally incriminating, following a grant of use immunity.

(2) If a person is required to give testimony or produce evidence in accordance with this section in any investigation or proceeding, compelled testimony or evidence or any information directly or indirectly derived from compelled testimony or evidence may not be used against the witness in any criminal prosecution.

(3) Nothing in this section prohibits a prosecutor from granting immunity from prosecution for or on account of any

transaction, matter, or thing concerning which a witness is compelled to testify if in the prosecutor's sole discretion it is determined that the ends of justice would be served.

(4) Immunity may not extend to prosecution or punishment for false statements given in any testimony required under this section.

NEW SECTION. **Section 146. Privileged matters.** All matters which are privileged upon the trial are privileged against disclosure through any discovery procedure.

NEW SECTION. **Section 147. When depositions may be taken.** (1) In felony cases if it appears that a prospective witness:

(a) is likely to be either unable or otherwise prevented from attending a trial or hearing;

(b) is likely to be absent from the state at the time of the trial or hearing; or

(c) is unwilling to provide relevant information to a requesting party, and the witness's testimony is material and necessary in order to prevent a failure of justice, the district court shall, upon motion of any party and proper notice, order that the testimony of the witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be introduced at the time the deposition is taken.

(2) The witness whose deposition is to be taken may be

required by subpoena to attend at any place designated by the district court, taking into account the convenience of the parties and of the witness.

(3) If the defendant is charged with a felony and it appears upon the affidavit of counsel for a party that good cause exists to believe that a witness will not respond to a subpoena and the administration of justice requires, any district judge may issue an arrest warrant commanding the arrest of a material witness. The arrest warrant shall further order a deposition to be taken without unnecessary delay. A person may not be imprisoned for the purpose of securing his testimony in any criminal proceeding longer than may be necessary to take his deposition.

NEW SECTION. **Section 148.** Procedure for taking depositions. (1) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking a deposition. The notice shall state the name and address of each person to be examined. On motion of the party upon whom the notice is served, the district court for cause shown may extend or shorten the time or change the place for taking the deposition.

(2) A deposition shall be taken in the manner provided in civil actions. The district court, upon request, may direct that any deposition be taken on written

interrogatories in the manner provided in civil actions. However, a deposition may not be taken of a party defendant without his consent, and the scope and manner of examination and cross-examination shall be restricted as would be allowed in the trial itself.

(3) The deposition shall be filed with the district court making the order and held until the trial. Either party shall make available to the other party, or the other party's counsel, for examination and use at the taking of the deposition any relevant nonprivileged statement of the witness being deposed which is in the possession of either party.

(4) Objections to deposition testimony or evidence or parts of the testimony or evidence may be reserved for subsequent determination by the district court.

(5) Unless a defendant in custody has waived, in writing, the right to be present at the taking of a deposition, the officer having custody of the defendant shall be notified of the time and place set for the deposition. The officer having custody shall produce the defendant and keep the defendant in the presence of a witness during the deposition.

(6) A defendant not in custody who fails to appear, without good cause, at the taking of a deposition after being notified of the time and place set for the deposition

will be considered to have waived the right to be present as provided in [section 125]. The waiver includes a waiver of any objection to the taking and use of the deposition based upon that right.

(7) Whenever a deposition is taken at the instance of the prosecution, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expense of taking a deposition, the district court shall direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the state.

NEW SECTION. **Section 149. Use of depositions at trial.** Any deposition may be used by any party for any purpose allowed by the Montana Rules of Evidence.

NEW SECTION. **Section 150. Mental disease or defect -- fitness to proceed -- state of mind.** (1) As used in [sections 150 through 166], the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or anti-social behavior.

(2) A person who, as a result of mental disease or defect, is unable to understand the proceedings against him or to assist in his own defense may not be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.

(3) Evidence that the defendant suffered from a mental disease or defect is admissible to prove that the defendant did or did not have a state of mind which is an element of the offense.

NEW SECTION. **Section 151. Examination of defendant.** (1) If the defendant or the defendant's counsel files a written motion requesting an examination, or the issue of the defendant's fitness to proceed is raised by the court, prosecution, or defense counsel, the court shall appoint at least one qualified psychiatrist or licensed clinical psychologist or shall request the superintendent of the Montana state hospital to designate at least one qualified psychiatrist or licensed clinical psychologist, which designation may be or include himself, to examine and report upon the defendant's mental condition.

(2) The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding 60 days or a longer period as the court determines to be necessary for the purpose and may direct that a qualified psychiatrist or licensed clinical psychologist retained by the defendant be permitted to witness and participate in the examination.

(3) In the examination any method may be employed which is accepted by the medical or psychological profession for the examination of those alleged to be suffering from mental

disease or defect.

(4) If the defendant is indigent or the examination occurs at the request of the state, the cost of the examination must be paid by the county or the state, or both, according to procedures established under 3-5-902(1).

NEW SECTION. **Section 152. Prosecution's right to examination.** (1) When the defense discloses the report of examination to the prosecution or files a notice of the intention to rely on a defense of mental disease or defect, the prosecution shall be entitled to have the defendant examined by a qualified psychiatrist or licensed clinical psychologist.

(2) The report of examination shall be disclosed to the defense within 10 days of its receipt by the prosecution.

NEW SECTION. **Section 153. Access to defendant for examination.** If either the defendant or the prosecution wishes the defendant to be examined by a qualified psychiatrist or licensed clinical psychologist selected by the one proposing the examination in order to determine the defendant's fitness to proceed or whether the defendant had, at the time the offense was committed, a particular state of mind which is an essential element of the offense, the examiner shall be permitted to have reasonable access to the defendant for the purpose of the examination.

NEW SECTION. **Section 154. Report of examination.** (1) A

report of the examination shall include the following:

(a) a description of the nature of the examination;

(b) a diagnosis of the mental condition of the defendant, including an opinion as to whether the defendant is seriously mentally ill as defined in 53-21-102(14);

(c) if the defendant suffers from a mental disease or defect, an opinion as to the defendant's capacity to understand the proceedings against him and to assist in his own defense;

(d) when directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged; and

(e) when directed by the court, an opinion as to the capacity of the defendant, because of a mental disease or defect, to appreciate the criminality of his conduct or to conform his conduct to the requirement of law.

(2) If the examination cannot be conducted by reason of the unwillingness of the defendant to participate in the examination, the report shall state that fact and include, if possible, an opinion as to whether the unwillingness of the defendant was the result of mental disease or defect.

NEW SECTION. **Section 155. Psychiatric or psychological testimony upon trial.** (1) Upon trial, any psychiatrist or licensed clinical psychologist who reported under [section 151 or 154] may be called as a witness by the prosecutor or

by the defense. Both the prosecution and the defense may summon any other qualified psychiatrist or licensed clinical psychologist to testify, but no one who has not examined the defendant is competent to testify to an expert opinion with respect to the mental condition of the defendant as distinguished from the validity of the procedure followed or the general scientific propositions stated by another witness.

(2) When a psychiatrist or licensed clinical psychologist who has examined the defendant testifies concerning the defendant's mental condition, he may make a statement as to the nature of his examination and his medical or psychological diagnosis of the mental condition of the defendant. The expert may make any explanation reasonably serving to clarify his examination and diagnosis, and the expert may be cross-examined as to any matter bearing on his competency or credibility or the validity of his examination or medical or psychological diagnosis. A psychiatrist or licensed clinical psychologist may not offer an opinion to the jury on the ultimate issue of whether the defendant did or did not have a particular state of mind or the capacity to have a particular state of mind which is an element of the offense charged.

NEW SECTION. **Section 156. Form of verdict and judgment.** When the defendant is found not guilty of the

charged offense or offenses or any lesser included offense for the reason that, due to a mental disease or defect, the defendant did not have a particular state of mind that is an essential element of the offense charged, the verdict and the judgment shall so state.

NEW SECTION. **Section 157. Admissibility of statements made during examination or treatment.** A statement made for the purposes of psychiatric or psychological examination or treatment provided for in this section by a person subjected to examination or treatment is not admissible in evidence against him at trial on any issue other than that of his mental condition. It is admissible on the issue of his mental condition at trial whether or not it would otherwise be considered a privileged communication, only when and after the defendant presents evidence that due to a mental disease or defect he did not have a particular state of mind which is an element of the offense charged.

NEW SECTION. **Section 158. Determination of fitness to proceed -- effect of finding of unfitness -- expenses.** (1) The issue of the defendant's fitness to proceed may be raised by the court, the defendant or his counsel, or by the prosecution. When the issue is raised, it shall be determined by the court. If neither the prosecution nor counsel for the defendant contests the finding of the report filed under [section 154], the court may make the

determination on the basis of the report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence at the hearing, the parties have the right to subpoena and cross-examine the psychiatrists or licensed clinical psychologists who joined in the report and to offer evidence upon the issue.

(2) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsection (4), and the court shall commit him to the custody of the director of the department of institutions to be placed in an appropriate institution of the department of institutions for so long as the unfitness endures. The committing court shall within 90 days of commitment, review the defendant's fitness to proceed. If the court finds that he is still unfit to proceed and that it does not appear that he will become fit to proceed within the reasonably foreseeable future, the proceeding against him shall be dismissed, except as provided in subsection (4), and the county attorney shall petition the court in the manner provided in chapter 20 or 21 of Title 53, whichever is appropriate, to determine the disposition of the defendant pursuant to those provisions.

(3) If the court determines that the defendant lacks fitness to proceed because he is developmentally disabled as provided in 53-20-102(4), the proceeding against him shall

be dismissed and the county attorney shall petition the court in the manner provided in chapter 20 of Title 53.

(4) The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible to fair determination prior to trial and without the personal participation of the defendant.

(5) The expenses of sending the defendant to the custody of the director of the department of institutions to be placed in an appropriate institution of the department of institutions, of keeping him there, and of bringing him back are chargeable to the state and payable according to procedures established under 3-5-902(1).

NEW SECTION. **Section 159. Proceedings if fitness regained.** When the court, on its own motion or upon the application of the director of the department of institutions, the prosecution, or the defendant or his legal representative, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charge and may order the defendant to be discharged, or subject to the law governing the civil commitment of persons suffering from serious mental illness, order the defendant

committed to an appropriate institution of the department of institutions.

NEW SECTION. **Section 160. Commitment upon finding of not guilty by reason of lack of mental state -- hearing to determine release or discharge.** (1) When a defendant is found not guilty for the reason that due to a mental disease or defect he could not have a particular state of mind that is an essential element of the offense charged, the court shall order a predisposition investigation in accordance with [section 224], which must include an investigation of the present mental condition of the defendant. If the trial was by jury, the court shall hold a hearing to determine the appropriate disposition of the defendant. If the trial was by the court, the court may hold a hearing to obtain any additional testimony it considers necessary to determine the appropriate disposition of the defendant. If the trial was by the court, the court may hold a hearing to obtain any additional testimony it considers necessary to determine the appropriate disposition of the defendant. In either case, the testimony and evidence presented at trial shall be considered by the court in making its determination.

(2) The court, upon finding that the defendant may not be discharged or released without danger to others, shall order the defendant committed to the custody of the superintendent of the Montana state hospital to be placed in

an appropriate institution for custody, care, and treatment.

(3) A person committed to the custody of the superintendent shall have a hearing within 180 days of his confinement to determine his present mental condition and whether he may be discharged or released without danger to others. The hearing shall be conducted by the court that ordered the commitment unless that court transfers jurisdiction to the third judicial district. The court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney. The hearing is a civil proceeding, and the burden shall be upon the defendant to prove by a preponderance of the evidence that he may be safely released.

(4) According to the determination of the court upon the hearing, the defendant shall be discharged or released on conditions the court determines to be necessary or shall be committed to the custody of the superintendent of the Montana state hospital to be placed in an appropriate institution for custody, care, and treatment.

NEW SECTION. **Section 161. Discharge or release upon motion of superintendent.** (1) If the superintendent of the Montana state hospital believes that a person committed to his custody under [section 160] may be discharged or released on condition without danger to himself or others, he shall make application for the discharge or release of

the person in a report to the court by which the person was committed and shall send a copy of the application and report to the prosecutor of the county from which the defendant was committed.

(2) The court shall then appoint at least two qualified examiners who shall be either psychiatrists or licensed clinical psychologists to examine the person and to report their opinion as to his mental condition within 60 days or a longer period which the court determines to be necessary for the purpose. To facilitate the examinations and the proceedings thereon, the court may have the person confined in any institution located near the place where the court sits which may be designated by the superintendent of the Montana state hospital as suitable for the temporary detention of irresponsible persons.

(3) If the court is satisfied by the report filed under subsection (1) and the testimony of the reporting psychiatrist or licensed clinical psychologist that the committed person may be discharged or released on condition without danger to himself or others, the court shall order his discharge or his release on conditions which the court determines to be necessary.

(4) If the court is not satisfied, it shall promptly order a hearing to determine whether the person may safely be discharged or released. A hearing is considered a civil

proceeding, and the burden is upon the committed person to prove by a preponderance of the evidence that he may safely be discharged or released. According to the determination of the court upon the hearing, the committed person shall be discharged or released on conditions which the court determines to be necessary or shall be recommitted to the custody of the superintendent of the Montana state hospital, subject to discharge or release only in accordance with the procedures prescribed in this section and [section 162].

NEW SECTION. **Section 162. Application for discharge or release by committed person.** A committed person may make application for his discharge or release to the court by which he was committed, and the procedure to be followed upon the application is the same as that prescribed in [section 161] in the case of an application by the superintendent of the Montana state hospital. However, an application by a committed person need not be considered until he has been confined for a period of not less than 6 months from the date of the order of commitment, and if the determination of the court is adverse to the application, the person may not be permitted to file a further application until 1 year has elapsed from the date of any preceding hearing on an application for his release or discharge.

NEW SECTION. **Section 163.** Recommitment after

conditional release. If within 5 years after the conditional release of a committed person the court determines after hearing evidence that the conditions of release have not been fulfilled and that for the safety of the person or for the safety of others his conditional release should be revoked, the court shall immediately order him to be recommitted to the superintendent of the Montana state hospital, subject to discharge or release only in accordance with the procedures prescribed in [section 161 or 162].

NEW SECTION. **Section 164. Consideration of mental disease or defect in sentencing.** Whenever a defendant is convicted on a verdict or a plea of guilty and he claims that at the time of the commission of the offense of which he was convicted he was suffering from a mental disease or defect which rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the sentencing court shall consider any relevant evidence presented at the trial and shall require additional evidence as it considers necessary for the determination of the issue, including examination of the defendant and a report of the examination as provided in [sections 151 and 154].

NEW SECTION. **Section 165. Sentence to be imposed.** (1) If the court finds that the defendant at the time of the commission of the offense of which he was convicted did not

suffer from a mental disease or defect as described in [section 164], it shall sentence him as provided in Title 46, chapter 18.

(2) If the court finds that the defendant at the time of the commission of the offense suffered from a mental disease or defect as described in [section 164], any mandatory minimum sentence prescribed by law for the offense need not apply and the court shall sentence him to be committed to the custody of the director of the department of institutions to be placed in an appropriate institution for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could be imposed under subsection (1). The authority of the court with regard to sentencing is the same as authorized in Title 46, chapter 18, if the treatment of the individual and the protection of the public are provided for.

(3) A defendant whose sentence has been imposed under subsection (2) may petition the sentencing court for review of the sentence if the professional person certifies that the defendant has been cured of the mental disease or defect. The sentencing court may make any order not inconsistent with its original sentencing authority except that the length of confinement or supervision must be equal to that of the original sentence. The professional person shall review the defendant's status each year.

NEW SECTION. **Section 166. Discharge of defendant from supervision.** At the expiration of the period of commitment or period of treatment specified by the court under [section 165(2)], the defendant must be discharged from custody and further supervision, subject only to the law regarding the civil commitment of persons suffering from serious mental illness.

NEW SECTION. **Section 167. Pretrial motions and notices.** (1) Except for good cause shown, any defense, objection, or request which is capable of determination without trial of the general issue must be raised at or before the omnibus hearing unless otherwise provided by [this act].

(2) Failure of a party to raise defenses or objections, or to make requests which must be made prior to trial, at the time set by the court, shall constitute a waiver of the defense, objection, or request.

(3) The court, for cause shown, may grant relief from any waiver provided by this section. Lack of jurisdiction or the failure of a charging document to state an offense is a nonwaivable defect and shall be noticed by the court at any time during the pendency of a proceeding.

NEW SECTION. **Section 168. Form of pretrial motions.** Unless the court provides otherwise, all pretrial motions shall be in writing and supported by a statement of the

relevant facts upon which the motion is being made. The motion shall state with particularity the grounds for the motion and the order or relief sought.

NEW SECTION. **Section 169. Ruling on motions.** (1) A motion made before trial shall be determined before trial unless the court, for good cause, orders it be deferred for determination at the trial of the general issue or until after the verdict, but a determination may not be deferred if a party's right to appeal is adversely affected.

(2) Except where mandated by [this act], the court has discretion to conduct a hearing into the merits of a motion.

(3) The court's final determination of any pretrial motion shall state, either in writing or on the record, the court's findings of fact and conclusions of law.

NEW SECTION. **Section 170. Omnibus hearing.** (1) Within a reasonable time following the entry of a not guilty plea but not less than 30 days before trial the court shall hold an omnibus hearing.

(2) The purpose of the hearing shall be to expedite the procedures leading up to the trial of the defendant.

(3) The presence of the defendant is not required. The prosecutor and the defendant's counsel shall attend the hearing and shall be prepared to discuss any pretrial matter appropriate to the case, including but not limited to:

(a) joinder and severance of offenses or defendants,

[sections 116, 117, 178, and 179];

(b) double jeopardy, [sections 118 through 120];

(c) need for exclusion of public and for sealing records of any pretrial proceedings, [section 122];

(d) notification of the existence of a plea agreement, [section 133];

(e) disclosure and discovery motions, [sections 136 through 146];

(f) notice of reliance on certain defenses, [section 138];

(g) notice of seeking enhanced punishment, [section 171];

(h) notice of other crimes, wrongs, or acts, [section 172];

(i) motion to suppress, [sections 173 and 174];

(j) motion to dismiss, [sections 180 and 181];

(k) motion for change of place of trial, [sections 175 through 177];

(l) reasonableness of bail, [sections 66 through 81]; and

(m) stipulations.

(4) At the conclusion of the hearing, a court-approved memorandum of the matters settled shall be signed by the court and counsel and filed with the court.

(5) Any motions made pursuant to subsections (1)

through (3) may be ruled on by the court at the time of the hearing, where appropriate, or may be scheduled for briefing and further hearing as the court considers necessary.

NEW SECTION. **Section 171. Notice by prosecutor seeking persistent felony offender status.** (1) Except for good cause shown, if the prosecutor seeks treatment of the accused as a persistent felony offender, notice of that fact must be given at or before the omnibus hearing pursuant to [section 167].

(2) The notice must specify the alleged prior convictions and may not be made known to the jury before verdict except as allowed by the Montana Rules of Evidence.

(3) If the defendant objects to the allegations contained in the notice, the judge shall conduct a hearing to determine if the allegations in the notice are true.

(4) The hearing shall be held before the court alone. If the judge finds any allegations of the prior convictions are true, the accused shall be sentenced as provided by law.

(5) The notice shall be filed and sealed until the time of trial or until a plea of guilty is given by the defendant.

NEW SECTION. **Section 172. Notice by prosecutor of other crimes, acts, or wrongs evidence.** (1) Except for good cause shown, if the prosecutor intends to use evidence of other crimes, wrongs, or acts pursuant to Rule 404(b) of the

Montana Rules of Evidence, notice shall be given at or before the omnibus hearing pursuant to [section 167].

(2) The notice shall specify the other crimes, wrongs, or acts and include a statement as to the purpose for which the evidence is to be offered.

(3) The notice shall be filed and sealed until the time of trial or until a plea of guilty is given by the defendant.

NEW SECTION. **Section 173. Suppression of evidence.** (1) A defendant aggrieved by an unlawful search and seizure may move the court to suppress as evidence anything obtained by the unlawful search and seizure.

(2) If the motion states facts which, if true, would show that the evidence should be suppressed, the court shall hear the merits of the motion at the omnibus hearing or at a later date if the court orders.

(3) If the motion is granted, the evidence shall not be admissible at trial.

NEW SECTION. **Section 174. Suppression of confessions or admissions.** (1) A defendant may move to suppress as evidence any confession or admission given by him on the ground that it was involuntary. The motion shall be in writing and state facts showing why the confession or admission was involuntary.

(2) If the allegations of the motion state facts which,

if true, show that the confession or admission was not voluntarily made, the court shall conduct a hearing into the merits of the motion. The prosecution must prove by a preponderance of the evidence that the confession or admission was voluntary.

(3) The issue of the admissibility of the confession or admission may not be submitted to the jury. If the confession or admission is determined to be admissible, the circumstances surrounding the making of the confession or admission may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession or admission.

(4) If the motion is granted, the confession or admission is admissible in evidence only for purposes of impeachment against the movant at the trial of the case.

NEW SECTION. **Section 175. Change for prejudice.** (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 the county.

(2) If the court determines that there exists in the county in which the prosecution is pending such prejudice that a fair trial cannot be had, the court shall:

(a) transfer the cause to any other county in which a fair trial may be had;

(b) direct that a jury be selected in any county where a fair trial may be had and then returned to the county where the prosecution is pending to try the case; or

(c) take any other action to ensure that a fair trial may be had.

NEW SECTION. **Section 176. Change for other reasons.** If the court determines that a motion to dismiss based upon the grounds of lack of jurisdiction or improper place of trial is well-founded, it may, instead of ordering dismissal, order the cause transferred to a court of competent jurisdiction or to a proper place of trial.

NEW SECTION. **Section 177. Return to original place of trial.** When a trial occurs after a change of place of trial and a retrial is required, the cause shall be returned to the county in which the charge was originally properly filed for further proceedings.

NEW SECTION. **Section 178. Trial together of indictments, informations, complaints, or defendants.** The court may order two or more indictments, informations, complaints, or defendants to be tried together if the interests of justice require and the charges or defendants could have been joined in a single indictment, information or complaint as provided for in [sections 114 through 117].

NEW SECTION. **Section 179. Relief from prejudicial joinder.** (1) If it appears that a defendant or the

prosecution is prejudiced by a joinder of charges or defendants in an indictment, information, or complaint or by joinder for trial together, the court may order separate trials, grant a severance of defendants, or provide whatever other relief justice requires.

(2) In ruling on a motion by a defendant for severance the court may order the prosecutor to deliver to the court for inspection, in camera, any statements or confessions made by the defendants that the prosecution intends to introduce at trial.

NEW SECTION. **Section 180. Dismissal at instance of court or prosecution.** (1) The court may, either on its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order a complaint, information, or indictment to be dismissed. However, the court may not order a dismissal of a complaint, information, or indictment, or a count contained in a complaint, information, or indictment, charging a felony, unless good cause for dismissal is shown and the reasons for dismissal are set forth in an order entered upon the minutes.

(2) After the entry of a plea upon a misdemeanor charge, the court, unless good cause to the contrary is shown, must order the prosecution to be dismissed, with prejudice, if a defendant whose trial has not been postponed upon the defendant's motion is not brought to trial within 6

months.

NEW SECTION. **Section 181.** **Effect of order to dismiss.** If the court directs the action to be dismissed, the defendant must, if in custody, be discharged and, if admitted to bail, have the defendant's bail exonerated or money deposited instead of bail refunded to the defendant.

NEW SECTION. **Section 182.** **Issuing subpoenas.** (1) After the filing of charges and upon the request of the prosecuting attorney, the defendant, or the defendant's attorney, the clerk of court shall issue subpoenas with the name of the person to whom each subpoena is directed commanding the person to appear and to give testimony. The clerk of the court shall maintain a list of the names of persons to whom subpoenas are issued.

(2) A subpoena shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified in the subpoena.

(3) The court, upon motion made promptly, may quash or modify a subpoena if compliance would be unreasonable or oppressive.

NEW SECTION. **Section 183.** **Subpoenas for the production of evidence.** (1) A subpoena may command the person to whom it is directed to produce the books, papers, documents, or other objects designated in the subpoena.

(2) The court may direct that the books, papers, documents, or other objects designated in the subpoena be produced before the court at the time prior to the trial or prior to the time when they are to be offered into evidence and may upon their production permit the books, papers, documents, or objects, or portions thereof, to be inspected by the parties and their attorneys.

(3) The court, upon motion made promptly, may quash or modify a subpoena if compliance would be unreasonable or oppressive.

NEW SECTION. **Section 184.** **Service of subpoenas.** (1) A subpoena may be served by a peace officer or by any other person who is not a party and who is not less than 18 years of age. A peace officer must serve any subpoena delivered to him for service in his county either on the part of the state or of the defendant.

(2) Service of a subpoena shall be made by delivering a copy of the subpoena to the person named and, if ordered by the court, by tendering to those residing outside the county of trial the fee for 1 day's attendance and the mileage allowed by law. The person making service shall without delay make a written return of the service subscribed by him stating the time and place of service.

(3) A subpoena requiring attendance of a witness at a hearing or trial may be served anywhere within the state of

Montana.

NEW SECTION. **Section 185. Subpoena for witnesses in this state to testify in another state.** (1) If a judge of a court of record in any state, which by its laws has made provision for commanding persons within that state to attend and testify in this state, certifies under the seal of the court that there is a criminal prosecution pending in the court or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in the prosecution or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of the certificate to any judge of a court of record in the county in which the person is located, the judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for hearing.

(2) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in a prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending or grand jury is commenced or about to commence will give him protection from arrest and the service of civil and criminal process, he shall issue a

summons with a copy of the certificate attached directing the witness to attend and testify in the court where the prosecution is pending or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In the hearing the certificate shall be prima facie evidence of all the facts stated in the certificate.

(3) If the certificate recommends that the witness be taken into custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, the judge may, in lieu of notification of the hearing, direct that the witness be brought before him for the hearing. At the hearing the judge may, in lieu of issuing a subpoena or summons, order that the witness be taken into custody and delivered to an officer of the requesting state.

NEW SECTION. **Section 186. Subpoena of a witness in another state to testify in this state.** (1) Whenever a person in any state that by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations in this state is a material witness in a prosecution pending in a court of record in this state or in a grand jury investigation which has commenced or is about to commence, a judge of the court may issue a certificate under the seal of

the court stating these facts and specifying the number of days the witness will be required. The certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(2) If the certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, it is prima facie proof of the desirability of the custody and delivery, and the judge may direct that the witness be brought before him immediately. If the judge is satisfied as to the desirability of custody and delivery, he may order that the witness be immediately taken into custody and delivered to an officer of this state. The order is sufficient authority for the officer to take the witness into custody and hold him unless and until he is released by bail, recognizance, or order of the judge issuing the certificate.

(3) A witness who has appeared in accordance with the provisions of the summons may not be required to remain within this state for a longer period of time than the period mentioned in the certificate unless otherwise ordered by the court.

(4) The witness fees, costs, and expenses shall be tendered as provided in [section 188].

NEW SECTION. **Section 187. Subpoena of witnesses for**

defendant unable to pay. (1) The court shall order at any time that a subpoena be issued for service on a named witness upon the ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the costs incurred for the witnesses and that the presence of the witness is necessary to an adequate defense.

(2) If a defendant is indigent a court order must be obtained if more than six witnesses are to be subpoenaed.

NEW SECTION. **Section 188. Fees, costs, and expenses.** (1) When a person appears before a judge, grand jury, or court as a witness in a criminal case or investigation upon a subpoena, the witness shall receive the witness fee as prescribed by Title 26, part 5. The court, on motion by either party, may allow additional fees for expert witnesses.

(2) The court may determine the reasonable and necessary expenses of subpoenaed witnesses and order the clerk of the court to pay the expenses from the county treasury.

(3) When a person is subpoenaed in this state to testify in another state, or from another state to testify in this state, the person must be paid for lodging, mileage or travel, and per diem, the sum equal to that allowed by Title 2, chapter 18, part 5, for each day that the person is

required to travel and attend as a witness. If the state where the witness is found has by statutory enactment required that the summoned witness be paid an amount in excess of the amount specified in this section, the witness may be paid the amount required by that state.

(4) According to procedures established by the department of commerce under 3-5-902, the clerk of the district court shall submit to the department a detailed statement containing a list of witnesses and the amount of expenses paid to each witness by the county. Upon receipt and verification of the statement, the department shall promptly reimburse the designated county for all or a portion of the witness expenses. The county shall deposit the amount reimbursed in its general fund.

NEW SECTION. **Section 189. Failure of witness to appear.** If the witness fails without good cause to attend and testify as directed, he shall be punished in the manner provided for punishment of any witness who disobeys an order issued from a court of record in this state in accordance with Title 3, chapter 1, part 5, or in accordance with 45-7-309.

NEW SECTION. **Section 190. Exemption from arrest and service of process.** (1) If a person comes into this state in obedience to a summons directing the person to attend and testify in this state, that person may not, while in this

state pursuant to such subpoena or order, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the subpoena.

(2) If a person passes through this state while going to or returning from another state in obedience to a subpoena or order to attend and testify in that state, the person may not, while passing through this state, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before the person's entrance into this state under the subpoena.

NEW SECTION. **Section 191. Right to jury trial and waiver.** (1) Defendants in all felony cases shall have a right to trial by jury of 12 persons.

(2) The parties may agree in writing at any time before the verdict, with the approval of the court, that the jury shall consist of any number less than that to which they are entitled.

(3) Upon written consent of the defendant, a trial by jury may be waived.

NEW SECTION. **Section 192. Formation of trial jury.** (1) Trial juries in criminal cases are formed in the same manner as trial juries in civil actions.

(2) The qualifications of jurors and excuses from jury duty are prescribed in Title 3, chapter 15, part 3.

NEW SECTION. **Section 193. Motion to discharge jury panel.** (1) Any objection to the manner in which a jury panel has been selected or drawn shall be raised by a motion to discharge the jury panel. Except for good cause shown, the motion shall be made at least 5 days prior to the term for which the jury is drawn.

(2) The motion shall be in writing supported by affidavit and shall state facts that show that the jury panel was improperly selected or drawn.

(3) If the motion states facts that show that the jury panel has been improperly selected or drawn, it shall be the duty of the court to conduct a hearing. The burden of proof shall be on the movant.

(4) If the court finds that the jury panel was improperly selected or drawn, the court shall order the jury panel discharged and the selection or drawing of a new panel in the manner provided by law.

NEW SECTION. **Section 194. Examination of prospective jurors.** (1) The clerk of court shall make available to the parties a list of prospective jurors with their questionnaires when the names have been drawn.

(2) The prosecutor and the defendant or the defendant's attorney shall conduct the examination of prospective jurors. The judge may conduct an additional examination. The judge may limit the examination by the defendant, the

defendant's attorney, or the prosecutor if the examination is improper.

NEW SECTION. **Section 195. Challenges for cause.** (1) Each party may challenge jurors for cause, and each challenge must be tried by the court.

(2) A challenge for cause may be taken for all or any of the following reasons or for any other reason which the court determines:

(a) consanguinity or relationship to the defendant or to the person who is alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;

(b) standing in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, or debtor and creditor with or being a member of the family or in the employment of the defendant or the person who is alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;

(c) being a party adverse to the defendant in a civil action or having complained against or being accused by the defendant in a criminal prosecution;

(d) having served on the grand jury which found the indictment or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information;

(e) having served on a trial jury which tried another person for the offense charged or a related offense;

(f) having been a member of a jury formerly sworn to try the same charge, the verdict of which was set aside or which was discharged without verdict after the case was submitted to it;

(g) having served as a juror in a civil action brought against the defendant for the act charged as an offense;

(h) if the offense charged is punishable with death, having conscientious opinions concerning the punishment as would preclude his finding the defendant guilty, in which case he may not be permitted or compelled to serve as a juror;

(i) having a belief that the punishment fixed by law is too severe for the offense charged; or

(j) having a state of mind in reference to the case or to either of the parties which would prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of either party.

(3) An excuse from service on a jury is not a cause of challenge but the privilege of the person excused.

NEW SECTION. **Section 196.** Peremptory challenges. (1) Each defendant shall be allowed eight peremptory challenges in capital cases and six in all other cases tried in the district court before a 12-person jury. There may not be

additional challenges for separate counts charged in the indictment or information.

(2) If the indictment or information charges a capital offense as well as lesser offenses in separate counts, the maximum number of challenges is eight.

(3) The state shall be allowed the same number of peremptory challenges as all of the defendants.

(4) In a criminal case tried before a six-person jury, the state and all the defendants shall be allowed three peremptory challenges each.

(5) When the parties in a criminal case in the district court agree upon a jury consisting of a number of persons other than 6 or 12, they shall also agree in writing upon the number of peremptory challenges to be allowed.

NEW SECTION. **Section 197.** Time for challenges. All challenges must be interposed before the jury is sworn unless the cause of challenge is discovered after the jury is sworn and before the introduction of any evidence, in which case the court, in its discretion, may allow the challenge to be interposed.

NEW SECTION. **Section 198.** Alternate juror. (1) The court may direct that one or more alternate jurors be selected in the same manner as principal jurors. The alternate jurors shall take the same oath as the principal jurors.

(2) Each party shall have one additional peremptory challenge for each alternate juror.

(3) Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury arrives at its verdict, become unable or disqualified to perform their duties. An alternate juror may not join the jury in its deliberation unless called upon by the court to replace a member of the jury. An alternate juror's conduct during the period in which the jury is considering its verdict shall be regulated by instructions of the trial court. An alternate juror who does not replace a principal juror shall be discharged after the jury arrives at its verdict.

NEW SECTION. **Section 199. Applicability of rules of evidence and civil rules.** The Montana Rules of Evidence and the statutory rules of evidence in civil actions are applicable to all criminal actions except as otherwise provided.

NEW SECTION. **Section 200. Defendant presumed innocent -- reasonable doubt.** A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether the defendant's guilt is satisfactorily shown, the defendant shall be found not guilty.

NEW SECTION. **Section 201. Competency of spouses.** (1)

Neither spouse may testify to the communications or conversations between spouses which occur during their marriage unless:

(a) consent of the defendant-spouse is obtained;

(b) the defendant-spouse has been charged with an act of criminal violence against the other; or

(c) the defendant-spouse has been charged with abuse, abandonment, or neglect of the other spouse or either spouse's children.

(2) Except as provided in subsection (1), a spouse is a competent witness for or against the other spouse.

NEW SECTION. **Section 202. Testimony of person legally accountable.** A person may not be found guilty of an offense on the testimony of one responsible or legally accountable for the same offense, as defined in 45-2-301, unless the testimony is corroborated by other evidence which in itself and without the aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense.

NEW SECTION. **Section 203. Use of confession.** Before an extrajudicial confession of the defendant to the crime charged may be admitted into evidence, the prosecution must introduce independent evidence tending to establish the commission of the crime charged.

NEW SECTION. **Section 204. Videotaped testimony.** (1)

For any prosecution commenced under 45-5-502(3), 45-5-503, 45-5-505, or 45-5-507, the testimony of the victim, at the request of the victim and with the concurrence of the prosecuting attorney, may be recorded by means of videotape for presentation at trial. The recorded testimony may be presented at trial and shall be received into evidence. The victim need not be physically present in the courtroom when the videotape is admitted into evidence.

(2) The procedural and evidentiary rules of the state that are applicable to criminal trials within the state shall apply to the videotape proceedings authorized by this section.

(3) The district court judge, the prosecutor, the victim, the defendant, the defendant's attorney, and other persons as are considered necessary by the court to make the recordings authorized under this section shall be allowed to attend the videotape proceedings.

(4) Videotapes that are part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

NEW SECTION. **Section 205. Order of trial.** (1) After the jury is sworn, but before the introduction of any evidence, the court may give the jury general instructions concerning the conduct of the trial. The court shall give the jury such cautionary instructions as may be required

during the course of the trial.

(2) The prosecutor may make an opening statement and shall offer evidence in support of the prosecution. The defendant may make his opening statement prior to the prosecutor's offer of evidence or at the close of the prosecution's case but prior to the defendant's offer of evidence.

(3) The prosecutor and the defendant may, respectively, offer rebutting testimony only. However, the court, for good cause, may permit either party to offer evidence upon their original case at any time before the close of evidence.

(4) Prior to final arguments, the court shall inform the parties as to the instructions that will be given and read them to the jury.

(5) A written copy of the instructions, both general and special, shall be delivered to the jury for their consideration during deliberations following the final arguments.

NEW SECTION. **Section 206. When order may be departed from.** For good cause shown and in the discretion of the court, the order prescribed in [section 205] may be departed from.

NEW SECTION. **Section 207. Evidence insufficient to go to jury.** When, at the close of the state's evidence or at the close of all the evidence, the evidence is insufficient

to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant. However, prior to dismissal, the court may allow the case to be reopened for good cause shown.

NEW SECTION. **Section 208. Settlement of jury instructions.** (1) Any party may request special jury instructions as provided in [section 205(4)]. All requests for instructions shall conform to the Uniform District Court Rules and all instructions shall be settled by the court out of the presence of the jury.

(2) A record shall be made at the settlement of instructions.

(3) A party may not assign as error any portion of the instructions or omission from the instructions unless an objection was made specifically stating the matter objected to, and the grounds for the objection, at the settlement of instructions.

(4) The presence of the defendant is not required during the settlement of instructions.

NEW SECTION. **Section 209. Conduct of jury during trial.** (1) The jurors sworn to try an action may at any time, in the discretion of the court, be permitted to separate or be ordered to remain sequestered in the charge of a proper officer. If sequestered, the officer must be

sworn to keep the jurors together, to allow no person to communicate with the jury or to personally communicate with the jury on any subject connected with the trial, and to return the jury into court as directed.

(2) Whether sequestered or permitted to separate, at each adjournment of the court, the jury shall be admonished that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial or to form or express any opinion thereon until the cause is finally submitted to them.

(3) In all cases appealed to the supreme court, it shall be conclusively considered that the court or judge gave the proper admonition in accordance with the provision of subsection (2) unless the record affirmatively shows the contrary.

NEW SECTION. **Section 210. View of relevant place or property.** When the court considers it proper that the jury view any place or personal property pertinent to the case, it will order the jury to be conducted in a body under the custody of the sheriff or bailiff to view the place or personal property in the presence of the court, the prosecutor, the defendant, and his counsel. The place or personal property will be shown them by a person appointed by the court for that purpose, and they may personally inspect the same. The sheriff or bailiff must be sworn to

suffer no person to speak or otherwise communicate with the jury or to do so himself on any subject connected with the trial and to return them into the courtroom without unnecessary delay or at a specified time, as the court may direct.

NEW SECTION. **Section 211. Conduct of jury after retirement -- advice from court.** (1) When the jury retires to consider its verdict, an officer of the court must be appointed to keep the jurors together and to prevent conversations between the jurors and others.

(2) After the jury has retired for deliberation, if there is any disagreement among the jurors as to the testimony or if the jurors desire to be informed on any point of law arising in the cause, they must notify the officer appointed to keep them together who shall then notify the court. The information requested may be given in the discretion of the court after consultation with the parties.

NEW SECTION. **Section 212. Items which may be taken into jury room.** Upon retiring for deliberation, the jury may take with them the written jury instructions read by the court, notes of the proceedings taken by themselves, and all exhibits that have been received as evidence in the cause as in the opinion of the court shall be necessary.

NEW SECTION. **Section 213. Activity of court during jury's absence.** While the jury is absent, the court may adjourn or conduct other business, but it must be open for every purpose connected with the cause submitted to the jury until a verdict is returned or the jury discharged.

NEW SECTION. **Section 214. Form of verdict.** (1) The jury shall return a verdict as instructed by the court. The verdict must be unanimous in all criminal actions. The verdict shall be signed by the foreman and returned by the jury to the judge in open court.

(2) If there are two or more defendants, the jury, at any time during its deliberations, may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

NEW SECTION. **Section 215. Poll of jury.** When a verdict is returned, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not the required concurrence, the jury may be directed to retire for further deliberations or may be discharged.

NEW SECTION. **Section 216. Verdict of not guilty -- when defendant discharged.** If a verdict of not guilty is returned and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given.

NEW SECTION. **Section 217.** **Conviction of lesser included offense.** (1) The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included in the offense charged.

(2) A lesser included offense instruction shall be given where there is a proper request by one of the parties and the jury, based on the evidence, could be warranted in finding the defendant guilty of a lesser offense.

(3) When a lesser included offense instruction is given, the court shall instruct the jury that it must reach a verdict on the crime charged before it may proceed to a lesser included offense. Upon the request of the defendant at the settling of instructions, the court shall instruct the jury that it may consider the lesser included offense if it is unable after reasonable effort to reach a verdict on the greater offense.

NEW SECTION. **Section 218.** **Effect of a new trial.** The granting of a new trial places the parties in the same position as if there had been no trial.

NEW SECTION. **Section 219.** **Motion for a new trial.** (1) Following a verdict or finding of guilty, the court may grant the defendant a new trial if required in the interest of justice.

(2) The motion for a new trial must be in writing and

must specify the grounds for a new trial. The motion must be filed by the defendant within 30 days following a verdict or finding of guilty and be served upon the state.

(3) On hearing the motion for a new trial, if justified by law and the weight of the evidence, the court may:

(a) deny the motion;

(b) grant a new trial; or

(c) modify or change the verdict or finding by finding the defendant guilty of a lesser included offense or finding the defendant not guilty.

NEW SECTION. **Section 220.** **Juries in misdemeanor cases.** (1) The defendant in a misdemeanor case is entitled to a jury of six qualified persons, but the parties may agree to a number less than six at any time before the verdict.

(2) Upon written consent of the defendant, a trial by jury may be waived.

NEW SECTION. **Section 221.** **Formation of trial jury for justice, municipal, and city courts.** (1) At the time of preparing the district court jury list, the county commissioners and clerk and recorder shall prepare a jury list for each justice and city court within the county. Each list must consist of residents of the appropriate county, city, or town. The lists must be selected in any reasonable manner that ensures fairness, and each list must include a number of names sufficient to meet the annual jury

requirements of the respective court. Additional lists may be prepared if required. The lists must be filed in the office of the clerk of the district court. The appropriate list must be posted in a public place in each county, city, or town, and the list must comprise the trial jury list for the ensuing year for the county, city, or town.

(2) Trial jurors shall be summoned from the jury list by notifying each one orally that he is summoned and of the time and place at which his attendance is required.

NEW SECTION. **Section 222. Appeal from justice, municipal, and city courts.** (1) The defendant may appeal to district court by filing written notice of intention to appeal within 10 days after a judgment is rendered following trial. In the case of an appeal by the prosecution the notice must be filed within 10 days of the date the order complained of is given. The prosecution may appeal only in the cases provided for in 46-20-103.

(2) Within 30 days of filing the notice of appeal, the court shall transfer the entire record of the lower court to the district court.

(3) Except for cases where legal issues are preserved for appeal pursuant to [section 130], all misdemeanor cases on appeal by the defendant from a justice, municipal, or city court must be tried anew in the district court and may be tried before a jury of six selected in the same manner as

for other criminal cases.

NEW SECTION. **Section 223. Presentence investigation -- when required.** (1) Upon acceptance of a plea or upon a verdict or finding of guilty to one or more felony offenses, the court shall direct the probation officer to make a presentence investigation and report. The court may, in its discretion, order a presentence investigation for a defendant convicted of a misdemeanor.

(2) If the court finds that the record contains information sufficient to enable the meaningful exercise of discretion during sentencing, the defendant may waive a presentence investigation and report. Both the finding and the defendant's waiver must be made in open court on the record.

NEW SECTION. **Section 224. Content of presentence investigation report.** (1) Whenever an investigation is required, the probation officer shall promptly inquire into and report upon:

(a) the defendant's characteristics, circumstances, needs, and potentialities;

(b) the defendant's criminal record and social history;

(c) the circumstances of the offense;

(d) the time of the defendant's detention for the offenses charged; and

(e) except in capital cases where the death penalty may

be imposed, the harm caused, as a result of the offense, to the victim, the victim's immediate family, and the community.

(2) If applicable, the court may require the officer to inquire into the victim's pecuniary loss and make a restitution report to the court as provided by law.

(3) The court may, in its discretion, require that the presentence investigation report include a physical and mental examination of the defendant.

(4) All local and state mental and correctional institutions, courts, and law enforcement agencies shall furnish, upon request of the officer preparing a presentence investigation, the defendant's criminal record and other relevant information.

NEW SECTION. **Section 225. Availability of the presentence investigation report.** (1) All presentence investigation reports must be a part of the court record but may not be opened for public inspection. A copy of the presentence investigation report must be provided to the prosecution, the defendant and the defendant's attorney, and the agency or institution to which the defendant is committed.

(2) The court having jurisdiction of the case may permit other access to the presentence investigation report as it considers necessary.

NEW SECTION. **Section 226. Sentencing hearing.** Before imposing sentence or making any other disposition upon acceptance of a plea or upon a verdict or finding of guilty, the court shall conduct a sentencing hearing without unreasonable delay, as follows:

(1) The court shall afford the parties an opportunity to be heard on any matter relevant to the disposition, including the applicability of sentencing enhancement provisions, mandatory minimum sentences, persistent felony offender status, or an exception thereto.

(2) If there is a possibility of imposing the death penalty, the court shall hold a hearing as provided by 46-18-301.

(3) Except as provided in [sections 122 through 126], the court shall address the defendant personally to ascertain whether the defendant wishes to make a statement and to present any information in mitigation of punishment or reason why he should not be sentenced. If the defendant wishes to make a statement, the court shall afford him a reasonable opportunity to do so.

(4) The court shall impose sentence or make any other disposition authorized by law.

(5) In felony cases, the court shall specifically state all reasons for the sentence, including restrictions, conditions, or enhancements imposed, in open court on the

record and in the written judgment.

NEW SECTION. **Section 227. Judgment.** The judgment must set forth the plea, verdict or finding, and the adjudication. If the defendant is convicted, it must set forth the sentence or other disposition. The judgment must be signed and entered of record.

NEW SECTION. **Section 228. Correction of sentence.** The court may correct an illegal sentence or disposition at any time and may correct a sentence imposed in an illegal manner within 120 days after the sentence is imposed or after remand from an appellate court.

NEW SECTION. **Section 229. Revocation of a suspended or deferred sentence.** (1) Upon the filing of a petition for revocation, accompanied by an affidavit showing probable cause that the defendant has violated any condition of a sentence or any condition of a deferred imposition of sentence, the court may issue an order for a hearing on revocation. The order must require the defendant to appear at a specified time and place for the hearing and be served by delivering a copy of the petition and order to the defendant personally. The court may also issue an arrest warrant directing any peace officer or a probation officer to arrest the defendant and bring the defendant before the court.

(2) The petition for a revocation must be filed with

the sentencing court during the period of suspension or deferral. Expiration of the period of suspension or deferral after the petition is filed does not deprive the court of jurisdiction to rule on the petition.

(3) The provisions pertaining to bail as set forth in [sections 66 through 81] are applicable to persons arrested pursuant to this section.

(4) Without unnecessary delay the defendant shall be brought before the court and the defendant shall be advised of:

(a) the allegations of the petition;

(b) the opportunity to appear and to present evidence in the defendant's own behalf;

(c) the opportunity to question adverse witnesses; and

(d) the right to be represented by counsel at the revocation hearing pursuant to [sections 58 through 65].

(5) A hearing is required before a suspended or deferred sentence can be revoked or the terms or conditions of the sentence can be modified, unless:

(a) the defendant admits the allegations and waives the right to a hearing; or

(b) the relief to be granted is favorable to the defendant, and the prosecuting attorney, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of

the term of probation is not favorable to the defendant for the purposes of this subsection.

(6) At the hearing the prosecution must prove that there has been a violation of the terms and conditions of the suspended or deferred sentence by a preponderance of the evidence. Provided, however, that where the failure to pay restitution is the basis for the petition the defendant may excuse such violation by showing sufficient evidence that the failure to pay restitution was not attributable to a failure on his part to make a good faith effort to obtain sufficient means to make the restitution payments as ordered.

(7) If the court finds that the defendant has violated the terms and conditions of the suspended or deferred sentence, the court may:

(a) continue the suspended or deferred sentence without a change in conditions;

(b) continue the suspended sentence with modified or additional terms and conditions;

(c) revoke the suspension of sentence and require the defendant to serve either the sentence imposed or any lesser sentence; or

(d) if the sentence was deferred, impose any sentence which might have been originally imposed.

(8) If the court finds that the prosecution has not

proven, by a preponderance of the evidence, that there has been a violation of the terms and conditions of the suspended or deferred sentence, the petition shall be dismissed and the defendant, if in custody, immediately released.

NEW SECTION. **Section 230. When validity of sentence may be challenged.** (1) A person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims that a sentence was imposed in violation of the constitution or the laws of this state or the Constitution of the United States, that the court was without jurisdiction to impose the sentence, that a suspended or deferred sentence was improperly revoked, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack upon any ground of alleged error available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy may petition the court that imposed the sentence or the supreme court to vacate, set aside, or correct the sentence or revocation order.

(2) If the sentence was imposed by a justice, city, or municipal court, the petition must be filed with the district court in the county where the lower court is situated.

(3) If the person is in custody, the person may elect

to file the petition directly with the supreme court.

NEW SECTION. **Section 231.** **When petition may be filed.** A petition for the relief referred to in [section 230] may be filed at any time.

NEW SECTION. **Section 232.** **Commencement of proceedings.** The proceeding for relief under [section 230] must be commenced by filing a verified petition with the clerk of the appropriate court. The clerk shall docket the petition upon its receipt and bring the petition promptly to the attention of the court.

NEW SECTION. **Section 233.** **Contents of petition.** (1) The petition for postconviction relief must:

(a) identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and clearly set forth the alleged violation or violations;

(b) identify any previous proceedings that the petitioner may have taken to secure relief from his condition;

(c) have attached to the petition any affidavits, records, or other evidence supporting its allegations or state why the evidence is not attached.

(2) The petition must be accompanied by a supporting memorandum including appropriate arguments and citations and discussion of authorities.

NEW SECTION. **Section 234.** **Waiver of grounds for relief.** (1) All grounds for relief claimed by a petitioner under [section 230] must be raised in the original or amended petition. Those grounds for relief not raised are waived unless the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or amended petition.

(2) When a petitioner has been afforded a direct appeal of his conviction, grounds for relief that could reasonably have been raised on direct appeal may not be raised in the original or amended petition.

NEW SECTION. **Section 235.** **Proceedings on the petition.** (1) Unless the petition and the files and records of the case conclusively show that the petitioner is not entitled to relief, the court shall cause notice of the petition to be served upon the county attorney in the county in which the conviction took place and the attorney general and order them to file a responsive pleading to the petition. Following its review of the responsive pleading, the court may dismiss the petition as a matter of law for failure to state a claim for relief, or it may grant a prompt hearing on the petition, determine the issue, and make findings of fact and conclusions with respect to the petition.

(2) If a hearing is required or the interests of justice require, the court shall appoint counsel for a

petitioner who qualifies for the appointment of counsel under [sections 58 through 65].

(3) The court, for good cause, may grant leave to either party to use the discovery procedures available in criminal or civil proceedings. Discovery procedures may be used only to the extent and in the manner the court has ordered or to which the parties have agreed.

(4) The court may receive proof of affidavits, depositions, oral testimony, or other evidence. In its discretion, the court may order the petitioner brought before the court for the hearing.

(5) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to reassignment, retrial, custody, bail, or discharge as may be necessary and proper. If the court finds for the state, the petition must be dismissed.

NEW SECTION. **Section 236. Record of proceedings.** A court that hears a petition pursuant to this rule shall keep a record of the proceedings and enter its findings and conclusions.

NEW SECTION. **Section 237. Review.** Either the petitioner or the state may appeal to the supreme court from an order entered on a petition. The appeal must be taken within 60 days of the entry of the order.

NEW SECTION. **Section 238. Applicability of the writ of habeas corpus.** (1) Except as provided in [sections 238 through 247], every person imprisoned or otherwise restrained of his liberty within this state may prosecute a writ of habeas corpus to inquire into the cause of imprisonment or restraint and, if illegal, to be delivered from the imprisonment or restraint.

(2) The writ of habeas corpus is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted his remedy of appeal. The relief under [sections 238 through 247] is not available to attack the legality of an order revoking a suspended or deferred sentence.

(3) A person may not be released on a writ of habeas corpus due to any technical defect in commitment not affecting his substantial rights.

NEW SECTION. **Section 239. Application for a writ of habeas corpus.** (1) Application for a writ of habeas corpus is made by petition signed either by the party for whose relief it is intended or by another person on the petitioner's behalf.

(2) The application must specify:

(a) that the petitioner is unlawfully imprisoned or restrained of his liberty;

(b) why the imprisonment or restraint is unlawful; and

(c) where and by whom the petitioner is confined or restrained.

(3) All parties must be named if they are known or otherwise described so that they may be identified.

(4) The petition must be verified by the oath or affirmation of the party making the application.

NEW SECTION. **Section 240.** **Granting a writ of habeas corpus.** (1) The writ of habeas corpus may be granted by any justice of the state supreme court or by any district court judge upon petition by or on behalf of any person restrained of his liberty within the judge's or justice's jurisdiction.

(2) When a writ of habeas corpus is issued, it may be made returnable before the issuing court.

(3) Any judge or justice authorized to grant the writ of habeas corpus shall grant the writ without delay if it appears that the writ ought to issue.

NEW SECTION. **Section 241.** **Form of the writ.** (1) The writ of habeas corpus must be directed to the person having custody of or restraining the person on whose behalf the application is made and must command that person to have the petitioner before the judge before whom the writ is returnable at a time and place specified.

(2) The issue or issues to be determined upon return of the writ may be stated either in the writ or in an order

attached to the writ. If the issues to be determined are not stated in the writ or in an attached order, then a copy of the petition must be attached to the writ.

NEW SECTION. **Section 242.** **Service of the writ.** (1) The writ of habeas corpus or any associated process may be issued and served on any day or at any time.

(2) The writ must be served upon the person to whom it is directed. If the writ is directed to a state institution, a copy of the writ shall be served upon the attorney general. If the writ is directed to a county facility, a copy of the writ must be served upon the county attorney.

(3) The writ must be served by the clerk of court, the sheriff, or any other person directed to do so by the court.

(4) The writ must be served in the same manner as a summons in civil actions, except when otherwise expressly directed by the judge or court.

NEW SECTION. **Section 243.** **Return of service.** (1) The person upon whom the writ is served shall make a return and state in that return:

(a) whether the party is in that person's custody or under his power or restraint; and

(b) if the party is in custody or otherwise restrained, state the authority for and cause of the custody or restraint; or

(c) if the party has been transferred to the custody of

or otherwise restrained by another, state to whom, the time and place of transfer, the reason for the transfer, and the authority under which such transfer took place.

(2) The return must be signed and verified by oath unless the person making the return is a sworn public officer making a return in his official capacity.

NEW SECTION. **Section 244. Appearance of petitioner.** (1) The person commanded by the writ shall bring the petitioner before the court as required by the writ unless the petitioner cannot be brought before the court without danger to his health. Sickness or infirmity must be confirmed in an affidavit by the person having custody of the petitioner.

(2) If the court is satisfied with the truth of the affidavit, the court may proceed and dispose of the case as if the petitioner were present, or the hearing may be postponed until the petitioner is present.

(3) If the person commanded by the writ refuses to obey, that person shall be adjudged in contempt of court.

NEW SECTION. **Section 245. Hearing.** (1) The court or judge before whom the writ is returned shall immediately proceed to hear and examine the return. The hearing may be summary in nature.

(2) Evidence may be produced and compelled in preparation of a hearing as provided in [sections 238

through 247].

NEW SECTION. **Section 246. Disposition of petitioner.** (1) If the court finds in favor of the petitioner, an appropriate order must be entered with respect to the judgment or sentence in the former proceeding and any supplementary orders as to reassignment, retrial, custody, bail, or discharge as may be necessary and proper.

(2) If the court finds for the state, the petitioner shall be returned to custody of the person to whom the writ was directed.

NEW SECTION. **Section 247. Appeal by state.** An appeal may be taken to the supreme court by the state from an order of judgment discharging the petitioner. The court may admit the petitioner to bail pending appeal as provided in [section 68]. The appeal must be taken in the same manner as in civil actions.

Section 248. Section 1-1-202, MCA, is amended to read:

"**1-1-202. Terms relating to procedure and the judiciary.** Unless the context requires otherwise, the following definitions apply in the Montana Code Annotated:

(1) A "deposition" is a written declaration under oath or affirmation, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.

(2) "Judicial officers" means justices of the supreme court, judges of the district courts, justices of the peace,

municipal judges, and city judges.

(3) A "judicial record" is the record of official entry of the proceedings in a court of justice or of the official act of a judicial officer in an action or special proceeding.

(4) "Magistrate" means any officer ~~described---in 46-1-201(6)~~ having the power to issue a warrant for the arrest of a person charged with an offense and includes:

(a) the justices of the supreme court;

(b) the judges of the district courts;

(c) justices of the peace; and

(d) city or municipal judges.

(5) An "oral examination" is an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

(6) "Process" means a writ or summons issued in the course of judicial proceedings.

(7) For purposes of legal notification, the term "registered mail" includes registered or certified mail.

(8) "Testify" includes every mode of oral statement under oath or affirmation.

(9) "Writ" means an order in writing issued in the name of the state or of a court or judicial officer."

Section 249. Section 1-1-207, MCA, is amended to read:

"**1-1-207. Miscellaneous terms.** Unless the context requires otherwise, the following definitions apply in the Montana Code Annotated:

(1) "Bribe" means anything of value or advantage, present or prospective, or any promise or undertaking to give anything of value or advantage, which is asked, given, or accepted with a corrupt intent to unlawfully influence the person to whom it is given in his action, vote, or opinion in any public or official capacity.

(2) "Peace officer" means any person described in ~~46-1-201(8)~~ [section 2(16)].

(3) "Vessel", when used in reference to shipping, includes ships of all kinds, steamboats and steamships, canal boats, and every structure adapted to be navigated from place to place."

Section 250. Section 3-15-603, MCA, is amended to read:

"**3-15-603. Manner of impaneling.** After the jurors have been selected, the grand jury shall be impaneled as prescribed in ~~46-11-301--through--46-11-303~~ [sections 97 through 112]."

Section 251. Section 7-4-2902, MCA, is amended to read:

"**7-4-2902. Vacancy in office of county coroner or disqualification of coroner.** (1) The coroner, or the board of county commissioners if the coroner is unable or refuses to act, shall request the coroner or a qualified deputy

coroner of another county to be acting county coroner if the coroner:

(a) is absent or unable to attend to his duties or if the office of coroner is vacant and there are no qualified deputies available;

(b) is related to the deceased;

(c) is a potential party in an action concerning the death or his inquiry into the death may pose a conflict of interest;

(d) has not successfully completed the basic coroner course required in 7-4-2905 and there are no qualified deputies available; or

(e) is disqualified under the provisions of ~~46-4-201~~ [section 10].

(2) The salary of and expenses incurred by an acting coroner on behalf of a requesting county are an allowable charge against the requesting county."

Section 252. Section 7-4-2912, MCA, is amended to read:

"**7-4-2912. Coroner's register.** The county coroner shall keep an official register, to be labeled "coroner's register"~~, as provided in 46-4-207~~."

Section 253. Section 7-16-2322, MCA, is amended to read:

"**7-16-2322. Rules and ordinances to implement part.** (1) (a) A county park board, in addition to powers and

duties now given under law, has the following powers and duties:

(i) to make rules necessary or convenient to protect and promote the improvement of land and facilities under the care and control of said board and for the protection of birds and animals inhabiting or frequenting land and facilities in parks and public places;

(ii) to make rules for the use of land and facilities by the public; and

(iii) to provide penalties for the violation of such rules.

(b) The rules authorized by subsection (1) have the force of resolutions of the county commissioners.

(2) The county governing body, by the adoption of an ordinance in substantial compliance with the provisions of 7-5-103 through 7-5-107, may:

(a) provide that violations of specific rules adopted pursuant to subsection (1) constitute criminal offenses and are punishable as provided in 7-5-109; and

(b) authorize a county park board to employ a county park warden to enforce park rules and ordinances. A county park warden is not a peace officer, as defined in ~~46-1-201~~ [section 2(16)]. The law enforcement powers of a park warden are limited to issuing citations charging violations of park ordinances and rules."

Section 254. Section 7-32-201, MCA, is amended to read:

"**7-32-201. Definitions.** As used in this part, the following definitions apply:

(1) "Auxiliary officer" means an unsworn, part-time, volunteer member of a law enforcement agency who may perform but is not limited to the performance of such functions as civil defense, search and rescue, office duties, crowd and traffic control, and crime prevention activities.

(2) "General law enforcement duties" means patrol operations performed for detection, prevention, and suppression of crime and the enforcement of criminal and traffic codes of this state and its local governments.

(3) "Law enforcement agency" means a law enforcement service provided directly by a local government.

(4) "Law enforcement officer" means a sworn, full-time, employed member of a law enforcement agency who is a peace officer as defined in ~~46-1-201(8)~~ [section 2(16)] and has arrest authority as described in ~~46-6-401~~ [sections 26 through 36].

(5) "Reserve officer" means a sworn, part-time, volunteer member of a law enforcement agency who is a peace officer as defined in ~~46-1-201(8)~~ [section 2(16)] and has arrest authority as described in ~~46-6-401~~ [sections 26 through 36] only when authorized to perform these functions as a representative of the law enforcement agency."

Section 255. Section 7-32-233, MCA, is amended to read:

"**7-32-233. Limitation on arrest authority of auxiliary officer.** An auxiliary officer has only the arrest authority granted a private person in ~~46-6-502 and 46-6-503~~ [section 39]."

Section 256. Section 7-32-4303, MCA, is amended to read:

"**7-32-4303. Control of shoplifting.** (1) The city or town council may ~~define shoplifting as provided in 46-6-501~~ and punish persons found guilty ~~thereof~~ of shoplifting.

(2) "Shoplifting" means the theft of any goods offered for sale by a wholesale or retail store or other mercantile establishment."

Section 257. Section 16-11-147, MCA, is amended to read:

"**16-11-147. Seizure and forfeiture of unlawful cigarettes.** (1) Any motor vehicle, airplane, conveyance, vehicle, or other means of transportation in which cigarettes are being unlawfully transported, together with the cigarettes and other equipment or personal property used in connection with such transportation and found in such means of transportation, shall be subject to seizure by the department, its duly authorized agent, any sheriff or deputy, or other peace officer and shall be subject to forfeiture in the manner hereinafter provided.

(2) Upon the seizure of any cigarettes and within 2 days thereafter, the person or officer making such seizure shall deliver an inventory of the property seized to the person from whom such seizure was made, if known, and file a copy thereof with the department. The person from whom the seizure was made or any other person claiming an interest in the property seized may apply for its return as provided in ~~46-5-302 through 46-5-305~~ [section 56]."

Section 258. Section 37-60-406, MCA, is amended to read:

"**37-60-406. Peace officer's casual employment.** A peace officer, as defined in ~~46-1-201~~ [section 2(16)], or a reserve officer, as defined in 7-32-201, is not prohibited or restricted from accepting and engaging in employment as a security guard during his off-duty hours, provided that he does not advertise his services or solicit employment and further provided that the chief of his department previously approves the off-duty employment. A peace officer or reserve officer so engaged in casual employment is exempt from the provisions of this chapter only if the casual employment is authorized in writing by his sheriff or chief of police."

Section 259. Section 44-11-303, MCA, is amended to read:

"**44-11-303. Definitions.** When used in this part, unless the context requires otherwise, the following definitions

apply:

(1) "Law enforcement agency" means a public agency lawfully established by statute or executive order that is responsible for the prevention and detection of crime and the enforcement of penal, traffic, regulatory, or game laws.

(2) "Law enforcement agency of this state" or "law enforcement agency of another (or any other) state" includes, respectively, a law enforcement agency of a political subdivision of this state and a law enforcement agency of a political subdivision of another state.

(3) "Mutual aid agreement" or "agreement" means an agreement between two or more law enforcement agencies, consistent with the purposes of this part.

(4) "Party law enforcement agency" means a law enforcement agency that is a party to a mutual aid agreement as set forth in this part.

(5) "Peace officer" has the meaning as the term is defined in ~~46-1-201~~ [section 2(16)]."

Section 260. Section 45-5-206, MCA, is amended to read:

"**45-5-206. Domestic abuse.** (1) A person commits the offense of domestic abuse if he:

(a) purposely or knowingly causes bodily injury to a family member or household member; or

(b) purposely or knowingly causes reasonable apprehension of bodily injury in a family member or

household member. The purpose to cause reasonable apprehension or the knowledge that reasonable apprehension would be caused shall be presumed in any case in which a person knowingly points a firearm at or in the direction of a family member or household member, whether or not the offender believes the firearm to be loaded.

(2) For the purposes of this section and ~~46-6-401~~ [section 26], "family member or household member" means a spouse, former spouse, adult person related by blood or marriage, or adult person of the opposite sex residing with the defendant or who formerly resided with the defendant.

(3) A person convicted of domestic abuse for the first or second time shall be fined not to exceed $500 or be imprisoned in the county jail not to exceed 6 months, or both. On a third or subsequent conviction for domestic abuse, the person convicted shall be fined not to exceed $50,000 or be imprisoned in the state prison for a term not to exceed 5 years, or both."

Section 261. Section 45-8-209, MCA, is amended to read:

"45-8-209. Harming a police dog -- penalty. (1) A person commits the offense of harming a police dog if he purposely or knowingly shoots or kills a police dog being used by a law enforcement officer in discharging or attempting to discharge any legal duty in a reasonable and proper manner.

(2) A person convicted of the offense of harming a police dog may be fined an amount not to exceed $5,000 or be imprisoned in the state prison for a term not to exceed 1 year, or both.

(3) As used in this section, the following definitions apply:

(a) "Law enforcement officer" means a person who is a peace officer as defined in ~~46-1-201~~ [section 2(16)].

(b) "Police dog" means a dog that is:

(i) used by a law enforcement agency, as defined in 7-32-201, in the exercise of its authority;

(ii) specifically trained for law enforcement work; and

(iii) under the control of a law enforcement officer."

Section 262. Section 46-8-114, MCA, is amended to read:

"46-8-114. Time and method of payment of costs. When a defendant is sentenced to pay the costs of court-appointed counsel, the court may order payment to be made within a specified period of time or in specified installments. Such payments shall be made to the clerk of the district court. The clerk of the district court shall disburse the payments to the county, agency, state agency, or local government unit responsible for the expenses of court-appointed counsel as provided for in ~~46-8-201~~ [section 65]."

Section 263. Section 46-16-103, MCA, is amended to read:

"**46-16-103. Who decides questions of law and fact.** (1) All prosecutions deciding issues of fact must be tried by the court and jury, except on a plea of guilty.

(2) Questions of law must be decided by the court and questions of fact by the jury except that on a trial for criminal defamation the jury shall determine both questions of law and of fact. Questions of law and fact must be decided by the court when a trial by jury is waived under ~~46-16-102(2)~~ [section 191]."

Section 264. Section 46-18-201, MCA, is amended to read:

"**46-18-201. Sentences that may be imposed.** (1) Whenever a person has been found guilty of an offense upon a verdict or a plea of guilty, the court may:

(a) defer imposition of sentence, excepting sentences for driving under the influence of alcohol or drugs, for a period, except as otherwise provided, not exceeding 1 year for any misdemeanor or for a period not exceeding 3 years for any felony. The sentencing judge may impose upon the defendant any reasonable restrictions or conditions during the period of the deferred imposition. Such reasonable restrictions or conditions may include:

(i) jail base release;

(ii) jail time not exceeding 180 days;

(iii) conditions for probation;

(iv) restitution;

(v) payment of the costs of confinement;

(vi) payment of a fine as provided in 46-18-231;

(vii) payment of costs as provided in 46-18-232 and 46-18-233;

(viii) payment of costs of court-appointed counsel as provided in ~~46-8-113~~ [section 62];

(ix) community service;

(x) any other reasonable conditions considered necessary for rehabilitation or for the protection of society; or

(xi) any combination of the above.

(b) suspend execution of sentence up to the maximum sentence allowed for each particular offense. The sentencing judge may impose on the defendant any reasonable restrictions or conditions during the period of suspended sentence. Such reasonable restrictions or conditions may include any of those listed in subsections (1)(a)(i) through (1)(a)(xi).

(c) impose a fine as provided by law for the offense;

(d) require payment of costs as provided in 46-18-232 or payment of costs of court-appointed counsel as provided in ~~46-8-113~~ [section 62];

(e) commit the defendant to a correctional institution with or without a fine as provided by law for the offense;

(f) impose any combination of subsections (1)(b) through (1)(e).

(2) If any financial obligation is imposed as a condition under subsection (1)(a), sentence may be deferred for a period not exceeding 2 years for any misdemeanor or for a period not exceeding 6 years for any felony, regardless of whether any other conditions are imposed.

(3) If any restrictions or conditions imposed under subsection (1)(a) or (1)(b) are violated, the court shall consider any elapsed time and either expressly allow part or all of it as a credit against the sentence or reject all or part as a credit and state its reasons in the order. Credit, however, must be allowed for jail time already served.

(4) Except as provided in 46-18-222, the imposition or execution of the first 2 years of a sentence of imprisonment imposed under the following sections may not be deferred or suspended: 45-5-103, 45-5-202(3) relating to aggravated assault, 45-5-302(2), 45-5-303(2), 45-5-401(2), 45-5-503(2) and (3), 45-9-101(2) and (3), 45-9-102(3), and 45-9-103(2).

(5) Except as provided in 46-18-222, the imposition or execution of the first 10 years of a sentence of imprisonment imposed under 45-5-102 may not be deferred or suspended.

(6) Except as provided in 46-18-222, imposition of sentence in a felony case may not be deferred in the case of

a defendant who has been convicted of a felony on a prior occasion whether or not the sentence was imposed, imposition of the sentence was deferred, or execution of the sentence was suspended.

(7) If the victim was less than 16 years old, the imposition or execution of the first 30 days of a sentence of imprisonment imposed under 45-5-502(3), 45-5-503, 45-5-504, 45-5-505, or 45-5-507 may not be deferred or suspended. Section 46-18-222 does not apply to the first 30 days of such imprisonment."

Section 265. Section 46-18-247, MCA, is amended to read:

"**46-18-247. Default.** (1) If an offender sentenced to make restitution is in default, the sentencing court, upon the motion of the prosecuting attorney or upon its own motion, may issue an order under ~~46-18-203~~ [section 229] requiring the offender to show cause why he should not be confined for failure to obey the sentence of the court. The court may order the offender to appear at a time, date, and place for a hearing or, if he fails to appear as ordered, issue a warrant for his arrest. The order or warrant must be accompanied by written notice of the offender's right to a hearing as provided in ~~46-18-203~~ [section 229].

(2) If the court finds that the offender's default was attributable to a failure on his part to make a good faith

effort to obtain the necessary funds for payment of the ordered restitution, the court may take any action provided for in ~~46-18-203~~ [section 229]. If confinement is ordered, the court, after entering the order, may at any time, for good cause shown, reduce the term of confinement and waive satisfaction of the restitution order.

(3) An order to pay restitution constitutes a judgment rendered in favor of the state, and following a default in the payment of restitution or any installment thereof, the sentencing court may order the restitution to be collected by any method authorized for the enforcement of other judgments."

Section 266. Section 46-18-502, MCA, is amended to read:

"**46-18-502. Sentencing of persistent felony offender.** (1) Except as provided in subsection (2), a persistent felony offender shall be imprisoned in the state prison for a term of not less than 5 years or more than 100 years or shall be fined an amount not to exceed $50,000, or both, if he was 21 years of age or older at the time of the commission of the present offense.

(2) If the offender was a persistent felony offender, as defined in ~~46-18-501~~ [section 2(17)], at the time of his previous felony conviction, less than 5 years have elapsed between the commission of the present offense and either the

previous felony conviction or the offender's release on parole or otherwise from prison or other commitment imposed as a result of the previous felony conviction, and he was 21 years of age or older at the time of the commission of the present offense, he shall be imprisoned in the state prison for a term of not less than 10 years or more than 100 years or shall be fined an amount not to exceed $50,000, or both.

(3) Except as provided in 46-18-222, the imposition or execution of the first 5 years of a sentence imposed under subsection (1) or the first 10 years of a sentence imposed under subsection (2) may not be deferred or suspended.

(4) Any sentence imposed under subsection (2) shall run consecutive to any other sentence imposed."

Section 267. Section 46-20-103, MCA, is amended to read:

"**46-20-103. Scope of appeal by state.** (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)~~ [section 219];

(c) granting a new trial;

(d) quashing an arrest or search warrant;

(e) suppressing evidence;

(f) suppressing a confession or admission; or

(g) granting or denying change of venue."

NEW SECTION. **Section 268. Repealer.** Sections 46-1-101, 46-1-102, 46-1-201, 46-3-101 through 46-3-106, 46-3-201 through 46-3-206, 46-4-201 through 46-4-207, 46-4-301 through 46-4-306, 46-5-101 through 46-5-104, 46-5-201 through 46-5-209, 46-5-301 through 46-5-305, 46-5-401, 46-5-402, 46-5-501 through 46-5-505, 46-6-101, 46-6-104 through 46-6-106, 46-6-201 through 46-6-204, 46-6-301 through 46-6-304, 46-6-401 through 46-6-404, 46-6-411, 46-6-412, 46-6-421, 46-6-422, 46-6-501 through 46-6-503, 46-7-101 through 46-7-103, 46-8-101 through 46-8-104, 46-8-111 through 46-8-115, 46-8-201, 46-8-202, 46-9-101 through 46-9-104, 46-9-111, 46-9-201 through 46-9-205, 46-9-301 through 46-9-303, 46-9-311, 46-9-401 through 46-9-404, 46-9-411 through 46-9-414, 46-9-501 through 46-9-505, 46-10-101, 46-10-102, 46-10-201 through 46-10-204, 46-11-101, 46-11-102, 46-11-201 through 46-11-204, 46-11-301 through 46-11-303, 46-11-311 through 46-11-319, 46-11-331 through 46-11-333, 46-11-401 through 46-11-405, 46-11-501 through 46-11-505, 46-11-601, 46-12-101 through 46-12-105, 46-12-201 through 46-12-206, 46-13-101 through 46-13-106, 46-13-201 through 46-13-204, 46-13-301, 46-13-302, 46-14-101 through 46-14-103, 46-14-201 through 46-14-203, 46-14-212,

46-14-213, 46-14-221, 46-14-222, 46-14-301 through 46-14-304, 46-14-311 through 46-14-313, 46-14-401, 46-15-101 through 46-15-105, 46-15-111 through 46-15-114, 46-15-201 through 46-15-204, 46-15-321 through 46-15-329, 46-15-331, 46-15-332, 46-15-401 through 46-15-403, 46-16-102, 46-16-108, 46-16-201, 46-16-202, 46-16-211 through 46-16-213, 46-16-301 through 46-16-307, 46-16-401 through 46-16-403, 46-16-501 through 46-16-505, 46-16-601 through 46-16-605, 46-16-701, 46-16-702, 46-17-101 through 46-17-103, 46-17-201 through 46-17-205, 46-17-211, 46-17-301 through 46-17-303, 46-17-311, 46-17-401 through 46-17-404, 46-18-102, 46-18-111 through 46-18-113, 46-18-203, 46-18-501, 46-18-503, 46-21-101 through 46-21-105, and 46-21-201 through 46-21-203, MCA, are repealed.

APPROVED BY COMMITTEE
ON JUDICIARY

SENATE BILL NO. 347

INTRODUCED BY [signatures]

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE LAW RELATING TO CRIMINAL PROCEDURE; IMPLEMENTING THE RECOMMENDATIONS OF THE COMMISSION ON RULES OF CRIMINAL PROCEDURE; AMENDING SECTIONS 1-1-202, 1-1-207, 7-4-2902, 7-4-2912, 7-16-2322, 7-32-201, 7-32-233, 7-32-4303, 16-11-147, 37-60-406, 44-11-303, 45-5-206, 45-8-209, 46-8-114, 46-16-103, 46-18-201, 46-18-247, 46-18-502, AND 46-20-103, MCA; AND REPEALING SECTIONS 46-1-101, 46-1-102, 46-1-201, 46-3-101 THROUGH 46-3-106, 46-3-201 THROUGH 46-3-206, 46-4-201 THROUGH 46-4-207, 46-4-301 THROUGH 46-4-306, 46-5-101 THROUGH 46-5-104, 46-5-201 THROUGH 46-5-209, 46-5-301 THROUGH 46-5-305, 46-5-401, 46-5-402, 46-5-501 THROUGH 46-5-505, 46-6-101, 46-6-104 THROUGH 46-6-106, 46-6-201 THROUGH 46-6-204, 46-6-301 THROUGH 46-6-304, 46-6-401 THROUGH 46-6-404, 46-6-411, 46-6-412, 46-6-421, 46-6-422, 46-6-501 THROUGH 46-6-503, 46-7-101 THROUGH 46-7-103, 46-8-101 THROUGH 46-8-104, 46-8-111 THROUGH 46-8-115, 46-8-201, 46-8-202, 46-9-101 THROUGH 46-9-104, 46-9-111, 46-9-201 THROUGH 46-9-205, 46-9-301 THROUGH 46-9-303, 46-9-311, 46-9-401 THROUGH 46-9-404, 46-9-411 THROUGH 46-9-414, 46-9-501 THROUGH 46-9-505, 46-10-101, 46-10-102, 46-10-201 THROUGH 46-10-204, 46-11-101, 46-11-102, 46-11-201 THROUGH 46-11-204, 46-11-301 THROUGH 46-11-303, 46-11-311 THROUGH 46-11-319, 46-11-331 THROUGH 46-11-333, 46-11-401 THROUGH 46-11-405, 46-11-501 THROUGH 46-11-505, 46-11-601, 46-12-101 THROUGH 46-12-105, 46-12-201 THROUGH 46-12-206, 46-13-101 THROUGH 46-13-106, 46-13-201 THROUGH 46-13-204, 46-13-301, 46-13-302, 46-14-101 THROUGH 46-14-103, 46-14-201 THROUGH 46-14-203, 46-14-212, 46-14-213, 46-14-221, 46-14-222, 46-14-301 THROUGH 46-14-304, 46-14-311 THROUGH 46-14-313, 46-14-401, 46-15-101 THROUGH 46-15-105, 46-15-111 THROUGH 46-15-114, 46-15-201 THROUGH 46-15-204, 46-15-321 THROUGH 46-15-329, 46-15-331, 46-15-332, 46-15-401 THROUGH 46-15-403, 46-16-102, 46-16-108, 46-16-201, 46-16-202, 46-16-211 THROUGH 46-16-213, 46-16-301 THROUGH 46-16-307, 46-16-401 THROUGH 46-16-403, 46-16-501 THROUGH 46-16-505, 46-16-601 THROUGH 46-16-605, 46-16-701, 46-16-702, 46-17-101 THROUGH 46-17-103, 46-17-201 THROUGH 46-17-205, 46-17-211, 46-17-301 THROUGH 46-17-303, 46-17-311, 46-17-401 THROUGH 46-17-404, 46-18-102, 46-18-111 THROUGH 46-18-113, 46-18-203, 46-18-501, 46-18-503, 46-21-101 THROUGH 46-21-105, AND 46-21-201 THROUGH 46-21-203, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1.** Scope -- purpose -- construction. (1) [This act] governs the practice and

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procedure in all criminal proceedings in the courts of Montana except where provision for a different procedure is specifically provided by law.

(2) [This act] is intended to provide for the just determination of every criminal proceeding. [This act] shall be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay.

NEW SECTION. **Section 2.** Definitions. As used in [this act], unless the context requires otherwise, the following definitions apply:

(1) "Arraignment" means the formal act of calling the defendant into open court to enter a plea answering a charge.

(2) "Arrest" means the taking of a person into custody in the manner authorized by law.

(3) "Arrest warrant" means the written order from a court directed to a peace officer or to some other person specifically named commanding that person to arrest another. This term includes the original warrant of arrest and a copy certified by the issuing court.

(4) "Bail" means the security given for the primary purpose of insuring the presence of the defendant in a pending criminal proceeding.

(5) "Charge" means a written statement presented to a

court accusing a person of the commission of the offense and is contained in a complaint, information, and indictment.

(6) "Concealment" means any act or deception done purposely or knowingly upon or outside the premises of a wholesale or retail store or other mercantile establishment with the intent to deprive the merchant of all or part of the value of the merchandise.

(7) "Conviction", unless otherwise provided by law, means a judgment or sentence entered upon a guilty plea or upon a verdict or finding of guilty of an offense rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

(8) "Court" means a place were justice is judicially administered and includes the judge thereof.

(9) "Judge" means a person who is invested by law with the power to perform judicial functions.

(10) "Judgment" means an adjudication by a court that the defendant is guilty and includes the sentence pronounced by the court.

(11) "Make available for examination and reproduction" means to make material and information subject to disclosure available upon request at a designated place during specified reasonable times and provide suitable facilities or arrangements for reproducing it. The term does not mean that the disclosing party is required to make copies at its

expense, to deliver the materials or information to the other party, or to supply the facilities or materials required to carry out tests on disclosed items. The parties may by mutual consent make any other or additional arrangements.

(12) "New trial" means a re-examination of the issue in the same court before another jury after a verdict or finding has been rendered.

(13) "Offense" means a violation of any penal statute of this state or any ordinance of its political subdivisions.

(14) "Included offense" means an offense that:

(a) is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

(b) consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(c) differs from the offense charged only in the respect that a less serious injury or risk to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

(15) "Parole" means the release to the community of a prisoner by a decision of the board of pardons prior to the expiration of a prisoner's term, subject to conditions imposed by the board of pardons and the supervision of the

department of institutions.

(16) "Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order and make arrests for offenses while acting within the scope of his authority.

(17) "Persistent felony offender" means an offender who has previously been convicted of a felony and who is presently being sentenced for a second felony committed on a different occasion than the first. An offender is considered to have been previously convicted of a felony if:

(a) the previous felony conviction was for an offense committed in this state or any other jurisdiction for which a sentence of imprisonment in excess of 1 year could have been imposed;

(b) less than 5 years have elapsed between the commission of the present offense and either:

(i) the previous felony conviction; or

(ii) the offender's release on parole or otherwise from prison or other commitment imposed as a result of a previous felony conviction; and

(c) the offender has not been pardoned on the ground of innocence and the conviction has not been set aside at the postconviction hearing.

(18) "Place of trial" means the geographical location and political subdivision within which is situated the court

that will hear the cause.

(19) "Preliminary examination" means a hearing before a justice of the peace for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant.

(20) "Probation" means release by the court without imprisonment, except as otherwise provided by law, of a defendant found guilty of a crime. The release is subject to the supervision of the department of institutions upon directions of the court.

(21) "Prosecutor" means an elected or appointed attorney who is vested by law with the power to initiate and carry out criminal proceedings on behalf of the state or a political subdivision.

(22) "Same transaction" means conduct consisting of a series of acts or omissions which are motivated by:

(a) a purpose to accomplish a criminal objective and which are necessary or incidental to the accomplishment of that objective; or

(b) a common purpose or plan which result in the repeated commission of the same offense or effect upon the same person or persons or the property thereof.

(23) "Search warrant" means a written order made in the name of the state and signed by a judge that particularly describes the thing, place, or person to be searched and the

instruments, articles, or things to be seized; and that is directed to a peace officer commanding him to search for personal property and bring it before the judge.

(24) "Sentence" means the judicial disposition of a criminal proceeding upon a plea or finding of guilty.

(25) "Statement" means:

(a) a writing signed or otherwise adopted or approved by a person;

(b) a video, audio, or other recording of a person's communications or a transcript of the communications; and

(c) a writing containing a summary of a person's oral communications or admissions.

(26) "Summons" means a written order issued by the court that commands a person to appear before a court at a stated time and place to answer the offense set forth therein.

(27) "Superseded notes" means handwritten notes, including field notes, that have been substantially incorporated into a statement. The notes may not be considered a statement and are not subject to disclosure except as provided in [section 139].

(28) "Temporary road block" means any structure, device, or means used by a peace officer for the purpose of controlling all traffic through a point on the highway where all vehicles may be slowed or stopped.

(29) "Witness" means any person whose testimony is

desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution, or proceeding.

(30) "Work product" means legal research, records, correspondence, reports, and memoranda, written and oral, to the extent that they contain the opinions, theories, and conclusions of the prosecutor, defense counsel, or their staff or investigators.

NEW SECTION. **Section 3.** **Filing the charge.** In all criminal prosecutions, the charge shall be filed in the county where the offense was committed unless otherwise provided by law.

NEW SECTION. **Section 4.** **Place of trial.** (1) The place of trial shall be the county where the charge is filed unless otherwise provided by law.

(2) All objections that a charge is filed in the improper county are waived by the defendant unless made before trial as provided for in [sections 175 through 177]. If an objection is made, a hearing shall be held and the proper county in which to file the charge shall be established before further proceedings.

NEW SECTION. **Section 5.** **Requisite act in multiple counties.** (1) When two or more acts are requisite to the commission of any offense, or two or more acts are committed in furtherance of a common scheme, the charge may be filed in any county in which any of the acts or offenses occur.

(2) When an act requisite to the commission of an offense occurs or continues in more than one county, the charge may be filed in any county in which the act occurred or continued.

NEW SECTION. **Section 6.** **Assisting or committing an offense.** When a person in one county commits or aids, abets, or procures the commission of an offense in another county, the charge may be filed in either county.

NEW SECTION. **Section 7.** **County of offense unknown.** (1) If it cannot be readily determined in which county the offense was committed, the offender may be charged in any county in which it readily appears that an element of the offense occurred.

(2) When an offense is committed in or against a public or private conveyance, and it is doubtful in which county the offense occurred, the charge may be filed in any county in or through which the conveyance has traveled.

NEW SECTION. **Section 8.** **Offense consummated within state.** If an offense is commenced outside the state but is consummated within the state, the offense shall be charged in the county where an act requisite to the commission of the offense is committed or continued.

NEW SECTION. **Section 9.** **Inquest -- when held -- how conducted.** (1) The coroner shall hold an inquest only if requested to do so by the county attorney of the county in

which the acts or events causing death occurred. However, when the death of any person occurs in a jail or a penal institution or from the use of a firearm by a peace officer, except where criminal charges have been or will be filed, the county attorney shall direct the coroner to hold an inquest.

(2) If an inquest is held, the proceedings shall be public. The coroner shall conduct the inquest with the aid and assistance of the county attorney. The inquest must be held in accordance with this section.

NEW SECTION. **Section 10.** **Disqualifying a coroner.** (1) A coroner who also serves as a peace officer may not conduct an inquest into the death of a person who:

(a) died in a jail or penal institution;

(b) died while in custody of a peace officer; or

(c) was killed by a peace officer.

(2) If a coroner is disqualified under subsection (1), the county attorney shall request a qualified coroner of another county to conduct the inquest. The expenses of a coroner fulfilling the request must be paid by the requesting county.

NEW SECTION. **Section 11.** **Summoning and swearing in of jurors -- instructions.** (1) For holding an inquest, the coroner must summon a jury of not more than nine persons qualified by law to serve as jurors.

(2) The jurors chosen to serve must be sworn by the coroner to inquire who the person was and when, where, and by what means he came to his death, and into the circumstances attending his death and to render a true verdict thereon, according to the evidence offered.

(3) The jurors may be required to inspect the body of the decedent, whether or not an autopsy has been performed, at the discretion of the county attorney.

(4) The coroner must instruct the jurors as to their duties.

NEW SECTION. **Section 12.** **Coroner's subpoena.** Upon the request of the county attorney, a coroner must issue subpoenas for witnesses returnable immediately or at a time and place as he may designate, which may be served by any competent person.

NEW SECTION. **Section 13.** **Witness compelled to attend -- examination.** (1) A witness served with a subpoena may be compelled to attend and testify or be punished as upon a subpoena issued by a justice of the peace.

(2) The county attorney shall examine each witness, after which the witness may be examined by the coroner and the jurors.

NEW SECTION. **Section 14.** **Form of verdict.** After inspecting the body, if required, and hearing the testimony, the jury must render its verdict, which shall be by majority

vote, and certify the same in writing signed by them and setting forth who the deceased person was and the location, time, circumstances, and means of the death.

NEW SECTION. **Section 15. Recording and filing the testimony and proceedings.** The testimony of the witness examined before the coroner's jury must be recorded and transcribed, the transcript of which shall be filed with the clerk of the district court of the county. The recording and transcribing expenses shall be paid by the county upon claims duly rendered and certified to by the coroner in the same manner as other claims against the county are paid.

NEW SECTION. **Section 16. Issuing subpoenas.** (1) Whenever the attorney general or county attorney has a duty to investigate alleged unlawful activity, any justice of the supreme court or district court judge of this state may cause subpoenas to be issued commanding the persons to whom they are directed to appear before the attorney general or the county attorney and give testimony.

(2) Subpoenas duces tecum may also issue commanding persons to whom they are directed to produce such books, records, papers, documents, and other objects as may be necessary and proper to the investigation.

(3) A subpoena may issue only when it appears upon the affidavit of the attorney general or the county attorney that the administration of justice requires it to be issued.

NEW SECTION. **Section 17. Failure to appear or obey.** (1) A person who, without just cause, fails to obey an investigative subpoena issued pursuant to this section may be cited for contempt of court.

(2) A person who, after being granted immunity under [section 20], refuses to give testimony or to produce evidence must be brought before the judge issuing the subpoena or, in that judge's absence or inability to act, before the nearest and most accessible judge who shall inform the person:

(a) of the contents and requirements of the subpoena;

(b) that because immunity has been granted, the person cannot be excused from testifying or producing evidence on the grounds that the testimony or evidence may be personally incriminating; and

(c) that the refusal to testify or to produce evidence as commanded in the subpoena is punishable as a contempt of court under Title 3, chapter 1, part 5.

(3) In the presence of the judge, the person must be examined by the county attorney or produce evidence as commanded in the subpoena.

NEW SECTION. **Section 18. Relief from improper subpoena.** A person aggrieved by a subpoena issued pursuant to this section may, within a reasonable time, file a motion to dismiss the subpoena. If a subpoena duces tecum has

issued, a person aggrieved may petition to limit its scope.

NEW SECTION. **Section 19.** **Conduct of investigative inquiry.** (1) The person requesting a subpoena may examine under oath all witnesses subpoenaed pursuant to [sections 16 through 21]. Testimony shall be recorded. The witness has the right to have counsel present at all times. If the witness does not have resources to obtain counsel, the issuing judge shall appoint counsel, when requested.

(2) The secrecy and disclosure provisions relating to grand jury proceedings shall apply to proceedings conducted under [sections 16 through 21]. A person who divulges the contents of the application or the proceedings without legal privilege to do so may be punished for contempt of court.

(3) All penalties for perjury or preparing, submitting, or offering false evidence apply to proceedings conducted under [sections 16 through 21].

NEW SECTION. **Section 20.** **Self-incrimination -- immunity.** (1) No person subpoenaed to give testimony pursuant to [sections 16 through 21] may be required to make any statement or to produce any evidence which may be personally incriminating.

(2) The attorney general or the county attorney may, with the approval of the judge who authorized the issuance of the subpoena on behalf of the state, grant any person subpoenaed immunity from the use of any compelled testimony

or evidence or any information directly or indirectly derived from such testimony or evidence against that person in any criminal prosecution.

(3) Nothing in [sections 16 through 20] prohibits a prosecutor from granting immunity from prosecution for or on account of any transaction, matter, or thing concerning which a witness is compelled to testify if the prosecutor determines, in his sole discretion, that the ends of justice would be served thereby.

(4) After being granted immunity, no person may be excused from testifying on the grounds that such testimony may be personally incriminating. Immunity may not extend to prosecution or punishment for false statements given pursuant to the subpoena.

(5) Nothing in [sections 16 through 21] requires a witness to divulge the contents of a privileged communication unless the privilege is waived as provided by law.

NEW SECTION. **Section 21.** **Fees -- costs.** (1) The fees and mileage of witnesses subpoenaed pursuant to [sections 16 through 20] shall be the same as required in criminal actions.

(2) When the application for the subpoena is made by the attorney general, the state shall bear all costs, including the cost of service. The appropriate county shall

bear all costs, including the cost of service, when the application for the subpoena is made by the county attorney.

(3) All provisions relating to subpoenas in criminal actions apply, including [sections 182 through 190], to subpoenas issued pursuant to [sections 16 through 20].

NEW SECTION. **Section 22. Method of arrest.** (1) An arrest is made by an actual restraint of the person to be arrested or by his submission to custody of the person making the arrest.

(2) All necessary and reasonable force may be used in making an arrest, but the person arrested may not be subject to any greater restraint than is necessary to hold or detain him.

(3) All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to make an authorized arrest.

NEW SECTION. **Section 23. Time of making arrest.** An arrest may be made on any day and at any time of the day or night, except that a person cannot be arrested in his home or private dwelling place at night for a misdemeanor committed some other time and place unless upon the direction of a judge endorsed upon a warrant for arrest. However, a person may be arrested in his home or private dwelling in cases involving domestic abuse.

NEW SECTION. **Section 24. Written report when no arrest made in domestic violence situation.** When a peace officer is called to the scene of a reported incident of domestic violence but does not make an arrest, he shall file a written report with the officer commanding the law enforcement agency employing him, setting forth the reason or reasons for his decision.

NEW SECTION. **Section 25. Notice of rights to victim upon arrest in domestic violence situation.** Whenever a peace officer arrests a person for domestic abuse, as defined in 45-5-206, if the victim is present, the officer shall advise the victim of the availability of a shelter or other services in the community and give the victim immediate notice of any legal rights and remedies available. The notice must include furnishing the victim with a copy of the following statement:

"IF YOU ARE THE VICTIM OF DOMESTIC ABUSE, the county attorney's office can file criminal charges against your abuser. You have the right to go to court and file a petition requesting any of the following orders for relief:

(1) an order restraining your abuser from abusing you;

(2) an order directing your abuser to leave your household;

(3) an order preventing your abuser from transferring any property except in the usual course of business;

(4) an order awarding you or the other parent custody

of or visitation with a minor child or children;

(5) an order restraining your abuser from molesting or interfering with minor children in your custody; or

(6) an order directing the party not granted custody to pay support of minor children or to pay support of the other party if there is a legal obligation to do so".

NEW SECTION. **Section 26. Basis for arrest without warrant.** (1) A peace officer may arrest a person when no warrant has issued if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest.

(2) A summons of a peace officer to a place of residence by a family or household member constitutes an exigent circumstance for making an arrest. Arrest is the preferred response in domestic abuse cases involving injury to the victim, use or threatened use of a weapon, violation of a restraining order, or other imminent danger to the victim.

NEW SECTION. **Section 27. Manner of arrest without warrant.** A peace officer making an arrest when no warrant has issued must inform the person to be arrested of the officer's authority, of the intention to arrest that person, and of the cause of the arrest, except when the person to be arrested is actually engaged in the commission of or in an

attempt to commit an offense, or is pursued immediately after its commission or after an escape, or when the giving of the information will imperil the arrest.

NEW SECTION. **Section 28. Notice to appear.** (1) Whenever a peace officer is authorized to arrest a person when no warrant has issued, the officer may instead issue the person a notice to appear.

(2) The notice to appear shall:

(a) be in writing;

(b) state the person's name and address, if known;

(c) set forth the nature of the offense;

(d) be signed by the issuing officer; and

(e) direct the person to appear before a court at a certain time and place.

(3) Upon failure of the person to appear, a summons or warrant of arrest may issue.

NEW SECTION. **Section 29. Release.** When no warrant has issued, a peace officer having custody of a person arrested may release the arrested person without requiring that person to appear before a court when the officer is satisfied that there are insufficient grounds to commence prosecution.

NEW SECTION. **Section 30. Arrest warrant and summons.** A peace officer may arrest a person when the officer has a warrant commanding that the person be arrested or when the

officer believes on reasonable grounds:

(1) that a felony warrant for the person's arrest has been issued in another jurisdiction; or

(2) that a warrant for the person's arrest has been issued in this state.

NEW SECTION. **Section 31.** **Issuing warrant or summons.** (1) Upon the filing of a charge, the court may issue a summons or a warrant of arrest as provided in [sections 91 and 93]. A summons may issue to a corporation upon the filing of a charge against it. More than one warrant or summons may issue on the same charge.

(2) A summons may be served personally or by first-class mail.

NEW SECTION. **Section 32.** **Failure to appear following summons.** (1) If, after the issuance of a summons or notice to appear, the judge becomes satisfied that the person has not appeared or will not appear as commanded, the judge may at once issue a warrant of arrest.

(2) If, after being summoned, the corporation does not appear, a plea shall be entered in accordance with [section 130] and the matter shall proceed to trial and judgment without further process.

NEW SECTION. **Section 33.** **Form and content of a summons.** (1) The form of a summons shall:

(a) be in writing in the name of the state of Montana

or in the name of the municipality if the violation of a municipal ordinance is charged;

(b) state the name of the person summoned and that person's address, if known;

(c) set forth the nature of the offense;

(d) state the date when issued and the municipality or county where issued;

(e) be signed by a judge of the court with the title of office also noted; and

(f) command the person to appear before a court at a certain time and place.

(2) The summons shall plainly state that, upon failure to appear following service of summons, an arrest warrant shall issue forthwith; or, if the service is made to a corporation, that a plea of not guilty will be entered.

NEW SECTION. **Section 34.** **Form and content of an arrest warrant.** (1) The form of an arrest warrant shall:

(a) be in writing in the name of the state of Montana or in the name of a municipality if a violation of a municipal ordinance is charged;

(b) set forth the nature of the charge;

(c) command that the person against whom the complaint was made be arrested and brought before the nearest or most accessible court for an initial appearance;

(d) specify the name of the person to be arrested or,

if that person's name is unknown, designate the person by any name or description by which the person to be arrested can be identified with certainty;

(e) state the date when issued and the municipality or county where issued; and

(f) be signed by the judge of the court with the title of office noted.

(2) The warrant of arrest may specify the amount of bail.

(3) No warrant of arrest shall be dismissed nor shall any person in custody for an offense be discharged from custody because of technical irregularities not affecting the substantial rights of the accused.

NEW SECTION. **Section 35. Execution of a warrant.** (1) A warrant of arrest may be directed to all peace officers in the state. It shall be executed by a peace officer and may be executed in any county of the state.

(2) Warrants issued for the violation of city ordinances cannot be executed outside the city limits, except as otherwise provided by law.

NEW SECTION. **Section 36. Manner of arrest with warrant.** (1) When making an arrest pursuant to a warrant, a peace officer shall inform the person to be arrested of the officer's authority, the intention to arrest that person, the cause of the arrest, and the fact that a warrant has

been issued for that person's arrest, except:

(a) when the person forcibly resists or flees before the peace officer has an opportunity to inform the person; or

(b) when the giving of the information will imperil arrest.

(2) The peace officer need not have possession of the warrant at the time of arrest, but after the arrest the warrant must be shown to the person arrested as soon as practicable if the person requests.

NEW SECTION. **Section 37. Assisting a peace officer.** (1) A peace officer making a lawful arrest may command the aid of persons 18 years of age or older.

(2) A person commanded to aid a peace officer in making an arrest:

(a) has the same authority to arrest as that officer; and

(b) is not civilly liable for any reasonable conduct in aid of the officer.

NEW SECTION. **Section 38. Assisting officer of another state.** (1) Any peace officer of another state, of the United States, or of the District of Columbia who enters this state in close pursuit of a person in order to arrest him has the same authority to arrest and hold the person in custody as peace officers of this state have to arrest and hold in

custody a person on the ground that he had committed a crime in this state.

(2) If an arrest is made in this state by an officer of another state or of the District of Columbia, the officer shall without unnecessary delay take the arrested person before the judge of a court of record, who shall conduct a hearing for the sole purpose of determining if the arrest was in accordance with subsection (1) and not of determining guilt or innocence of the arrestee.

(3) If the judge determines that the arrest was in accordance with subsection (1), the judge shall commit the arrestee to the custody of the officer making the arrest, who shall, without unnecessary delay, take the arrestee to the state from which he fled. If the judge determines that the arrest was unlawful, the judge shall discharge the person arrested.

(4) This section may not be construed to make unlawful an arrest in this state which would otherwise be lawful.

NEW SECTION. **Section 39.** When authorized -- custody. (1) A private person may arrest another when there is probable cause to believe that the person is committing or has committed an offense and the existing circumstances require the person's immediate arrest.

(2) A private person making an arrest shall immediately notify the nearest available law enforcement agency or peace

officer and give custody of the person arrested to the officer or agency.

NEW SECTION. **Section 40.** Peace officer's custody. A peace officer who, pursuant to law, takes custody of a person arrested by a private citizen shall proceed in accordance with [sections 27 and 36], and as otherwise provided by law.

NEW SECTION. **Section 41.** Investigative stop. A peace officer may stop any person or vehicle which is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense, to obtain or verify an account of the person's presence or conduct, or to determine whether to arrest the person.

NEW SECTION. **Section 42.** Stop and frisk. A peace officer who has made a lawful stop under [sections 41 through 43]:

(1) may frisk the person and take other reasonably necessary steps for protection if the officer has reasonable cause to suspect that the person is armed and presently dangerous to him or another person present;

(2) may take possession of any object that is discovered during the course of the frisk if the officer has probable cause to believe the object is a weapon;

(3) may demand of the person or persons stopped his or

her name and present address; and

(4) shall inform the person or persons stopped as promptly as possible under the circumstances and in any case before questioning the person, that he is a peace officer, that the stop is not an arrest but rather a temporary detention for an investigation, and that upon the completion of the investigation the person will be released if not arrested.

NEW SECTION. **Section 43.** Duration of stop. A stop authorized by [section 41 or 42] may not last longer than is necessary to effectuate the purpose to the stop.

NEW SECTION. **Section 44.** Authority to establish roadblock. Any law enforcement agency of this state is authorized to establish, within its jurisdiction, temporary roadblocks on the highways of this state for the purpose of identifying drivers, checking for driver's licenses, vehicle registration, and insurance.

NEW SECTION. **Section 45.** Establishing a roadblock. A written plan for establishing a roadblock shall be designed by supervisory officers within the law enforcement agency to ensure motorist safety, minimize motorist inconvenience, and prevent the arbitrary selection of vehicles to be stopped by providing a schedule for the selection of vehicles to be stopped.

NEW SECTION. **Section 46.** Search and seizure -- when

authorized. A search of a person, object, or place may be made and instruments, articles, or things may be seized in accordance with [this act] when a search is made:

(1) by the authority of a search warrant; or

(2) in accordance with recognized exceptions to the warrant requirement.

NEW SECTION. **Section 47.** Authority to issue search warrant. A search warrant authorized by this section may be issued:

(1) upon the request of a peace officer, the city or county attorney or the attorney general; and

(2) by any city or municipal court judge or justice of the peace within his respective jurisdiction wherein the property or person sought is located; or

(3) by any district court judge within this state.

NEW SECTION. **Section 48.** What may be seized with search warrant. A warrant may issue under this section to search for and seize any:

(1) property that constitutes evidence of the commission of an offense;

(2) contraband, fruits of the crime, or things otherwise criminally possessed;

(3) property designed or intended for use or which is or has been used as a means of committing a criminal offense; or

(4) person for whose arrest there is probable cause, or for whom there has been a warrant of arrest issued, or who is unlawfully restrained.

NEW SECTION. **Section 49.** **Search warrant upon affidavit.** (1) A search warrant, other than a search warrant upon oral testimony under [section 50], shall issue only upon an affidavit or affidavits sworn to before the judge which establishes grounds for issuing a warrant. The judge shall issue a search warrant if the judge is satisfied that there is probable cause to believe an offense has been or will be committed and that there is probable cause for issuance of the warrant.

(2) The warrant shall particularly describe the thing, place, or person to be searched and instruments, articles, or person to be seized.

(3) The warrant shall be directed to a specific peace officer commanding the officer to search for and seize the designated person or items.

NEW SECTION. **Section 50.** **Search warrant upon oral testimony.** (1) If the circumstances make it reasonable to dispense with a written affidavit, a judge may issue a warrant based on sworn oral testimony communicated by telephone or other appropriate means.

(2) The person who is requesting the warrant shall prepare a document to be known as a duplicate original

warrant and shall read the duplicate original warrant, verbatim, to the judge. The judge shall then enter, verbatim, what is read to him on a document to be known as the original warrant.

(3) If the judge is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist, or that there is probable cause to believe that they exist, the judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the judge's name on the duplicate original warrant and enter on the face of the original warrant the exact time when the warrant was issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(4) When a caller informs the judge that the purpose of the case is to request a warrant, the judge shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. An applicant's telephonic oath or affirmation is considered to have been made before the judge. If a voice recording device is available, the judge shall record all of the call after the caller informs the judge that the purpose of the call is to request a warrant. Otherwise, a stenographic or longhand verbatim record shall

be made. If a voice recording is used or a stenographic record is made, the judge shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the judge shall file a signed copy with the court.

(5) A search warrant issued upon any telephonic request is invalid unless it is subsequently signed by the issuing judge or his successor.

(6) The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(7) Evidence obtained pursuant to a warrant issued under this section is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

NEW SECTION. **Section 51.** Service of a search warrant. A search warrant must in all cases be served by the peace officer specifically named and by no other person except in aid of the officer, the officer being present and acting in its execution.

NEW SECTION. **Section 52.** Procedures assisting execution of search warrant. (1) All necessary and reasonable force may be used to execute a search warrant or to effect an entry into any building or property or part thereof to execute a search warrant.

(2) The person executing the warrant may reasonably detain and search any person in the place being searched at the time:

(a) to protect himself from attack; or

(b) to prevent disposal or concealment of any instruments, articles, or things particularly described in the warrant.

NEW SECTION. **Section 53.** Execution and return. (1) Service of a search warrant is made by exhibiting the original warrant, or a duplicate original warrant, at the place or to the person to be searched. The officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the search warrant and receipt for property taken or shall leave the copy and receipt at the place from which the items were taken. Failure to leave a copy and receipt may not render the property seized inadmissible at trial.

(2) The return shall be made promptly and shall be accompanied by a written inventory of any property taken, verified by the person executing the warrant. The return shall be made before the judge who issued the warrant or, if he is absent or unavailable, before the nearest available judge.

(3) The judge shall, upon request, deliver a copy of the inventory and the order of custody or disposition to the

person from whom or from whose premises the property was taken and to the applicant for the warrant.

(4) The warrant may be executed at any time of the day or night. The warrant shall be executed within 10 days from the time of issuance. Any warrant not executed within 10 days is void and shall be returned to the court or judge issuing the same as "not executed".

(5) The judge shall enter an order providing for the custody or appropriate disposition of the instruments, articles, or things seized pending further proceedings.

NEW SECTION. **Section 54. Filing of return.** (1) The application on which the warrant is issued shall be retained by the judge but may not be filed with the clerk of court, or with the court if there is no clerk, until the warrant has been executed or has been returned "not executed".

(2) The judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory, and all other papers in connection with the warrant and shall file them with the issuing court.

NEW SECTION. **Section 55. Custody and disposition -- seizure without search warrant.** (1) Instruments, articles, or things lawfully seized without a warrant may be retained in the custody of the officer making the seizure for a time sufficient to complete an investigation.

(2) Notice of the seizure and a receipt for the

property seized shall be given to the person from whose possession the property is taken and to the owner of the property if the owner is reasonably ascertainable. The failure to give a receipt may not render the evidence seized inadmissible upon trial.

NEW SECTION. **Section 56. Return of property seized -- right to possess.** (1) Any person claiming the right to possession of property seized as evidence may apply to the judge for its return. The judge shall give written notice as the judge considers adequate to the prosecuting attorney and all persons who have or may have an interest in the property and shall hold a hearing to determine the right to possession.

(2) If the right to possession is established, the judge shall order the property other than contraband returned if:

(a) the property is not needed as evidence; or

(b) all proceedings in which it might be required have been completed.

NEW SECTION. **Section 57. Disposition of unclaimed property.** If property seized as evidence is not claimed within 6 months of the completion of the case for which it was seized, the officer having custody of it shall apply to the court for its disposition. If the judge, after proper inquiry, cannot ascertain or locate any person entitled to

its possession, the judge must order the property to be sold or, if contraband, destroyed, by the sheriff. The proceeds from the sale, after deduction of the costs of storage, preservation of property, and the sale, must be paid into the county general fund.

NEW SECTION. **Section 58.** **Right to counsel.** (1) During the initial appearance before the court, every defendant must be informed of the right to have counsel, and must be asked if the aid of counsel is desired.

(2) If the defendant desires counsel, is financially unable to employ counsel, and is entitled to have counsel assigned, the court must assign counsel to the defendant without unnecessary delay.

(3) The defendant, if unable to employ counsel, is entitled to have counsel assigned if:

(a) the offense charged is a felony;

(b) the offense charged is a misdemeanor and the court desires to retain imprisonment as a sentencing option; or

(c) the interests of justice would be served by assignment.

NEW SECTION. **Section 59.** **Waiver of counsel.** A defendant may waive the right to counsel when the court ascertains that the waiver is made knowingly, voluntarily, and intelligently.

NEW SECTION. **Section 60.** **Duration of appointment.** (1)

Where counsel has been assigned, the assignment shall be effective until final judgment, including any proceeding upon direct appeal to the Montana supreme court, unless relieved by order of the court.

(2) If counsel finds the defendant's case on appeal to be wholly frivolous, counsel must advise the court of that fact and request permission to withdraw. The request to withdraw must be accompanied by a memorandum referring to anything in the record that might arguably support the appeal. The defendant is entitled to receive a copy of counsel's memorandum, and to file a reply with the court.

NEW SECTION. **Section 61.** **Determination of indigence.** (1) The court shall make a determination of indigence.

(2) In applying for a court-appointed counsel, a defendant shall submit a sworn financial statement demonstrating a financial inability to obtain legal representation without substantial hardship in providing for personal or family necessities. The statement is not admissible in any civil or criminal action except where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false swearing.

NEW SECTION. **Section 62.** **Payment for court-appointed counsel by defendant.** (1) The court may require a convicted defendant to pay the costs of court-appointed counsel as a part of or a condition under the sentence imposed as

provided in [this act].

(2) Costs must be limited to reasonable compensation and costs incurred by the court-appointed counsel in the criminal proceeding.

(3) The court may not sentence a defendant to pay the costs of court-appointed counsel unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced him for remission of the payment of costs or of any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

NEW SECTION. **Section 63. Time and method of payment.** When a defendant is sentenced to pay the costs of court-appointed counsel, the court may order payment to be made within a specified period of time or in specified installments. Payments shall be made to the clerk of the district court. The clerk of the district court shall

distribute the payments to the government agency responsible for the expense of court-appointed counsel as provided in [section 65].

NEW SECTION. **Section 64. Effect of nonpayment.** (1) When a defendant who is sentenced to pay the costs of court-appointed counsel defaults in payment of the costs or of any installment, the court on motion of the county attorney or on its own motion may require the defendant to show cause why the default should not be treated as a contempt of court and may issue a show cause citation or a warrant of arrest for the defendant's appearance.

(2) Unless the defendant shows that the default was not attributable to an intentional refusal to obey the order of the court or to a failure on the defendant's part to make a good faith effort to make the payment, the court may find that the default constitutes civil contempt.

(3) The term of imprisonment for contempt for nonpayment of the costs of court-appointed counsel shall be set forth in the judgment and may not exceed 1 day for each $25 of the payment, 30 days if the order for payment was imposed upon conviction of a misdemeanor, or 1 year in any other case, whichever is the shorter period. A person committed for nonpayment of costs must be given credit toward payment for each day of imprisonment at the rate specified in the judgment.

(4) If it appears to the satisfaction of the court that the default in the payment of costs is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount of the payment or of each installment, or revoking the order for payment of the unpaid portion of the costs in whole or in part.

(5) A default in the payment of costs or any installment may be collected by any means authorized by law for the enforcement of a judgment. The writ of execution for the collection of costs may not discharge a defendant committed to imprisonment for contempt until the amount of the payment for costs has actually been collected.

NEW SECTION. **Section 65. Remuneration of appointed counsel.** (1) Whenever in a criminal proceeding an attorney represents or defends any person by order of the court on the ground that the person is financially unable to employ counsel, the attorney shall be paid for his services a sum as a district court or justice of the state supreme court certifies to be reasonable compensation and shall be reimbursed for reasonable costs incurred in the criminal proceeding.

(2) The expense of implementing this rule is chargeable as provided in 3-5-901 to the county in which the proceeding arose, the department of commerce, or both, except that:

(a) in proceedings solely involving the violation of a

city ordinance or state statute prosecuted in a city or municipal court, the expense is chargeable to the city or town in which the proceeding arose; or

(b) when there has been an arrest by agents of the department of fish, wildlife, and parks or agents of the department of justice and the charge is prosecuted by personnel of the state agency that made the charge, the expense must be borne by the prosecuting state agency.

NEW SECTION. **Section 66. General authority for release and detention.** (1) An arrested person shall be released or detained pending judicial proceedings pursuant to [sections 66 through 81].

(2) If a person is released, he shall appear to answer, as ordered, in the court having jurisdiction.

NEW SECTION. **Section 67. Release or detention of a defendant pending trial.** Before a verdict has been rendered, the court shall:

(1) authorize the release of the defendant upon reasonable conditions that assure the appearance of the defendant and protect the safety of the community or of any other person; or

(2) detain the defendant where there is probable cause to believe that the defendant committed an offense for which death is a possible punishment and adequate safeguards are not available to ensure the defendant's appearance and

safety of the community.

NEW SECTION. **Section 68. Release or detention pending appeal -- revocation -- sentencing hearing.** The court shall order that a defendant found guilty of an offense who is awaiting imposition or execution of sentence, revocation hearing, or who has filed an appeal, be detained, unless the court finds that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released.

NEW SECTION. **Section 69. Conditions upon the defendant's release.** (1) The court may impose any condition which will reasonably assure the appearance of the defendant as required, or assure the safety of any person and the community, including but not limited to, the following:

(a) the defendant not commit an offense during the period of release;

(b) the defendant remain in the custody of a designated person who agrees to supervise the defendant and report any violation of a release condition to the court, if the designated person is reasonably able to assure the court that the defendant will appear as required and will not pose a danger to the safety of any person or the community;

(c) the defendant maintain employment, or if unemployed, actively seek employment;

(d) the defendant abide by specified restrictions on

the defendant's personal associations, place of abode, and travel;

(e) the defendant avoid all contact with the alleged victim of the offense and any potential witness who may testify concerning the offense;

(f) the defendant report on a regular basis to a designated agency or individual, pretrial services agency, or other appropriate individual;

(g) the defendant comply with a specified curfew;

(h) the defendant may not possess a firearm, destructive device, or other dangerous weapon;

(i) the defendant may not use or possess alcohol, or any dangerous drug or other controlled substance without a legal prescription;

(j) furnish bail in accordance with [section 75]; or

(k) the defendant return to custody for specified hours following release for employment, schooling, or other limited purposes.

(2) The court may not impose an unreasonable condition that results in the pretrial detention of the defendant and shall subject the defendant to the least restrictive condition, or combination of conditions, that will assure the defendant's appearance and provide for the protection of the community. The court may, upon a reasonable basis, amend the order to impose additional or different conditions of

release, at any time, upon its own motion or upon the motion of either party.

NEW SECTION. **Section 70.** **Release or detention hearing.** (1) The release or detention of the defendant shall be determined immediately upon the defendant's first appearance.

(2) In determining whether the defendant shall be released or detained, the court shall take into account the available information concerning:

(a) the nature and circumstances of the offense charged, including whether the offense involved the use of force or violence;

(b) the weight of the evidence against the defendant;

(c) the history and characteristics of the defendant, including:

(i) the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to alcohol or drug abuse, criminal history, and record concerning the appearance at court proceedings; and

(ii) whether at the time of the current arrest or offense, the defendant was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentencing for an offense;

(d) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release; and

(e) the property available as collateral for the defendant's release to determine if it will reasonably assure the appearance of the defendant as required.

(3) Upon the motion of any party or the court, a hearing shall be held to determine whether bail is established in the appropriate amount, or whether any other condition or restriction upon the defendant's release will reasonably assure the appearance of the defendant and the safety of any other person or the community.

NEW SECTION. **Section 71.** **Release order.** A release order issued by the court shall include a written statement setting forth any restrictions or conditions upon the defendant's release.

NEW SECTION. **Section 72.** **Release ordered by court where charge not pending.** If release is ordered or bail is accepted by a court other than the court in which the charge is pending, any bonds, instrument of ownership, money posted, and a written statement of other conditions of release shall be delivered without delay to the court in which the charge is pending.

NEW SECTION. **Section 73.** **Bail schedule.** A judge may establish and post a schedule of bail for offenses over

which the judge has original jurisdiction. A person may not be released on bail without first appearing before the judge when the offense is domestic abuse or any assault against a family member or a household member.

NEW SECTION. **Section 74.** **Peace officer accepting bail.** (1) A peace officer may accept bail on behalf of a judge:

(a) in accordance with the bail schedule established under [section 73]; or

(b) on behalf of a judge whenever the warrant of arrest specifies the amount of bail.

(2) Whenever a peace officer accepts bail, the officer shall give a signed receipt to the offender setting forth the bail received. The peace officer shall then deliver the bail to the judge before whom the offender is to appear, and the judge shall give a receipt to the peace officer for the bail received.

NEW SECTION. **Section 75.** **Forms of bail.** (1) Bail may be furnished in the following ways:

(a) by a deposit with the court of an amount equal to the required bail of cash, stocks, bonds, certificates of deposit, or other personal property approved by the court;

(b) by real estate situated within the state with an unencumbered equity, not exempt, owned by the defendant or sureties at a value double the amount of the required bail;

(c) by written undertaking executed by the defendant

and by two sufficient sureties; or

(d) by a commercial surety bond executed by the defendant and a qualified agent for and on behalf of the surety company.

(2) The bond shall insure the appearance of the defendant at all times required through all stages of the proceeding including trial de novo, if any, and unless the bond is denied by the court pursuant to [section 68], shall remain in effect until final sentence is pronounced in open court.

(3) Nothing in [sections 66 through 81] prohibits a surety who considers himself insecure to surrender the defendant pursuant to [section 79].

NEW SECTION. **Section 76.** **Qualifying property as bail.** (1) If property posted as a condition of release is personal property, the defendant or sureties shall file a sworn schedule which must contain a list of the personal property including a description of each item, its location and market value, and the total market value of all items listed.

(2) If the property is real estate:

(a) the defendant or sureties shall file a sworn schedule which must contain a legal description of the property, a description of any and all encumbrances on the property, including the amount of each and the holder of the

encumbrance, and the market value of the unencumbered equity owned by the affiant; and

(b) a certified copy of the schedule of the property must be filed immediately by the court in the office of the clerk and recorder of the county in which the property is situated. The state has a lien on the property from the time the copy is filed. The clerk and recorder shall enter, index, and record the schedule without requiring any fee.

(3) If the property posted as a condition of release is a written undertaking with sureties, each surety must be a resident or freeholder within the state. Each surety must be worth the amount specified in the undertaking, exclusive of property exempt from execution, but the court or judge on taking the property may allow more than two sureties to justify severally and in amounts less than that expressed in the undertaking if the whole justification is equivalent to that amount required.

(4) If the property posted as a condition of release is a commercial bond, it may be executed by any domestic or foreign surety company which is qualified to transact surety business in this state. The undertaking shall be in a form to be prescribed by the commissioner of insurance and shall state the following:

(a) the name and address of the commercial surety company which issued the bond;

(b) the amount of the bond and the unqualified obligation of the surety company to pay the court should the defendant fail to appear as guaranteed; and

(c) a provision that the surety company may not revoke the undertaking without good cause.

(5) The court may examine the sufficiency of any undertaking and take any action it considers proper to insure that a sufficient undertaking is posted.

NEW SECTION. **Section 77.** Guaranteed arrest bond certificates. (1) A domestic or foreign surety company which has qualified to transact surety business in this state may, in any year, become surety in an amount not exceeding $500 with respect to any guaranteed arrest bond certificates issued in the year by an automobile club or association or by an insurance company authorized to write automobile liability insurance within this state by filing with the commissioner of insurance an undertaking to become surety.

(2) The form of the undertaking shall be prescribed by the commissioner of insurance but must include those matters as required by [section 75].

(3) A guaranteed arrest bond certificate shall, when posted by the person whose signature appears on the certificate, be accepted in lieu of any cash bail in an amount not exceeding $500 as a bail bond to guarantee the appearance of the person in any court, including municipal

courts, in this state at the time as may be required by the court when the person was arrested for violation of a motor vehicle law of this state or ordinance of a municipality of this state (except for the offense of driving while intoxicated or for any felony) committed prior to the date of expiration shown on the guaranteed arrest bond certificate.

(4) A guaranteed arrest bond certificate is subject to the same enforcement and forfeiture provisions established by [sections 66 through 81] unless otherwise provided by law.

NEW SECTION. **Section 78. Violation of a release condition -- forfeiture.** (1) If a defendant violates a condition of release, including failure to appear, the prosecuting attorney may move the court in writing for revocation of the order of release. A judge may issue a warrant for the arrest of a defendant charged with violating a condition of release. Upon arrest the defendant shall be brought before a judge for proceeding in accordance with [section 82].

(2) If a defendant fails to appear before a court as required, and bail has been posted, the judge may declare the bail forfeited. Notice of the order of forfeiture shall be mailed to the defendant and the defendant's sureties at their last known address.

(3) If at any time within 30 days after the forfeiture the defendant or the defendant's sureties appear and satisfactorily excuse the defendant's failure to appear, the judge may direct the forfeiture to be discharged upon terms as may be just.

NEW SECTION. **Section 79. Surrender of defendant.** (1) At any time before the forfeiture of bail:

(a) the defendant may surrender to the court or any peace officer of this state; or

(b) the surety may arrest the defendant and surrender the defendant to the court or any peace officer of this state.

(2) The peace officer must detain the defendant in the officer's custody as upon commitment and shall file a certificate, acknowledging the surrender, in the court having jurisdiction of the defendant. The court may then order the bail exonerated.

NEW SECTION. **Section 80. Forfeiture procedure.** When the order of forfeiture is not discharged, the court having jurisdiction shall proceed with the forfeiture of the bail posted as follows:

(1) if any money has been posted as bail, the court must pay over the money to the treasury of the city or county where the money was posted; or

(2) if other property is posted as a condition of

release, the property shall be sold in the same manner as execution of sales in civil actions. The proceeds of the sale shall be used to satisfy all court costs and prior encumbrances, if any, and from the balance, a sufficient sum to satisfy the judgment or forfeiture shall be paid into the treasury of the city or county where the case is pending.

(3) If a surety bond has been posted as bail, execution may be issued against the sureties or the surety company in the same manner as executions in civil actions.

NEW SECTION. **Section 81.** Use of forfeited bail as restitution. (1) If the court enters a judgment declaring bail to be forfeited or if the order of forfeiture is not discharged, the court having jurisdiction may order the bail forfeited to be paid as restitution to any victim of the offense for which the court has received bail. Whenever the court believes restitution may be proper, the court shall order a hearing for the purpose of considering the nature and extent of the victim's pecuniary loss as defined by law.

(2) If the court finds that restitution is appropriate, the court shall order restitution in an amount not exceeding the amount of the victim's complaint or the amount of the victim's pecuniary loss.

(3) An order to require restitution is a judgment against the defendant and the defendant's sureties, and the court may order the restitution to be made by payment of

money deposited as bail. Any balance of the bail money must be disposed of in the manner prescribed in [section 80].

(4) A determination or decision under this section is not admissible as evidence in any other civil action and is not res judicata in any civil action.

NEW SECTION. **Section 82.** Appearance of the arrested person. Any person arrested, whether with or without a warrant, shall be taken without unnecessary delay before the nearest and most accessible judge for an initial appearance.

NEW SECTION. **Section 83.** Duty of the court. (1) The judge shall inform the defendant:

(a) of the charge or charges against the defendant;

(b) of the defendant's right to counsel;

(c) of the defendant's right to have counsel assigned by a court of record in accordance with [section 58];

(d) of the general circumstances under which the defendant may obtain pretrial release;

(e) of the defendant's right to refuse to make a statement and that any statement made by the defendant may be offered in evidence at the defendant's trial; and

(f) of the defendant's right to a judicial determination of whether probable cause exists if the charge is by complaint alleging the commission of a felony.

(2) The judge shall admit the defendant to bail as provided by law.

NEW SECTION. **Section 84. Preliminary examination -- when held.** (1) After the initial appearance, in all cases where the charge is triable in district court, the justice court shall, within a reasonable time, hold a preliminary examination unless:

(a) the defendant waives a preliminary examination;

(b) the district court has granted leave to file an information;

(c) an indictment has been returned; or

(d) the case is triable in a justice court.

NEW SECTION. **Section 85. Waiver.** If the defendant waives the preliminary examination, the justice shall hold the defendant to answer to the court having jurisdiction of the offense.

NEW SECTION. **Section 86. Presentation of evidence.** (1) The defendant may not enter a plea. The judge shall hear the evidence without unnecessary delay. All witnesses must be examined in the presence of the defendant. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf.

(2) During the examination of any witness or when the defendant is making a statement or testifying, the judge may, and on the request of the defendant or state shall, exclude all other witnesses. The judge may also cause the witnesses to be kept separate and to be prevented from

communicating with each other until all are examined.

(3) Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in [section 173].

NEW SECTION. **Section 87. Disposition of the defendant.** (1) If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the judge shall hold the defendant to answer to the court having jurisdiction of the offense.

(2) If from the evidence it appears that there is insufficient probable cause to believe that an offense has been committed and that the defendant committed it, the judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant may not preclude the state from instituting a subsequent prosecution for the same offense.

NEW SECTION. **Section 88. Record of preliminary examination.** (1) The testimony of each witness must be taken by a court-appointed stenographer upon demand by the county attorney, the defendant, or the defendant's counsel.

(2) After concluding the proceeding, if the justice holds the defendant to answer, the justice shall transmit immediately to the clerk of the court having jurisdiction of

the offense all papers in the proceeding and any bail taken by the justice.

NEW SECTION. **Section 89. Methods of commencing prosecution.** A prosecution may be commenced by:

(1) a complaint;

(2) an information following a preliminary examination or waiver of a preliminary examination;

(3) an information after leave of court has been granted; or

(4) an indictment.

NEW SECTION. **Section 90. Required methods.** (1) All prosecutions of offenses charged in the district courts shall be by indictment or information.

(2) All other prosecutions of offenses shall be by complaint.

NEW SECTION. **Section 91. Filing a complaint.** (1) When a complaint is presented to a court charging a person with the commission of an offense, the court may examine the complainant and any affidavits, if filed, to determine whether a charge may be filed.

(2) If it appears from any affidavit filed with the charge, or from testimony of the complainant that there is probable cause to believe that an offense has been committed and that the person against whom the charge is made has committed it, the court may issue a warrant of arrest.

NEW SECTION. **Section 92. Amending a complaint.** A complaint may be amended, with leave of court, under the same circumstances and in the same manner as an information.

NEW SECTION. **Section 93. Leave to file.** (1) The county attorney may apply directly to the district court for permission to file an information against a named defendant. If the defendant named is a district court judge, the county attorney shall apply directly to the supreme court for leave to file the information.

(2) An application must be by affidavit supported by such evidence as the judge or chief justice may require. If it appears that there is probable cause to believe that an offense has been committed by the defendant, the judge or chief justice shall grant leave to file the information; otherwise the application shall be denied.

(3) When leave to file an information has been granted, a warrant or summons may issue for the defendant's arrest or appearance.

(4) When leave is granted to file an information against a district court judge, the chief justice shall designate and direct a judge of the district court of another district to preside at the trial of the information and hear and determine all pleas and motions affecting the defendant under the information before and after judgment. All necessary records shall be transferred to the clerk of

the district court of the district in which the action arose.

NEW SECTION. **Section 94. Amending an information as to substance.** (1) The court shall grant leave to amend an information as to matters of substance at any time, but not less than 5 days before trial, provided that a motion is timely filed, states the nature of the proposed amendment, and is accompanied by an affidavit stating facts which show the existence of probable cause to support the charge as amended. A copy of the proposed amended information shall be included with the motion to amend an information.

(2) If the court grants leave to amend the information, the defendant shall be arraigned on the amended information without unreasonable delay and shall be given a reasonable period of time to prepare for trial on the amended information.

NEW SECTION. **Section 95. Amending an information as to form.** The court may permit an information to be amended as to form at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

NEW SECTION. **Section 96. Time for filing information.** (1) After a finding of probable cause following a preliminary examination or waiver of a preliminary examination, or after leave of court has been granted, the

county attorney shall file within 30 days in the proper district court an information charging the defendant with the offense or any other offense supported by probable cause.

(2) The court, unless good cause to the contrary is shown, shall dismiss the prosecution if an information is not filed within 30 days as required in subsection (1).

NEW SECTION. **Section 97. Summoning grand jury.** (1) A grand jury may only be drawn or summoned when the district judge, in his discretion, considers a grand jury to be in the public interest and orders the grand jury to be drawn or summoned. The composition and drawing of a grand jury shall be in accordance with Title 3, chapter 15, part 6.

(2) The district judge may direct the selection of one or more alternate jurors who shall sit as regular jurors before an indictment is found or a grand jury investigation is concluded. If a member of the jury becomes unable to perform his duty, the juror may be replaced by an alternate.

NEW SECTION. **Section 98. Challenges to grand jury or grand jurors.** (1) The attorney general or county attorney may challenge the panel of a grand jury on the ground that the grand jury was not selected, drawn, or summoned according to law and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the

oath of the jurors, may be oral or in writing, and shall be tried and decided by the court.

(2) A motion to dismiss the indictment may be based on the grounds that a grand jury was not selected, drawn, or summoned according to law or that the individual juror was not legally qualified. An indictment may not be dismissed on grounds that one or more members are not legally qualified if it appears from the record kept pursuant to [sections 97 through 112] that eight or more jurors, after deducting those not legally qualified, concurred in finding the indictment.

NEW SECTION. **Section 99. Excuse or discharge of grand jurors.** Any time for cause shown, the court may excuse or discharge a juror or jurors either temporarily or permanently and, in the latter event, the court may impanel another person or persons in place of the juror or jurors discharged.

NEW SECTION. **Section 100. Foreman.** The court shall appoint one of the jurors to be a foreman. The foreman shall have the power to administer oaths or affirmations and shall sign all indictments. The foreman or another juror designated by the foreman shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of court, but the record may not be made public except on order of the court.

NEW SECTION. **Section 101. Appointing special prosecutor.** When the county attorney or attorney general is the subject of the grand jury investigation, the court shall appoint a special prosecutor. If a special prosecutor is appointed, the county attorney's or attorney general's office may not participate in an official capacity, but only as witnesses.

NEW SECTION. **Section 102. Charge to the grand jury.** When a grand jury is impaneled and sworn, it shall be charged by the judge who summoned it. In making the charge, the court shall instruct the jury as to its duties and the matters which jurors may consider. The prosecutor may bring additional matters before the grand jury which are consistent with the original charge or are developed during the proceedings.

NEW SECTION. **Section 103. Closed hearing.** Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed. This rule may not affect a defendant's discovery rights after the filing of the indictment.

NEW SECTION. **Section 104. Power and duties of grand jurors.** The grand jury shall inquire into those matters as directed by the court summoning the jury and other matters as presented by the prosecutor.

NEW SECTION. **Section 105.** Subpoena of witnesses. (1) A subpoena requiring the attendance of a witness before the grand jury may be signed and issued by the county attorney, by the foreman of the grand jury, or by the judge of the district court.

(2) The fees and mileage of witnesses subpoenaed pursuant to this section shall be the same as required in criminal actions.

(3) All provisions relating to subpoenas in criminal actions apply to subpoenas issued pursuant to this section, including provisions of [sections 182 through 190].

NEW SECTION. **Section 106.** Reception of evidence. In the investigation of a charge, the grand jury shall receive no other evidence than that given by witnesses produced and sworn before it, furnished by legal evidence, or the deposition of a witness.

NEW SECTION. **Section 107.** Advice and assistance to grand jury. (1) The grand jury may at all times ask the advice of the judge. Unless his advice is asked, the judge may not be present during sessions of the grand jury.

(2) The prosecutor may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by the grand jury and may interrogate witnesses before the grand jury whenever he thinks it necessary.

(3) Subject to the approval of the court, the county attorney may employ a special prosecutor, investigators, interpreters, and experts at an agreed compensation to be first approved by the court.

NEW SECTION. **Section 108.** Who may be present. The prosecutor, witnesses under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session. No person other than the jurors may be present while the grand jury is deliberating or voting.

NEW SECTION. **Section 109.** Recorded proceedings. (1) The grand jury shall appoint a stenographer to take in shorthand the testimony of witnesses, or the testimony may be taken by a recording device, but the record shall include the testimony of all witnesses on that particular investigation.

(2) The stenographic reporter or operator of a recording device shall, within 30 days after an indictment has been found, certify and file with the clerk of the district court the shorthand notes or the recordings made and an original transcript of the notes or recordings.

(3) An unintentional failure of any recording to reproduce all or any portion of a proceeding may not affect the validity of the prosecution.

NEW SECTION. **Section 110. Secrecy of proceedings.** (1) A grand juror, an interpreter, a stenographer, an operator of a recording device, any typist who transcribes recorded testimony, or the prosecutor may not disclose matters occurring before the grand jury except as otherwise provided for in [this act]. No obligation of secrecy may be imposed on any person except in accordance with this section. A knowing violation of this section may be punishable as contempt of court.

(2) Disclosure of matters occurring before the grand jury, other than its deliberations and the vote of any juror, may be made to any prosecutor or investigator of this state, and prosecutors or investigators from any other state, or the federal government for use in the performance of their duty.

(3) Disclosure otherwise prohibited by this section of matters occurring before the grand jury may also be made:

(a) if directed by the court preliminary to or in connection with a judicial proceeding;

(b) when permitted by the court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or

(c) when permitted by the court, to a defendant pursuant to a proper discovery motion.

NEW SECTION. **Section 111. Discharge of jury.** When the grand jury certifies completion of business before it and the court concurs, it shall be discharged by the court.

NEW SECTION. **Section 112. Expenses of grand jury.** (1) Except as provided in subsection (2), all expenses of the grand jury, including special prosecutors, experts, investigators, and interpreters, if any, must be paid by the treasurer of the county out of the general fund of the county, upon warrants drawn by the county auditor or the clerk of the district court upon a written order of the judge of the district court of the county.

(2) If the county has a district court fund, all expenses of a grand jury must be paid out of that fund.

(3) Subject to the procedures established by law, the state shall reimburse the court for juror and witness fees and witness expenses. The county shall deposit the amount reimbursed in the general fund unless the county has a district court fund. If the county has a district court fund, the amount reimbursed must be deposited in that fund.

NEW SECTION. **Section 113. Finding an indictment.** (1) The grand jury shall find an indictment when all the evidence before it taken together would in its judgment warrant a conviction by a trial jury. An indictment may be found only upon the concurrence of at least eight grand jurors.

(2) If a complaint or information is pending against the defendant and eight jurors do not concur in finding an indictment, the foreman shall report the decision to the district judge.

NEW SECTION. **Section 114.** **Presenting an indictment.** (1) An indictment, when found by the grand jury, must be signed by the foreman and presented by the foreman in the presence of the grand jury to the court and must be filed with the clerk. The court shall then issue a warrant or summons for the defendant.

(2) The court may direct that an indictment shall be kept secret until the defendant is in custody or has appeared to answer the charge and a person may not disclose the execution of a warrant or summons.

NEW SECTION. **Section 115.** **Form of charge.** (1) The charge shall be in writing in the name of the state or appropriate municipality and specify the court in which the charge is filed. The charge shall be a plain, concise, and definite statement of the essential facts constituting the offense charged, including the name of the offense, whether the offense is a misdemeanor or felony, the name of the person charged, and the time and place of its occurrence as definitely as can be determined. The charge shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law which

the defendant is alleged to have violated.

(2) If the charge is by information or indictment, it shall include endorsed on the information or indictment the names of the witnesses for the state, if known.

(3) If the charge is by complaint, it shall be signed on oath by a person having knowledge of the facts or by the prosecuting attorney.

(4) If the charge is by information, it shall be signed by the prosecuting attorney. If the charge is by indictment, it shall be signed by a foreman of the grand jury.

(5) The court, on motion of the defendant, may strike surplusage from the indictment or information.

(6) A charge may not be dismissed because of a formal defect which does not tend to prejudice a substantial right of the defendant.

NEW SECTION. **Section 116.** **Joinder of offenses.** (1) Two or more offenses, or different statements of the same offense, may be charged in the same charging document in a separate court, or alternatively, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Allegations made in one count may be incorporated by reference in another count.

(2) If two or more charging documents are filed in the case, the court may order them to be consolidated.

(3) The prosecution is not required to elect between the different offenses set forth in the charging document and the defendant may be convicted of any number of offenses charged except as provided in [section 118]. Each offense of which the defendant is convicted must be stated in the verdict or the finding of the court.

NEW SECTION. **Section 117.** Joinder of defendants. Two or more defendants may be charged in the same indictment, information, or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

NEW SECTION. **Section 118.** Multiple charges. (1) When the same transaction may establish the commission of more than one offense, a person charged with the conduct may be prosecuted for each offense.

(2) A defendant may not, however, be convicted of more than one offense if:

(a) one offense is included in the other;

(b) one offense consists only of a conspiracy or other form of preparation to commit the other;

(c) inconsistent findings of fact are required to establish the commission of the offenses;

(d) offenses differ only in that one is defined to prohibit a specific instance of the conduct; or

(e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that the specific periods of the conduct constitute separate offenses.

NEW SECTION. **Section 119.** Prosecution based on same transaction barred by former prosecution. (1) When two or more offenses are known to the prosecuting attorney, are supported by probable cause, are consummated before the original charge, and jurisdiction and venue of the offenses lie in a single court, a prosecution based upon the same transaction as a former prosecution is barred under the following circumstances:

(a) the former prosecution resulted in an acquittal. There is an acquittal whenever the prosecution results in a finding of not guilty by the trier of fact or in a determination that there is insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense that is subsequently set aside is an acquittal of the greater offense that was charged.

(b) the former prosecution resulted in a conviction that has not been set aside, reversed, or vacated;

(c) after a charge had been filed the prosecution was terminated by a final order or judgment for the defendant which has not been set aside, reversed, or vacated;

(d) the former prosecution was terminated for reasons not amounting to an acquittal and takes place:

(i) in a jury trial, after the jury was sworn but before verdict; or

(ii) in a nonjury trial, after the first witness is sworn but before the verdict.

(2) A prosecution based upon the same transaction as a former prosecution is not barred under subsection (1)(d) when:

(a) the defendant consents to the termination or waives his right to object to the termination; or

(b) the trial court finds the termination is necessary because:

(i) it is physically impossible to proceed with the trial in conformity with law;

(ii) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law;

(iii) prejudicial conduct makes it impossible to proceed with the trial without manifest injustice to either the defendant or the state;

(iv) the jury is unable to agree upon a verdict; or

(v) false statements of a juror during voir dire prevent a fair trial.

NEW SECTION. **Section 120.** **Former prosecution in another jurisdiction.** When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States, or another state, or of two courts of separate, overlapping, or concurrent jurisdictions in this state, a prosecution in any other jurisdiction is a bar to a subsequent prosecution in this state under the same circumstances barring further prosecution in this state if:

(1) the first prosecution resulted in an acquittal or in a conviction and the subsequent prosecution is based on an offense arising out of the same transaction; or

(2) the former prosecution was terminated, after the charge had been filed, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated; and the acquittal, final order, or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense for which the defendant is subsequently prosecuted.

NEW SECTION. **Section 121.** **Former prosecution not a bar.** A prosecution is not a bar if:

(1) the former prosecution was before a court which lacked jurisdiction over the defendant or the offense; or

(2) the former prosecution resulted in a judgment of

conviction which was held invalid in a postconviction hearing.

NEW SECTION. **Section 122. Pretrial proceedings -- exclusion of public and sealing of records.** (1) Except as provided in this section, pretrial proceedings and their record shall be open to the public. If, at the pretrial proceedings, testimony or evidence is advanced that is likely to threaten the fairness of a trial, the presiding officer shall advise those present of the danger and shall seek the voluntary cooperation of the news media in delaying dissemination of potentially prejudicial information by means of public communication until the impaneling of the jury or until an earlier time consistent with the fair administration of justice.

(2) The defendant may move that all or part of the proceeding be closed to the public or, with the consent of the defendant, the judge may take action on his own motion.

(3) The judge may close a preliminary hearing, bail hearing, or any other pretrial proceedings, including a motion to suppress, and may seal the record only if:

(a) the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial; and

(b) the prejudicial effect of the information on trial fairness cannot be avoided by any reasonable alternative

means.

(4) Whenever under this section all or part of any pretrial proceeding is held in chambers or otherwise closed to the public, a complete record shall be kept and made available to the public following the completion of trial or earlier if consistent with trial fairness.

(5) When the judge determines that a document filed in support of a charge or warrant would present a clear and present danger to the defendant's right to a fair trial, all or part of the document shall be sealed until the trial is completed or earlier if consistent with trial fairness.

NEW SECTION. **Section 123. Misdemeanor offenses.** In all cases in which the defendant is charged with a misdemeanor offense, he may appear by counsel only, although the court may require the personal attendance of the defendant at any time.

NEW SECTION. **Section 124. Felony offenses.** (1) Except as otherwise provided in [this act], the defendant in all cases in which a felony is charged must be present at the initial appearance, arraignment, entry of plea, preliminary examination, trial, at the time of imposition of sentence, and when otherwise required by the court.

(2) The defendant may be present at all other proceedings.

(3) Presence of the defendant is not required before

the supreme court.

NEW SECTION. **Section 125. Absence of defendant from trial.** (1) In a misdemeanor case, if the defendant fails to appear in person, either at the time set for trial or at any time during the course of the trial, and:

(a) if the defendant's counsel is authorized to act on the defendant's behalf, the court shall proceed with the trial unless good cause for continuance exists; or

(b) if the defendant's counsel is not authorized to act on the defendant's behalf or if the defendant is not represented by counsel, the court, in its discretion, may do one or more of the following:

(i) order a continuance;

(ii) order bail forfeited;

(iii) issue a bench warrant; or

(iv) proceed with the trial after finding that the defendant had knowledge of the trial date and is voluntarily absent.

(2) The absence of the defendant during the trial of a felony offense, after the trial has commenced in the defendant's presence, may not prevent the trial from continuing, up to and including the return of a verdict, if:

(a) the defendant has been removed from the courtroom for disruptive behavior after receiving a warning that removal will result if the defendant persists in conduct

that is so disruptive that the trial cannot be carried on with the defendant in the courtroom; or

(b) the defendant is voluntarily absent and the offense is not one which is punishable by death.

(3) Nothing in this section limits the right of the court to order the defendant to be personally present at the trial for purposes of identification unless counsel stipulates to the issue of identity.

NEW SECTION. **Section 126. Absence of defendant on receiving verdict or at sentencing.** (1) In all misdemeanor cases, the verdict may be returned and the sentence imposed without the defendant being present.

(2) In all felony cases, the defendant must appear in person when the verdict is returned or sentence is imposed unless, after the exercise of due diligence to procure the defendant's presence, the court finds that it is in the interest of justice that the verdict be received and sentence be pronounced in the defendant's absence.

NEW SECTION. **Section 127. Pretrial diversion.** (1) The prosecutor and defendant, who has counsel or who has voluntarily waived counsel, may agree that a prosecution will be deferred for a specified period of time based on any or all of the following conditions:

(a) that the defendant not commit any offense;

(b) that the defendant not engage in specified

activities, conduct, and associations bearing a relationship to the conduct upon which the charge against him is based;

(c) that the defendant participate in a supervised rehabilitation program that may include treatment, counseling, training, or eduction;

(d) that the defendant make restitution in a specified manner for harm or loss caused by the offense; or

(e) any other reasonable conditions.

(2) The agreement may include stipulations concerning the admissibility of evidence, specified testimony, or dispositions if the deferral of the prosecution is terminated and there is a trial on the charge. The agreement shall be in writing signed by the parties and state that the defendant waives his right to speedy trial for the period of deferral.

(3) The prosecution shall be deferred for the period specified in the agreement unless there has been a violation of its terms.

(4) The agreement shall be terminated and the prosecution automatically dismissed with prejudice upon expiration and compliance with the terms of the agreement.

NEW SECTION. **Section 128.** **Place of arraignment.** The defendant shall be arraigned in the court that has trial jurisdiction of the charge.

NEW SECTION. **Section 129.** **Manner of conducting arraignment.** (1) Arraignment shall be conducted in open court and shall consist of reading the charge to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead to the charge. The defendant shall be given a copy of the charging document before being called upon to plead.

(2) The court shall inquire of the defendant, or the defendant's counsel, the defendant's true name, and if the defendant's true name is given as any other than that used in the charge, the court must order the defendant's name to be substituted for the name under which the defendant is charged.

(3) The court shall determine whether the defendant is under any disability which would prevent the court in its discretion from proceeding with the arraignment. The arraignment may be continued until the court determines the defendant is able to proceed.

NEW SECTION. **Section 130.** **Plea alternatives.** (1) A defendant may plead not guilty or guilty. If a defendant refuses to plead, or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a plea of guilty reserving the right, on appeal from the judgment, to review the adverse determination of any specified pretrial

motion. If the defendant prevails on appeal, the defendant shall be allowed to withdraw the plea.

NEW SECTION. **Section 131.** Advice to defendant. Before accepting a plea of guilty, the court shall determine that the defendant understands the following:

(1) the nature of the charge for which the plea is offered, the mandatory minimum penalty provided by law, if any, the maximum penalty provided by law, including the effect of any penalty enhancement provision or special parole restriction and, when applicable, that the court may also order the defendant to make restitution of the costs and assessments provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has a right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at the trial has a right to the assistance of counsel, the right to confront and cross-examine witnesses against the defendant, and the right not to be compelled to reveal personally incriminating information; and

(4) that if the defendant pleads guilty in fulfillment of a plea agreement, the court is not required to accept the

terms of an agreement, and that the defendant may not be entitled to withdraw the plea if the agreement is not accepted pursuant to [section 133]; and

(5) that if the defendant's plea of guilty is accepted by the courts there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.

NEW SECTION. **Section 132.** Insuring plea is voluntary. The court may not accept a plea of guilty without first determining that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty results from prior discussions between the prosecuting attorney and the defendant or the defendant's attorney.

NEW SECTION. **Section 133.** Plea agreement procedure. (1) The prosecuting attorney and the attorney for the defendant, or the defendant when acting pro se, may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty to a charged offense or to a lesser or related offense, the prosecuting attorney will do any of the following:

(a) move for dismissal of other charges;

(b) agree that a specific sentence is the appropriate disposition of the case; or

(c) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that the recommendation or request may not be binding upon the court.

(2) If a plea agreement has been reached by the parties, the court shall, on the record, require a disclosure of the agreement in open court or, on a showing of good cause in camera, at the time the plea is offered. If the agreement is of the type specified in subsections (1)(a) and (1)(c), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in section (1)(c), the court shall advise the defendant that, if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea.

(3) If the court accepts a plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact and advise the defendant that the court is not bound by the plea agreement, afford the defendant an opportunity to withdraw

the plea, and advise the defendant that if he persists in the guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

NEW SECTION. **Section 134. Determining the accuracy of plea.** (1) The court may not accept a guilty plea without determining that there is a factual basis for the plea in felonies or misdemeanors resulting in incarceration.

(2) A defendant who is unwilling to admit to any element of the offense which would provide a factual basis for a plea of guilty may, with the consent of the court, enter a plea of guilty to the offense if the defendant considers the plea to be in his best interest and a factual basis exists for the plea.

NEW SECTION. **Section 135. Harmless error.** Any variance from the procedure required by this section which does not affect substantial rights of the defendant shall be disregarded.

NEW SECTION. **Section 136. Disclosure by the prosecution.** (1) Upon request, the prosecutor shall make available to the defendant for examination and reproduction or testing the following material and information within the prosecutor's possession or control:

(a) the names, addresses, and statements of all persons whom the prosecutor may call as witnesses in the

case-in-chief;

(b) all written or oral statements of the defendant and of any other person who will be tried with the defendant;

(c) all written reports or statements of experts who have personally examined the accused or any evidence in the particular case, together with the results of physical examinations, scientific tests, experiments, or comparisons;

(d) all papers, documents, photographs, or tangible objects that the prosecutor may use at trial or that were obtained from or purportedly belong to the defendant; and

(e) all material or information that tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce the defendant's potential sentence.

(2) The prosecutor may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under section (1)(d).

(3) At the same time, the prosecutor shall inform the defendant of, and make available to the defendant for examination and reproduction, any written or recorded material or information within the prosecutor's control regarding:

(a) whether there has been any electronic surveillance of any conversations to which the defendant was a party;

(b) whether an investigative subpoena has been executed in connection with the case; and

(c) whether the case has involved an informant, and, if so, the informant's identity if the defendant is entitled to know either or both of these facts under Rule 502 of the Montana Rules of Evidence.

(3) The prosecutor's obligation of disclosure extends to material and information in the possession or control of members of the prosecutor's staff and of any other persons who have participated in the investigation or evaluation of the case.

(4) Upon motion showing that the defendant has substantial need in the preparation of the case for additional material or information not otherwise provided for and that the defendant is unable, without undue hardship, to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available to the defendant. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive. The prosecutor may not be required to disclose or prepare summaries of witnesses' testimony.

(5) The prosecutor shall furnish to the defendant no later than 5 days before trial or at a later time as the court may for good cause permit, together with their

statements, a list of the names and addresses of all persons whom the prosecutor intends to call as rebuttal witnesses to the defenses of alibi, compulsion, entrapment, justifiable use of force, mistaken identity, or good character or the defense that the defendant did not have a particular state of mind that is an element of the offense charged.

NEW SECTION. **Section 137.** Disclosure by the defendant. (1) At any time after the filing in district court of an indictment or information, the defendant, in connection with the particular crime charged, shall upon written request of the prosecutor and approval of the court:

(a) appear in a line-up;

(b) speak for identification by witnesses;

(c) be fingerprinted, palmprinted, footprinted, or voiceprinted;

(d) pose for photographs not involving reenactment of an event;

(e) try on clothing;

(f) permit the taking of samples of hair, blood, saliva, urine, or other specified materials that involve no unreasonable bodily intrusions;

(g) provide handwriting samples; or

(h) submit to reasonable physical or medical inspection. However, such inspection does not include psychiatric or psychological examination.

(2) Within 10 days after the omnibus hearing in district court or at a later time as the court may for good cause permit, the defendant shall make available to the prosecutor for testing, examination, or reproduction:

(a) the names, addresses, and statements of all persons, other than the accused, whom the defendant may call as witnesses in the defense case-in-chief, together with their statements;

(b) the names and addresses of experts whom the defendant may call at trial, together with the results of their physical examinations, scientific tests, experiments, or comparisons, including all written reports and statements made by these experts in connection with the particular case; and

(c) all papers, documents, photographs, or other tangible objects that the defendant may use at trial.

(3) The defendant's obligation under this section extends to material and information within the possession or control of the defendant, defendant's counsel and defense counsel's staff or investigators.

(4) Upon motion of the prosecutor showing that the prosecutor has substantial need in the preparation of the case for additional material or information not otherwise provided for, that the prosecutor is unable without undue hardship to obtain the substantial equivalent by other

means, and that disclosure will not violate the defendant's constitutional rights, the court in its discretion may order any person to make material or information available to the prosecutor. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive. Defense counsel may not be required to prepare or disclose summaries of witness testimony.

NEW SECTION. **Section 138. Notice of defenses and disclosure of witnesses and their statements.** (1) Within 10 days after the omnibus hearing in district court or at a later time as the court may for good cause permit, the defendant shall provide the prosecutor with a written notice of the defendant's intention to introduce evidence at trial of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity.

(2) Within 10 days after receiving a report of examination pursuant to [section 151] or at a later time as the court may for good cause permit, the defendant shall provide the prosecutor with a written notice of the intention to introduce evidence at trial of the defense that due to a mental disease or defect the defendant did not have a particular state of mind that is an essential element of the offense charged.

(3) The notice must specify for each defense the names

and addresses of the persons, other than the defendant, whom defense counsel may call as witnesses at trial in support of the defense together with all written reports or statements made by them concerning the results of physical examination, scientific tests, experiments, or comparisons.

(4) Prior to trial the defendant may, upon motion and showing of good cause, add to the list of witnesses the names of any additional witnesses and disclose their statements or report as required by this section. After trial commences, no witnesses may be called by the defendant in support of these defenses unless the name of the witness is included on the list and the witness's statement or report has been disclosed as required by this section except for good cause shown.

NEW SECTION. **Section 139. Materials not subject to disclosure.** (1) Except as provided in this section, disclosure is not required for the superseded notes or work product of the prosecuting or defense attorney.

(2) If exculpatory information is contained in the superseded notes or work product of the prosecution, that information must be disclosed.

NEW SECTION. **Section 140. Failure to call a witness or raise a defense.** The fact that a witness whose name is on a list furnished pursuant to [sections 136 through 146] does not testify or that a matter contained in a pretrial notice

is not raised may not be commented upon at trial unless the court, on motion of a party, allows comment after finding that the inclusion of the witness's name or the pretrial notice constituted an abuse of the applicable disclosure requirement or that other good cause is shown.

NEW SECTION. **Section 141. Continuing duty to disclose.** If at any time after a disclosure has been made any party discovers additional information or material that would be subject to disclosure had it been known at the time of disclosure, the party shall promptly notify all other parties of the existence of the additional information or material and make an appropriate disclosure.

NEW SECTION. **Section 142. Investigation not to be impeded.** Except as to matters to which discovery is restricted and except as to the defendant's counsel advising the defendant, a party or agent of a party may not discourage or obstruct communication between any person and any party or otherwise obstruct a party's investigation of the case.

NEW SECTION. **Section 143. Excision and protective orders.** (1) Upon a motion of any party showing good cause, the court may at any time order that any disclosure be deferred or regulated when it finds:

(a) that the disclosure would result in a risk or harm outweighing any usefulness of the unrestricted disclosure to

any party; and

(b) that the risk cannot be eliminated by a less substantial restriction of discovery rights.

(2) Whenever the court finds, upon motion of any party, that only a portion of a document or other material is discoverable, it may authorize the party disclosing it to excise that portion of the material which is nondiscoverable and disclose the remainder.

(3) On motion of the party seeking a protective or excision order or in submitting for the court's determination the discoverability of any material or information, the court may permit that party to present the material or information for the inspection of the judge alone. Counsel for all other parties may, in the discretion of the court, be present when the presentation is made.

(4) If the court enters an order that any material or any portion thereof is not discoverable, the entire text of the material must be sealed and preserved in the record in the event of an appeal.

NEW SECTION. **Section 144. Sanctions.** If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any of the provisions of [sections 136 through 146] or any order issued pursuant to [sections 136 through 146], the court may impose any sanction that it finds just under the

circumstances, including but not limited to:

(1) ordering disclosure of the information not previously disclosed;

(2) granting a continuance;

(3) holding a witness, party, or counsel in contempt for an intentional violation;

(4) precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; or

(5) declaring a mistrial when necessary to prevent a miscarriage of justice.

NEW SECTION. **Section 145. Compelling testimony or production of evidence -- immunity.** (1) Before or during trial in any judicial proceeding, a judge of the district court, upon request by the prosecutor or defense counsel, may require a person to answer any question or produce any evidence, even though personally incriminating, following a grant of use immunity.

(2) If a person is required to give testimony or produce evidence in accordance with this section in any investigation or proceeding, compelled testimony or evidence or any information directly or indirectly derived from compelled testimony or evidence may not be used against the witness in any criminal prosecution.

(3) Nothing in this section prohibits a prosecutor from granting immunity from prosecution for or on account of any

transaction, matter, or thing concerning which a witness is compelled to testify if in the prosecutor's sole discretion it is determined that the ends of justice would be served.

(4) Immunity may not extend to prosecution or punishment for false statements given in any testimony required under this section.

NEW SECTION. **Section 146. Privileged matters.** All matters which are privileged upon the trial are privileged against disclosure through any discovery procedure.

NEW SECTION. **Section 147. When depositions may be taken.** (1) In felony cases if it appears that a prospective witness:

(a) is likely to be either unable or otherwise prevented from attending a trial or hearing;

(b) is likely to be absent from the state at the time of the trial or hearing; or

(c) is unwilling to provide relevant information to a requesting party, and the witness's testimony is material and necessary in order to prevent a failure of justice, the district court shall, upon motion of any party and proper notice, order that the testimony of the witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be introduced at the time the deposition is taken.

(2) The witness whose deposition is to be taken may be

required by subpoena to attend at any place designated by the district court, taking into account the convenience of the parties and of the witness.

(3) If the defendant is charged with a felony and it appears upon the affidavit of counsel for a party that good cause exists to believe that a witness will not respond to a subpoena and the administration of justice requires, any district judge may issue an arrest warrant commanding the arrest of a material witness. The arrest warrant shall further order a deposition to be taken without unnecessary delay. A person may not be imprisoned for the purpose of securing his testimony in any criminal proceeding longer than may be necessary to take his deposition.

NEW SECTION. **Section 148.** Procedure for taking depositions. (1) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking a deposition. The notice shall state the name and address of each person to be examined. On motion of the party upon whom the notice is served, the district court for cause shown may extend or shorten the time or change the place for taking the deposition.

(2) A deposition shall be taken in the manner provided in civil actions. The district court, upon request, may direct that any deposition be taken on written

interrogatories in the manner provided in civil actions. However, a deposition may not be taken of a party defendant without his consent, and the scope and manner of examination and cross-examination shall be restricted as would be allowed in the trial itself.

(3) The deposition shall be filed with the district court making the order and held until the trial. Either party shall make available to the other party, or the other party's counsel, for examination and use at the taking of the deposition any relevant nonprivileged statement of the witness being deposed which is in the possession of either party.

(4) Objections to deposition testimony or evidence or parts of the testimony or evidence may be reserved for subsequent determination by the district court.

(5) Unless a defendant in custody has waived, in writing, the right to be present at the taking of a deposition, the officer having custody of the defendant shall be notified of the time and place set for the deposition. The officer having custody shall produce the defendant and keep the defendant in the presence of a witness during the deposition.

(6) A defendant not in custody who fails to appear, without good cause, at the taking of a deposition after being notified of the time and place set for the deposition

will be considered to have waived the right to be present as provided in [section 125]. The waiver includes a waiver of any objection to the taking and use of the deposition based upon that right.

(7) Whenever a deposition is taken at the instance of the prosecution, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expense of taking a deposition, the district court shall direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the state.

NEW SECTION. **Section 149.** **Use of depositions at trial.** Any deposition may be used by any party for any purpose allowed by the Montana Rules of Evidence.

NEW SECTION. **Section 150.** **Mental disease or defect -- fitness to proceed -- state of mind.** (1) As used in [sections 150 through 166], the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or anti-social behavior.

(2) A person who, as a result of mental disease or defect, is unable to understand the proceedings against him or to assist in his own defense may not be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.

(3) Evidence that the defendant suffered from a mental disease or defect is admissible to prove that the defendant did or did not have a state of mind which is an element of the offense.

NEW SECTION. **Section 151.** **Examination of defendant.** (1) If the defendant or the defendant's counsel files a written motion requesting an examination, or the issue of the defendant's fitness to proceed is raised by the court, prosecution, or defense counsel, the court shall appoint at least one qualified psychiatrist or licensed clinical psychologist or shall request the superintendent of the Montana state hospital to designate at least one qualified psychiatrist or licensed clinical psychologist, which designation may be or include himself, to examine and report upon the defendant's mental condition.

(2) The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding 60 days or a longer period as the court determines to be necessary for the purpose and may direct that a qualified psychiatrist or licensed clinical psychologist retained by the defendant be permitted to witness and participate in the examination.

(3) In the examination any method may be employed which is accepted by the medical or psychological profession for the examination of those alleged to be suffering from mental

disease or defect.

(4) If the defendant is indigent or the examination occurs at the request of the state, the cost of the examination must be paid by the county or the state, or both, according to procedures established under 3-5-902(1).

NEW SECTION. **Section 152. Prosecution's right to examination.** (1) When the defense discloses the report of examination to the prosecution or files a notice of the intention to rely on a defense of mental disease or defect, the prosecution shall be entitled to have the defendant examined by a qualified psychiatrist or licensed clinical psychologist.

(2) The report of examination shall be disclosed to the defense within 10 days of its receipt by the prosecution.

NEW SECTION. **Section 153. Access to defendant for examination.** If either the defendant or the prosecution wishes the defendant to be examined by a qualified psychiatrist or licensed clinical psychologist selected by the one proposing the examination in order to determine the defendant's fitness to proceed or whether the defendant had, at the time the offense was committed, a particular state of mind which is an essential element of the offense, the examiner shall be permitted to have reasonable access to the defendant for the purpose of the examination.

NEW SECTION. **Section 154. Report of examination.** (1) A

report of the examination shall include the following:

(a) a description of the nature of the examination;

(b) a diagnosis of the mental condition of the defendant, including an opinion as to whether the defendant is seriously mentally ill as defined in 53-21-102(14);

(c) if the defendant suffers from a mental disease or defect, an opinion as to the defendant's capacity to understand the proceedings against him and to assist in his own defense;

(d) when directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged; and

(e) when directed by the court, an opinion as to the capacity of the defendant, because of a mental disease or defect, to appreciate the criminality of his conduct or to conform his conduct to the requirement of law.

(2) If the examination cannot be conducted by reason of the unwillingness of the defendant to participate in the examination, the report shall state that fact and include, if possible, an opinion as to whether the unwillingness of the defendant was the result of mental disease or defect.

NEW SECTION. **Section 155. Psychiatric or psychological testimony upon trial.** (1) Upon trial, any psychiatrist or licensed clinical psychologist who reported under [section 151 or 154] may be called as a witness by the prosecutor or

by the defense. Both the prosecution and the defense may summon any other qualified psychiatrist or licensed clinical psychologist to testify, but no one who has not examined the defendant is competent to testify to an expert opinion with respect to the mental condition of the defendant as distinguished from the validity of the procedure followed or the general scientific propositions stated by another witness.

(2) When a psychiatrist or licensed clinical psychologist who has examined the defendant testifies concerning the defendant's mental condition, he may make a statement as to the nature of his examination and his medical or psychological diagnosis of the mental condition of the defendant. The expert may make any explanation reasonably serving to clarify his examination and diagnosis, and the expert may be cross-examined as to any matter bearing on his competency or credibility or the validity of his examination or medical or psychological diagnosis. A psychiatrist or licensed clinical psychologist may not offer an opinion to the jury on the ultimate issue of whether the defendant did or did not have a particular state of mind or the capacity to have a particular state of mind which is an element of the offense charged.

NEW SECTION. **Section 156.** **Form of verdict and judgment.** When the defendant is found not guilty of the

charged offense or offenses or any lesser included offense for the reason that, due to a mental disease or defect, the defendant did not have a particular state of mind that is an essential element of the offense charged, the verdict and the judgment shall so state.

NEW SECTION. **Section 157.** **Admissibility of statements made during examination or treatment.** A statement made for the purposes of psychiatric or psychological examination or treatment provided for in this section by a person subjected to examination or treatment is not admissible in evidence against him at trial on any issue other than that of his mental condition. It is admissible on the issue of his mental condition at trial whether or not it would otherwise be considered a privileged communication, only when and after the defendant presents evidence that due to a mental disease or defect he did not have a particular state of mind which is an element of the offense charged.

NEW SECTION. **Section 158.** **Determination of fitness to proceed -- effect of finding of unfitness -- expenses.** (1) The issue of the defendant's fitness to proceed may be raised by the court, the defendant or his counsel, or by the prosecution. When the issue is raised, it shall be determined by the court. If neither the prosecution nor counsel for the defendant contests the finding of the report filed under [section 154], the court may make the

determination on the basis of the report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence at the hearing, the parties have the right to subpoena and cross-examine the psychiatrists or licensed clinical psychologists who joined in the report and to offer evidence upon the issue.

(2) If the court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in subsection (4), and the court shall commit him to the custody of the director of the department of institutions to be placed in an appropriate institution of the department of institutions for so long as the unfitness endures. The committing court shall within 90 days of commitment, review the defendant's fitness to proceed. If the court finds that he is still unfit to proceed and that it does not appear that he will become fit to proceed within the reasonably foreseeable future, the proceeding against him shall be dismissed, except as provided in subsection (4), and the county attorney shall petition the court in the manner provided in chapter 20 or 21 of Title 53, whichever is appropriate, to determine the disposition of the defendant pursuant to those provisions.

(3) If the court determines that the defendant lacks fitness to proceed because he is developmentally disabled as provided in 53-20-102(4), the proceeding against him shall

be dismissed and the county attorney shall petition the court in the manner provided in chapter 20 of Title 53.

(4) The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible to fair determination prior to trial and without the personal participation of the defendant.

(5) The expenses of sending the defendant to the custody of the director of the department of institutions to be placed in an appropriate institution of the department of institutions, of keeping him there, and of bringing him back are chargeable to the state and payable according to procedures established under 3-5-902(1).

NEW SECTION. **Section 159. Proceedings if fitness regained.** When the court, on its own motion or upon the application of the director of the department of institutions, the prosecution, or the defendant or his legal representative, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charge and may order the defendant to be discharged, or subject to the law governing the civil commitment of persons suffering from serious mental illness, order the defendant

committed to an appropriate institution of the department of institutions.

NEW SECTION. **Section 160. Commitment upon finding of not guilty by reason of lack of mental state -- hearing to determine release or discharge.** (1) When a defendant is found not guilty for the reason that due to a mental disease or defect he could not have a particular state of mind that is an essential element of the offense charged, the court shall order a predisposition investigation in accordance with [section 224], which must include an investigation of the present mental condition of the defendant. If the trial was by jury, the court shall hold a hearing to determine the appropriate disposition of the defendant. If the trial was by the court, the court may hold a hearing to obtain any additional testimony it considers necessary to determine the appropriate disposition of the defendant. If the trial was by the court, the court may hold a hearing to obtain any additional testimony it considers necessary to determine the appropriate disposition of the defendant. In either case, the testimony and evidence presented at trial shall be considered by the court in making its determination.

(2) The court, upon finding that the defendant may not be discharged or released without danger to others, shall order the defendant committed to the custody of the superintendent of the Montana state hospital to be placed in

an appropriate institution for custody, care, and treatment.

(3) A person committed to the custody of the superintendent shall have a hearing within 180 days of his confinement to determine his present mental condition and whether he may be discharged or released without danger to others. The hearing shall be conducted by the court that ordered the commitment unless that court transfers jurisdiction to the third judicial district. The court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney. The hearing is a civil proceeding, and the burden shall be upon the defendant to prove by a preponderance of the evidence that he may be safely released.

(4) According to the determination of the court upon the hearing, the defendant shall be discharged or released on conditions the court determines to be necessary or shall be committed to the custody of the superintendent of the Montana state hospital to be placed in an appropriate institution for custody, care, and treatment.

NEW SECTION. **Section 161. Discharge or release upon motion of superintendent.** (1) If the superintendent of the Montana state hospital believes that a person committed to his custody under [section 160] may be discharged or released on condition without danger to himself or others, he shall make application for the discharge or release of

the person in a report to the court by which the person was committed and shall send a copy of the application and report to the prosecutor of the county from which the defendant was committed.

(2) The court shall then appoint at least two qualified examiners who shall be either psychiatrists or licensed clinical psychologists to examine the person and to report their opinion as to his mental condition within 60 days or a longer period which the court determines to be necessary for the purpose. To facilitate the examinations and the proceedings thereon, the court may have the person confined in any institution located near the place where the court sits which may be designated by the superintendent of the Montana state hospital as suitable for the temporary detention of irresponsible persons.

(3) If the court is satisfied by the report filed under subsection (1) and the testimony of the reporting psychiatrist or licensed clinical psychologist that the committed person may be discharged or released on condition without danger to himself or others, the court shall order his discharge or his release on conditions which the court determines to be necessary.

(4) If the court is not satisfied, it shall promptly order a hearing to determine whether the person may safely be discharged or released. A hearing is considered a civil

proceeding, and the burden is upon the committed person to prove by a preponderance of the evidence that he may safely be discharged or released. According to the determination of the court upon the hearing, the committed person shall be discharged or released on conditions which the court determines to be necessary or shall be recommitted to the custody of the superintendent of the Montana state hospital, subject to discharge or release only in accordance with the procedures prescribed in this section and [section 162].

NEW SECTION. **Section 162.** **Application for discharge or release by committed person.** A committed person may make application for his discharge or release to the court by which he was committed, and the procedure to be followed upon the application is the same as that prescribed in [section 161] in the case of an application by the superintendent of the Montana state hospital. However, an application by a committed person need not be considered until he has been confined for a period of not less than 6 months from the date of the order of commitment, and if the determination of the court is adverse to the application, the person may not be permitted to file a further application until 1 year has elapsed from the date of any preceding hearing on an application for his release or discharge.

NEW SECTION. **Section 163.** **Recommitment after**

conditional release. If within 5 years after the conditional release of a committed person the court determines after hearing evidence that the conditions of release have not been fulfilled and that for the safety of the person or for the safety of others his conditional release should be revoked, the court shall immediately order him to be recommitted to the superintendent of the Montana state hospital, subject to discharge or release only in accordance with the procedures prescribed in [section 161 or 162].

NEW SECTION. **Section 164. Consideration of mental disease or defect in sentencing.** Whenever a defendant is convicted on a verdict or a plea of guilty and he claims that at the time of the commission of the offense of which he was convicted he was suffering from a mental disease or defect which rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the sentencing court shall consider any relevant evidence presented at the trial and shall require additional evidence as it considers necessary for the determination of the issue, including examination of the defendant and a report of the examination as provided in [sections 151 and 154].

NEW SECTION. **Section 165. Sentence to be imposed.** (1) If the court finds that the defendant at the time of the commission of the offense of which he was convicted did not

suffer from a mental disease or defect as described in [section 164], it shall sentence him as provided in Title 46, chapter 18.

(2) If the court finds that the defendant at the time of the commission of the offense suffered from a mental disease or defect as described in [section 164], any mandatory minimum sentence prescribed by law for the offense need not apply and the court shall sentence him to be committed to the custody of the director of the department of institutions to be placed in an appropriate institution for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could be imposed under subsection (1). The authority of the court with regard to sentencing is the same as authorized in Title 46, chapter 18, if the treatment of the individual and the protection of the public are provided for.

(3) A defendant whose sentence has been imposed under subsection (2) may petition the sentencing court for review of the sentence if the professional person certifies that the defendant has been cured of the mental disease or defect. The sentencing court may make any order not inconsistent with its original sentencing authority except that the length of confinement or supervision must be equal to that of the original sentence. The professional person shall review the defendant's status each year.

NEW SECTION. **Section 166. Discharge of defendant from supervision.** At the expiration of the period of commitment or period of treatment specified by the court under [section 165(2)], the defendant must be discharged from custody and further supervision, subject only to the law regarding the civil commitment of persons suffering from serious mental illness.

NEW SECTION. **Section 167. Pretrial motions and notices.** (1) Except for good cause shown, any defense, objection, or request which is capable of determination without trial of the general issue must be raised at or before the omnibus hearing unless otherwise provided by [this act].

(2) Failure of a party to raise defenses or objections, or to make requests which must be made prior to trial, at the time set by the court, shall constitute a waiver of the defense, objection, or request.

(3) The court, for cause shown, may grant relief from any waiver provided by this section. Lack of jurisdiction or the failure of a charging document to state an offense is a nonwaivable defect and shall be noticed by the court at any time during the pendency of a proceeding.

NEW SECTION. **Section 168. Form of pretrial motions.** Unless the court provides otherwise, all pretrial motions shall be in writing and supported by a statement of the

relevant facts upon which the motion is being made. The motion shall state with particularity the grounds for the motion and the order or relief sought.

NEW SECTION. **Section 169. Ruling on motions.** (1) A motion made before trial shall be determined before trial unless the court, for good cause, orders it be deferred for determination at the trial of the general issue or until after the verdict, but a determination may not be deferred if a party's right to appeal is adversely affected.

(2) Except where mandated by [this act], the court has discretion to conduct a hearing into the merits of a motion.

(3) The court's final determination of any pretrial motion shall state, either in writing or on the record, the court's findings of fact and conclusions of law.

NEW SECTION. **Section 170. Omnibus hearing.** (1) Within a reasonable time following the entry of a not guilty plea but not less than 30 days before trial the court shall hold an omnibus hearing.

(2) The purpose of the hearing shall be to expedite the procedures leading up to the trial of the defendant.

(3) The presence of the defendant is not required. The prosecutor and the defendant's counsel shall attend the hearing and shall be prepared to discuss any pretrial matter appropriate to the case, including but not limited to:

(a) joinder and severance of offenses or defendants,

[sections 116, 117, 178, and 179];

(b) double jeopardy, [sections 118 through 120];

(c) need for exclusion of public and for sealing records of any pretrial proceedings, [section 122];

(d) notification of the existence of a plea agreement, [section 133];

(e) disclosure and discovery motions, [sections 136 through 146];

(f) notice of reliance on certain defenses, [section 138];

(g) notice of seeking enhanced punishment, [section 171];

(h) notice of other crimes, wrongs, or acts, [section 172];

(i) motion to suppress, [sections 173 and 174];

(j) motion to dismiss, [sections 180 and 181];

(k) motion for change of place of trial, [sections 175 through 177];

(l) reasonableness of bail, [sections 66 through 81]; and

(m) stipulations.

(4) At the conclusion of the hearing, a court-approved memorandum of the matters settled shall be signed by the court and counsel and filed with the court.

(5) Any motions made pursuant to subsections (1)

through (3) may be ruled on by the court at the time of the hearing, where appropriate, or may be scheduled for briefing and further hearing as the court considers necessary.

NEW SECTION. **Section 171. Notice by prosecutor seeking persistent felony offender status.** (1) Except for good cause shown, if the prosecutor seeks treatment of the accused as a persistent felony offender, notice of that fact must be given at or before the omnibus hearing pursuant to [section 167].

(2) The notice must specify the alleged prior convictions and may not be made known to the jury before verdict except as allowed by the Montana Rules of Evidence.

(3) If the defendant objects to the allegations contained in the notice, the judge shall conduct a hearing to determine if the allegations in the notice are true.

(4) The hearing shall be held before the court alone. If the judge finds any allegations of the prior convictions are true, the accused shall be sentenced as provided by law.

(5) The notice shall be filed and sealed until the time of trial or until a plea of guilty is given by the defendant.

NEW SECTION. **Section 172. Notice by prosecutor of other crimes, acts, or wrongs evidence.** (1) Except for good cause shown, if the prosecutor intends to use evidence of other crimes, wrongs, or acts pursuant to Rule 404(b) of the

Montana Rules of Evidence, notice shall be given at or before the omnibus hearing pursuant to [section 167].

(2) The notice shall specify the other crimes, wrongs, or acts and include a statement as to the purpose for which the evidence is to be offered.

(3) The notice shall be filed and sealed until the time of trial or until a plea of guilty is given by the defendant.

NEW SECTION. **Section 173. Suppression of evidence.** (1) A defendant aggrieved by an unlawful search and seizure may move the court to suppress as evidence anything obtained by the unlawful search and seizure.

(2) If the motion states facts which, if true, would show that the evidence should be suppressed, the court shall hear the merits of the motion at the omnibus hearing or at a later date if the court orders.

(3) If the motion is granted, the evidence shall not be admissible at trial.

NEW SECTION. **Section 174. Suppression of confessions or admissions.** (1) A defendant may move to suppress as evidence any confession or admission given by him on the ground that it was involuntary. The motion shall be in writing and state facts showing why the confession or admission was involuntary.

(2) If the allegations of the motion state facts which,

if true, show that the confession or admission was not voluntarily made, the court shall conduct a hearing into the merits of the motion. The prosecution must prove by a preponderance of the evidence that the confession or admission was voluntary.

(3) The issue of the admissibility of the confession or admission may not be submitted to the jury. If the confession or admission is determined to be admissible, the circumstances surrounding the making of the confession or admission may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession or admission.

(4) If the motion is granted, the confession or admission is admissible in evidence only for purposes of impeachment against the movant at the trial of the case.

NEW SECTION. **Section 175. Change for prejudice.** (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 the county.

(2) If the court determines that there exists in the county in which the prosecution is pending such prejudice that a fair trial cannot be had, the court shall:

(a) transfer the cause to any other county in which a fair trial may be had;

(b) direct that a jury be selected in any county where a fair trial may be had and then returned to the county where the prosecution is pending to try the case; or

(c) take any other action to ensure that a fair trial may be had.

NEW SECTION. **Section 176. Change for other reasons.** If the court determines that a motion to dismiss based upon the grounds of lack of jurisdiction or improper place of trial is well-founded, it may, instead of ordering dismissal, order the cause transferred to a court of competent jurisdiction or to a proper place of trial.

NEW SECTION. **Section 177. Return to original place of trial.** When a trial occurs after a change of place of trial and a retrial is required, the cause shall be returned to the county in which the charge was originally properly filed for further proceedings.

NEW SECTION. **Section 178. Trial together of indictments, informations, complaints, or defendants.** The court may order two or more indictments, informations, complaints, or defendants to be tried together if the interests of justice require and the charges or defendants could have been joined in a single indictment, information or complaint as provided for in [sections 114 through 117].

NEW SECTION. **Section 179. Relief from prejudicial joinder.** (1) If it appears that a defendant or the

prosecution is prejudiced by a joinder of charges or defendants in an indictment, information, or complaint or by joinder for trial together, the court may order separate trials, grant a severance of defendants, or provide whatever other relief justice requires.

(2) In ruling on a motion by a defendant for severance the court may order the prosecutor to deliver to the court for inspection, in camera, any statements or confessions made by the defendants that the prosecution intends to introduce at trial.

NEW SECTION. **Section 180. Dismissal at instance of court or prosecution.** (1) The court may, either on its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order a complaint, information, or indictment to be dismissed. However, the court may not order a dismissal of a complaint, information, or indictment, or a count contained in a complaint, information, or indictment, charging a felony, unless good cause for dismissal is shown and the reasons for dismissal are set forth in an order entered upon the minutes.

(2) After the entry of a plea upon a misdemeanor charge, the court, unless good cause to the contrary is shown, must order the prosecution to be dismissed, with prejudice, if a defendant whose trial has not been postponed upon the defendant's motion is not brought to trial within 6

months.

NEW SECTION. **Section 181. Effect of order to dismiss.** If the court directs the action to be dismissed, the defendant must, if in custody, be discharged and, if admitted to bail, have the defendant's bail exonerated or money deposited instead of bail refunded to the defendant.

NEW SECTION. **Section 182. Issuing subpoenas.** (1) After the filing of charges and upon the request of the prosecuting attorney, the defendant, or the defendant's attorney, the clerk of court shall issue subpoenas with the name of the person to whom each subpoena is directed commanding the person to appear and to give testimony. The clerk of the court shall maintain a list of the names of persons to whom subpoenas are issued.

(2) A subpoena shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified in the subpoena.

(3) The court, upon motion made promptly, may quash or modify a subpoena if compliance would be unreasonable or oppressive.

NEW SECTION. **Section 183. Subpoenas for the production of evidence.** (1) A subpoena may command the person to whom it is directed to produce the books, papers, documents, or other objects designated in the subpoena.

(2) The court may direct that the books, papers, documents, or other objects designated in the subpoena be produced before the court at the time prior to the trial or prior to the time when they are to be offered into evidence and may upon their production permit the books, papers, documents, or objects, or portions thereof, to be inspected by the parties and their attorneys.

(3) The court, upon motion made promptly, may quash or modify a subpoena if compliance would be unreasonable or oppressive.

NEW SECTION. **Section 184. Service of subpoenas.** (1) A subpoena may be served by a peace officer or by any other person who is not a party and who is not less than 18 years of age. A peace officer must serve any subpoena delivered to him for service in his county either on the part of the state or of the defendant.

(2) Service of a subpoena shall be made by delivering a copy of the subpoena to the person named and, if ordered by the court, by tendering to those residing outside the county of trial the fee for 1 day's attendance and the mileage allowed by law. The person making service shall without delay make a written return of the service subscribed by him stating the time and place of service.

(3) A subpoena requiring attendance of a witness at a hearing or trial may be served anywhere within the state of

Montana.

NEW SECTION. **Section 185. Subpoena for witnesses in this state to testify in another state.** (1) If a judge of a court of record in any state, which by its laws has made provision for commanding persons within that state to attend and testify in this state, certifies under the seal of the court that there is a criminal prosecution pending in the court or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in the prosecution or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of the certificate to any judge of a court of record in the county in which the person is located, the judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for hearing.

(2) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in a prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending or grand jury is commenced or about to commence will give him protection from arrest and the service of civil and criminal process, he shall issue a

summons with a copy of the certificate attached directing the witness to attend and testify in the court where the prosecution is pending or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In the hearing the certificate shall be prima facie evidence of all the facts stated in the certificate.

(3) If the certificate recommends that the witness be taken into custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, the judge may, in lieu of notification of the hearing, direct that the witness be brought before him for the hearing. At the hearing the judge may, in lieu of issuing a subpoena or summons, order that the witness be taken into custody and delivered to an officer of the requesting state.

NEW SECTION. **Section 186. Subpoena of a witness in another state to testify in this state.** (1) Whenever a person in any state that by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations in this state is a material witness in a prosecution pending in a court of record in this state or in a grand jury investigation which has commenced or is about to commence, a judge of the court may issue a certificate under the seal of

the court stating these facts and specifying the number of days the witness will be required. The certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(2) If the certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, it is prima facie proof of the desirability of the custody and delivery, and the judge may direct that the witness be brought before him immediately. If the judge is satisfied as to the desirability of custody and delivery, he may order that the witness be immediately taken into custody and delivered to an officer of this state. The order is sufficient authority for the officer to take the witness into custody and hold him unless and until he is released by bail, recognizance, or order of the judge issuing the certificate.

(3) A witness who has appeared in accordance with the provisions of the summons may not be required to remain within this state for a longer period of time than the period mentioned in the certificate unless otherwise ordered by the court.

(4) The witness fees, costs, and expenses shall be tendered as provided in [section 188].

NEW SECTION. **Section 187. Subpoena of witnesses for**

defendant unable to pay. (1) The court shall order at any time that a subpoena be issued for service on a named witness upon the ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the costs incurred for the witnesses and that the presence of the witness is necessary to an adequate defense.

(2) If a defendant is indigent a court order must be obtained if more than six witnesses are to be subpoenaed.

NEW SECTION. **Section 188. Fees, costs, and expenses.** (1) When a person appears before a judge, grand jury, or court as a witness in a criminal case or investigation upon a subpoena, the witness shall receive the witness fee as prescribed by Title 26, part 5. The court, on motion by either party, may allow additional fees for expert witnesses.

(2) The court may determine the reasonable and necessary expenses of subpoenaed witnesses and order the clerk of the court to pay the expenses from the county treasury.

(3) When a person is subpoenaed in this state to testify in another state, or from another state to testify in this state, the person must be paid for lodging, mileage or travel, and per diem, the sum equal to that allowed by Title 2, chapter 18, part 5, for each day that the person is

required to travel and attend as a witness. If the state where the witness is found has by statutory enactment required that the summoned witness be paid an amount in excess of the amount specified in this section, the witness may be paid the amount required by that state.

(4) According to procedures established by the department of commerce under 3-5-902, the clerk of the district court shall submit to the department a detailed statement containing a list of witnesses and the amount of expenses paid to each witness by the county. Upon receipt and verification of the statement, the department shall promptly reimburse the designated county for all or a portion of the witness expenses. The county shall deposit the amount reimbursed in its general fund.

NEW SECTION. **Section 189.** **Failure of witness to appear.** If the witness fails without good cause to attend and testify as directed, he shall be punished in the manner provided for punishment of any witness who disobeys an order issued from a court of record in this state in accordance with Title 3, chapter 1, part 5, or in accordance with 45-7-309.

NEW SECTION. **Section 190.** **Exemption from arrest and service of process.** (1) If a person comes into this state in obedience to a summons directing the person to attend and testify in this state, that person may not, while in this

state pursuant to such subpoena or order, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the subpoena.

(2) If a person passes through this state while going to or returning from another state in obedience to a subpoena or order to attend and testify in that state, the person may not, while passing through this state, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before the person's entrance into this state under the subpoena.

NEW SECTION. **Section 191.** **Right to jury trial and waiver.** (1) Defendants in all felony cases shall have a right to trial by jury of 12 persons.

(2) The parties may agree in writing at any time before the verdict, with the approval of the court, that the jury shall consist of any number less than that to which they are entitled.

(3) Upon written consent of the defendant, a trial by jury may be waived.

NEW SECTION. **Section 192.** **Formation of trial jury.** (1) Trial juries in criminal cases are formed in the same manner as trial juries in civil actions.

(2) The qualifications of jurors and excuses from jury duty are prescribed in Title 3, chapter 15, part 3.

NEW SECTION. **Section 193.** **Motion to discharge jury panel.** (1) Any objection to the manner in which a jury panel has been selected or drawn shall be raised by a motion to discharge the jury panel. Except for good cause shown, the motion shall be made at least 5 days prior to the term for which the jury is drawn.

(2) The motion shall be in writing supported by affidavit and shall state facts that show that the jury panel was improperly selected or drawn.

(3) If the motion states facts that show that the jury panel has been improperly selected or drawn, it shall be the duty of the court to conduct a hearing. The burden of proof shall be on the movant.

(4) If the court finds that the jury panel was improperly selected or drawn, the court shall order the jury panel discharged and the selection or drawing of a new panel in the manner provided by law.

NEW SECTION. **Section 194.** **Examination of prospective jurors.** (1) The clerk of court shall make available to the parties a list of prospective jurors with their questionnaires when the names have been drawn.

(2) The prosecutor and the defendant or the defendant's attorney shall conduct the examination of prospective jurors. The judge may conduct an additional examination. The judge may limit the examination by the defendant, the

defendant's attorney, or the prosecutor if the examination is improper.

NEW SECTION. **Section 195.** **Challenges for cause.** (1) Each party may challenge jurors for cause, and each challenge must be tried by the court.

(2) A challenge for cause may be taken for all or any of the following reasons or for any other reason which the court determines:

(a) consanguinity or relationship to the defendant or to the person who is alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;

(b) standing in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, or debtor and creditor with or being a member of the family or in the employment of the defendant or the person who is alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;

(c) being a party adverse to the defendant in a civil action or having complained against or being accused by the defendant in a criminal prosecution;

(d) having served on the grand jury which found the indictment or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information;

(e) having served on a trial jury which tried another person for the offense charged or a related offense;

(f) having been a member of a jury formerly sworn to try the same charge, the verdict of which was set aside or which was discharged without verdict after the case was submitted to it;

(g) having served as a juror in a civil action brought against the defendant for the act charged as an offense;

(h) if the offense charged is punishable with death, having conscientious opinions concerning the punishment as would preclude his finding the defendant guilty, in which case he may not be permitted or compelled to serve as a juror;

(i) having a belief that the punishment fixed by law is too severe for the offense charged; or

(j) having a state of mind in reference to the case or to either of the parties which would prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of either party.

(3) An excuse from service on a jury is not a cause of challenge but the privilege of the person excused.

NEW SECTION. **Section 196.** Peremptory challenges. (1) Each defendant shall be allowed eight peremptory challenges in capital cases and six in all other cases tried in the district court before a 12-person jury. There may not be

additional challenges for separate counts charged in the indictment or information.

(2) If the indictment or information charges a capital offense as well as lesser offenses in separate counts, the maximum number of challenges is eight.

(3) The state shall be allowed the same number of peremptory challenges as all of the defendants.

(4) In a criminal case tried before a six-person jury, the state and all the defendants shall be allowed three peremptory challenges each.

(5) When the parties in a criminal case in the district court agree upon a jury consisting of a number of persons other than 6 or 12, they shall also agree in writing upon the number of peremptory challenges to be allowed.

NEW SECTION. **Section 197.** Time for challenges. All challenges must be interposed before the jury is sworn unless the cause of challenge is discovered after the jury is sworn and before the introduction of any evidence, in which case the court, in its discretion, may allow the challenge to be interposed.

NEW SECTION. **Section 198.** Alternate juror. (1) The court may direct that one or more alternate jurors be selected in the same manner as principal jurors. The alternate jurors shall take the same oath as the principal jurors.

(2) Each party shall have one additional peremptory challenge for each alternate juror.

(3) Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury arrives at its verdict, become unable or disqualified to perform their duties. An alternate juror may not join the jury in its deliberation unless called upon by the court to replace a member of the jury. An alternate juror's conduct during the period in which the jury is considering its verdict shall be regulated by instructions of the trial court. An alternate juror who does not replace a principal juror shall be discharged after the jury arrives at its verdict.

NEW SECTION. **Section 199. Applicability of rules of evidence and civil rules.** The Montana Rules of Evidence and the statutory rules of evidence in civil actions are applicable to all criminal actions except as otherwise provided.

NEW SECTION. **Section 200. Defendant presumed innocent -- reasonable doubt.** A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether the defendant's guilt is satisfactorily shown, the defendant shall be found not guilty.

NEW SECTION. **Section 201. Competency of spouses.** (1)

Neither spouse may testify to the communications or conversations between spouses which occur during their marriage unless:

(a) consent of the defendant-spouse is obtained;

(b) the defendant-spouse has been charged with an act of criminal violence against the other; or

(c) the defendant-spouse has been charged with abuse, abandonment, or neglect of the other spouse or either spouse's children.

(2) Except as provided in subsection (1), a spouse is a competent witness for or against the other spouse.

NEW SECTION. **Section 202. Testimony of person legally accountable.** A person may not be found guilty of an offense on the testimony of one responsible or legally accountable for the same offense, as defined in 45-2-301, unless the testimony is corroborated by other evidence which in itself and without the aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense.

NEW SECTION. **Section 203. Use of confession.** Before an extrajudicial confession of the defendant to the crime charged may be admitted into evidence, the prosecution must introduce independent evidence tending to establish the commission of the crime charged.

NEW SECTION. **Section 204. Videotaped testimony.** (1)

For any prosecution commenced under 45-5-502(3), 45-5-503, 45-5-505, or 45-5-507, the testimony of the victim, at the request of the victim and with the concurrence of the prosecuting attorney, may be recorded by means of videotape for presentation at trial. The recorded testimony may be presented at trial and shall be received into evidence. The victim need not be physically present in the courtroom when the videotape is admitted into evidence.

(2) The procedural and evidentiary rules of the state that are applicable to criminal trials within the state shall apply to the videotape proceedings authorized by this section.

(3) The district court judge, the prosecutor, the victim, the defendant, the defendant's attorney, and other persons as are considered necessary by the court to make the recordings authorized under this section shall be allowed to attend the videotape proceedings.

(4) Videotapes that are part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

NEW SECTION. **Section 205.** Order of trial. (1) After the jury is sworn, but before the introduction of any evidence, the court may give the jury general instructions concerning the conduct of the trial. The court shall give the jury such cautionary instructions as may be required

during the course of the trial.

(2) The prosecutor may make an opening statement and shall offer evidence in support of the prosecution. The defendant may make his opening statement prior to the prosecutor's offer of evidence or at the close of the prosecution's case but prior to the defendant's offer of evidence.

(3) The prosecutor and the defendant may, respectively, offer rebutting testimony only. However, the court, for good cause, may permit either party to offer evidence upon their original case at any time before the close of evidence.

(4) Prior to final arguments, the court shall inform the parties as to the instructions that will be given and read them to the jury.

(5) A written copy of the instructions, both general and special, shall be delivered to the jury for their consideration during deliberations following the final arguments.

NEW SECTION. **Section 206.** When order may be departed from. For good cause shown and in the discretion of the court, the order prescribed in [section 205] may be departed from.

NEW SECTION. **Section 207.** Evidence insufficient to go to jury. When, at the close of the state's evidence or at the close of all the evidence, the evidence is insufficient

to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant. However, prior to dismissal, the court may allow the case to be reopened for good cause shown.

NEW SECTION. **Section 208.** **Settlement of jury instructions.** (1) Any party may request special jury instructions as provided in [section 205(4)]. All requests for instructions shall conform to the Uniform District Court Rules and all instructions shall be settled by the court out of the presence of the jury.

(2) A record shall be made at the settlement of instructions.

(3) A party may not assign as error any portion of the instructions or omission from the instructions unless an objection was made specifically stating the matter objected to, and the grounds for the objection, at the settlement of instructions.

(4) The presence of the defendant is not required during the settlement of instructions.

NEW SECTION. **Section 209.** **Conduct of jury during trial.** (1) The jurors sworn to try an action may at any time, in the discretion of the court, be permitted to separate or be ordered to remain sequestered in the charge of a proper officer. If sequestered, the officer must be

sworn to keep the jurors together, to allow no person to communicate with the jury or to personally communicate with the jury on any subject connected with the trial, and to return the jury into court as directed.

(2) Whether sequestered or permitted to separate, at each adjournment of the court, the jury shall be admonished that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial or to form or express any opinion thereon until the cause is finally submitted to them.

(3) In all cases appealed to the supreme court, it shall be conclusively considered that the court or judge gave the proper admonition in accordance with the provision of subsection (2) unless the record affirmatively shows the contrary.

NEW SECTION. **Section 210.** **View of relevant place or property.** When the court considers it proper that the jury view any place or personal property pertinent to the case, it will order the jury to be conducted in a body under the custody of the sheriff or bailiff to view the place or personal property in the presence of the court, the prosecutor, the defendant, and his counsel. The place or personal property will be shown them by a person appointed by the court for that purpose, and they may personally inspect the same. The sheriff or bailiff must be sworn to

suffer no person to speak or otherwise communicate with the jury or to do so himself on any subject connected with the trial and to return them into the courtroom without unnecessary delay or at a specified time, as the court may direct.

NEW SECTION. **Section 211. Conduct of jury after retirement -- advice from court.** (1) When the jury retires to consider its verdict, an officer of the court must be appointed to keep the jurors together and to prevent conversations between the jurors and others.

(2) After the jury has retired for deliberation, if there is any disagreement among the jurors as to the testimony or if the jurors desire to be informed on any point of law arising in the cause, they must notify the officer appointed to keep them together who shall then notify the court. The information requested may be given in the discretion of the court after consultation with the parties.

NEW SECTION. **Section 212. Items which may be taken into jury room.** Upon retiring for deliberation, the jury may take with them the written jury instructions read by the court, notes of the proceedings taken by themselves, and all exhibits that have been received as evidence in the cause as in the opinion of the court shall be necessary.

NEW SECTION. **Section 213. Activity of court during jury's absence.** While the jury is absent, the court may adjourn or conduct other business, but it must be open for every purpose connected with the cause submitted to the jury until a verdict is returned or the jury discharged.

NEW SECTION. **Section 214. Form of verdict.** (1) The jury shall return a verdict as instructed by the court. The verdict must be unanimous in all criminal actions. The verdict shall be signed by the foreman and returned by the jury to the judge in open court.

(2) If there are two or more defendants, the jury, at any time during its deliberations, may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

NEW SECTION. **Section 215. Poll of jury.** When a verdict is returned, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not the required concurrence, the jury may be directed to retire for further deliberations or may be discharged.

NEW SECTION. **Section 216. Verdict of not guilty -- when defendant discharged.** If a verdict of not guilty is returned and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given.

NEW SECTION. **Section 217.** Conviction of lesser included offense. (1) The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included in the offense charged.

(2) A lesser included offense instruction shall be given where there is a proper request by one of the parties and the jury, based on the evidence, could be warranted in finding the defendant guilty of a lesser offense.

(3) When a lesser included offense instruction is given, the court shall instruct the jury that it must reach a verdict on the crime charged before it may proceed to a lesser included offense. Upon the request of the defendant at the settling of instructions, the court shall instruct the jury that it may consider the lesser included offense if it is unable after reasonable effort to reach a verdict on the greater offense.

NEW SECTION. **Section 218.** Effect of a new trial. The granting of a new trial places the parties in the same position as if there had been no trial.

NEW SECTION. **Section 219.** Motion for a new trial. (1) Following a verdict or finding of guilty, the court may grant the defendant a new trial if required in the interest of justice.

(2) The motion for a new trial must be in writing and

must specify the grounds for a new trial. The motion must be filed by the defendant within 30 days following a verdict or finding of guilty and be served upon the state.

(3) On hearing the motion for a new trial, if justified by law and the weight of the evidence, the court may:

(a) deny the motion;

(b) grant a new trial; or

(c) modify or change the verdict or finding by finding the defendant guilty of a lesser included offense or finding the defendant not guilty.

NEW SECTION. **Section 220.** Juries in misdemeanor cases. (1) The defendant in a misdemeanor case is entitled to a jury of six qualified persons, but the parties may agree to a number less than six at any time before the verdict.

(2) Upon written consent of the defendant, a trial by jury may be waived.

NEW SECTION. **Section 221.** Formation of trial jury for justice, municipal, and city courts. (1) At the time of preparing the district court jury list, the county commissioners and clerk and recorder shall prepare a jury list for each justice and city court within the county. Each list must consist of residents of the appropriate county, city, or town. The lists must be selected in any reasonable manner that ensures fairness, and each list must include a number of names sufficient to meet the annual jury

requirements of the respective court. Additional lists may be prepared if required. The lists must be filed in the office of the clerk of the district court. The appropriate list must be posted in a public place in each county, city, or town, and the list must comprise the trial jury list for the ensuing year for the county, city, or town.

(2) Trial jurors shall be summoned from the jury list by notifying each one orally that he is summoned and of the time and place at which his attendance is required.

NEW SECTION. **Section 222. Appeal from justice, municipal, and city courts.** (1) The defendant may appeal to district court by filing written notice of intention to appeal within 10 days after a judgment is rendered following trial. In the case of an appeal by the prosecution the notice must be filed within 10 days of the date the order complained of is given. The prosecution may appeal only in the cases provided for in 46-20-103.

(2) Within 30 days of filing the notice of appeal, the court shall transfer the entire record of the lower court to the district court.

(3) Except for cases where legal issues are preserved for appeal pursuant to [section 130], all misdemeanor cases on appeal by the defendant from a justice, municipal, or city court must be tried anew in the district court and may be tried before a jury of six selected in the same manner as

for other criminal cases.

NEW SECTION. **Section 223. Presentence investigation -- when required.** (1) Upon acceptance of a plea or upon a verdict or finding of guilty to one or more felony offenses, the court shall direct the probation officer to make a presentence investigation and report. The court may, in its discretion, order a presentence investigation for a defendant convicted of a misdemeanor.

(2) If the court finds that the record contains information sufficient to enable the meaningful exercise of discretion during sentencing, the defendant may waive a presentence investigation and report. Both the finding and the defendant's waiver must be made in open court on the record.

NEW SECTION. **Section 224. Content of presentence investigation report.** (1) Whenever an investigation is required, the probation officer shall promptly inquire into and report upon:

(a) the defendant's characteristics, circumstances, needs, and potentialities;

(b) the defendant's criminal record and social history;

(c) the circumstances of the offense;

(d) the time of the defendant's detention for the offenses charged; and

(e) except in capital cases where the death penalty may

be imposed, the harm caused, as a result of the offense, to the victim, the victim's immediate family, and the community.

(2) If applicable, the court may require the officer to inquire into the victim's pecuniary loss and make a restitution report to the court as provided by law.

(3) The court may, in its discretion, require that the presentence investigation report include a physical and mental examination of the defendant.

(4) All local and state mental and correctional institutions, courts, and law enforcement agencies shall furnish, upon request of the officer preparing a presentence investigation, the defendant's criminal record and other relevant information.

NEW SECTION. **Section 225. Availability of the presentence investigation report.** (1) All presentence investigation reports must be a part of the court record but may not be opened for public inspection. A copy of the presentence investigation report must be provided to the prosecution, the defendant and the defendant's attorney, and the agency or institution to which the defendant is committed.

(2) The court having jurisdiction of the case may permit other access to the presentence investigation report as it considers necessary.

NEW SECTION. **Section 226. Sentencing hearing.** Before imposing sentence or making any other disposition upon acceptance of a plea or upon a verdict or finding of guilty, the court shall conduct a sentencing hearing without unreasonable delay, as follows:

(1) The court shall afford the parties an opportunity to be heard on any matter relevant to the disposition, including the applicability of sentencing enhancement provisions, mandatory minimum sentences, persistent felony offender status, or an exception thereto.

(2) If there is a possibility of imposing the death penalty, the court shall hold a hearing as provided by 46-18-301.

(3) Except as provided in [sections 122 through 126], the court shall address the defendant personally to ascertain whether the defendant wishes to make a statement and to present any information in mitigation of punishment or reason why he should not be sentenced. If the defendant wishes to make a statement, the court shall afford him a reasonable opportunity to do so.

(4) The court shall impose sentence or make any other disposition authorized by law.

(5) In felony cases, the court shall specifically state all reasons for the sentence, including restrictions, conditions, or enhancements imposed, in open court on the

record and in the written judgment.

NEW SECTION. **Section 227. Judgment.** The judgment must set forth the plea, verdict or finding, and the adjudication. If the defendant is convicted, it must set forth the sentence or other disposition. The judgment must be signed and entered of record.

NEW SECTION. **Section 228. Correction of sentence.** The court may correct an illegal sentence or disposition at any time and may correct a sentence imposed in an illegal manner within 120 days after the sentence is imposed or after remand from an appellate court.

NEW SECTION. **Section 229. Revocation of a suspended or deferred sentence.** (1) Upon the filing of a petition for revocation, accompanied by an affidavit showing probable cause that the defendant has violated any condition of a sentence or any condition of a deferred imposition of sentence, the court may issue an order for a hearing on revocation. The order must require the defendant to appear at a specified time and place for the hearing and be served by delivering a copy of the petition and order to the defendant personally. The court may also issue an arrest warrant directing any peace officer or a probation officer to arrest the defendant and bring the defendant before the court.

(2) The petition for a revocation must be filed with

the sentencing court during the period of suspension or deferral. Expiration of the period of suspension or deferral after the petition is filed does not deprive the court of jurisdiction to rule on the petition.

(3) The provisions pertaining to bail as set forth in [sections 66 through 81] are applicable to persons arrested pursuant to this section.

(4) Without unnecessary delay the defendant shall be brought before the court and the defendant shall be advised of:

(a) the allegations of the petition;

(b) the opportunity to appear and to present evidence in the defendant's own behalf;

(c) the opportunity to question adverse witnesses; and

(d) the right to be represented by counsel at the revocation hearing pursuant to [sections 58 through 65].

(5) A hearing is required before a suspended or deferred sentence can be revoked or the terms or conditions of the sentence can be modified, unless:

(a) the defendant admits the allegations and waives the right to a hearing; or

(b) the relief to be granted is favorable to the defendant, and the prosecuting attorney, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of

the term of probation is not favorable to the defendant for the purposes of this subsection.

(6) At the hearing the prosecution must prove that there has been a violation of the terms and conditions of the suspended or deferred sentence by a preponderance of the evidence. Provided, however, that where the failure to pay restitution is the basis for the petition the defendant may excuse such violation by showing sufficient evidence that the failure to pay restitution was not attributable to a failure on his part to make a good faith effort to obtain sufficient means to make the restitution payments as ordered.

(7) If the court finds that the defendant has violated the terms and conditions of the suspended or deferred sentence, the court may:

(a) continue the suspended or deferred sentence without a change in conditions;

(b) continue the suspended sentence with modified or additional terms and conditions;

(c) revoke the suspension of sentence and require the defendant to serve either the sentence imposed or any lesser sentence; or

(d) if the sentence was deferred, impose any sentence which might have been originally imposed.

(8) If the court finds that the prosecution has not

proven, by a preponderance of the evidence, that there has been a violation of the terms and conditions of the suspended or deferred sentence, the petition shall be dismissed and the defendant, if in custody, immediately released.

NEW SECTION. **Section 230. When validity of sentence may be challenged.** (1) A person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims that a sentence was imposed in violation of the constitution or the laws of this state or the Constitution of the United States, that the court was without jurisdiction to impose the sentence, that a suspended or deferred sentence was improperly revoked, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack upon any ground of alleged error available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy may petition the court that imposed the sentence or the supreme court to vacate, set aside, or correct the sentence or revocation order.

(2) If the sentence was imposed by a justice, city, or municipal court, the petition must be filed with the district court in the county where the lower court is situated.

(3) If the person is in custody, the person may elect

to file the petition directly with the supreme court.

NEW SECTION. **Section 231.** When petition may be filed. A petition for the relief referred to in [section 230] may be filed at any time.

NEW SECTION. **Section 232.** Commencement of proceedings. The proceeding for relief under [section 230] must be commenced by filing a verified petition with the clerk of the appropriate court. The clerk shall docket the petition upon its receipt and bring the petition promptly to the attention of the court.

NEW SECTION. **Section 233.** Contents of petition. (1) The petition for postconviction relief must:

(a) identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and clearly set forth the alleged violation or violations;

(b) identify any previous proceedings that the petitioner may have taken to secure relief from his condition;

(c) have attached to the petition any affidavits, records, or other evidence supporting its allegations or state why the evidence is not attached.

(2) The petition must be accompanied by a supporting memorandum including appropriate arguments and citations and discussion of authorities.

NEW SECTION. **Section 234.** Waiver of grounds for relief. (1) All grounds for relief claimed by a petitioner under [section 230] must be raised in the original or amended petition. Those grounds for relief not raised are waived unless the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or amended petition.

(2) When a petitioner has been afforded a direct appeal of his conviction, grounds for relief that could reasonably have been raised on direct appeal may not be raised in the original or amended petition.

NEW SECTION. **Section 235.** Proceedings on the petition. (1) Unless the petition and the files and records of the case conclusively show that the petitioner is not entitled to relief, the court shall cause notice of the petition to be served upon the county attorney in the county in which the conviction took place and the attorney general and order them to file a responsive pleading to the petition. Following its review of the responsive pleading, the court may dismiss the petition as a matter of law for failure to state a claim for relief, or it may grant a prompt hearing on the petition, determine the issue, and make findings of fact and conclusions with respect to the petition.

(2) If a hearing is required or the interests of justice require, the court shall appoint counsel for a

petitioner who qualifies for the appointment of counsel under [sections 58 through 65].

(3) The court, for good cause, may grant leave to either party to use the discovery procedures available in criminal or civil proceedings. Discovery procedures may be used only to the extent and in the manner the court has ordered or to which the parties have agreed.

(4) The court may receive proof of affidavits, depositions, oral testimony, or other evidence. In its discretion, the court may order the petitioner brought before the court for the hearing.

(5) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to reassignment, retrial, custody, bail, or discharge as may be necessary and proper. If the court finds for the state, the petition must be dismissed.

NEW SECTION. **Section 236.** Record of proceedings. A court that hears a petition pursuant to this rule shall keep a record of the proceedings and enter its findings and conclusions.

NEW SECTION. **Section 237.** Review. Either the petitioner or the state may appeal to the supreme court from an order entered on a petition. The appeal must be taken within 60 days of the entry of the order.

NEW SECTION. **Section 238.** Applicability of the writ of habeas corpus. (1) Except as provided in [sections 238 through 247], every person imprisoned or otherwise restrained of his liberty within this state may prosecute a writ of habeas corpus to inquire into the cause of imprisonment or restraint and, if illegal, to be delivered from the imprisonment or restraint.

(2) The writ of habeas corpus is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted his remedy of appeal. The relief under [sections 238 through 247] is not available to attack the legality of an order revoking a suspended or deferred sentence.

(3) A person may not be released on a writ of habeas corpus due to any technical defect in commitment not affecting his substantial rights.

NEW SECTION. **Section 239.** Application for a writ of habeas corpus. (1) Application for a writ of habeas corpus is made by petition signed either by the party for whose relief it is intended or by another person on the petitioner's behalf.

(2) The application must specify:

(a) that the petitioner is unlawfully imprisoned or restrained of his liberty;

(b) why the imprisonment or restraint is unlawful; and

(c) where and by whom the petitioner is confined or restrained.

(3) All parties must be named if they are known or otherwise described so that they may be identified.

(4) The petition must be verified by the oath or affirmation of the party making the application.

NEW SECTION. **Section 240. Granting a writ of habeas corpus.** (1) The writ of habeas corpus may be granted by any justice of the state supreme court or by any district court judge upon petition by or on behalf of any person restrained of his liberty within the judge's or justice's jurisdiction.

(2) When a writ of habeas corpus is issued, it may be made returnable before the issuing court.

(3) Any judge or justice authorized to grant the writ of habeas corpus shall grant the writ without delay if it appears that the writ ought to issue.

NEW SECTION. **Section 241. Form of the writ.** (1) The writ of habeas corpus must be directed to the person having custody of or restraining the person on whose behalf the application is made and must command that person to have the petitioner before the judge before whom the writ is returnable at a time and place specified.

(2) The issue or issues to be determined upon return of the writ may be stated either in the writ or in an order

attached to the writ. If the issues to be determined are not stated in the writ or in an attached order, then a copy of the petition must be attached to the writ.

NEW SECTION. **Section 242. Service of the writ.** (1) The writ of habeas corpus or any associated process may be issued and served on any day or at any time.

(2) The writ must be served upon the person to whom it is directed. If the writ is directed to a state institution, a copy of the writ shall be served upon the attorney general. If the writ is directed to a county facility, a copy of the writ must be served upon the county attorney.

(3) The writ must be served by the clerk of court, the sheriff, or any other person directed to do so by the court.

(4) The writ must be served in the same manner as a summons in civil actions, except when otherwise expressly directed by the judge or court.

NEW SECTION. **Section 243. Return of service.** (1) The person upon whom the writ is served shall make a return and state in that return:

(a) whether the party is in that person's custody or under his power or restraint; and

(b) if the party is in custody or otherwise restrained, state the authority for and cause of the custody or restraint; or

(c) if the party has been transferred to the custody of

or otherwise restrained by another, state to whom, the time and place of transfer, the reason for the transfer, and the authority under which such transfer took place.

(2) The return must be signed and verified by oath unless the person making the return is a sworn public officer making a return in his official capacity.

NEW SECTION. **Section 244.** Appearance of petitioner. (1) The person commanded by the writ shall bring the petitioner before the court as required by the writ unless the petitioner cannot be brought before the court without danger to his health. Sickness or infirmity must be confirmed in an affidavit by the person having custody of the petitioner.

(2) If the court is satisfied with the truth of the affidavit, the court may proceed and dispose of the case as if the petitioner were present, or the hearing may be postponed until the petitioner is present.

(3) If the person commanded by the writ refuses to obey, that person shall be adjudged in contempt of court.

NEW SECTION. **Section 245.** Hearing. (1) The court or judge before whom the writ is returned shall immediately proceed to hear and examine the return. The hearing may be summary in nature.

(2) Evidence may be produced and compelled in preparation of a hearing as provided in [sections 238

through 247].

NEW SECTION. **Section 246.** Disposition of petitioner. (1) If the court finds in favor of the petitioner, an appropriate order must be entered with respect to the judgment or sentence in the former proceeding and any supplementary orders as to reassignment, retrial, custody, bail, or discharge as may be necessary and proper.

(2) If the court finds for the state, the petitioner shall be returned to custody of the person to whom the writ was directed.

NEW SECTION. **Section 247.** Appeal by state. An appeal may be taken to the supreme court by the state from an order of judgment discharging the petitioner. The court may admit the petitioner to bail pending appeal as provided in [section 68]. The appeal must be taken in the same manner as in civil actions.

Section 248. Section 1-1-202, MCA, is amended to read:

"1-1-202. Terms relating to procedure and the judiciary. Unless the context requires otherwise, the following definitions apply in the Montana Code Annotated:

(1) A "deposition" is a written declaration under oath or affirmation, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.

(2) "Judicial officers" means justices of the supreme court, judges of the district courts, justices of the peace,

municipal judges, and city judges.

(3) A "judicial record" is the record of official entry of the proceedings in a court of justice or of the official act of a judicial officer in an action or special proceeding.

(4) "Magistrate" means any officer ~~described---in 46-1-201(6)~~ having the power to issue a warrant for the arrest of a person charged with an offense and includes:

(a) the justices of the supreme court;

(b) the judges of the district courts;

(c) justices of the peace; and

(d) city or municipal judges.

(5) An "oral examination" is an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

(6) "Process" means a writ or summons issued in the course of judicial proceedings.

(7) For purposes of legal notification, the term "registered mail" includes registered or certified mail.

(8) "Testify" includes every mode of oral statement under oath or affirmation.

(9) "Writ" means an order in writing issued in the name of the state or of a court or judicial officer."

Section 249. Section 1-1-207, MCA, is amended to read:

"**1-1-207. Miscellaneous terms.** Unless the context requires otherwise, the following definitions apply in the Montana Code Annotated:

(1) "Bribe" means anything of value or advantage, present or prospective, or any promise or undertaking to give anything of value or advantage, which is asked, given, or accepted with a corrupt intent to unlawfully influence the person to whom it is given in his action, vote, or opinion in any public or official capacity.

(2) "Peace officer" means any person described in ~~46-1-201(8)~~ [section 2(16)].

(3) "Vessel", when used in reference to shipping, includes ships of all kinds, steamboats and steamships, canal boats, and every structure adapted to be navigated from place to place."

Section 250. Section 3-15-603, MCA, is amended to read:

"**3-15-603. Manner of impaneling.** After the jurors have been selected, the grand jury shall be impaneled as prescribed in ~~46-11-301--through--46-11-303~~ [sections 97 through 112]."

Section 251. Section 7-4-2902, MCA, is amended to read:

"**7-4-2902. Vacancy in office of county coroner or disqualification of coroner.** (1) The coroner, or the board of county commissioners if the coroner is unable or refuses to act, shall request the coroner or a qualified deputy

coroner of another county to be acting county coroner if the coroner:

(a) is absent or unable to attend to his duties or if the office of coroner is vacant and there are no qualified deputies available;

(b) is related to the deceased;

(c) is a potential party in an action concerning the death or his inquiry into the death may pose a conflict of interest;

(d) has not successfully completed the basic coroner course required in 7-4-2905 and there are no qualified deputies available; or

(e) is disqualified under the provisions of ~~46-4-201~~ [section 10].

(2) The salary of and expenses incurred by an acting coroner on behalf of a requesting county are an allowable charge against the requesting county."

Section 252. Section 7-4-2912, MCA, is amended to read:

"7-4-2912. Coroner's register. The county coroner shall keep an official register, to be labeled "coroner's register"~~, as provided in 46-4-207~~."

Section 253. Section 7-16-2322, MCA, is amended to read:

"7-16-2322. Rules and ordinances to implement part. (1) (a) A county park board, in addition to powers and

duties now given under law, has the following powers and duties:

(i) to make rules necessary or convenient to protect and promote the improvement of land and facilities under the care and control of said board and for the protection of birds and animals inhabiting or frequenting land and facilities in parks and public places;

(ii) to make rules for the use of land and facilities by the public; and

(iii) to provide penalties for the violation of such rules.

(b) The rules authorized by subsection (1) have the force of resolutions of the county commissioners.

(2) The county governing body, by the adoption of an ordinance in substantial compliance with the provisions of 7-5-103 through 7-5-107, may:

(a) provide that violations of specific rules adopted pursuant to subsection (1) constitute criminal offenses and are punishable as provided in 7-5-109; and

(b) authorize a county park board to employ a county park warden to enforce park rules and ordinances. A county park warden is not a peace officer, as defined in ~~46-1-201~~ [section 2(16)]. The law enforcement powers of a park warden are limited to issuing citations charging violations of park ordinances and rules."

Section 254. Section 7-32-201, MCA, is amended to read:

"**7-32-201. Definitions.** As used in this part, the following definitions apply:

(1) "Auxiliary officer" means an unsworn, part-time, volunteer member of a law enforcement agency who may perform but is not limited to the performance of such functions as civil defense, search and rescue, office duties, crowd and traffic control, and crime prevention activities.

(2) "General law enforcement duties" means patrol operations performed for detection, prevention, and suppression of crime and the enforcement of criminal and traffic codes of this state and its local governments.

(3) "Law enforcement agency" means a law enforcement service provided directly by a local government.

(4) "Law enforcement officer" means a sworn, full-time, employed member of a law enforcement agency who is a peace officer as defined in ~~46-1-201(8)~~ [section 2(16)] and has arrest authority as described in ~~46-6-401~~ [sections 26 through 36].

(5) "Reserve officer" means a sworn, part-time, volunteer member of a law enforcement agency who is a peace officer as defined in ~~46-1-201(8)~~ [section 2(16)] and has arrest authority as described in ~~46-6-401~~ [sections 26 through 36] only when authorized to perform these functions as a representative of the law enforcement agency."

Section 255. Section 7-32-233, MCA, is amended to read:

"**7-32-233. Limitation on arrest authority of auxiliary officer.** An auxiliary officer has only the arrest authority granted a private person in ~~46-6-502 and 46-6-503~~ [section 39]."

Section 256. Section 7-32-4303, MCA, is amended to read:

"**7-32-4303. Control of shoplifting.** (1) The city or town council may ~~define shoplifting as provided in 46-6-501 and~~ punish persons found guilty ~~thereof~~ of shoplifting.

(2) "Shoplifting" means the theft of any goods offered for sale by a wholesale or retail store or other mercantile establishment."

Section 257. Section 16-11-147, MCA, is amended to read:

"**16-11-147. Seizure and forfeiture of unlawful cigarettes.** (1) Any motor vehicle, airplane, conveyance, vehicle, or other means of transportation in which cigarettes are being unlawfully transported, together with the cigarettes and other equipment or personal property used in connection with such transportation and found in such means of transportation, shall be subject to seizure by the department, its duly authorized agent, any sheriff or deputy, or other peace officer and shall be subject to forfeiture in the manner hereinafter provided.

(2) Upon the seizure of any cigarettes and within 2 days thereafter, the person or officer making such seizure shall deliver an inventory of the property seized to the person from whom such seizure was made, if known, and file a copy thereof with the department. The person from whom the seizure was made or any other person claiming an interest in the property seized may apply for its return as provided in ~~46-5-302 through 46-5-305~~ [section 56]."

Section 258. Section 37-60-406, MCA, is amended to read:

"**37-60-406.** Peace officer's casual employment. A peace officer, as defined in ~~46-1-201~~ [section 2(16)], or a reserve officer, as defined in 7-32-201, is not prohibited or restricted from accepting and engaging in employment as a security guard during his off-duty hours, provided that he does not advertise his services or solicit employment and further provided that the chief of his department previously approves the off-duty employment. A peace officer or reserve officer so engaged in casual employment is exempt from the provisions of this chapter only if the casual employment is authorized in writing by his sheriff or chief of police."

Section 259. Section 44-11-303, MCA, is amended to read:

"**44-11-303.** Definitions. When used in this part, unless the context requires otherwise, the following definitions

apply:

(1) "Law enforcement agency" means a public agency lawfully established by statute or executive order that is responsible for the prevention and detection of crime and the enforcement of penal, traffic, regulatory, or game laws.

(2) "Law enforcement agency of this state" or "law enforcement agency of another (or any other) state" includes, respectively, a law enforcement agency of a political subdivision of this state and a law enforcement agency of a political subdivision of another state.

(3) "Mutual aid agreement" or "agreement" means an agreement between two or more law enforcement agencies, consistent with the purposes of this part.

(4) "Party law enforcement agency" means a law enforcement agency that is a party to a mutual aid agreement as set forth in this part.

(5) "Peace officer" has the meaning as the term is defined in ~~46-1-201~~ [section 2(16)]."

Section 260. Section 45-5-206, MCA, is amended to read:

"**45-5-206.** Domestic abuse. (1) A person commits the offense of domestic abuse if he:

(a) purposely or knowingly causes bodily injury to a family member or household member; or

(b) purposely or knowingly causes reasonable apprehension of bodily injury in a family member or

household member. The purpose to cause reasonable apprehension or the knowledge that reasonable apprehension would be caused shall be presumed in any case in which a person knowingly points a firearm at or in the direction of a family member or household member, whether or not the offender believes the firearm to be loaded.

(2) For the purposes of this section and ~~46-6-401~~ [section 26], "family member or household member" means a spouse, former spouse, adult person related by blood or marriage, or adult person of the opposite sex residing with the defendant or who formerly resided with the defendant.

(3) A person convicted of domestic abuse for the first or second time shall be fined not to exceed $500 or be imprisoned in the county jail not to exceed 6 months, or both. On a third or subsequent conviction for domestic abuse, the person convicted shall be fined not to exceed $50,000 or be imprisoned in the state prison for a term not to exceed 5 years, or both."

Section 261. Section 45-8-209, MCA, is amended to read:

"45-8-209. Harming a police dog -- penalty. (1) A person commits the offense of harming a police dog if he purposely or knowingly shoots or kills a police dog being used by a law enforcement officer in discharging or attempting to discharge any legal duty in a reasonable and proper manner.

(2) A person convicted of the offense of harming a police dog may be fined an amount not to exceed $5,000 or be imprisoned in the state prison for a term not to exceed 1 year, or both.

(3) As used in this section, the following definitions apply:

(a) "Law enforcement officer" means a person who is a peace officer as defined in ~~46-1-201~~ [section 2(16)].

(b) "Police dog" means a dog that is:

(i) used by a law enforcement agency, as defined in 7-32-201, in the exercise of its authority;

(ii) specifically trained for law enforcement work; and

(iii) under the control of a law enforcement officer."

Section 262. Section 46-8-114, MCA, is amended to read:

"46-8-114. Time and method of payment of costs. When a defendant is sentenced to pay the costs of court-appointed counsel, the court may order payment to be made within a specified period of time or in specified installments. Such payments shall be made to the clerk of the district court. The clerk of the district court shall disburse the payments to the county, agency, state agency, or local government unit responsible for the expenses of court-appointed counsel as provided for in ~~46-8-201~~ [section 65]."

Section 263. Section 46-16-103, MCA, is amended to read:

"**46-16-103. Who decides questions of law and fact.** (1) All prosecutions deciding issues of fact must be tried by the court and jury, except on a plea of guilty.

(2) Questions of law must be decided by the court and questions of fact by the jury except that on a trial for criminal defamation the jury shall determine both questions of law and of fact. Questions of law and fact must be decided by the court when a trial by jury is waived under ~~46-16-102(2)~~ [section 191]."

Section 264. Section 46-18-201, MCA, is amended to read:

"**46-18-201. Sentences that may be imposed.** (1) Whenever a person has been found guilty of an offense upon a verdict or a plea of guilty, the court may:

(a) defer imposition of sentence, excepting sentences for driving under the influence of alcohol or drugs, for a period, except as otherwise provided, not exceeding 1 year for any misdemeanor or for a period not exceeding 3 years for any felony. The sentencing judge may impose upon the defendant any reasonable restrictions or conditions during the period of the deferred imposition. Such reasonable restrictions or conditions may include:

(i) jail base release;

(ii) jail time not exceeding 180 days;

(iii) conditions for probation;

(iv) restitution;

(v) payment of the costs of confinement;

(vi) payment of a fine as provided in 46-18-231;

(vii) payment of costs as provided in 46-18-232 and 46-18-233;

(viii) payment of costs of court-appointed counsel as provided in ~~46-8-113~~ [section 62];

(ix) community service;

(x) any other reasonable conditions considered necessary for rehabilitation or for the protection of society; or

(xi) any combination of the above.

(b) suspend execution of sentence up to the maximum sentence allowed for each particular offense. The sentencing judge may impose on the defendant any reasonable restrictions or conditions during the period of suspended sentence. Such reasonable restrictions or conditions may include any of those listed in subsections (1)(a)(i) through (1)(a)(xi).

(c) impose a fine as provided by law for the offense;

(d) require payment of costs as provided in 46-18-232 or payment of costs of court-appointed counsel as provided in ~~46-8-113~~ [section 62];

(e) commit the defendant to a correctional institution with or without a fine as provided by law for the offense;

(f) impose any combination of subsections (1)(b) through (1)(e).

(2) If any financial obligation is imposed as a condition under subsection (1)(a), sentence may be deferred for a period not exceeding 2 years for any misdemeanor or for a period not exceeding 6 years for any felony, regardless of whether any other conditions are imposed.

(3) If any restrictions or conditions imposed under subsection (1)(a) or (1)(b) are violated, the court shall consider any elapsed time and either expressly allow part or all of it as a credit against the sentence or reject all or part as a credit and state its reasons in the order. Credit, however, must be allowed for jail time already served.

(4) Except as provided in 46-18-222, the imposition or execution of the first 2 years of a sentence of imprisonment imposed under the following sections may not be deferred or suspended: 45-5-103, 45-5-202(3) relating to aggravated assault, 45-5-302(2), 45-5-303(2), 45-5-401(2), 45-5-503(2) and (3), 45-9-101(2) and (3), 45-9-102(3), and 45-9-103(2).

(5) Except as provided in 46-18-222, the imposition or execution of the first 10 years of a sentence of imprisonment imposed under 45-5-102 may not be deferred or suspended.

(6) Except as provided in 46-18-222, imposition of sentence in a felony case may not be deferred in the case of

a defendant who has been convicted of a felony on a prior occasion whether or not the sentence was imposed, imposition of the sentence was deferred, or execution of the sentence was suspended.

(7) If the victim was less than 16 years old, the imposition or execution of the first 30 days of a sentence of imprisonment imposed under 45-5-502(3), 45-5-503, 45-5-504, 45-5-505, or 45-5-507 may not be deferred or suspended. Section 46-18-222 does not apply to the first 30 days of such imprisonment."

Section 265. Section 46-18-247, MCA, is amended to read:

"**46-18-247. Default.** (1) If an offender sentenced to make restitution is in default, the sentencing court, upon the motion of the prosecuting attorney or upon its own motion, may issue an order under ~~46-18-203~~ [section 229] requiring the offender to show cause why he should not be confined for failure to obey the sentence of the court. The court may order the offender to appear at a time, date, and place for a hearing or, if he fails to appear as ordered, issue a warrant for his arrest. The order or warrant must be accompanied by written notice of the offender's right to a hearing as provided in ~~46-18-203~~ [section 229].

(2) If the court finds that the offender's default was attributable to a failure on his part to make a good faith

effort to obtain the necessary funds for payment of the ordered restitution, the court may take any action provided for in ~~46-18-203~~ [section 229]. If confinement is ordered, the court, after entering the order, may at any time, for good cause shown, reduce the term of confinement and waive satisfaction of the restitution order.

(3) An order to pay restitution constitutes a judgment rendered in favor of the state, and following a default in the payment of restitution or any installment thereof, the sentencing court may order the restitution to be collected by any method authorized for the enforcement of other judgments."

Section 266. Section 46-18-502, MCA, is amended to read:

"**46-18-502. Sentencing of persistent felony offender.** (1) Except as provided in subsection (2), a persistent felony offender shall be imprisoned in the state prison for a term of not less than 5 years or more than 100 years or shall be fined an amount not to exceed $50,000, or both, if he was 21 years of age or older at the time of the commission of the present offense.

(2) If the offender was a persistent felony offender, as defined in ~~46-18-501~~ [section 2(17)], at the time of his previous felony conviction, less than 5 years have elapsed between the commission of the present offense and either the

previous felony conviction or the offender's release on parole or otherwise from prison or other commitment imposed as a result of the previous felony conviction, and he was 21 years of age or older at the time of the commission of the present offense, he shall be imprisoned in the state prison for a term of not less than 10 years or more than 100 years or shall be fined an amount not to exceed $50,000, or both.

(3) Except as provided in 46-18-222, the imposition or execution of the first 5 years of a sentence imposed under subsection (1) or the first 10 years of a sentence imposed under subsection (2) may not be deferred or suspended.

(4) Any sentence imposed under subsection (2) shall run consecutive to any other sentence imposed."

Section 267. Section 46-20-103, MCA, is amended to read:

"**46-20-103. Scope of appeal by state.** (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)~~ [section 219];

(c) granting a new trial;

(d) quashing an arrest or search warrant;

(e) suppressing evidence;

(f) suppressing a confession or admission; or

(g) granting or denying change of venue."

NEW SECTION. **Section 268. Repealer.** Sections 46-1-101, 46-1-102, 46-1-201, 46-3-101 through 46-3-106, 46-3-201 through 46-3-206, 46-4-201 through 46-4-207, 46-4-301 through 46-4-306, 46-5-101 through 46-5-104, 46-5-201 through 46-5-209, 46-5-301 through 46-5-305, 46-5-401, 46-5-402, 46-5-501 through 46-5-505, 46-6-101, 46-6-104 through 46-6-106, 46-6-201 through 46-6-204, 46-6-301 through 46-6-304, 46-6-401 through 46-6-404, 46-6-411, 46-6-412, 46-6-421, 46-6-422, 46-6-501 through 46-6-503, 46-7-101 through 46-7-103, 46-8-101 through 46-8-104, 46-8-111 through 46-8-115, 46-8-201, 46-8-202, 46-9-101 through 46-9-104, 46-9-111, 46-9-201 through 46-9-205, 46-9-301 through 46-9-303, 46-9-311, 46-9-401 through 46-9-404, 46-9-411 through 46-9-414, 46-9-501 through 46-9-505, 46-10-101, 46-10-102, 46-10-201 through 46-10-204, 46-11-101, 46-11-102, 46-11-201 through 46-11-204, 46-11-301 through 46-11-303, 46-11-311 through 46-11-319, 46-11-331 through 46-11-333, 46-11-401 through 46-11-405, 46-11-501 through 46-11-505, 46-11-601, 46-12-101 through 46-12-105, 46-12-201 through 46-12-206, 46-13-101 through 46-13-106, 46-13-201 through 46-13-204, 46-13-301, 46-13-302, 46-14-101 through 46-14-103, 46-14-201 through 46-14-203, 46-14-212, 46-14-213, 46-14-221, 46-14-222, 46-14-301 through 46-14-304, 46-14-311 through 46-14-313, 46-14-401, 46-15-101 through 46-15-105, 46-15-111 through 46-15-114, 46-15-201 through 46-15-204, 46-15-321 through 46-15-329, 46-15-331, 46-15-332, 46-15-401 through 46-15-403, 46-16-102, 46-16-108, 46-16-201, 46-16-202, 46-16-211 through 46-16-213, 46-16-301 through 46-16-307, 46-16-401 through 46-16-403, 46-16-501 through 46-16-505, 46-16-601 through 46-16-605, 46-16-701, 46-16-702, 46-17-101 through 46-17-103, 46-17-201 through 46-17-205, 46-17-211, 46-17-301 through 46-17-303, 46-17-311, 46-17-401 through 46-17-404, 46-18-102, 46-18-111 through 46-18-113, 46-18-203, 46-18-501, 46-18-503, 46-21-101 through 46-21-105, and 46-21-201 through 46-21-203, MCA, are repealed.

BILL NO. 347

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE LAW RELATING TO CRIMINAL PROCEDURE; IMPLEMENTING THE RECOMMENDATIONS OF THE COMMISSION ON RULES OF CRIMINAL PROCEDURE; AMENDING SECTIONS 1-1-202, 1-1-207, 7-4-2902, 7-4-2912, 7-16-2322, 7-32-201, 7-32-233, 7-32-4303, 16-11-147, 37-60-406, 44-11-303, 45-5-206, 45-8-209, 46-8-114, 46-16-103, 46-18-201, 46-18-247, 46-18-502, AND 46-20-103, MCA; AND REPEALING SECTIONS 46-1-101, 46-1-102, 46-1-201, 46-3-101 THROUGH 46-3-106, 46-3-201 THROUGH 46-3-206, 46-4-201 THROUGH 46-4-207, 46-4-301 THROUGH 46-4-306, 46-5-101 THROUGH 46-5-104, 46-5-201 THROUGH 46-5-209, 46-5-301 THROUGH 46-5-305, 46-5-401, 46-5-402, 46-5-501 THROUGH 46-5-505, 46-6-101, 46-6-104 THROUGH 46-6-106, 46-6-201 THROUGH 46-6-204, 46-6-301 THROUGH 46-6-304, 46-6-401 THROUGH 46-6-404, 46-6-411, 46-6-412, 46-6-421, 46-6-422, 46-6-501 THROUGH 46-6-503, 46-7-101 THROUGH 46-7-103, 46-8-101 THROUGH 46-8-104, 46-8-111 THROUGH 46-8-115, 46-8-201, 46-8-202, 46-9-101 THROUGH 46-9-104, 46-9-111, 46-9-201 THROUGH 46-9-205, 46-9-301 THROUGH 46-9-303, 46-9-311, 46-9-401 THROUGH 46-9-404, 46-9-411 THROUGH 46-9-414, 46-9-501 THROUGH 46-9-505, 46-10-101, 46-10-102, 46-10-201 THROUGH 46-10-204,

LC 1439/01

There is no change on SB 347 and will not be reprinted. Please refer to introduced (white) or second reading (yellow) for complete text.

INTRODUCED BILL
SB 347