MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on March 6, 2003 at 9:00 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:
Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted:	HB 166, HB 170, HB 161, HB 156, 2/21/2003
Executive Action:	HB 161, HJ 1, HB 14, HB 18, HB 54, HB 77, HB 234,

HEARING ON HB 166

Sponsor: **REP. DAVE WANZENRIED, HD 68, MISSOULA**

Proponents: **John Connor, Department of Justice and the Attorney General's Office**

Opponents: **Leo Gallagher, Lewis and Clark County Attorney and Montana County Attorneys Association**

Opening Statement by Sponsor:

REP. DAVE WANZENRIED, HD 68, MISSOULA, presented HB 166. He remarked the bill would codify a Supreme Court decision regarding a court case in Ravalli County. In 1999, Mr. Pepilo was charged with five felony counts. Prior to going to trial, he attempted to plead on several of those counts. The District Court would not allow him to do so. He was convicted on all five counts. On appeal, the Supreme Court held the district court could not prevent a defendant from negotiating on pending charges. This bill would clarify that a defendant could plead and the court is required to accept a plea bargain prior to going to trial.

Proponents' Testimony:

John Connor, Department of Justice and the Attorney General's Office, remarked in the House Judiciary Committee hearing there was opposition from a prosecutor who did not think this would allow the state to present the entire transaction of its offense. He further added that in the Pepilo decision the court stated that general principles of statutory construction provide that when the word "may" is used to confer power on an officer, court, or tribunal, and the public or a third person has an interest in the exercise of power, then the exercise of power becomes imperative. The court was saying that "may" meant "must" in the situation and the defendant wanted to plead guilty to the additional offenses.

Opponents' Testimony:

Leo Gallagher, Lewis and Clark County Attorney and Montana County Attorneys Association, rose in opposition to HB 166. He presented an e-mail from **George Corn, Ravalli County Attorney,** **EXHIBIT(jus47b01).** **Mr. Corn** was the attorney involved in the Pepilo case. Mr. Pepilo was driving while under the influence of alcohol. He was also driving without liability insurance and had a suspended drivers license. The jury was prevented from hearing the entire transaction related to the DUI offense because on the morning of the trial, he told the judge he wanted to plead guilty

to driving without a license and without insurance. The county attorney opposed this and the judge allowed the trial to go forward. Mr. Pepilo was convicted and appealed his case. The Supreme Court interpreted the discretionary word "may" to mean "must" in regard to pleading guilty. The concern is that this prevents the jury from considering the entire transaction. **Mr. Corn's** proposed amendment would read: "If the plea of guilty or nolo contendere is to some, but not all of the charges contained in the information, indictment or complaint, the court shall admit evidence of the plea and evidence concerning the underlying charges to which the plea was entered in the trial on the remaining charges."

Questions from Committee Members and Responses:

SEN. BRENT CROMLEY remarked that the proposed amendment would involve a change in the Rules of Evidence. He believed the situation at the current time would be that the other offenses to which the defendant has pleaded guilty would not be admissible. **Mr. Connor** noted that to be the case. The other offenses would not be admissible because they would have been adjudicated. The disagreement in the House Judiciary Committee was that the defendant obviously had waited until the last minute to plead guilty so that the other offenses would not prejudice the jury toward finding him guilty of the DUI offense. The defendant has a right to do so. The proposed amendment would be legitimate in making this the law by statute.

SEN. CROMLEY remarked that evidence of other crimes is not admissible during a trial. He asked why an exception should be made in this instance. **Mr. Gallagher** claimed that Rule of Evidence 404(b) stated that it was not admissible unless it goes to another issue at trial. In this fact situation, the fact that the defendant was driving without liability insurance and a revoked drivers license, would not be evidence of a DUI. The proposed amendment would allow for the jury to understand the entire transaction. This is a policy decision.

Closing by Sponsor:

REP. WANZENRIED noted the policy issue was whether or not a court ruling should be codified to allow a defendant to plead guilty on charges. The amendment goes further in that it states if the defendant pleads guilty, this information should be admitted as evidence at trial. He preferred to leave the bill in its present form.

HEARING ON HB 170

Sponsor: **REP. JOHN PARKER, HD 45, GREAT FALLS**

Proponents: **John Connor, Department of Justice and the Attorney General's Office**
Leo Gallagher, Lewis and Clark County Attorney and Montana County Attorneys Association

Opponents: **None**

Opening Statement by Sponsor:

REP. JOHN PARKER, HD 45, GREAT FALLS, introduced HB 170. He explained the bill addressed situations in which a felon's deferred or suspended sentence was revoked before the district court judge. The bill would clarify changes that apply to revocation of a deferred or suspended sentence regardless of the date of the underlying conviction. Under present law, a district judge can revoke the entire term that is suspended or reinstate the entire term with the existing conditions. The judge may want to have the defendant sentenced to the Department of Corrections (DOC) for a number of years with a portion of the term suspended to ensure a period of transition back into the community before the sentence is completed.

Proponents' Testimony:

John Connor, Department of Justice and the Attorney General's Office, noted the last legislative session amended 46-18-203 to allow the court the utilize additional sentencing conditions of probation where a violation has occurred but the person has not violated his probation. New, additional, or lessor conditions may need to be imposed. The conditions originally imposed may no longer be appropriate. State v. Brister held there were no provisions to allow the retroactive application of the changes. If the defendant developed a drinking problem during his or her period of probation and there was no condition regarding drinking or treatment for alcohol abuse in the probation sentence, the court would be able to address the alcohol problem. The House Judiciary Committee added language on page 3 of the bill. This states any new or modified conditions must be within the scope of the conditions of the original sentence. This doesn't make much sense. The conditions need to be consistent with the other conditions that were imposed. The intent was that the conditions could be additional conditions. He reviewed the cases which do state that the conditions must have some correlation or connection to the underlying offense for which the offender is being sentenced. The conditions need to be consistent with the

crime. They should be reasonably related to rehabilitation given the nature of the crime involved.

Leo Gallagher, Lewis and Clark County Attorney and Montana County Attorneys Association, rose in support of HB 166 with the proposed amendment.

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. CROMLEY asked for the specific changes made in the last legislative session. **Mr. Connor** explained the changes were made in subsection (7)(c), lines 23 and 24 on page 2.

Closing by Sponsor:

REP. PARKER claimed the proposed amendment would more clearly reflect the intent of the House Judiciary Committee.

{Tape: 1; Side: B}

HEARING ON HB 161

Sponsor: **REP. GARY MATTHEWS, HD 4, MILES CITY**

Proponents: **Dick Meeker, Montana Juvenile Probation Officers Association**

Opponents: **None**

Opening Statement by Sponsor:

REP. GARY MATTHEWS, HD 4, MILES CITY, introduced HB 161. He noted if a youth was in violation of his parole agreement and another placement was proposed by the probation officer, the law states the youth must be granted a hearing. House Bill 161 adds language which states the youth may waive the right to a hearing with advice of his attorney. If the youth does not waive the right to that hearing, the hearing is provided.

Proponents' Testimony: None

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. CROMLEY asked whether the youth would typically be represented by an attorney. **REP. MATTHEWS** explained this would involve youth that have been released from a correctional facility and are on parole. Their parole agreement would have been violated. The parole officer would like to have another placement for the youth. The youth has the ability to have an attorney for the violation of the parole agreement. Normally, when parole has been violated, another crime has been committed.

SEN. MIKE WHEAT remarked that page two does not include the advice of counsel. **REP. MATTHEWS** claimed that when a youth admits that his parole agreement has been violated, the hearing would be waived.

Closing by Sponsor:

REP. MATTHEWS closed by stating the bill would simply clear up a contradiction in the law.

HEARING ON HB 156

Sponsor: **REP. GARY MATTHEWS, HD 4, MILES CITY**

Proponents: **Dick Meeker, Montana Juvenile Probation Officers Association**

Opponents: **None**

Opening Statement by Sponsor:

REP. GARY MATTHEWS, HD 4, MILES CITY, introduced HB 156. He remarked that he had amendments he wanted the Committee to consider that dealt with the professionals involved. The original intent of the bill was to eliminate juveniles convicted of a misdemeanor from being placed in a state youth correctional facility. This would include the Pine Hills Youth Correctional Facility and the Riverside Girls School. These facilities are for serious juvenile offenders. Under statute, a serious juvenile offender is defined as a youth who has committed a crime that would be considered a felony if the youth were an adult. This would be a crime against property or persons or would involve the use of drugs. The House amendment eliminated the concerns of the probation officers. On page 1, line 26, he would like an amendment to add a licensed clinical professional counselor or a licensed clinical social worker.

REP. MATTHEWS stated he has worked at the Pine Hills Youth Correctional Facility for five years. As a matter of public policy, he believed placing misdemeanor juveniles with felony offenders was the wrong thing to do. Approximately ten to twelve misdemeanor youth are sent to Pine Hills annually. Once a youth is in the system, it is very difficult for the youth to leave the system.

Proponents' Testimony:

Dick Meeker, Montana Juvenile Probation Officers Association, presented his written testimony, **EXHIBIT(jus47b02).**

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. JERRY O'NEIL asked what misdemeanors could be committed that would not show the youth was a danger to the public. **Mr. Meeker** noted approximately 7.5 percent of the youth committed to Pine Hills on an annual basis are misdemeanor offenders. This would include multiple shoplifting offenses.

SEN. WHEAT noted a previous bill dealt with allowing the judge discretion to send youths with mental problems to some facility other than a state facility so that Medicare payments would be available. **REP. MATTHEWS** explained that juvenile placement committees consist of the probation officer, the judge, and the school. The problem is inappropriate sentences. Juvenile placement dollars are available for shoplifters. The Pine Hills Correctional Facility is for serious juvenile offenders. The population includes gang members and drug users. County attorneys like to plea bargain. If a juvenile committed a crime of sexual intercourse without consent and this was plea bargained to six months, this misdemeanor youth would not be able to be placed in the sex offender program at Pine Hills. The youth become better criminals by being placed with serious offenders.

SEN. WHEAT questioned whether the state needed a correctional facility between home-based care and the Pine Hills Correctional Facility. **REP. MATTHEWS** noted juvenile placement dollars are available for this population.

SEN. O'NEIL asked why the juvenile placement committee were not responsible to make the determination regarding whether or not the youth should be placed in a state correctional facility. **REP. MATTHEWS** explained the licensed, mental health professionals had the ultimate decision in regard to placement for youth at Pine Hills or Riverside. Under this bill, the probation officers

and the district court judge would be able to send a misdemeanor youth to a state correctional facility, but consideration would need to be given to the mental health professionals.

CHAIRMAN DUANE GRIMES questioned whether line 27 on page 1 should use the word "or" instead of "and".

{Tape: 2; Side: A}

REP. MATTHEWS preferred using the word "and" instead of "or". His goal is to reduce the number of misdemeanor youths at the Pine Hills facility. The amendment to further define a licensed social worker is very important. There is a huge difference between youth from rural areas and youth from urban areas.

SEN. CROMLEY remarked it was his understanding that the intent of the legislation is to provide for fewer youths being sent to the state correctional facility. **REP. MATTHEWS** hoped this would be the result. Currently ten to twelve youth are sent to the facility on an annual basis. The legislation will further define a multiple misdemeanor youth who is highly delinquent. The number of placements for serious juvenile offenders should be decreased.

SEN. CROMLEY asked for further clarification of the conditions set out at the bottom of page one of the bill. **REP. MATTHEWS** clarified that currently a misdemeanor youth may be sent to Pine Hills Correctional Facility by the juvenile placement committee. The legislation will provide better guidelines and policy in regard to keeping serious juvenile offenders away from misdemeanor youth. The language at the bottom of page one further defines a highly misdemeanor youth.

SEN. CROMLEY raised a concern that there could be a court finding that the misdemeanor youth could in fact could present a danger to the public if he or she is not placed in a youth correctional facility. Under this legislation, the court would be powerless to make that placement.

REP. MATTHEWS reiterated his concern was inappropriate placement of youth to the Pine Hills facility. The probation officers opposed this bill in the House Judiciary Committee. They were concerned about taking away their authority. The bill has been amended to provide a guideline within which they can accomplish their work. The amendments do not take anything away from the court but instead they define a highly delinquent misdemeanor youth.

Closing by Sponsor:

REP. MATTHEWS stated he works as a teacher's aide in the Pine Hills facility. It is a place for serious juvenile offenders. This bill addresses youth that are sent to the facility for misdemeanors. The population at Pine Hills have usually been involved in a high number of crimes. This includes sex offenders, gang members, white power, brown power, huffers, etc. These youth have committed many felonies.

EXECUTIVE ACTION ON HB 161

Discussion:

SEN. WHEAT asked **Steve Gibson, Department of Corrections,** for further clarification of the bill. He noted the language on page 1 stated that the youth, upon advice of an attorney, could waive the right to a hearing. The language on page 2 states that the youth signs a waiver of the hearing that acknowledges that the youth has violated the terms of the youth's parole agreement. He questioned whether at the same time the youth waived his or her right to a hearing the youth would also be admitting that the terms of the parole agreement were violated. **Mr. Gibson** affirmed. If the youth, with advice of an attorney, waives a right to a hearing, he or she is admitting the revocation violations. Even if a hearing is held and the hearings officer determines the placement is not appropriate, the youth would still go to the facility and then would appeal to the Director of the Department of Corrections.

SEN. WHEAT suggested the language be added to state when a youth waives the right to a hearing, the youth acknowledges that he or she has violated the terms of their parole agreement.

Ms. Lane raised a concern in regard to placing the language on page 1. She believed the youth could not waive the hearing unless they also admitted the violation. She further noted on page 2 (6) allows the hearings officer to make a decision for the placement of the youth if the youth waived the hearing and acknowledged the violation. This begs the question to the situation when a youth would waive a hearing but did not acknowledge commission of a violation.

SEN. WHEAT noted that two things are set out on page two: 1) The youth is waiving a substantive right to a hearing. 2) The youth is acknowledging guilt of violation of the terms of his or her agreement. **Mr. Gibson** clarified this is similar to an adult revocation. It is not a probation situation but a parole situation. In the waiver process, the youth is admitting, under

the advice of an attorney, that they in fact violated the agreement and therefor the right to a hearing is waived. When there is a formal hearing, the youth wants to fight the allegation. In the last year, there has been only one appeal. The language was changed in the last session and this made the language confusing.

SEN. O'NEIL recommended on page 2, line 17, the language be changed to state: " . . . the youth signs a waiver of the hearing pursuant to Section 1." The remainder of the sentence should be placed into Section 1.

Further executive action on HB 161 was postponed until a later date.

EXECUTIVE ACTION ON HB 166

Discussion:

SEN. DAN MCGEE claimed he could not support the bill without the amendment proposed by **George Corn, Ravalli County Attorney.** He believed at times court rules get in the way of getting to the truth. The amendment allows for the court to hear the evidence which is germane to the action perpetrated by the individual.

CHAIRMAN GRIMES suggested the amendment be put into proper form.

SEN. WHEAT claimed in the practice of law, there are rules that have developed over time. On the surface, some of the rules may not seem logical, but logic has been built into the rules. In the DUI case discussed during the hearing, the person who was arrested did not have insurance, a revoked driver's license, etc. The person had several charges in addition to driving while under the influence of alcohol. The person chose to plead to the other offenses and go forward on the DUI. The fact that the person did not have insurance is not germane to whether or not the person was impaired when driving.

Further executive action on HB 166 was postponed until a later date.

EXECUTIVE ACTION ON HB 299

Discussion:

CHAIRMAN GRIMES explained that **SEN. JOHN COBB** raised a concern that the term "grossly" was removed from the bill. The bill addresses an issue between farmers and ranchers.

SEN. MCGEE stated the bill went from intentional misconduct to negligence and the term "gross" was skipped.

SEN. WHEAT explained that insurance would cover negligence but it would not cover intentional misconduct. If a farmer's cows broke through a fence and trampled the neighbor's grain fields, this would be turned over to the insurance carrier. The insurance carriers would decide which party was negligent and the matter would be handled. When the language of intentional misconduct is introduced, the insurance companies leave the issue for the two neighbors to handle. If the insurance adjusters finds intentional misconduct, coverage will be denied. He questioned why the standard was not left at a negligence standard.

Ms. Lane pointed out that under the existing section, there is a strict liability standard. Line 13 states animals that break into an enclosure. Current law states the owner is liable.

Further executive action on HB 299 was postponed until a later date.

EXECUTIVE ACTION ON HJ 1

Motion: **SEN. CROMLEY moved to INDEFINITELY POSTPONE HJ 1.**

Discussion:

SEN. O'NEIL claimed it was not proper to use a motion to dismiss in order to obtain an extension of time.

Vote: The motion carried unanimously.

EXECUTIVE ACTION ON HB 14

Motion: **SEN. O'NEIL** moved that **HB 14 BE CONCURRED IN.**

Discussion:

Ms. Lane maintained a bill had been introduced in the last three sessions attempting to address the concept. It has been determined that it will be necessary to address the issue by constitutional amendment.

SEN. MCGEE pointed out that this bill addresses misdemeanors and would not take away the right of a trial by jury in the person is involved in a felony situation.

SEN. CROMLEY suggested the language on line 18 state "one" speedy trial. **Ms. Lane** did not believe line 18 was limited to misdemeanors.

SEN. O'NEIL maintained the bill would not take away a person's right to a jury trial. It will require the court of non-record to become a court of record.

{Tape: 3; Side: A}

Vote: The motion failed on roll call vote.

Motion/Vote: SEN. MCGEE moved that HB 14 BE INDEFINITELY POSTPONED AND THE VOTE REVERSED. The motion carried.

EXECUTIVE ACTION ON HB 18

Motion: SEN. JEFF MANGAN moved that HB 18 BE CONCURRED IN.

Substitute Motion: SEN. O'NEIL made a substitute motion that HB 18 BE AMENDED.

Discussion:

SEN. O'NEIL recommended a sunset on the user surcharge for court information technology until 2005. Currently there is only one person in the state who knows how to use this computer language.

SEN. MANGAN maintained the funding for the current information technology will not go away. It is not self-sustaining.

SEN. WHEAT noted that this involves a four-year cycle. This involves hardware, not software. The sunset would not be appropriate.

SEN. O'NEIL contended that the legislature did not have the power to tell the Supreme Court that they need to use a commonly-known computer program. The legislature can let them know that they do not have free reign to let the problem go on indefinitely.

Vote: Motion failed 2-7 with MCGEE and O'NEIL voting aye.

CHAIRMAN GRIMES reported HB 369 will provide that speeding ticket increases would fund the same program. A suggestion was made to reduce the surcharge from $10.00 to $7.50.

SEN. WHEAT noted the IT Director for the Supreme Court should report back to the Legislature.

SEN. MANGAN raised a concern in regard to lowering the fees, even in contingency language. He suggested the judiciary have some input in this regard.

Further executive action on HB 18 was postponed until a later date.

EXECUTIVE ACTION ON HB 54

Motion: SEN. MCGEE moved that HB 54 BE CONCURRED IN.

Discussion:

SEN. MCGEE recommended adding the language "in person or by any other means".

SEN. WHEAT noted line 19 contained the language "or by other action, device, or method." The sponsor wanted to address computers and fax machines. It may be helpful to define electronic communication.

Motion: SEN. MCGEE moved that HB 54 BE AMENDED.

Discussion:

SEN. MCGEE explained his amendment. On line 17, page 1, he would strike the language beginning with the word "phone" through the word "by" on line 19. It would then read: "harassing, threatening, or intimidating the stalked person in person or by other action, device or method."

SEN. WHEAT believed a lot of intimidating took place by telephone and by mail. He was not in favor of the proposed amendment.

SEN. MCGEE withdrew his amendment.

Substitute Motion: SEN. MCGEE made a substitute motion that HB 54 BE AMENDED.

Discussion:

SEN. MCGEE explained his amendment. On line 18, after the comma following the word "communication", he would strike "including but not limited to a computer, videorecorder, or fax machine". This would read: "(b) harassing, threatening, or intimidating the stalked person, in person or by telephone, by mail, or by any type of electronic communication, or by other action, device, or method."

SEN. WHEAT suggested including a definition that would include all the above items, but not be limited to the same.

SEN. O'NEIL suggested that on line 18, following the words "stalked person", the remainder of the sentence be stricken. A person commits the offense of stalking if the person purposely or knowingly causes another person substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly harassing the person.

SEN. MCGEE withdrew his motions.

Ms. Lane will work with **SENATORS MCGEE, WHEAT** and **O'NEIL** on the aforementioned amendments. Further executive action on HB 54 was postponed until a later date.

EXECUTIVE ACTION ON HB 18

Motion: SEN. MANGAN moved that HB 18 BE CONCURRED IN.

Discussion:

SEN. MCGEE pointed out the fiscal note showed $900,000 was being collected each year for the informational technology system. They also want to add another eight FTE. He believed this could be managed in a much more effective manner. Since 1995, they have been collecting close to a million dollars a year.

SEN. O'NEIL noted the computer system should be compatible with the state computer system.

SEN. MANGAN noted he was also concerned about accountability and cost containment. In this particular case, a commitment to court assumption has been made. One of the consequences of that action is an increased need for up-to-date and professional information technology.

{Tape: 3; Side: B}

Vote: Motion carried 6-3 on roll call vote with CURTISS, MCGEE, and O'NEIL voting no.

EXECUTIVE ACTION ON HB 77

Motion: SEN. WHEAT moved that HB 77 BE CONCURRED IN.

Discussion:

SEN. O'NEIL remarked that the language states the court shall grant the petition if it determines the petition is not made for the purposes of delay. The person in prison is not delaying anything. He questioned whether the court would have a reason not to consider the petition.

SEN. WHEAT maintained that persons who are incarcerated for "bad" crimes will do anything to raise an issue on appeal. If the court finds that the petition is made for the purpose of delay, the court will need to state why it has made a particular finding.

SEN. O'NEIL did not know how a prisoner could prove that something they are doing is not made for the purpose of delay.

SEN. WHEAT noted that Section 1 addressed what needed to be contained within the petition for a court to make a decision as to whether or not the petition would be granted. The granting of the petition then requires that the evidence be tested. In effect, the person filing the petition needs to set forth a certain level of factual information for the court to consider.

Vote: Motion carried 8-1 with MCGEE voting no.

EXECUTIVE ACTION ON HB 234

Motion: SEN. MANGAN moved that HB 234 BE CONCURRED IN.

Discussion:

SEN. CROMLEY supported the bill because it was limited to persons under eighteen years of age.

Motion: SEN. MCGEE moved that HB 234 BE INDEFINITELY POSTPONED.

Discussion:

Ms. Lane noted that on page 1, line 28, the word "he" should be changed. She suggested using the word "driver". **SEN. CURTISS** had suggested that the word "he" be changed to "occupant". The representative from the Montana Highway Patrol testified that they wanted it drafted that way. **Ms. Lane** noted that if an occupant threw litter out of the window, they could now stop the car. Under current law, the driver would be the one who would violate the traffic regulation.

SEN. MANGAN pointed out the statistical and scientific data available shows that adults and children are killed in automobile accidents year after year because they do not wear their seatbelts. This legislation is pushed off to the side while people are dying on our highways. Statistics prove that seatbelts save lives.

Vote: Motion carried 5-4 on roll call vote.

ADJOURNMENT

Adjournment: 11:30 A.M.

_____
SEN. DUANE GRIMES, Chairman

_____
JUDY KEINTZ, Secretary

DG/JK

EXHIBIT(jus47bad)