

MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
March 29, 1977

The meeting of this committee was called to order on the above date by Senator Turnage, Chairman, at 9:35 a.m. in Room 415 of the State Capitol Building.

ROLL CALL:

All committee members were present for this meeting.

WITNESSES PRESENT TO TESTIFY:

Rep. Scully - Bozeman
Tom Honzel - County Attorneys Assn.

CONSIDERATION OF HOUSE BILL 280:

Rep. Scully of Bozeman, sponsor of the bill, said that this bill would provide a specific time period in which a criminal charge may be amended by the prosecution without leave of the district court. He said that the House had put in an amendment to make the bill read "with leave of court" and he would like to have this committee amend it back out by reinserting the word "without" and striking "with".

Tom Honzel, representing the County Attorneys Assn., appeared as a proponent of the bill. He gave a copy of the Uniform Rules to the committee and asked that this bill be amended to reflect these rules. (See Exhibit 1). He said that the emphasis is based on the conduct of the defendant and asked what conduct he is being charged with. This bill does not violate the double jeopardy clause of our constitution.

There were no opponents to the bill.

In answer to a question by Sen. Turnage, Rep. Scully said that 5 days would be much better than 15 days.

Sen. Towe then moved amend line 16 by changing the figure to "5" from "15". The motion carried unanimously.

Sen. Olson moved to strike "with" and insert "without". The motion carried with Sen. Towe voting "No".

Sen. Warden then moved that HB 280 as amended BE CONCURRED IN. The motion carried unanimously.

EXECUTIVE SESSION

HB 761 - Sen. Warden moved BE NOT CONCURRED IN. The motion carried with Sen. Murray voting "No" and Sen. Towe abstaining.

HB 320 - Sen. Regan moved that HB 320 BE NOT CONCURRED IN. The motion carried unanimously.

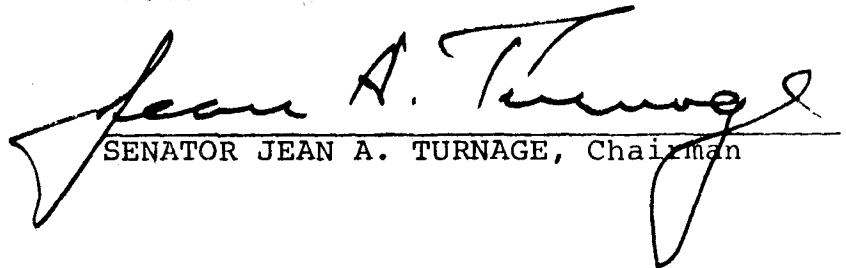
HB 567 - Sen. Towe moved the adoption of the attached (Attach. #1) amendments. The motion carried unanimously. Sen. Regan then moved that HB 567 as amended BE CONCURRED IN. The motion carried unanimously.

HB 79 - Sen. Towe moved that HB 79 be laid on the table until the committee is sure the study resolution on sentencing is passed and that it be stipulated that HB 79 will be within the scope of the study resolution. The motion carried unanimously.

HB 164 - Sen. Roberts moved the adoption of the attached amendments (Attach #2) and that the title be made to conform. The motion carried unanimously. He then moved that HB 164 as amended BE CONCURRED IN. The motion carried unanimously.

HB 326 - Sen. Roberts moved to strike section 5 in its entirety. The motion carried unanimously. Sen. Towe then moved that HB 326 as amended BE CONCURRED IN. The motion carried with a vote of 5-3.

There being no further business before the committee at this time, the committee adjourned at 11:00 a.m..


SENATOR JEAN A. TURNAGE, Chairman

(Black #1)

That.....HOUSE..... Bill No.....567,
the third reading bill, be amended as follows:

1. Amend title, lines 6 and 7.
Following: "CONSTITUTION TO"
Strike: lines 6 and 7 in their entirety.
Insert: "ALLOW THE LEGISLATURE TO DISAPPROVE RULES PROMULGATED BY THE SUPREME COURT."
2. Amend page 1, section 2, lines 21 and 22.
Following: "courts,"
Insert: "admission to the bar"
Following: "conduct of"
insert: "its"
Following: "members"
Strike: "of the bar"
3. Amend page 1, section 2, line 23.
Following: "procedure"
Insert: "and rules for the admission to the bar"
4. Amend page 1, section 2, line 24.
Following: line 23
Strike: "in either of the two sessions following promulgation"
5. Amend page 2, section 3, lines 10 and 11.
Following: "FOR"
Strike: lines 10 and 11 in their entirety.
Insert: "allowing the legislature to disapprove rules promulgated by the supreme court."
6. Amend page 2, section 3, lines 12 and 13.
Following: "AGAINST"
Strike: lines 12 and 13 in their entirety.
Insert: "allowing the legislature to disapprove rules promulgated by the supreme court."

(Attach H. R.)

That.....HOUSE..... Bill No.....164,
the third reading bill, be amended as follows:

1. Amend title, lines 6 through 9.

Following: "ACT"

Strike: "TO MAKE CONFIDENTIAL ALL INFORMATION OBTAINED FOR PURPOSES OF
PUBLIC ASSISTANCE; AMENDING SECTION 71-231.3, R.C.M. 1947; AND"

Insert: "REVISING THE LAW REGARDING PUBLIC ASSISTANCE RECORDS;"

2. Amend page 1, section 1, line 14 through line 1 on page 2.

Following: "71-231.4."

Strike: line 14 through line 1 on page 2 in their entirety

Insert: "Audit of public assistance records. All applications, informa-
tion, and records concerning any applicant or recipient of assistance
or services under this title are subject to audit for legislative
oversight or determination of welfare fraud."

3. Amend page 2, section 1, line 25 through line 25 on page 3.

Following: line 24

Strike: sections 2, 3 and 4 in their entirety

Renumber: subsequent section

JUDICIARY COMMITTEE

Date 5-24-77

[illegible]

(Ex-1)

PROCEDURES BEFORE APPEARANCE **Rule 231**

avoid an unnecessary trip to the court house. See ALI Model Code of Pre-Arrest Procedure § 130.3 (T.D. # 6, 1974).

Clause (3) allows filing of the information "promptly thereafter" as well as "by the time of his appearance before a [magistrate]," because a prosecutor may not be available by the time of appearance. In that event, Rule 311(4), *infra*, would require a

writing stating the essential facts constituting the offense charged and citing the provision of law allegedly violated. Compare ALI § 310.1(2) (T.D. # 5, 1972); former Uniform Rule 6(a); F.R. Crim.P. 5(a); Alaska R.Crim.P. 5(a); Colo.R.Crim.P. 5(a)(1); Maine R.Crim.P. 5(a); Mont.Rev. Codes § 95-901(b); Nev.Rev.Stat. § 171.178(1); N.J.Rules of Court 3:4-1; Wis.Stat. § 970.01(2).

(g) Amendment.

(1) *Before trial.* If trial has not commenced, the prosecuting attorney may amend the information to allege, or to change the allegations regarding, any offense arising out of the same alleged conduct of the defendant that gave rise to any offense alleged or attempted to be alleged in the original information.

Comment

Because the information under these Rules is prepared earlier and when the prosecuting attorney has less facts than is generally true with the traditional information, pretrial amendment is freely permitted. This provision

is similar in concept to Calif. Penal Code § 1009, Mont.Rev. Codes § 95-1505(a), and Wis.Stat. § 971.29(1). Compare Colo.R. Crim.P. 7(e); La.Code Crim.P. art. 487(A); N.Y.Crim.P.Law § 100.45(3).

(2) *After commencement of trial.* After commencement of trial, the court may permit the prosecuting attorney to amend the information at any time before verdict or finding if no additional or different offense is charged and substantial rights of the defendant are not thereby prejudiced. An amendment may charge an additional or different offense with the express consent of the defendant.

Comment

The first sentence hereof is similar in effect to Colo.R.Crim.P. 7(e) and Mont.Rev.Codes § 95-1505. Compare La.Code Crim. P. 487(A). A number of provisions apply this "at any time before verdict or finding if no

additional or different offense is charged and substantial rights of the defendant are not thereby prejudiced" standard to all amendments, not just those after commencement of trial. See former Uniform Rule 18; F.R.Crim.P. 7

Rule 231 RULES OF CRIMINAL PROCEDURE

(e); Alaska R.Crim.P. 7(e); Maine R.Crim.P. 7(e); Nev.Rev. Stat. § 173.095; N.J.Rules of Court 3:7-4.

The last sentence hereof covers situations where the defendant wishes to *stand trial* on a differ-

ent offense (even though it is not a "lesser included offense") as well as where he wishes to plead guilty to a different offense. The latter situation is covered by La. Code Crim.P. art. 487(B).

(3) *Continuance.* The defendant shall be granted any extension of time, adjournment, or continuance reasonably necessitated by an amendment.

Comment

This is comparable to Calif. 3:7-4, N.Y.Crim.P.Law § 100.45 Penal Code § 1009, La.Code Crim. (3), and Pa.R.Crim.P. 220. P. art. 489, N.J.Rules of Court

(h) *Dismissal by prosecuting attorney.* The prosecuting attorney may dismiss the information or any count thereof by filing a notice of the dismissal. The notice shall state the reasons for the dismissal. The dismissal is with prejudice only if trial has commenced or the court has approved a stipulation for dismissal with prejudice. While a motion for a pretrial judgment of acquittal under Rule 481 is pending, the prosecuting attorney may dismiss the information only with consent of the defendant.

Comment

The first sentence is to the same effect as provision in Alaska R.Crim.P. 43(a) and La.Code Crim.P. art. 691. As stated in 3 Wright--Federal Practice & Procedure § 812 (1969):

It is difficult indeed to see any real or substantial change or benefit achieved by [requiring court approval]. The court is powerless to compel a prosecutor to proceed in a case which he believes does not warrant prosecution. If the court refuses consent to dismiss, the prosecutor in his opening statement to the jury and in his presentation of evidence can indicate to the jury the considera-

tions that should work an acquittal.

The second sentence is in line with ABA Standards, The Prosecution Function 4.4 (Approved Draft, 1971), Colo.R.Crim.P. 48(a), Maine R.Crim.P. 48(a), Mont.Rev.Codes § 95-1703(1), and Tex.Code Crim.P. art. 32.02, and is designed to increase the visibility of the dismissal decision.

Under the third sentence, dismissal with prejudice can occur only at a time of high visibility—after trial has commenced or if the court approves. As to the after trial has commenced feature, this is to the same effect as

SENATE

Judiciary

COMMITTEE

VISITORS' REGISTER

DATE

3-29-77H. BILL 280

NAME

REPRESENTING

BILL #

(check one)
SUPPORT OPPOSEMr. HertzCounty AttorneysHR 280Agree

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY