

JUDICIARY COMMITTEE
HOUSE OF REPRESENTATIVES
March 13, 1979

The regular meeting of the Judiciary Committee was called to order by Chairman Scully at 8 a.m. in room 436 of the Capitol Building. All members were present. Scheduled for hearing were Senate Bills 228, 286, 243, 495, 386, 476, and 271.

SENATE BILL NO. 243: Senator Towe. This bill clears up a very confused area, injunctions, restraining orders, and provides that temporary restraining orders will expire within 10 days unless renewed. On page 1 you will note that the complaint is stricken out. It has always been necessary to file a complaint. We are taking that out, and you may file a separate action. It would probably be the injunction.

On line 23, strike the word, plaintiff and put in advocate. On page 3, no preliminary injunction may be issued without notice to the adverse party. It will parallel the federal procedure. Section 3 covers what I just stated. The injunction must be granted or oral testimony. Section 305 is a temporary restraining order. It was simply a restraining order. In order to get it you go through the form as set forth in section 6. In section 7 if you want a temporary restraining order without notice you must show that it would cause immediate and irreparable injury.

Section 9, page 6 covers the restraining order without notice. It will expire within 10 days. On the top of page 7, it could be extended for an additional 10 days. It must be set for the earliest possible time.

MIKE McGRATH: This bill was introduced at our request. There have been a number of instances where in our experience state agencies have been enjoined without a hearing and without an ex parte order. There has long been confusion in the state of Montana and a preliminary injunction and a temporary restraining order that is consistent with our law and with the due process has been needed. This bill is consistent with rule 65 and we urge a do pass.

SENATOR TOWE: It would help the state when they get hit with an injunction without notice. He elaborated further.

There was no discussion and no questions and the hearing closed on Senate Bill No. 243.

SENATE BILL NO. 286: Senator S. Brown. This bill would increase the number of associate justices on the supreme court. This bill was amended on the floor of the Senate to provide that two new justices would be elected.

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JUSTICE HASWELL:

In this little handout it presents basically how we would operate the Supreme Court with two new justices. We would stay in the panel as we do now with five justices and have two extra but we could sit as a seven man court in some cases. This method will be much cheaper than creating another court. It will also be considerably cheaper to the litigants because there would not be another court to go through. We feel this is the proper way to go about it.

J. C. WEINGARTNER:

State Bar of Montana. We do support this bill.

SENATOR S. BROWN:

We would like to discuss the immediate need for two more justices. He went through the high points of the handout from Justice Haswell.

REPRESENTATIVE HOLMES:

If you got two more justices, where would you put them.

MR. HASWELL:

We have figured out the room and how we will do it, with some shifting around.

REPRESENTATIVE EUDAILY:

He wondered how the seven member panel would work.

There was general discussion about this and also about the area that would be needed for them to operate. The hearing closed with no further discussion and no questions, on Senate Bill No. 286.

SENATE BILL NO. 495:

Senator Towe. This bill is similar to Representative Keedys bill. The major difference between them is that it would be brought in as a condition for defense. My bill would give the judge the option to sentence to Deer Lodge, or Warm Springs just so he would get treatment. The Keedy bill would throw out the defense except when it could be shown that there was the intent in the first place. Almost all of page 2 is the same as it appears in 877 except that subsection (4) was changed slightly. On page 3 and 4 there is no change. On line 7 and 8 of page 7 he may provide for commitment only for that part which is necessary to cure that mental disease or defect. It provides for an annual review. The new sections on page 8 and 9 really relate to that condition. It was better to rewrite that section rather than treat this problem erroneously. He gave examples of kinds of cases that might be involved. It is my understanding that there is some concern that perhaps we would just be putting the emphasis on the state of mind instead of actual fact. The question that will be raised now will be the intent or the state of mind.

NICK ROTERING:

Department of Institutions. We are primarily concerned with what we will do with these people when we get them to Warm Springs state Hospital.

A problem that we are afraid of, the Montana Supreme Court ruled that when a person has been released, who has supervision over that person. The Supreme Court will not allow that so we are caught in the quandary of what to do and who has supervision. We want to study this for two years. We would recommend that the committee kill the bill.

MIKE McCARTY:

Attorney Generals office. Opponent.

The problem that we see is that the bill will not do what it is supposed to achieve. The real question is how to prove the mental state. Now the problem with taking out the old insanity defense is that it is going to cause a focusing on that defense. We did a fair amount of research on this and we have come to the conclusion that expert witnesses will always be able to claim it as a state of mind. He talked at length about the unconscious disease process in applying the standard in the courts. We would rather see that defense applied rather than the insanity defense.

ROSEMARY ZION:

Mental Health Advisory Counsel. The

bill raised at least as many questions as it answers. I do feel that the bill in its present form addresses all of the complaints that may raise, also get involved in the criminal law process. There is no commentary on whether the question of knowledge is going to relate to lesser included offenses. She talked about mental defect and disease. There are a lot of areas in the bill as to who is in charge. It is not clear what restraints may be on the sentencing judge and if the person is released it is not clear under whos supervision. We need to work out something that will address all of these issues, whether it relates to certain crimes, and how it relates to constitutional principles. There are a lot of questions of constitutionality, law and procedure.

MARK BROSCOE:

Opponent, Montana County Attorney Asso.

There are 56 different people for 56 different opinions. He talked about the diminished capacity and they agree that there are abuses but this bill will not cure it. They are opposed to the bill in its present form. I don't think there are any constitutional problems with either of these bills, either Senator Towe or Representative Keedys but we are somewhat concerned about the tactical procedure. He gave an example of a case in Malta of a triple homicide. We would just as soon see the diminished capacity done away with rather than the mental disease.

SENATOR TOWE:

The initial request for this bill came from County Attorney Harold Hanser. I

am surprised that they changed their mind. The thing that is unfortunate is that they need to review the bill because there is no need right now to review the state of mind if it came up in a case. We are eliminating one area that is very significant at the present time in acquittal of people that should not be acquitted. He gave an example. It is much better to try him as an individual who did

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something that he intended as a result and he should be punished for that. On page 6, lines 3 through 6, is the existing law, he would have an absolute defense. Now what I am saying is that matter should be looked at in the sentencing procedure. It does not change the burden of proof one iota but it does make a person stick up for the responsibility of their action. He talked about trying to work out something between the two bills, as a compromise.

REPRESENTATIVE KEEDY: On page 10 you have removal of notice requirements of your bill. On line 7 it is true that you would strike "mental disease or defect" but on the other hand on page 2 of this bill you would leave in language on line 6 and the following paragraph. Are you satisfied that that is the notice requirement about which the opponents were concerned.

SENATOR TOWE: Yes, I do intend notice would be given.

Representative Keedy questioned other language and what was intended. Senator Towe read the language on line 6, that would apply. It is my understanding that crimes have specific elements and one of these is the state of mind and the prosecution has to prove this. The burden of proof is still on the courts to prove these different elements.

MR. McCARTY: Representative Keedy asked him, since the prosecution must now prove the state of mind, what is your concern with the bill that is now existing law, and he answered, say you impose a burden of proof in state of mind. We would rather see that eliminated.

Mr. Keedy and Mr. McCarty led discussion about reasonable doubt to entertain that state of mind. Mr. McCarty said the Supreme Court has taken a different interpretation. Then followed discussion about the present law and raising a reasonable doubt.

Representative Keedy raised a question about the language on page 6, concerning the sentencing court. On page 4 which is section 203 you have stricken the old Durham test so I am wondering if you are satisfied that that will not create a problem. Mr. Towe said, yes and then explained.

Representative Keedy went on, your bill retains the concept "guilty but crazy and in need of treatment" so if we are going to treat non-criminally and treat rather than punish what mechanism do you see to use. Mr. Towe replied, the courts are saying in effect, that it is almost impossible to treat these people. There was discussion about everybody assuming he has never been to trial. No other questions and no further discussion and the hearing closed on Senate Bill No. 495.

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SENATE BILL NO. 386:

Senator Blaylock. This bill is an act to disapprove the Supreme Court's rules on disqualification and substitution of judges and to adopt a modified version of the Federal Rule. Since I have been in the legislature since 1975 I have heard that we need more judges. He read a brief from last summer about case loads and asking for court administrators. In 1973 in number 1 they had 11 trials and in #2 they had 63 trials and in #3 they had 38, and called in 15 outside judges. He went on and gave the following numbers of cases.

	<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>
#1	14	16	11	14
#2	63	80	106	68
#3	40	28	54	55
#4	22	12	25	37

The #4 cases were all handled by outside judges. What is happening because of the challenge is just automatic disqualification. We are literally working the good judges to death and they keep asking for more judges. This will still follow the federal rule. I had a scenario made for me about a workmans compensation case, and he gave the example. By removing the periphery disqualification that is the thrust of my bill. There is a real question on the repealers and I would like to have your counsel look at them very carefully.

CHRIS TWEETEN:

Attorney Generals office. I am going to look at the repealer, and went on to explain the sections in the repealer. Two have been repealed and four remain. The section that deals with judge disqualification. The section on venue should be looked at.

MARK ROSCOE:

County Attorney Association. We are strongly in support of this bill, primarily because of the problem of speedy trial. He gave examples of how disqualification was being used. We are primarily concerned with the area of torts in criminal cases.

MIKE MCGRATH:

Attorney Generals Office. We are very much in support of this bill.

J. C. WEINGARTNER:

State Bar of Montana. We are opposed to the bill. I do agree that the Supreme Court and the State Bar have known for a long time that there is a problem here. He talked about disqualifying a judge. They have solved some of the problem with a rule. The Supreme Court came out with a ruling and said that one judge had to serve as a head judge. I strongly feel that the Supreme Court should be able to clean up its own procedures. There might also be a problem that this bill is unconstitutional.

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JIM BECK: Highway Department. We are very concerned with this bill. We don't know whether this is a local problem just in Billings or not. I would suggest that time be given to the new rule by the Supreme Court to see if it will work. He talked about maybe the judge isn't any good if he is being disqualified so often. He gave an example of a case of bias by a judge that he was personally familiar with.

KAREN MIKOTA: League of Women Voters. We are opposed to this bill. We feel this bill sacrifices a great deal. She went on to explain.

MIKE MELOY: MONTANA Trial Lawyers. There may be any number of reasons why there is a challenge exercised against a judge. Most of these examples given by Senator Blaylock were from Billings. I have to tell you that this bill favors plaintiffs attorneys. He explained how the judge is chosen to handle a case, by the numbers system. For those reasons we would like to see the existing method retained.

BRUCE LOBEL: I am opposed to the bill. He gave an example of disqualification that you could not do under this bill. He gave examples of cases in which a judge should be disqualified. I would also point out that the bill may be unconstitutional. He read article 3, section 7 of the constitution.

SENATOR BLAYLOCK: He talked about himself going to the Supreme Court to find out how they were being disqualified. They have the problem in Great Falls and Missoula as well as Billings. As far as its being unconstitutional the law says that we have the right to say this is the way we want it done. He explained how he would change the numbers system as it is now being used. The system should be changed and I would ask that you look upon the bill favorably.

REPRESENTATIVE SCULLY: Have you tried recall of the judge that doesn't work and Mr. Blaylock said "no". Whereupon Mr. Scully asked, would you appoint the judges instead of electing them, and Mr. Blaylock said "no" again.

There was discussion between Mr. Scully and Mr. Blaylock about the client you represent and how to make a judge work harder. Mr. Blaylock said that he agreed with Mr. Scully in that it was a lawyer problem as well as a people problem. Discussion about what is fair when you have an imbalance. You have to assume that the judge is impartial.

REPRESENTATIVE SCULLY: We have the same problem in the school system. There are school teachers that work hard and some that don't. Don't you think it is more important to have your day in court. Do you throw out the people's right to go before the court and get a fair trial.

MR. BLAYLOCK: Are you telling me that there is nothing we can do about the imbalance in our court system, and Mr. Scully answered, I think it is changing and there should be a chance to have it work.

REPRESENTATIVE KEYSER: Mr. Meloy, would you say that you always hold out and get the odd judges. Much laughter followed this exchange because Mr. Meloy had said he always got the odd numbered judge so that he would not appear before his father, Judge Peter Meloy.

Representative Conroy asked about the District Court load, and Mr. Beck said that there were many reasons for a light case load, other than the judge would not work.

Representative Daily asked about the back-up judge and how that would work, and Mr. Meloy explained. Then Mr. Daily asked for clarification. Are you saying that the judge who has been disqualified becomes the new judge and Mr. Meloy said "yes".

Representative Conroy asked Mr. Meloy if he had any trouble getting a case removed from in front of his father. Mr. Meloy answered by reading the section of the bill that might apply under subsection (f).

Representative Holmes mentioned that the problem here seems to be in part, incompetent judges. Is there anything we can do about that. Discussing about this.

MIKE ABLEY: We are looking at the case loads, how they are handled, and that sort of thing. And we have been gathering information for the last few months with the eye toward perhaps redistricting.

Discussion about why a judge is always disqualified. Mr. Beck said there are lots of reasons and explained, by giving examples.

Mr. MELOY: I look to see if the judge is going to give my client a fair trial.

REPRESENTATIVE ROTH: One of the criticism is the long delay. Can you give me any reasons why.

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J. C. WEINGARTNER: A lot of times the delays are caused by the lawyers themselves because they are trying to do discovery work.

Representative Keyser asked what would you do about a judge that does not work or is one whiz of a judge. Mr. Blaylock answered that you could go before the judicial standards and ask for his removal. Discussion about how to remove a judge.

Mr. ABLEY: It is almost impossible because they are elected and answer to the people. You could go to the judicial standards.

No further discussion and the hearing closed on Senate Bill No. 386.

SENATE BILL NO. 271: Senator Hazelbaker. This bill delegates authority to the Department of Justice to adopt rules. He had to go to another meeting so introduced Senator Towe who would explain the bill.

SENATOR TOWE: We have been working on this bill for something like four years. It is a very different and complex measure. This deals with criminal justice information records. There are certain regulations you must follow. The regulations are aimed primarily at accuracy. He went on to explain further.

SHERRY SPRAGUE: I was on the committee from the Attorney Generals office.

LARRY PETERSON: Bureau of Research and Crime Control. We did the work on the bill. We worked on it about four years. It will be a real asset to the system in Montana.

DOYLE SAXBE: Department of Administration. We have the central computer and it will have some impact because of the criminal justice network. It will force us to be a little more careful of our people who have access to the data.

MIKE MELDAHL: We think that this bill does address some of the problems that we have today.

SHERRY SPRAGUE: I do want to explain why the Attorney General is interested in this bill. In the Department of Justice we have a bureau that was set up 15 years ago. This bureau has had a lot of trouble fulfilling its mandate

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because local agencies are confused about what information to give to the bureau. Congress is on our back, and she explained why. And third, the right of privacy and the right to know and this is the major problem in all areas. This bill would clarify that for government agencies and would better protect people in the system. I also think it would protect news agencies. What the bill does, there are five major aspects.

1. require completeness (section 6)
2. accuracy of information (section 9)
3. area of dissemination of the information which allows conviction information to be released to the public. It does not allow release of information that would not result in conviction.
4. it requires certain precautions
5. section 19 and 20 inspection and review. This does not include intelligence records. It allows an individual to go and see their own record and if there is a mistake to correct it

There has been some confusion about this bill in the area of automated systems.

BRUCE McGINNIS:

Department of Revenue. We have some amendments to assist the department in functions and to take care of some problems in its present form. He talked about their mandate if someone holds a liquor license, and also about the child support parent locator service. I should point out to the committee that the Department is not totally in favor of the parts of this bill about access to records and for accurate and complete data availability. All that we are asking for in our amendment is that we be allowed to continue as we are now.

MIKE MELOY:

Lee Newspapers. It is a very confusing bill to read. That might be because of the way it was put together by the committee. I was concerned about page 10 at the bottom. Section 7 concerns itself with records. The amendments seem to be inconsistent. I suggest that you might want to amend section 7 to conform.

SENATOR TOWE:

My initial response is, we have been studying this for five years, why do you just now come forward. And also there might be some flack if the Department of Revenue should be declared a criminal Justice agency. He went through the amendments and discussed them. I don't like section 8 but I am willing to go with it because this is a compromise measure. In section 7 we are referring to the police blotter. He gave the exceptions that were made.

Representative Eudaily asked about the cost if we were to go to automation as given on the fiscal note. Discussion about this.

Senator Towe commented that the state is mostly automated at the present time so this would relate to the others.

MIKE MELDAHL: The Department of Justice says they will handle it through a mandate process. It was noted there would be no automation in this bill.

Representative Kemmis asked, can you explain why there is not a conflict between 6 and 7 on page 10. Mr. Towe explained you should look at the definition of public criminal justice information. He talked about the public records and no other records which would have a rap sheet which would not be public. Mr. Kemmis asked if all of these records are public records then, and Mr. Towe said, we wanted to preclude them from taking other records.

Representative Curtiss asked about page 6, lines 16 and 17. Mr. Towe explained that the disposition is a very technical reference for this and there may be many other dispositions.

There was no other discussion and the hearing closed on Senate Bill 271.

SENATE BILL NO. 228: Senator Goodover. This bill is relating to persistent felon offenders eligibility for parole or participation in the prisoner furlough program. He gave the new language on page 2, line 12, and page 3, lines 6 through 9. This bill will add a little more incentive for people to obey the law.

GLEN BRADLEY: Former head Highway Patrol. I am sort of trying to pinch-hit for Judge Nelson. I have some notes from Judge Nelson. He talked about the persistent felony offender. I would like to recommend that this include that the judge would have no discretion. The offender would have to serve the imposed sentence with only good time.

SENATOR GOODOVER: He read several letters in support of the measure.

There was some general discussion and the hearing closed on Senate Bill 228.

SENATE BILL NO. 476: Senator Van Valkenburg. There are some definitions on page 3. Page 10 prohibits certain practices, and page 11 is certain requirements, line 18 is the statement and page 12, line 3 is the criminal penalty. The bill is intended to cover lie detectors and the operators and provide for some kind of supervising of them.

REPRESENTATIVE SCULLY:

I am not in favor of lie detectors taking the place of the jury process which you seem to be doing. Look on page 11, lines 20 through 25, answered Senator Van Valkenburg. They were not going to be admissible into court under the original bill.

Mr. Scully pointed out lines 14 to 17 on page 11, "any information he volunteers could be used against him or made available to the party requesting the examination unless otherwise specified and agreed to in writing."

SENATOR VAN VALKENBURG:

I have asked to be in the room but polygraph examiners don't like anyone else in the room. He talked about the PSI psychological stress indicator. Discussion followed about this.

REPRESENTATIVE SCULLY:

The mere act of those two would be enough to register a reaction, especially if you are given a list of the questions. Discussion about this.

Senator Van Valkenburg stated that he would suggest an amendment that would exercise a persons rights on the machine.

REPRESENTATIVE LORY:

Why not just prohibit them, and Mr. Van Valkenburg said, I think they have some real value in law enforcement.

REPRESENTATIVE KEEDY:

What are some of the abuses that we are trying to get at.

SENATOR VAN VALKENBURG:

followed about this.

Some items that would not be relevant just to shake somebody up. Discussion

With no further discussion the hearing closed on Senate Bill No. 476.

The meeting adjourned at 11:10 a.m.


John P. Scully, Chairman
Mary Ellen Connelly
Mary Ellen Connelly, Secretary