

MINUTES OF THE MEETING OF THE JUDICIARY COMMITTEE  
EXECUTIVE SESSION  
January 22, 1981

The Executive Session of the House Judiciary Committee was called to order by Chairman Kerry Keyser at 9:00 a.m. All committee members were present except Rep. Teague, who was excused. Jim Lear, Legislative Council, was present.

HOUSE BILL 159 REP. DAILY moved do pass. DAILY felt that until the amendments were drawn up by the sponsor and the people who testified, this bill should be held for executive action. REP. DAILY offered a substitute motion to delay the bill until the amendments were prepared. The substitute motion passed unanimously.

HOUSE BILL 176 REP. YARDLEY moved do pass. REP. YARDLEY moved page 1, line 21 be amended to "prior to 1950". YARDLEY stated quite a few people he knows collect the machines as a hobby and prior to 1950 is the approximate date the antique devices in the machines were used. If the wording is left as it presently is, twenty years from now people will be collecting slot machines of today. The motion passed unanimously.

REP. BROWN stated if the bill should be amended to include other antique gambling devices. REP. YARDLEY stated his intent of the bill did not include anything besides slot machines.

REP. YARDLEY moved do pass as amended. The bill passed unanimously.

HOUSE BILL 205 REP. KEEDY moved do pass. KEEDY moved page 1, line 13 and 14 "for or" be stricken. KEEDY stated "for or against" is not the intent to foreclose the opportunity of a witness who wants to testify for the other spouse. The amendment passed unanimously.

REP. KEEDY moved page 1, line 16 be amended to "consent of the spouse called to testify". The amendment passed with REP. EUDAILY voting against the amendment.

REP. KEEDY moved 46-16-212 be added as amended under section 2 (as attached) and the title be changed to reflect the amendment. JIM LEAR stated the title is broad enough to include both criminal and civil action. The amendment passed unanimously.

REP. KEEDY moved do pass as amended. REP. DAILY felt this bill has good intentions but will not accomplish what the sponsor intended. House Bill 205 passed as amended with SEIFERT, DAILY and SHELDEN voting no.

HOUSE BILL 207 REP. SEIFERT moved do pass. There was no discussion. The bill passed unanimously.

HOUSE BILL 208 REP. KEEDY moved do pass. KEEDY noted page 1, line 12, 45-5-402 referring to sexual assault by extending the definition on page 1, line 21 the victim less than 16 would not be able to consent.

This would be a type of statutory sexual assault. KEEDY doesn't not want it to mean that two 15 year olds who were willingly involved in petting to have one of the youths suddenly say it was sexual assault.

JIM LEAR stated if line 21 following the letter (c) and before less, inserting "except in 45-5-502," that would be the correct amendment. REP. KEEDY moved the amendment as stated by JIM LEAR. The amendment passed unanimously.

REP. HANNAH stated by broadening the language to willing participant it will be creating problems in such an area where the courts will have a hay day. REP. EUDAILY stated by eliminating force and substituting willing participant there will be all types of cases since it is hard to tie down the term willing participant.

REP. HANNAH indicating the case of the recruiter, as noted in the testimony, the law is inclusive enough to incorporate those areas. CONN responded the law does not address situations such as this. "Force" puts the person in a position where she has to prove she was risking her life.

REP. KEEDY stated nobody wants to make criminal these acts. The subject is criminal charges that have to be brought by the prosecution. There will be a close examination of any facts. The prosecution can win only if he can prove the facts, including consent. The statutory definition does place a woman in a dangerous situation. It is a humiliating, trying experience.

REP. EUDAILY was concerned with whether a person was a willing participant and later used physical intimidation as the basis for bringing suit. REP. MATSKO felt the language was not adequate. How willing is willing? REP. DAILY felt the language is too broad.

REP. EUDAILY moved to restore the original language in subsection (1) and after "force" insert "not necessarily physical force" on page 1, line 14.

A roll call vote was called for. The amendment did not pass due to a tie vote, 9 to 9. Those voting yes were: KEYSER, BENNETT, EUDAILY, HANNAH, IVERSON, MATSKO, DAILY, ABRAMS, and YARDLEY. Those voting no were: SEIFERT, CONN, CURTISS, ANDERSON, HUENNEKENS, SHELDEN, KEEDY BROWN, and MCLANE.

REP. KEEDY moved do pass as amended. The motion failed 10 to 8. Those voting no were: KEYSER, SEIFERT, BENNETT, EUDAILY, HANNAH, IVERSON, MATSKO, DAILY, ABRAMS, and YARDLEY. Those voting yes were: CONN, CURTISS, ANDERSON, HUENNEKENS, SHELDEN, KEEDY, BROWN and MCLANE.

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REP. KEEDY moved the vote be reversed to do not pass. Those voting yes were: KEYSER, SEIFERT, BENNETT, EUDAILY, HANNAH, IVERSON, MATSKO, DAILY, ABRAMS, and YARDLEY. Those voting no were: CONN, CURTISS, ANDERSON, HUENNEKENS, SHELDEN, KEEDY, BROWN and MCLANE. House Bill 208 did not pass.

Under other discussion, REP. MATSKO handed out information to committee members for a possible committee bill. (EXHIBIT 1)

The meeting adjourned at 10:05 a.m.

  
KERRY KEYSER, Chairman

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## EXPLANATION OF THE BILL

To understand this bill and its implications, it is helpful to use an actual incident. On September 22, 1978, a gunman robbed the Crossroads truckstop and obtained about \$5,000. In their investigation, the police arrested John Grissom who admitted that he had driven the getaway car and identified Charles Dolan as the gunman. Other than Grissom's statement, there was very little to connect Dolan with the crime. However, Dolan was charged with robbery and theft and Grissom was granted immunity so that he would testify against Dolan at Dolan's trial. Dolan was convicted of theft. See State v. Dolan, 37 St. Rep. 1860 (1980).

As the above indicates, it happens that where there are two or more persons involved in a crime it is often necessary to obtain the testimony of one of the defendants in order to convict the primary culprit. Under the present law, Section 46-15-311, M.C.A., the prosecutor applies to the district court for an immunity order and, if granted, this order immunizes or protects the defendant who must testify from being prosecuted for any crime arising out of the transactions to which he testifies. This is called "transactional" or full immunity. Without such immunity, calling a codefendant to the stand in another defendant's trial would be useless because the codefendant would take the Fifth Amendment. Unfortunately, with transactional or full immunity, the codefendant who testifies "walks away" and gets off scot free.

What this bill proposes is to abolish transactional immunity and substitute what is called "use" immunity. What this means is the codefendant must testify against the defendant when called to do so but that his testimony and any evidence obtained as a result of testimony cannot be used against him at his trial. Thus, the codefendant can be charged and convicted with the crime if there is sufficient other evidence than his testimony at the other defendant's trial.

Providing for use immunity rather than transactional immunity satisfies three conflicting goals in the criminal justice system. One is that a jury should hear the testimony of all persons connected with an offense. The other goal, which is in conflict, is that no person should be compelled to testify against himself or give testimony which can be used against him. Finally, "deals" to "buy" testimony which result in one criminal getting off scot free lower the level of the criminal justice system to that of a bargain basement.

You should note that a defendant's attorney as well as the prosecutor can ask the court for use immunity to permit a codefendant to testify. This is provided in the present law and serves a very clear purpose. No matter how against crime one is, it would be a crime to convict a defendant who might have been exonerated by the testimony of a co-defendant. This may seem strange coming from a deputy county attorney but it is the function of a prosecutor to see that justice is done to the citizens in the courts, not merely to convict everyone charged.

Carroll C. Blend  
2323 3rd Avenue South  
P.O. Box 1052  
Great Falls, Montana 59403

January 16, 1981

Honorable Members of the Judiciary Committee:

Please find attached a proposed bill relating to use immunity in criminal prosecutions, an explanation of the bill and an analysis of it.

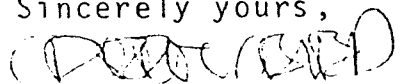
I apologize for bringing this bill to you late. While I as a deputy county attorney should realize that ignorance of the rules is no defense, I did not know that the deadline for introduction of bills was Thursday, January 15, 1981, and believed that I could ask for this bill's introduction when I was in Helena to attend a commission meeting on the 16th.

I realize that you have enough legislation proposed for your consideration to keep you in session for a year. However, I would earnestly ask your consideration of this proposed bill and your support of it in the interest that those guilty of a crime are convicted and those innocent are acquitted.

The proposed bill is not designed to assist in the prosecution of any criminal action in Cascade County now pending. It is not suggested by an organization. It is merely the suggestion of a private person, who is also a prosecutor, based on my experience and knowledge.

I hope that the explanation and analysis are helpful in understanding the purpose of the bill. When I first discovered the difference between transactional immunity and use immunity three years ago, I had to think about it to see it. I hope that what I have written is as clear as a lawyer can be about this sort of thing.

Thank you.

Sincerely yours,  
  
Carroll C. Blend

48th Legislature

\_\_\_\_\_  
BILL NO. \_\_\_\_\_

INTRODUCED BY \_\_\_\_\_

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR THE COMPULSION OF INCRIMINATING TESTIMONY OF WITNESSES BEFORE COURTS, STATE AGENCIES, AND THE LEGISLATURE, REGULATING THE FURTHER USE THEREOF AND REPEALING SECTIONS 5-5-105 AND 46-15-311, M.C.A."

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

Section 1. Definitions

As used in this part-----

(1) "agency of the state" means an office position, commission, committee, board, department, council, division, bureau, section, or any other entity or instrumentality of the executive branch of state government.

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the state" means any proceeding before such an agency with respect to which it is authorized to issue subpoenas and to take testimony or receive

### Section 3. Court and grand jury proceedings

(1) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the state or a grand jury of the state, the district court for the county of the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (2) of this section, upon the request of the county attorney for such county, or counsel for a defendant in such proceeding, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 2 of this part.

(2) A county attorney or counsel for a defendant in a proceeding may request an order under subsection (1) of this section upon certification in writing.

(a) the testimony or other information from such individual may be necessary to the public interest; and

(b) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

### Section 4. Certain administrative proceedings

(1) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the state, the district for the county in which the proceeding is or may be held shall issue, upon request of the agency

other information from witnesses under oath; and

- (4) "court of the state" means any of the following courts:
- (a) the court of impeachment, which is the senate;
  - (b) the supreme court;
  - (c) the district courts;
  - (d) the municipal courts;
  - (e) the justice's courts;
  - (f) the city courts and such other courts of limited jurisdiction as the legislature may establish.

## Section 2. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to-----

- (1) a court or grand jury of the state.
- (2) an agency of the state, or
- (3) either the senate, the house of representatives,

, or a committee of either house, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

accordance with subsection (2) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 2 of this part.

(2) An agency of the state may apply for an order under sub-section (1) of this section only upon certification in writing:

(a) the testimony or other information from such individual may be necessary to the public interest; and

(b) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

## Section 5. Legislative proceedings

(1) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either house of legislature or any committee of either house, a district court shall issue, in accordance with subsection (2) of this section, upon the request of the president of the senate, speaker of the house or chairman of the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in/<sup>sub</sup>section 2 of this part.

(2) Before issuing an order under subsection (1) of this section, the district court shall find that-----

(a) in the case of a proceeding before either house of

the legislature, the request for such an order has been approved by an affirmative vote of a majority of the members present of that house; or

(b) in the case of a proceeding before a committee of either house of the legislature, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the committee.

Section 6.

Sections 5-5-105 and 46-15-311, M.C.A. are repealed.