MINUTES OF THE MEETING OF THE JUDICIARY COMMITTEE
March 23, 1981

The meeting of the House Judiciary Committee was called to order at 9:00 a.m. in Room 437 of the Capitol by Chairman Kerry Keyser. All members were present except Rep. Iverson, who was excused. Jim Lear, Legislative Council, was present.

SENATE BILL 219 SENATOR TOWE, chief sponsor, stated this bill is to amend 46-18-201 to generally revise the sentencing laws. Although this bill was considered in the Corrections Interim Committee the bill does not have the committee's approval. This bill is similar to House Bill 10 since they both relate to sentencing laws.

There is a problem in that the same person who commits the same offense with the same circumstances in one jurisdiction would get a different sentence in another jurisdiction. This bill will approach sentencing on a more workable method as it gives flexibility.

The court shall impose a presumptive sentence and depending on aggravating and mitigating circumstances, they might increase or decrease the sentence, providing it is in the court's written opinion. The increase would be 30% for the second felony and 50% for the third felony.

The Montana Supreme Court shall set a presumptive sentence for each felony offense. The court would review each felony in the codes and come up with a presumptive sentence. The advantage of the supreme court deciding this is that they will annually review it. An updated list would be published each year.

The last section of the bill gives the state the right to appeal the sentence if it is given. This bill will allow the judges flexibility.

A letter from M. JAMES SORTE and a letter from LEONARD H. LANGEN were given to the committee. EXHIBIT 1 and EXHIBIT 2.

MIKE MCGRATH, Attorney General's Office, was in support of the bill. This would allow the court to establish guidelines which are important. The court would use these standards to follow. MCGRATH supports the amendment allowing the state to appeal. This will make the bill workable and enforceable. MCGRATH felt this approach is an appropriate way to deal with sentence disparity.

There were no further proponents.

There were no opponents.

SENATOR TOWE closed the bill.

REP. HUENNEKENS felt that all felonies could not be grouped together.

Unless the court could determine the difference between drunk driving and assault something should be done to make it acceptable. SENATOR TOWE stated if the committee felt some of the felonies were too rigid those two sections should be stricken from the bill. If the supreme court set up the guidelines SENATOR TOWE would defend the bill as it is written.

REP. KEEDY questioned the language added that was appropriate because the state should be able to appeal only when a deviation from the supreme court. MCGRATH replied the language is somewhat awkward. The state would be able to appeal in all circumstances to the supreme court.

REP. KEEDY asked why allow the state to appeal sentences when House Bill 6 was similar yet killed in the Senate. SENATOR TOWE stated the appeal would be on procedure instead of the sentence itself. MCGRATH stated the Senate Judiciary Committee had problems with going to the Review Board. It is more appropriate to go directly to the Supreme Court.

REP. KEEDY asked if aggravating circumstances were not brought into consideration what would apply. REP. BENNETT felt the bill was a fancy way of saying we are going to keep the law the way it is now. It looks like the judge can defer or suspend a sentence. SENATOR TOWE replied the big difference is that each judge has to start from the same spot. This will require uniformity. The only objection is that there are circumstances that are not listed. That is too restrictive and that is why a catch all phrase is there.

REP. BENNETT asked what if the judges start ignoring the presumption of the supreme court. SENATOR TOWE replied if they do the state can appeal. REP. BENNETT stated they would be appealing to the same people that set the presumptive sentence in the first place. The Senator felt BENNETT was assuming the supreme court will not make the judges follow the law.

REP. HANNAH asked if the supreme court would set the presumptive sentence. SENATOR TOWE replied yes upon consultation of district judges. They will follow within current laws but it could vary. The supreme court is more qualified to set this as compared to the legislature since they experience this constantly.

REP. MATSKO asked why the bill did not receive a favorable recommendation from the interim committee. SENATOR TOWE responded the vote was very close. The committee felt that House Bill 10 would do a better job. REP. YARDLEY stated the bill did not come out of the committee at all.

REP. DAILY asked what the supreme court would decide as presumptive sentencing for robbery. SENATOR TOWE did not know. He did review a list of all the people convicted of the various crimes. The average sentence was hard to determine. Averaging a deferred sentence with an actual sentence would not be right in determining the actual sentencing. MCGRATH stated the ABA has standards for sentencing, but he did not know what they are for sure.

REP. DAILY wondered about the consitutional rights of the individual if the sentence was reviewed and the penalty was increased as compared to the individual who was convicted of the same crime before the increase. SENATOR TOWE said the procedure is to unify the system. It is very inequitable but the individual would have no claim since the judge decides. This will give guidelines so there will be fairness. If the legislature passed a law creating a new crime effective July 1st and someone committed that crime on June 30th, he would not be convicted, whereas someone who committed the same crime on July 1st would be convicted. REP. DAILY asked if there would be no appeal for the second person. No was the reply.

REP. DAILY asked how the supreme court judges and district judges would decide this. The Senator replied the supreme court would decide upon consultation with the district judges. A committee would probably be appointed to review it and then give their recommendation to the supreme court, which would implement it.

REP. DAILY wondered if the committee should include a few legislators. TOWE replied no.

REP. KEEDY asked for an example of a crime that was not listed. He felt all the ones that were listed were the same from House Bill 10. The Senator replied the original draft of the bill did include more and was amended to the ones listed. An example might include an elderly couple and mercy killing. The "criminal" would be convicted of deliberate homicide. Under House Bill 10 the criminal would receive 60 years, adding another 15 years because of the age of the victim, and another 30 years if the criminal had a previous record. REP. KEEDY felt that was the same example given on the House Floor in opposition to House Bill 10. The judge could determine unusual duress. REP. KEEDY felt House Bill 10 was being misrepresented. SENATOR TOWE did not feel duress would fit.

REP. MATSKO asked if there would be any effect on the Sentencing Review Board. SENATOR TOWE replied presently they do have the authority to increase or decrease the sentence giving their reason in doing so. This would still continue. REP. EUDAILY asked if section 6 would be used. The Senator stated knowing the county attorneys it would. If the judge ignored the law the county attorney should be able to take them to the supreme court.

There may be a real disagreement as to which sentence will apply. Under those circumstances the state should have the right to appeal.

REP. YARDLEY felt the bill was not giving the supreme court guidelines.

REP. EUDAILY asked if the supreme court would come up with a list that was not in the statutes. SENATOR TOWE stated the list would be published. A statement of intent is not necessary.

REP. KEYSER asked who made the laws concerning all the sentences within title 45. The answer was the legislature has over the years. Existing law will continue. It will be refined with a presumptive sentence. The judges are willing to implement this.

SENATE BILL 272 SENATOR MAZUREK, chief sponsor, stated this bill would generally revise the procedures for the issuance of a warrant for distraint by the Department of Revenue. This bill was requested by the Department of Revenue. This would unify the procedure for collecting taxes such as inheritance and estate taxes.

When a warrant of distraint is issued it is from the Department of Revenue to the sheriff to collect the tax. It becomes a lien against the property. If it is not paid after 30 days of the due date the warrant is issued. This is an attempt to bring uniform standards to the collection of taxes. It is basically a clean-up bill and it makes the process more orderly.

LARRY WEINBERG, Department of Revenue, was in support of the bill. EXHIBIT 3. The procedures will not apply to inheritance, estate or local taxes. The department does the collection work for only certain taxes and does not get involved with local taxes.

The warrant is filed with the clerk of the district court. The judge would inform the sheriff to collect the tax. Child support would be included. This would also give an opportunity for a hearing. In 1978 850 warrants were issued. In 1979 2,476 were issued and in 1980 a total of 2,749 were issued. If this is used and a person felt that the taxes assessed were unfair they could ask for a refund.

There were no further proponents.

There were no opponents.

The Senator closed the bill.

REP. CURTISS asked if the department is being challenged because of not having an administrative hearing. WEINBERG stated there is only one case he knows of. REP. CURTISS asked if the language in the warrants state that the person must reply and request a hearing. WEINBERG replied as it is written now, opportunity has to be given for a hearing. In normal cases the person receives a statement saying how much money is owed and how much interest is due. It also states that a hearing should be made and it must be requested. REP. CURTISS asked about the emergency clause. WEINBERG stated that is not used very often. If the department has notice that a taxpayer is observed leaving the state they might investigate it.

REP. TEAGUE felt this would be using the hearing process and jumping over the court process. WEINBERG stated no - the taxpayer has various options available. He could pay the tax and apply for a refund, not pay the tax and have the department go after him, or go to court after paying the tax.

REP. TEAGUE asked about the hearings. WEINBERG stated conferences are at field offices throughout the state. The problem would hopefully be resolved there. If it came to a formal hearing it would be in Helena. A lot of the disputes are cleared up over the phone or at the field office. There are not very many disputes as compared to the number of taxpayers.

REP. KEEDY asked about the warrant for distraint on page 7. WEINBERG stated it should be sections 1-9 instead of 4-9.

REP. KEYSER asked if the state treasurer could release by statute a lien if partial payment was made. WEINBERG felt the department is charged with releasing the liens.

REP. TEAGUE asked what time period determines a tax is delinquent. Sixty days after the tax is due a warrant for distraint is issued.

The meeting adjourned at 11:00 a.m.

KERRY KEYSER, CHAIRMAN

mr

Exhibit 1

State of Montana

M. James Sorte
District Judge

Calmer A. Ersness
Court Reporter

District Court

Fifteenth Judicial District
Wolf Point, Montana 59201

March 17th, 1981

Honorable Thomas Towe
Montana State Senator
State Capitol Building
Helena, Montana 59601

Dear Senator Towe:

I am sorry that I will not be able to personally attend the hearing in the House Judiciary Committee on your Presumptive Sentencing Bill. However, in my capacity as President of the Montana Judges Association, we endorse your bill. We feel it is a reasonable compromise between our present structure on sentencing and House Bill 10. Your bill will allow us to gain some experience without the tremendous cost that would accompany the passage of House Bill 10.

Please feel free to read this letter to the Committee.

Respectfully yours,

M. James Sorte
District Judge
President, Montana Judtes Association

MJS/cae

Exhibit 2

LEONARD H. LANGEN
DISTRICT JUDGE
SEVENTEENTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA

P. O. BOX 1110
GLASGOW, MONT. 59230
TELEPHONE: 228-2221

March 17, 1981

The Honorable Thomas Towe
Montana State Senator
State Senate Building
Capitol Station
Helena, MT 59620

RE: SENATE BILL 219

Dear Senator Towe:

I received a telephone call from your aid requesting my testimony on SB219 (Presumptive Sentencing) on Monday morning, March 23rd.

I commence a criminal trial in Polson on March 23rd and must decline your invitation, but am sending this letter giving my support for passage of SB219.

My position on sentencing is summed up in Standard 18-2.1. from the American Bar Association Standards for Criminal Justice Second Edition, Volume III. The American Bar Association's Standards for Criminal Justice is the most ambitious and detailed study ever made with private funds.

There is enclosed a copy of Standard 18-2.1. and Standard 18-3.1 for your information.

Please note the words in Standard 18-2.1. as follows:

"* * *.

"(c) The legislature should not specify a mandatory sentence for any sentencing category or for any particular offense.

"(d) The legislature should establish a guideline drafting agency authorized to develop more detailed sentencing criteria and standards and to promulgate presumptive sentencing ranges in order to curtail unwarranted sentencing disparities. Standards addressed to such an agency are set forth in standards 18-3.1 to 18-3.5."

So far as public funding is concerned, the most comprehensive study on the criminal justice system was made by the National Advisory Commission on Criminal Justice Standards and Goals. This study was made possible through a $1.75 million grant of LEAA funds.

I am furnishing you with a copy of page 545 from this report and a copy of page 569. You will observe that this report comes out very strongly against the legislature imposing mandatory sentencing.

I appreciate your interest in making the Montana Criminal Justice System work. Please call upon me if I can be of assistance in the future.

Sincerely,

Leonard H. Langen
District Judge

LHL/js

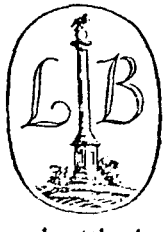
Enclosures

American Bar Association

Standards for Criminal Justice

Second Edition

Volume III



Prepared with the assistance of the American Bar Foundation

Little, Brown and Company Boston Toronto

Nonetheless, the position taken by the Second Circuit in distinguishing retrospective determinations from predictive ones has a basic logic that should not be obscured by focusing exclusively on which reforms would be of the greatest practical benefit to the defendant. The interest of these standards is in improving the reliability of decision making, not erecting barriers for the prosecution, and from such a perspective the introduction of the jury into such long-term commitment decisions seems a reform of dubious value.

PART II. STATUTORY STRUCTURE

Standard 18-2.1. General principles: role of the legislature

(a) The proper role of the legislature with respect to sentencing is a limited one. All crimes should be classified by it for the purpose of sentencing into a small number of categories which reflect substantial differences in gravity. For each such category, the legislature should specify the sentencing alternatives available for offenses which fall within it. The penal codes of each jurisdiction should be revised where necessary to accomplish this.

(b) The legislature should provide sentencing authorities with a range of alternatives, including nonincarcerative sanctions and gradations of supervisory, supportive, and custodial facilities, so as to permit an appropriate sentence in each individual case consistent with standards 18-2.2 and 18-3.2.

(c) The legislature should not specify a mandatory sentence for any sentencing category or for any particular offense.

(d) The legislature should establish a guideline drafting agency authorized to develop more detailed sentencing criteria and standards and to promulgate presumptive sentencing ranges in order to curtail unwarranted sentencing disparities. Standards addressed to such an agency are set forth in standards 18-3.1 to 18-3.5.

(e) Both the legislature and sentencing authorities should recognize that in many instances prison sentences which are now authorized, and sometimes required, are significantly higher than are needed in the vast majority of cases in order adequately to protect the interests of the public. For most offenses, the maximum prison

PART III. SENTENCING AUTHORITY

Standard 18-3.1 Sentencing guidelines

(a) The legislature should establish a guideline drafting agency in the judicial branch empowered to promulgate presumptively appropriate sentencing ranges within the statutory limits. The creation of such a body is recommended because:

(i) unstructured judicial discretion tends to produce unwarranted sentencing disparities among similarly situated offenders;

(ii) guideline ranges facilitate a reduction in the excessive indeterminacy that now characterizes many penal codes; and

(iii) the administrative agency approach makes possible greater flexibility, specificity, and oversight than the legislature could achieve directly.

(b) The proper function of sentencing guidelines is to shape and structure judicial discretion, not replace it with mechanical rules. Accordingly, the legislature should counterbalance this delegation of authority to such an agency with a clear statement of the responsibility of the sentencing court to depart from the applicable guideline range when substantial mitigating or aggravating factors are present that were not adequately taken into consideration by the guideline drafting agency.

(c) The following standards should apply to sentencing guidelines or any similar system of presumptive sentencing:

(i) In recognition that deserved punishment need not necessarily take the form of institutional confinement, a system of guidelines should take into account a variety of sentencing alternatives, including probation, "split sentences," fines, community service, and other intermediate sanctions;

(ii) Except in the case of short-term sentences (where a single guideline range may be appropriate), separate guideline ranges should generally be promulgated for both the maximum and minimum terms to be imposed by the court, since use of such a dual guideline approach reduces the possibility that factors affecting the determination of one term of the sentence will arbitrarily influence the setting of the other term. Different considerations also should apply with respect to the desirable breadth of these two guideline ranges. The guideline range for the maximum term should be relatively narrow and as a general rule should not exceed two years; in contrast, in the case of guidelines applicable to the minimum term, the governing consideration should be to ensure that minimum terms do not so closely approach the maximum so as to prevent the effective operation of an independent system of early release administered by parole or correctional authorities. This question of the desirable degree of indeterminacy which should exist between minimum and maximum terms is more specifically addressed in standards 18-4.1 and 18-4.3, and a scale dependent on the length of the maximum term is there recommended;

(iii) Guidelines should focus on more than the offense of conviction alone, and should seek to relate combinations of offense-offender characteristics to presumptive sentencing ranges; and

(iv) Guidelines should seek to reflect a current community consensus about the relative gravity of offenses. In order to achieve proportionality among offenses, the guideline drafting agency should not rely simply upon historical sentencing averages, but should instead seek to construct a normative ranking of offenses consistent with contemporary community attitudes, subject to the limits imposed by the crime categories established by the legislature (standard 18-2.1(a)). Periodic review of any such offense severity scale in light of changing societal values should also be required.

History of Standard

This standard is new.

Related Standards

NCCUSL, Model Sentencing and Corrections Act §§ 3-110, 3-111

Commentary

Generally

> Nowhere is the problem of sentence disparity more acute than in the American judicial system. Wide sentencing frames, almost complete discretion of the sentencing judge within those frames, and the lack of effective guidelines allow sentences to differ widely for no other reason than that the one was set by Judge A and the other by Judge B.[1]

all offenders may adversely affect public safety rather than enhance it.

Effect of Minimum Sentences on Corrections

Legislatively established minimum terms serve a different function. Since the legislature may contemplate only the offense and not the individual offender when setting the limits of criminal sanction, the promulgation of minimum sentences is unrelated to correctional programming requirements. The diversity, length, and inconsistency of present maximum sentences may account for the present tendency for State legislatures to enact minimum sentences.

The minimum sentence imposed by statute serves only to affect the offender adversely. Since the minimum term generally determines parole eligibility, it prolongs confinement unnecessarily. This overconfinement results not only in ineffective use of valuable resources that might be allocated more appropriately to other offenders but also may undermine seriously the progress of an offender.

The argument that a statutory minimum of 1 year should apply to all felonies represents the theory that a shorter period of confinement does not allow sufficient time for the development of a correctional program. Assuming that the corrections system cannot effectively operate in less than a year, the question remains as to which agency should make that decision. By imposition of a legislatively imposed 1 year minimum, all flexibility within that year is lost. When the judge makes a mistake in terms of correctional needs, the mistake cannot be rectified.

Whether the judge should be authorized to impose a 1-year minimum is a different question. The sentencing judge is in a position to determine on an individual basis if satisfaction of retributive feelings requires that a minimum be imposed. If imposed for that purpose, then judicially imposed minimums are justifiable, regardless of what effect they may have on correctional programming.

If the 1-year minimum is essential for correctional programming purposes, the wisest course would be to adopt by administrative rule a policy of not paroling individuals within the first year except in unusual situations. Thus, the minimum sentence decision based on correctional programming requirements would be made by those responsible and knowledgeable in those programs. This also would allow adequate flexibility for individualized justice.

Effect of Mandatory Sentences on Corrections

There are two important factors in fashioning sentencing provisions: the offender and the offense. The legislature, in enacting a penal code with penalty provisions, can deal only with the offense; the offenders who will be convicted under the provision over the history of its enactment will span the spectrum of guilt. Recently there has been an increase of laws which differentiate between the killing of a policeman and other homicides. The FBI Uniform Crime Reports indicate that persons who kill police officers range from husbands interrupted in the course of a family dispute to deranged persons lying in ambush. No legislature can determine in advance the nature of the offender who will be prosecuted under a particular penalty provision.

In a number of instances, however, legislatures have, because of public reaction to a particular offense, attempted to write mandatory sentences into law. These take the form either of specifying what sanction shall be applied or eliminating certain sentencing or correctional alternatives from consideration. Minimum sentences established by law operate as mandatory provisions since they generally postpone parole.

Legislators should not impose mandatory sentences. They are counterproductive to public safety, and they hinder correctional programming without any corresponding benefit. To the extent that the mandatory provision requires an individual offender to be incarcerated longer than necessary, it is wasteful of public resources. To the extent that it denies correctional programming such as probation or parole to a particular offender, it lessens the chance for his successful reintegration into the community. To the extent that mandatory sentences are in fact enforced, they have a detrimental effect on corrections.

However, mandatory sentences generally are not enforced. The Crime Commission's Task Force on Courts found "persuasive evidence of nonenforcement of these mandatory sentencing provisions by the courts and prosecutors."* Prosecutors who find that an unusually harsh sentence in a particular case is unjust will, through plea negotiations, substantially circumvent the provision. Where lengthy mandatory sentences are imposed, undermanned prosecutors may be forced to alter the charge to obtain guilty pleas, since mandatory sentences leave little incentive for the offender to plead guilty.

Mandatory sentences in fact grant greater sentencing prerogatives to prosecutors than to courts. The result increases rather than decreases disparity in sentences and subverts statutory provisions by a system designed to enforce them. The resulting disrespect for the system on the part of both the

* President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts.* (1967), p. 16.

Standard 16.8

Sentencing Alternatives

By 1975 each State should enact the sentencing legislation proposed in Chapter 5, Sentencing, reflecting the following major provisions:

1. All sentences should be determined by the court rather than by a jury.

2. The court should be authorized to utilize a variety of sentencing alternatives including:

a. Unconditional release.

b. Conditional release.

c. A fine payable in installments with a civil remedy for nonpayment.

d. Release under supervision in the community.

e. Sentence to a halfway house or other residential facility located in the community.

f. Sentence to partial confinement with liberty to work or participate in training or education during all but leisure time.

g. Imposition of a maximum sentence of total confinement less than that established by the legislature for the offense.

3. Where the court imposes an extended term under Standard 5.3 and feels that the community requires reassurance as to the continued confinement of the offender, the court should be authorized to:

a. Recommend to the board of parole that the offender not be paroled until a given period of time has been served.

b. Impose a minimum sentence to be served prior to eligibility for parole, not to exceed one-third of the maximum sentence imposed or be more than three years.

c. Allow the parole of an offender sentenced to a minimum term prior to service of the minimum upon the request of the board of parole.

4. The legislature should delineate specific criteria patterned after the Model Penal Code for imposition of the alternatives available.

5. The sentencing court should be required to make specific findings and state specific reasons for the imposition of a particular sentence.

6. The court should be required to grant the offender credit for all time served in jail awaiting trial or appeal arising out of the conduct for which he is sentenced.

Sentencing legislation should not contain:

1. Mandatory sentences of any kind for any offense.

2. Ineligibility for alternative dispositions for any offense except murder.

Commentary

Distrust of judges appointed by the Crown of England influenced the development of sentencing

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

SENATE

BILL 272 Date 3/23/81

SPONSOR Mazurek

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Larry Wemberg	Helena	D.O.R	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Form CS-33
1-81

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

SENATE

BILL 219 Date 3/23/81

SPONSOR Towe

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Mike McGrath	Helena	Atty Gen	X	

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