MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
March 19, 1981

The forty-seventh meeting of the Senate Judiciary Committee was called to order by Mike Anderson, Chairman, on the above date in Room 331, at 10:00 a.m.

ROLL CALL:

All members were present.

CONSIDERATION OF HOUSE BILL 678:

TO REVISE THE PROVISIONS RELATING TO CITY JUDGES FOR TOWNS.

Rep. Burnett, District 71, presented the bill, saying that the reason for it is an attorney general's ruling opinion which deprived towns of the ability to appoint a city judge.

Dan Mizner, representing the Montana League of Cities and Towns, spoke in support of the bill, saying that there are towns where the nearest justice of the peace is fifty or sixty miles away.

Gary Spaeth also supported the bill by saying that in the town of Joliet it is literally impossible to enforce the laws, and that passage of this bill would help the situation.

Senator Mazurek wondered why the city judge, under this bill, should be appointed rather than elected.

CONSIDERATION OF HOUSE BILL 612:

TO INCLUDE TRANSACTIONS BETWEEN GRAIN CROP PRODUCERS, GRAIN CROP SELLERS, AND GRAIN CROP BUYERS WITHIN DEFINITION OF "BETWEEN MERCHANTS" IN THE UNIFORM COMMERCIAL CODE.

Rep. Bardanouve, District 6, presented the bill.

C. A. Dogterom, representing the Montana Grain Elevator Association, supported the bill by saying the grain industry needs its passage very badly. He said that the changing markets make it necessary for the grain growers to know where they stand from hour to hour. If the market rises rapidly, and the seller of the grain decides that a verbal contract is not in his best interests, he could say that he is not a

Larry Weinberg.

Larry Weinberg, staff attorney for the Department of Revenue, presented a handout (attached Exhibit A) which contained court opinions relevant to the applicability clause of the bill. He said that the bill is intended to provide an unlimited statute of limitations in cases where the taxes have never been filed, and that the principal impact would fall upon out-of-state corporations since Montana corporations can usually be detected every two years. He then proposed an amendment (attached Exhibit B) for page 1, line 23. He offered the cooperation of the Department of Revenue if it is needed to get the bill passed.

Opposing the bill was George Bennett, Helena attorney, who said he did so on behalf of the small corporate taxpayers who might not be aware of this bill. He referred to the King Colony case when insisting that a five-year statute of limitations should remain in effect. He also objected to the retroactive effect of the law. He said that on page 2, line 4, "determination" should instead be "discovery"; and he suggested striking all language following "1980" on page 2, line 10, and amending the title on line 13, following "FOR" by striking the remainder of the title and inserting "PROVIDING FOR AN EFFECTIVE DATE".

Senator O'Hara asked how many corporations would be involved under this bill. Jeff Miller, of the Department of Revenue, said that the impact would be very great, into a million dollars, and would involve a large number of multi-state corporations.

Senator Crippen said it would also affect in-state corporations, large and small, and Jeff Miller agreed. Senator Crippen asked how a corporation would defend itself if it had destroyed its records after a long period of time. Larry Weinberg replied that if a return had been filed, and the D.O.R. assessed the deficiency seven years later, then the D.O.R. would have the burden of proving fraud was involved. With this burden resting with the D.O.R., it would take the pressure off the corporation which had destroyed its records.

Senator Mazurek asked Weinberg if he agreed with Mr. Bennett's choice of "discovery" rather than "determination", and was told there would be no problem with the change.

In closing, Rep. Huennekens said that while hopefully there would be very few Montana corporations which would be affected by this bill, if they were conducting fraud, then they should have to pay the price.

CONSIDERATION OF HOUSE BILL 480:

TO REVISE THE YOUTH COURT ACT.

Rep. Matsko presented the bill as an attempt to make some changes in the youth court act in order to prohibit some of the lawless behavior, to separate felony acts committed by juveniles from ordinary trouble that kids can get into, and to move the handling of these felony acts into district court.

Jeremiah Johnson, representing the Montana Probation Officers Association, said that he supported portions of the bill, and opposed other portions. He presented written comments (attached Exhibit C), and said that on page 10, line 8, the language raised a concern with him relative to cases in which parents can affort counsel but, because the youth and the parents are in disagreement, counsel has to be appointed. He also objected to page 4, lines 12 through 18, because it would allow misdemeanors to be transferred to district court. He felt it should be completely eliminated. On page 14, lines 21 and 22, he recommended "or any branch of the youth court" be deleted, as the probation office does not have the staff to handle these investigations. If the changes are made, his group would support the bill; otherwise, they would have to oppose it.

A letter of opposition written by Karen Mikota, representing the Montana League of Women Voters, was passed out to the committee (attached Exhibit D).

In closing, Rep. Matsko accepted some, but not all, of the changes suggested by Mr. Johnson.

Senator Mazurek asked who retains custody of fingerprint records, and Rep. Matsko said that the individual agencies, such as the city police, sheriff's office, etc., keep the records. Senator Mazurek said that there perhaps was not a sufficient check in obtaining the records, even though a court order is required, since the records are available within the different agencies.

Senator Mazurek asked if a youth could not presently be charged with an attempted offense, and Mr. Johnson referred to his written testimony (attached Exhibit C), specifically the Staplekampr case.

Chairman Anderson asked the committee what they want to do relative to executive sessions for disposing of the outstanding bills. The possibility of a session right after the Senate adjourns this Saturday was discussed, as well as possible night sessions next Monday and Tuesday.

Mike Anderson
Chairman, Judiciary Committee

ROLL CALL

JUDICIARY COMMITTEE

47th LEGISLATIVE SESSION - - 1981 Date 2/March/19, 19

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| ~~Anderson, Mike, Chr. (R)~~ | ✓ | | |
| O'Hara, Jesse A. (R) | ✓ | | |
| Olson, S. A. (R) | ✓ | | |
| Brown, Bob (R) | ✓ | | |
| Crippen, Bruce D. (R) | ✓ | | |
| Tveit, Larry J. (R) | ✓ | | |
| Brown, Steve (D) | ✓ | | |
| Berg, Harry K. (D) | ✓ | | |
| Mazurek, Joseph P. (D) | ✓ | | |
| Halligan, Michael (D) | ✓ | | |
| | | | |
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| | | | |

Each day attach to minutes.

NAME: [illegible] DATE: 3-19

ADDRESS: [illegible]

PHONE: [illegible]758

REPRESENTING WHOM? First Federal of Lincoln

APPEARING ON WHICH PROPOSAL: LB 677

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: I would like to thank Senator Chambers and Judiciary that it is the opinion of First Federal of Lincoln instead of City Bank

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: P. D. LOGTERMAN DATE: 2/1/19

ADDRESS: 8561 MEADOWLARK DR

PHONE: 587-7021

REPRESENTING WHOM: MISSOULA COUNTY PUBLIC SCHOOLS

APPEARING ON WHICH PROPOSAL: HB 7

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? _____

COMMENTS: I SUPPORT THE EFFORT TO PROVIDE ADDITIONAL FUNDING FOR SCHOOL FACILITIES. HOWEVER, I HAVE A NUMBER OF CONCERNS WITH THE BILL AS DRAFTED.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

4/7

NAME: Chris Johansen DATE: 3-19-81

ADDRESS: Great Falls, Mt.

PHONE: 452-6406

REPRESENTING WHOM? Montana Farmers Union

APPEARING ON WHICH PROPOSAL: HB 612

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

WITNESS STATEMENT

NAME Jo Brunner BILL No. SB612

ADDRESS 531 S Oakes DATE 2/19

WHOM DO YOU REPRESENT W.I.F.E.

SUPPORT X OPPOSE AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: We feel that we should be able to sell our produce over the phone and should also be responsible for our actions.

FORM CS-34
1-81

(4)

NAME: Francis Koukoulis DATE: _____

ADDRESS: Tacoma

PHONE: 266-3602

REPRESENTING WHOM? Myself

APPEARING ON WHICH PROPOSAL: 612

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Larry Weinberg DATE: 3/19/81

ADDRESS: Helena

PHONE: 449 - 2852

REPRESENTING WHOM? D. O. R.

APPEARING ON WHICH PROPOSAL: HB 538

DO YOU: SUPPORT? ✓ AMEND? ✓ OPPOSE? _____

COMMENTS: D. O. R supports, bill will rectify a district court ruling concerning the ability of the department to assess back corporate taxes.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

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NAME: GEORGE T. BENNETT DATE: 3/19/81

ADDRESS: P.O. Box 1166 406 FULLER AVE

PHONE: (406) 442-3690

REPRESENTING WHOM? SELF

APPEARING ON WHICH PROPOSAL: H.B. 538

DO YOU: SUPPORT? _____ AMEND? X OPPOSE? _____

COMMENTS: Ask that bill be amended to eliminate retroactive effect.
Amend Page 2, Line 4, strike "determination" and insert "discovery".

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: JEREMIAH F JOHNSON DATE: 3/19/81

ADDRESS: YOUTH COURT PROBATION MISSOULA, MONTANA

PHONE: 721-5700

REPRESENTING WHOM? MONTANA PROBATION OFFICERS ASSOCIATION

APPEARING ON WHICH PROPOSAL: H.B. 480

DO YOU: SUPPORT? _____ AMEND? ✓ OPPOSE? _____

COMMENTS: PLEASE SEE ATTACHED LETTER:

AMEND PAGE 1, LINES 19 & 20 TO CHANGE ~~SHALL~~ TO MAY

PAGE 2, LINES 13 & 14: RECOMMEND DELETE BOTH LINES

PAGE 4, LINES 12 THROUGH 18: RECOMMEND DELETE ALL WORDING IN THESE LINES

PAGE 14, LINES 21 & 22: RECOMMEND DELETE, " OR ANY BRANCH OF THE YOUTH COURT "

PAGE 15, LINE 1: RECOMMEND DELETE, " OR ANY BRANCH OF THE YOUTH COURT "

PAGE 15 LINE 9: RECOMMEND DELETE " OR ANY BRANCH OF THE YOUTH COURT. "

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Exhibit 1

SUPPLEMENTARY MATERIAL IN RETROACTIVE

STATUTES OF LIMITATION

In reviewing a retroactive application of a Minnesota statute of limitation enacted after the prior statute would have barred an action involving the states securities law, the United States Supreme Court in Chase Security Corporation vs. Donaldson, 325 U.S. 304 (1945) declared:

> "Statutes of limitations find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a fundamental right ..." (325 U.S. 304, 314)

The Court went on to declare:

> "Assuming that statutes of limitations like other types types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment. Nor has the appelant pointed out special hardships or oppressive effects which result from lifting the bar in this class of cases with retrospective force. This is not a case where appelant's conduct would have been different if the present rule has been known and the change forseen." (325 U.S. 304, 315)

In a later case, Electrical Workers vs. Robbins and Meyers, Inc., 429 U.S. 229 (1976), the United States Supreme Court quoted Chase Securities with approval and found that Congress could constitutionally provide for retroactive application of an extended limitation period.

The Department of Revenue submits that in the case of delinquent taxes, retroactive application is legally permissible.

Exhibit B

DEPARTMENT OF REVENUE

Legal Division

MEMORANDUM

Date: 3/19/81

TO: Senate Judiciary Committee

FROM: Larry Weinberg

Suggested Amendment

1. Page 1, line 23
2. Following: "tax"
   Insert: " or the date of filing the return, whichever is later,"

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Exhibit C

JOHN S. HENSON
JUDGE

JAMES B. WHEELIS
JUDGE

JACK L. GREEN
JUDGE

DOUGLAS G. HARKIN
JUDGE

# YOUTH COURT

Fourth Judicial District
COURTHOUSE
MISSOULA, MONTANA 59801

JEREMIAH F. JOHNSON
CHIEF PROBATION OFFICER

AREA CODE 406
PHONE 721-5700
EXTENSION 206

March 4, 1981

TO: Members of the Senate Judiciary Committee

FROM: Jeremiah F. Johnson, President
Montana Probation Officers Association

SUBJECT: Comments Regarding H.B. 480

The Montana Probation Officers Association opposes H.B. 480 as it presently stands. There are five major concerns pertaining to this Bill that we are requesting review and four changes. They are as follows:

1. Page 1, lines 18-22 of the Bill states,

> "41-5-206. Transfer to criminal court. (1) After a petition has been filed alleging delinquency, the court ~~may~~ shall, upon motion of the county attorney, before hearing the petition on its merits, transfer the matter of prosecution to the district court if:"

This particular section (transfer to District Court) was incorporated into the Youth Court Act due to Kent v. U.S., 383 U.S. 541 (1966). Morris Kent committed the acts of burglary, robbery, and rape. He appeared before the district court judge of the District of Columbia and jurisdiction of the juvenile court was waived and Kent was transferred to the Federal District Court to be tried as an adult. Kent was found guilty of the charges in an adult court, but three years later, in 1966, his case was overturned in the United States Supreme Court on the basis that the juvenile court judge failed to hold a waiver hearing, he failed to set forth any findings and reasons for the waiver, and Kent's counsel was denied access to social records and other reports which were considered in making the waiver. The Supreme Court held, based on the due process and assistance of counsel clauses of the Constitution, a juvenile is entitled to a hearing and to a statement of reasons as a condition to a valid waiver order by the juvenile court. The statement of reasons should be sufficient to demonstrate that a full investigation has been made and that the question has received the careful consideration of the juvenile court. The statement must set forth the basis for the waiver order with sufficient particularity so as to permit meaningful appellate review. The Court further stated that the juvenile's counsel is entitled to see the social records or other probation

records or other probation reports and to subject them, within reasonable limits, to examination, criticism, and refutation. The opinion also contained an appendix or policy decision which set forth the criteria and the factors which the judge should consider in deciding whether the juvenile court's jurisdiction should be waived. These factors are:

1) Is the offense serious? Does the protection of the community require a waiver?

2) Was the alleged offense committed in an aggressive, violent, premeditated or willful manner?

3) Was the act committed against a person or was it committed against property? The court should attach greater weight if the act was committed against a person especially if personal injury resulted.

4) Is there sufficient evidence against the juvenile upon which a grand jury might be expected to return an indictment?

5) If the juvenile associated with adults in the commission of the crime, is it better to dispose of the entire case in the adult criminal court?

6) Is the juvenile sophisticated and mature and thus able to stand trial in the adult criminal court? To answer this question, the juvenile's home, environmental situation, emotional attitude and pattern of living must be scrutinized.

7) Scrutinize the juvenile's past record.

8) Is it likely that the juvenile can be rehabilitated through the use of facilities available to the juvenile court?

It should be noted that the United States Supreme Court in Kent v. United States, 383 U.S. 541 (1966). has indicated that the waiver of jurisdiction is a "critically important" action determining vitally important statutory rights of the juvenile. In addition, the Court holds "the Juvenile Court Act confers upon the child a right to avail himself of that court's exclusive jurisdiction... it is implicit in [the Juvenile Court] scheme that noncriminal treatment is to be the rule -- and adult criminal treatment, the exception which must be governed by the particular factors of individual cases." Kent, supra at 560.

Since the transfer proceeding has such great impact on the juvenile's life, it is felt that the discretion to transfer should be up to the judge and not be a mandatory decision. It is therefore recommended that the wording in this section of the bill be changed back to may rather than shall.

2. The second issue of concern is on page 2, lines 13 and 14. The language states:

> (x) Attempt as defined in 45-4-103 of any of the acts enumerated in subsections (1)(a)(i) through (1)(a)(ix);

The issue of "attempt" arose in Montana in the case of In The Matter of Staplekampr, 172 Mont. 192, 562 P.2d 815 (1977).

The Montana Supreme Court in Matter of Staplekampr, 172 Mont. 192, 562 P.2d 815 (1977). refused to allow the charge of attempted deliberate homicide to be transferred into criminal court on the grounds of statutory construction. The Court stated that the statute is clear and unambiguous, and that there is no language in the statute which would provide for the transfer of the charge. Matter of Staplekampr, supra, at 198. However, this would indicate that had the statute provided for transfer of the charge of attempt, the court would have found the transfer legitimate.

While we would not argue with the issue of transferring a case on attempted criminal homicide, we would have great concern on transfers to adult court for 16 year old youth on attempted burglary, sexual intercourse, sale of drugs, arson, etc. The latter charges would greatly harm a youth who could be more properly handled in the Youth Court.

3. The third issue to be addressed is whether or not the legislature can change the factors of:

a) sophistication and maturity, page 3 lines 9 - 11;

b) previous history of the youth, page 3 lines 12 - 18; and

c) prospects for adequate protection of the community and the likelihood of reasonable rehabilitation through the use of Youth Court facilities, page 3 lines 20 - 23;

from mandatory to optional in considering the transfer of a juvenile offender to criminal court.

This is a very troublesome issue in current Montana law. An appendix to the opinion of the Court in Kent v. United States, 383 U.S. 541 (1966). enumerated eight criteria for waiver of jurisdiction by the juvenile court and transfer to criminal courts.

The Montana Supreme Court has addressed the issue of whether or not the eight criteria are binding on a Montana Juvenile Court in Lujan v. District Court, 161 Mont. 287, 505 P.2d 896 (1973). The Montana Supreme Court held in that case "that a Montana juvenile court is in no way bound to apply the same standards under the Montana Juvenile Court Act." Lujan v. District Court, supra at 295. It should be noted that this case pre-dated the enactment of the Montana Youth Court Act, which is currently in effect in the State of Montana. However, the Montana Supreme Court has never reversed itself on this point, and it is concluded that this is the state of the law in Montana.

In two subsequent decisions under the current Youth Court Act, the Montana Supreme Court has endorsed the consideration of all relevant factors, including the three factors at issue here.

In the case of In Re Stevenson, 167 Mont. 220, 538 P.2d 5 (1975). the Court stated that the transfer hearing is a critically important phase in youth proceedings. The Court went on to quote from an article by F. Thomas Schornhorst, entitled "The Waiver of Juvenile Court Jurisdiction: Kent revisited," 43 Ind. Law Journal 583, 586:

> ". . . There is convincing evidence that most juvenile court personnel, and the judges themselves, regard the waiver of jurisdiction as the most severe sanction that may be imposed by the juvenile court."

The Court concluded it's opinion by stating that "all factors set forth by statute must be carefully considered and a very deliberate evaluation of each individual case must be effectuated prior to the entry of a waiver order." In Re Stevenson, supra, at 230. It would seem from this case that the Court places considerable emphasis on the evaluation of all the criteria set forth in the statute.

In a later Montana decision the Court again endorsed the importance of considering all factors found in the statute as it is now written, the three factors at issue included. In The Matter of Staplekampr, 172 Mont. 192, 562 P.2d 815 (1977). Additionally, the Court made a reference to the Wisconsin decision of Mikulovsky v. State, 54 Wis. 2d 699, 196 N.W. 2d 748 (1972). In that case, the Supreme Court of Wisconsin seemed to adopt the eight criteria expressed in Kent v. United States, supra. In a footnote by the Court in Mikulovsky v. State, supra, the Court stated that "[a]lthough the court in Kent did not expressly adopt these criteria, the fact that they are appendixed to the court's opinion suggests their appropriateness as guidelines for juvenile court waiver proceedings." Mikulovsky v. State, supra at 751.

The foregoing would seem to indicate, although not conclusively, that the Montana Supreme Court, if faced with the issue, would hold that the factors in question should be considered in all juvenile transfer proceedings; due to the Court's endorsement of them in the recent past and expressions by the Court regarding the consequences of transfer to criminal court.

It should be noted that the reference to Mikulovsky v. State, supra. did not expressly adopt the holding, and should not be considered a change in the position of the Court as expressed in Lujan v. District Court, supra.

On page 3, line 7, we feel that in transferring the matter of prosecution to the District, the Court should have may rather than shall even though there may be sufficient argument to leave it as shall.

4. The fourth issue on page 4 lines 12 - 18 should be deleted entirely. This proposed change would enable additional offenses not enumerated in the list of serious crimes in sub-section (1)(a) that arise during the commission of a crime to also be transferred to adult court. The same argument that applied in the attempt issue arises again here. It would be grossly unfair to transfer a youth on one of the other charges including attempt and have additional charges tacked on to the information. Theoretically, the youth could be found innocent of the original charge but guilty, as an adult, on a less serious charge that could have been handled in the Youth Court.

5. The final comments regarding H.B. 480 pertain to page 14 lines 18 - 25, and page 15 lines 1 - 4 and 8 - 14. These sections amend the financial investigation by county welfare to include "any branch of the Youth Court". This section of law is already adequately handled by the welfare department and they have the staff to properly conduct a financial background check. The youth courts do not have the staff to adequately conduct these checks and it would draw officers time away from working with youth in order to conduct a financial background check on cases in which welfare would already be working on. It is recommended that "or any branch of the Youth Court" be deleted from page 14, lines 21 and 22; and page 15, line 1 and line 9.

Thank you for your consideration of the changes regarding this bill.

Exhibit D

406 North Ewing
Helena, Montana
March 19, 1981

Senator Mike Anderson
Senate Judiciary
Capitol Bldg.

Dear Chairman Anderson and Members of the Senate Judiciary,

The LWV of Montana opposes HB 480. We ask that you closely consider the amendments to the law found on pages 1,2,3, and 10 as well as the intent of the bill in its entirety.

Our major opposition stems from the treatment of prior Juvenile Justice legislation. Substantive bills dealing with the juvenile system have been killed with the understanding that an interim study will be established. We urge consideration of the entire juvenile system, adjudicative procedures through incarceration and treatment programs. The result would be to revise or create a system rather than having to work with bits and pieces.

For these reasons we request a Do Not Pass on HB 480.

Thank you for your attention.

Sincerely,
Karen Mikota
Karen Mikota
League of Women
Voters of Montana

(17)

DATE March 19, 1981

COMMITTEE ON JUDICIARY

HB678
HB 612
HB 538 HB 480

VISITORS' REGISTER

| NAME | REPRESENTING | BILL # | Check One: Support | Check One: Oppos |
|---|---|---|---|---|
| Gary Spratt | SELF | HB678 | ✓ | |
| Dan Brown | MT Assn of Churches | HB480 | | |
| Jerry McNutt | Columbia Grain Inc | 612 | ✓ | |
| | | | ✓ | |
| | | | | |
| Roy Bjorgen | MT. Dept. of Agri | 612 | | |
| G. Brunner | W.L.C. | 612 | ✓ | |
| B.M. Gramble | | | | |
| Frank Bennett | Sussex Elementary School | | | |
| Larry Weeby | D.O.R. | 538 | ✓ | |

(Please leave prepared statement with Secretary)