MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

January 18, 1985

The ninth meeting of the Senate Judiciary Committee was called to order at 10:05 a.m. on January 18, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present, with the exception of Senator Galt, who was excused.

Chairman Mazurek turned the chair over to Vice Chairman Daniels while he excused himself to testify on the bill which was to be heard before the committee as he was the sponsor.

CONSIDERATION OF SB 90: Senator Mazurek stated he was introducing SB 90 at the request of the Montana County Attorneys' Association and, in particular, Lewis and Clark County Attorney, Mike McGrath. Senator Mazurek stated this bill is entirely new law and does not amend any existing sections. Its purpose is to establish a procedure for mutual and reciprocal discovery in criminal cases. He stated that in the civil trial setting, there are expansive discovery procedures by which both sides learn in advance of trial what the other side will use as evidence. Although under the current practice, the prosecution makes all of its witnesses available for interviewing by the defense, the defense does not share that obligation. Senator Mazurek believes the prosecution is at a considerable disadvantage. He stated we have had bills which are not as extensive as this in the past, and it has been argued in opposition to those bills that surprise is the only defense, because the state has so many resources. Senator Mazurek believes providing a defense goes further than just hiring counsel. He believes defendants have the ability to hire experts. In light of those real life situations, he does not think that argument holds water. This bill provides that both sides would share the information that is developed. Senator Mazurek then walked the committee through the bill and stated it is a new one which is modeled after procedure that is in place in the state of Arizona.

PROPONENTS: Mike McGrath, Lewis and Clark County Attorney and a member of the County Attorneys' Legislative Committee, spoke in favor of SB 90. Mr. McGrath stated this bill is probably the most significant and at least one of the most important criminal justice bills the committee will hear this session, because it is an issue of fairness to the people that are represented by the prosecution and an issue of fairness to

the jury. He believes it will assure that the jury gets all of the relevant information that is available. Under section 1, those provisions that allow information about electronic surveillance and search warrants are new provisions and expand the rights of the defendant. Section 3 includes items the defendant must presently expose. That is a new provision, but the prosecution's right to it currently exists under present case law. Court decisions say the fifth amendment provisions do not apply to non-testimonial things. Mr. McGrath stated this bill adds another right to the defendant--the right to have his counsel present when those things are done. Section 3, subsection 2, talks about the things the defendant must provide in terms of alibi and self-defense. Those are existing law. The two new additions are they have to give notice if they will use the defense of character or mistaken identity. Mr. McGrath felt section 3, subsection 3, is probably the most important. It requires the defendants disclose who their witnesses will be at trial. Mr. McGrath indicated the court can issue a protective order and preserve the defendant's rights through that method. Mr. McGrath stated you need to be prepared for a trial; successful litigants will spend four to ten times as much time preparing for a trial as they do in trial. In the criminal system, the prosecution opens up its files and gives all of its information to the defense attorney and then geta nothing in return. The prosecution has no idea who the defense witnesses will be or who their experts will be. This bill will resolve that. Mr. McGrath stated one thing the committee will hear about or there will be concern expressed about is whether or not this bill is constitutional, whether it violates the defendant's fifth amendment rights to self incrimination. He stated there are numerous courts that have upheld very similar provisions such as we have here. Ed McLain, Deputy County Attorney from Missoula and a member of the Legislative Committee of the County Attorneys' Association, appeared in support of SB 90. He stated that as Mr. McGrath pointed out, the courts have reviewed this matter several times, and it has not been held to violate any constitutional tests as to the rights against self incrimination. The legislature in prior discovery statutes has commented on the idea behind discovery and the legislative intent. He referred to the comment under Section 45-15-302, MCA, under the compiler's notes. He believes the problem is that in every matter that would be coming before the court, they are tied up in lengthy discovery hearings. This bill would clarify the matters that are discoverable, thus getting at the issue at hand rather than be subjected to matters that may come as a surprise at trial. The rules of civil procedure make things adequate and open. In criminal procedures, some feel there is a necessity that the defendant have the element of surprise available to them. In his opinion, we should be able to get at the issues at hand. Mr. McLain quoted Justice Brennan of the United States Supreme Court, where in the Washington Law Review Quarterly he asked if a trial is a sporting event or a quest for the truth. Mr. McLain wants complete discovery on both sides. John

Connor, Jefferson County Attorney, appeared in support of SB 90. He stated that when he became a prosecutor, he was struck by the disparity that exists between the prosecution and the defense as to discovery. He spends a considerable amount of his time documenting the information he is trying to provide to the defense and making sure he has a record that he has provided it. In return for all of that expenditure of time, he gets nothing in return. He believes the disparity creates problems in the delivery of the justice process itself. He questioned why we cared about this and stated we care about it because as Mr. McLain quoted from Justice Brennan, a trial is a search for the truth. If that is true, then Mr. Connor doesn't feel there is any place for a tactic of surprise if the people that are trying to deliver that truth to the jury. He doesn't think that the constitutional and statutory provisions they afford defendants should allow people who are guilty of some offense to miss responsbility. He thinks on the whole it is an excellent piece of legislation. Mark Racicot, from the Montana Attorney General's office, appeared in support of the bill. Mr. Racicot stated that in Montana at the present time, we do not have a consistent set of rules employed by our courts. Mr. Racicot explained a different set of rules applies in different districts as you go across the state. We do not have a pattern of criminal discovery rules contained in one area in our code. SB 90 is an effort to do that. The constitutional limitation has been addressed by the Arizona Supreme Court and other courts. The most critical area of the bill is in requiring the defendant to provide a list of his witnesses. SB 90 is intended to provide good faith discovery on a reciprocal basis. They think it will reduce surprise, it will provide a fair adversary system, and it will strengthen the integrity of that system. It, more than any other piece of legislation, will provide us with the opportunity to make a better system. This piece of legislation is based on Arizona law, which has been upheld as constitutional. It does not violate the defendant's rights. The bill from a constitutional perspective requires the parties to disclose information they would ultimately reveal in the future anyway. Mr. Racicot doesn't think either side should have something to hide.

OPPONENTS: Karl Englund, attorney from Missoula representing the Montana Trial Lawyers' Association, stated they support some provisions of the bill and have some concerns about others. He asked that the committee members remember that in a criminal trial unlike a civil trial, the defendant's attorney is put in a position where his responsibility is to react to the case put on by the state because the state carries the burden of proof and the defendant is under no compulsion to provide any evidence or testimony to help the state meet its responsibility. Mr. Englund stated a major part of a case from the defense aspect is reaction to the state's case; the defendant may not know exactly what it's going to do until it sees things develop at trial. Section 2, subsection 2(1)(a), is already information that is given to

the defendant in the information. The rest of the information may not be available 10 days after the arraignment. Mr. Englund stated that all of the things listed in Section 3, subsection 1, are already available from the defendant, but it probably is a good idea to codify it in the law. Subsection 3 expands the current notion of what defenses the defendant must give the state notice and includes the good character and mistaken identity defenses. Mr. Englund believes good character may be a reactionary defense. Subsection 4 gives the Montana Trial Lawyers Association the most trouble. All of the information that needs to be provided in that section needs to be provided 20 days after arraignment, which time frame is very unrealistic, particularly in light of the fact the vast majority of cases are defended by attorneys who have a tremendous case load. As to the question of the constitutionality of providing this information, Mr. Englund doesn't think it is as cut and dry as the county attorneys led the committee to believe. Several states have held this type of statute to be unconstitutional infringement on the defendant's fifth (self incrimination) and sixth (competent assistance of counsel) amendment rights. Other case law from the Arizona Supreme Court indicates some of the sanctions in the bill cannot necessarily be applied due to the fourteenth amendment (due process) rights and sixth amendment rights. Mr. Englund believes the statute may not accomplish what is trying to be accomplished here, because defense counsel will be providing large, all inclusive lists of names to preserve their rights, particularly with these quick time frames. He believes there are those problems, but there are also other sections that are good.

QUESTIONS FROM THE COMMITTEE: Senator Blaylock questioned Mr. Englund about his main objection to the 20-day stipulation. Senator Blaylock asked what he thought would be reasonable. Mr. Englund responded 40 or 60 days would be much more realistic. Senator Shaw asked Mr. Englund what are the six states that have declared this unconstitutional. Mr. Englund responded Illinois, Indiana, Kansas, New York, Washington D.C., and possibly New Jersey. Senator Shaw asked if he thinks this would help to speed up trials or does he think it would make it worse. Mr. Englund responded if a situation were to cause a substantial surprise, it would cause substantial delays, although he has been involved in cases where the defense will put on a witness and the judge will allow a short recess for examination. Senator Pinsoneault asked Mr. Englund whether he had served as a prosecutor. Mr. Englund responded negatively. Senator Pinsoneault then asked when he spoke for the Montana Trial Lawyers Association, he was speaking for the concensus of the membership. Mr. Englund stated his obligation is he has a list of people he checks with on criminal bills as they come up. The problems he pointed out are the problems they brought up. Senator Pinsoneault asked what "reaction" had to do with a fair trial. Mr. Englund stated a major part of a defense attorney's job has to do with reacting and

making sure the prosecution proves every aspect of his case beyond a reasonable doubt. Senator Pinsoneault stated he just doesn't know what that adds to the process; believes they should get the discovery over with and get on with the trial itself. Senator Pinsoneault asked how this compared with the federal rules. Mr. McGrath stated he was not entirely sure. As he understands the federal rules, there is little discovery on either side, and he believes in criminal proceedings, the federal rules are archaic. Senator Towe stated he is generally impressed with the drafting of the bill and the approach that it takes, although he has some sensitivity to items in section 3, subparagraphs (a) through (h). He asked if those were all approved constitutionally at this time. Mr. McGrath stated the prosecution is entitled to all of those items right now. As they are not testimonial items, the court allows them to be discoverable. The American Bar Association standards on criminal justice also list those items and say the prosecution should be entitled to them. Senator Towe asked how that is handled mechanically in this bill. Mr. McGrath stated it is not handled in the bill; counsel must work it out informally. He explained that what they do now is get a search warrant. Senator Towe asked if there were resistance, must you go into court and get an order. Mr. McGrath stated no, although he would go into court and ask for an order requiring them to do that. Not use contempt. As witnesses become available, it is an ongoing process up to the point of trial. As more witnesses become available, the list is updated. Senator Towe questioned what page 9, lines 22 and 23, referred to. Mr. McGrath stated the identity of an informant.

CLOSING STATEMENT: Senator Mazurek wanted to respond to the question raised by Senator Blaylock and stated the 20-day period is only a starting point where the information has to be commenced to be shared. He believes arraignment is sometime down the road from arrest, so you may be a month after the offense before you are in a position to begin producing anything. He thinks the bill has been adequately discussed, and it will move the process along more expeditiously and fairly.

Hearing was closed on SB 90.

ACTION ON SB 2: Mr. Petesch explained that the amendments submitted (see Exhibit 1) were suggested yesterday by Senator Towe. Senator Crippen asked if you leave section 6 out of the bill, were you providing that a person over 19 can actually possess booze. Senator Towe stated it is not a crime to possess booze and referred to Section 16-6-305, MCA. Senator Towe stated a person over 19 should not be guilty of a crime for possession. He explained that if his fifth amendment were passed, it would not be an offense for the child to possess. Mr. Petesch stated he had a question regarding the licensing provision and wondered if we might be taking away someone's license. Senator Crippen asked if we were going to try to provide some penalty to a person under

the age of 21 for possession of alcoholic beverages. SB 3, as the committee passed it yesterday, may raise the legal age for purchasing, consuming, or possession. If we are going to be consistent with the constitutional amendment, this should do the same. Senator Mazurek stated there are some problems with the existing penalties for minors. Senator Towe moved that his proposed amendments be adopted and left open whether it would be advisable to have further clarification language to comply with the federal law which requires us to prohibit purchase and public possession, but not the existing law which allows a parent or guardian to give alcohol for beverage or medicinal purposes to a person under 21 years of age or a physician or dentist to give it for medicinal purposes. Senator Brown addressed amendments #2 and #6. He questioned if you made it contingent on something the federal government does, wouldn't you run into problems. Senator Towe stated when you say when the federal law changes, we change, then you are delegating authority to the federal government, but if you put it on one event, you are not. Mr. Petesch stated you are not delegating the same type of authority, and there is some precedence for this type of effective date (the BPA power line taxation matter). Senator Shaw offered a substitute motion that we strike all of #2 and #6. Senator Crippen stated one of the compelling reasons to do this is the loss of funds. As he sees it, we are delaying the effective date until the South Dakota case is resolved. Senator Pinsoneault stated we are all in agreement that the federal government is screwing us around. He asked if anyone had joined South Dakota. Mr. Petesch stated no, he is not aware of anyone's doing so at this time. Senator Pinsoneault stated he was not in favor of being a sacrificial lamb or of jeopardizing highway funds. Senator Towe stated this bill cannot take effect until January 1, 1986. Senator Blaylock stated Wyoming has refused to go along with the federal government's mandate. He suggested the state legislature should have the right to set the drinking age. Senator Shaw stated we are talking about withholding and blackmail. He is opposed to this section, because he thinks the drinking age should be 21. Senator Mazurek asked Senator Towe if we would have problems regarding what's private and what's public possession. Senator Towe addressed the issue of whether we should delay the effective date. He was inclined to support his position that we should do the best job we can to get the people to adopt this. He feels by amending this, we can--with this, you have a better chance of selling it to the public. Senator Crippen stated in trying to sell it to the public, we should present the proposition to the public and let them decide. He believes there are two issues here--Senator Shaw's is the other issue. The people should have the right to determine whether people under the age of 21 should have the right to drink. The question was called for. A roll call vote indicated the motion to adopt Senator Towe's proposed amendments #2 and #6 failed (see Exhibit 2). Chairman Mazurek then stated the committee would address the remainder of Senator Towe's amendments. Senator Towe stated the amendments would keep the

age 21 in the bill and put in an exception as provided in Section 16-6-305, MCA--it would not be unlawful for a parent or guardian to give a person under the age of 21 alcohol for beverage or medicinal purposes or for a physician to do so. Amendment #5 would strike all of section 6, which would mean that we would leave the age of 19 in the unlawful possession statute, which means it would be unlawful for a person under the age of 19 to possess, but it would be permissible for someone 19 or 20 to do so if it complies with the language at the top of page 7. Senator Towe questioned whether a separate section was needed to define public possession. Senator Crippen asked for clarification that if the committee were to strike section 6, then private possession of alcoholic beverages by an individual between the ages of 19 and 20 would be legal. Senator Towe responded yes. Senator Crippen asked how they would define something other than public possession. Senator Towe stated if we were to add additional language deciding that public possession was still a crime, we would then have to define the word, public possession. Senator Towe stated he was impressed with Mr. Males' testimony that those states that put everything in one basket, there's where you have a large amount of drinking and accidents following, but if you have graduated drinking, it is lower. Mr. Petesch stated there may be a concept of public versus private law already in existence. Section 16-6-305, MCA, allows a parent or physician to give a beverage to a person under age. The rest deals with it being a misdemeanor to invite a person into a public place and buy him a drink. Public places exist, but they are not defined already. Senator Mazurek addressed amendment #4 and stated there is no exception within the criminal statute and there should be an exception for a parent as is already provided. Senator Towe's motion to adopt his amendments having been divided into three parts, a motion to adopt amendment #4 carried unanimously. Senator Shaw moved that the committee not concur in amendments #1, #3, and #5 as a substitute motion. Senator Yellowtailed asked if these amendments created a situation that was in any stretch of the imagination enforceable. Senator Towe responded no more difficult than the present law. Senator Towe thinks there is much merit in making it a two-phased process. Senator Brown stated that as a practical matter, it is not enforceable now and it would have a great effect on college compuses as you will greatly increase the number of kids that will belong to sororities. The motion to not concur in amendments #1, #3, and #5 failed as indicated by the roll call vote attached as Exhibit 3. Senator Towe moved that SB 2 be amended as follows:

Page 10, line 9.
Following: "in"
Strike: "(LC 100)"
Insert: "Senate"

Page 10, line 10.
Following: "No."
Insert: "3"

The motion carried unanimously. Senator Crippen questioned whether this piece of legislation made it illegal to consume alcoholic beverages under the age of 21. Mr. Petesch stated he is not aware of how you consume alcohol without possessing it at some point. Senator Towe moved that SB 2 be amended as follows:

Title, line 5.
Following: "CONSUMING"
Insert: ", PURCHASING, OR POSSESSING"

The motion carried unanimously. Senator Shaw moved that the committee recommend SB 2 DO PASS AS AMENDED. A roll call vote indicated the motion carried (see Exhibit 4).

TABLING OF SB 98: Senator Crippen moved SB 98 be TABLED, which motion carried unanimously.

There being no further business to come before the committee, the meeting was adjourned at 12:10 p.m.

Chairman

ROLL CALL

SENATE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985 Date 01/88

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt			X
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe	X		
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels	X		
Chairman Senator Joe Mazurek	X		

DATE January 18, 1985

COMMITTEE ON Judiciary

VISITORS' REGISTER SB 90

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Mike McGrath	County Attys		✓	
Marc Racicot	"		✓	
John Connor	County Attorneys		✓	
Mike Edwards	MT. Trial Lawyers			✓
Joe Roberts	Attorney General		✓	
Susan Cottingham	ACLU			

(Please leave prepared statement with Secretary)

PROPOSED AMENDMENTS TO SB 2:

1. Title, line 5.
Following: "FOR"
no Insert: "PURCHASING, PUBLICLY POSSESSING, OR"

2. Title, line 10.
Following: "ELECTORATE"
no Insert: "AND THE FEDERAL LEGISLATION THREATENING THE STATE WITH LOSS OF HIGHWAY FUNDS IS UPHELD"

3. Title, line 11.
no Following: "16-6-314"
Insert: "AND"
Following: "45-5-623,"
Strike: "AND 45-5-624,"

4. Page 8, line 25.
Following: "age"
yes Insert: ", except as provided in 16-6-305"

5. Page 9, line 12.
Following: line 11
no Strike: Section 6 in its entirety
Renumber: subsequent section

6. Page 10, lines 13 and 14.
Following: "effective"
no Strike: remainder of line 13 through "effective" on line 14
Insert: "only if section 6(a) of Public Law 98-363 (23 U.S.C. § 158) requiring the secretary of transportation to withhold highway funds from states allowing the purchase or public possession of any alcoholic beverage by a person who is less than 21 years of age is ultimately upheld as constitutional in State of South Dakota v. Elizabeth H. Dole, Secretary, U.S. Department of Transportation, civil action No. 84-5137, U.S. District Court, District of South Dakota, Western Division"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 011385
BILL NO. SB 2

secretary and chairman. Have at least 50 printed to start.)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 011885 Senate Bill No. 2 Time 11:40 am

NAME	YES	NO
Senator Chet Blaylock	X	
Senator Bob Brown	X	
Senator Bruce D. Crippen		X
Senator Jack Galt		
Senator R. J. "Dick" Pinsoneault		X
Senator James Shaw		X
Senator Thomas E. Towe	X	
Senator William P. Yellowtail, Jr.		X
Vice Chairman Senator M. K. "Kermit" Daniels	X	
Chairman Senator Joe Mazurek		X
	(4)	(5)

Cindy Staley
Secretary

Mazurek
Chairman

Motion: Motion to adopt Sen. Towe's amendments #2 & #6

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 011885
BILL NO. SB 2

secretary and chairman. Have at least 50 printed to start.)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 011885 Senate Bill No. 2 Time 12:02 pm

NAME	YES	NO
Senator Chet Blaylock		X
Senator Bob Brown	X	
Senator Bruce D. Crippen	X	
Senator Jack Galt		
Senator R. J. "Dick" Pinsoneault	X	
Senator James Shaw	X	
Senator Thomas E. Towe		X
Senator William P. Yellowtail, Jr.	X	
Vice Chairman Senator M. K. "Kermit" Daniels		X
Chairman Senator Joe Mazurek	X	
	(6)	(3)

Secretary Cindy Staley

Chairman Mazurek

Motion: In favor of not adopting Towe's amendments #1, #3 + #2.5

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 011885
BILL NO. SB 2

(Type in committee name) ...
secretary and chairman. Have at least 50 printed to start.)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 011885 Senate Bill No. 2 Time 12:07

NAME	YES	NO
Senator Chet Blaylock		X
Senator Bob Brown	X	
Senator Bruce D. Crippen	X	
Senator Jack Galt	X	
Senator R. J. "Dick" Pinsoneault	X	
Senator James Shaw	X	
Senator Thomas E. Towe	X	
Senator William P. Yellowtail, Jr.	X	
Vice Chairman Senator M. K. "Kermit" Daniels		X
Chairman Senator Joe Mazurek	X	
	(8)	(2)

Cindy Staley
Secretary

Chairman

Motion: SB 2 Do Pass As Amended

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 011885
BILL NO. SB 2

STANDING COMMITTEE REPORT

January 13 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE BILL No. 2

first reading copy (white color)

AMEND DRINKING AGE LAWS TO AGE 21 TO CONFORM TO CONSTITUTIONAL AMENDMENT

Respectfully report as follows: That SENATE BILL No. 2

be amended as follows:

1. Title, line 5.
Following: "CONSUMING"
Insert: ", PURCHASING, OR POSSESSING"

2. Page 8, line 25.
Following: "age"
Insert: ", except as provided in 16-6-305"

3. Page 10, line 9.
Following: "in"
Strike: "[LC 100]"
Insert: "Senate"

4. Page 10, line 10.
Following: "No."
Insert: "3"

AND AS AMENDED

DO PASS

~~XXXXXXXXXX~~

Chairman.