MINUTES

MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Senator Bill Yellowtail, on March 4, 1993, at 10:02 a.m.

ROLL CALL

Members Present:

Sen. Bill Yellowtail, Chair (D)
Sen. Steve Doherty, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Chet Blaylock (D)
Sen. Bob Brown (R)
Sen. Bruce Crippen (R)
Sen. Eve Franklin (D)
Sen. Lorents Grosfield (R)
Sen. Mike Halligan (D)
Sen. John Harp (R)
Sen. David Rye (R)
Sen. Tom Towe (D)

Members Excused: NONE

Members Absent: NONE

Staff Present: Valencia Lane, Legislative Council
Rebecca Court, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing:	HB 68
	HB 134
	HB 151
	HB 255
Executive Action:	HB 68
	HB 151
	HB 66
	HB 67

HEARING ON HB 68

Opening Statement by Sponsor:
Representative Fagg, District 89, told the Committee that HB 68 was brought by the County Attorneys Association. Currently the statute says "within 10 days after an omnibus hearing in District

Court, the defendant has to give over all of the information." HB 68 changes it to say, "within 30 days after the arraignment." The purpose is to make sure information is passed over to the prosecution in a timely manner. Rep. Fagg said that sometimes judges do not hold omnibus hearings until right before the trial. Rep. Fagg said with the old language, sometimes the prosecution would not get information until right before trial. In those cases, the prosecution does not have time to interview witnesses of the defense, and those sorts of things. HB 68 says "within 30 days after the arraignment, or at a later time as the court may permit, the defendant passes over information.

Proponents' Testimony:
Randy Hood, standing in for John Conner, Montana County Attorneys Association, said HB 68 is one of five pieces of legislation that is being proposed by the Montana County Attorneys Association. Ms. Hood said HB 68 takes care of a problem that arose with the passage of the Criminal Procedure Bill that was passed two years ago. Two years ago a provision was codified for an omnibus hearing in each criminal case prior to trial. An omnibus hearing is a hearing held between the judge, the prosecutor, and the defense attorney to deal with various issues that would arise in trial and any motion that would be brought forward. Under present law, the hearing is held not less than 30 days before trial. In the Criminal Procedure Bill there was a time frame set for the defense to give notice of its affirmative offense and of witnesses that would be called in support of a defendant. The notice was set to be within 10 days after the omnibus hearing. That would mean if the court waits 30 days before trail to have the omnibus, the defense would not be required to give its notice of affirmative defenses until 10 days after the hearing or only 20 days before trial. Ms. Hood said most counties hold the omnibus hearing close to the 30 day limit. When that happens the prosecution is required to turn over everything the defense wants, but the defense only has to turn over information relating to the affirmative defense. HB 68 copies the law the way it was before the Criminal Procedure Bill. HB 68 requires the defendant to give notice of affirmative offenses within 30 days of arraignment. HB 68 would not impose problems for defense attorneys and would make the situation more fair in a general way. Ms. Hood urges support in HB 68.

Russell Hill, Montana Trial Lawyers Association, said HB 68 is a good way to fix the problems in the Criminal Procedure Bill.

Opponents' Testimony:
NONE

Questions From Committee Members and Responses:
Senator Towe asked Ms. Hood whether listing all witnesses and exhibits within 30 days would be a burden for the defense. Ms.

Hood said that it would not be a burden.

Senator Towe asked Ms. Hood about witnesses that were not listed by the defense. Ms. Hood said on page 2, where the time line change is made it says "or a later date as the court may, for a good cause permit." Ms. Hood said that would allow a prosecution to deal with witnesses that were later discovered.

Closing by Sponsor:
Rep. Fagg said he would appreciate support for HB 68.

EXECUTIVE ACTION ON HB 68

Motion/Vote:
Senator Blaylock moved HB 68 BE CONCURRED IN. The motion CARRIED UNANIMOUSLY.

HEARING ON HB 255

Opening Statement by Sponsor:
Rep. Anderson, District 81, said HB 255 was introduced as a result of a Supreme Court case, Foucha vs. Louisiana. The case stated that the way we presently keep mentally incompetent people is unconstitutional. Currently, it is required that a person has to prove, by a preponderance of evidence, that they are no longer mentally incompetent in order to be released. The Foucha case replaces the burden on the person, and places the burden on the state to show clear and convincing evidence that the person is still mentally insane in order to be kept in a mental institution. Rep. Anderson said there are eight cases that are being brought against the State of Montana challenging the state that they are being unconstitutionally held in light of the Foucha case. Rep. Anderson said if HB 255 is passed it would make those cases mute. Rep. Anderson submitted and explained amendments. (Exhibit #1)

Proponents' Testimony:
Kimberly Kradolfer, Assistant Attorney General, read from prepared testimony. (Exhibit #2)

Dan Anderson, Department of Corrections & Human Services read from prepared testimony. (Exhibit #3)

Kelly Morrison, Executive Director of the Mental Disabilities Board of Visitors, said they support HB 255 with amendments. Ms. Morrison had some suggested revisions for HB 255. Ms. Morrison said that on page 5, line 2, reference is made to the burden being placed on the Department of Corrections and Human Services. Ms. Morrison suggested that the current wording be changed and that the burden be placed upon the state. Ms. Morrison said that

if a person is no longer mentally ill or dangerous there would be no basis to restrict liberties. Therefore the Board suggests that on page 8, line 22, the sentence end with the word "discharged," then delete the remainder of the sentence. Ms. Morrison supports HB 255 with the revisions and the amendments proposed by the Department of Corrections & Human Services.

Opponents' Testimony:
NONE

Questions From Committee Members and Responses:
Senator Blaylock asked Ms. Kradolfer if she objected to the revisions suggested by Ms. Morrison. Ms. Kradolfer said no.

Senator Towe asked Ms. Kradolfer about the people who this law would affect. Ms. Kradolfer said there are nine people who have currently been acquitted. Under the statute on mental diseases and defect, as a defense, those people have been found not guilty by reason of mental disease or defect. Ms. Kradolfer said those people are currently placed at the hospital and a few of them have been there for 12 years. Unless they can prove themselves no longer a danger, then they are placed at the hospital forever.

Senator Towe asked Ms. Kradolfer if the defense of mental disease and defect was abolished. Ms. Kradolfer said yes, in 1979. However, it is still a defense, but is restructured. Ms. Kradolfer said that the state does not have an insanity defense, but if a person can show at the time of the defense they could not have a requisite mental state, then an insanity plea would apply.

Senator Towe asked Ms. Kradolfer if the change of the burden of proof was from the Foucha case. Ms. Kradolfer said yes. Ms. Kradolfer said Foucha changed the burden to the state and it changed it to clear up "clear and convincing" evidence. Foucha also requires that any continuing commitment be based upon a persons continued dangerousness because of mental disease or defect.

Senator Towe asked Ms. Kradolfer if the conditional release provision was taken from the Foucha case. Ms. Kradolfer said yes. Currently, if a person is caught doing something wrong that is not at all related to mental disease or defect, they would get pulled back into the state hospital. Ms. Kradolfer said that if a person has not been convicted of an offense they should be entitled to the same civil liberties as everyone else, unless they have mental illness that justifies commitment and treatment.

Senator Towe asked Ms. Kradolfer about the burden of proof. Ms. Kradolfer said the burden would always be on the state to continue the commitment and to justify continued commitment.

Senator Towe asked Ms. Kradolfer about substantial property damage. Ms. Kradolfer said substantial property damage would not be in and of itself a basis for commitment. The person would have to be suffering from mental disease and defect which caused that person to engage in conduct that resulted in substantial risk of serious bodily injury, death, an imminent threat of injury, or substantial property damage.

Senator Towe asked Ms. Kradolfer if the threat or risk of property damage is a basis for commitment under HB 255. Ms. Kradolfer said it is not the intent of HB 255 that substantial property damage must have actually occurred. Ms. Kradolfer said that may indicate that a person is a greater risk to themselves or others, rather than someone who had not engaged in that type of conduct.

Senator Towe asked Ms. Kradolfer about the circumstances on which a person would not be released from a hospital. Ms. Kradolfer said the person would have to either caused a substantial risk of serious bodily injury, an imminent threat of injury to a person, or caused substantial property damage.

Senator Towe asked Ms. Kradolfer about the commitment provision. Ms. Kradolfer said under the current Criminal Commitment Statute, if a person is acquitted and commits any kind of offense, that person could be put in a hospital. Ms. Kradolfer said the reason substantial property damage is in the provision is to have a cut off so the court cannot use any kind of criminal act to trigger a higher level of scrutiny. If an offense was serious, the court would be allowed to keep close tabs on a person; however, if the offense was for a minor property crime the court would not be able to keep track of a person.

Closing by Sponsor:
Representative Anderson closed.

HEARING ON HB 134

Opening Statement by Sponsor:
Representative Peterson, District 1, said HB 134 sets up a plan to suspend or revoke certification. Rep. Peterson said there were two main parts to HB 134. Rep. Peterson said the first change is on page 2, line 6, regarding misdemeanor fines punishable by $25. Rep. Peterson said the meat of HB 134 is on page 7, subsection b, regarding the revocation or suspension of certification of police officers.

Proponents' Testimony:

Gene Kiser, Montana Board of Crime Control, said HB 134 would develop procedures for revoking or suspending the certification

of peace officers that are currently being issued by the Board to peace officers, detention officers, and those people the Board currently serves. Mr. Kiser said if a peace officer resigned, rather than being prosecuted for a crime committed, that peace officer would still be licensed in the state of Montana. Mr. Kiser said peace officers then would be able to go to any other agency or outside the state and claim that he is currently certified. If the agency contacted the Board of Crime Control to see if an individual was certified, the Board would show the person currently certified. Mr. Kiser said HB 134 would allow the Board of Crime Control to suspend or revoke a license that has been issued after the agency has acted upon the officer. Mr. Kiser said the suspension or revocation would occur after the complaint had been resolved in the local agency and after the peace officer is dismissed from the agency. When the license is revoked or suspended the peace officer would be notified and due process would be allocated to the person if they wished protest the ruling.

Col. Bob Griffith, Chairman of Peace Officer and Training Council, told the Committee that the legislature has provided means to certify peace officers for the public, so they should also should supply a means for decertification if the officer has violated public trust. Mr. Griffith supports HB 134.

Opponents' Testimony:
NONE

Questions From Committee Members and Responses:
Senator Crippen asked Mr. Kiser about decertifying a peace officer under current law. Mr. Kiser said a peace officer would remain certified until five years has passed if that officer had not been employed during that time as a peace officer. If the officer did not work as a police officer in those five years, the officer would be required to retake the basic training to be accepted by another agency.

Senator Crippen asked Mr. Kiser about the course that a police officer takes. Mr. Kiser said the peace officer would take a course and once that course was taken they would be able to apply for certification. Mr. Kiser said once the certification is granted, the peace officer can work in the State as an officer.

Senator Crippen asked Mr. Kiser whether a peace officer would have to retake the course after five years even if the officer was not decertified. Mr. Kiser said yes.

Closing by Sponsor:
Representative Peterson said the Board of Crime Control would like to be able to revoke certification if there are problems with peace officers.

HEARING ON HB 151

Opening Statement by Sponsor:
Representative Vogel, District 86, said HB 151 defines a Criminal Justice Agency. HB 151 was introduced because of a request by the Justice Department. Currently, Montana is the only state in the nation that does not include foreign countries as a Criminal Justice Agency that would allow dissemination of criminal information with law enforcement within the State. Rep. Vogel said HB 151 provides that the Justice Department would be the oversight agency for the approval that a foreign agency be legitimate. Rep. Vogel told the Committee that there have been problems that have arisen in regards to cases being prepared by Justice Department or other law enforcement agencies in Montana. The Department and the agencies are not able to share investigative files with foreign countries. HB 151 would solve that problem. Rep. Vogel requested that the effective date be immediate upon passage. The reason is because the Justice Department has current problems which could be solved if the effective date was immediate upon passage.

Proponents' Testimony:
Beth Baker, Department of Justice, said the Department of Justice requested HB 151 to facilitate the exchange of criminal justice information with foreign countries, particularly Canada. Ms. Baker told the Committee that the Governments of the United States and Canada implemented an automated system for criminal history record information, retrieval and dissemination. Ms. Baker said because of Montana's Criminal Justice Information Act, Montana is the only state in the country that is unable to participate in the automated system. The reason being that Montana's Criminal Justice Act defines the criminal justice agency to include federal, state, and local agencies whose principal function would be the administration of criminal justice. HB 151 would give foreign law enforcement agencies the status, similar to a state or federal law enforcement agency. HB 151 provides the Attorney General with oversight to approve foreign agencies before they would be allowed to receive criminal justice information. HB 151 would also allow the Attorney General to consult with the Department of Justice. It is important for law enforcement agencies to share essential information because the need for exchange of this information is critical. Ms. Baker urges support of HB 151. Ms. Baker submitted amendments. (Exhibit #4)

Opponents' Testimony:
NONE

Questions From Committee Members and Responses:
Senator Blaylock asked Ms. Baker if all foreign agencies would be

allowed to receive criminal justice information. Ms. Baker said yes with the approval of the Attorney General.

Senator Rye asked Ms. Baker if information could be withheld from foreign counties. Ms. Baker said yes.

Senator Towe asked Ms. Baker what Attorney General reviewed the case. Ms. Baker said the Montana Attorney General.

Senator Towe asked Ms. Baker if the Montana Attorney General would make the decision to share the information with foreign countries. Ms. Baker said yes.

Senator Towe asked Ms. Baker about the information that would be available to foreign agencies. Ms. Baker said currently the Montana Criminal Justice Information Act allows exchange of public criminal justice information. Confidential criminal justice information, which would consist of arrest records, or cases that have not been disposed of, could be shared with any agency in the country with the passage of HB 151. The U.S. Government has facilitated the exchange of that information with Canada. Montana can now obtain that information from Canada, but cannot give the information to them.

Senator Towe asked Ms. Baker about intelligence information. Ms. Baker said Montana would be allowed to share intelligence information, but not as part of the electronic exchange.

Closing by Sponsor:
Rep. Vogel said HB 151 allows Montana to share information that we CHOOSE to share with foreign countries.

EXECUTIVE ACTION ON HB 151

Motion:
Senator Rye moved to Amend HB 151.

Discussion:
Senator Towe said HB 151 is a real serious matter concerning the sharing of information about individuals, that often times is speculation, which could have a serious impact on the people about who the information relates. Senator Towe felt that it is appropriate to allow law enforcement agencies to obtain criminal justice information.

Vote:
The motion to amend HB 151 CARRIED UNANIMOUSLY.

Motion/Vote:
Senator Rye moved HB 151 BE CONCURRED IN AS AMENDED. The motion CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON HB 66

Motion:
Senator Bartlett moved HB 66 BE CONCURRED IN.

Discussion:
Senator Bartlett said HB 66 provides more protection for people who are required by the statute to report cases of child abuse by establishing that they make those reports in good faith.

Senator Halligan said it is very rare for anyone other than spouses involved in a child custody dispute, to maliciously report false cases of child abuse.

Vote:
The motion CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON HB 67

Motion:
Senator Bartlett moved to AMEND HB 67.

Discussion:
Senator Bartlett explained the amendments. (Exhibit #5)

Senator Towe asked Senator Bartlett about the concerns the House Judiciary Committee had with HB 67. Senator Bartlett said she attempted to address the concern of the House Committee. There are cases where there may be no study conducted if the Department of Family Services is taken completely out of the picture as a potential source of those studies. HB 67 is trying to identify the instances in which it would be appropriate for the Department of Family Services to conduct the investigation and to limit that to circumstances where no other funding exists.

Senator Towe asked Senator Bartlett about the conducting of studies by the Department of Family Services. Senator Bartlett said the Department of Family Services may not be ordered to conduct the study unless they are recipients of benefits and all reasonable options for the payment of the investigation have been exhausted. Senator Bartlett said the real desire of the Department of Family Services is to get out of doing as much of these studies as they can because it has taken away from what

their real mission is and draining staff resources.

Vote:
The motion to amend HB 67 CARRIED with Senator Halligan voting NO.

Motion/Vote:
Senator Bartlett moved HB 67 BE CONCURRED IN AS AMENDED. The motion CARRIED UNANIMOUSLY.

ADJOURNMENT

Adjournment: 11:28 a.m.

Wm Yellowtail
BILL YELLOWTAIL, Chair

Rebecca Court
REBECCA COURT, Secretary

BY/rc

ROLL CALL

SENATE COMMITTEE Judiciary DATE 3-4-93

NAME	PRESENT	ABSENT	EXCUSED
Senator Yellowtail	X		
Senator Doherty	X		
Senator Brown	X		
Senator Crippen	X		
Senator Grosfield	X		
Senator Halligan	X		
Senator Harp	X		
Senator Towe	X		
Senator Bartlett	X		
Senator Franklin	X		
Senator Blaylock	X		
Senator Rye	X		

FC8

Attach to each day's minutes

SENATE STANDING COMMITTEE REPORT

March 4, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 66 (first reading copy -- blue), respectfully report that House Bill No. 66 be concurred in.

Signed: Wm Yellowtail
Senator William "Bill" Yellowtail, Chair

m - Amd. Coord.
nl Sec. of Senate

Bartlett
Senator Carrying Bill

491218SC.Sma

SENATE STANDING COMMITTEE REPORT

March 4, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 67 (first reading copy -- blue), respectfully report that House Bill No. 67 be amended as follows and as so amended be concurred in.

Signed: Wm Yellowtail
Senator William "Bill" Yellowtail, Chair

That such amendments read:

1. Title, line 9.
Following: "~~INVESTIGATION;~~"
Insert: "PROHIBITING A COURT FROM ORDERING THE DEPARTMENT OF FAMILY SERVICES TO CONDUCT A CHILD CUSTODY INVESTIGATION EXCEPT IN CERTAIN CASES;"

2. Title, line 10.
Following: "~~40-4-215,~~"
Insert: "40-4-215,"

3. Page 3.
Following: line 19
Insert: "**Section 2.** Section 40-4-215, MCA, is amended to read:

"**40-4-215. Investigations and reports.** (1) In contested custody proceedings and in other custody proceedings if a parent or the child's custodian ~~so~~ requests, the court may order an investigation and report concerning custodial arrangements for the child. ~~If the court orders the department of family services to conduct the investigation, the department may charge a reasonable fee. The department shall waive the fee for conducting the investigation if the parent or the child's custodian requesting the investigation is a recipient of aid to families with dependent children, food stamps, or general relief benefits.~~ The department of family services may not be ordered to conduct the investigation or draft a report unless the parent or the child's custodian requesting the investigation is a recipient of aid to families with dependent children, food stamps, or general relief benefits and all reasonable options for payment of the investigation, if conducted by a person not employed by the department, are exhausted. The department may consult with any investigator and share information relevant to the child's best interests. The cost of the investigation and report ~~shall~~ must be paid according to the final order.

(2) In preparing ~~his~~ a report concerning a child, the investigator may consult any person who may have information about the child and ~~his~~ the child's potential custodial

MS Amd. Coord.
TH Sec. of Senate

Bartlett
Senator Carrying Bill

491226SC.Sma

arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if ~~he~~ the child has reached the age of 16 unless the court finds that ~~he~~ the child lacks mental capacity to consent. If the requirements of subsection (3) are fulfilled, the investigator's report may be received in evidence at the hearing.

(3) The court shall mail the investigator's report to counsel and to any party not represented by counsel at least 10 days prior to the hearing. The investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying data and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (2), and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator and any person ~~whom he~~ the investigator has consulted for cross-examination. A party may not waive ~~his~~ the right of cross-examination prior to the hearing.""

Renumber: subsequent sections

-END-

SENATE STANDING COMMITTEE REPORT

March 4, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 68 (first reading copy -- blue), respectfully report that House Bill No. 68 be concurred in.

Signed: Wm Yellowtail
Senator William "Bill" Yellowtail, Chair

M - Amd. Coord.
Sec. of Senate

Sen. Harp
Senator Carrying Bill

491216SC.Sma

SENATE STANDING COMMITTEE REPORT

March 4, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 151 (first reading copy -- blue), respectfully report that House Bill No. 151 be amended as follows and as so amended be concurred in.

Signed: Wm Yellowtail
Senator William "Bill" Yellowtail, Chair

That such amendments read:

1. Title, line 8.
Strike: "AND"

2. Title, line 9.
Following: "MCA"
Insert: "; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE"

3. Page 7, line 14.
Following: line 13
Insert: "NEW SECTION. Section 2. Effective date. [This act] is effective on passage and approval."

-END-

Amd. Coord.
Sec. of Senate

Sen Doherty
Senator Carrying Bill

491516SC.San

Amendments to House Bill No. 255
Third Reading Copy (blue)

Suggested by Dan Anderson of the Department of Corrections

For the Committee on Judiciary

Prepared by Valencia Lane
March 1, 1993

SENATE JUDICIARY
EXHIBIT NO. 1
DATE 3-4-93
BILL NO. HB255

1. Page 6, line 17.
Following: "~~committed~~"
Insert: "by which the person was committed unless that court transfers jurisdiction to the court"

2. Page 6, lines 20 and 21.
Following: "committed" on line 20
Strike: remainder of line 20 through "person" on line 21

3. Page 6, line 22 through page 7, line 5.
Strike: subsection (2) in its entirety
Renumber: subsequent subsections

4. Page 10, line 1.
Following: "~~to~~"
Strike: "in"
Insert: "to"

5. Page 10, line 2.
Following: "~~committed,~~"
Insert: "by which the person was committed unless that court transfers jurisdiction to the court"

SENATE JUDICIARY
EXHIBIT NO. 2
DATE 3-4-93
BILL NO. HB255

HB 255
Senate Judiciary Committee
March 4, 1993

TESTIMONY OF KIMBERLY A. KRADOLFER
ASSISTANT ATTORNEY GENERAL

I am a member of the Montana Mental Health Planning and Advisory Council and appear today on behalf of the Council to support HB 255. I have been an assistant attorney general for the State of Montana for nine and a half years. During my first four or five years in that position, I handled virtually all of the criminal appeals in which challenges were brought to Montana's statutes on the defense of mental disease or defect. The past five years I have defended civil cases against the State of Montana, including the Ihler class action lawsuit against Montana State Hospital at Warm Springs. It was based upon that background that the Department of Corrections and Human Services asked me to serve as the Justice Department member of the Montana Mental Health Planning and Advisory Council. I have served on the Council for the past year and a half.

Several members of the Council worked with other interested parties over the past year and a half to draft changes to the statutes dealing with commitments of persons acquitted based upon the defense of mental disease or defect. HB 255 was triggered by a number of practical problems which arise in trying to apply the current statutes. Some of those concerns were echoed in the United States Supreme Court's decision in Foucha v. Louisiana. That decision was handed down last May.

The intent of this bill is to address the mandates which were set out in the Foucha decision and to then apply those mandates to Montana's statutes. The bill accomplishes a number of things. First, it includes one minor "housekeeping" change which adds the seriously developmentally disabled within the scope of these statutes since they had not been included in the statutes previously for evaluating the reason a person was unable to hold a mental state which is a requisite element of an offense. The bill provides for civil commitment under Title 53, chapter 20, MCA, of anyone determined to have been acquitted of an offense based upon his developmental disability.

Second, the bill addresses the mechanics of how a person who has been committed because he was acquitted of a crime due to his mental disease or defect should be reviewed, how often such review should take place, and what standards should be applied in determining what sort of placement that person should remain in or whether the person should be released.

1. Foucha v. Louisiana

The United States Supreme Court decision in Foucha v. Louisiana held that a person who had been found not guilty by reason of insanity (or by reason of mental disease and defect under Montana's statutes) must be handled as a civil commitment of some sort. The opinion recognized that it was appropriate to presuppose that a person who had just been acquitted of a crime based upon an

insanity or mental disease and defect was still suffering from mental illness and could be automatically committed for an initial period of time. The opinion also suggested that it would be permissible to have different levels of scrutiny that applied to commitments depending upon the nature of the acts underlying the offense that had been charged.

However, the opinion holds that a state has the obligation to treat this as a civil commitment and to apply the same sorts of standards and burdens that it would apply in other civil commitment cases.

The Foucha holding requires that after the initial 180 day commitment: (1) the State of Montana must assume the burden to prove that a person should be recommitted; (2) the State must prove the need for recommitment by clear and convincing evidence; (3) the recommitment must be based upon proof that the person is still a danger to himself or others; and (4) the State must prove that the dangerousness is caused by the person's mental illness.

In other words, if a person was mentally ill at a given point in time, but he has recovered from that mental illness and it is under control and the illness itself no longer renders him dangerous, the person cannot be constitutionally recommitted (even if he is dangerous because of his criminal propensities).

EXHIBIT 2
DATE 3-4-93
HB 255

2. Levels of Scrutiny.

HB 255 amends the statutes by changing the burden of proof and the standard of proof, and by prohibiting recommitment unless a person is a danger because of his mental illness. It also provides two tiers of scrutiny based upon the acts that formed the basis for the original criminal charges.

First, HB 255 provides that where the charged offense involved "a substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage," the court can immediately commit the person to the custody of the director of the Department of Corrections and Human Services to be placed in an appropriate mental health facility for custody, care, and treatment. By contrast, if an offense did not involve "substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage," the person would simply be committed under Montana's regular civil commitment statutes.

3. Jurisdiction.

The original bill changed jurisdiction of follow-up proceedings to the location where the person was committed. That portion of the bill was amended in the House. There is one portion of the jurisdiction which inadvertently did not get amended back. Dan Anderson of the Mental Health Division has prepared an amendment which he will present to this Committee which will finish

making that change back to the way jurisdiction is currently defined.

4. Annual Review/Second Opinion.

The bill also amends the statutes to provide the same annual review -- with a second opinion by a professional person of the committed person's choice -- which other patients who are civilly committed receive. While annual review is currently provided for, there is no provision for a second opinion.

The language in the bill pertaining to the second opinion is identical to the statutes pertaining to civil commitments. As a practical matter, such evaluations are conducted with regularity and the court regularly appoints one or more professional person at the request of the patient in preparing for the recommitment proceeding. Dan Anderson will address the fiscal note in his testimony. I would note, however, there will as a practical matter be no fiscal impact to this bill since in practice the courts have been appointing professional persons of the patients' choice to assist in preparing for recommitment hearings.

5. Conditional releases.

The other portion of the statutes which are changed pertain to conditional release of a person who had been acquitted based upon mental disease or defect. At the present time, a district judge has virtually unlimited jurisdiction over someone who has

been acquitted and is originally committed under these statutes. There is a five-year limit on any conditional release during which time a judge may revoke the release and bring the person back to the hospital. The problems that have occurred with this are the same sort that are addressed in Foucha v. Louisiana.

In some instances, district courts have used the conditional release provision to revoke a release into the community based upon activity which had nothing to do with the person's mental illness. For example, a former patient who had been released to a community was picked up for violation of drug laws. His mental illness was not a factor in him violating statutes dealing with dangerous drugs. Rather than prosecuting the person for a crime and sending the person to prison, it was easier for the court and the county attorney to revoke the conditional release and to send him back to the Montana State Hospital. Again, that is unconstitutional under the Foucha decision. Such revocation or recommitment is not constitutional unless the person is a danger and that danger is caused by the person's mental illness.

The changes to the statutes in this area will eliminate the possibility of abuse since they will provide that judges cannot repeatedly release someone and leave then out for nearly five years and then simply revoke based upon some conduct which is a violation of the terms of release. If the violation is caused by the person's mental illness and it demonstrates that the person is in fact dangerous, such revocation is appropriate. However, unless

dangerousness can be tied directly to the illness, other criminal proceedings would be more appropriate than recommitment.

Additionally, if someone has been conditionally released, more than five years has passed from his original commitment to the hospital, and most of that time has been spent on community release without incident, it is more appropriate to simply commit him civilly on a new commitment under the regular commitment statutes if the status of his mental illness warrants commitment. To simply hold a prior criminal charge over someone's head for an indeterminate period of time and to use that as a means of maintaining control over the person is not permissible in light of the Foucha v. Louisiana decision.

6. Lawsuit: Houghton v. State of Montana

On January 7, 1993, based upon the holding in Foucha v. Louisiana decision, a lawsuit was filed by eight named patients at Montana State Hospital who have been committed after acquittal based upon mental disease and defect. Those patients filed suit on behalf of themselves and all others similarly situated to request an injunction against enforcement of Montana's current statutes. They request the relief which this bill would afford. I would note that the hospital staff have identified a ninth patient who falls into this category.

It is the position of the Montana Mental Health Planning and Advisory Council that this bill will establish the standards

required by Foucha. It will also structure the recommitment process to allow a higher degree of scrutiny in more serious cases (where an act involved "substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage"). It also provides a means for continued input from the original county attorney and district court judge. This is therefore a more desireable approach than simply imposing an injunction which leaves questions about the procedures which should be followed, who has standing to appear, the standards which apply, and how recommitment review should be triggered.

Conclusion

The Montana Mental Health Planning and Advisory Council has reviewed this area extensively and has sought input from the hospital, local community mental health providers, the Board of Visitors for Mental Disabilities, and from people working in the criminal justice system. I would urge this committee's thoughtful consideration of this bill and that the committee issue a "Do Pass" recommendation. Thank you.

Testimony on HB 255 by February 19, 1993

Dan Anderson, Administrator
Mental Health Division
Department of Corrections & Human Services

HB 255 was drafted by a committee established by the Mental Health Planning and Advisory Council. The Planning and Advisory Council is a group made up of representatives of a variety of state agencies, consumers of mental health services, family members of consumers of mental health services, and providers of mental health services. The original goal of the council in drafting this legislation was to assure that when the Montana State Hospital is used as a resource for the criminal justice system, that it is used as a treatment resource and not simply as a site of incarceration of people who have committed criminal acts.

Ironically during the time this committee was deliberating to try to develop legislation, the United States Supreme Court made its ruling in the Foucha v. Louisiana case. The decision in the Foucha case is consistent with the goal of the advisory council. That is, that persons who have been found not guilty by reason of mental disease or defect should be confined to the state hospital or other treatment facility only for so long as their mental disorder causes them to be a danger to themselves or to the community.

HB 255 will bring Montana's statute on the review of patients found not guilty by reason of mental disease and defect into compliance with the United States Constitution as interpreted by the Supreme Court. This bill requires an annual clinical review of these patients to determine whether they continue to meet the standard required to keep them in the State Hospital or other treatment facility. The bill allows the Department or the mentally ill person to, on an annual basis, request of the court discharge or conditional release. During such a hearing for discharge or conditional release the burden to proof that the person continues to be dangerous is on the state as required under the Foucha decision.

HB 255 also makes four other changes in how people with mental illnesses who are in the criminal justice system are dealt with.

First, the bill would transfer authority for dealing with a person found not guilty by reason of mental disease or defect, when the defect is a developmental disability, to civil court for consideration through the normal civil commitment process for developmental disabilities.

Second, the bill would give authority to the director of the department rather than the superintendent of the State Hospital to make a determination of where a person found not guilty by reason of mental disease or defect can best be served.

Third, the bill changes how a mentally ill individual seeking discharge is evaluated. Current law requires two psychiatrists or psychologists to evaluate the person. Under HB 255, the court will appoint one psychiatrist or psychologist and the person with mental illness has the option of asking for a second independent evaluation. This procedure is consistent with what is currently in practice in civil commitment and re-commitment procedures.

Finally, the bill also makes some changes to the criteria which can be used to ask for a review of a person who has been found guilty of a crime but sentenced to the treatment facility rather than to the state prison. The changes would allow the department to bring a case before a judge for consideration of a change in the sentence when the department and the State Hospital believe that further use of the State Hospital for treatment and confinement is either not appropriate or will not benefit the individual.

One of our department's primary objectives over the past several years has been to focus and strengthen the mission of the Montana State Hospital as a treatment resource providing active treatment for people with serious mental illnesses. Part of that focusing activity is to do what we can to assure that people who do not require active treatment are served elsewhere. HB 255, brings Montana's statute into compliance with the Supreme Court's ruling in the Foucha case. In doing so it also better defines the mental health system's role as a resource within the criminal justice system. We believe that the mental health system has an important role to play in the criminal justice system. That role is one of providing treatment for those who need treatment and we believe that with passage of HB 255, that role is better defined in state law.

The bill, as originally prepared, required that hearings concerning discharge and conditional releases of people found not guilty by reason of mental disease be held in the court serving the district in which the person was being treated. In most cases, this would be the Third Judicial District which serves Warm Springs.

Representative Liz Smith prepared an amendment which would keep jurisdiction with the original committing court unless that court transfers jurisdiction. Unfortunately, due to some miscommunication, the amendment was made only for the automatic 180 day hearing and not for subsequent requests for discharge or conditional release.

I have prepared amendments to complete what I believe to be the intent of Representative Smith's amendment - to retain jurisdiction for all requests for discharge or conditional release with the original court unless that court transfers jurisdiction.

EXHIBIT 3
DATE 3-4-93
HB 255

Amendment to House Bill 151
Third Reading Copy

Prepared by Department of Justice

1. Page 1, line 9.
Following: "MCA"
Insert: ", AND PROVIDING AN IMMEDIATE EFFECTIVE DATE"

2. Page 7, line 13.
Following: "ascertainable."
Insert:
"NEW SECTION. **Section 2. Effective date.** [This act] is effective on passage and approval."

SENATE JUDICIARY
EXHIBIT NO. 4
DATE 3-4-93
BILL NO. HB151

Amendments to House Bill No. 67
Third Reading Copy (BLUE)

Requested by Senator Bartlett
For the Committee on Judiciary

Prepared by Valencia Lane
March 3, 1993

SENATE JUDICIARY
EXHIBIT NO. 5
DATE 3-4-93
BILL NO. HB67

1. Title, line 9.
Following: "~~INVESTIGATION;~~"
Insert: "PROHIBITING A COURT FROM ORDERING THE DEPARTMENT OF FAMILY SERVICES TO CONDUCT A CHILD CUSTODY INVESTIGATION EXCEPT IN CERTAIN CASES;"

2. Title, line 10.
Following: "~~40-4-215,~~"
Insert: "40-4-215,"

3. Page 3.
Following: line 19
Insert: "**Section 2.** Section 40-4-215, MCA, is amended to read:

"**40-4-215. Investigations and reports.** (1) In contested custody proceedings and in other custody proceedings if a parent or the child's custodian ~~so~~ requests, the court may order an investigation and report concerning custodial arrangements for the child. ~~If the court orders the department of family services to conduct the investigation, the department may charge a reasonable fee. The department shall waive the fee for conducting the investigation if the parent or the child's custodian requesting the investigation is a recipient of aid to families with dependent children, food stamps, or general relief benefits.~~ The department of family services may not be ordered to conduct the investigation or draft a report unless the parent or the child's custodian requesting the investigation is a recipient of aid to families with dependent children, food stamps, or general relief benefits and all reasonable options for payment of the investigation, if conducted by a person not employed by the department, are exhausted. The department may consult with any investigator and share information relevant to the child's best interests. The cost of the investigation and report ~~shall~~ must be paid according to the final order.

(2) In preparing ~~his~~ a report concerning a child, the investigator may consult any person who may have information about the child and ~~his~~ the child's potential custodial arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if ~~he~~ the child has reached the age of 16 unless the court finds that ~~he~~ the child lacks mental capacity to consent. If the requirements of subsection (3) are fulfilled, the investigator's

report may be received in evidence at the hearing.

(3) The court shall mail the investigator's report to counsel and to any party not represented by counsel at least 10 days prior to the hearing. The investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying data and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (2), and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator and any person ~~whom he~~ the investigator has consulted for cross-examination. A party may not waive ~~his~~ the right of cross-examination prior to the hearing.""
{*Internal References to 40-4-215: None.*}

Renumber: subsequent sections

DATE 3-4-93

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: H.B 68 Fagg H.B 134 Peterson
H.B 151 Vogel HB 255 Anderson

Name	Representing	Bill No.	Check One Support	Oppose
Dan Anderson	DCHS - MH	255	X	
Kim Kradolfer	MT Mental Health Planners + Advisory Council	255	X	
George Schunk		151	X	
Beth Baker	Dept of Justice	151	✓	
Col Bob Griffith	Dept of Justice	134	✓	
Gene Kiser	MBCC	134	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

F10