



# Commission on Sentencing

## 64th Montana Legislature

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HELENA, MONTANA 59620-1706  
(406) 444-3064

### LEGISLATORS

SEN. CYNTHIA WOLKEN - CHAIR  
SEN. KRISTIN HANSEN - VICE CHAIR  
REP. MATTHEW MONFORTON  
REP. MARGARET MacDONALD

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MIKE BATISTA  
DEREK GIBBS  
DAN GUZYNSKI  
JENNIE HANSEN  
ROXANNE KLINGENSMITH

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PETER OHMAN  
MARY ANN RIES  
MAJEL RUSSELL  
DONNA WHITT

### COMMITTEE STAFF

RACHEL WEISS, RESEARCH ANALYST  
JULIANNE BURKHARDT, ATTORNEY  
KATYA GROVER, SECRETARY

## MINUTES

### Statute Review Subcommittee

August 29, 2016  
Room 172, Capitol Building  
Helena, Montana

Please note: This document is a Minutes Log and provides a notation of the time elapsed between the beginning of the meeting and the time at which the item was presented or discussed, a motion was made, or a vote was taken. The narrative presented here is provided only as a guide to the audio or video record of the meeting. The official discussion, motion, or vote is available on the audio or video archive of this meeting. The Legislature does not prepare a transcript of meeting activities. The time designation may be used to locate the referenced discussion on the audio or video recording of this meeting.

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### COMMISSION MEMBERS PRESENT

SEN. CYNTHIA WOLKEN - CHAIR  
SEN. KRISTIN HANSEN - VICE CHAIR  
HON. INGRID GUSTAFSON  
DAN GUZYNSKI  
PETER OHMAN  
MAJEL RUSSELL (via phone)  
DONNA WHITT

### STAFF PRESENT

RACHEL WEISS, Research Analyst  
JULIE JOHNSON, Attorney  
KATYA GROVER, Committee Secretary

## VISITORS' LIST (Attachment 1)

## AGENDA (Attachment 2)

### COMMITTEE ACTION

The Statute Review Subcommittee recommends that the Commission on Sentencing should draft legislation to:

1. Revise 46-18-201 to:
  - a. Include fewer "doors" into community corrections facilities;
  - b. Provide opportunity for in-patient treatment in DOC facility or contracted facility while preserving opportunity for a deferred sentence; and
  - c. Provide credit for jail time served before entry to a facility.
2. Revise the criminal endangerment statute to provide that a high blood alcohol content alone is not sufficient to support a criminal endangerment charge.
3. Revise 45-5-214(3) (Assault with bodily fluid) to remove reference to district court jurisdiction over a violation of this section by a minor.
4. Repeal the persistent felony offender statutory structure.
5. Enact changes made in Senate Bill 90 (2015), including that the legislation should:
  - a. revise 45-6-301 (Theft) as provided in the introduced version of the bill, except that the revision should also include that for theft offenses where the amount is less than \$100 the court is encouraged to give a deferred sentence;
  - b. revise 45-6-316 (Issuing a bad check) as provided in the Senate version of the bill, except that the revision should also strike language in subsection (3)(C) that refers to "common scheme" and leave the section language to be "if the value of property, labor, or services exceeding \$1500." The same change should be made to identical language in 45-6-325(4) (Forgery).
6. Revise Theft, Forgery, Issuing a Bad Check, Identity Theft, Deceptive Practices, Failure to Return Rented Property crimes to create a tiered sentencing structure as provided in Commissioner Ohman's June 7, 2016, memo.
7. Revise Title 45, chapter 9 (Dangerous Drugs) to:
  - a. Eliminate the life sentence option for small sales of marijuana;
  - b. Provide a lesser penalty for sharing drugs as compared to selling drugs;
  - c. Make 2nd offense criminal possession of dangerous drugs a misdemeanor not a felony;
  - d. Make consistent the mandatory minimums for the different types of drug offenses, such as those contained in 45-9-102 (Criminal possession of dangerous drugs) and 45-9-103 (Criminal possession with intent to distribute), as well as other relevant statutes.
8. Revise 46-18-204(1)(a) to allow a dismissal after a deferred imposition of sentence in cases where the defendant does not go to trial but pleads nolo contendere or pleads guilty.
9. Repeal statutory references to "drug information courses" or "drug education courses," including in 45-9-208, 45-10-108, and 61-8-732.

The Statute Review Subcommittee also requested that:

1. Staff research options for splitting out accountability (45-2-302 and 45-2-303) from actual crime including:
  - a. A focus on lesser, nonviolent crimes;

- b. The possibility of sentencing options for a judge to decide to sentence the accountable person to a lesser penalty or be exposed to a lesser maximum sentence;
  - c. How other states handle the classifications or tiers; and
  - d. The possibility of having draft language ready for the full commission's review at the September 20 meeting.
2. Staff research options to revise 45-5-213 (Assault with a weapon) to split out actual assault with a weapon compared to reasonable apprehension of assault. Use North Dakota code and the Model Penal Code as examples with the possibility of having draft language ready for the full commission's review at the September 20 meeting.
  3. Staff identify all of the statutes that allow for a suspension or revocation of a driver's license with the possibility of having the research available for the full commission at the September 20 meeting.
  4. Senator Wolken work with Senator Swandal to propose other revisions to the bill based on SB 90 (2015).
  5. The full commission consider requesting that the courts collect data on treatment assigned by a judge as part of a sentence, including lower court judges.

#### **CALL TO ORDER and ROLL CALL**

- 00:00:02 Sen. Wolken called the commission to order at 9:02 a.m. The commission secretary called roll. **(Attachment 3)** Sen. Hansen was excused starting at 12:00 PM and left her proxy with Sen. Wolken. **(Attachment 4)**
- 00:00:41 Sen. Wolken was selected to be the presiding officer of the subcommittee.
- 00:01:02 Sen. Wolken discussed the meeting structure.
- 00:01:25 Ms. Weiss elaborated further on the structure and order of the agenda items for the meeting.

#### **SUBCOMMITTEE REVIEW AND DISCUSSION OF POTENTIAL CRIMINAL AND SENTENCING STATUTE REVISIONS:**

##### **Individual Commissioner and Council of State Governments Justice Center (CSG)**

##### **Recommendations**

- 00:02:03 Carl Reynolds, CSG, provided recommendations proposed by CSG, which involve selected Montana statutes. **(Exhibit 1)**

##### **Subcommittee Questions and Discussion**

- 00:10:07 Commissioner Ohman agreed with the point Mr. Reynolds made about the DOC commits. Commissioner Ohman also expressed his hope to find a way to get offenders into treatment while they are in a deferred status.
- 00:12:22 Mr. Reynolds asked Commissioner Ohman to confirm that, at present, it is impossible to get offenders into a treatment program while the offender is in a deferred status.
- 00:12:27 Commissioner Ohman's answered Mr. Reynolds question and elaborated further on the topic.
- 00:13:15 Judge Gustafson agreed with Commissioner Ohman by saying that she sees the same progression of offenders failing on the deferred sentences.
- 00:14:34 Mr. Reynolds asked about the barriers to getting someone into a treatment as a

condition of a deferred sentence.

00:15:01 Judge Gustafson addressed Mr. Reynolds' point.

00:16:05 Mr. Reynolds expressed his agreement with what Judge Gustafson said and noted that across the country, when an individual is sentenced to a prison or jail, the system guarantees a place in secure custody but when an individual is sentenced to treatment, there is no such guarantee.

00:16:34 Commissioner Guzynski reiterated what has been said about repetitious courtroom meetings before sentencing an offender to an inpatient treatment.

00:17:24 Commissioner Ohman noted that in his practice, he has never seen an individual placed into a DOC type center on a deferred sentence.

00:17:41 Commissioner Guzynski responded to Commissioner Ohman's comment and expressed his agreement that it would be a good idea to clean up the statute relevant to this discussion.

00:17:57 Sen. Wolken said to Mr. Reynolds that there is a general interest in further study of getting offenders into treatment while they are being on a deferred status.

### **Summary of Discussion and Subcommittee's Recommendation to CSG**

00:18:56 Commissioner Russell asked to summarize what the subcommittee agreed on as a recommendation to Mr. Reynolds.

00:19:33 Sen. Wolken summarized the recommendation: the subcommittee looked at Mr. Reynolds' recommendation on the deferred sentences statute and tried to clean it up to reflect more of the reality of how people are moving through the system in Montana.

00:19:57 Mr. Reynolds added that the cleanup would go beyond deferred sentences, but that 46-18-201 be, essentially, streamlined somewhat to include fewer "doors" into community corrections facilities that are not really used and that are not really needed in the law.

00:20:17 Sen. Wolken reminded the subcommittee members and the public that this is a recommendation of the subcommittee and that it will be discussed during the full commission meeting.

00:20:38 Mr. Reynolds said that what he will bring to the full commission will be a bill draft.

00:20:51 Sen. Wolken reiterated the idea that this is not a final legislation but simply a recommendation to move forward with the topic.

00:21:02 Commissioner Russell added two more suggestions for the subcommittee recommendations: (1) that one of the objectives would be that the law would provide some opportunity for treatment for people who are on a deferred sentence; and (2) that people get credit for jail time when the commission looks at the provisions of the statute that talks about a period not to exceed one year for the pre-release.

### **SELECTED STATUTE MODIFICATIONS SUGGESTED BY COMMISSIONER OHMAN FROM TITLE 45 AND TITLE 46 OF THE MONTANA CODE ANNOTATED**

00:21:38 Sen. Wolken introduced the discussion that will be led by Commissioner Ohman on Titles 45 and 46, MCA. Sen. Wolken emphasized the importance of the work that the Commission on Sentencing and its subcommittee have been doing regarding reviewing statutes in Title 45.

00:23:10 Sen. Hansen noted that before Commissioner Ohman provides the statute

review recommendations, it would be beneficial to hear what recommendations the Law and Justice Interim Committee proposed regarding statutes dealing with sexual assault.

00:23:58 Ms. Weiss stated that the recommendations proposed by the Law and Justice Interim Committee will not overlap greatly with the statutes that Commissioner Ohman will be discussing.

00:24:20 Sen. Hansen agreed that because there no significant overlap, Ms. Weiss could discuss those recommendations at a later point in today's agenda.

### **Accountability and Attempt: 45-2-301**

00:24:38 Commissioner Ohman explained the rationale for how he produced his recommendations. He started his presentation by discussing issues present in Montana statutes regarding accountability and attempt. **(Exhibit 2)**

### **Subcommittee Discussion of the Statute**

The outcome of the discussion was that the subcommittee staff would do further research and look at options for splitting out accountability from actual crime and compare those options to what has been done in other states.

00:27:16 Commissioner Guzynski

00:29:15 Commissioner Ohman

00:30:37 Commissioner Russell

00:31:29 Commissioner Guzynski

00:33:01 Commissioner Ohman

00:34:26 Mr. Reynolds

00:35:11 Sen. Hansen

00:36:39 Commissioner Ohman

00:37:32 Judge Gustafson

00:38:46 Commissioner Guzynski

00:40:05 Mr. Reynolds

00:40:19 Commissioner Guzynski

00:40:38 Sen. Wolken

00:40:57 Commissioner Ohman

00:41:28 Sen. Wolken

00:41:39 In response to the subcommittee discussion, Ms. Weiss said that she will take notes as the commissioners discuss the proposals and summarize them in one document, which will be presented to the commissioners for revision before the work session in today's meeting.

### **Further Discussion of the Statute**

00:42:15 Sen. Hansen

00:43:02 Commissioner Guzynski

00:43:56 Commissioner Ohman

00:45:18 Sen. Hansen

00:45:38 Commissioner Ohman

00:45:44 Sen. Hansen

00:46:01 Sen. Wolken

00:46:08 Mr. Reynolds  
00:46:23 Sen. Wolken  
00:46:42 Commissioner Guzynski  
00:47:00 Sen. Wolken  
00:47:22 Judge Gustafson  
00:47:35 Sen. Hansen  
00:48:08 Commissioner Guzynski  
00:49:21 Sen. Wolken  
00:49:38 Ms. Weiss  
00:50:16 Sen. Wolken

**Mitigated Deliberate Homicide: 45-5-103, Negligent Homicide: 45-5-104**

00:50:41 Commissioner Ohman

Subcommittee Discussion of the Statute

The outcome of the discussion was that there will be no further action regarding these two statutes and that the three tiers of homicide will remain as such in the code.

00:52:15 Commissioner Guzynski  
00:52:55 Sen. Hansen  
00:53:01 Commissioner Guzynski  
00:53:40 Sen. Hansen  
00:53:46 Commissioner Ohman  
00:54:02 Sheriff Whitt  
00:54:36 Commissioner Ohman  
00:54:56 Sen. Wolken  
00:55:01 Commissioner Ohman  
00:55:11 Sen. Hansen  
00:56:14 Judge Gustafson  
00:56:26 Mr. Reynolds  
00:57:30 Sen. Wolken  
00:57:42 Sheriff Whitt  
00:58:00 Commissioner Guzynski  
00:58:28 Mr. Reynolds

**Criminal Endangerment: 45-5-207**

00:59:07 Commissioner Ohman (**Exhibit 3**)

Subcommittee Discussion of the Statute

00:59:22 Mr. Reynolds  
01:02:27 Commissioner Guzynski  
01:04:01 Commissioner Ohman  
01:04:52 Commissioner Guzynski  
01:05:21 Sen. Wolken  
01:06:48 Judge Gustafson  
01:08:10 Sen. Wolken

Public Comment on Criminal Endangerment Statute: 45-5-207

01:08:43 Mary Ann Wellbank  
01:11:44 Steve Cape, Executive Director, Montana Coalition for Safety and Justice

Subcommittee Questions

01:13:48 Sen. Hansen asked Mr. Cape what his recommendations for revising the criminal endangerment statute would be.  
01:14:45 Mr. Cape addressed Sen. Hansen's question.

Further Discussion of the Criminal Endangerment Statute

The outcome of the discussion was that the commission staff would draft a bill to revise the criminal endangerment statute so high blood alcohol content alone would not be enough to support a criminal endangerment conviction.

01:15:34 Commissioner Guzynski  
01:17:12 Judge Gustafson  
01:17:29 Mr. Cape  
01:18:37 Sen. Hansen  
01:21:15 Commissioner Guzynski  
01:21:55 Commissioner Ohman  
01:21:59 Mr. Reynolds  
01:22:07 Sen. Wolken  
01:22:12 Commissioner Guzynski  
01:22:22 Commissioner Russell  
01:22:24 Sen. Hansen  
01:22:30 Sheriff Whitt  
01:22:35 Commissioner Guzynski  
01:22:55 Sen. Hansen  
01:23:28 Commissioner Ohman  
01:24:27 Commissioner Russell  
01:25:38 Sen. Wolken  
01:25:54 Mr. Reynolds  
01:27:03 Sen. Hansen  
01:27:16 Mr. Reynolds  
01:27:33 Commissioner Guzynski  
01:28:56 Judge Gustafson  
01:30:47 Commissioner Guzynski  
01:31:45 Sen. Wolken  
01:32:56 Commissioner Guzynski  
01:33:51 Sen. Wolken  
01:34:17 Mr. Reynolds  
01:34:43 Sen. Wolken  
01:35:11 Sen. Hansen  
01:35:45 Commissioner Guzynski  
01:36:10 Sen. Wolken

Assault with Bodily Fluid: 45-5-214 (3)

01:36:21 Commissioner Ohman

Subcommittee Discussion of the Statute

The outcome of the discussion was that the commission staff would draft a bill that would strike the reference to district court jurisdiction over a violation of this section of the statute by a minor.

01:38:07 Sen. Wolken

**BREAK** (reconvened at 11:04 a.m.)

01:58:20 Sen. Wolken called the subcommittee back to order.

**Custodial Interference: 45-5-304**

01:58:35 Commissioner Ohman

Subcommittee Discussion of the Statute

The outcome of the discussion was that this statute would be set aside for now and no recommendation to the full commission would be made.

02:00:29 Sen. Hansen  
02:01:18 Commissioner Ohman  
02:01:27 Commissioner Guzynski  
02:02:08 Commissioner Ohman  
02:02:13 Sen. Hansen  
02:02:23 Commissioner Guzynski  
02:03:00 Sen. Wolken  
02:03:04 Commissioner Ohman

**Assault with a Weapon: 45-5-213**

The outcome of the discussion was that the commission staff would look at the Model Penal Code and North Dakota Code so that at the full Commission meeting the commissioners would determine whether they would want to create a separate type of assault or separate out the actual injury vs. the reasonable apprehension and create a different length of sentencing for that.

02:03:09 Sen. Hansen  
02:04:12 Commissioner Guzynski  
02:04:45 Sen. Hansen  
02:04:55 Sen. Wolken  
02:05:19 Sen. Hansen  
02:05:40 Judge Gustafson  
02:06:48 Commissioner Guzynski  
02:07:16 Judge Gustafson  
02:07:35 Sen. Hansen  
02:08:27 Commissioner Guzynski  
02:08:57 Commissioner Ohman  
02:09:37 Sen. Hansen  
02:10:05 Commissioner Guzynski  
02:10:44 Judge Gustafson  
02:11:44 Sen. Hansen



02:12:12 Commissioner Ohman  
02:12:55 Sen. Wolken  
02:13:05 Commissioner Ohman  
02:13:07 Commissioner Guzynski  
02:13:36 Commissioner Ohman  
02:14:23 Commissioner Guzynski  
02:14:27 Commissioner Ohman  
02:14:43 Commissioner Guzynski  
02:15:41 Sen. Wolken  
02:16:25 Sen. Hansen  
02:18:03 Judge Gustafson  
02:18:20 Sen. Hansen  
02:18:29 Sheriff Whitt  
02:18:46 Sen. Hansen and Judge Gustafson  
02:18:50 Sheriff Whitt  
02:19:09 Judge Gustafson  
02:19:23 Sen. Hansen  
02:20:12 Sheriff Whitt  
02:20:24 Judge Gustafson  
02:21:01 Sen. Hansen  
02:21:29 Commissioner Guzynski  
02:22:23 Sen. Wolken

**Minor in Possession: 45-5-624, Possession of Tobacco: 45-5-637**

02:22:56 Commissioner Ohman

Subcommittee Discussion of the Statute

There was no resolution regarding these two statutes and no recommendation to the full commission would be made.

02:24:04 Sen. Wolken suggested to set it aside for the time being and possibly to come back to this discussion later.

02:24:20 Commissioner Ohman agreed with Sen. Wolken's suggestion.

**Persistent Felony Offender: 46-18-501**

02:24:43 Sen. Wolken ([Exhibit 4](#))

02:25:13 Mr. Reynolds

Subcommittee Discussion of the Statute

The outcome of the discussion was that the commission staff would draft a bill that would repeal the persistent felony offender statutory structure.

02:27:52 Sen. Wolken

02:29:47 Commissioner Guzynski

02:30:45 Sen. Wolken

02:30:47 Commissioner Guzynski

02:30:53 Sen. Hansen

02:32:14 Sen. Wolken

02:32:33 Mr. Reynolds  
02:32:59 Sheriff Whitt  
02:33:03 Mr. Reynolds  
02:33:15 Sen. Hansen  
02:33:34 Commissioner Guzynski  
02:33:58 Judge Gustafson  
02:34:19 Commissioner Guzynski  
02:34:33 Sen. Hansen  
02:34:45 Commissioner Guzynski  
02:35:30 Judge Gustafson  
02:35:35 Commissioner Guzynski  
02:35:45 Mr. Reynolds  
02:35:58 Sen. Wolken

**Alternative Sentencing Authority: 45-9-202**

02:36:32 Sen. Hansen said that she would like to go over this statute as she feels it is important and should not be dismissed as previously suggested.

**Subcommittee Discussion of the Statute**

The outcome of the discussion was that the commission staff was directed to identify all the statutes that allow for a suspension or revocation of a driver's license.

02:38:00 Commissioner Ohman  
02:38:25 Sen. Hansen  
02:39:02 Commissioner Ohman  
02:39:21 Sen. Wolken

**Second Offense Driving Without Valid License: 61-5-212**

02:39:52 Sen. Wolken introduced discussion on this statute.  
02:40:13 Mr. Reynolds

**Subcommittee Discussion of the Statute**

The outcome of the discussion was that the commission staff was directed to identify all of the statutes contained in Title 61 that allow for a suspension or revocation of a driver's license with the possibility of having the research available for the full commission at the September 20, 2016, meeting.

02:40:58 Sen. Wolken  
02:41:20 Commissioner Guzynski  
02:41:24 Sen. Wolken  
02:41:42 Mr. Reynolds  
02:41:53 Commissioner Guzynski  
02:42:02 Commissioner Ohman  
02:42:13 Commissioner Guzynski  
02:42:21 Sen. Hansen

**SELECTED STATUTE MODIFICATIONS SUGGESTED BY COMMISSIONER OHMAN FROM TITLE 45 AND TITLE 46, MCA - continued**

**Third Offense Petty Theft: 45-6-301 (8)(a)**

02:42:54 Sen. Wolken introduced discussion on this statute.  
02:43:28 Commissioner Ohman

Subcommittee Discussion of the Statute

There was no resolution on this statute and no recommendation to the full commission would be made.

02:43:42 Sen. Hansen  
02:45:37 Sen. Wolken

**Enact Changes Made in Senate Bill 90 (2015)**

02:46:10 Sen. Wolken provided background information on SB 90 ([Exhibit 5](#)).

Theft: 45-6-301

Subcommittee Discussion of the Statute

The outcome of the discussion was that the commission staff was directed to draft a bill to revise 45-6-301 as provided in the introduced version of the bill, with the exception that the revision should also include that for theft offenses, where the amount is less than \$100, the court is encouraged to give a deferred sentence.

02:51:07 Commissioner Ohman  
02:52:05 Sen. Wolken  
02:52:39 Commissioner Ohman  
02:52:57 Commissioner Guzynski  
02:53:05 Commissioner Ohman  
02:53:31 Sen. Wolken  
02:54:09 Judge Gustafson  
02:54:19 Sen. Wolken

Issuing a Bad Check: 45-6-316

Subcommittee Discussion of the Statute

The outcome of the discussion was that the commission staff was directed to draft a bill to revise 45-6-316 as provided in the Senate version of the bill, except that the revision should also strike language in subsection (3)(C) that refers to "common scheme" and leave the section language to be "if the value of property, labor, or services exceeding \$1500." The same change should be made to identical language in 45-6-325 (4) (Forgery).

02:54:46 Judge Gustafson  
02:55:49 Ms. Weiss ([Exhibit 6](#))  
02:56:41 Sen. Wolken  
02:56:45 Judge Gustafson  
02:56:59 Commissioner Guzynski  
02:57:12 Sen. Wolken  
02:58:36 Mr. Reynolds  
02:58:49 Sen. Wolken  
03:02:42 Julie Johnson, Staff Attorney  
03:02:51 Sen. Wolken

03:03:10 Ms. Johnson  
03:03:47 Sen. Wolken  
03:03:55 Mr. Reynolds  
03:04:35 Commissioner Guzynski

#### Public Comment on Accountability and Courts of Limited Jurisdiction

03:05:28 Sen. Wolken announced public comment.  
03:06:55 Greg Mohr, Richland County Justice of the Peace, Sidney City Judge, Montana Magistrates' Association, clarified certain points regarding the issue of driving while suspended and the mandatory jail time.

#### Subcommittee Questions of Mr. Mohr

03:08:57 Sen. Wolken asked whether civil contempt can be used instead of jail time for crimes like driving while suspended, failure to comply, and failure to appear.  
03:11:03 Sen. Wolken asked Mr. Mohr to elaborate on having a more formal process in place that would allow a judge to establish who can or cannot pay the fines.  
03:13:37 Sen. Wolken said that she has a question about bail but that it can wait until the next meeting as it is not on today's agenda.  
03:14:01 Mr. Mohr asked whether the question is about bond schedule.  
03:14:08 Sen. Wolken elaborated on the issues that have been brought up about bond schedules and asked Mr. Mohr to comment on bond schedules.  
  
03:18:02 Judge Larry Carver, Chairman, Legislation Services, Montana Magistrates' Association, addressed some of the questions that were asked of Mr. Mohr about contempt and about the letter issued by the Department of Justice Federal Prosecutor.  
03:20:30 Sen. Wolken asked Mr. Carver to let this subcommittee and the full commission know if they could help in finding a better way to perform financial eligibility determinations for the Office of the State Public Defender.  
03:21:04 Judge Carver proceeded with his comment and addressed a point about the bond schedule.  
  
03:23:27 Steve Cape, Montana Coalition for Safety and Justice, spoke about collateral consequences for petty thefts and creating a system of community service across the state.  
  
03:27:09 Judge Perry Miller, Montana Magistrates' Association, addressed some of the questions Sen. Wolken had about sentencing, as well as comments made by Mr. Cape about community services. Mr. Miller noted that Montana currently has a community services program and an alternative sentencing program. Other topics Judge Miller elaborated on include courts of limited jurisdiction, mandatory minimums, the bond schedule, and training of judges.

#### Subcommittee Questions of Judge Miller

03:32:27 Sen. Wolken asked Judge Miller whether there is any change in statute that he and his colleagues need from the legislature to meet the goals that they have.  
  
03:35:01 Patty Jacques spoke about persistent felony offenders and issues with sentencing people who are mentally ill in the criminal justice system.

- 03:37:50 Robin Turner, Public Policy and Legal Director, Montana Coalition Against Domestic and Sexual Violence, introduced herself and offered her expertise to the subcommittee members. Ms. Turner noted that the Coalition generally is in support of changes to Montana statutes that serve to decriminalize poverty, rather than to issue a punitive response from the state, especially when it comes to non-violent offenses. Ms. Turner encouraged the commissioners to look at assault with a weapon and reasonable apprehension from a survivors' prospective.
- 03:40:58 Sen. Wolken noted that after lunch, the next item on the agenda will be an update of the Law & Justice Interim Committee work on the sexual assault study.

**LUNCH** (reconvened at 1:50 P.M.)

**Update on Any Changes to Sexual Assault Mandatory Minimums and Related Statutes Requested by the Law and Justice Interim Committee**

- 04:54:20 Sen. Wolken called the subcommittee back to order and went over the remaining agenda for this meeting.
- 04:55:16 Ms. Weiss began her report on the bill drafts that were recommended by the Law and Justice Interim Committee ([Exhibit 7](#)), starting with LCJ01 ([Exhibit 8](#))
- 04:58:31 Ms. Weiss: LCJ02b ([Exhibit 9](#))
- 04:59:17 Ms. Weiss: LCJ03 ([Exhibit 10](#))
- 05:01:03 Ms. Weiss: LCJ04 ([Exhibit 11](#))
- 05:02:01 Ms. Weiss: LCJ05 ([Exhibit 12](#))
- 05:02:55 Ms. Weiss: LCJ06 ([Exhibit 13](#))
- 05:04:41 Ms. Weiss: Revise Incest Laws ([Exhibit 14](#))

Questions of Ms. Weiss

- 05:06:02 Mr. Reynolds asked about use of the term "consent" in Exhibit 14.
- 05:06:30 Mr. Weiss addressed Mr. Reynolds' question.
- 05:07:02 Sen. Woken said that since the Law and Justice Interim Committee has been working on the statutes related to sexual assault, neither the Statute Review Subcommittee nor the Commission on Sentencing will be taking on the sexual assault arena. Sen. Wolken asked Commissioner Ohman whether he prepared any recommendations on this topic.
- 05:07:35 Commissioner Ohman referred to the Romeo and Juliet provision that he recommended to the Law and Justice Interim Committee.
- 05:07:56 Before concluding discussion of bill drafts recommended by the Law and Justice Interim Committee, Sen. Wolken opened public comment.

Public Comment

- 05:08:09 Andy Hudak, Montana Sex Offender Treatment Association, commented on the Romeo and Juliet suggestion made by Commissioner Ohman.
- 05:09:36 Dr. Gary Mihelish, National Alliance on Mental Illness, spoke on his own behalf about mental health treatment system in Montana and about offenders who suffer from mental illness.
- 05:12:40 Mr. Hudak added to his testimony by saying that the organization he represents

is in strong support for sex offender registration, but he finds that a pressure towards reoffending gets created a lot of times with the system that is currently in place.

#### **Title 45: Property Theft**

- 05:13:52 Sen. Wolken returned back to the discussion of the proposed changes to the statutes grouped under Title 45.
- 05:14:05 Commissioner Ohman talked about his proposal to modify sentences regarding crimes falling under a property theft category.

#### **Subcommittee Discussion**

The outcome of the discussion was that the subcommittee staff would draft a bill that would modify sentencing structure for crimes falling under a property theft category as provided in Commissioner Ohman's memo (see Exhibit 2) and that the subcommittee will make these recommendation to the full commission.

- 05:14:43 Sen. Wolken
- 05:14:58 Commissioner Guzynski
- 05:15:05 Commissioner Ohman
- 05:15:37 Commissioner Guzynski
- 05:15:47 Commissioner Ohman
- 05:16:53 Commissioner Guzynski
- 05:17:26 Sen. Wolken

#### **Title 45, Chapter 9: Dangerous Drugs**

- 05:17:54 Commissioner Ohman went over his suggestions with respect to revising statutes covering crimes regarding dangerous drugs.

#### **Subcommittee Discussion**

The outcome of the discussion was that the subcommittee staff would draft a bill that would eliminate the life sentence option for small sales of marijuana; provide a lesser penalty for sharing marijuana as compared to selling marijuana; make 2nd offense criminal possession of marijuana drug a misdemeanor and not a felony; and make consistent the mandatory minimums for different types of drugs in 45-9-102 (criminal possession of dangerous drugs) and 45-9-103 (criminal possession with intent to distribute).

- 05:19:43 Sen. Wolken
- 05:19:56 Commissioner Guzynski
- 05:20:28 Judge Gustafson
- 05:20:40 Commissioner Ohman
- 05:21:37 Sen. Wolken
- 05:21:44 Commissioner Ohman
- 05:22:13 Commissioner Guzynski
- 05:22:23 Commissioner Ohman
- 05:23:16 Commissioner Guzynski
- 05:23:33 Sen. Wolken
- 05:24:08 Judge Gustafson
- 05:24:32 Commissioner Ohman

05:24:46 Sen. Wolken  
05:24:53 Commissioner Gusynski  
05:25:26 Sen. Wolken  
05:25:37 Commissioner Guzynski  
05:26:00 Sen. Wolken  
05:26:16 Judge Gustafson  
05:27:16 Commissioner Guzynski  
05:27:27 Sen. Wolken  
05:27:31 Commissioner Ohman  
05:27:45 Sen. Wolken  
05:27:59 Judge Gustafson  
05:28:11 Sen. Wolken

**Title 46: Violent Offenders in Treatment Court**

05:28:21 Commissioner Ohman

Subcommittee Discussion

Judge Gustafson provided an update to the subcommittee members saying that a drug court legislative committee has put together a bill draft addressing the same point that Commissioner Ohman has discussed. No resolution was made by the subcommittee and no recommendation to the full commission would be made.

05:28:33 Sen. Wolken  
05:28:36 Judge Gustafson

Questions and Subcommittee Discussion of Mandatory Minimums and Drug Offenses

05:29:16 Mr. Reynolds asked for clarification about statutes regarding mandatory minimums and the drug laws.  
05:29:57 Commissioner Ohman  
05:30:04 Mr. Reynolds  
05:30:24 Sen. Wolken  
05:30:41 Judge Gustafson

**Title 46: A Dismissal After a Deferred Imposition: 46-18-204(1)(a)**

05:33:16 Commissioner Ohman

Subcommittee Discussion

The outcome of the discussion was that the subcommittee staff would draft a bill allowing a dismissal after a deferred imposition of sentence in those cases when the defendant does not go to trial but pleads *nolo contendere* or pleads guilty.

05:34:14 Sen. Wolken

**Credit Time Served**

05:34:22 Commissioner Ohman

### Subcommittee Discussion

Mr. Reynolds has drafted a bill addressing this point and he will distribute this bill draft at the next Commission on Sentencing meeting.

05:34:55 Mr. Reynolds

05:35:14 Sen. Wolken concluded discussion of recommendations proposed by Commissioner Ohman.

### **STATUTES THAT REQUIRE TREATMENT OR COUNSELING AS PART OF SENTENCES**

05:36:04 Ms. Weiss went over a document entitled "Montana Criminal Statutes that Require Treatment or Programming as Part of a Sentence" which provides background information with respect to those statutes. [\(Exhibit 15\)](#)

### Subcommittee Questions and Discussion

05:37:57 Sen. Wolken asked Mr. Reynolds to comment on how Montana compares to other states.

05:38:33 Mr. Reynolds said that a real issue is community resources. Mr. Reynolds also provided his feedback about the Batterer's Intervention Program.

05:41:21 Sen. Wolken asked for the subcommittee's feedback on any of the statutes that Ms. Weiss went over. Sen. Wolken expressed her agreement with Mr. Reynolds that Montana's biggest issue is not statutes but lack of services. Sen. Wolken also noted that Sen. Hansen is concerned about the Batterer's Intervention Program.

05:42:37 Judge Gustafson asked Mr. Reynolds whether he is aware of any data that shows that there is any benefit with respect to recidivism coming out of these programs. Judge Gustafson noted that a lot of money is spent on programs that don't have positive impact and suggested that perhaps offenders could do other things and the money could be diverted to resources that produce tangible impact.

05:43:55 Mr. Reynolds asked for clarification regarding the ACT program.

05:44:04 Judge Gustafson clarified her question.

05:44:08 Commissioner Ohman noted that the ACT program that Judge is referring to might have a new name now.

05:44:17 Mr. Reynolds addressed Judge Gustafson's question.

05:44:42 Judge Gustafson elaborated further on the point about forcing people take courses that are not effective towards rehabilitation.

05:45:24 Sen. Wolken agreed with Judge Gustafson and said that the commission's goal is to move towards evidence-based meaningful treatment and stop cycling people through. Sen. Wolken asked for Judge Gustafson's opinion.

05:46:18 Judge Gustafson suggested to have a provision requiring to keep data on programs, such as drug-information courses.

05:47:03 Mr. Reynolds added to Judge Gustafson's point about keeping data: most data comes from the Department of Corrections and very little from courts. Mr. Reynolds emphasized importance of the court data.

05:48:22 Sen. Wolken asked Judge Gustafson whether she thinks a formal executive action is needed regarding this discussion.

05:48:41 Judge Gustafson said that her recommendation would be to have purely



- educational programs not being required, unless an evidence-based program becomes available.
- 05:50:13 It was agreed that Judge Gustafson will work with the commission staff on the language for the bill draft.
- 05:50:30 Commissioner Guzynski expressed his opinion that he doesn't know how successful the ACT program is.
- 05:50:54 Commissioner Ohman addressed Commissioner Guzynski's point.
- 05:50:57 Commissioner Guzynski elaborated further on the point about not having information regarding effectiveness of programs that have been discussed.
- 05:51:02 Sen. Wolken spoke in the remaining agenda items.
- 05:51:59 Sen. Wolken asked for public comment and talked about remaining agenda items.

Public Comment on Any Matter on the Agenda Starting with the Updates by the Law and Justice Interim Committee

- 05:52:36 SK Rossi, Director of Advocacy and Policy, ACLU of Montana, thanked the subcommittee for their work. Ms. Rossi expressed her support of repealing the persistent felony offender statute and expressed her concern regarding addressing racial justice, specifically for Native Americans, in Montana.
- 05:55:49 Steve Cape, Montana Coalition for Safety and Justice, spoke in support of the necessity of treatment programs being outcome-based and the necessity to collect data on whether any program is effective.
- 06:00:11 John Nolte spoke about the necessity of diagnosing the mentally ill. Mr. Nolte also spoke in support of creating a statute that would require a mandatory evaluation before releasing somebody from prison.
- 06:07:04 Dr. Gary Mihelish, NAMI, gave his feedback on what he learned by attending the Board of Pardons and Parole meetings: that those with mental illness receive sentences that are much worse than those without a mental illness. Dr. Mihelish spoke in support of the idea that the habitual offenders who suffer from a severe mental illness would be sent to Montana State Hospital to the Forensic Unit for 2 to 5 years to get treatment. Dr. Mihelish spoke against 90-day treatment programs because the time is too short.
- 06:13:47 Sen. Wolken announced a recess during which Ms. Weiss would put a list of suggestions that the Subcommittee could recommend to the full Commission.

**BREAK** (reconvened at 3:37 p.m.)

**SUBCOMMITTEE WORK SESSION**

**Discussion and Possible Action on Subcommittee Recommendations to the Full Commission**

- 06:31:18 Sen. Wolken called the subcommittee back to order and announced that Ms. Weiss has compiled the recommendations to the Commission on Sentencing produced by the Statute Review Subcommittee during today's meeting.
- 06:32:38 Ms. Weiss went over the document entitled "Statute Review Subcommittee Recommendations to the Commission on Sentencing - August 29 draft language". ([Exhibit 16](#))

- 06:40:17 Sen. Wolken said that she thought that recommendation 7(b) in the bill drafting section of Exhibit 16 was not limited to marijuana and that the commissioners talked about it in terms of other drug crimes as well.
- 06:40:34 Commissioner Ohman and Judge Gustafson confirmed that the bill draft should not be limited to marijuana.
- 06:40:45 Sen. Wolken noted that 7(b) should not be limited to marijuana. Sen. Wolken also said that her recollection about recommendation 2 in the bill drafting section of Exhibit 16 regarding criminal endangerment was that the commissioners had talked about looking at sideboards other than just the high BAC. Sen. Wolken said that she can volunteer to research this topic further to see if there is a better language and, at the same time, make sure not to do it as an enhancement to crimes but to when there isn't another enumerated offense.
- 06:41:17 Commissioner Guzynski said that his recollection of the earlier discussion was that the commissioners decided that if there is another offense that covers that, prosecutors would go to a more specific offense and that the legislature direct the prosecutors and courts that they have to charge a specific offense over the general vague criminal endangerment.
- 06:42:09 Sen. Wolken said that recommendation 2 will remain as is written in Exhibit 16 but that she will reflect on this recommendation more.
- 06:42:25 Commissioner Ohman referred to recommendation 6 in the bill drafting section of Exhibit 16 and said that he was thinking about using a common scheme with respect to bad checks and noted that if the commissioners were going to think about bad checks that they should also think about forgeries because both crimes are very similar.
- 06:42:51 Judge Gustafson referred to recommendation 7(d) in the bill drafting section of Exhibit 16 and suggested that statutes other than 45-9-102 and 45-9-103 should be taken into consideration as there are probably some other statutes in chapter 9 that also have some mandatory minimums related to drugs that commission might want to take a look at.
- 06:43:17 Ms. Weiss said that she can reflect that in the subcommittee recommendations.
- 06:43:36 Commissioner Russell went back to the discussion of criminal endangerment statute and said that she agrees with Sen. Wolken in that the commissioners talked more about some parameters, or sideboards on criminal endangerment. Commissioner Russell also agreed with Sen. Wolken on thinking more about the proposed changes to this statute.
- 06:44:05 Judge Gustafson discussed recommendation 9 in the bill drafting section of Exhibit 16.
- 06:44:47 Sen. Wolken said that she thinks that there should be somebody who has to check off courses that are approved somewhere. Sen. Wolken also said that

maybe the Judge could do some research to see whether there is an existing model or an exiting legislation that this commission could utilize so that the legislature doesn't have to go back and enforce changes as practices evolve.

- 06:45:30 Ms. Weiss asked Judge Gustafson for clarification with regards to 61-8-731 as it doesn't contain a reference to the ACT course.
- 06:45:50 Judge Gustafson said that there is a provision in that statute (that is possibly referred to as an educational course) according to which offenders would have to take the ACT course. Judge Gustafson said that she was hoping that judges, who testified during public comment, would elaborate more about it. Judge Gustafson said that she doesn't know what happens at the misdemeanor level but the offenders still end up taking educational courses. Judge Gustafson also noted that many offenders in her drug court have to take those courses in order to get a drivers license back and, in the end, they take those course multiple times.
- 06:46:33 Commissioner Guzynski noted that if the legislature is looking to DOC to develop evidence-based programing for DOC programs, then why wouldn't the legislature say "an evidence-based course approved by the Department of Corrections" and give them the duty to determine what course would be satisfactory.
- 06:46:49 Sen. Wolken expressed her agreement.
- 06:46:53 Judge Gustafson noted that if the commission were to do it this way, it would require that the DOC would study the course and provide data on its effectiveness with respect to rehabilitation.
- 06:47:07 Sen. Wolken asked Ms. Weiss whether this is something she could research.
- 06:47:14 Ms. Weiss said that the statute that Judge Gustafson was referring to was 61-8-732 which can be viewed on page 16 of Exhibit 15. Ms. Weiss noted that this statute does refer to a chemical dependency course as well as an assessment, so the commission staff could look through that and revise it and then let the commission to respond to that: whether the commissioners would like to revise the statute that the courses become optional or whether the committee would like to just strike those education-type courses from law.
- 06:47:51 Judge Gustafson noted that Mr. Reynolds found the same as she did: there is no rehabilitation with educational courses. Judge Gustafson said that it seems not wise to require people to be paying money to take a course that doesn't improve their rehabilitation and reduce recidivism, and that if the legislature wants to penalize those offenders, then there should be a point put in the statute about a monetary penalty instead of a requirement to take courses for no benefit to them or society.
- 06:48:42 Sen. Wolken asked commission staff whether they could do a research to see whether there is a substitute curriculum that is evidence-based that could be an option as well.

06:48:52 Ms. Weiss suggested that maybe the subcommittee could recommend a repeal of the statutes related to those drug information or education courses, and then request "that the full commission consider requiring the court system to collect data on required courses."

06:49:20 Judge Gustafson agreed and in the language of the bill draft recommended to leave it to the discretion of judges to impose an evidence-based course.

06:49:27 Ms. Weiss said that this way the data piece will be left to the full commission to decide on, rather than trying to have the subcommittee to sort out what is evidence-based and what might not be and trying to do that research between now and September 19th.

06:49:54 Sen. Wolken expressed her agreement. Sen. Wolken said that she will talk to Sen. Swandal about his expungement bill as well, so that information from Sen. Swandal's bill and the subcommittee's work can be tied together and avoid duplication. Sen. Wolken asked whether any of the subcommittee members would like to separate any of the recommendations from the recommendation list as presented in Exhibit 16.

06:50:46 Commissioner Guzynski said he would like to separate recommendation 4 in the PFO bill drafting section of Exhibit 16 during the votes.

#### **Motion**

06:51:07 Sen. Wolken asked whether there is a motion to move the entire package, absent recommendation 4.

06:51:49 Commissioner Ohman moved to approve the entire package, absent #4, of Statute Review Subcommittee recommendations to the Commission on Sentencing as written in the document entitled "Statute Review Subcommittee Recommendations to the Commission on Sentencing - August 29 Draft Language".

#### **Vote**

06:51:17 The motion passed unanimously on a roll call vote with Sen. Hansen voting by proxy. ([Attachment 5](#))

#### **Motion**

06:51:46 Sen. Wolken asked whether there is a motion on recommendation #4.

06:51:53 Commissioner Ohman moved to approve recommendation #4 from the Statute Review Subcommittee.

#### **Vote**

06:52:02 The motion passed on a roll call vote, 5-2, with Sen. Hansen voting by proxy. ([Attachment 6](#))

06:52:41 Ms. Weiss said that she will revise these recommendations as commissioners instructed and split them out in the way that reveals that #4 had a different vote than the rest of them. Ms. Weiss said that she will email those recommendations

to the subcommittee members and have this document available at the next meeting of the full commission.

**ADJOURNMENT**

06:53:27 With no further business before the committee, Sen. Wolken announced adjournment at 3:53 p.m.

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