

**Montana Law on Correctional and Sentencing Policy:
Article II, Section 28, Montana Constitution and
Section 46-18-101, MCA**

An Issues and Options Work Paper

Prepared for
The Law and Justice Interim Committee
by
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ARTICLE II, SECTION 28, MONTANA CONSTITUTION
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INTRODUCTION

An examination of issues related to Montana law and policy on criminal sentencing was assigned to the Law and Justice Interim Committee (LJIC) through House Joint Resolution No. 39 (2001). HJR 39 requested that the LJIC:

7) develop recommendations for modification or enactment of sentencing and related statutes that are necessary or advisable to carry out a consistent, effective, humane, and rational correctional and sentencing policy that is within the available resources of the state and that are necessary or advisable to address recidivism and the growth of the populations in secure facilities

In working toward accomplishment of the mission, the LJIC has, among other things, examined all of the felony statutes in the Montana Code Annotated (MCA) with respect to "consistency" by adopting a document titled, *Felony Sentencing Statutes, Analysis Tool and Reference Guide, 2003*. The *Guide* categorizes, describes, and lists each of the felony statutes and ascribes to each a "crime seriousness ranking". The rankings were and, in the future, can be compared to help ensure that Montana's felony sentencing statutes are "consistent".

What remains of the HJR 39 charge is for the LJIC to develop recommendations that are necessary or advisable to carry out an effective, humane, and rational correctional and sentencing policy that is within the available resources of the state and that are necessary or advisable to address recidivism and the growth of the populations in secure facilities.

The primary purpose of this work paper is to provide a tool that the LJIC can use to assess the legal foundation of the state's correctional and sentencing policy and to propose changes to the policy if changes are considered to be advisable.

CURRENT CORRECTIONAL AND SENTENCING POLICY

The state's current correctional and sentencing policy is articulated, principally, in two places: Article II, Section 28, Montana Constitution, and Section 46-18-101, MCA, the complete text of which follows.

Constitution: Article II -- Declaration of Rights

Section 28. Criminal justice policy -- rights of the convicted. (1) Laws for the punishment of crime shall be founded on the principles of prevention, reformation, public safety, and restitution for victims.

(2) Full rights are restored by termination of state supervision for any offense against the state.

Montana Code Annotated: Title 46 -- Criminal Procedure

46-18-101. Correctional and sentencing policy. (1) It is the purpose of this section to establish the correctional and sentencing policy of the state of Montana. Laws for the punishment of crime are drawn to implement the policy established by this section.

(2) The correctional and sentencing policy of the state of Montana is to:

(a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable;

(b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders;

(c) provide restitution, reparation, and restoration to the victim of the offense; and

(d) encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community.

(3) To achieve the policy outlined in subsection (2), the state of Montana adopts the following principles:

(a) Sentencing and punishment must be certain, timely, consistent, and understandable.

(b) Sentences should be commensurate with the punishment imposed on other persons committing the same offenses.

(c) Sentencing practices must be neutral with respect to the offender's race, gender, religion, national origin, or social or economic status.

(d) Sentencing practices must permit judicial discretion to consider aggravating and mitigating circumstances.

(e) Sentencing practices must include punishing violent and serious repeat felony offenders with incarceration.

(f) Sentencing practices must provide alternatives to imprisonment for the punishment of those nonviolent felony offenders who do not have serious criminal records.

(g) Sentencing and correctional practices must emphasize that the offender is responsible for obeying the law and must hold the offender accountable for the offender's actions.

(h) Sentencing practices must emphasize restitution to the victim by the offender. A sentence must require an offender who is financially able to do so to pay restitution, costs as provided in 46-18-232, costs of court-appointed counsel as provided in 46-8-113, and, if the offender is a sex offender, costs of any chemical treatment.

(i) Sentencing practices should promote and support practices, policies, and programs that focus on restorative justice principles.

The statutory language in 46-18-101, MCA, has been quite dynamic in recent years, having been revised by legislatures in 1991, 1993, 1995 (twice), 1997 (twice), and 2001. It could be inferred from the legislatures' attention to this section that the language, as it has been regularly revised, sufficiently reflects current philosophy. Alternatively, however, the Legislature's attention might also imply that the policy language does not adequately reflect current philosophy.

The LJIC, in its review of felony sentencing statutes, discussed a range of possible priorities that state criminal sentencing policy could reflect. After working through several possible priorities, the LJIC accorded "top three" priority to: (1) public safety; (2) cost control of the state corrections system; and (3) rehabilitation.¹

Public safety and rehabilitation are specifically mentioned as components of the correctional and sentencing policy of the state; cost control is not, either in the constitutional language or in the statute.²

ISSUES AND OPTIONS REGARDING CORRECTIONAL AND SENTENCING POLICY

An issue before the LJIC is whether or not current constitutional and statutory language accurately, adequately, and appropriately articulates the correctional and sentencing policy of the state. If the LJIC determines that the existing language is sufficient, it can simply make a finding of sufficiency and forward the finding to the 58th Legislature. If the LJIC determines that the existing language is not sufficient, it may wish to make an alternative finding (of insufficiency) and make one or more recommendations to the 58th Legislature in an effort to improve existing statements of state correctional and sentencing policies.

¹ The LJIC examined as possible "goals and priorities" the concepts that follow. The "priority ranking" that appears in parentheses was established through a very informal and simple ordinal ranking process. The possible goals and priorities before the LJIC were: public safety (1); punishment (7 tie); rehabilitation (3); inmate training (6); cost-control of state corrections system (2); managing prison population growth (4 tie); consistency in sentencing (7 tie); recidivism (4 tie); and corrections facilities' management (9).

² To the extent that cost control has become a priority of the state's correctional and sentencing policy, 46-18-101, MCA, could be revised to more clearly reflect the priority.

Option 1: Find that the existing correctional and sentencing policy of the state is sufficient.

Discussion: The correctional and sentencing policy of the state as contained in Article II, section 28, of the Constitution and in 46-18-101, MCA, in their current forms may be serving the state reasonably well. The LJIC could make such a finding, conclude that no revisions are necessary or advisable at this time, and recommend to the 58th Legislature that the current corrections and sentencing policy, embodied in Art. II, sec. 28, Constitution and 46-18-101, MCA, remain as is.

Action: Does the LJIC wish to make a finding that the correctional and sentencing policy of the state as contained in Article II, section 28, of the Constitution and in 46-18-101, MCA, in their current forms may be serving the state reasonably well? If the response is "yes", then the LJIC need not go further. If the answer is "no", the LJIC must consider how the current policy is deficient and what changes are in order.

Option 2: Propose revisions to Article II, Section 28, Montana Constitution.

Discussion: The LJIC identified "cost containment" as one of the top three priorities that could be reflected in the state's correctional and sentencing policy. Article II, section 28 does not mention cost containment as one of the principles on which the state's laws for the punishment of crime should be founded. However, Article II, section 28 could be revised to include "cost containment" as one of the principles on which laws should be founded. Article II, section 28 could also be revised to include any other criterion or principle on which laws for the punishment of crime should be founded.

Action: Does the LJIC wish to propose that a statement regarding "cost containment" be included in Article II, section 28, Montana Constitution? If the LJIC's response is "no", no further consideration is necessary. If the LJIC's answer is "yes", the members should determine the overriding goal to be achieved and appropriate language.

Action: Does the LJIC wish to propose that one or more other criteria be included in or excluded from Article II, section 28, Montana Constitution? If the LJIC's response is "no", no further consideration is necessary. If the LJIC's answer is "yes", the members should determine the overriding goal to be

achieved and appropriate language.

Option 3: Propose minor revisions to 46-18-101, MCA.

Discussion: The LJIC identified "cost containment" as one of the top three priorities that could be reflected in the state's correctional and sentencing policy. Section 46-18-101(2), MCA, could be revised to include "cost containment" as one of the components of the correctional and sentencing policy of the state. Section 46-18-101(2), MCA, could also be revised to include any other criterion or principle to clarify or expand the correctional and sentencing policy of the state.

Section 46-18-101(3) outlines the "principles" formulated to achieve the policy outlined in subsection (2). Subsection (3) could also be revised to include a principle aimed at "cost containment".

Action: Does the LJIC wish to propose that a statement regarding a policy of "cost containment" be included in 46-18-101(2), MCA? If the LJIC's response is "no", no further consideration is necessary. If the LJIC's answer is "yes", the members should determine the policy to be achieved and appropriate language that would serve to that end.

Action: Does the LJIC wish to propose that one or more other criteria be included in or excluded from 46-18-101(2), MCA? If the LJIC's response is "no", no further consideration is necessary. If the LJIC's answer is "yes", the members should determine the policy to be achieved and appropriate language.

Action: Does the LJIC wish to propose that a statement regarding a principle of "cost containment" be included in 46-18-101(3), MCA? If the LJIC's response is "no", no further consideration is necessary. If the LJIC's answer is "yes", the members should determine the principle to be followed and appropriate language.

Action: Does the LJIC wish to propose that one or more other principles be included in or excluded from 46-18-101(3), MCA? If the LJIC's response is "no", no further consideration is necessary. If the LJIC's answer is "yes", the members should determine the principle(s) to be followed and appropriate

language.

Option 4: Propose major revisions to or rewrite 46-18-101, MCA.

Discussion: In addition to "cost containment", the LJIC identified other factors deserving of some level of priority within the state's correctional and sentencing policy. The other factors included: public safety (rank 1); punishment (rank 7, tie); rehabilitation (rank 3); inmate training (rank 6); cost-control of state corrections system (rank 2); managing prison population growth (rank 4, tie); consistency in sentencing (rank 7, tie); recidivism (rank 4, tie); and corrections facilities' management (rank 9). Some of these factors are identified, either directly or indirectly, in the state's policy statement in 46-18-101, MCA, while some are not. The LJIC could recommend that the state's correctional and sentencing policy be completely rewritten.

Action: Does the LJIC wish to propose a wholly new correctional and sentencing policy for the state? If the LJIC's response is "no", no further consideration is necessary. If the LJIC's answer is "yes", the members should: (1) identify policy statements that more appropriately reflect current philosophy; and (2) describe principles that should be followed to achieve the new or restated policy goals.

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