

JUDICIAL DISTRICTARY

Exhibit No. 9Date 03 14 05Bill No. HB 280

State Of Montana

TENTH JUDICIAL DISTRICT COURT

Judith Basin, Fergus &amp; Petroleum Counties

**HON. E. WAYNE PHILLIPS,**  
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March 11, 2005

Dear Chairman Wheat and Committee Members:

Thank you for the opportunity to respond to the Montana Advocacy Program (MAP) opposition to HB 280. MAP misconstrues this bill and engages in hyperbolic, highly speculative analysis of the bill's actual outcomes. Based on the written testimony I received, MAP contends the legislation "will impair the right of defendants in criminal proceedings to counsel, to be present at critical stages of criminal proceedings and to due process."

First, the right to counsel is a fundamental right established under the Montana and U.S. Constitutions. HB 280 does not address or impact the right to counsel in any way, shape or form.

Second, is a defendant any less "present" under law if actually in the courtroom where the judge is or by video conference? Having conducted numerous video conference proceedings, I can affirm for the Committee that in the proceedings HB 280 will allow, there is no realistic or legal difference.

Third, what due process rights are violated? Sentencing hearings are not required to follow the laws of evidence and have a format and import which are more amenable to a video conference format than nearly any other legal proceeding. It is a very rare case where sentencing takes more than one-half hour. To drive to Havre, Shelby, Virginia City, Roundup or various other cities where I have taken cases for other judges for so straight forward a proceeding is a terribly inefficient use of time and taxpayer dollars.

Taking a plea is even less involved and more clearly procedural (with a very defined legal colloquy required). There are basic rights which must be communicated, and it takes two minutes.

MAP also claims that video sentencing or taking of a plea "will result in unsound judgments and sentences, easily challenged under the Montana and U.S. Constitutions." They made the same argument before the House Judiciary Committee by misleading the Committee about a Ninth Circuit Court of Appeals case. Before the Senate Judiciary

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Committee they don't even try to cite that case or any law in their favor. In fact, there is none.

Can I predict the result of an appeal of such a sentence or plea? No. But we District Judges are confident the approach has solid, very defensible legal grounding.

MAP does present a substantive concern about the mental state of defendants and whether teleconferencing would lessen the court's ability to perceive such a mental state and adjust the proceedings accordingly. First and foremost, mental state issues would not be a surprise only "discovered" by the court at the taking of a plea or at sentencing, irregardless whether conducted in person or by video conference. Those matters are to be raised by counsel before the initial appearance or, if indications are present, addressed *sua sponte* by the court when it informs a defendant of his or her rights. One of the fundamental elements of the rights colloquy addresses mental state very specifically. In other words, mental state issues/problems will have been previously addressed and a judge can factor in any considerations necessary before taking a plea or conducting sentencing by video conference and determining whether in person hearings are necessary or appropriate.

MAP states: "They are unlikely to insist on being present in court in order to improve their chances of effectively participating in and understanding a change of plea or sentencing proceeding." Frankly, this is incomprehensible. The Defendant does appear in a courtroom. Effective participation is not changed as they are represented every moment by counsel. A defendant has a legal advocate through whom he or she participates, insists, questions, and seeks understanding.

The District Judges oppose the amendments sought by MAP. The proposed amendment requiring written waiver adds another layer of process which causes delay. The legislation already requires waiver. That is procedurally sufficient.

The physical presence of counsel with the defendant is also unnecessary. In fact, allowing video conferencing between client and attorney creates the opportunity for greater access by a defendant particularly in rural districts where we are forced to obtain counsel from over 100 miles away.

Finally, the requirement that a court be bound by a plea agreement entered through video conference reduces the flexibility so critical in good sentencing. The practical effect would be to preclude many uses of video conferencing because a judge wants the ability to conform sentencing to the facts and situation rather than a plea agreement.

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It appears that the MAP is projecting into a courtroom process problems that are addressed in other, substantive procedures, is misconstruing the appropriate timeliness of when mental status issues are to be raised, and completely discounts the services of defense counsel in favor of broad, over generalized and unspecified infirmities that rarely occur.

This legislation will save significant resources and time and will address positively the one area in which courts receive criticism – delay in justice. the District Judges encourage a do pass recommendation from the Committee.

Sincerely,



Hon. E. Wayne Phillips