EXHIBIT 5
DATE 3/14/2013
SB 267

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STATE OF MONTANA
TWENTY-FIRST JUDICIAL DISTRICT
RAVALLI COUNTY

December 31, 2012

RE: No Contest Plea /Legislative Amendments to § 46-16-105(1) & § 46-17-203(1), MCA.

Executive Summary

The three plea statutes (§§ 46-12-204, 46-16-105 and 46-17-203, MCA) contain different language with respect to the court's acceptance of nolo contendere (no contest) pleas.

The Legislature could solve any perceived inconsistency by amending § 46-16-105(1) and § 46-17-203(1), MCA to both read:

> (1) Before or during trial, a plea of guilty ***must be accepted, and a plea of nolo contendere may be accepted with the consent of the court and the prosecutor,*** when . . .

Background

Historically - and by statute - trial courts have had discretion to determine whether to accept or reject a nolo contendere plea. *See* § 46-12-204(1), MCA; *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L. Ed. 2d 162, 1970 (1970); Wayne R. LaFave, et. al., *Criminal Procedure*, vol. 5, § 21.4(a), 152-155 (2d ed., West 1999). Judicial discretion over the

acceptance of a nolo contendere plea permits case by case consideration of whether the nature of the case is such that the defendant's admitting guilt is desirable to maximize deterrence or rehabilitative effects. LaFave, *Criminal Procedure* at 154-155. Court discretion to accept or reject a nolo contendere plea still leaves the defendant the right to plead guilty.

Not affected in bill.

In § 46-12-204(1), MCA - which governs the defendant's arraignment[1] in city, justice, and district court - the Legislature has continued to provide from 1999 to the present that:

> A defendant may plead guilty, not guilty, ***or, with the consent of the court and the prosecutor, nolo contendere***. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(Emphasis added). Thus, with the use of the language "with the consent of the court and the prosecutor" in Section 46-12-204, MCA, the Legislature has left some situational discretion with both the court and the prosecutor to determine whether to allow a nolo contendere plea during the defendant's arraignment.

Similarly, from 1999 until 2003, the Legislature also appeared to many to provide through the use of the word "may" in § 46-16-105(1), MCA (the part of the statutory scheme dealing with trial in district court) and § 46-17-203(1), MCA (the part of the statutory scheme dealing with trial in city and justice court) - that the court's acceptance of a plea of nolo contendere was discretionary. *See* Sec. 16-17, Ch. 395, L. 1999 ("Before or during trial, a plea of guilty or nolo contendere ***may*** be accepted when . . .")(emphasis added). Such an interpretation would be consistent, for example, with the Montana Legislature's 2012 Bill Drafting Manual which states in Chapter 2-4(3) to "[u]se 'may' to confer a discretionary right, privilege, or power."

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[1]Arraignment is "the formal act of calling the defendant into open court to enter a plea answering a charge." § 46-1-202, MCA

The *Peplow* Decision

In 2001 the Montana Supreme Court decided the Ravalli County case of *State v. Peplow*, 2001 MT 253, 307 Mont. 172, 36 P.3d 922, which resolved the issue of whether, under the *1997* versions of the above mentioned statutes, a defendant had the right to plead guilty if the defendant met certain statutory criteria. *Peplow*, §§ 34, 42-43. In 1997 (before the amendments two years later in 1999), neither § 46-12-204(1), MCA , § 46-16-105(1), MCA, nor § 46-17-203(1), MCA had any language dealing with a nolo contendere plea. *See* Sec. 16-17, Ch. 395, L. 1999. Therefore, the *Peplow* case did not decide any issue with respect to nolo contendere pleas.

In *Peplow*, the Montana Supreme Court construed the word "may" in § 46-16-105(1) (the provision for taking pleas before or during trial in district court) to mean "must" because the word "may" in the context of accepting a guilty plea had conferred a power upon a court and the defendant had an interest in the exercise of that power. *Peplow*, ¶ 41. The Montana Supreme Court in *Peplow* also required the defendant to satisfy a "statutory" requirement contained only in the arraignment statute (voluntariness) in order to plead guilty under § 46-16-105(1), MCA:

> [P]rior to or during trial, a court is mandated to accept a defendant's guilty plea, ***as long as the statutory requirements of voluntariness***, intelligence, and factual basis for the plea, are fulfilled[.]

Peplow, ¶ 42 (emphasis added). Thus, case law clarifies that at least some additional statutory requirements found in the arraignment statute are prerequisites for the acceptance of a plea under the post-arraignment statutes, § § 46-16-105(1) and § 46-17-203(1), MCA. Therefore, for example, the additional requirement in the arraignment statute that a nolo contendere plea cannot be taken in a case involving a sexual offense is generally believed to apply also to pleas that are taken post-arraignment. *See* § 46-12-204(4), MCA.

The Montana Supreme Court also implied in *Peplow* that with respect to nolo contendere pleas, the 1999 amendments to § 46-12-204, MCA indicated a legislative intent to subject acceptance of nolo contendere pleas to the consent of the prosecutor and the court:

> Presumably, had the Legislature intended to require the consent of the court or State as a condition to a plea of guilty, it would have so stated. ***In fact, the Legislature imposed a consent of the court condition to a plea of nolo contendere in the 1999 Amendments to § 46-12-204(1), MCA*** ("A defendant may plead guilty, not guilty, or, with the consent of the court and the prosecutor, nolo contendere.").

Peplow, ¶ 42 (emphasis added).

The Legislature's Response to *Peplow*

In 2003, the Legislature amended § 46-16-105(1), MCA through HB 166 to change the word "may" to "must." Sec. 1, Ch. 96, L. 2003.

The preamble to Representative Dave Wanzenried's HB 166 indicates that the 2003 amendment was limited to guilty pleas and intended as a codification of *Peplow*:

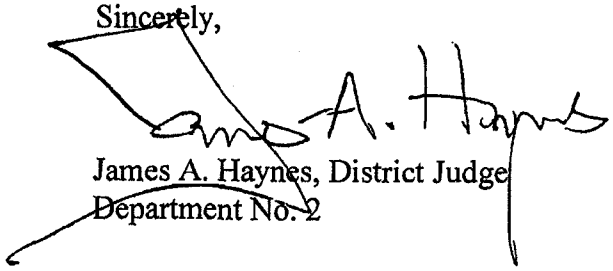
> WHEREAS, in State v. Peplow, 2001 MT 253, 307 Mont. 172, 36 P.3d 922 (2001), the Montana Supreme Court held that in section 46-16-105, MCA, that when the term "may" is used to confer power on an officer, court, or tribunal and the public or a third person has an interest in the exercise of the power, then the exercise of the power becomes imperative.

Despite the Legislature's apparent intent to merely codify *Peplow*, the arraignment and post-arraignment plea statutes now have different language with respect to the acceptance of a nolo contendere plea. These differences may be perceived as being inconsistent unless the Legislature expressly harmonizes the statutes.

Proposed Solution

A sensible solution is to amend the first subsection of the district court, city and justice court plea statutes identically so that they contain the same consent language found in § 46-12-204, MCA. I have included some proposed language in the executive summary above.

Sincerely,



James A. Haynes, District Judge
Department No. 2

JAH/bk