

EXHIBIT 5

DATE 1/16/15

HB 195

OFFICE OF THE MISSOULA CITY ATTORNEY

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January 15, 2015

RE: House Bill 195

To the Honorable Jerry Bennett, Chairman, and members of Judiciary Committee of the Montana House of Representatives,

The Missoula City Attorney's Office wishes to express its support of HB 195, and to request that the members of the House Judiciary Committee vote to recommend passage. Presently, if a charge has already been filed into court, subsection (3) of § 46-16-130, MCA, requires court "approval" of pretrial diversion, also commonly known as deferred prosecution agreements (DPAs). Subsection (3) does not define the term "approval," and does not contain a protocol or standard by which to approve or disapprove. The reason for this lack of definition, protocol or standard, is that the original intent of the Commission on Criminal Procedure and the 1991 Legislature was for the approval provision to be one of procedure, and not substance, to wit: When a charge has already been filed into a court and the prosecution & defense enter into a DPA, there must be a mechanism to notify the court and to take the case off the trial docket and place it into an inactive status.

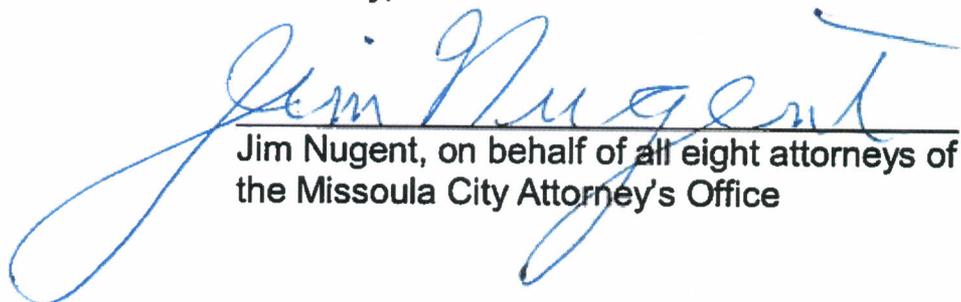
Neither the Commission nor the Legislature intended to subject a prosecutor's decision to divert, or defer, prosecution to judicial review. However, a number of courts of limited jurisdiction throughout Montana have adopted policies of never accepting, or being opposed to, DPAs. Such blanket policies result in an unconstitutional invasion of the judiciary into the administrative branch of government (the prosecution), in violation of the separation of powers. Moreover, such policies do not take into consideration the unique facts and circumstances of individual cases.

For example, this past year our office prosecuted a boyfriend and girlfriend both of whom were charged with Partner or Family Member Assault arising from the same incident. Boyfriend moved to Louisiana and had warrants out in his case, and had no intention of coming back for his own case, much less the case against his girlfriend in which he was the alleged victim. Our evidence, however, included incriminating admissions by the girlfriend to law enforcement that may have been sufficient to convince a jury to convict her. Our prosecutors, who have over 100 years of combined prosecution experience, felt that the chances of a jury convicting were 50:50. The defense attorney who represented the girlfriend approached our office about the possibility of a DPA because he felt that there was a risk of conviction if the case went to trial. His client was willing to get a chemical dependency evaluation, obtain treatment, attend counseling for violence issues, not drink and be subject to testing, and obey all laws. Given the risk to both sides – prosecution and defense – we agreed that a DPA with those conditions was in both sides' best interest.

Although both prosecution and defense explained the unique facts and circumstances in support of the DPA, the Court's response was, "No, I'm not going to accept a DPA because that's my policy now," without providing any further explanation. Because the Court's rejection of a DPA is not subject to direct or interlocutory appeal, we lacked the ability to challenge what happened.

Thank you for your consideration of House Bill 195. We urge you to vote in favor of passage.

Sincerely,



Jim Nugent, on behalf of all eight attorneys of
the Missoula City Attorney's Office