

HON. JAMES A. HAYNES
DISTRICT COURT JUDGE
DEPARTMENT TWO



STATE OF MONTANA
TWENTY-FIRST JUDICIAL DISTRICT
RAVALLI COUNTY

RAVALLI COUNTY COURTHOUSE
205 BEDFORD STREET, SUITE B
HAMILTON, MONTANA 59840
PHONE: (406) 375-6790
FAX: (406) 375-6785

RECEIVED

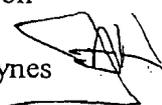
MAR 10 2006

MONTANA LEGISLATIVE
SERVICES DIVISION

MEMORANDUM

DATE: March 8, 2006

TO: Hon. Karla Gray, Chief Justice
Hon. Ed McLean
Hon. Jeffrey Langton

FROM: Hon. James A. Haynes 

RE: No Contest Plea / Legislative Amendment to §46-16-105(1)

A legislative amendment in 2003 to MCA §46-16-105(1) eliminated the trial court's discretion to allow or disallow a plea of no contest or *nolo contendere*. This change appears to be the unintended by-product of the Legislature's response to *State v. Peplow*. Restorative language is suggested below.

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

No need exists to change or amend §46-16-105(2).

Law and Justice Interim Committee
May 12, 2006
Exhibit 8

DISCUSSION

The language of § 46-16-105(1) states in pertinent part:

- (1) Before or during trial, a plea of guilty or nolo contendere must be accepted when:
 - (a) subject to the provisions of subsection (3) [two-way electronic audio visual communication], the defendant enters a plea of guilty or nolo contendere in open court; and
 - (b) the court has informed the defendant of the consequences of the plea and of the maximum penalty provided by law that may be imposed upon acceptance of the plea.
- (2) At any time before judgment or, except when a claim of innocence is supported by evidence of a fundamental miscarriage of justice, within 1 year after judgment become final, the court may, for good cause shown, permit the plea of guilty or nolo contendere to be withdrawn and a plea of not guilty substituted.

Mont. Code Ann. § 46-16-105(1)-(2) (2003).

The former version of § 46-16-105(1) stated: “before or during trial, a plea of guilty or nolo contendere may be accepted” Its interpretation became an issue of first impression in *State v. Peplow*, a case that arose in Ravalli County in 1999 and was decided by the Montana Supreme Court in December, 2001. *State v. Peplow*, 2001 MT 253, 307 Mont. 172, 36 P.3d 922.

In *Peplow*, the Montana Supreme Court held:

We conclude that Montana statutes confer upon a defendant the right to plead guilty to the crime charged either at the arraignment, pursuant to § 46-12-204 et. al., MCA, or before or during trial, pursuant to § 46-16-105, MCA. Thus, the District Court erred in denying Peplow that right prior to trial.

Peplow, ¶ 43.

House Bill 166 was introduced by Rep. Dave Wanzonried of Missoula, at the request of the Law and Justice Interim Committee, in order to codify the *Peplow* holding. The word "must" was inserted in place of may in subsection 1. "Must" was inserted overbroadly. *Peplow* only made mandatory the trial court must accept a guilty plea. *Peplow* does not require the trial court must accept a no contest plea. *Peplow* never considered or addressed no contest pleas.

This is a critical distinction. Historically -- and by statute -- trial courts retain the discretion whether to accept or reject a no contest plea: See, §46-12-204(1).

46-12-204. Plea alternatives. (1) 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. [bold emphasis added]

Section 46-12-204 leaves situational discretion with "the court and the prosecutor" to determine whether to allow a no contest or *nolo contendere* plea. The 2003 amendment to §46-16-105(1) which says a trial court must accept a no contest plea creates an inconsistency with §46-12-204.

The no contest or *nolo contendere* plea is believed to have originated in medieval times when accused individuals avoided imprisonment and ended the matter by paying a sum of money to the king. *North Carolina v. Alford* (1970), 400 U.S. 25, 36, FN8, 91 S.Ct. 160, 167, FN8, citing 2 F. Pollock & F. Maitland, *The History of English Law* 517 (2d ed. 1909). The accused did not admit guilt, but placed himself at the mercy of the king while asking for permission to pay a fine. *Id.*, citing *Anon.*, Y.B.Hil., 9 Hen. 6, f. 59, pl. 8 (1431).

"Implicit in the *nolo contendere* cases is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but

who, faced with grim alternatives, is willing to waive his trial and accept the sentence.” *Alford*, 400 U.S. at 36, 91 S.Ct. at 167. By pleading nolo contendere, “a defendant does not expressly admit guilt but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty.” *Alford*, 400 U.S. at 35, 91 S.Ct. at 166, citing *Hudson v. United States* (1926), 272 U.S. 451, 47 S.Ct. 127, 71 L.Ed. 347. [The *Alford* defendant maintained his innocence even while he entered a guilty plea to murder to avoid the death penalty. The distinction is that in a nolo contendere plea, the defendant refuses to admit guilt, while in an *Alford* plea, the defendant maintains his innocence.]

The Legislature itself has prohibited entry of a no contest plea in most sexual offense cases. §46-12-204(4). Historically, the district/trial courts have disallowed entry of a no contest plea when the defendant simply desires to avoid taking responsibility for criminal behavior. Restoring the discretion of trial courts to accept or reject a no contest plea, still leaves the defendant the right to enter a guilty plea, as required by *Peplow*.

The current contradictory in language between §46-16-105(1) and §46-12-204(1) can be easily resolved by amending §46-16-105(1) to read:

(1) Before or during a 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:

.....

Note: Subsection 2 of §46-16-105 was also amended in 2003. HB 171 was sponsored by Rep. John Parker of Great Falls on behalf of the Department of Justice in order to bring the one year statute of limitations in line for both post-conviction relief and withdrawal of a guilty plea. “He stated this bill allows a defendant one year after final judgment to withdraw his guilty plea or a plea of nolo contendere.” *House Cmte. on Judiciary*, Jan. 20, 2003, page 9 (emphasis added). This is entirely separate from the amendment to subsection 1. It has nothing to do with the *Peplow* decision. No further amendment of subsection 2 is required.

Memorandum
Page 5
March 8, 2006

cc: Mike McGrath, Attorney General
George Corn, Ravalli County Attorney
Senator Jim Shockley
Senator Rick Laible
Representative Ron Stoker
Law and Justice Interim Committee
Montana Association of Criminal Defense Lawyers
Montana County Attorneys Association